CASE NO. 23-5771

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

KIMBERLY DIEI,

Plaintiff-Appellant,

-vs-

RANDY BOYD, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Western District of Tennessee (2:21-cv-02071-JTF-cgc)

BRIEF OF AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Amici hereby certify, pursuant to Sixth Circuit Rule 26.1, that no party to this brief is a subsidiary or affiliate of a publicly owned corporation, nor has a financial interest in the outcome of this matter.

Respectfully submitted,

/s/ Jennifer Safstrom

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INTERESTS OF AMICI CURIAE

Amici American Civil Liberties Union ("ACLU") is a nonprofit, nonpartisan membership organization devoted to protecting the civil rights and civil liberties of all Americans, including the First Amendment right to free speech online. The ACLU of Tennessee is a state affiliate of the ACLU. The ACLU and its affiliates regularly appear in First Amendment cases, both as counsel and amicus, including in this Court. *See, e.g., Wood v. Eubanks*, 25 F.4th 414 (6th Cir. 2022); *Bible Believers v. Wayne Cnty., Mich.*, 805 F.3d 228 (6th Cir. 2015). This includes cases about First Amendment rights online, *see, e.g., Reno v. ACLU*, 521 U.S. 844 (1997) (counsel); *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038 (2021) (counsel).

Amici Vanderbilt Stanton Foundation First Amendment Clinic ("Clinic") defends and advances the freedoms of speech, press, assembly, and petition through court advocacy. Furthermore, the Clinic serves as an educational resource on free expression and press rights and provides law students with real-world practice experience to become leaders on First Amendment issues. The Clinic engages in advocacy and representation across the country and has an interest in promoting the sound interpretation of the First Amendment to preserve the freedom of speech the U.S. Constitution and subsequent court precedents afford.[1]

[1] Plaintiff-Appellant consents, and Defendants-Appellees do not object, to the filing of this brief.

INTRODUCTION

Courts have acknowledged that "the most important place[] . . . for the exchange of views[] . . . is cyberspace." *See Packingham v. North Carolina*, 582 U.S. 98, 104 (2017). The Pew Research Center reports that "seven-in-ten Americans use social media to connect with one another, engage with news content, share information and entertain themselves." *See Social Media Fact Sheet*, Pew Research Center (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/social-media/. Social media is a widely used, universally embraced means of exercising speech, with users spanning all race, gender, age, and income groups. *Id.* The use of social media platforms is only expected to grow. *See* Stacy Jo Dixon, *Number of Global Social Network Users 2017-2027*, Statistica (Aug. 29, 2023), https://statista.com/statistics/278414/number-of-worldwide-social-network-users/ (predicting that nearly 6 billion people will use social media platforms by 2027, an increase from 2022). Accordingly, the robust protection of speech on social media is necessary to adequately protect the exercise of fundamental constitutional rights in our modern society.

Protecting the ability of higher education students to speak online is no exception. When it comes to campuses, the Supreme Court has recognized that "[t]he essentiality of freedom in the community of American universities is almost self-evident." *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 250 (1957). "The

Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (internal alterations omitted).

This is all the more true when it comes to online, off-campus speech. As the Supreme Court has held when considering the rights of schoolchildren vis-à-vis their grade schools, "courts must be more skeptical of a school's efforts to regulate [their online] speech, for doing so may mean the student cannot engage in that kind of speech at all." *Mahanoy Area Sch. Dist. v. B.L., by and through Levy*, 141 S. Ct. 2038, 2046 (2021). That same effect is perhaps even more troubling when it comes to college or professional school students, as "[t]he First Amendment guarantees wide freedom in matters of adult public discourse." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

A professional school cannot be permitted to broadly prohibit speech that brings "disrepute and disgrace" upon both student and profession, even where that speech has no connection to the school, other students, or the curriculum. If a court were to accept such a broad understanding of professional schools' reach, adult students would never be able to express certain views or explore kaleidoscopic ideas and perspectives. This would be a significant loss not only for the students, but also for others seeking to engage with and learn from them. And it would be especially

perilous because higher educational institutions are "peculiarly the 'marketplace of ideas,'" and should exemplify "this Nation's dedication to safeguarding academic freedom." *Healy v. James*, 408 U.S. 169, 180–81 (1972) ((quoting *Keyishian*, 385 U.S. at 603; *Sweezy*, 354 U.S. at 249–50).

FACTUAL BACKGROUND

Plaintiff-Appellant, Ms. Diei, was a graduate student at the University of Tennessee Health Science Center posting social media outside of the classroom and using her personal devices, where she shared selfies and music, and expressed her views about sexuality. *Diei v. Boyd*, No. 2:21-cv-02071 (W. D. Tenn. Aug. 3, 2023) at 2–3 [hereinafter Dist. Op.]; Compl., *Diei v. Boyd*, No. 2:21-cv-02071 (W. D. Tenn. Feb. 3, 2021) at ¶¶ 2, 21–25 [hereinafter Compl]. In the posts at issue, she did not talk about her profession or related schoolwork; to the contrary, she intentionally kept the posts separate from her professional life—for example, by relying on a pseudonym. Dist. Op. at 2; Compl. at ¶¶ 3, 21–29. Despite her efforts to create a social media presence entirely removed from her professional life, Ms. Diei was anonymously reported to the College of Pharmacy's Professional Conduct Committee for posting "sexual" and "vulgar" content. Dist. Op. at 2; Compl. at ¶¶ 3, 21–29.

The Professional Conduct Committee determined that Ms. Diei's social media posts violated a professional standard requiring "all students enrolled at the UTHSC

[to] maintain the high ethical and professional standards of the various disciplines of the health professions." *See Professional Conduct*, University of Tennessee, https://catalog.uthsc.edu/content.php?catoid=29&navoid=2706. Ms. Diei was expelled for her off-campus, pseudonymous social media posts, which were deemed "'crude,' 'vulgar,' and 'sexual.'" Dist. Op. at 7 (quoting Compl. at ¶ 43). Ms. Diei appealed, and the Committee's decision to expel her was overturned by the Dean approximately three weeks later. Dist. Op. at 3 (citing Compl. at ¶¶ 89, 92).

ARGUMENT

"[T]he state may not act as though professors or students 'shed their constitutional rights to freedom of speech or expression at the [university] gate.'" *Meriwether v. Hartop*, 992 F.3d 492, 503 (6th Cir. 2021). Although there may be some legitimate regulation of student speech under limited circumstances, when a professional student is engaging in online, off-campus speech that is not obscene or otherwise unprotected and has no connection to the school or its curriculum, the case is easy: university administrators cannot restrict such expression. In addition, amorphous professionalism standards that permit unfettered discretion in their enforcement do not pass constitutional muster.

I. The First Amendment Protects Adult Students' Online Speech.

Five decades ago, the Supreme Court announced that its cases "leave no room for the view that [. . .] First Amendment protections should apply with less force on

college campuses than in the community at large." *Healy*, 408 U.S. at 180. Put simply, college and professional school students "are adults," and so enjoy the attendant First Amendment freedoms. *Id*. at 197.

That includes the freedom to speak online. The protections of the First Amendment apply with at least equal force to online speech—whether pictures, films, or drawings—as they do to traditional oral utterances and the printed word. *303 Creative LLC v. Elenis*, 600 U.S. 570, 587 (2023) (applying First Amendment protections to the online speech of a web designer). In a global society connected through online interactions and social media, online speech serves the First Amendment's original purpose of enabling people to "think as [they] will and to speak as [they] think." *Id.* at 584.

Nearly five billion people across the world use social media. *See* Dixon, *supra* at 1. Indeed, the Supreme Court has recognized that centrality of "cyberspace . . . in general, . . . and social media in particular" to facilitate "the exchange of views" in modern society. *Packingham*, 582 U.S. at 104; *see also Reno v. ACLU*, 521 U.S. 844, 868–70 (1997) (observing that the internet houses "vast democratic forums," and holding that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied" online).

Protecting adults' ability to speak and access information online is of particular importance. *See, e.g.*, *Reno*, 521 U.S. at 874 (striking down regulation of

speech purportedly aimed at protecting children in part because the "burden on adult speech is unacceptable"). Restricting adults from being free and full members of this growing marketplace of ideas merely because they are students at public colleges or professional schools, even when their speech is not connected to their school or its curriculum, would be inconsistent with both the values and precedent of the First Amendment, for speech protections are "nowhere more vital than in the community of American schools." *Healy*, 408 U.S. at 180 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

II. Ms. Diei's Speech is Protected by the First Amendment.

Defendants' focus on the "crude, vulgar, and sexual" nature of Ms. Diei's posts constitutes unconstitutional content and viewpoint discrimination. Their objections to Ms. Diei's posts appear to focus on the sexual content of her speech—but such speech is protected as long as it does not cross the line into obscenity, which Ms. Diei's posts did not.

A. A Professional School Cannot Punish a Student Merely Because Officials Find Her Speech Distasteful.

Professional school officials cannot base discipline for protected speech on their personal distaste for a student's views. Universities "may not exclude speech . . . [nor] discriminate against speech on the basis of . . . viewpoint." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992)) ("[D]iscrimination against one set of views or

ideas is but a subset or particular instance of the more general phenomenon of content discrimination."). Regardless of how offensive some speech may be to some listeners, the right to "receive information and ideas, regardless of their social worth, is fundamental to our free society." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (internal citation omitted).

Student speech that is merely offensive to some readers because it discusses sex, especially when occurring off-campus, cannot be punished. "The First Amendment protection of freedom of expression may not be made a casualty of the effort to force-feed good manners to the ruffians among us," and unchecked discretion to whittle away at First Amendment rights should not be taken lightly. *Klein v. Smith*, 635 F. Supp. 1440, 1442 (D. Me. 1986) (ruling that school officials exceeded their authority in punishing a student for off-campus expressive conduct). "Disliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech." *Beussink* ex rel. *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998).

The suppression of student speech by institutions of higher education is notably dangerous. Courts have been clear to establish that a school may not punish a student for "the mere dissemination of ideas," even if they are "offensive to good taste," if not "otherwise unprotected." *Papish v. Bd. of Curators*, 410 U.S. 667, 667–70, 668 n.3 (1973). "For the University . . . to cast disapproval on particular

viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life." *Rosenberger*, 515 U.S. at 834; *see also Widmar v. Vincent*, 454 U.S. 263, 268–269 (U.S. 1981) (holding university could not prohibit access to facilities based on groups' religious viewpoints).

Even if this case were about a high school, administrators could not punish a student for "vulgar" speech outside of school. *Fraser*, 478 U.S. at 685. In *Fraser*, the Court held that a school's suspension of a high school student for speech at a "required" school assembly did not run afoul of the First Amendment. *Id.* at 677. However, the Court was careful to distinguish similar speech occurring outside of school, even by a teenager. *Id.* at 682. And it was explicit that its holding did not apply to adults. Specifically, the Court articulated that the "First Amendment guarantees wide freedom in matters of adult public discourse," and it recognized only a limited exception for "school officials acting *in loco parentis*, to protect children—particularly in a captive audience—from exposure to sexually explicit, indecent, or lewd speech." *Id.* at 684 (limiting ruling to "children in public schools"). Adults in higher education are guaranteed more expansive protections. *See id.*

B. The Cases the District Court Relied on to Hold Otherwise Are Inapt.

The professionalism caselaw relied on by Defendants and the District Court is distinguishable from the matter at hand and, thus, inapt. Those cases either concern

conduct and not speech; relate to speech that is directed at or about other students; or pertain to speech about the student's coursework or curriculum. None of these concerns are present in the instant matter, as Ms. Diei's anonymous posts were pure speech and unrelated to other students or her educational program.

First, Ms. Diei did not engage in any conduct when posting online; her posts of photographs, commentary, and song lyrics were pure speech. Unlike the plaintiff in *Al-Dabagh*, who was denied a medical degree for engaging in unprofessional behavior, including "tardiness to class" and "driving while intoxicated," Ms. Diei is being punished purely for her speech and its message. Dist. Op. at 12 (citing *Al-Dabagh v. Case Western Reserve Univ.*, 777 F.3d 357, 359–61 (6th Cir. 2015). Although conduct may implicate expressive rights, there is no protected message in Al-Dabagh's conduct. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989) (recognizing flag burning as symbolic speech). By contrast, Ms. Diei's conduct was in compliance with all generally-applicable, objective performance requirements of her program. Dist. Op. at 21 ("Diei asserts that she was always in good academic standing, maintained excellent grades and earned competitive internships.").

Second, the content of Ms. Diei's speech is protected and readily differentiated from the remarks made by the student in *Keefe v. Adams,* which were directed at other students in his educational program. 840 F.3d 523, 526–27 (8th Cir. 2016). In *Keefe*, the student was "suspended from a nursing program at a public

college for 'on-line, off-campus Facebook postings'" that targeted others at the institution. *See* Dist. Op. at 12 (quoting *Keefe*, 840 F.3d at 529–33). The record in *Keefe* "conclusively established that the posts were directed at classmates, involved their conduct in the Nursing Program, and included a physical threat related to their medical studies." *Keefe*, 840 F.3d at 532. For instance, in a public social media post, the student wrote: "Not enough whiskey to control that anger. . . . Im [sic] going to take this electric pencil sharpener in this class and give someone a hemopneumothorax with it before to [sic] long. I might need some anger management." *Keefe*, 840 F.3d at 526–27; *see also Keefe v. Adams*, 44 F. Supp. 3d 874, 881 n.4 (D. Minn. 2014) (quoting student testimony that "a hemopneumothorax 'is a punctured lung with air being allowed into the lung pleural cavity along with blood'"). Other statements were either directed at classmates ("LMAO [a classmate], you keep reporting my post and get me banded.") or about fellow students in the program ("Keefe had told someone there would be 'hell to pay for whoever complained about me.'"). *Keefe*, 840 F.3d at 526. Such statements are different in kind and substance from Ms. Diei's public statements. Ms. Diei's comments on matters of public concern, such as bodily autonomy and sexual health, were neither directed at, nor related to, her fellow students or educational program.

For similar reasons, reliance on *Hunt v. Board of Regents of Univ. of New Mexico* is misplaced. 338 F. Supp. 3d 1251, 1256 (D.N.M. 2018), aff'd sub nom.

Hunt v. Bd. of Regents of Univ. of N.M., 792 F. App'x 595 (10th Cir. 2019). University administrators in *Hunt* punished the plaintiff for statements targeted at classmates. *See id.* (statements including challenging a classmate's "depraved belief in legal child murder," insulting "you sick, disgusting people," and targeting classmates as "a disgrace to the name of human" and "Moloch worshiping assholes"). In contrast, the opinions Ms. Diei expressed were not about or directed to fellow students. Because her speech was unrelated to the educational program or her peers, Ms. Diei's case is readily distinguishable.

III. Professionalism Standards That Allow Decisionmakers' Unfettered Discretion in Enforcement Are Unconstitutional.

Ambiguous, imprecise, and vague professionalism standards grant decisionmakers unfettered discretion in their enforcement, providing no safeguards against unconstitutional viewpoint discrimination. Where professional standards offer no guidelines as to what, exactly, professionalism requires, they are subject to exploitation; undefined, catchall standards can permit arbitrary, subjective enforcement to subdue protected speech activity in contravention of the right to free speech. *See, e.g.*, *Ward v. Polite*, 667 F.3d 727, 732–34 (6th Cir. 2012) ("The free-speech clause generally prohibits suppressing speech 'because of its message,' and the Court has enforced that prohibition in the public school—indeed the university—setting.").

That does not mean that professional schools can never punish students for their speech—but any punishment must be pursuant to narrower, clearer standards. For example, in *Yoder v. University of Louisville*, a nursing student at the University of Louisville wrote a blog post about viewing a specific patient's childbirth as part of a course assignment. 526 Fed. App'x 537, 539–40 (6th Cir. 2013). The university dismissed the student because she "ma[de] comments off campus that implicate[d] patient privacy concerns" by discussing a specific patient and her birthing process. *Id.* at 545–46. This Court upheld the punishment pursuant to a confidentiality policy in part because "Defendants have a compelling interest in ensuring that students observe patient confidentiality." *Id.* at 548. Moreover, the court added, "the policies [did not] burden substantially more speech than necessary." *Id.* at 547 (restricting communications narrowly "in the context of a specific patient observed in conjunction with their clinical coursework"). That is in sharp contrast to the "disrepute and disgrace" standard Defendants argue they invoked here.

Similarly, in *Tatro v. University of Minnesota*, a mortuary student was punished for statements made on Facebook about a cadaver that violated student code of conduct and laboratory rules, which were specifically tied to the program's coursework. 816 N.W.2d 509, 512–13 (Minn. 2012); *id.* at 522–23 (prohibiting "'blogging' about the anatomy lab or cadaver dissection"). The university's rule, the court found, was "narrowly tailored and directly related to established professional

conduct standards." *Id.* at 521. The policy was sufficiently narrow to prohibit only a particular kind of speech about a particular topic in accordance with professional practice standards. *See, e.g.*, *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018) ("Speech is not unprotected merely because it is uttered by 'professionals.'").

By contrast, the university's policy requiring "high ethical and professional standards" establishes neither a clear, comprehensible understanding of conduct limits nor a narrowly tailored limitation on any speech activity. Rather, it forces students to self-censor in order to meet one's "best guess as to what the [school's] professionalism policies prohibit[]." Compl. at ¶ 52. "[T]he reach of school authorities is not without limits," for the imposition of unclear standards that provide no limiting principle to university administrators will permit overreach and result in an impermissible chilling effect. *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216 (3d Cir. 2011).

IV. This Case Has Broad First Amendment Implications.

Social media empowers student activism and civic engagement. Ensuring robust First Amendment protections for students on digital platforms, in turn, protects discourse for all viewpoints and perspectives. Such safeguards arguably come at a crucial time in our society, particularly at the postgraduate level.

New York University's First Amendment Watch has observed that "U.S. campuses have been hotbeds of political and social debate since the colonial era." *Free Speech on College and University Campuses*, First Amendment Watch at New York University, https://firstamendmentwatch.org/deep-dive/classes-are-over-but-the-campus-free-speech-debate-still-rages/#tab-news-updates (last updated Dec. 5, 2023). "In 1964," for example, "student activists at Berkeley launched a free speech movement that would spread nationwide by insisting that the University administration remove restrictions on campus expression." *Id.* More recently, students in higher education have engaged in heated debate about everything from which speakers should be invited to speak on campus to the devastating conflict in Israel and Palestine. *Id.*

The right to freely debate political issues or speak on social issues without fear of official sanction is deeply ingrained in First Amendment protections. "Because judicial redress cannot adequately restore what a school has wrongfully taken away," when administrators punish constitutionally-permissible speech, it stands "in contravention of the oft-touted marketplace of ideas," which most threatens "those expressions are unpopular, vulgar, or disturbing." Beth Norrow & Sommer Dean, *The Law of Students' Rights to Online Speech: The Impact of Students' Ability to Openly Discuss Public Issues*, American Bar Association (Jan. 4, 2022)

https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-civic-education-in-america/the-law-of-students-rights-to-online-speech. The outcome of this case will impact not only the parties before the Court, but the many adult students who exercise their rights to free speech.

CONCLUSION

For the reasons set forth above, this Court should reverse the trial court's decision to grant Defendants-Appellees' Motion to Dismiss and remand for further proceedings.

Dated: December 15, 2023

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation in Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 3,547 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, Times New Roman, in 14-point font using Microsoft Word.

Dated: December 15, 2023

Respectfully submitted,

/s/ Jennifer Safstrom

CERTIFICATE OF SERVICE

The undersigned certifies that on December 15, 2023, an electronic copy of this brief was filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system and that service of the brief will be accomplished by the electronic filing system.

Dated: December 15, 2023

Respectfully submitted,

/s/ Jennifer Safstrom