C.A. No. SU-2021-0267-A

Rhode Island Supreme Court

WILLIAM FELKNER,

Plaintiff-Appellant,

v.

RHODE ISLAND COLLEGE et al.,

Defendants-Appellees,

On appeal from the Providence County Superior Court
Case No. PC-2007-6702
Honorable Susan E. McGuirl Presiding

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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INTEREST OF AMICUS CURIAE[1]

The Foundation for Individual Rights and Expression (FIRE)[2] is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to the freedoms of speech, expression, and conscience—the essential qualities of liberty. Because colleges and universities play an essential role in preserving free thought, FIRE places a special emphasis on defending these rights on our nation's campuses. To best prepare students for success in our democracy, FIRE believes the law must remain unequivocally on the side of robust free speech rights on campus.

Since 1999, FIRE has successfully defended the First Amendment rights of countless students at campuses nationwide. FIRE engages in strategic litigation and regularly files *amicus curiae* briefs to ensure student and faculty First Amendment rights are vindicated when threatened at public institutions like Rhode Island College. *See, e.g.*, Brief for FIRE and Cato Institute as *Amici Curiae* Supporting Petitioners, *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021) (No. 19-968); Brief for FIRE, et al. as *Amici Curiae* Supporting Plaintiffs-Appellants, *Doe v. Valencia*

[1] No counsel for a party authored this brief in whole or in part. Further, no person, other than amicus, its members, or its counsel contributed money intended to fund preparing or submitting this brief.

[2] Formerly known as the Foundation for Individual Rights in Education, FIRE has recently changed its name to reflect its expanded mission of protecting free expression beyond colleges and universities.

Coll. Bd. of Trs., 838 F.3d 1207 (11th Cir. 2016) (No. 17-12562); Brief for FIRE as *Amicus Curiae* Supporting Plaintiff-Appellee, *Barnes v. Zaccari*, 669 F.3d 1295 (11th Cir. 2012) (No. 10-14622). Indeed, FIRE previously participated as *amicus* in this case, arguing before this Court that Defendants had violated Plaintiff's constitutional rights to free speech. *See* Brief for FIRE, et al. as *Amici Curiae* Supporting Plaintiff-Appellant, *Felkner v. R.I. Coll.*, 203 A.3d 433 (R.I. 2019) (No. SU-16-0017).

FIRE seeks to file another *amicus* brief in this appeal in support of Plaintiff-Appellant because expansive application of qualified immunity impedes students' ability to secure a meaningful legal remedy to the irreparable harm caused by retaliation for the exercise of their free speech rights. If allowed to stand, the ruling below will embolden public colleges across the country to justify their otherwise clearly unlawful actions as resolving an "academic dispute."

SUMMARY OF ARGUMENT

In 2004, Rhode Island College administrators penalized student William Felkner for refusing to lobby the state General Assembly in support of a bill he personally opposed. After the trial court granted the Defendants summary judgment in Felkner's lawsuit challenging Rhode Island College's actions, FIRE filed an *amicus* brief in this Court, supporting Felkner's appeal. We argued then that the Defendants' efforts to compel Felkner to publicly affirm beliefs contrary to his own

violated Felkner's clearly established right to freedom of expression under the First Amendment. This Court agreed, ruling that Felkner had demonstrated a colorable violation of his free speech rights:

> The fact that a student may be required to debate a topic from a perspective that is contrary to his or her own views may well be reasonably related to legitimate pedagogical concerns. That relationship is far more tenuous, however, when the student is told that he or she must then lobby for that position in a public forum or that his or her viewpoint is not welcome in the classroom because it is contrary to the majority viewpoint of the students and faculty.

Felkner v. R.I. Coll. (*Felkner I*), 203 A.3d 433, 450 (R.I. 2019).

Nevertheless, on remand the trial court ignored this ruling, mischaracterizing Felkner's claims as merely an academic dispute about his performance. Consequently, the trial court ignored decades of precedent affirming the First Amendment's broad protection of student speech—including the right not to speak—in favor of invoking two cases about academic disputes that do not narrow students' expressive rights. As detailed *infra*, in FIRE's decades of experience protecting free speech in higher education, we have observed case after case in which administrators in higher education disregard students' expressive rights as the Defendants have done here. In the six years since FIRE last wrote in to this Court, we have seen even more. Granting public college officials the protection of qualified immunity when they violate students' rights undermines the protection of student

speech that guarantees the "robust exchange of ideas" necessary to train our nation's future leaders. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

At summary judgment, this Court must construe the evidence of Defendants' actions in the light most favorable to Felkner, the nonmovant. *Tolan v. Cotton*, 572 U.S. 650, 656–57 (2014). Defendants are not entitled to qualified immunity if they violated clearly established law at the time of their actions. *Id.* at 656 (citing *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)). The Superior Court improperly granted Defendants the protection of qualified immunity after crediting Defendants' framing of their actions as permissible to address an academic dispute, rather than construing the evidence in the light most favorable to Felkner. Applying the proper standard for summary judgment, the court must direct its qualified immunity inquiry to the question of whether the law clearly established Felkner's right to refuse to publicly lobby elected officials against his own beliefs.

In the fall of 2004, at the time of Defendants' actions, reasonable public university administrators would have understood that retaliating against Felkner for refusing to publicly speak against his personal beliefs violated the First Amendment. The First Amendment prohibits public educational institutions from compelling students to publicly affirm views with which they disagree. *See Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981); *W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943). At the time of the Defendants' actions, it was also clear that public

schools cannot attempt to compel students to speak publicly in violation of their beliefs by threatening their ability to complete their course of study. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1290 (10th Cir. 2004).

Eighteen years after penalizing Felkner for refusing to speak publicly against his own conscience, Rhode Island College administrators are *still* trying to evade responsibility for violating Felkner's First Amendment rights. To finally redress Defendants' violation of Felkner's First Amendment rights, and to clearly convey to institutions both in Rhode Island and across the country that expressive rights are of paramount importance, this Court should reverse the decision below, and deny Defendants qualified immunity.

ARGUMENT

I. Despite the Clear Obligations of Public Colleges and Universities Under the First Amendment, Disregard for Students' Expressive Rights Remains Rampant in Higher Education.

Since as early as 1943, it has been clearly established that the First Amendment protects students' right to speak as well as the right not to speak. *Barnette*, 319 U.S. at 642. Yet, in 2004, Rhode Island College administrators violated Felkner's right not to speak by penalizing him for refusing to publicly lobby the state General Assembly in favor of a bill he personally opposed. Nearly eighteen years later, while those administrators are *still* trying to evade responsibility for violating Felkner's First Amendment rights, similar incidents continue to occur across the country. FIRE's work in higher education demonstrates that, when colleges and universities dislike the content of student speech, they do not hesitate to violate students' rights.

A. Courts have recognized that free expression is vitally important to students' education.

Public universities play a "vital role in a democracy," and silencing speech on college campuses "would imperil the future of our Nation." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). *See also 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*, 385 U.S. at 603 ("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). The U.S. Supreme Court has warned that the stakes in the fight against censorship at our colleges and universities couldn't be higher: "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy*, 354 U.S. at 250. Accordingly, "[m]ere unorthodoxy or dissent from the prevailing mores is not to be condemned." *Id.* at 251.

In a virtually unbroken string of decisions dating back decades, courts have time and again affirmed the critical importance and wide breadth of First Amendment protections for college students. *See, e.g.*, *Speech First, Inc. v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022) (holding an overbroad and viewpoint-based university discriminatory harassment policy objectively chilled student speech); *Intervarsity Christian Fellowship/USA v. Univ. of Iowa*, 5 F.4th 855 (8th Cir. 2021) (denying qualified immunity to university administrators who violated a student group's freedom of expressive association); *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019) (holding a university's power to refer cases of "bias" for discipline objectively chilled speech); *Gerlich v. Leath*, 861 F.3d 697 (8th Cir.

2017) (holding a university may not discriminate based on viewpoint when granting or denying students permission to use its own trademark); *McCauley v. Univ. of Virgin Is.*, 618 F.3d 232 (3d Cir. 2010) (invalidating university speech policies, including harassment policy); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (striking down sexual harassment policy); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (declaring university discriminatory harassment policy facially unconstitutional); *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) (invalidating "free speech zone" policy); *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (enjoining enforcement of university civility policy); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (finding university sexual harassment policy unconstitutionally overbroad); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of university harassment policy due to overbreadth); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575 (S.D. Tex. 2003) (declaring university policy regulating "potentially disruptive" events unconstitutional); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (declaring university racial and discriminatory harassment policy facially unconstitutional); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (enjoining enforcement of university discriminatory harassment policy).

The First Amendment's protection of free expression extends not only to individuals' right to speak, but also to the right *not* to speak. *Barnette,* 319 U.S. at 637 (holding a public grade school cannot expel students for refusing to salute the U.S. flag and pledge allegiance); *see also Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (holding the state cannot require an individual to disseminate an ideological message by displaying it on his private property for the purpose that it be observed and read by the public). "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley*, 430 U.S. at 714 (quoting *Barnette,* 319 U.S. at 637). Indeed, since the Supreme Court's landmark decision in *Barnette*, it has been abundantly clear that public schools cannot compel their students to publicly "profess any statement of belief, or engage in any ceremony of assent to one . . . ." 319 U.S. at 634. Contrary to the trial court's analysis, this long-standing rule is not narrowed by subsequent decisions acknowledging schools' ability to punish students for failing to perform academically. *See Felkner v. R.I. Coll.* (*Felkner II*), No. PC-2007-6702, 2021 WL 4049338, at *9–10 (R.I. Super. Ct. Aug. 31, 2021). Neither case relied on by the trial court—*Bd. of Curators of University of Missouri v. Horowitz*, 435 U.S. 78 (1978) nor *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985)—even address students' First Amendment rights, let alone permit administrators to violate students'

First Amendment rights by penalizing them for refusing to speak publicly. *See Felkner II*, 2021 WL 4049338, at *9–10.

B. Public colleges and universities regularly trample on students' rights to free expression.

Despite the clarity of public college and university obligations under the First Amendment, administrators regularly infringe on students' right to freedom of expression on public campuses. Affirming the Superior Court's grant of qualified immunity for Defendants' violation of Felkner's free speech rights would exacerbate the problem by emboldening college administrators to ignore the Constitution. FIRE's work defending students' First Amendment rights on college campuses since last writing to this Court demonstrates that public college professors and administrators continue to trample over student speech they dislike.

When FIRE last wrote to this Court as *amicus*, we described a 2016 incident in which Northern Michigan University instructed students not to talk to their peers about "self-destructive" thoughts, including self-injury and suicide. The university publicly announced the rescission of this policy only after widespread uproar, sparked by a FIRE press release.[3] Six years later that lesson has been all but forgotten. Just this April, after a Northern Michigan University student committed

[3] Press Release, FIRE, Victory: Northern Michigan U. Publicly Tells Students They Can Discuss Self-Harm (Sept. 30, 2016), https://www.thefire.org/victory-northern-michigan-u-publicly-tells-students-they-can-discuss-self-harm [https://perma.cc/2JGN-M4U5].

suicide, administrators suspended a student for emailing his peers a survey requesting anonymous feedback regarding the adequacy of the university's mental health resources.[4] The student later posted on social media: "I am not sure how many of you know, but yesterday over 700 students responded with ways the campus could handle mental health better. Now they are suspending me for shedding a light on this issue without hearing my side of the story."[5]

In September 2020, administrators at the University of Tennessee Health Science Center voted to expel graduate pharmacy student Kimberly Diei for a lack of professionalism, based on Diei's social media posts.[6] Diei posted on her own time, in her personal capacity.[7] Her tweets merely referenced popular music and contributed to topics of public discussion.[8] Less than a month later, the dean of the pharmacy school reversed Diei's expulsion, but only after FIRE submitted a letter

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[4] Zach Greenberg, *Is Northern Michigan University Still Targeting Students Who Talk About Mental Health?*, FIRE (May 4, 2022), https://www.thefire.org/is-northern-michigan-university-still-targeting-students-who-talk-about-mental-health [https://perma.cc/9A4Q-KLPT].

[5] Christie Mastric, *Suspended NMU student grateful for support*, Mining Journal (Apr. 12, 2022), https://www.miningjournal.net/news/front-page-news/2022/04/suspended-nmu-student-grateful-for-support [https://perma.cc/N32D-36SD].

[6] *See* Compl., *Diei v. Boyd*, No. 2:21-CV-02071 (W.D. Tenn. Feb. 3, 2021).

[7] *Id.* at ¶¶ 21–33.

[8] *Id.* at ¶¶ 60–63.

explaining the First Amendment violation.[9] Represented by FIRE, Diei later sued the university to prevent further investigations into her social media, invalidate the college's overbroad professionalism policies, and seek damages for the past deprivation of her First Amendment rights.[10]

In April 2022, a Central Washington University administrator stole a stack of student newspapers for the express purpose of censoring a front-page headline critical of university budget cuts.[11] The administrator announced, in the presence of the newspaper's social media editor, that he was going to "put these papers in the recycling."[12] When student reporters later reached out, the administrator admitted he removed the newspapers with the intent to present guests on campus with a "positive portrayal and outlook" of the university.[13] After FIRE wrote a letter to the university president, the administrator apologized to the newspaper.[14]

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[9] *Id.* at ¶¶ 90, 92.

[10] *Id.* at pp. 29–30.

[11] Star Diavolikis, *Editorial: Censorship Is Alive and Well*, Observer (Apr. 12, 2022), https://cwuobserver.com/22002/news/editorial-censorship-is-alive-and-well [https://perma.cc/2WUE-7XH9].

[12] *Id.*

[13] *Id.*

[14] Lindsie Rank, *After FIRE Letter, University Administrator Apologizes for Confiscating Student Newspapers*, FIRE (May 2, 2022), https://www.thefire.org/after-fire-letter-university-administrator-apologizes-for-confiscating-student-newspapers [https://perma.cc/85TB-Q6UP].

These examples are blatant First Amendment violations, prohibited by decades of precedent, but they represent just a few of the incidents of censorship on college campuses in recent years. Each of them represents, as in this case, an instance of college or university officials censoring student speech on matters of public concern with viewpoints contrary to administrators' interest. The law has long been clear: viewpoint discrimination is egregious, and antithetical to the historic purpose of higher education in our country. *Rosenberger*, 515 U.S. at 829; *Keyishian*, 385 U.S. at 603. The trial court's grant of qualified immunity, if allowed to stand, would let college administrators walk away from a blatant violation of their own student's rights without consequence. This result would signal to other administrators at Rhode Island colleges that they will be free to do the same, undermining the protection of student speech.

II. The Trial Court Inappropriately Granted Summary Judgment Where There Remains a Factual Dispute Material to the Question of Qualified Immunity.

Summary judgment is inappropriate where there remains a dispute of material fact. In its prior opinion on summary judgment, this Court held that a jury could find Defendants violated Felkner's First Amendment rights, and remanded this case only to determine whether Defendants are entitled to qualified immunity. *Felkner I*, 203 A.3d at 453, 460. As this Court has made clear, defendants must be denied qualified immunity if their actions violated clearly established law. *Monahan v. Girouard*, 911

A.2d 666, 673 (R.I. 2006). In order make that determination at summary judgment, the Court must view defendants' actions in the light most favorable to the nonmovant. *Tolan*, 572 U.S. at 657. Reviewing the evidence in the light most favorable to Felkner, the Court must direct its qualified immunity inquiry to the question of whether the law clearly established Felkner's right to refuse to publicly lobby against his own beliefs.

A. Summary judgment requires the Court to review the evidence in the light most favorable to Felkner.

This Court, reviewing the trial court's grant of summary judgment *de novo*, must only affirm if, "after reviewing the admissible evidence in the light most favorable to the nonmoving party" it concludes there are no "genuine issue of material fact." *Felkner I*, 203 A.3d at 446 (quoting *Newstone Dev., LLC v. E. Pac., LLC*, 140 A.3d 100, 103 (R.I. 2016)). The nonmoving party "bears the burden of proving by competent evidence the existence of a disputed issue of material fact," and "summary judgment should enter against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Id.* at 446–47 (quoting *Newstone*, 140 A.3d at 103). However, "[i]t is a fundamental principle that summary judgment is a drastic remedy, and a motion for summary judgment should be dealt with cautiously." *Id.* (quoting *Botelho v. City of Pawtucket Sch. Dep't*, 130 A.3d 172, 176 (R.I. 2016)). As discussed in Section III, *infra*, the

Superior Court did not cautiously conduct its analysis of qualified immunity, as it ignored outstanding material questions of fact.

B. Qualified immunity is inappropriate if the Defendants Violate Clearly Established Rights.

Actions for damages against government officials who violate individual rights are "an important means of vindicating constitutional guarantees." *Butz v. Economou*, 438 U.S. 478, 506 (1978). Nevertheless, qualified immunity shields government officials from liability if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Monahan*, 911 A.2d at 674 (quoting *Wilson v. Layne*, 526 U.S. 603, 609 (1999)).

The qualified immunity inquiry requires the plaintiff to address two prongs: whether government officials violated the plaintiff's rights, and whether those rights were clearly established at the time of the violation. *Tolan,* 572 U.S. at 655–56. This Court previously held that Felkner "made tenable claims that defendants have violated his constitutional rights to free speech," and remanded the case on the question of whether Defendants are entitled to qualified immunity. *Felkner I*, 203 A.3d at 449, 460. The trial court agreed in its recent analysis that Felkner satisfied his burden of showing a constitutional violation, the first prong of the qualified immunity analysis. *Felkner II*, 2021 WL 4049338, at *8.

Under the second prong, the Court must determine whether the law clearly established the right the Defendants violated, at the time of their actions. *Tolan*, 572 U.S. at 656. "Clearly established" means "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Wilson*, 526 U.S. at 614–15 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The U.S. Supreme Court has equated this standard to "fair warning" to government officials that their actions violate the plaintiff's constitutional rights. *Hope*, 536 U.S. at 741. Furthermore, the test does "not require a case directly on point," *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011), and a plaintiff may demonstrate the law is clearly established by pointing to not only controlling law, but also to "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Wilson*, 526 U.S. at 617. In order to determine whether the law clearly established that a defendant's actions were unconstitutional, the court must establish what those actions were. *Tolan*, 572 U.S. at 656.

The defense of qualified immunity does not obviate the standard for summary judgment. In deciding the question of whether the plaintiff's rights were clearly established at the time of the defendant's actions, courts must still refrain from resolving genuine disputes of fact in favor of the party seeking summary judgment. *Id.* ("[U]nder either prong, courts may not resolve genuine disputes of fact in favor

of the party seeking summary judgment."). When addressing the second prong of the qualified immunity analysis, courts should define the clearly established right at issue "on the basis of the 'specific context of the case.'" *Id.* at 657. (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). Accordingly, at summary judgment, "courts must take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions." *Id.* However, as discussed below, the Superior Court did exactly that, framing the rights at issue within a context that imported a proposition supported only by the Defendants' version of events.

III. The Superior Court Erred in Granting Defendants Qualified Immunity for Violating Felkner's First Amendment Rights.

The Superior Court erroneously analyzed the availability of qualified immunity by relying on cases that supported the Defendants' claim that they had the right to penalize students for their academic performance. Despite Felkner's evidence that the Defendants retaliated against him for refusing to *publicly* lobby against his beliefs, the court acted as if this lawsuit addressed purely *academic* matters. However, at summary judgment, the Superior Court should have construed the evidence in the light most favorable to Felkner, and asked whether Defendants violated Felkner's clearly established right to refuse to speak publicly against his personal beliefs.

First Amendment law has prohibited public schools from compelling students to publicly affirm views with which they disagree since 1943. *Barnette*, 319 U.S. at

642. When Defendants penalized Felkner in the fall of 2004, no reasonable public university official would have believed they could constitutionally penalize Felkner for refusing to publicly lobby a state legislature in favor of a bill he opposed.

A. Qualified immunity at summary judgment requires the Court to determine whether Felkner had the clearly established right to refuse to publicly lobby against his beliefs.

Reviewing the facts in the light most favorable to the nonmovant, the question before the trial court to determine the availability of qualified immunity should have been whether the law clearly established that Defendants could not constitutionally penalize Felkner for refusing to *publicly* lobby against his beliefs. Instead, the court imported the genuinely disputed factual proposition that this case involves a purely *academic* dispute. *See Tolan*, 572 U.S. at 657.

When this Court last reviewed the lower court's grant of summary judgment in this case it identified the following issue of fact, with regard to Felkner's allegation that his professor assigned him the task of publicly lobbying against his own beliefs:

> The fact that a student may be required to debate a topic from a perspective that is contrary to his or her own views may well be reasonably related to legitimate pedagogical concerns. That relationship is far more tenuous, however, when the student is told that he or she must then lobby for that position in a public forum or that his or her viewpoint is not welcome in the classroom because it is contrary to the majority viewpoint of the students and faculty.

Felkner I, 203 A.3d at 450. Applying the above-described standard for summary judgment the Court held that, in the light most favorable to Felkner, a genuine issue of material fact existed "as to whether defendants' justifications for their actions were truly pedagogical or whether they were pretextual." *Id.* That same fact—whether Defendants told Felkner he must lobby against his beliefs in a public forum—remains unresolved.

The trial court laid the outstanding factual dispute bare, describing two conflicting accounts from Felkner and James Ryczek, the then Director of Field Education at Rhode Island College's Social Work Program:

> Per Plaintiff, Ryczek assigned students to form groups to lobby the Rhode Island General Assembly for social welfare programs from a specific list of topics approved by Ryczek. . . . However, in an affidavit, Ryczek contends that two group assignments existed: one to debate a social welfare issue; and a second to write a policy research paper "based on the perspective the student chose within her/his debate group."

Felkner II, 2021 WL 4049338, at *3 (internal citations omitted). The trial court nevertheless ignored Felkner's evidence that Defendants penalized him for refusing to publicly lobby the state legislature to adopt a program he opposed. *Id.* (directing the balance of its analysis to Felkner's displeasure with other aspects of his assignments).

Ultimately, the trial court held the law "clearly established that [Felkner's] suit was precluded from being brought, considering that his lawsuit concerns

intangible academic matters such as grades and internship and project approvals." *Id.* at *12. In doing so, the court relied on *Horowitz* and *Ewing*. *Id.* at *9–11. However, neither *Horowitz* nor *Ewing* considered claims involving students' First Amendment rights. *Ewing*, relying on *Horowitz*, described courts' "narrow avenue for judicial review" as one which cautions against evaluating the substance of faculty *academic* decisions. *Ewing*, 474 U.S. at 226–27. Neither case even *mentions* students' First Amendment rights, let alone suggests courts' deference to faculty pedagogy should extend as far as ignoring *Barnette* and permitting professors to compel their students to publicly profess an adherence to institutional orthodoxy.

The Superior court's analysis of qualified immunity, asking whether the law clearly established that the Defendants could penalize Felkner for only his academic performance, required accepting the Defendants' version of the facts as true. *Felkner II*, 2021 WL 4049338, at *12. At the summary judgment stage, this Court must credit Felkner's evidence instead, and analyze the availability of qualified immunity based on whether the law at the time of Defendants' actions clearly established his right to be free from retaliation for exercising his First Amendment right not to publicly speak against his own beliefs.

B. Clearly established law prohibited Defendants from penalizing Felkner for refusing to lobby against his beliefs.

In the fall of 2004, at the time Defendants penalized Felkner for refusing to publicly speak against his personal beliefs, reasonable public university

administrators would have understood that their actions violated the First Amendment. The law has long clearly established that the First Amendment prohibits public schools from compelling students to publicly affirm views with which they disagree. *See Barnette*, 319 U.S. at 642 (holding a public grade school cannot expel students for refusing to salute the U.S. flag). At the time of Defendants' actions, it was also clear that public schools cannot attempt to compel students to speak in violation of their beliefs by threatening inability to complete their program. *Axson-Flynn*, 356 F.3d at 1290 (holding a public university cannot assert a pedagogical concern as a pretext for punishing a student for refusing to speak against her personal beliefs).

Qualified immunity shields government officials from liability for damages only insofar as their conduct has not violated clearly established law. *Monahan*, 911 A.2d at 674 (citing *Wilson*, 526 U.S. at 609). For the purposes of a court's qualified immunity analysis, "clearly established" means "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Wilson*, 526 U.S. at 614–15 (quoting *Anderson*, 483 U.S. at 640). The U.S. Supreme Court has equated this standard to "fair warning" to government officials that their actions violate the plaintiff's constitutional rights. *Hope*, 536 U.S. at 741. The "clearly established" test does "not require a case directly on point," *al-Kidd*, 563 U.S. at 741, and a plaintiff may point to controlling law or "a consensus

of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful" in order to defeat qualified immunity. *Wilson*, 526 U.S. at 617. Both controlling law and persuasive authority demonstrate that Defendants could not have believed that their actions against Felkner were lawful.

When Defendants penalized Felkner for refusing to lobby the Rhode Island General Assembly in support of a bill which he personally opposed, the law clearly established Felkner's right to be free from such imposition on his expressive rights. In the fall of 2004, when Felkner first enrolled in Rhode Island College's Masters of Social Work program, the law made clear that the First Amendment prohibits government actors from compelling private citizens to express views with which they disagree. *United States v. United Foods, Inc*., 533 U.S. 405, 410 (2001) ("Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views . . . ."); *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (holding that the government "may not compel affirmance of a belief with which the speaker disagrees."). This prohibition on compelled speech encompasses the compelled expression of political views. *See Wooley*, 430 U.S. at 714 ("A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts.").

It was also abundantly clear at the time of Defendants' actions against Felkner that the First Amendment limits the ability of public colleges and universities, as state actors, to regulate students' free expression. *Widmar*, 454 U.S. at 268–69. Accordingly, at the time of Defendants' actions, reasonable administrators would have known that a public college cannot compel its students to endorse a particular political opinion or punish students for refusing to endorse or adopt a political stance. *See Barnette,* 319 U.S. at 642. As this Court previously recognized, that the government may not compel its citizens to salute the flag is one of the *most* well-established principles in constitutional law. *Felkner I*, 203 A.3d at 447 (quoting *Barnette* for the proposition that, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." 319 U.S. at 642). In *Barnette*, the Supreme Court held that when the state compels public grade school students to salute and pledge to the flag, it "transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." 319 U.S. at 642. Based on this precedent, it is clear that a public college cannot compel a student to profess publicly a belief he does not hold.

Government compulsion to speak "need not take the form of a direct threat or a gun to the head." *Axson-Flynn*, 356 F.3d at 1290. In *Axson-Flynn*, the Tenth Circuit held that the University of Utah violated a student's First Amendment rights when it made "abundantly clear that [plaintiff] would not be able to continue in the program if she refused to say the words with which she was uncomfortable." *Id.* That case issued in February 2004, earlier in the same year that Defendants penalized Felkner for refusing to lobby against his beliefs. Even so, it relied on the long-standing principle that government consequences may consist of "'indirect discouragement,' rather than a direct punishment, such as 'imprisonment, fines, injunctions or taxes.'" *Id.* (quoting *Am. Comm'ns Ass'n v. Douds*, 339 U.S. 382, 402 (1950)). As in this case, administrators never forced Axson-Flynn to utter the words she opposed—she withdrew from the program instead. *Id.* at 1282. Unlike this case, the speech at issue was to occur solely as part of an in-class exercise. *Id.* Nevertheless, the Tenth Circuit held the University of Utah's attempt to compel student speech would be unconstitutional if a finder of fact determined it was not reasonably related to legitimate pedagogical concerns. *Id.* at 1291–92.

Meanwhile, it has also long been clear that the government cannot retaliate against its own employees for refusing to engage in public politics against their beliefs. *Elrod v. Burns,* 427 U.S. 347, 372 (1976) (holding that sheriff's employees cannot be compelled to support a political party in order to keep their jobs and

emphasizing "the rights of every citizen to believe as he will and to act and associate according to his beliefs"). Other circuits have consistently held public employers cannot retaliate against employees for refusing to speak on matters of public concern. In *Sykes v. McDowell*, the Eleventh Circuit held the First Amendment did not permit a sheriff to fire a deputy for refusing to sign ads supporting a political candidate. 786 F.2d 1098, 1105 (11th Cir. 1986). And in *Jackler v. Byrne*, the Second Circuit held a police chief could not constitutionally fire an officer for refusing to submit a false police report. 658 F.3d 225, 243–44 (2d Cir. 2011). Both cases demonstrate that the First Amendment prevents retaliation for refusing to publicly speak against one's beliefs. *Sykes*, 786 F.2d at 1105; *Jackler*, 658 F.3d at 238.

In the fall of 2004, in light of controlling law and the weight of persuasive authority, reasonable public university administrators would have had fair warning that threatening a student with grade reduction or the inability to complete his program for refusing to publicly speak against his personal beliefs violated the First Amendment. Citing *Axson-Flynn*, this Court has already held that, in this case, "genuine issues of material fact exist as to whether defendants' justifications for their actions were truly pedagogical or whether they were pretextual." *Felkner I*, 203 A.3d at 450. Consequently, this Court should deny the Defendants the protection of qualified immunity at summary judgment.

CONCLUSION

To ensure that public college students like Felkner are able to successfully vindicate their First Amendment rights when violated, this Court should reverse the decision below.

Respectfully Submitted,

Dated: June 7, 2022

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By their Attorney:

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 18(B).

1. This brief contains 5831 words, excluding the parts exempted from the word count by Rule 18(b).

2. This brief complies with the font, spacing, and type size requirements stated in Rule 18(b).

Dated: June 7, 2022

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CERTIFICATE OF SERVICE

I hereby certify that this brief was served on counsel for all parties entitled thereto via this Court's e-file & serve system, and in particular:

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I further certify that:

An original and 9 (nine) copies (plus an original and 5 (five) copies of any appendix) are being mailed to the Clerk, Rhode Island Supreme Court, 250 Benefit St.—7 th Floor, Providence, RI 02903, within five days of notice of acceptance in accordance with R.I. S. Ct. R. App. P. 18.

Dated: June 7, 2022

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