20-2194-cv

United States Court of Appeals

for the

Second Circuit

NORIANA RADWAN,

Plaintiff-Appellant,

– v. –

UNIVERSITY OF CONNECTICUT BOARD OF TRUSTEES, WARDE MANUEL, LEONARD TSANTIRIS, AND MONA LUCAS, Individually and in their Official Capacities,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF *AMICI CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, THE BRECHNER CENTER FOR FREEDOM OF INFORMATION AND STUDENT PRESS LAW CENTER IN SUPPORT OF PLAINTIFF-APPELLANT NORIANA RADWAN AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF FINANCIAL INTEREST

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* certify that amici are § 501(c)(3) nonprofit organizations. Amici have no parent corporations and no publicly traded stock.

/s/ Darpana M. Sheth

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INTEREST OF *AMICI CURIAE*[1]

The Brechner Center for Freedom of Information in the College of Journalism and Communications at the University of Florida in Gainesville is a center of research dedicated to advancing access to civically essential information. The Center's focus on encouraging public participation in government decision-making is grounded in the belief that a core value of the First Amendment is its contribution to democratic governance. The Center is exercising the academic freedom of its faculty to express scholarly views, and is not submitting this brief on behalf of the University of Florida or the University of Florida Board of Trustees.

The Student Press Law Center is a non-profit, non-partisan organization that, since 1974, has been the nation's only legal assistance agency devoted to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment. Although this case does not involve student journalism, the district court's logic and ultimate conclusions could be applied to student journalists in a way that greatly circumscribes their ability to speak on matters of public concern.

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[1] Pursuant to Rule 29(a)(4) of the Federal Rules of Appellate Procedure, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Both parties consented to the filing of this brief.

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to protecting civil liberties at our nation's institutions of higher education. Since 1999, FIRE has successfully defended the expressive rights and academic freedom of thousands of students and faculty members across the United States. FIRE defends these rights at both public and private institutions through public advocacy, litigation, and participation as *amicus curiae* in cases that implicate student and faculty rights, like the one now before this Court.

SUMMARY OF ARGUMENT

Without notice or an opportunity to be heard, student Noriana Radwan received the most severe penalty available to the administrators of her athletic department—revocation of her scholarship, the practical equivalent of dismissal from the University of Connecticut—for a fleeting expression of joy at a soccer competition that her coach and athletic director deemed embarrassing. With this punishment, Defendants violated Radwan's First Amendment rights and her rights to procedural due process.

"Embarrassment" is not a legally recognized basis for *any* government agency to impose content-based penalties on speakers, most especially a public university, which the Supreme Court has consistently recognized to be a place of special solicitude for speech that pushes boundaries. Worse, Radwan's penalty was imposed for violating a vague and subjective prohibition against "severe misconduct" that invites selective enforcement and gives speakers no notice of what might be punishable. Still worse, UConn imposed this career-ending punishment on Radwan under a makeshift "process" without the barest of formalities that federal courts universally recognize as necessary when public university students are disciplined.

If the ruling below is upheld, universities like UConn will believe themselves to possess limitless authority to punish even fleeting use of coarse

language simply because it embarrasses administrators, contrary to decades of First Amendment precedent. Compounding the threat to student rights, they will believe themselves able to mete out such unlawful punishment without affording students even the bare minimum of procedural protections. This Court should reverse.

ARGUMENT

I. DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE LAW IS CLEARLY ESTABLISHED THAT COLLEGE STUDENTS ARE ENTITLED TO THE FULL PROTECTION OF THE FIRST AMENDMENT.

It is well established that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). This principle, recognized in *Tinker* at the K-12 level, applies with even greater force to college students on public university campuses. Undergraduate institutions are laboratories for original thought and innovation. A campus community that fosters the free flow of ideas is paramount to this mission. As such, speech restrictions function only to damage a student's ability to choose for themselves a worldview.

A good deal of existing precedent regarding student speech censorship takes place within K-12 institutions. Even there, *Tinker* counsels that an institution bears the burden of demonstrating a "material" or "substantial" disruption to school functions, not—as in this case—a one-second-long distraction at a sporting event. If anything, college students have even greater latitude to speak than do children attending K-12 school; the goals of the institutions and the profile of their attendees are so different that the same rules cannot logically apply.

Cases such as *Papish* and *Healy* clearly establish that college campuses are a hub for the exchange of ideas, and as such, First Amendment rights are coextensive

with the community at large. *See Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670–71 (1973); *Healy v. James*, 408 U.S. 169, 180 (1972). Qualified immunity should not apply to Radwan's First Amendment claims, since the Supreme Court has clearly established that free-speech protections apply with full force on college campuses.

A. The district court erred in relying on *Fraser* because *Fraser* solely applies to underage students in a K-12 setting.

The district court erred in finding that caselaw about in-school speech in a K-12 school could have convinced the Defendants that it was lawful to end a college student's career on the grounds of speech that was neither "in-school" nor directed to K-12 children. The court relied almost entirely on the Supreme Court's *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), which patently is about the use of foul language in front of impressionable children at a compulsory-attendance school function. But K-12 schools and universities have completely different cultures, functions, and missions, which in turn require different standards for speech censorship. *See McCauley v. Univ. of the V.I.*, 618 F.3d 232, 242–43 (3d Cir. 2010).

As an initial matter, clearly established law recognizes the middle-finger gesture as an act of protected expression under the First Amendment. *See Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth.*, 134 F.3d 87, 91 (2d Cir. 1998); *see also Cruise-Gulyas v. Minard*, 918 F.3d 494, 497 (6th Cir. 2019) (explaining that,

"any reasonable officer would know that a citizen who raises her middle finger engages in speech protected by the First Amendment."). This is true even when the gesture is made by a student. In *Klein v. Smith*, 635 F. Supp. 1440 (D. Me. 1986), the court ruled that a public high school violated the First Amendment by suspending a student who "flipped off" a teacher in the parking lot of a restaurant as a show of disrespect. It would be an extreme departure from settled law to hold that a motorist or pedestrian who intentionally gives a police officer the middle finger in rage has the benefit of clearly established constitutional protection, while a person who makes the same gesture in a good-humored celebratory display, in a place where celebratory displays are entirely at home, does not.

The concerns that exist in the K-12 sphere are completely separate from the concerns of an undergraduate institution. *McCauley*, 618 F.3d at 242–43. The *Fraser* decision, which forms the district court's entire basis for dismissing Radwan's First Amendment claim, holds that a K-12 school may restrict "lewd" student speech directed at a captive audience of children, *see* 478 U.S. at 685, a far cry from what happened in this case. The *Fraser* Court reached its conclusion relying heavily on the *in loco parentis* doctrine—which applies uniquely to children in a K-12 setting, not to adults in college, and provides that while a child's parents are not present during school hours, the school faculty takes on that parental role. The Court mentions that it is an obvious concern for "school

authorities acting *in loco parentis*, to protect children" from exposure to vulgar language. *Id.* at 684–85.

The *in loco parentis* doctrine has long been recognized as a dead letter in the college setting. *Bradshaw v. Rawlings*, 612 F.2d 135, 139–40 (3d Cir. 1979) (explaining that although *in loco parentis* applied to college students in the past, colleges no longer "control the broad arena of general morals."); *Furek v. Univ. of Del.*, 594 A.2d 506, 516–17 (Del. 1991) (stating "the doctrine of *in loco parentis* has all but disappeared in the face of the realities of modern college life where 'students are now regarded as adults . . .'" (citation omitted)); *Nero v. Kan. State Univ.*, 861 P.2d 768, 778 (Kan. 1993) (holding that "the *in loco parentis* doctrine is outmoded and inconsistent with the reality of contemporary collegiate life."). Because *Fraser* is a case about the *in loco parentis* role of K-12 school authorities, Defendants could not reasonably have relied on it in this decisively different setting.

Healy and *Papish* are the leading cases on First Amendment rights for university students. These cases demonstrate K-12 schools and undergraduate institutions have different goals for their student populations. Different than a K-12 classroom, the college campus is "peculiarly the 'marketplace of ideas.'" *Healy*, 408 U.S. at 180 (citation omitted). The vigilant protection of civil liberties is no less vital in American educational institutions as it is in American society at large.

Id. Further, *Healy* provides that "state colleges and universities are not enclaves immune from the sweep of the First Amendment." *Id.*

Papish, not *Fraser*, is the "clearly established" precedent when a higher educational institution punishes a student for using profane or vulgar language. In *Papish*, a student was expelled for circulating a newspaper on her campus that contained strong profanity, and violent and sexual imagery. *Papish*, 410 U.S. at 667. The Supreme Court held that the dissemination of ideas cannot be chilled on a state university campus no matter how offensive. *Id.* at 670. The Court decided it was unconstitutional for the university to expel the student solely because the university disapproved of the content of her newspaper: "The First Amendment leaves no room for a dual standard in the academic community with respect to the content of speech . . . " *Id.* at 671.

As Radwan's brief explains, the record shows that UConn officials initially levied a modest punishment—a suspension and a letter of reprimand—but then weeks later, imposed essentially the maximum penalty possible on an athlete, scholarship revocation, *not* because Radwan had been "inadequately educated" about proper sideline behavior, but because her coach was embarrassed that others were teasing him about the incident. *See* Appellant Br. 6–11. *Even if* Defendants had believed themselves to have the authority to sanction Radwan mildly for

"educational" purposes, nothing about this later-imposed "financial death penalty" finds any support in any First Amendment caselaw.

Even if K-12 First Amendment jurisprudence did apply at the college level, *Fraser* still would not provide "cover" for what the Defendants did here. *Fraser* is a case about a bombardment of "lewd" speech that is unsuitable for its audience because of its sexually graphic content. *Fraser*, 478 U.S. at 685–86. The student in *Fraser* gave his sexually explicit speech to a mandatory assembly full of classmates. *Id.* Here, Radwan's celebratory gesture was directed toward a professional television camera operator, and perhaps viewable by some sharp-eyed college sports fans. Plainly, one who attends a high school student government forum does not expect to be bombarded with sexual imagery—but it would be a thin-skinned and naïve person who attends a college sporting event expecting not to be exposed to a fleeting profanity (assuming that Radwan's gesture even equates to a profanity).

Even if K-12 speech precedent did apply at a college sporting event, the proper precedent would be the *Tinker* case, which gives no quarter for what Defendants did in this case. While *Fraser* provides the standard for the narrow circumstance of sexually explicit speech inappropriate for an underage audience, *Tinker* is otherwise the "default" standard for all K-12 student speech—and nothing in this case crossed the *Tinker* line of protection. Radwan's gesture created

no substantial disruption. *Tinker*, 393 U.S. at 514. The record contains no evidence that anyone on the field complained about or even saw Radwan's gesture, which lasted less than a second. JA981–982. It was not until weeks later that Radwan's coach and athletic director decided to pursue further punishment. While *Tinker* was about the burden that a public school must satisfy to prevent students from wearing protest attire during the school day, Radwan's "protest" ended after one second. Even a suspension from the team was not necessary to quell a "disruption" that lasted one second, *much less* permanent removal from the athletic program.

While the district court based its finding of a lack of clearly established law solely on *Fraser*,[2] reliance on *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), is also misplaced. *Hazelwood* involved censorship of high school newspaper articles, a curricular vehicle in which readers might reasonably assume the speech to have been pre-approved by school authorities, thus bearing the school's "imprimatur"—*and* the case requires a showing that school authorities acted with a "legitimate pedagogical" basis. *Id.* at 271–73. *Hazelwood* is categorically inapplicable here. Plainly, no reasonable person thinks an athlete's spontaneous celebration was pre-approved by her college. And by their own

[2] *Radwan v. Univ. of Conn. Bd. of Trs.*, No. 3:16-cv-2091 (VAB), 2020 U.S. Dist. LEXIS 99453, at *77 (D. Conn. June 6, 2020) ("The Court agrees with respect to the lack of clearly established law under the *Fraser* standard.").

admission, Defendants did not take the scholarship away from Radwan for "pedagogical" purposes, but in retribution for the embarrassment that Tsantiris felt when others reminded him of the gesture. Further, *Hazelwood* is about whether a school can be *compelled to distribute* speech, not about punishment once speech is uttered—in the K-12 setting, that is governed by *Tinker*.

Qualified immunity does not apply in situations where there is a clear precedent putting the state actor on notice that he is acting unconstitutionally. The *Papish* case, in particular, is on all fours with what happened in this case, holding that a college student cannot be punished for using profanity because college students' First Amendment rights are coextensive with those of the community at large. The district court erred in straining *Fraser* to apply to this case.

B. Defendants' punishment of Radwan is a classic case of giving effect to the "heckler's veto."

A state entity cannot restrict otherwise protected speech solely because critics might react poorly. *See Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966). The "heckler's veto" is disfavored for two key reasons: It holds speakers responsible for the unforeseen and perhaps unreasonable overreaction of others, and it rewards those who shout down their opponents.

The Supreme Court has stated that "a function of free speech under our system of government is to invite dispute." *Tarminiello v. City of Chi.*, 337 U.S. 1, 4 (1949). In fact, the Court explains that free speech best serves its purpose when it

draws out a condition of unrest or stirs anger. *Id.* A state actor cannot censor otherwise protected speech simply because other people overreacted to said speech. This doctrine applies to a school setting as well. *See Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001) (reasoning that a threat someone might become offended as a result of speech is not a justifiable reason to chill that speech). The Supreme Court discussed this phenomenon in *Papish*, stating that student speech on campus "may not be shut off in the name alone of 'conventions of decency.'" 410 U.S. at 670.

After first learning of Radwan's celebratory gesture, Coach Tsantiris initially required only an apology from Radwan. However, the record shows Tsantiris further punished Radwan after the negative responses he received from other soccer coaches. In fact, Tsantiris and Manuel were embarrassed by Radwan's celebration. JA367, JA384. In other words, Tsantiris and Manuel levied additional punishment on Radwan, weeks after the fact, not because of what she said or did, but because of how onlookers overreacted.

Ultimately, holding that qualified immunity applies in this case risks creating a dangerous precedent by which state university officials could escape responsibility for punishing any sharply voiced opinion. Opinions on political and social issues often are expressed using coarse language for effect. Witness the brigade of "pussy hat" marchers protesting President Trump's 2017 inauguration,

waving signs with such slogans as: "My neck / my back / my pussy will grab back" and "Keep your politics off my pussy."[3] If students on college campuses—even, as in this case, outside of the classroom on non-academic time—are limited to the speech that would be considered proper for K-12 children at a school function, then universities will be free to punish core political speech without redress for the speaker.

Leaving the district court's misguided application of qualified immunity undisturbed could result in a disastrous chilling effect. If a fleeting and unserious profanity is considered grounds to end a student's college career, then there is no discernible stopping point to a college's censorship authority, and students invariably will self-censor in fear of stepping over a decisionmaker's subjective line of propriety.

II. THE UNIVERSITY'S PROHIBITION AGAINST "SERIOUS MISCONDUCT" IS IMPERMISSIBLY VAGUE.

The UConn conduct policy under which Radwan was punished is unenforceable because it is vague and overbroad. Vague speech codes that do not define what speech is punishable are disfavored because they invite state officials

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[3] Alanna Vagianos and Damon Dahlen, *89 Badass Feminist Signs From The Women's March On Washington*, HUFFINGTON POST (Jan. 21, 2017), https://www.huffpost.com/entry/89-badass-feminist-signs-from-the-womens-march-on-washington_n_5883ea28e4b070d8cad310cd.

to enforce the code in a viewpoint discriminatory way. Even by the standard of university speech codes, the rule under which Radwan was punished was the archetype of vagueness: A catch-all prohibition against "serious misconduct."

As this Court has recognized, vagueness is a creature of due process law, in that it protects citizens against the enforcement of laws that fail to give fair notice of what is and is not punishable—but vagueness is "particularly troubling when First Amendment rights are involved." *Farrell v. Burke,* 449 F.3d 470, 485 (2d Cir. 2006). As the Court explained in *Farrell*: "A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Id.* at 485 (citing *Hill v. Colorado,* 530 U.S. 703 (2000)). A policy giving college officials *carte blanche* to classify speech as "serious misconduct" suffers from both of these infirmities.

Generally, a higher degree of clarity is required for student speech codes which could impinge on fundamental First Amendment rights. A student speech code cannot leave a student in the dark about exactly what speech is disallowed. For this reason, it is common for courts to find student speech codes unconstitutionally overbroad or vague. *Speech First, Inc. v. Fenves*, No. 19-50529, 2020 U.S. App. LEXIS 34087 at *44 (5th Cir. Oct. 28, 2020); *see also DeJohn v.*

Temple Univ., 537 F.3d 301, 317 (3d Cir. 2008) (finding a sexual harassment policy overbroad partially because it "'could conceivably be applied to cover any speech' of a 'gender-motivated nature'" that could offend someone (citation omitted)); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1183 (6th Cir. 1995) (finding a university policy invalid because its broad scope presented a "realistic danger" that it could encroach on protected speech).

The University's prohibition of "serious misconduct" provides no way for a student-athlete to determine what conduct is proscribed. Indeed, it is not even clear that a reasonable person thinks "mis*conduct*" subsumes speech at all. Radwan had no notice that flipping the bird would fall within the category of "serious misconduct." The threat of the University's vague policy is that state actors can selectively decide what constitutes "serious misconduct" and what does not (and, as pointed out in Appellant's Brief at 51–52 there is ample evidence of worse *non*-expressive misbehavior by male athletes going unpunished). Vagueness creates a significant risk of both content-based and viewpoint discrimination.

For a prohibition against "serious" misconduct to mean anything, there must be a lesser category of misconduct that falls outside the rule's strictures—but based on the way the code was enforced in this case, it is impossible to tell where the line of "seriousness" lies. What if Radwan had hollered "hell yes, we won!" Would *that*

be grounds for losing one's scholarship and college career? The reality is that we do not know, because the rule tells us nothing. That is the essence of vagueness.

Additionally, UConn's policy against "serious misconduct" is constitutionally impermissible vague because it allows for viewpoint-discriminatory enforcement. Time and again, courts have struck down statutes and regulations that confer standardless discretion on decisionmakers to pick-and-choose which speech gets heard. As this Court explained in a campus speech case, *Amidon v. Student Association of State University of N.Y.*, 508 F.3d 94, 103–04 (2d Cir. 2007), unbridled discretion is problematic even outside the domain of a "prior restraint" (where the doctrine originated) because a decisionmaker is more likely to use that discretion in a viewpoint-discriminatory way, as here.

Federal courts have not hesitated to invalidate restrictions on student speech much *less* open-ended than UConn's prohibition against "serious misconduct." The Fifth Circuit struck down a Mississippi State University regulation providing that student organizations could not hold events on campus without verification from two administrators certifying that the event would be "of a wholesome nature." *Shamloo v. Miss. State Bd. of Trs. of Insts. of Higher Learning*, 620 F.2d 516, 519 (5th Cir. 1980). A federal district court held that the University of Michigan could not enforce a prohibition making it a punishable offense to engage in "[a]ny behavior, verbal or physical, that stigmatizes or victimizes an individual on the

basis of race" or other minority status. *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 856 (E.D. Mich. 1989). The court found that, while well-motivated, the rule was unenforceable as vague: "Stigmatization" lacked a precise definition, and in the absence of guidance, a reasonable speaker could not discern the line between protected and unprotected conduct. *Id.* at 867. As in these analogous cases, the regulation under which UConn disciplined Radwan is fatally vague.

III. THE DISTRICT COURT ALSO ERRED IN DISMISSING PLAINTIFF'S PROCEDURAL DUE PROCESS CLAIM.

Despite their athletic gifts and the benefits they secure, student-athletes like Radwan are in an untenably vulnerable position. As Radwan's predicament demonstrates, UConn believed itself free to terminate an athletic scholarship at will, effectively expelling a student-athlete without notice or an opportunity to be heard. The unjust treatment of student-athletes has generated significant concern

from students,[4] commentators,[5] legal scholars,[6] and legislators.[7] Student-athletes may be denied an opportunity to be heard and left blindsided—suddenly without housing, robbed of their educational and athletic future.

This Court must make clear that student-athletes are not disposable. While athletic scholarships bestow a particular status and benefit, student-athletes like Radwan are students first. This case does not require this Court to determine precisely what process UConn owed Radwan; UConn failed to afford Radwan even the bare minimum of procedural protections. Radwan's scholarship was contingent upon her adherence to university and National Collegiate Athletic Association (NCAA) rules—and those same rules limited UConn's ability to revoke her scholarship without sufficient process. Fundamental fairness requires

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[4] *See, e.g.,* Emma Butler, *Anything but Amateur: Pay our Athletes*, CRIMSON WHITE (Sept. 16, 2020), https://cw.ua.edu/65782/top-stories/anything-but-amateur-pay-our-athletes (restructuring college athletics could mean "the end of student-athletes going to bed hungry or working at car washes after graduation").
[5] *See, e.g.,* Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643 ("Whether motivated by hostility for students . . . , or by noble and paternalistic tough love (as the NCAA professes), the denial of fundamental due process for college athletes has stood unchallenged in public discourse.").
[6] *See, e.g.,* David A. Grenardo, *The Continued Exploitation of the College Athlete: Confessions of a Former College Athlete Turned Law Professor*, 95 OR. L. REV. 223 (2016).
[7] *See, e.g.,* Billy Witz, *Democratic Senators Suggest Bill of Rights for College Athletes*, N.Y. TIMES (Aug. 13, 2020), https://www.nytimes.com/2020/08/13/sports/ncaa-senate-athletes-bill-of-rights.html.

that public institutions provide student-athletes basic procedural protections prior to the termination of a scholarship. To protect Radwan and her fellow student-athletes, this Court should reverse the district court's grant of summary judgment to Defendants on Radwan's due process claim.

A. Radwan Possessed a Protected Property Interest in Her Scholarship.

"To prevail on a procedural due process claim, a plaintiff must demonstrate (1) that she was deprived of a cognizable interest in life, liberty, or property, (2) without receiving constitutionally sufficient process." *Perez de Leon-Garritt v. State Univ. of N.Y.*, 785 F. App'x 896, 898 (2d Cir. 2019). By revoking Radwan's scholarship in the middle of the academic year by a simple phone call, without providing her notice or a meaningful opportunity to tell her side of the story, Defendants violated Radwan's right to procedural due process.

Radwan possessed a property interest in her athletic scholarship. The University of Connecticut sought to benefit from Radwan's unique athletic ability by granting her a full athletic scholarship, making Radwan one of the just two percent of high school athletes nationwide who receive such an award.[8] In return, UConn paid for Radwan's education and housing. Radwan's soccer skill enabled

[8] *Scholarships*, NAT'L COLLEGIATE ATHLETIC ASS'N, http://www.ncaa.org/student-athletes/future/scholarships (last visited Nov. 23, 2020).

her to attend UConn; like student-athletes nationwide, Radwan depended upon her scholarship to pursue her degree at her chosen institution, obtaining an education that would otherwise be out of reach.[9] Because Radwan's scholarship secured her continued enrollment at UConn and could be terminated only for cause, it constituted a property interest protected by the Due Process Clause of the Fourteenth Amendment.

Just as a student possesses a protected property interest in continued enrollment,[10] so too does a student-athlete like Radwan possess a property interest in the scholarship that enables her own degree progress and provides her with room and board. The Supreme Court has identified protected property interests as

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[9] Even with scholarships, many student-athletes struggle financially. *See, e.g.*, Sheridan Hendrix and Ashley Nelson, *Student-Athletes Look to Pell Grants to Subsidize Education*, LANTERN (May 15, 2018), https://www.thelantern.com/2018/05/student-athletes-look-to-pell-grants-to-subsidize-education ("The reality for many student-athletes, however, is that those scholarships do not cover all their needs."); Kevin McNamara, *With little money, many scholarship athletes struggle to get by*, PROVIDENCE J. (Jan. 24, 2015), https://www.providencejournal.com/article/20150124/SPORTS/301249983.

[10] *See, e.g.*, *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 633–34 (6th Cir. 2005) (holding that "Due Process Clause is implicated by higher education disciplinary decisions" and observing that student's interest in continuing studies is "significant"); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988) ("a student's interest in pursuing an education is included within the fourteenth amendment's protection of liberty and property"); *Harris v. Blake*, 798 F.2d 419, 422 (10th Cir. 1986) (graduate student held "a property interest in his [University of Northern Colorado's Center for Special and Advanced Programs] enrollment which entitled him to procedural due process.").

"claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined[,]" arising from "rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). To determine whether a person holds "a property interest in a benefit," this Court focuses its analysis "on the applicable statute, contract or regulation that purports to establish the benefit." *Martz v. Inc. Vill. of Valley Stream*, 22 F.3d 26, 29–30 (2d Cir. 1994). This Court understands the Due Process Clause "to protect something more than an ordinary contractual right," extending instead to "a state's revocation of a *status*, an estate within the public sphere characterized by a quality of either extreme dependence in the case of welfare benefits, or permanence in the case of tenure, or sometimes both, as frequently occurs in the case of social security benefits." *S & D Maint. Co. v. Goldin*, 844 F.2d 962, 966 (2d Cir. 1988).

Applying this precedent, the district court concluded that Radwan's athletic scholarship "did not have the qualities of 'dependence' or 'permanence' required for it to create a constitutionally protected property interest." *Radwan*, 2020 U.S. Dist. LEXIS 99453, at *67. But this conclusion fails to accurately assess the quality of Radwan's interest in her student-athlete status and its attendant benefits.

Radwan's daily reliance on her full athletic scholarship was total. In exchange for her "adherence to NCAA, Conference, Division of Athletics and

University rules, scholarship standards required by the University, and contribution to student life through participation in Women's Soccer," Radwan's agreement with the University of Connecticut supplied her with a place to live, tuition, and books enabling her progress toward a degree. *Id.* at *4–5. More all-encompassing than a simple employment contract, Radwan's athletic scholarship facilitated both her daily life as a student-athlete and her future prospects as a UConn graduate. Its revocation forced Radwan to leave her team, end her studies, and relocate. *Id.* at *27–32.

The district court held that Radwan was not dependent on her scholarship "for either continued enrollment at UConn or for athletic financial aid at another institution." *Id.* at *68. But this conclusion is not supported by the record, and the district court's narrow framing obscures the degree of Radwan's dependence on her UConn scholarship and the impact of its revocation. Defendants' cancellation of Radwan's athletic scholarship constructively ended her academic and athletic career at the university. Radwan depended on her athletic scholarship for her continued enrollment at UConn; as Radwan advised Defendants, her "family d[id] not have any money to support [her] going anywhere else." *Id.* at *21. Both Radwan and Defendants understood that the cancellation of her athletic scholarship effectively terminated her degree progress at UConn. Indeed, recognizing the consequence of the revocation, Defendants were aware that the loss of her

scholarship "could be devastating" to Radwan. *Id*. at *19. Coach Tsantiris recommended that she not attend UConn for the spring semester but instead take classes at a community college. *Id*. at *22. Had Radwan been able to attend UConn without her scholarship, such a recommendation would be unnecessary.

Radwan's ability to subsequently earn an athletic scholarship at a different institution does not obviate her prior reliance on the property interest at issue in this case—her UConn scholarship—nor does it alleviate the harm of its revocation. *See Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir. 1961) (finding that even if "other colleges are open to" admitting student-plaintiffs wrongfully expelled from state university without due process, "plaintiffs would nonetheless be injured by the interruption of their course of studies in mid-term"). Noting that "Ms. Radwan received an athletic scholarship from Hofstra University within weeks of losing her scholarship at UConn," the district court cites *Grasson v. Board of Education of Town of Orange*, 24 F. Supp. 3d 136, 151–52 (D. Conn. 2014), to suggest that Radwan cannot demonstrate dependence on her scholarship if that scholarship was later replaced elsewhere. *Radwan*, 2020 U.S. Dist. LEXIS 99453 at *67. But in *Grasson*, a district court rejected a bus driver's property interest claim in a contract with a Board of Education because he simultaneously maintained two other contracts with other government entities. Here, Radwan possessed no immediate substitute for her scholarship; she was not simultaneously

enrolled at another institution. When Defendants terminated her scholarship, Radwan was entirely dependent on her scholarship's provision of "tuition, fees, room, board, and books" at UConn. *Id.* at *4. Radwan's later success in securing a second scholarship is irrelevant to UConn's failure to provide her the process she was due.

The district court's dismissal of Radwan's due process claim contradicts both this Court's understanding of protected property rights and holdings from other courts. *See, e.g.*, *Heike v. Guevara*, 519 F. App'x 911, 923–24 (6th Cir. 2013) (assuming possession of property interest in athletic scholarship); *Fluitt v. Univ. of Neb.*, 489 F. Supp. 1194, 1203 (D. Neb. 1980) (assuming that a student-athlete's property interest in scholarship would attach upon notification of receipt of scholarship). Some courts have declined to recognize a property interest in a student's ability to participate on an athletic team—*i.e.*, a "right to play." *See*, *e.g.*, *Spath v. Nat'l Collegiate Athletic Assoc.*, 728 F.2d 25, 29 (1st Cir. 1984) (finding that student-athlete plaintiff "had no right to play hockey"). But playing time and the funding secured by an athletic scholarship present distinct questions, and courts have recognized that the latter constitutes a protected property interest. For example, in *Hysaw v. Washburn University of Topeka*, 690 F. Supp. 940, 944 (D. Kan. 1987), a district court found that while the student-athlete plaintiffs did not possess property interests "under the scholarship agreements to play football," they

had successfully "established a property right in the scholarship funds." Likewise, some courts have declined to find the deprivation of property interest in the non-renewal of an athletic scholarship. *See, e.g.*, *Austin v. Univ. of Or.*, 205 F. Supp. 3d 1214, 1222 (D. Or. 2016) (declining to find property interest in the expected renewal of "one-year scholarships, from which [student-athlete plaintiffs] benefited the full promised year."). But those cases also present distinctly different facts. UConn did not simply decline to renew Radwan's scholarship after its completion, but instead terminated it mid-year. Its revocation deprived her of an agreed-upon benefit without any procedural protections.

Radwan's scholarship facilitated her enrollment at UConn. As Defendants knew, its revocation meant that she would no longer be able to attend her university. Radwan's reliance on her scholarship to continue her progress toward a degree makes her property interest in it clear. Indeed, "no tenet of constitutional law is more clearly established than the rule that a property interest in continued enrollment in a state school is an important entitlement protected by the Due Process Clause of the Fourteenth Amendment." *Barnes v. Zaccari*, 669 F.3d 1295, 1305 (11th Cir. 2012). Student-athletes do not possess any less of a property interest in their continued enrollment than their non-athlete peers.

Per the terms of her agreement with UConn and NCAA rules, the termination of Radwan's scholarship required procedural safeguards that she did not receive.

B. Defendants' Termination of Radwan's Scholarship Mid-Year for "Serious Misconduct" Violated Her Right to Due Process.

Defendants blindsided Radwan by revoking her scholarship mid-year via a simple phone call, denying her any semblance of notice or a meaningful opportunity to respond to a disciplinary charge of "serious misconduct." *Radwan*, 2020 U.S. Dist. LEXIS 99453 at *20, *24. Both the UConn and NCAA agreements governing Radwan's scholarship and the Due Process Clause require more. When a public university takes disciplinary action that alters a student-plaintiff's "legal status since [she] could no longer be a student, put[s her] reputation at stake, and seriously damage[s her] career prospects; [she] is thus entitled to procedural protections under the Due Process Clause." *Doe v. Univ. of Conn.*, No. 3:20cv92 (MPS), 2020 U.S. Dist. LEXIS 11170, at *6 (D. Conn. Jan. 23, 2020). By depriving Radwan of a property interest without providing her with the basic procedural protections to which she was entitled, Defendants violated Radwan's right to due process.

"An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542

(1985) (quoting *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950)). The opportunity "to be heard 'at a meaningful time and in a meaningful manner'" is the "fundamental requirement of due process." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation omitted). Accordingly, the necessity of providing students notice and an opportunity to respond to the charges against them before discipline has been clearly established for decades. *See, e.g., Goss v. Lopez*, 419 U.S. 565, 581 (1975); *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018); *Winnick v. Manning*, 460 F.2d 545, 548 (2d Cir. 1972); *Dixon*, 294 F.2d at 157. While courts must often weigh whether a particular set of procedures satisfied the requirements of due process commensurate with the property interest at stake, *Mathews*, 424 U.S. at 334–35, this case does not demand such balancing because Defendants failed to offer Radwan even the barest procedural protections. "The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'" *Id.* at 348 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171–72 (1951)). Contrary to both the terms of her agreement with UConn and the NCAA and the most basic tenet of due process, Radwan was provided with neither.

1. Radwan was not provided sufficient notice.

Radwan was not provided with sufficient notice that Defendants sought to cancel her athletic scholarship because of her gesture. Notice must "apprise

interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. Further, "to comply with due process requirements," the notice provided "must set forth the alleged misconduct with particularity." *In re Gault*, 387 U.S. 1, 33 (1967). The "degree of required specificity also increases with the significance of the interests at stake." *Spinelli v. City of N.Y.*, 579 F.3d 160, 172 (2d Cir. 2009). And because "no one can question that the right to remain at the college in which the plaintiffs were students in good standing is an interest of extremely great value," Radwan's interests are substantial. *Dixon*, 294 F.2d at 157; *see also Doe v. Cummins*, 662 F. App'x 437, 446 (6th Cir. 2016) (because the outcome of a student disciplinary process will "have a substantial lasting impact on appellants' personal lives, educational and employment opportunities, and reputations in the community," student-appellants' interests are "compelling.").

Radwan learned that her scholarship had been canceled via a simple phone call. *Radwan*, 2020 U.S. Dist. LEXIS 99453 at *20. Defendants failed to give Radwan official notice that such a penalty was being contemplated, let alone imminent. To the contrary, Radwan had every reason to believe that she had already completed whatever punishment the gesture had warranted: she had missed games, received a letter of reprimand, and met with Defendant Manuel, who had himself told UConn's president that the "[c]ase [was] closed." *Id.* at *16.

Meanwhile, Radwan had continued to be treated like a member of the team in good standing—being asked for her shoe order for the next season, for example, and attending an end-of-season meeting. *Id.* at *18. At no point was Radwan provided meaningful notice that her scholarship was at risk, or that she should prepare her objections to its revocation. Instead, Radwan was blindsided in a phone call. Because Defendants entirely failed to provide Radwan with adequate notice prior to depriving her of a protected property interest, they violated Radwan's right to procedural due process.

2. Radwan was not provided a pre-deprivation hearing.

Radwan did not receive any opportunity to be heard before Defendants terminated her scholarship. Coupled with notice, an opportunity to be heard is the most fundamental requirement of due process—*i.e.*, the bare minimum—and a reasonable public university administrator would understand that disciplining a student without some form of hearing violates the student's clearly established rights. *Barnes*, 669 F.3d at 1308 (denying public university president qualified immunity because student-plaintiff "received no predeprivation process" prior to administrative withdrawal).

Shockingly, UConn does not have any procedures governing the mid-term revocation of a student's athletic scholarship. *Radwan*, 2020 U.S. Dist. LEXIS 99453 at *20. Instead, Defendants appear to have made it up as they went along,

resulting in exactly the kind of arbitrary decision-making that procedural protections are meant to preclude. *Goss*, 419 U.S. at 583 (observing that providing students with notice and a hearing serves as "a meaningful hedge against erroneous action."). In so doing, Defendants acted contrary to the provisions of the 2013–2014 NCAA Division I Manual incorporated into the agreements between Radwan and UConn. *Radwan*, 2020 U.S. Dist. LEXIS 99453 at *5–*8. The Manual provides for mid-year cancellation of an athletic scholarship if a student-athlete "[e]ngages in serious misconduct warranting substantial disciplinary penalty"—but only if the student-athlete is found responsible for such misconduct "*by the university's regular student disciplinary authority*." 2013–2014 NCAA Division I Manual, NAT'L COLLEGIATE ATHLETIC ASS'N, https://www.ncaapublications.com/productdownloads/D114.pdf (emphasis added). As noted by the district court, Radwan's "serious misconduct" was never referred to the UConn Office of Community Standards, nor could that office's director "recall ever having a disciplinary matter referred to the Office of Community Standards based on someone making an obscene gesture." *Radwan*, 2020 U.S. Dist. LEXIS 99453 at *33.

Simply put, Defendants ignored the terms of the agreements entered into with Radwan to discipline her without notice or a hearing of any kind. While "not every deviation from a university's regulations constitutes a deprivation of due

process," *Winnick*, 460 F.2d at 550, judicial action is warranted when an institution's failure to adhere to its own policies and agreements results in a fundamentally unfair proceeding. *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 246 (D. Vt. 1994) (college's failure to provide student with sufficient notice as to charges against him contradicted institutional policy and rendered proceeding "fundamentally unfair"). An athletic scholarship's terms cannot bind the student but not the school. This Court must make clear that a university like UConn cannot strip student-athletes like Radwan of protected property interests in athletic scholarships without adherence to the bare minimum of clearly established procedural protections.

CONCLUSION

Without judicial action, colleges will continue to ignore the fundamental rights of student-athletes. To protect the rights of Radwan and student-athletes like her, this Court should reverse.

Respectfully submitted,

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