

No. 14-2988
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CRAIG KEEFE,
Plaintiff-Appellant,

v.

BETH ADAMS, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the District of Minnesota
Civil Case No. 13-326 (Honorable Joan N. Ericksen)

**BRIEF OF THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION AND
ALLIANCE DEFENDING FREEDOM AS *AMICI CURIAE*
IN SUPPORT OF APPELLANT URGING REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 8th Cir. R. 26.1A, *amici curiae* state that they have no parent corporations, nor do they issue stock.

Dated: November 19, 2014.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

The **Foundation for Individual Rights in Education**, Inc. (“FIRE”), is a non-profit, tax-exempt educational and civil liberties organization dedicated to promoting and protecting First Amendment rights at our nation’s institutions of higher education. FIRE has defended constitutional liberties on behalf of thousands of students and faculty. In the interest of protecting student and faculty rights at our nation’s colleges and universities, FIRE has participated as *amicus curiae* in many cases. *See, e.g., Barnes v. Zaccari*, 669 F.3d 1295 (11th Cir. 2012); *Adams v. Trustees of the Univ. of N.C.–Wilmington*, 640 F.3d 550 (4th Cir. 2011); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008).

Alliance Defending Freedom (“ADF”) is a non-profit, public interest legal organization that provides strategic planning, training, funding, and direct litigation services to protect our first constitutional liberty—religious freedom. Since its founding in 1994, ADF has played a role in many United States Supreme Court cases, including: *Burwell v. Conestoga Wood Specialties Corp.*, 134 S. Ct. 2751 (2014); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014); *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); and hundreds more in lower courts. In addition, ADF is counsel of record

in a case pending before the Court this term: *Reed v. Town of Gilbert*, 707 F.3d 1057 (9th Cir. 2013), *cert. granted*, 134 S. Ct. 2900 (2014).

ADF's University Project is dedicated to protecting the rights of dissenting students, faculty, and staff at public universities who are often victims of unlawful censorship and retaliation because of their protected expression. ADF submits this brief to ensure that the First Amendment's guarantee of free speech is safeguarded in higher education.

Pursuant to Federal Rule of Appellate Procedure 29(b), *Amici* are filing concurrently a motion for leave to file this brief. Counsel for Appellant consented to the filing of this brief, but counsel for Appellees did not.

No counsel for any party authored this brief in whole or in part, and no person or entity, other than *Amici* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Fed. R. App. P. 29(c)(5).

SUMMARY OF THE ARGUMENT

It is well-established that “state colleges and universities are not enclaves immune from the sweep of the First Amendment.” *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973) (quotation marks and citation omitted); *see also Gay Lib v. Univ. of Mo.*, 558 F.2d 848, 857 (8th Cir. 1977) (“[T]he First Amendment must flourish as much in the academic setting as anywhere else.... To

invoke censorship in an academic environment is hardly the recognition of a healthy democratic society.”). Indeed, the Supreme Court has declared the public college campus to be “peculiarly the marketplace of ideas.” *Healy v. James*, 408 U.S. 169, 180 (1972). Accordingly, “a public educational institution exceeds constitutional bounds... when it ‘restrict[s] speech or association simply because it finds the views expressed by [students] to be abhorrent.’” *Christian Legal Soc’y Chapter of Univ. of Cal. v. Martinez*, 561 U.S. 661, 683–84 (2010) (quoting *Healy*, 408 U.S. at 187–88).

In contravention of these and other longstanding precedents, Central Lakes College (“College”) expelled Craig Keefe for off-campus, online speech that is unequivocally protected by the First Amendment. The College attempts to justify its disregard for its legal obligations under the Bill of Rights by invoking a vague, subjective “professional standard.” But like the overly broad and vague college speech codes struck down by federal courts across the country over the past twenty-five years, the College’s purported justification for regulating and punishing protected student expression fails to pass First Amendment scrutiny. Public institutions may not require students to conform to professional conduct codes that violate the First Amendment. Nor may they interpret professional conduct codes to permit punishment of students for speech otherwise protected by the First Amendment.

Nevertheless, the district court below upheld the College's punishment of Mr. Keefe. The lower court relied on case law that does not support its broad holding, disregarded the obvious constitutional flaws presented by amorphous professional standards like the one at issue, and ignored the ways in which colleges may regulate student expression in a manner consistent with their First Amendment obligations. *Amici* have years of experience combating student and faculty censorship and know the urge to censor is strong on our nation's campuses. If allowed to stand, the lower court's blithe acceptance of the College's censorship will establish a dangerous precedent that will be seized upon by college administrators to censor a virtually limitless range of student expression, both on- and offline, on- and off-campus.

For the reasons described below, this Court should reverse the district court's decision and remand this case for further proceedings.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S FIRST AMENDMENT CLAIM.

A. Public Colleges May Not Abandon the First Amendment for Professional Codes of Conduct.

More than twenty-five years ago, public colleges began adopting vague and overbroad “speech codes” to regulate student expression on campus.¹ Whether in the guise of sexual and racial harassment policies, civility mandates, or so-called “free speech zones,” courts have uniformly rejected these restrictions on student speech, both facially and as-applied, as clear violations of core First Amendment principles.²

Despite the clarity and near-uniformity of this precedent, public institutions like Central Lakes College are increasingly adopting “professional” codes of conduct that regulate student speech both on- and off-campus and lack the constitutional precision necessary to balance pedagogical goals with students’ First Amendment rights. Indeed, professional standards like the one at issue in the instant case are as vague and overbroad as the speech codes struck down by federal courts for more than two decades.

¹ See Azhar Majeed, *Defying the Constitution, The Rise, Persistence, and Prevalence of Campus Speech Codes*, 7 GEO. J.L. & PUB. POL’Y 481 (2009).

² See *infra* Section II.A.

The district court’s opinion below is unsupported by case law, both with respect to the application of professional standards and the regulation of off-campus and online speech. Public colleges possess many lawful and constitutional ways to regulate student misconduct—infringing students’ First Amendment rights is not one of them.

1. Public colleges may not enforce professional standards of private organizations in a way that violates students’ constitutional rights.

The state may not deliberately delegate rule-making authority to a private entity in order to avoid its constitutional obligations. *See Terry v. Adams*, 345 U.S. 461, 469 (1953) (holding that it violates the Constitution for a state to permit a political party to hold a primary election that discriminates against voters based on race); *accord Andrews v. Fed. Home Loan Bank of Atlanta*, 998 F.2d 214, 218 (4th Cir. 1993) (“Government cannot evade constitutional duties by delegating the responsibility to a private contractor.”).

As an arm of the State of Minnesota, Central Lakes College may not adopt rules or professional standards of a private organization in disregard of its constitutional obligations. While the College may adopt the American Nurses Association Code for Nurses to meet accreditation requirements, and while it may teach students that practicing nurses must comply with those professional standards, it may not enforce those standards in a way that violates students’

constitutional rights—either inside or outside the classroom. Because the professional standards at issue here are vague and overly broad, as detailed below, the College must ensure that administrators do not apply these vague standards to censor otherwise protected speech—a task at which the College failed here.

2. Professional standards like those at issue in this case are often impermissibly vague when used by the government to restrict expression.

The First Amendment requires that public college policies be written with enough clarity so that students have fair warning about prohibited and permitted conduct. *See Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1183 (6th Cir. 1995) (“A vague ordinance denies fair notice of the standard of conduct to which a citizen is held accountable.”). A government policy is void for vagueness when persons “of common intelligence must necessarily guess at its meaning and differ as to its application.” *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). Additionally, a regulation is vague if it “invites arbitrary, discriminatory and overzealous enforcement.” *Dambrot*, 55 F.3d at 1184; *accord City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). Central Lakes College’s nursing standards are unconstitutionally vague because (1) they deny students fair notice of prohibited conduct; (2) they permit the unrestricted enforcement of the standards against any student, thereby inviting arbitrary, discriminatory, and overzealous enforcement; and (3) they chill speech.

First, the plain language of the nursing standards do not provide fair notice to students of prohibited conduct. The standards prohibit “behavior unbecoming of the Nursing Profession” and “transgression of professional boundaries.” Appellant’s Addendum (“Add.”) 23A. The district court concluded that “[g]reater specificity is not required” for these standards, and cited to court decisions upholding similar standards when applied by *professional licensing bodies*. *Id.* Those decisions did not involve speech, but this case does, so greater specificity is required here.

“Unbecoming” behavior and “professional boundaries” are subjective and imprecise standards that make it “impossible to discern any limitation on [the standard’s] scope or any conceptual distinction between protected and unprotected conduct.” *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 867 (E.D. Mich. 1989). The College did not expel Mr. Keefe for performing nursing duties in a way that transgressed “professional boundaries,” but for sharing his personal opinions and frustrations on Facebook. The First Amendment obligates the College to regulate that off-campus speech with narrow specificity. *See Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (holding that state’s goals “cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved”); *Mailloux v. Kiley*, 448 F.2d 1242, 1243 (1st Cir. 1971) (holding that professional code of ethics for educators was unconstitutionally vague and that

imposing sanctions under it “would be a denial of due process”). The professional standards here do not contain such precision.

Aside from the litany of cases striking down public college speech codes, *see infra* Section II.A, courts have rejected attempts by public universities to interpret professional ethical standards in ways that infringe students’ First Amendment rights. For example, in *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012), the Sixth Circuit considered whether Eastern Michigan University violated the First Amendment when it expelled a counseling student for refusing to counsel a patient in a way that violated her religious beliefs. The American Counseling Association’s code of ethics permitted counselors to refer patients if their needs conflicted with a counselor’s values. *Id.* at 735–36. The university, however, interpreted the code to prohibit such referrals, despite the fact that practitioners in the field used different interpretations of the values-based referral rule, some that permitted such referrals and some that did not. *Id.* at 736. The Sixth Circuit ruled in favor of the student at the summary judgment stage and found that a reasonable jury could have found in her favor due to the wide disagreement in how the professional standards were enforced. *Id.* at 738.

The professional standards in *Ward* were relatively clear, yet university administrators and professionals in the field still differed on how to interpret them. By contrast, the professional nursing standards imposed on Mr. Keefe are vague

and did not give him fair notice of prohibited and permitted speech. “In order to determine what conduct will be considered ‘[unbecoming]’ or ‘[unprofessional]’ by the university, one must make a subjective reference.” *Dambrot*, 55 F.3d at 1184; *see also UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1172 (E.D. Wis. 1991) (holding policy that prohibited comments that “create an intimidating, hostile or demeaning environment for education” was impermissibly vague). The nebulous prohibitions contained in the nursing standards force students to guess as to what speech an administrator may deem “unbecoming” or “unprofessional.” The Constitution does not permit such a result because “where a vague statute ‘abuts upon sensitive areas of basic First Amendment freedoms,’ it ‘operates to inhibit the exercise of those freedoms.’” *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal citations omitted). “No one may be required at peril of life, liberty or property to speculate as to the meaning” of government prohibitions. *Morales*, 527 U.S. at 58.

Second, the vague professional standards permitted unrestricted and overzealous enforcement by College officials. Just as students like Mr. Keefe cannot determine the meaning of the standards without definitions, administrators charged with their enforcement will have difficulty carrying out their responsibilities. *Id.* The terms are not self-defining. Left undefined, college officials will use the standards to silence disfavored expression. But the First

Amendment protects such expression, whether extreme, *see Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993) (fraternity’s “ugly woman contest”); or benign, *see College Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (anti-terrorism rally).

The unconstitutional vagueness of the College’s policy is further demonstrated by the fact that Mr. Keefe was charged with violating the standards only after a few students complained that his speech made them “upset, nervous, and uncomfortable.” Add. 4A–5A. When the College investigated, it found Mr. Keefe’s statements to be “derogatory, inappropriate, and unprofessional.” Add. 5A. But courts have routinely struck down policies that allow students and administrators to punish speech based on listeners’ subjective reactions. A public college “may not prohibit speech . . . based solely on the [e]motive impact that its offensive content may have on a listener.” *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 371 (M.D. Pa. 2003); *see also McCauley v. Univ. of V.I.*, 618 F.3d 232, 250-252 (3d Cir. 2010) (striking down university policy prohibiting “Conduct Which Causes Emotional Distress” because of potential application to “any protected speech, without forewarning, based on the subjective reaction of the listener”); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 (2001) (“The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech

is not sufficient justification for prohibiting it.”). What is “derogatory,” “inappropriate,” or “unprofessional” varies from one person to another. *See Cohen v. California*, 403 U.S. 15, 25 (1971) (“one man’s vulgarity is another’s lyric”); *Dambrot*, 55 F.3d at 1184 (“Though some statements might be seen as universally offensive, different people find different things offensive.”).

Third, reliance on the subjective whims of administrators and fellow students leads to arbitrary and discriminatory enforcement by government officials—causing students to self-censor for fear of punishment and chilling speech. Because the nursing standards are both “opaque and malleable, the [College’s] failure even to try to define [them] intensifies the risk that students will be deterred from engaging in controversial but fully protected activity out of fear of being disciplined for so doing.” *College Republicans*, 523 F. Supp. 2d at 1018. These vague standards enabled the College to punish Mr. Keefe’s protected speech simply because a few students and administrators disliked it.

3. Professional standards like those at issue in this case are often overly broad when used by the government to restrict expression.

“The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment’s vast and privileged sphere.” *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002). This is because the “First Amendment needs breathing space and [policies] attempting to restrict or burden the exercise of

First Amendment rights must be narrowly drawn.” *Broadrick v. Oklahoma*, 413 U.S. 601, 611–12 (1973); see *Snider v. City of Cape Girardeau*, 752 F.3d 1149, 1157 (8th Cir. 2014) (“The overbreadth doctrine permits the facial invalidation of laws which inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when judged in relation to the statute’s plainly legitimate sweep.”). Public colleges must narrowly craft any regulation that impacts speech. See *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) (“[W]e have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government’s ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment”).

Central Lakes College’s nursing standards are unconstitutionally overbroad. Federal courts across the country have declared speech codes similar to the College’s professional standards to be overbroad because they are based on listeners’ subjective reactions and sweep within their ambit too much protected speech.

The harassment context provides a practical reference point. In regulating harassment, the Supreme Court requires schools to write policies with narrow specificity, lest they prohibit protected speech. Anti-harassment policies must use

clear and objective standards to root out true threats of harassment, while steering far clear of speech the First Amendment protects. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999). In *Davis*, the Court defined harassment in the educational context as conduct that is “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.” *Id.* at 650. The Court noted, however, that even the “severe, pervasive, and objectively offensive” standard may be too strict in a college setting. “A university might not, for example, be expected to exercise the same degree of control over its students that a grade school would enjoy, and it would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims.” *Id.* at 649 (citing *id.* at 667–68 (Kennedy, J., dissenting)).

Thus, in *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008), the Third Circuit found Temple University’s use of the terms “hostile,” “offensive,” and “gender-motivated” in an anti-harassment policy so broad and subjective it would cover any speech of a “gender-motivated” nature “the content of which offends someone.” 537 F.3d at 317–18 (citation omitted). “‘Harassing’ or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections.” *Id.* at 314 (citations omitted); *see also Dambrot*, 55 F.3d at 1182–83 (finding the use of

the term “offensive” rendered an anti-harassment policy substantially overbroad because it banned speech based on the subjective reaction of listeners).

Federal district courts have reached similar conclusions when examining public college policies that regulate student speech and conduct. *See Roberts v. Haragan*, 346 F. Supp. 2d 853, 872 (N.D. Tex. 2004) (striking down university policy prohibiting “insults, epithets, ridicule, or personal attacks”); *Bair*, 280 F. Supp. 2d at 370–72 (enjoining as overbroad university policy prohibiting “acts of intolerance”); *Doe*, 721 F. Supp. at 856, 864 (enjoining university policy prohibiting “‘stigmatizing or victimizing’ individuals or groups” in specified categories).

Central Lakes College’s professional standards are overbroad under these precedents. They impermissibly conditioned Mr. Keefe’s continuation in the nursing degree program on compliance with subjective standards that prohibit “unbecoming” and “unprofessional” speech. Even if the College may require nursing students to comply with professional standards, it may not interpret those standards to prohibit the vast array of protected speech that falls within their scope. Such broad prohibitions on speech are unconstitutional, regardless of their source.

4. Public colleges already possess sufficient power to discipline student misconduct without violating the First Amendment.

Instead of restricting student speech through vague and overly broad professional standards, public colleges may address student misconduct through a

variety of proven, constitutional, methods. *See Iota Xi*, 993 F.2d at 393 (finding the university “has available numerous alternatives to imposing punishment on students based on the viewpoints they express”).

First, public colleges may restrict unprotected speech, such as fighting words, libel, and obscenity. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). They may also prohibit student-on-student harassment that is “severe, pervasive, and objectively offensive.” *Davis*, 526 U.S. at 651; *see also DeJohn*, 537 F.3d at 320 (“Yet, unless harassment is qualified with a standard akin to a severe or pervasive requirement, a harassment policy may suppress core protected speech.”). And public colleges may prohibit true threats of violence. *See Virginia v. Black*, 538 U.S. 343, 359–60 (2003) (“‘True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”); *Bauer v. Sampson*, 261 F.3d 775, 783–84 (9th Cir. 2001) (finding professor’s writing in underground campus newspaper had some violent content, but was “hyperbole of the sort found in non-mainstream political invective and in context ...[and were] patently not true threats”); *Murakowski v. Univ. of Delaware*, 575 F. Supp. 2d 571, 590, (D. Del. 2008) (finding student’s comments on university-operated website suggesting that he intends to commit rape, kidnapping

and murder were sophomoric, immature, crude, and offensive, but were not true threats).

Second, college officials may report students for violating civil and criminal laws enacted by states and municipalities. Students are accountable to generally applicable criminal and civil laws. If a student is engaging in criminal harassment or true threats of violence, law enforcement may step in. If a student engages in defamatory speech or the intentional infliction of emotional distress, he or she may face civil penalties.

Public colleges do not possess the constitutional ability to reach beyond the campus grounds to restrict student speech whenever and wherever it occurs. In the public school context, where administrators have more leeway to regulate speech that materially and substantially disrupts the school, the Supreme Court has never “allowed schools to punish students for off-campus speech that is not school-sponsored or at a school-sponsored event and that caused no substantial disruption at school.” *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 933 (3d Cir. 2011) (en banc). For example, after the landmark public school case, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the Southern District of Texas refused to extend the reach of the school beyond the “schoolhouse gate,” and noted that remedies exist outside of school for dealing with students’ behavior:

It makes little sense to extend the influence of school administration to off-campus activity under the theory that such activity might interfere with the function of education. School officials may not judge a student's behavior while he is in his home with his family nor does it seem to this court that they should have jurisdiction over his acts on a public street corner. A student is subject to the same criminal laws and owes the same civil duties as other citizens, and his status as a student should not alter his obligations to others during his private life away from the campus.

Sullivan v. Houston Indep. Sch. Dist., 307 F. Supp. 1328, 1340–41 (S.D. Tex. 1969). If that is true of primary and secondary school students, it is surely true of adult college students who possess more First Amendment freedom. *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (“The First Amendment guarantees wide freedom in matters of adult public discourse.”); *McCauley*, 618 F.3d at 242 (“Public university administrators are granted *less leeway* in regulating student speech than are public elementary or high school administrators.”) (emphasis in original).

With students accountable to real-world consequences for their actions, why should college administrators be able to “double-dip” and add punishment, even though these civil and criminal laws carry far greater weight?³ Rather than letting students learn that real-world misbehavior results in real-world penalties, colleges are teaching a different lesson: “Be careful what you say in the real world; we can

³ Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 245–46 (2001).

punish you for that too.”⁴ No citizen, whether a student or not, deserves to have the government monitoring his expression. Allowing professional standards to regulate off-campus and online college student speech violates the First Amendment, and this Court must reverse the district court’s judgment to correct the error.

B. The District Court’s Reasoning Is Unsupported by Case Law.

The district court sanctioned the College’s punishment of Mr. Keefe, but it is unclear what First Amendment doctrine, if any, the court used to justify the College’s actions. The court found that (1) the College adopted “nationally established nursing standards;” and (2) it “may hold students in its associate degree nursing program to the standards of the nursing profession.” Add. 23A. The court thus reasoned that since College officials said Mr. Keefe violated the nursing standards, his First Amendment claim failed. But this is not supported by case law.

The district court cited *Yoder v. University of Louisville*, where a nursing student at the University of Louisville wrote a blog post on MySpace about a course assignment to view a childbirth. 526 Fed. App’x 537, 539–40 (6th Cir. 2013). The university dismissed the student because her blog post included derogatory statements about the patient and birthing process. The Sixth Circuit rejected the student’s First Amendment claim because the student had violated unambiguous rules that “implicate[d] patient privacy concerns” and had signed

⁴ *Id.* at 246.

both a confidentiality agreement and a consent form that prohibited disseminating precisely the type of patient information patient included on her blog. *Id.* at 545–46.

The district court also relied on *Tatro v. University of Minnesota*, 816 N.W.2d 509 (Minn. 2012). There, a mortuary student made statements on Facebook about a cadaver. *Id.* at 512–13. The University of Minnesota punished her for violating the student code of conduct and laboratory rules. She challenged that punishment as a restriction on her First Amendment rights, and the Minnesota Supreme Court ruled in favor of the university. It did so because the university mortuary sciences professional rules permitted students to discuss their cadaver experiences, but prohibited students from blogging about cadaver dissection. The court determined the rule was narrowly tailored to the professional conduct standards for the mortuary science profession which require professionals to treat the deceased with “dignity and respect.” *Id.* at 522–23. In other words, the university’s rule was not overbroad such that it prohibited all speech about the class, but was sufficiently narrow to prohibit only a particular kind of speech about a particular topic.

Central Lakes College, unlike the universities in *Yoder* and *Tatro*, used a vague and overbroad standard of “behavior unbecoming” of a nurse to punish Mr. Keefe for “transgression of professional boundaries.” The district court did not

analyze whether the College's rule was narrowly tailored, as in *Tatro*, nor did it find a disregard for clearly stated rules implicating patient privacy concerns, as in *Yoder*. Instead, without much comment at all, the court declared that the College did nothing wrong because it used nursing standards to regulate Mr. Keefe's speech.

A public university cannot lawfully expel a student in retaliation for expressive activity protected by the First Amendment. *Papish*, 410 U.S. at 669–71. It is unclear what First Amendment standard the district court applied to justify the punishment of Mr. Keefe for his protected speech, but the case law cited in the opinion does not support its conclusions and fails to consider the vagueness and overbreadth of the nursing standards.

C. The District Court's Reasoning Would Allow Public Colleges to Punish Students for Off-Campus, Online Speech.

Though social networking sites like Facebook and Twitter have increased in popularity, the fact that students frequently voice their opinions or make sophomoric or unkind comments about college personnel or other students is not a new phenomenon. The Internet has simply made it easier for college administrators to find objectionable student speech and punish it.⁵ Unfortunately, several primary and secondary school students have been punished for speech created off campus

⁵ See Will Creeley & Greg Lukianoff, *New Media, Old Principles: Digital Communication and Free Speech on Campus*, 5 CHARLESTON L. REV. 333, 348–58 (2011).

that should have been fully protected by the First Amendment, regardless of whether the speech was offensive, mean-spirited, or appeared to be valueless.⁶

Punishment of off-campus student speech, which the district court sanctioned here, opens the door to far more ominous applications and teaches students the wrong lesson about their First Amendment rights in our modern liberal democracy. As with a public secondary school, a public college's campus is "not without boundaries and the reach of school authorities is not without limits." *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216 (3d Cir. 2011).

Even professional licensing bodies do not have unfettered power to regulate all a professional says on and off the job. Recent decisions from other circuits confirm that professionals may speak freely when engaged in public discussion and commentary. *See, e.g., Moore-King v. Cnty. of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013); *Pickup v. Brown*, 740 F.3d 1208, 1227 (9th Cir. 2013).

Public colleges cannot justify the suppression of student speech on the Internet unless it has some tangible impact on campus. Even then, colleges may only subject students to discipline for online unprotected speech, such as true threats, harassment, and defamation. The College did not prove that Mr. Keefe's speech fell into any of those unprotected categories. Rather, it simply claimed an

⁶ *See generally* Calvert, *supra*, at 244–87 (discussing numerous examples of students being punished for Internet speech ranging from highly offensive and profane to immature, harmless "notebook marginalia").

unlimited right to regulate student speech online based on whether the speech offended someone else. The First Amendment does not permit such a result.

II. IF ALLOWED TO STAND, THE DISTRICT COURT’S OPINION WILL ERODE FIRST AMENDMENT PROTECTIONS FOR PUBLIC COLLEGE STUDENTS.

More than four decades ago, the Supreme Court made clear that public college students do not sacrifice their constitutional rights when they arrive on campus, finding “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. Public college students are entitled to full First Amendment rights—and safeguarding those rights is of paramount importance. *See Shelton*, 364 U.S. at 487 (“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”).

Despite this unmistakable clarity, the First Amendment rights of public college students are violated with alarming frequency. *Amici* have taken action against hundreds of instances of campus censorship and received reports of thousands more. If allowed to stand by this Court, the lower court’s unsupported reasoning will provide public college administrators with clear guidance on how to silence unwanted student speech. This appeal presents this Court the opportunity to reaffirm decades of precedent protecting freedom of expression for whom it arguably matters most: our nation’s college students.

A. Despite Decades of Precedent, 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 Rosenberger v. Rector & Visitors of Univ. of Va.*, 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 v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 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). Because public universities play a “vital role in a democracy,” the Court has recognized that silencing student speech “would imperil the future of our Nation.” *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). 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 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% of the public institution’s campus. *See Young Americans for Liberty v. Williams*, No. 1:12-cv-

155, 2012 WL 2160969, at *1, 5 (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."⁷ 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 *5 & 9.

This decision is the latest in a virtually unbroken string of cases affirming the critical importance of First Amendment protections for college students. *See McCauley*, 618 F.3d 232 (invalidating university speech policies, including harassment policy); *DeJohn*, 537 F.3d 301 (striking down university sexual harassment policy); *Dambrot*, 55 F.3d 1177 (declaring university discriminatory harassment policy facially unconstitutional); *Smith v. Tarrant Cnty. Coll. Dist.*, 694 F. Supp. 2d 610 (N.D. Tex. 2010) (finding university "cosponsorship" policy to be overbroad); *College Republicans*, 523 F. Supp. 2d 1005 (enjoining enforcement of university civility policy); *Roberts*, 346 F. Supp. 2d 853 (finding university sexual harassment policy unconstitutionally overbroad); *Bair*, 280 F. Supp. 2d 357 (enjoining enforcement of university harassment policy due to overbreadth); *Pro-*

⁷ *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>.

Life Cougars v. Univ. of Houston, 259 F. Supp. 2d 575 (S.D. Tex. 2003) (declaring university policy regulating “potentially disruptive” events unconstitutional); *Booher v. Bd. of Regents, N. Ky. Univ.*, No. 2:96-cv-135, 1998 WL 35867183, *10 (E.D. Ky. Jul. 22, 1998) (finding university sexual harassment policy void for vagueness and overbreadth); *UWM Post*, 774 F. Supp. 1163 (declaring university racial and discriminatory harassment policy facially unconstitutional); *Doe*, 721 F. Supp. 852 (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 administrators too often trample students’ rights to free expression.

To provide one recent example of many, Modesto Junior College (“MJC”) student Robert Van Tuinen was prohibited from distributing copies of the U.S. Constitution to 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

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 Nan Austin, *MJC student files freedom of speech lawsuit against college*, MODESTO BEE, Oct. 10, 2013, available at <http://www.modbee.com/news/local/education/article3155056.html>.

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.¹¹

Sadly, Van Tuinen's case is not an isolated incident. A similar federal lawsuit against the University of Hawaii at Hilo is now pending after administrators there told two students that "it wasn't the 60s anymore" and that they could only protest National Security Agency spying in the university's small, remote "free speech zone."¹² The university has adopted an interim policy while litigation proceeds.¹³

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

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 Compl. for Injunctive & Declaratory Relief & Damages; Exs. A-E; Summons, *Burch v. Univ. of Hawaii Sys.*, No. 1:14-cv-00200 (D. Haw. Apr. 24, 2014).

¹³ Dave Smith, *UH-Hilo Issues New Policy in Response to Lawsuit*, BIG ISLAND NOW, May 15, 2014, available at <http://bigislandnow.com/2014/05/15/uh-hilo-issues-new-policy-in-response-to-lawsuit>.

just how dangerous the district court’s reasoning would be if allowed to stand by this Court.

For another example, earlier this year, Cameron University punished a student for distributing a religious flyer on campus—simply because someone found the flyer “offensive.” Instead of dismissing the complaint as frivolous, Cameron investigated the matter and concluded that the student violated the university’s prohibition against religious discrimination.¹⁴ The fact that a religious flyer resulted in punishment indicates that the university’s instinct and intent was to stifle speech. After all, the nondiscrimination policy was created to *protect* religious students, not censor them. Without outside intervention, it may have succeeded. But after *amicus* ADF filed a lawsuit to protect the student’s First Amendment rights, the university reversed the charges and settled.¹⁵ Under the district court’s thin reasoning here, had the student been subject to a vague “professionalism” requirement, the Cameron University’s decision to punish him would be beyond the First Amendment’s protection.

Again, these are hardly isolated incidents. In October 2012, State University of New York College at Oswego journalism student Alex Myers wrote about the

¹⁴ *Cameron University faces lawsuit over flyers*, KSWO.com, May 27, 2014, available at <http://www.kswo.com/story/25582672/cameron-university-faces-lawsuit-over-flyers>.

¹⁵ Bob Kellogg, *University revises free speech policy after student sues*, ONE NEWS NOW, Oct. 7, 2014, available at <http://www.onenewsnow.com/legal-courts/2014/10/07/university-revises-free-speech-policy-after-student-sues>.

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."¹⁶ Myers apologized, clarifying that he intended to convey that he was not writing a "puff piece."¹⁷ For this exchange, Myers was charged with "disruptive behavior," placed on interim suspension, ordered to vacate his dormitory, and banned from campus.¹⁸ After *amicus* FIRE informed Oswego that Myers' email constituted protected speech,¹⁹ the charges were dropped.²⁰ Again, were the district court's rationale adopted, Oswego could justify its otherwise unconstitutional punishment of Myers' speech by invoking a subjective interpretation of journalistic standards.

¹⁶ 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>.

¹⁷ 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.

¹⁸ 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.

¹⁹ 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>.

²⁰ 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.

These recent examples are blatant First Amendment violations, prohibited by decades of precedent, but they represent just a few of the incidents reported to *Amici* this year and a tiny percentage of those reported to *Amici* since they were founded.²¹ The district court’s opinion, if allowed to stand, would allow administrators nationwide virtually limitless 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. Clarity from this Court Is Needed to Preserve the First Amendment Rights of 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% of students agree that it is safe to hold unpopular views on campus.²² Yet the Supreme Court has made clear that if students are not free to explore and express ideas, then “our civilization will stagnate and die.” *Sweezy*, 354 U.S. at 250. In the instant case, Central Lakes College—like too many colleges nationwide—decided to ignore

²¹ See GREG LUKIANOFF, *UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE* (2012).

²² ERIC L. DEY ET AL., *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.

long-established law. This Court must remind the College that respecting the First Amendment is not optional.

Colleges and universities nationwide are closely watching this case. If the lower court's error is allowed to stand, would-be censors at colleges across the country will seize upon their newfound authority to silence merely dissenting, unwanted, unpopular, or unpleasant student speech by emulating the College'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 for the health of our democracy. *Sweezy*, 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 district court's meager understanding of the expressive rights of public college students—even those enrolled in a professional program—must be reversed and remanded.

CONCLUSION

For these reasons, the Court should reverse the judgment of the district court and remand this case for further proceedings.

Dated: November 19, 2014

Respectfully submitted,

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Dated: November 19, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

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