STATE OF RHODE ISLAND **SUPREME COURT**

WILLIAM FELKNER,
Plaintiff / Appellant,

v.

RHODE ISLAND COLLEGE, **JOHN NAZARIAN**, individually and in his official capacity as President of Rhode Island College; **CAROL BENNETT-SPEIGHT**, individually and in her official capacity as Dean of the School of Social Work; **JAMES RYCZEK**, individually; **ROBERTA PEARLMUTTER**, individually and in her official capacity as Professor of Social Work; and **S. SCOTT MUELLER**, individually and in his official capacity as Assistant Professor of Social Work, Defendants / Appellees.

Case No. SU-16-0017
[C.A. No.:
PC 2007-6702]

BRIEF *AMICI CURIAE* OF FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, NATIONAL ASSOCIATION OF SCHOLARS, AND CATO INSTITUTE IN SUPPORT OF PLAINTIFF-APPELLANT WILLIAM FELKNER.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The Foundation for Individual Rights in Education ("FIRE") is a nonpartisan, nonprofit, tax-exempt education and civil liberties organization dedicated to defending student and faculty rights at our nation's institutions of higher education. Since its founding in 1999, FIRE has effectively and decisively defended constitutional liberties including freedom of speech, legal equality, due process, religious liberty, and sanctity of conscience on behalf of students and faculty nationwide via legal and public advocacy. FIRE believes that if our nation's universities are to best prepare students for success in our democracy, the law must remain clearly on the side of student and faculty rights.

The National Association of Scholars ("NAS") is a network of scholars and citizens united by a commitment to academic freedom, disinterested scholarship, and excellence in American higher education. NAS upholds the principles of academic freedom that include faculty members' and students' freedom to pursue academic research; their freedom to question and to think for themselves; and their freedom from ideological imposition. These freedoms are means toward the pursuit of truth that is essential to higher education. NAS regularly publishes studies that examine curricula and other aspects of higher education policy and practice; files friend-of-the-court briefs in legal cases, defending freedom of speech and conscience, and the civil rights of educators and students; and gives testimony before congressional and legislative committees to engage public support for worthy reforms.

The Cato Institute ("Cato") was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums,

publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs.

This case is of interest to *amici* because it concerns the contours of a student's right to freedom of expression and freedom of conscience at a public institution of higher education. *Amici* believe that all students must have equal access to the benefits of public educational programs, without regard to their political views and commitments, and that public institutions cannot require students to publicly lobby elected officials in support of a particular viewpoint. *Amici* believe that if allowed to stand, the trial justice's decision will embolden public college administrators across the country to disregard their constitutional obligations. Given *amici*'s shared commitment in preserving constitutional rights on our nation's public campuses, *amici* have a deep interest in securing a just result in this case.

SUMMARY OF ARGUMENT

The expressive rights of public college students like William Felkner are fully protected by the First Amendment. Courts have long recognized that safeguarding student speech rights is of particular importance for our nation. *See Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."). Indeed, nearly a half century ago, the Supreme Court of the United States declared that it could allow "no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large." *Healy v. James*, 408 U.S. 169, 180 (1972).

The trial justice's opinion is erroneous for several reasons. First, students should not be compelled to lobby in support of a position with which he or she disagrees. *See, e.g.*, *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001). Second, because the trial justice failed to view the evidence in the light most favorable to the nonmoving party, she concluded that

Felkner's First Amendment rights were not violated when he was compelled to lobby against his own beliefs. Third, the trial justice erroneously concluded that the issue of qualified immunity was moot; however, qualified immunity remains a live issue because the trial justice improperly decided Felkner's constitutional claim.

ARGUMENT

I. The First Amendment Does Not Allow the Government to Compel Individuals to Lobby Against Their Beliefs.

The Supreme Court of the United States has consistently held that the government cannot compel an individual to lobby in support of a position with which he or she disagrees. *See, e.g.*, *United Foods, Inc.*, 533 U.S. at 410. The trial justice failed to properly review the evidence and erroneously concluded that Felkner's First Amendment rights were not violated even though he was compelled to lobby against his beliefs. Because the trial justice incorrectly decided the constitutional issue, qualified immunity remains a live issue. *See Felkner v. R.I. College,* No. PC 2007-6702, slip op. (R.I. Super. Ct. 2015), at 35 ("Opinion").

A. The Trial Justice Erred in Finding That Felkner's First Amendment Rights Were Not Violated.

1. The government cannot compel an individual to lobby in support of a position with which he or she disagrees.

The First Amendment prohibits government actors from compelling private citizens to express views with which they disagree. *United Foods, Inc.*, 533 U.S. at 410 ("Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views . . . ."); *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995) (government "may not compel affirmance of a belief with which the speaker disagrees."). This prohibition on forced speech encompasses the forced expression of political views. *See Wooley v. Maynard*, 430 U.S.

705, 714 (1977) ("A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts.").

The First Amendment binds public colleges and universities and protects their students. *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981). Accordingly, public educational institutions cannot compel a student to endorse a particular political opinion or punish a student for refusing to endorse or adopt a political stance. *See W. Va. State Board of Educ. v. Barnette,* 319 U.S. 624, 642 (1943) (holding that compulsory salute and pledge to the flag required of public grade school students "transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."). This "[c]ompulsion need not take the form of a direct threat or a gun to the head." *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1290 (10th Cir. 2004). For example, the University of Utah violated the First Amendment when it compelled a student to speak by "ma[king] it abundantly clear that [Plaintiff] would not be able to continue in the program if she refused to say the words with which she was uncomfortable." *Axson-Flynn,* 356 F.3d at 1290; *see also Elrod v. Burns,* 427 U.S. 347, 372–73 (1976) (holding that sheriff's employees cannot be compelled to support a political party in order to keep their jobs and emphasizing "the rights of every citizen to believe as he will and to act and associate according to his beliefs").

2. Defendants violated the First Amendment by penalizing Felkner for refusing to lobby in favor of a bill that he opposed.

The trial justice erred when she dismissed Felkner's First Amendment claims because the record shows a genuine factual dispute about whether Defendants forced Felkner to lobby in favor of a bill that he opposed. In deciding Defendants' motion for summary judgment, the trial justice should have "draw[n] from the record all reasonable inferences that support the position

of the nonmoving party." *Morabit v. Hoag*, 80 A.3d 1, 14 (R.I. 2013). The trial justice's conclusion that "the record reveals that Felkner never was compelled to lobby or testify at a public hearing," Opinion at 35, and that "Felkner has presented no genuine issues of material fact to support his contention that he was required to lobby from a political perspective in violation of his constitutional right to free speech in part two of the Policy and Organizing class," *id.* at 35–36, is undermined by the record when viewed in the light most favorable to Felkner.

The entirety of the record shows that Defendants required Felkner to engage in lobbying related to a partisan issue. While RIC social work students could choose among a range of issues to lobby the Rhode Island General Assembly, the Social Work 531 syllabus explicitly required students to engage in "policy advocacy" in order to "achieve social justice." Defendants' Exhibit T, ¶16 (quoting the course syllabus describing the lobbying requirement). Roberta Pearlmutter, Felkner's professor, testified in her affidavit that she "told [Felkner] that the organizing project needed to be related to the course subject matter." *Id.* at ¶17. James Ryczek, the Director of Field Education at Rhode Island College's Social Work Program, testified at his deposition that social work students were required to lobby for a position chosen by the school, even if it conflicted with their personal beliefs. *See* PX 87 at 173–75. In fact, Ryczek admitted that students *could not choose which position* they would lobby for. *Id.* at 173:16–18 ("Q. So, in other words, the school was going to tell them which position they had to lobby on. A. Yes.").

Felkner's refusal to abide by this requirement resulted in a grade reduction and a threat to remove him from RIC's social work program. Pearlmutter told Felkner he would only be able to advocate in support of his preferred viewpoint if he found group members who shared that viewpoint. Defendants' Exhibit T, ¶ 25-26. However, none of his classmates obliged, leaving Felkner forced to choose between sacrificing his First Amendment right against compelled

speech or suffering a grade reduction. *See Axson-Flynn,* 356 F.3d at 1290; *Id.* at ¶ 28 ("I finally agreed to let him do that [the lobbying project by himself] but advised him that it would adversely affect his grade because it would not be fulfilling an important element of the course requirement; group effort."). Eventually, Felkner proceeded with the group assignment with participants who were not enrolled in the class; perhaps unsurprisingly, his failure to perform in accordance with class expectations resulted in a grade reduction. *Id*. at ¶ 32. Ryczek then told Felkner that his refusal to lobby for the position chosen by the school would result in "not be[ing] able to meet the academic requirements necessary to obtain a degree," PX 32. This was confirmed by Felkner's expert witness who testified that Felkner had to stay in the class and lobby for the required perspective in order to continue his academic career in social work at RIC. *See* PX 94 at 108–09.

Accordingly, a genuine issue of material fact exists as to whether placing these burdens on Felkner for his refusal to publicly lobby in support of a viewpoint he did not hold violated his First Amendment rights. The trial justice erred in granting summary judgment as she ignored material evidence, *see, e.g.*, PX 94 at 108–09; PX 87 at 173–75, and failed to "draw from the record all reasonable inferences that support the position of the nonmoving party." *Morabit*, 80 A.3d at 14. This Court should reverse the trial justice's grant of summary judgment. *See O'Connell v. Walmsley*, 93 A.3d 60, 66 (R.I. 2014) (reversing summary judgment because trial court improperly weighed evidence in favor of party moving for summary judgment.).

B. Defendants Are Not Entitled to Qualified Immunity.

The trial justice erred when she held that "the issue of qualified immunity [was] rendered moot" because Felkner did not establish a genuine issue of material fact and because there was no evidence of a constitutional violation. Opinion at 42. Because the record, properly considered in the light most favorable to the nonmoving party, establishes a genuine issue of material fact,

the issue of qualified immunity is not moot. Further, because the facts show that Felkner was penalized for refusing to lobby against his personal beliefs, Defendants violated clearly established law.

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal citation omitted). An official is not entitled to qualified immunity when a plaintiff's allegations constitute a violation of a constitutional right, and that right was clearly established at the time of the alleged violation. *Id*. at 232. The Supreme Court has explained that, for the purposes of qualified immunity, a constitutional right is clearly established when its contours are made sufficiently clear so that any reasonable public official would understand what conduct violates the right. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). The unlawfulness of the conduct must be apparent in light of pre-existing law, *Hope v. Pelzer*, 536 U.S. 730, 739 (2002), and there need not be "a case directly on point"—precedent need only place the "statutory or constitutional question beyond debate." *See Ashcroft*, 563 U.S at 741.

The First Amendment rights of students at public colleges has been established by decades of Supreme Court precedent. *See, e.g.*, *Healy v. James*, 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."). For over 50 years, the Supreme Court has emphasized that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). These cases affirm that a

student's right to free speech is clearly established at public colleges such as Rhode Island College.

Moreover, the right to free speech includes the right to be free from compelled speech. *United Foods, Inc.*, 533 U.S. at 410; *see also Wooley*, 430 U.S. at 714 (1977) ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'") (internal citations omitted). Tellingly, in *Barnette*, the Supreme Court struck down a state statute requiring public school students to salute the American flag. 319 U.S. at 624. As Justice Robert H. Jackson wrote:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Id. at 642. It follows that if the right to be free from compelled speech was afforded to grade school students, it has similarly been afforded to students enrolled in public colleges. *See id.*

Even in 1969, the principle that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" had been the "the unmistakable holding of [the Supreme Court] for almost 50 years." *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Accordingly, the right to be free from compelled speech is clearly established for students in public institutions of higher education.

II. The Trial Justice Inappropriately Relied on Analytical Frameworks Established in Contexts Distinct From This Case.

In granting Defendants' motion for summary judgment, the trial justice applied to Felkner limitations on his First Amendment rights that the Supreme Court has explicitly declined to apply to college and university students. The court's application of *Hazelwood School District v. Kuhlmeier*, a case that governs student speech at public primary and secondary schools, is

especially unsuitable given that Felkner is in a master's program, a course of study more advanced than that undertaken by undergraduates. The trial justice further analyzed Felkner's claim under a framework appropriate for a school's regulation of curricular speech—speech that is not disseminated outside the classroom in a context in which the student would be presumed to be speaking only for himself. As discussed above, Felkner was forced to choose between lobbying in favor of a position with which he disagreed or receiving a grade reduction. He was, therefore, effectively punished for not *publicly* espousing an opinion—not for simply refusing to submit to directions regarding curricular, in-class speech heard only by his professors and peers.

A. The Trial Justice Improperly Relied on *Hazelwood v. Kuhlmeier*.

The trial justice correctly noted that the right to freedom of expression is not unlimited. Opinion at 17. When determining whether expression falls outside the boundaries of First Amendment protection, however, it is critically important to use the framework established for the circumstances in question. The trial justice framed her discussion of the limits of First Amendment protections using *Hazelwood*, writing: "It is well settled that 'educators do not offend the First Amendment . . . so long as their actions are reasonably related to legitimate pedagogical concerns.' *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)." To base the court's legal analysis on this standard, however, is to ignore that the context of *Hazelwood* is distinct from the circumstances in this case, and that the proper legal framework for analyzing Felkner's speech is broader than that of *Hazelwood*.

1. *Hazelwood* involved speech that could potentially be viewed as bearing the school's imprimatur.

The text omitted in the trial justice's quotation is significant. More completely quoted, the Supreme Court held "that educators do not offend the First Amendment *by exercising editorial control over the style and content of student speech in school-sponsored expressive*

activities so long as their actions are reasonably related to legitimate pedagogical concerns." 484 U.S. 260, 273 (1988) (emphasis added). In *Hazelwood*, a public high school principal restricted the topics to be published in a "newspaper produced as part of the school's journalism curriculum." 484 U.S. at 262. The administrative control over speech authorized by *Hazelwood* is not universal—it applies in part because "members of the public might reasonably perceive to bear the imprimatur of the school." *Id.* at 271. Further, the Supreme Court itself has observed that *Hazelwood* controls only cases involving speech that could be mistaken for having the school's stamp of approval, and reaches no further. *Morse v. Frederick*, 551 U.S. 393, 405 (2007) ("*Kuhlmeier* does not control this case because no one would reasonably believe that Frederick's banner bore the imprimatur of the school.").

In sharp contrast, the speech RIC sought to compel from Felkner *did* reflect the administrator's views, and Felkner was understandably concerned that if he were to publicly lobby a legislative body in favor of certain positions, his testimony would be viewed as having *his* stamp of approval. The facts of the case put Felkner in essentially the same position as Hazelwood School District—defending himself against the potential of the public's construing the speech as bearing his imprimatur (reasonably, in Felkner's case). Accordingly, the school's interest in "exercising editorial control over the style and content of student speech in school-sponsored expressive activities," as the trial justice fails to specify, is very different from whatever interest RIC may have in compelling students to publicly promote certain ideas, particularly as Felkner was required to speak to state lawmakers.

2. *Hazelwood* involved authors and audiences who were children.

The *Hazelwood* Court also explicitly justified its holding in large part on the young age of the newspaper's audience and reserved the question of whether its holding should be applied

in the context of higher education. It is therefore not an appropriate standard to use in this case, which involves an adult university student speaking only to other adults.

The *Hazelwood* Court relied on the notion that a high school administrator "must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics." *Id.* at 272. The age of the newspaper's audience was a significant factor in the Court's decision to defer to the judgment of the school principal; the Court wrote that "[i]t was not unreasonable for the principal to have concluded that such frank talk" about sexuality and birth control "was inappropriate in a school-sponsored publication distributed to 14-year-old freshmen and presumably taken home to be read by students' even younger brothers and sisters." *Id.* at 274–75. The Court bolstered its holding by reasoning that the standard it announced "is consistent with [the Court's] oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Id.* at 273.

In stark contrast, Felkner, his classmates, and those who would read his class assignments are adults, not "youths" for whom parents and teachers are responsible. Accordingly, the rationale that broad deference should be granted to the decisions of those responsible adults is not appropriate here, in the context of higher education. Indeed, the Court explicitly stated that it "need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level." *Id.* at 273 n.7.

Subsequent decisions from both the Supreme Court and lower appellate courts have recognized the important distinction between the *in loco parentis* stance permissible in public grade schools and the full protections of the First Amendment afforded public college and university students. For example, in *Board of Regents of the University of Wisconsin System v.*

Southworth, Justice David Souter observed that "cases dealing with the right of teaching institutions to limit expressive freedom of students ha[d] been confined to high schools, . . . whose students and their schools' relation to them are different and at least arguably distinguishable from their counterparts in college education." 529 U.S. 217, 238 n.4 (2000) (Souter, J., concurring in the judgment). The United States Court of Appeals for the Third Circuit explicitly wrote in *DeJohn v. Temple University* that a university administrator is "granted *less leeway* in regulating student speech than are public elementary or high school administrators." 537 F.3d 301, 316 (3d Cir. 2008) (emphasis in original). The Third Circuit similarly wrote in *McCauley v. University of the Virgin Islands*:

> At a minimum, the teachings of *Tinker*, *Fraser*, *Hazelwood*, *Morse*, and other decisions involving speech in public elementary and high schools, cannot be taken as gospel in cases involving public universities. Any application of free speech doctrine derived from these decisions to the university setting should be scrutinized carefully, with an emphasis on the underlying reasoning of the rule to be applied.

618 F.3d 232, 247 (3d Cir. 2010).

Because the interests and responsibilities of high school students and administrators differ so greatly from the rights and responsibilities of college students and administrators, respectively, *Hazelwood* does not provide the appropriate standard for assessing whether restrictions or mandates on Felkner's speech violated his rights under the First Amendment.

B. The Cases Cited by the Trial Justice to Support Her *Hazelwood* Analysis Are Similarly Distinguishable.

In continuing her analysis, the trial justice cites *Brown v. Li*, 308 F.3d 939, 952 (9th Cir. 2002), in writing:

> [S]pecifically, the standard for evaluating a graduate student's First Amendment claim stemming from curricular speech "balances a university's interest in academic freedom and a student's First Amendment rights. It does not immunize the university altogether from First Amendment challenges but, at the same time, appropriately defers to the university's expertise in defining academic standards and teaching students to meet them."

Opinion at 18. The trial justice also relied on a lengthy excerpt from *C.N. v. Ridgewood Board of Education*, 430 F.3d 159, 187 (3rd Cir. 2005), explaining that requiring students to make arguments they don't agree with is sometimes necessary to further the school's "curricular mission." But neither case provides the appropriate framework for assessing Felkner's claims.

While it is true that curricular speech mandated as part of a class assignment may involve voicing opinions different from the students' personal views, cases involving such curricular speech are distinguishable from Felkner's because RIC sought to compel him to speak outside the classroom. As discussed above, the lobbying requirement imposed on Felkner and his peers created the risk that people who were not involved with the class would view Felkner's speech as his own opinions—a reasonable assumption, given that unpaid lobbyists typically believe in the positions they advocate for publicly.

Brown and *C.N.* did not involve the same risk. *Brown* centered on the University of California at Santa Barbara thesis committee's refusal to approve for filing in the university's library a "Disacknowledgments" section of his thesis, which contained criticism of UCSB administrators. At worst, the plaintiff in *Brown* would have to voice his disapproval of those administrators in a forum other than his thesis. He was not compelled, for example, to voice approval of the administrators, only to omit his remarks from a particular piece written as part of the school curriculum.

In *C.N.*, the Third Circuit affirmed a grant of summary judgment to a school district that had allegedly required students to participate in a survey about students' drug use, sexual activity, and other personal matters. 430 F.3d at 190, 161. As the court notes, however, "the information was disclosed in a format that did not permit individualized detection." *Id.* at 189.

Accordingly, there was no chance that anyone would be able to make any judgment about a particular student's relationship to the allegedly compelled information.

Because *Brown* and *C.N.* do not involve the risk that audiences outside the classroom will incorrectly attribute viewpoints to a student who has been compelled to speak, they do not provide support for the constitutionality of RIC's curricular requirements, which involve speaking to audiences outside the classroom in a manner normally employed by those speaking only for themselves.

III. If Allowed to Stand, the Trial Justice's Decision Will Encourage Censorship on Public Campuses Nationwide.

The First Amendment rights of public college students are threatened with depressing regularity. *Amicus* FIRE annually reviews speech policies maintained by more than 440 colleges and universities; its 2016 report found that 45.8 percent of public colleges and universities surveyed maintained at least one policy that clearly and substantially restricts First Amendment rights.[1] An overwhelming 94 percent of public colleges and universities surveyed at that time maintained either an explicitly and severely restrictive speech policy or one that can be used to suppress or punish protected expression.[2]

Further, these policies are regularly enforced against students. Since its founding in 1999, FIRE has received thousands of reports of censorship on public college campuses, and has taken action to successfully defend student and faculty rights in hundreds of instances. FIRE's recent litigation efforts further illustrate the extent of the problem. Launched in July 2014, FIRE's Stand Up For Speech Litigation Project has already coordinated the filing of 12 separate federal

[1] FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., SPOTLIGHT ON SPEECH CODES 2016: THE STATE OF FREE SPEECH ON OUR NATION'S CAMPUSES, *available at* https://www.thefire.org/spotlight-on-speech-codes-2016.
[2] *Id.*

lawsuits in defense of student and faculty First Amendment rights.[3] Eight have resulted in settlements favorable for plaintiffs, and one resulted in a favorable court decision. (Four cases are ongoing.) In total, these cases have secured over $400,000 in fees and policy changes benefiting over 250,000 students.[4]

Public campus administrators nationwide will watch this Court's decision closely. If the trial justice's decision is allowed to stand, public college administrators will be presented with a road map for an end-run around decades of First Amendment jurisprudence governing student speech rights. To ensure that the "marketplace of ideas"[5] remains vibrant and that administrative efforts at censorship fail, this Court should reaffirm the importance and the breadth of First Amendment protections for public college students.

A. Despite Well-Established Law, Student First Amendment Rights Are Violated on Public Campuses Nationwide.

The Supreme Court has repeatedly and emphatically affirmed the vital importance of free expression in public higher education. *See*, *e.g.*, *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 836 (1995) ("For the University, by regulation, 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, its college and university campuses."); *Keyishian*, 385 U.S. at 603 (1967) ("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.'") (internal citation omitted).

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[3] Catherine Sevcenko and Katie Barrows, *FIRE's Stand Up For Speech Litigation Project Turns Two*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (July 1, 2016), https://www.thefire.org/fires-stand-up-for-speech-litigation-project-turns-two.

[4] *Id.*

[5] *Keyishian v. Bd. of Regents of the Univ. of the State of New York*, 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the 'marketplace of ideas.'").

Because public universities play a "vital role in a democracy," the Court has recognized that silencing speech in that context "would imperil the future of our Nation." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). The Court's warning of the repercussions of censorship in higher education cannot be overstated: "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Id.* Accordingly, "[m]ere unorthodoxy or dissent from the prevailing mores is not to be condemned." *Id.* at 251.

Recent jurisprudence protecting public college students' First Amendment rights is equally unambiguous. In a case brought as part of FIRE's Stand Up For Speech Litigation Project, two students at Iowa State University sued the institution after it cited a trademark policy to prevent the campus chapter of the National Organization for the Reform of Marijuana Laws ("NORML ISU") from printing T-shirts depicting a marijuana leaf. The United States District Court for the Southern District of Iowa issued a permanent injunction barring ISU from continuing to block the student group's expression in this way, finding that ISU's rejection of the T-shirt designs based on NORML ISU's viewpoints was unconstitutional under the First Amendment. *Gerlich v. Leath*, No. 14-264 (S.D. Iowa Jan. 22, 2016). The court further rejected the named defendants' argument that they were entitled to qualified immunity, finding that "a reasonable person would understand that Defendants' actions treaded on Plaintiffs' First Amendment rights of political expression and association." *Id.* at *36.

In 2012, a federal district court struck down the University of Cincinnati's ("UC's") "free speech zone" policy, which forbade students from engaging in protected speech on all but 0.1 percent of the public institution's campus. *See Univ. of Cincinnati Chapter of Young Americans for Liberty v. Williams*, No. 1:12-cv-155, 2012 U.S. Dist. LEXIS 80967, at *16 (S.D. Ohio June

12, 2012). Making this free speech quarantine still more objectionable, UC required students to provide a minimum of five working days' notice prior to staging any "demonstration, picketing, or rally."[6] Citing the minuscule space allotted for "free speech" and the fact that the registration requirement essentially prohibited spontaneous speech, the court found the policy to be "anathema to the nature of a university" and enjoined the university from enforcing it. *Id.* at *26–27.

These decisions are just two in a virtually unbroken string of cases affirming the critical importance of First Amendment protections for college students. *See, e.g.*, *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010) (invalidating university speech policies, including harassment policy); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (striking down sexual harassment policy); *Dambrot v. Cent. Michigan Univ.*, 55 F.3d 1177 (6th Cir. 1995) (declaring university discriminatory harassment policy facially unconstitutional); *Univ. of Cincinnati Chapter of Young Americans for Liberty v. Williams*, No. 1:12-cv-155 (S.D. Ohio Jun. 12, 2012) (invalidating "free speech zone" policy); *Smith v. Tarrant Cnty. College Dist.*, 694 F. Supp. 2d 610 (N.D. Tex. 2010) (finding university "cosponsorship" policy to be overbroad); *Coll. Republicans at San Francisco State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (enjoining enforcement of university civility policy); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (finding university sexual harassment policy unconstitutionally overbroad); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of university harassment policy due to overbreadth); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575 (S.D. Tex. 2003) (declaring university policy regulating "potentially disruptive"

[6] *See* S.D. Lawrence, *U Cincinnati Free Speech Restrictions Struck Down in Court*, EDUC. NEWS (June 19, 2012), *available at* http://www.educationnews.org/higher-education/u-cincinnati-free-speech-restrictions-struck-down-in-court.

events unconstitutional); *Booher v. Bd. of Regents, Northern Ky. Univ.*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. Jul. 21, 1998) (finding university sexual harassment policy void for vagueness and overbreadth); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wisconsin Sys., 774 F. Supp. 1163 (E.D. Wis. 1991)* (declaring university racial and discriminatory harassment policy facially unconstitutional); *Doe v. Univ. of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989) (enjoining enforcement of university discriminatory harassment policy).

Despite the clarity of the legal precedent, censorship of student expression on our nation's public campuses is rampant. Unfortunately, as in the instant case, public college professors and administrators too often trample students' rights to free expression.

For one recent example of many, in recent years, Northern Michigan University ("NMU") instructed students not to talk to their peers about "self-destructive" thoughts, including thoughts about self-injury and suicide. After a public outcry, NMU pledged to revise its policies and practices, but students reported receiving the same instructions well into 2016. NMU did not respond to a letter from FIRE explaining that NMU cannot, consistent with the First Amendment, impose such a gag order and that it must clarify to students that they are free to speak to each other on this issue. The university publicly announced the rescission of this policy only after the more widespread uproar sparked by FIRE's press release on the case.[7]

In another egregious instance of campus censorship, Modesto Junior College ("MJC") student Robert Van Tuinen was prohibited from distributing copies of the U.S. Constitution to

[7] Press Release, Found. for Individual Rights in Educ., *Victory: Northern Michigan U. Publicly Tells Students They Can Discuss Self-Harm* (Sept. 30, 2016), https://www.thefire.org/victory-northern-michigan-u-publicly-tells-students-they-can-discuss-self-harm.

his fellow students on September 17, 2013—Constitution Day.[8] Van Tuinen was informed by MJC staff that he was required to fill out an application to use the college's "free speech area" five days in advance.[9] After the college refused to revise its policy, Van Tuinen filed a First Amendment lawsuit.[10] Only after being forced to answer for its censorship in federal court did MJC recognize Van Tuinen's rights, settling the case by abandoning its free speech zone and paying him $50,000 in February 2014.[11]

In addition to quarantining expressive activity to isolated areas on campus, public colleges frequently disregard the First Amendment in a misguided attempt to rid campuses of protected expression. This is particularly true when students engage in speech that administrators subjectively deem "unbecoming," illustrating just how dangerous the trial justice's reasoning would be if allowed to stand by this court. For example, in October 2012, State University of New York College at Oswego journalism student Alex Myers wrote about the university's men's hockey coach, Ed Gosek, for a class assignment. Myers asked rival coaches their honest opinion of Gosek over email; in reply, Cornell University's coach told Myers that his request was "offensive."[12] Myers apologized, clarifying that he intended to convey that he was not writing a

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[8] Nan Austin, *MJC halt of Constitution handout lands on YouTube*, MODESTO BEE, Sep. 19, 2013, *available at* http://www.modbee.com/2013/09/19/2930225/mjc-halt-of-constitution-handout.html.

[9] *See* Nan Austin, *MJC student files freedom of speech lawsuit against college*, MODESTO BEE, Oct. 10, 2013, *available at* http://www.modbee.com/2013/10/10/2968629/mjc-student-files-freedom-of-speech.html.

[10] *Van Tuinen v. Yosemite Cmty. Coll. Dist.*, No. 1:13-at-00729 (E.D. Cal. filed Oct. 10, 2013).

[11] Jessica Chasmar, *Calif. college student wins $50K settlement in free speech case*, WASH. TIMES, Feb. 26, 2014, *available at* http://www.washingtontimes.com/news/2014/feb/26/california-college-student-wins-50k-settlement-fre.

[12] Barry Petchesky, *University Suspends Journalism Student For Asking Questions For A Class Assignment*, GAWKER (Nov. 10, 2012, 12:05 PM), http://gawker.com/5959439/university-suspends-journalism-student-for-asking-questions-for-a-class-assignment.

"puff piece."[13] For this exchange, Myers was charged with "disruptive behavior," placed on interim suspension, ordered to vacate his dormitory, and banned from campus.[14] After FIRE informed Oswego that Myers' email constituted protected speech,[15] the charges were dropped.[16] Were the trial justice's rationale adopted, Oswego could justify its otherwise unconstitutional punishment of Myers' speech by invoking a subjective interpretation of journalistic standards of professionalism.

These recent examples are blatant First Amendment violations, prohibited by decades of precedent, but they represent just a few of the incidents reported to FIRE in recent years.[17] The trial justice's opinion, if allowed to stand, would grant administrators in Rhode Island vast discretion to censor critical, dissenting, joking, or merely inconvenient speech simply by citing vague, subjective "professional standards." This result would be disastrous for student speech.

B. This Court Must Act to Protect the First Amendment Rights of Public College Students.

The routine infringement of student First Amendment rights is having a profound and devastating impact on campus inquiry. In a 2010 survey, the Association of American Colleges and Universities found that just 30 percent of students agree that it is safe to hold unpopular

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[13] William Creeley, *Journalism Student Suspended for Offending Hockey Coaches*, HUFFINGTON POST (Nov. 14, 2012, 11:06 AM), http://www.huffingtonpost.com/will-creeley/suny-oswego-journalism-alex-myer_b_2121906.html.
[14] Glenn Coin, *SUNY Oswego president "heart sick" over case of student suspended for misrepresentation*, SYRACUSE ONLINE (Nov. 16, 2012, 3:23 PM), *available at* http://www.syracuse.com/news/index.ssf/2012/11/suny_oswego_president_heartsic.html.
[15] *See* Letter from Peter Bonilla to State University of New York at Oswego President Deborah F. Stanley, Oct. 26, 2012, *available at* http://thefire.org/article/15094.html.
[16] Glenn Coin, *How an email to three college coaches led to a near suspension for SUNY Oswego student*, SYRACUSE ONLINE (Nov. 13, 2012, 8:24 AM), *available at* http://www.syracuse.com/news/index.ssf/2012/11/how_an_email_to_three_college.html.
[17] *See* Greg Lukianoff, UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE (2012).

views on campus.[18] As discussed above, the Supreme Court has continually and consistently emphasized that the freedom for students to explore and express ideas is vital to the health of our democracy. *Sweezy*, 354 U.S. at 250. In the instant case, Rhode Island College—like too many colleges nationwide—decided to ignore long-established law. This Court must remind Rhode Island College that respecting the First Amendment is not optional.

Colleges and universities nationwide are closely watching this case. If the trial justice's error is allowed to stand, would-be censors at colleges across the country will be emboldened to silence merely dissenting, unwanted, unpopular, or unpleasant student speech by emulating RIC's shameful end-run around the First Amendment. If faced with a choice between respecting a student's right to freedom of expression or expelling her, a public college administrator will recall this erroneous result and conclude that punishment is permissible—as long as it is justified by reference to "professional guidelines." Given the Supreme Court's repeated and emphatic recognition of the importance of student civil liberties, this is precisely the wrong result, and we are at risk of the exact result the Court warned of in *Sweezy*: that "our civilization will stagnate and die." 354 U.S. at 250.

The right to speak one's mind without fear of official reprisal for transgressing vague and subjective standards should be beyond question on an American public campus. Because today's students are tomorrow's leaders, protecting this right is of paramount importance to our nation as a whole. For these reasons, the trial justice's meager understanding of the expressive rights of public college students must be reversed and remanded.

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[18] ERIC L. DEY, MOLLY C. OTT, MARY ANTONAROS, CASSIE L. BARNHARDT & MATTHEW A. HOLSAPPLE, ENGAGING DIVERSE VIEWPOINTS: WHAT IS THE CAMPUS CLIMATE FOR PERSPECTIVE-TAKING? (Washington, D.C.: Association of American Colleges and Universities, 2010), *available at* http://www.aacu.org/core_commitments/documents/Engaging_Diverse_Viewpoints.pdf.

C. Ensuring Students' Freedom to Enjoy Their First Amendment Rights Requires a Denial of Qualified Immunity, Which Will Provide Clarity and Predictability to Students, Professors, and Administrators on Public College Campuses.

Students' First Amendment rights will be respected only if this Court sends an unequivocal message to colleges and universities that RIC's disparate treatment of Felkner based on his viewpoints is untenable under well-established and longstanding law. Accordingly, this Court should reject the defense of qualified immunity.

Granting qualified immunity to Defendants would muddle and distort the law in an area where the Supreme Court has spoken with unmistakable clarity. By protecting government officials from frivolous litigation, qualified immunity provides predictability and certainty for these officials in the performance of their official duties. *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). This doctrine also provides a clear avenue for those seeking a remedy when overzealous government officials violate their clearly established constitutional rights. *See id*. In an area where courts have consistently denied qualified immunity to defendants,[19] a grant of qualified immunity here will harm the ability of students, professors, and administrations at public colleges to determine the contours of First Amendment rights.

The importance of providing public colleges and their students with clarity is paramount when the First Amendment freedoms are at stake. This is because "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton*, 364 U.S. at 487. The fundamental necessity of First Amendment rights on public college campuses should make courts particularly wary about allowing colleges to shield

[19] Azhar Majeed, *Putting Their Money Where Their Mouth Is: The Case for Denying Qualified Immunity to University Administrators for Violating Students' Speech Rights*, 8 CARDOZO PUB. L. POL'Y & ETHIC J. 515 (2010) (listing cases where public college and university officials were denied qualified immunity when they violated students' First Amendment rights).

themselves from liability via qualified immunity when they have violated these rights. As the Supreme Court wrote in *Sweezy*, "The essentiality of freedom in the community of American universities is almost self-evident." 354 U.S. at 250.

The Supreme Court further wrote in *Healy*, "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom." 408 U.S. at 180–81 (citing *Keyishian*, 385 U.S. at 603). Nearly 60 years after *Sweezy*'s warnings of the dire consequences of censorship, and with decades of jurisprudence reaffirming students' First Amendment rights, the essentiality of robust freedom of expression on college campuses is evident.

To avoid chilling protected expression on college campuses; refrain from compelling individuals to engage in public speech against their beliefs; deter the repeated violation of students' rights; and provide clear rules for students, professors, and administrators to follow, this Court should adhere to the consensus of Supreme Court authority by finding that qualified immunity does not apply. A contrary ruling would break with decades of precedent and disrespect the profound importance accorded by courts to student free speech.

CONCLUSION

For the foregoing reasons, the Court should reverse the Superior Court's judgment and remand this case for further proceedings.

Respectfully submitted,

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CERTIFICATION

I hereby certify that a copy of this document was served upon all parties hereto by mailing a copy, postage prepaid, to the address of counsel of record as follows:

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