No. 19-968

IN THE

Supreme Court of the United States

CHIKE UZUEGBUNAM AND JOSEPH BRADFORD,
Petitioners,

v.

STANLEY C. PRECZEWSKI, JANN L. JOSEPH, LOIS C. RICHARDSON, JIM B. FATZINGER, TOMAS JIMINEZ, AILEEN C. DOWELL, GENE RUFFIN, CATHERINE JANNICK DOWNEY, TERRANCE SCHNEIDER, COREY HUGHES, REBECCA A. LAWLER, AND SHENNA PERRY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights in Education ("FIRE") is a nonpartisan, nonprofit organization dedicated to promoting and protecting civil liberties at our nation's institutions of higher education. Since its founding in 1999, FIRE has worked to defend student and faculty First Amendment rights on campuses nationwide. FIRE believes that, if our nation's universities are to best prepare students for success in our democracy, the law must remain unequivocally on the side of robust free-speech rights on campus.

FIRE coordinates and engages in targeted litigation and regularly files briefs as *amicus curiae* to ensure that student First Amendment rights are vindicated at public institutions. Launched in 2014, FIRE's Stand Up for Speech Litigation Project has coordinated the filing of more than a dozen lawsuits to challenge unconstitutional campus speech codes.

The students FIRE defends rely on access to federal courts to secure meaningful and lasting legal remedies for the irreparable harm of censorship. This case is of interest to FIRE because the Eleventh Circuit's ruling, if allowed to stand, will undermine

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[1] Pursuant to Rule 37.6, FIRE affirms that no counsel for a party authored this brief in whole or in part, and that no person other than FIRE or its counsel made any monetary contributions intended to fund the preparation or submission of this brief. Counsel for Petitioners and counsel for Respondents were timely notified of FIRE's intent to file this brief and consented to its filing.

students' already precarious ability to vindicate their First Amendment rights in court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The right to speak freely is a priceless freedom. Nowhere is this more true than on public college and university campuses, which serve as "vital centers for the Nation's intellectual life." *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 836 (1995). The decision below threatens the ability of college and university students to vindicate their First Amendment rights at a time when those rights are increasingly at risk.

Students have few reliable options for securing judicial redress when their free-speech rights are infringed. Equitable-relief claims are frequently mooted by graduation or by revision of the challenged policy, and speech restrictions typically do not inflict financial injuries warranting claims for compensatory damages. Nominal damages, which address violations that do not result in substantial financial loss, are often the only remedy available.

Under the decision below, nominal damages can no longer fulfill that critical role. If standalone nominal-damages claims are mooted just as easily as claims for equitable relief, students will be left with little incentive to challenge unlawful speech codes in court. Student speech rights will become increasingly devalued and colleges and universities will be emboldened to expand their speech restrictions.

The Eleventh Circuit's misguided approach also ignores a critical distinction: unlike prospective equitable relief, nominal damages remedy *past* violations, not ongoing or potential future wrongs. In this

regard, the Eleventh Circuit's decision fails to appreciate that the deprivation of a constitutional right is an injustice irrespective of whether it results in monetary loss.

Correcting the Eleventh Circuit's error is all the more important because colleges and universities across the country routinely infringe students' First Amendment rights. Vague and overbroad campus speech policies abound. These policies grant campus administrators discretion to suppress and punish a stunning range of speech deemed controversial, inconvenient, or simply unwanted. FIRE has witnessed this troubling trend firsthand: It has received thousands of reports of censorship on public college and university campuses and has defended students and faculty in more than five hundred cases nationwide. Compounding the problem is the propensity of colleges and universities to re-institute speech restrictions after executing settlement agreements that require the restrictions to be eliminated. This Court's intervention is needed to protect students' ability to hold colleges and universities accountable and to vindicate their priceless First Amendment rights.

ARGUMENT

I. THE ELEVENTH CIRCUIT'S RULE JEOPARDIZES STUDENTS' ALREADY PRECARIOUS ABILITY TO VINDICATE THEIR FIRST AMENDMENT RIGHTS.

A. Nominal-Damages Claims Are Often Students' Sole Path to Relief from Unconstitutional Speech Restrictions.

Students burdened by unconstitutional speech restrictions have few reliable options for securing relief. Their claims for declaratory or injunctive relief are frequently mooted, either by graduation or by revision of the challenged policy (or both, in the case of Petitioners here). And because suppression of speech typically does not inflict financial injuries, students rarely have viable claims for compensatory damages. As a result, nominal damages are often the only remedy available.

First, students' claims for prospective declaratory or injunctive relief evaporate at graduation. Students at public colleges and universities enroll in two- or four-year degree programs, but the median length of time for resolution of a civil case in federal district court is between 10.8 and 27.8 months, depending on whether the case goes to trial.[2] Moreover, the most outspoken and politically active students tend to be juniors and seniors, such that those most vulnerable to enforcement have the least time to secure redress.

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[2] *See* Administrative Office of the U.S. Courts, *United States District Courts—National Judicial Caseload Profile* (2019), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0930.2019.pdf.

First Amendment claims mooted by graduation are thus commonplace. *See, e.g.*, *Bd. of Sch. Comm'rs v. Jacobs*, 420 U.S. 128, 129 (1975) (graduation mooted declaratory-judgment claim alleging interference with school newspaper); *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1225 (10th Cir. 2009) (valedictorian's graduation mooted her equitable-relief claims challenging graduation-speech policy); *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 791–98 (9th Cir. 1999) (en banc) (graduation mooted declaratory- and injunctive-relief claims against policy permitting student prayers during graduation ceremony); *Adler v. Duval Cty. Sch. Bd.*, 112 F.3d 1475, 1478 (11th Cir. 1997) (same); *Fox v. Bd. of Trustees of State Univ. of New York*, 42 F.3d 135, 140 (2d Cir. 1994) (graduation mooted equitable-relief claims challenging regulation preventing cookware demonstration in university dormitory); *Sapp v. Renfroe*, 511 F.2d 172, 175 (5th Cir. 1975) (graduation mooted equitable-relief claims challenging mandatory ROTC training). Colleges and universities can take advantage of this reality and insulate themselves from liability by prolonging litigation until student plaintiffs graduate.

Second, colleges and universities can also moot claims for equitable relief by revising or disavowing their policies after the start of litigation. For example, one such policy change mooted students' equitable-relief claims in *Husain v. Springer*, even though the college's commitment to the new policy did not extend "indefinitely into the future." 193 F. Supp. 2d 664, 670

(E.D.N.Y. 2002), *aff'd*, 494 F.3d 108 (2d Cir. 2007).[3] Students' First Amendment claims are particularly vulnerable to dismissal on this basis because courts apply a relaxed mootness test in suits against government entities, such as public colleges and universities. Although the general rule is that a defendant's voluntary cessation moots an action only if "there is no reasonable expectation . . . that the alleged violation will recur," *Los Angeles Cty. v. Davis*, 440 U.S. 625, 631 (1979) (cleaned up), courts apply "a rebuttable presumption that the objectionable behavior will *not* recur" when a governmental defendant voluntarily rescinds a challenged policy, *Troiano v. Supervisor of Elections*, 382 F.3d 1276, 1283 (11th Cir. 2004).[4]

Third, restrictions on student speech typically do not inflict financial injuries, such that compensatory damages are rarely available. *See Lowry ex rel. Crow*

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[3] The Second Circuit reviewed the case on its merits because the students also pursued claims for nominal damages. *See Husain v. Springer*, 494 F.3d 108, 121–34 (2d Cir. 2007). Under the Eleventh Circuit's rule, those nominal-damages claims would have been dismissed as moot.

[4] *See also, e.g.*, *Prison Legal News v. Fed. Bureau of Prisons*, 944 F.3d 868, 881 (10th Cir. 2019); *Fikre v. F.B.I.*, 904 F.3d 1033, 1037 (9th Cir. 2018) ("Where that party is the government we presume that it acts in good faith."); *Town of Portsmouth v. Lewis*, 813 F.3d 54, 59 (1st Cir. 2016); *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 325 (5th Cir. 2009); *Fed'n of Advert. Indus. Reps., Inc. v. City of Chicago*, 326 F.3d 924, 929 (7th Cir. 2003) ("[W]hen the defendants are public officials . . . we place greater stock in their acts of self-correction, so long as they appear genuine."); 13C Charles A. Wright et al., *Federal Practice and Procedure* § 3533.7 (3d ed. 2008) ("Courts are more likely to trust public defendants to honor a professed commitment to changed ways.").

v. Watson Chapel Sch. Dist., 540 F.3d 752, 765 (8th Cir. 2008) (affirming nominal damages and attorneys' fees awards to student protesters where "the free speech right vindicated was not readily reducible to a sum of money"); *Flanigan's Enters., Inc. v. City of Sandy Springs*, 868 F.3d 1248, 1275 (11th Cir. 2017) (Wilson, J., dissenting) ("For a number of civil rights violations (e.g., free speech, procedural due process), compensable damages may not always exist.").

Even when enforcement of a speech restriction against a student may cause an economic injury—for example, the cost of gas to drive to a designated free speech zone, the cost of printing flyers, or the cost of a website registration—the appropriate legal remedy is often nominal, rather than compensatory, damages. *See Hughes v. Lott*, 350 F.3d 1157, 1162 (11th Cir. 2003) ("Nominal damages are appropriate if a plaintiff establishes a violation of a fundamental constitutional right, even if he cannot prove actual injury sufficient to entitle him to compensatory damages."); *Nominal Damages*, Black's Law Dictionary (11th ed. 2019) (nominal damages are "[a] trifling sum awarded when a legal injury is suffered but there is no *substantial* loss or injury to be compensated") (emphasis added).

Students with meritorious First Amendment claims thus often have only one remedy available: nominal damages.

B. The Eleventh Circuit's Rule Threatens Students' Access to Relief for Past Violations of Their Constitutional Rights.

In the decision below, the Eleventh Circuit held that Petitioners' claims for nominal damages were

mooted by the same events that mooted their claims for injunctive relief: graduation and a post-suit revision to the college's speech code. *See* Pet. App. 3a. Applying its decision in *Flanigan's*, 868 F.3d 1248, the Eleventh Circuit concluded that, once plaintiffs have "receive[d] all the [forward-looking] relief they requested," their "right to receive nominal damages" remains viable only when accompanied by "a well-pled request for compensatory damages." Pet. App. 15a (quoting *Flanigan's*, 868 F.3d at 1264).

Under the Eleventh Circuit's rule, students' standalone nominal-damages claims for past violations of their First Amendment rights are mooted just as easily as claims for prospective equitable relief. This is because, according to the Eleventh Circuit, nominal-damages claims do not "have a practical effect on the parties' rights or obligations" and thus, absent a continuing violation or live claim for compensatory damages, seek nothing more than an "impermissible advisory opinion." Pet. App. 14a.

This rule will reduce the deterrent value of litigation, emboldening colleges and universities to adopt and enforce more expansive (and constitutionally deficient) speech restrictions. As a result, student speech rights will become increasingly devalued: Existing speech restrictions will remain on the books, chilling student speech, and the development of case law on the constitutionality of university speech codes will stagnate, making it harder for students to ascertain whether their rights have been infringed. The decision below thus leaves students with little incentive to invest the time and resources required to challenge restrictive university speech codes and secure judicially enforced redress.

C. The Decision Below Disregards the Distinctive Role Nominal Damages Play in Remedying Past Constitutional Violations.

The decision below ignores a critical distinction between prospective and retrospective relief. Unlike prospective equitable relief, "nominal damages are about remedying past wrongs, not future ones." *Flanigan's*, 868 F.3d at 1273–74 (Wilson, J., dissenting); *see also, e.g.*, *Comm. for First Amendment v. Campbell*, 962 F.2d 1517, 1526 (10th Cir. 1992) ("[T]he district court erred in dismissing the nominal damages claim which relates to past (not future) conduct."). Nominal damages remedy "*the infraction of a legal right* . . . where the right is one not dependent upon loss or damage." Charles T. McCormick, *Handbook on the Law of Damages* § 20, at 85 (1935) (emphasis added); *see also id.* ("The award of nominal damages is made as a judicial declaration that the plaintiff's right *has been violated*." (emphasis added)).

Nominal damages in section 1983 actions ensure that government officials respect priceless freedoms where the infringement of those freedoms generally causes little or no monetary injury. "[A] civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986). Student plaintiffs are no different, and their rights are no less important. Contrary to the Eleventh Circuit's view, vindicating those rights provides more than just "psychic satisfaction." *Flanigan's*, 868 F.3d at 1268. As this Court has made clear, civil-rights litigation "serve[s] the public interest" and

"secures important social benefits that are not reflected in nominal or relatively small damages awards." *Rivera*, 477 U.S. at 574. "By making the deprivation of such rights actionable for nominal damages without proof of [compensable] injury, the law recognizes the importance to organized society that those rights be scrupulously observed." *Carey v. Piphus*, 435 U.S. 247, 266 (1978).

This Court has also explained that "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307–08 (2012) (cleaned up). Constitutional rights are no small thing. "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever." *Id.* Nominal damages *are* an "effectual" means of vindicating those freedoms. *Id.* Indeed, they are frequently the *only* remedy available to students on university campuses, as described above. By finding "no reason to treat nominal and declaratory relief differently," the Eleventh Circuit's rule deprives students of this remedy. *Flanigan's*, 868 F.3d at 1268 n.22; *see also id.* at 1274–75 (Wilson, J., dissenting) ("[A]s long as the government repeals the unconstitutional law, the violation will be left unaddressed; the government gets one free pass at violating your constitutional rights.").

Nominal damages are uniquely important in the context of colleges and universities. Time and again, this Court has reiterated the vital importance of First Amendment rights on public university campuses. *See, e.g., Rosenberger*, 515 U.S. at 836 ("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."); *Healy v. James*, 408 U.S. 169, 180 (1972) ("[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (emphasizing that, because public universities play a "vital role in a democracy," silencing speech in that context "would imperil the future of our Nation"). Indeed, "[u]niversities have historically been fierce guardians of intellectual debate and free speech, providing an environment where students can voice ideas and opinions without fear of repercussion." *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 761 (6th Cir. 2019).

When acting consistent with the First Amendment, colleges and universities engage students and faculty in the pursuit of truth, beauty, and innovation. This engagement benefits not only the students themselves, but society as a whole. By uprooting the most promising avenue for students to ensure that their rights are "scrupulously observed," *Carey*, 435 U.S. at 266, the Eleventh Circuit's rule undermines freedom of expression and thought.

II. PUBLIC COLLEGES AND UNIVERSITIES ROUTINELY INFRINGE STUDENTS' FIRST AMENDMENT RIGHTS.

A. Unconstitutional Speech Policies Are Prevalent on Campuses Nationwide.

Notwithstanding their professed commitment to students' free-speech rights, public colleges and universities across the country have adopted sweeping

policies that prohibit expression protected by the First Amendment. The widespread and long-running nature of this problem further underscores the importance of the issue presented in this case.

FIRE annually reviews and maintains detailed records of the speech regulations of more than four hundred and fifty of the largest colleges and universities in the country.[5] FIRE also publishes an annual report on the state of free expression on the nation's campuses, highlighting noteworthy policies and national trends. FIRE's latest report, *Spotlight on Speech Codes 2020: The State of Free Speech on Our Nation's Campuses*, reveals that almost ninety percent of the institutions surveyed maintain either a "severely restrictive" speech policy that "clearly and substantially restricts protected speech" or a policy that could easily be applied to suppress or punish protected expression.[6]

These constitutionally deficient policies tend to be vaguely worded, overbroad, or both. As the following examples illustrate, campus speech restrictions reach far beyond the narrow categories of unprotected speech recognized by this Court's precedent: obscenity, child pornography, incitement to imminent lawless action, fighting words, harassment, true threats, defamation, fraud, and speech integral to criminal conduct. The restrictions grant campus administrators discretion to silence or punish a stunning range of student speech the administrators may deem

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[5] *See Spotlight Database*, https://www.thefire.org/resources/spotlight/.

[6] *Spotlight Report* at 2, 6, https://www.thefire.org/resources/spotlight/reports/spotlight-on-speech-codes-2020/.

inconvenient, disagreeable, objectionable, or simply unwanted—everything from satire and art to political debate.

Many colleges and universities prohibit offensive expression irrespective of whether it constitutes actionable obscenity, defamation, or harassment. For example, Murray State University bans use of its information technology systems—including the campus Wi-Fi network—in an "offensive, profane, or abusive manner," where "[t]he perception or reaction of affected persons is a major factor in determining if a specific action is in violation of this policy." *Spotlight Report* at 15. The University of Texas at San Antonio likewise prohibits posting signs that contain "vulgar" material, without limiting this restriction to speech unprotected by the First Amendment. *See id.*

Similar policies abound, including Lake Superior State University's ban on "postings deemed offensive, sexist, vulgar, discriminatory or suggestive"[7]; Portland State University's prohibition of "sexual or derogatory comments"[8]; Louisiana State University's ban on "offensive language" and "suggestive

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[7] Lake Superior State Univ., *Posting Policy*, https://www.lssu.edu/campus-life/stay-informed/student-handbook/#toggle-id-5.

[8] Portland State Univ., *Prohibited Discrimination & Harassment Policy* at 2 (Mar. 15, 2013), https://www.pdx.edu/ogc/sites/www.pdx.edu.ogc/files/Policy_on_Prohibited_Discrimination_and_Harassment.Final_.pdf.

comments"[9]; and Valdosta State University's ban on "hate-based material."[10]

Universities commonly turn laudable pleas for civility and respect on campus into unconstitutional mandates. For example, Cheyney University of Pennsylvania prohibits posting "inappropriate" and "uncivil" content online. *Spotlight Report* at 19. Delaware State University bans verbal abuse, defined as "the use of harsh, often insulting language."[11] Some universities have expanded their discretion yet further: Northeastern University's Internet-usage policy prohibits transmission of any material deemed "annoying" in "the sole judgment of the University." *Spotlight Report* at 20. Officials at other institutions have similarly sought to suppress protected speech in the name of creating "safe spaces" free of ideas that might challenge some students' feelings or ideological convictions.[12]

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[9] La. State Univ., *Policy Statement 95: Sexual Harassment of Students* at 2 (Apr. 1, 2016), https://www.lsu.edu/policies/ps/ps_95.pdf.

[10] Valdosta State Univ., *Information Resources Acceptable Use Policy* (Apr. 29, 2015), https://valdosta.policytech.com/dotNet/documents/?docid=83&public=true.

[11] Del. State Univ., *Student Judicial Affairs Handbook: Conduct Standards, Policies and Procedures* at 34 (Aug. 2, 2017), https://www.desu.edu/sites/flagship/files/document/21/student-judicial-handbook.pdf.

[12] *See, e.g.*, Alex Morey, FIRE, *Students, Admins Cite 'Safe Spaces' in Seeking Limits to Media Coverage* (Nov. 15, 2015), https://www.thefire.org/students-admins-cite-safe-spaces-in-seeking-limits-to-media-coverage/. *But see* Univ. of Chicago, *Welcome Letter to 2020 Students*, https://news.uchicago.edu/sites/default/files/attachments/Dear_Class_of_2020_Students.pdf

On occasion, college and university policies go so far as to prohibit political speech, which this Court has long considered to lie at the core of the First Amendment's protection. *See Buckley v. Valeo*, 424 U.S. 1, 14 (1976). For example, the University of Alaska Anchorage's policy governing e-mail and other information-technology systems bans posting "[c]ontent related to partisan political activities."[13]

Above and beyond such vague and overbroad restrictions on student speech, many colleges and universities have established "free speech zones" that quarantine student demonstrations and other expressive activities to small, typically out-of-the-way areas. *See Spotlight Report* at 23–24. While courts have struck down free speech zones as unconstitutional on multiple occasions, *see infra* n.24, they remain commonplace. *See Spotlight Report Appendix D: Schools with "Free Speech Zones"* (listing surveyed colleges and universities with free speech zones). For example, the University of Massachusetts, Dartmouth has designated just one area on campus as a "public forum space," and students wishing to use that space must inform the campus police "at least 48 hours in advance."[14]

("[W]e do not condone the creation of intellectual 'safe spaces' where individuals can retreat from ideas and perspectives at odds with their own.").

[13] Univ. of Alaska Anchorage, *Acceptable Use Policy*, https://www.uaa.alaska.edu/about/administrative-services/policies/information-technology/acceptable-use.cshtml.

[14] Univ. of Mass. Dartmouth, *Public Forum Use of University Facilities* (Aug. 24, 2010), https://www.umassd.edu/policies/

While the mere existence of these policies (and the concomitant threat of discipline) chills student expression, officials are actively enforcing them. Since its founding in 1999, FIRE has received thousands of reports of censorship on public college and university campuses. FIRE has successfully defended student and faculty rights in more than five hundred cases, nationwide.[15] In doing so, FIRE has witnessed these troubling trends firsthand. Students' First Amendment rights are not just threatened—they are routinely violated.

Moreover, litigated cases are only the tip of the iceberg. Many students do not realize that restrictions on their speech are unconstitutional. Those who do may nevertheless be daunted by the time, monetary investment, emotional toll, and potential repercussions of pursuing judicial redress. For these reasons, the vast majority of instances of campus censorship likely go unreported and unchallenged.

B. Colleges and Universities Often Reinstitute Unconstitutional Policies after Revoking Them to End Litigation.

When students do challenge campus speech restrictions in court, one of the chief alternatives to judgment on the merits—settlement—has often proven an ineffective means for securing students' First Amendment rights. Colleges and universities have repeatedly re-instituted speech restrictions even

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active-policy-list/facilities-operations-and-construction/public-forum-use-of-university-facilities/.

[15] *See* FIRE, *All Cases*, https://www.thefire.org/cases/?limit=all.

after executing settlement agreements that require the restrictions to be eliminated.

For example, a student at California's Citrus College challenged a policy limiting expressive activities to three small "free speech areas" and subjecting students to an advance-notice requirement.[16] In 2003, the college revoked the challenged policies and settled the suit.[17] In 2013, however, the college adopted a renewed regulation limiting students' expressive activities to a narrowly defined free speech area.[18] When a student challenged this nearly identical policy, the college again agreed to revise it in order to settle the suit.[19]

A similar pattern unfolded at Pennsylvania's Shippensburg University. There, after students challenged the university's speech code, a federal district court issued a preliminary injunction barring its enforcement. *See Bair v. Shippensburg Univ.*, 280 F.

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[16] *See* Complaint ¶ 12, *Stevens v. Citrus Cmty. Coll. Dist.*, No. 2:03-cv-03539 (C.D. Cal. May 19, 2003), *available at* https://www.thefire.org/complaint-against-citrus-college-may-19-2003/.

[17] *See* Resolution of the Citrus Coll. Bd. of Trs. (June 5, 2003), *available at* https://www.thefire.org/resolution-of-the-citrus-college-board-of-trustees-june-5-2003/.

[18] *See* Complaint ¶ 2, *Sinapi-Riddle v. Citrus Cmty. Coll. Dist.*, No. 14-cv-05104 (C.D. Cal. July 1, 2014), *available at* https://www.thefire.org/complaint-in-sinapi-riddle-v-citrus-community-college-et-al/.

[19] *See* Settlement Agreement, *Sinapi-Riddle v. Citrus Cmty. Coll. Dist.*, No. 14-cv-05104 (C.D. Cal. Dec. 3, 2014), *available at* https://www.thefire.org/settlement-agreement-sinapi-riddle-v-citrus-college/.

Supp. 2d 357, 373–74 (M.D. Pa. 2003). The university then settled the suit, agreeing to repeal the challenged policies.[20] By 2008, however, the university had readopted the same policies verbatim.[21] Students challenged the speech code a second time, and the university once again settled and agreed to revise its policies.[22]

Recent litigation challenging the University of Michigan's speech policies illustrates the risk that colleges and universities, if left unchecked by the courts, will reinstate challenged policies. In *Speech First*, a group of students challenged the university's prohibition of "bullying and harassing behavior," which the university defined as including "annoy[ing]" someone "persistently" or "frighten[ing]" a "smaller weaker person." 939 F.3d at 762. The policy subjected students to "a range of consequences, including expulsion." *Id.* at 765. Although the university rescinded the challenged restriction in part after students challenged it in court, the university "continue[d] to defend its use of the challenged definitions"

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[20] *See* Press Release, FIRE, *A Great Victory for Free Speech at Shippensburg* (Feb. 24, 2004), https://www.thefire.org/a-great-victory-for-free-speech-at-shippensburg.

[21] *See* Complaint ¶ 28, *Christian Fellowship of Shippensburg Univ. of Pa. v. Ruud*, No. 4:08-cv-00898 (M.D. Pa. May 7, 2008), *available at* https://www.thefire.org/legal-complaint-against-shippensburg-university-2008/.

[22] *See* Will Creeley, FIRE, *Victory for Free Speech at Shippensburg: After Violating Terms of 2004 Settlement, University Once Again Dismantles Unconstitutional Speech Code* (Oct. 24, 2008), https://www.thefire.org/victory-for-free-speech-at-shippensburg-after-violating-terms-of-2004-settlement-university-once-again-dismantles-unconstitutional-speech-code/.

and refused to make a commitment not "to reenact" them. *Id.* at 769, 770. Observing that the university had "simply not [provided] a meaningful guarantee" that its new definitions "will remain the same in the future," *id.* at 769, the Sixth Circuit vacated the district court's denial of the students' motion for preliminary injunction, *see id.* at 771. Only after this ruling did the university commit, in a settlement agreement, to refrain from later "reinstat[ing] the removed [harassment] definitions."[23]

Repeat violations of students' First Amendment rights are less likely when students have the ability to litigate their claims to judgment the first time around. Such judgments—even if supported only by an award of nominal damages—create precedent that clarifies the law and deters colleges and universities from re-instituting unlawful policies.

Although violations of students' free-speech rights are seldom challenged in court (and violations that are challenged often become moot or result in settlement agreements), many cases have been litigated to judgment over the past three decades. These decisions—which come from circuits that do not follow the Eleventh Circuit's outlier mootness rule—have consistently struck down campus speech codes on First Amendment grounds.[24] Students' successes in

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[23] *See* Settlement Agreement, *Speech First, Inc. v. Schlissel*, No. 18-cv-11451 (E.D. Mich. Oct. 25, 2019), *available at* https://speechfirst.org/wp-content/uploads/2019/10/Settlement-Agreement-signed.pdf.

[24] *See McCauley v. Univ. of the V.I.*, 618 F.3d 232 (3d Cir. 2010) (declaring university speech policy overbroad); *Dambrot v. Cent.*

these cases, coupled with the reality that campus censorship remains prevalent nationwide, confirm that access to the courts remains as important as ever for students to vindicate their constitutional rights.

Mich. Univ., 55 F.3d 1177 (6th Cir. 1995) (declaring discriminatory harassment policy overbroad and unconstitutionally vague); *Olsen v. Rafn*, 400 F. Supp. 3d 770 (E.D. Wis. 2019) (enjoining enforcement of unconstitutionally vague speech and assembly policy); *Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, No. 1:12-cv-155, 2012 WL 2160969 (S.D. Ohio June 12, 2012) (enjoining enforcement of unconstitutional "free speech zone" policy); *Smith v. Tarrant Cty. Coll. Dist.*, 694 F. Supp. 2d 610 (N.D. Tex. 2010) (enjoining enforcement of overbroad "cosponsorship" policy); *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (enjoining enforcement of civility policy); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (declaring speech policy overbroad); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of overbroad speech policies); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575 (S.D. Tex. 2003) (declaring speech policy regulating "potentially disruptive" events unconstitutional); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (declaring harassment policy overbroad and unconstitutionally vague); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (finding harassment policy overbroad and unconstitutionally vague).

CONCLUSION

For the reasons set forth above and in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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