No. 18-12676

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CHIKE UZUEGBUNAM, *et al.*,
Plaintiffs-Appellants

v.

STANLEY PRECZEWSKI, *et al.*,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

EN BANC BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amicus* certifies that (1) *amicus* does not have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in *amicus*.

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fed. R. App. P. 26.1(a) and 29(a)(4)(A), and 11th Cir. R. 26.1-1, 26.1-2, 26.1-3, and 29-2, the undersigned counsel for *amicus curiae* Foundation for Individual Rights in Education certifies that in addition to the persons and entities identified in the Certificate of Interested Persons provided by Plaintiffs-Appellants in their initial brief, the following have an interest in the outcome of this appeal:

1. Foundation for Individual Rights in Education.
2. Bush, John C.
3. Bryan Cave Leighton Paisner LLP
4. Woodhouse LLC
5. Woodhouse, Samuel

Pursuant to Fed. R. App. P. 29(c)(5), counsel for *amicus* states that no party's counsel authored this motion in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting this motion; and no person other than *amicus curiae* or their counsel contributed money that was intended to fund preparing or submitting this motion.

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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 institutions of higher education. The students FIRE defends rely on access to federal courts to secure meaningful and lasting legal remedies to the irreparable harm of censorship – remedies to which the availability of nominal damages are critical.

[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 29(a), all parties have consented to the filing of this brief.

STATEMENT OF THE ISSUES

In light of the importance of nominal damages claims for litigants seeking to remedy civil liberties violations, should this Court's decision in *Flanigan's Enters., Inc. v. City of Sandy Springs*, 868 F.3d 1248 (11th Cir. 2017) remain controlling?

SUMMARY OF ARGUMENT

This Court's holding in *Flanigan's Enters., Inc. v. City of Sandy Springs*, 868 F.3d 1248 (11th Cir. 2017) fails to account for the fact that nominal damages are of crucial importance to students facing campus censorship in contravention of the First Amendment.

ARGUMENT

I. Without Nominal Damages, Students Will Have Great Difficulty Vindicating Their Constitutional Rights in Court.

A. Nominal Damage Claims Are Necessary to Remedy Intangible Harm to Students Caused by First Amendment Violations.

Nominal damages are essential in constitutional litigation, where "proof of actual injury" is often lacking. *Carey v. Piphus*, 435 U.S. 247, 266 (1978). The Supreme Court has awarded nominal damages without accompanying compensatory or equitable relief, *see Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986), and numerous circuit courts have done the same.[2] Under the majority's conclusion in *Flanigan's*, by contrast, "as 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." 868 F.3d at 1275 (Wilson, J. dissenting)

[2] *See Flanigan's Enters. v. City of Sandy Springs*, 868 F.3d 1248, 1265 n.17 (11th Cir. 2017).

B. Nominal Damage Claims Are Often the Only Means to Vindicate Students' First Amendment Rights.

a. Graduation frequently moots equitable claims.

Most students graduate in two to four years, with the most outspoken and politically active students often being juniors or seniors.[3] Meanwhile, the *median* time for a federal district court to complete a trial in 2015 was 25.2 months.[4] As a result, graduation often moots equitable claims before appeals are exhausted—as has happened to student prayer leaders,[5] student prayer opponents,[6] and student journalists,[7] among others.

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[3] U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS, TABLE 326.10, *available at* https://nces.ed.gov/programs/digest/d16/tables/dt16_326.10.asp. *See also* Tyler J. Buller, *Subtle Censorship: The Problem of Retaliation Against High School Journalism Advisers and Three Ways to Stop It*, 40 J.L. & EDUC. 609, 630 (2011).

[4] ADMIN. OFFICE OF U.S. COURTS, TABLE C-5: U.S. DISTRICT COURTS—MEDIAN TIME INTERVALS FROM FILING TO DISPOSITION OF CIVIL CASES TERMINATED, *available at* http://www.uscourts.gov/sites/default/files/c05mar15_0.pdf.

[5] *E.g.*, *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1225 (10th Cir. 2009) (student forced to apologize for religious valedictory speech lacked standing to maintain equitable claims); *Cole v. Oroville Union High Sch.*, 228 F.3d 1092, 1098–99 (9th Cir. 2000) (finding First Amendment claims moot where plaintiffs were prevented from giving religious graduation speeches).

[6] *Adler v. Duval Cty. Sch. Bd.*, 112 F.3d 1475, 1478 (11th Cir. 1997) (dismissing as moot equitable claims from former students who objected to student-initiated prayer at graduation ceremonies).

[7] *Bd. of Sch. Comm'rs v. Jacobs*, 420 U.S. 128 (1975); *Lane v. Simon*, 495 F.3d 1182, 1186–87 (10th Cir. 2007); *Husain v. Springer*, 691 F. Supp. 2d 339, 340-41 (E.D.N.Y. 2009).

b. Equitable claims are frequently mooted by policy change during litigation.

Institutions can, and often do, change a challenged policy during litigation.[8] In such cases, courts frequently find equitable claims that arose under the prior policy moot, provided the court has some reason to believe the original policy will not be reinstated.

C. Student-Plaintiffs Face Additional Hurdles to Vindicating Their First Amendment Rights.

Although a plaintiff may bring a pre-enforcement facial challenge to a regulation on First Amendment grounds, *see, e.g.*, *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010), the plaintiff still must demonstrate injury-in-fact, showing an intent to engage in speech that would lead to "a credible threat of prosecution" under the regulation. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014).

This showing can be difficult to make. Many college harassment policies sweep a great deal of protected speech within their ambit,[9] but courts often dismiss challenges to them for lack of standing — even where the potential for punishment

[8] *See, e.g.*, *Husain v. Springer*, 494 F.3d 108, 120 (2d Cir. 2007) (change in election policy mooted injunctive claim against school for cancelling student election due to student media coverage); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1195 (9th Cir. 2000) (requests for injunctive and declaratory relief against race-conscious admissions policy were moot because state legislature altered policy by statute).

[9] FOUND. FOR INDIV. RIGHTS IN EDUC., *Spotlight Database, available at* https://www.thefire.org/spotlight (last visited Aug. 5, 2018).

is raised with regard to past speech — where students could not show they intended to engage in particular speech that would violate the policy. *See Lopez*, 630 F.3d at 791–92 (plaintiff lacked standing to challenge policy that could be employed to punish "offensive" speech); *Abbott v. Pastides*, 263 F. Supp. 3d 565, 579-80 (D.S.C. 2017) (plaintiffs lacked standing to challenge policy that prohibited "insulting" or "inappropriate" speech).

Consequently, facially unconstitutional speech codes often persist until actually used to punish students willing to challenge them — while chilling the rights of everyone who self-censors to comply with their plain language.

II. Clear Legal Precedent Is Necessary to Curb Rampant Campus Censorship.

A. Speech Codes Are Rampant at American Universities.

Students' First Amendment rights are routinely threatened. *Amicus* FIRE annually reviews policies at over 460 colleges and universities; its 2018 report found that 91 percent of public institutions surveyed maintained one or more policies restricting protected expression.[10]

[10] Found. for Individual Rights in Educ., Spotlight on Speech Codes 2018: The State of Free Speech on Our Nation's Campuses, https://www.thefire.org/spotlight-on-speech-codes-2018 (last accessed July 31, 2018).

B. Universities Often Revise Policies Only to Reinstate Them Later.

A university's revising a policy does not guarantee that the university will not reinstate it later, or restrict the same type of expression by other means. The only real safeguard against continued censorship is judicial precedent delineating the appropriate limits of campus speech policies.

In 2003, a student sued California's Citrus College, challenging a policy that limited students' expressive activities to three "free speech areas." Complaint at ¶ 12, *Stevens v. Citrus Comm. Coll. Dist.*, No. 2:03-cv-03539 (C.D. Cal. filed May 20, 2003). In June 2003, the Citrus College Board of Trustees revoked the policy, and settled the lawsuit. 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.

In 2013, however, the Board adopted a new regulation limiting expressive activity to one free speech area. Complaint at ¶ 2, *Sinapi-Riddle v. Citrus Comm. Coll. Dist.*, No. 14-cv-05104 (C.D. Cal. filed Jul. 1, 2014). Student Vincenzo Sinapi-Riddle sued after he was prohibited from soliciting signatures for a petition outside of the free speech area. Citrus settled the lawsuit, again agreeing to revise its policies. Settlement Agreement, *Sinapi-Riddle v. Citrus Comm. 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.

In 2003, students at Shippensburg University of Pennsylvania alleged that several of the university's speech codes violated their First Amendment rights. *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003). After a district court issued a preliminary injunction against Shippensburg, the university settled the suit, agreeing to repeal the challenged policies.[11]

But the university did not comply with the settlement. According to a second lawsuit, administrators "reenacted the stricken policy *verbatim* in the Code of Conduct." Complaint at ¶ 28, *Christian Fellowship of Shippensburg Univ. of Pa. v. Ruud*, No. 4:08-cv-00898 (M.D. Pa. filed May 7, 2008). In October 2008, Shippensburg settled this second lawsuit as well and again revised its speech codes.[12]

Other times, FIRE has persuaded university administrators to revise problematic policies, only to have other administrators reinstate those policies, or

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[11] Press Release, FOUND. FOR INDIV. RIGHTS IN EDUC., *A Great Victory for Free Speech at Shippensburg* (Feb. 24, 2004), available at https://www.thefire.org/a-great-victory-for-free-speech-at-shippensburg.

[12] Will Creeley, *Victory for Free Speech at Shippensburg: After Violating Terms of 2004 Settlement, University Once Again Dismantles Unconstitutional Speech Code*, FOUND. FOR INDIV. RIGHTS IN EDUC. (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.

equally problematic policies, at a later date. In 2012, for example, the University of Mississippi revised a policy that had confined unplanned student demonstrations to designated "Speaker's Corners." The university replaced it with a policy allowing students to engage in spontaneous expression anywhere on campus so long as they did not violate other university policies in the process.[13]

Recently, however, the university amended that policy to again prohibit spontaneous student demonstrations, requiring student organizations to "contact the Dean of Students in advance of the activity" and complete an event registration form.[14]

C. Without Clear Precedent Declaring Speech Codes Unconstitutional, Students Will Continue to Face Widespread Censorship.

Despite decades of legal precedent finding campus speech codes unconstitutional,[15] censorship of student expression persists. If a university may

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[13] UNIV. OF MISS., *Free Inquiry, Expression, and Assembly* (Jan. 18, 2012), *available at* https://dfkpq46c1l9o7.cloudfront.net/pdfs/727bfb2fe0db5cc81272728b32c0c378.pdf.

[14] UNIV. OF MISS., *Free Inquiry, Expression, and Assembly* (Nov. 27, 2017), *available at* https://policies.olemiss.edu/ShowDetails.jsp?istatPara=1&policyObjidPara=11079224.

[15] *See, e.g., McCauley v. Univ. of the V.I.*, 618 F.3d 232 (3d Cir. 2010) (harassment policy); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (sexual harassment policy); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (discriminatory harassment 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,

avoid legal consequences simply by revising a policy that has been challenged, protecting students' speech rights becomes a never-ending game of whack-a-mole: A student may succeed in beating back a policy, only to have that policy—or one just like it—pop back up again. But unlike the whack-a-mole player standing at the ready with a rubber mallet, students graduate and move on, making it exceedingly difficult to know whether a university has kept its promise to revise a policy until another student or student group is censored. Only a judicial determination that a policy violates students' First Amendment rights can truly secure those rights going forward.

CONCLUSION

To ensure that students are able to vindicate their constitutional rights, the revision of an unconstitutional policy or regulation should not moot a claim for nominal damages.

2012) ("free speech zone" policy); *Smith v. Tarrant Cty. Coll. Dist.*, 694 F. Supp. 2d 610 (N.D. Tex. 2010) (university "cosponsorship" policy); *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (civility policy); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (sexual harassment policy); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (harassment policy); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575 (S.D. Tex. 2003) (disruptive events policy); *Booher v. Bd. of Regents, N. Ky. Univ.*, No. 2:96-CV-135, 1998 WL 35867183 (E.D. Ky. July 22, 1998) (sexual harassment policy); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (discriminatory harassment policy).

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CERTIFICATE OF COMPLIANCE

1) This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 1,939 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2) This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman font.

3) This brief and cover pages were prepared in compliance with 11th Cir. R. 32–4.

/s/ John C. Bush
John C. Bush

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on September 19, 2018, which will automatically send notification to the counsel of record for the parties.

This 19th day of September, 2018.

/s/ John C. Bush
John C. Bush