NO. 19-3016

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

TURNING POINT USA AT ARKANSAS STATE UNIVERSITY, et al.,

Plaintiffs-Appellants,

v.

RON RHODES, *et al.*,

Defendants-Appellees.

On Appeal from the U.S. District Court
for the E. D. Ark.—Jonesboro (Holmes, J.)
No. 3:17-cv-000327-JLH

BRIEF OF *AMICI CURIAE* YOUNG AMERICANS FOR LIBERTY, NATIONAL LEGAL FOUNDATION, AND PACIFIC JUSTICE INSTITUTE
in support of Appellants
and urging reveral

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Corporate Disclosure Statement

Amici Curiae, Young Americans for Liberty, National Legal Foundation, and Pacific Justice Institute have not issued shares to the public, and no *Amicus* has any parent company, subsidiary, or affiliate that has issued shares to the public. Thus, no publicly held company can own more than 10% of stock.

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Statements of Interest[1]

Young Americans for Liberty ("YAL") is a national, 501(c)(3) non-profit that is committed to identifying, educating, and mobilizing campus activists in order to pursue a free and peaceful government. As of the time of this writing, YAL has chapters on 548 campuses across the country and hosts multiple leadership training events and national conventions.

YAL students engage daily with their peers and classmates, and the existence of the organization relies on students being able to talk and share the message of Liberty with other students. Since 2016, by YAL's count, administrations on 166 campuses have actively violated the First Amendment rights of YAL students. As part of YAL's "Fight for Free Speech" initiative, YAL is committed to defending student rights on campuses and holding campus administrators who offend those rights accountable for their actions.

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[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *Amici*, their members, and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

The **National Legal Foundation** ("NLF") is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, including those in Arkansas, seek to ensure that free speech is protected in all places, including college campuses.

The **Pacific Justice Institute** ("PJI") is a nonprofit legal organization established under Section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment rights. Such includes those who exercise their first amendment rights in public forums, including those located on institutions of higher learning. As such, PJI has a strong interest in the development of the law in this area.

Summary of Argument

Free speech, especially by students and faculty, is essential to our universities. Without it, and the diversity of opinions and associations it fosters, the mission of higher education is thwarted.

Unfortunately, on our country's campuses today, free speech often is being repressed, as several well-publicized incidents amply illustrate. Many universities have generated official policies proscribing "hate speech" and other unpopular views, trying to keep them off limits. While the courts have uniformly struck down such speech codes of public universities, surveys show a surprising ignorance of free speech rights among students, including a belief that obstructing speech found objectionable is consistent with the First Amendment.

In this context, it is important that public university officials be held to a high bar of protecting the constitutional and civil rights of those exercising their rights of speech, religion, and assembly. This is the bar Congress set up in §1983 to protect such civil rights. While the Supreme Court has uniformly granted immunity from §1983 to protect public officials when they act reasonably, what is reasonable must be viewed in context. Much of the Supreme Court's immunity law deals with police actions requiring split-second decisions about potentially criminal activity. That is a world apart from high-level university officials drafting and reviewing policies, and what might be reasonable

in a police context does not readily translate to the drafting ad approval of university free speech policies.

Argument

I. The Life Blood of Public Universities Is Free Speech and Assembly

It is now well settled that a public university, far from being a constitution-free zone, is where the free speech and association rights of its students must be enforced most robustly. As the Supreme Court stated in *Shelton v. Tucker*, 364 U.S. 479, 487 (1960), "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *See also Healy v. James*, 408 U.S. 169, 180 (1972) ("state colleges and universities are not enclaves immune from the sweep of the First Amendment"); *Tinker v. Des Moines Ind. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

"The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,'" *Healy*, 480 U.S. at 180 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). Indeed, the "campus of a

public university, at least for its students, possesses many characteristics of a public forum." *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981). "The campus's function as the site of a community of full-time residents makes it 'a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment,' and suggests an intended role more akin to a public street or park than a non-public forum." *Hays Cnty. Guardian v. Supple*, 969 F.2d 111, 117 (5th Cir. 1992) (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 651 (1981), and citing *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

Particularly apropos here are the Supreme Court's teachings in *Healy*, in which the Court struck down a public university's refusal to recognize as a campus club a local Students for Democratic Society chapter. The Court noted, "Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition." 408 U.S. at 181 (citing

Baird v. *State Bar of Ariz.,* 401 U.S. 1, 6 (1971); *NAACP* v. *Button,* 371 U.S. 415, 430 (1963); *La. ex rel. Gremillion* v. *NAACP,* 366 U.S. 293, 296 (1961); *NAACP* v. *Ala. ex rel. Patterson,* 357 U.S. 449 (1958)). In *Healy*, the students' associational and speech rights were inhibited by, among other things, lack of access to areas of campus available to others:

> If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students. Moreover, the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by denial of access to the customary media for communicating with the administration, faculty members, and other students.

480 U.S. at 181-82.

Because of the critical importance of speech and association on campus, the burden on state actors to justify restrictions on those rights is high:

> It is to be remembered that the effect of the College's denial of recognition was a form of prior restraint, denying to petitioners' organization the range of associational activities described above. While a college has a legitimate interest in preventing disruption on the campus, which under circumstances requiring the safeguarding of that interest may justify such restraint, a "heavy burden" rests on the college to demonstrate the appropriateness of that action.

Id. at 184 (citing *Near v. Minn.*, 283 U.S. 697, 713-716 (1931); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971); *Freedman v. Md.*, 380 U.S. 51, 57 (1965)); *see also Gay and Lesbian Students Ass'n v. Gohn*, 850 F.2d 361, 366 (8th Cir. 1988). Even regulations that regulate only the time, place, and manner of speech must be content-neutral, "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

II. Free Speech Has Been Under Attack on Universities Through Both Obstruction and Official Restrictions.

Luminaries, including federal court of appeals judges and law school deans, have lamented the intolerance for free speech currently being exhibited on university campuses across this country.[2] Judge

[2] Dean Erwin Chemerinsky of California Berkley School of Law has written, "[T]he law of the First Amendment [is] . . . clear and long established. The Supreme Court repeatedly has said that the First Amendment means public institutions cannot punish speech, or exclude speakers, on the grounds that it is hateful or deeply offensive. This includes public colleges and universities." "Hate Speech is Protected Free Speech, Even on College Campuses," *Vox*, Dec. 26, 2017, https://www.vox.com/the-big-idea/2017/10/25/16524832/campus-free-speech-first-amendment-protest (last visited Nov. 30, 2019). *See also* the speech delivered by Judge Raggi of the

Jose Cabranes, who sits on the U.S. Court of Appeals for the Second Circuit and was previously general counsel for Yale University, in a speech that was adapted for publication in the *Wall Street Journal* ("Higher Education's Enemy Within," Nov. 8, 2019), included this observation:

> American colleges and universities have been overwhelmed by a dangerous alliance of academic bureaucrats and student activists committed to imposing the latest social-justice diktats. . . . Indeed, [this alliance is] . . . driving some of the most dangerous developments in university life, including the erosion of the due-process rights of faculty and students, efforts to regulate the 'permissible limits' of classroom discussion, and the condemnation of unwelcome ideas as "hate speech."

This threat comes from all ideological directions.[3] The multi-partisan internet site "Intellectual Dark Web" details numerous examples of invited speakers (primarily conservative- and libertarian-

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Second Circuit at the University of North Carolina Law School found at https://vimeo.com/210832772.

[3] For one summary of the ecumenism of intolerance on campuses, see Conor Friedersdorf, "The Glaring Evidence That Free Speech Is Threatened on Campus," *The Atlantic*, Mar. 4, 2016, https://www.theatlantic.com/politics/archive/2016/03/the-glaring-evidence-that-free-speech-is-threatened-on-campus/471825/ (last visited Nov. 30, 2019).

leaning) who have been "deplatformed" by student protests in recent years, including the libertarian-leaning commentator Ben Shapiro, the African-American journalist Jason Riley, then-CIA director in the Obama administration John Brennan, and the feminist Christina Hoff Sommers.[4] These examples are far from exhaustive.[5]

Surveys underscore that these acts of repression are fueled by student intolerance for the expression of opinions with which they disagree. A Pew Research Center survey in 2015 found that 40% of millennials (the age group largely attending college now) thought that the government should prevent citizens from making public statements that are offensive to minority groups.[6] Gallup conducted a similar

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4 "The Crisis of Free Speech on College Campuses," https://intellectualdarkweb.site/speakers-who-have-been-deplatformed-on-college-campuses/ (last visited Dec. 3, 2019).

5 *See generally* Mary Eberstadt, Primal Screams 26-28 (Templeton Press 2019). For firsthand accounts by a speaker subjected to "shout-downs" on campuses, see Heather MacDonald, "Why Are College Students So Afraid of Me?," *The Wall Street Journal* A15 (Nov. 27, 2019); Heather MacDonald, "The Hysterical Campus," *Quillette*, Sept. 19, 2018, https://quillette.com/2018/09/19/the-hysterical-campus/ (last visited Dec. 11, 2019).

6 https://www.pewresearch.org/fact-tank/2015/11/20/40-of-millennials-ok-with-limiting-speech-offensive-to-minorities/ (last visited Dec. 2, 2019).

survey in 2017 to examine how college students view the First Amendment. The findings included that (1) 53% consider promoting a diverse and inclusive society is more important than protecting free speech rights; (2) 37% believe it is sometimes acceptable to shout down speakers; and (3) 10% think it is sometimes acceptable to use violence to prevent someone from speaking.[7] In a Brookings Institute 2017 survey, 44% of college students responded "no" to the question, "Does the First Amendment protect 'hate speech?'" In response to another question about using the heckler's veto to shut down a controversial speaker, over 50% of the students surveyed thought such behavior was acceptable.[8] Unsurprisingly, another Pew survey in 2019 found that only 25% of Americans consider colleges and universities to be "very" open to a range of opinions and viewpoints, while 43%, 19%, and 12%,

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[7] https://medium.com/informed-and-engaged/8-ways-college-student-views-on-free-speech-are-evolving-963334babe40 (last visited Dec. 4, 2019).

[8] "Views among college students regarding the First Amendment: Results from a new survey," https://www.brookings.edu/blog/fixgov/2017/09/18/views-among-college-students-regarding-the-first-amendment-results-from-a-new-survey/ (last visited Dec. 5, 2019).

found them to be "somewhat," "not too," and "not at all" open, respectively.[9] In other words, almost 75% of Americans do not consider the institutions that are supposed to serve as the incubator of intellectual inquiry and growth to be "very" open to the exchange of differing viewpoints.

Sadly, with some notable exceptions, university officials have often fostered, rather than corrected, these incursions on campus speech. The Foundation for Individual Rights in Education ("FIRE") publishes an annual report on the state of free speech on college and university campuses. In its 2020 report, FIRE reported that 24.2% of the 471 colleges and universities it surveyed "maintained at least one severely restrictive policy [indicating] . . . that it both clearly and substantially restricts protected speech."[10] Another 63.9% had policies that impose restrictions that are less substantial but that "are either

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9 https://www.people-press.org/2019/06/19/the-climate-for-discourse-around-the-country-on-campus-and-on-social-media/ (last visited Dec. 2, 2019).

10 "The State of Free Speech on our Nation's Campuses," at 2, https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2019/12/04102305/FIRE-Spotlight-On-Speech-Codes-2020.pdf (last visited Dec. 9, 2019).

clear restrictions on a narrower range of expression or policies that, by virtue of vague wording, could too easily be applied to restrict protected expression."[11] FIRE determined that only 10.6% of the campuses it surveyed had policies that do not seriously threaten campus expression.[12]

These surveys by hold true for the experience of *Amicus* Young Americans for Liberty and its affiliated students and clubs. For example,

- In 2019 alone, the free speech and assembly of YAL groups has been shut down by college administrators 23 times.
- At Portland Community College (Oregon), administrators restricted speech and assembly by requiring students to fill out paperwork before engaging in any First Amendment activities in the public areas of campus and the wear tags labeled "Expressive Conduct," apparently to warn others. (After challenge by YAL and FIRE, these policies have recently been rescinded by the school.)

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[11] *Id.*

[12] *Id.*

- At Jones County Junior College (Mississippi), YAL has been required to sue because administrators require students to get advance approval from a campus official to speak and assemble in open and public spaces on campus. Officials were enforcing this rule even though the administrator from whom permission had to be sought was on personal leave.[13]
- And at Santa Ana College (California), YAL students held a "free speech ball" event in which students were invited to write on an oversized beach ball. Campus administrators disapproved of some of the messages written by other than YAL students, labeling them as hate speech, and required YAL to deflate the ball and end the event. The officials then charged the students with violations of the student code of conduct regulating "obscenity and hate speech." (These charges have recently been dropped and the code provisions revised after being challenged by YAL and FIRE.)[14]

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[13] https://www.thefire.org/lawsuit-campus-police-said-he-shouldve-been-smarter-than-to-exercise-his-first-amendment-rights-now-hes-suing/ (last visited Dec 10, 2019).

[14] https://www.thefire.org/cases/santa-ana-college-deflated-free-speech-ball-leads-to-critical-speech-code-reforms/ (last visited Dec 10, 2019).

The federal courts have repeatedly addressed and struck down public university "speech codes" that give officials discretion to restrict or prohibit speech based on its "objectionable" content. For example, in *McGlone v. Bell*, 681 F.3d 718 (6th Cir. 2012), the court reviewed the university's policy applied to nonaffiliated individuals speaking on certain parts of the university that were considered traditional public fora. The court held that the policy's requirements for advance notice, disclosure of speaker identity, and content of the speech were unconstitutional restrictions on free speech.

In *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008), the Third Circuit struck down the university's "sexual harassment" policy. It noted that the greater lenity allowed for speech and assembly restrictions in elementary and secondary schools does not apply on university campuses; that campus "[s]peech codes are disfavored under the First Amendment because of their tendency to silence or interfere with protected speech;" and that overbreadth doctrine should be applied to strike down policies that, on their face, target subjective motivations of the speaker or listeners due to the "objectionable" content of the

speech. *Id.* at 313-20 (citing, *inter alia*, *Healy*, *Tinker*, and *Saxe v. State College Area Sch. Dist.,* 240 F.3d 200 (3d Cir. 2001) (Alito, J.)).

In *Justice for All v. Faulkner*, 410 F.3d 760 (5th Cir. 2005), the court invalidated the university's literature distribution policy, which required that all printed material distributed on campus include the name of a university-affiliated person or organization responsible for the distribution. The court held that the policy was an unconstitutional restriction on anonymous speech in a designated public forum.

In *UWM Post v. Bd. of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991), the court struck down a university system's rule that prohibited students from using epithets that were "discriminatory" to particular individuals and intended to "demean" such individuals and create a "hostile" educational environment. The court determined that the policy, as written, was overbroad, vague, and did not satisfy what was required by the fighting words doctrine. The court concluded that "freedom of speech is almost absolute in our land and the only restriction the fighting words doctrine can abide is that based on the fear of violent reaction. Content-based prohibitions . . . , however well intended, simply cannot survive the screening which our Constitution

demands."[15] *Id.* at 1181.

It is not uncommon for cases litigated at the district court level to result in colleges or universities deciding to revise the contested policy, providing tacit acknowledgement that the previous version violated the law. *See, e.g., Univ. of Cincinnati Chapter of Young Americans for Liberty v. Williams,* 2012 WL 3636932 (S.D. Ohio, Aug. 22, 2012); *Sklar v. Clough*, 2008 WL 11406009 (N.D. Ga. 2008); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575 (S.D. Tex. 2003). Unfortunately, some public colleges and universities, after litigation requiring them to change their speech code, have doubled back, reinstating some or all of the objectionable restrictions at a later date[16] or replacing them with

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[15] Other cases invalidating speech codes due to their overbroad "harassment" and the potential for selective viewpoint discrimination include *McCauley v. Univ. of V.I.*, 618 F.3d 232, 250, 252 (3d Cir. 2010); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1185 (6th Cir. 1995); *Coll. Republicans v. Reed*, 523 F. Supp. 2d 1005, 1021 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 872 (N.D. Tex. 2004); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 370-71 (M.D. Pa. 2003); and *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 866 (E.D. Mich. 1989).

[16] The authors of a "Volokh Conspiracy" blog reported that "Pennsylvania's Shippensburg University settled a lawsuit in 2004, only to reinstate some of those codes that led to a second lawsuit, settled in 2008. . . . In 2003, FIRE coordinated a lawsuit against

other restrictions that have the same, impermissible effect.[17]

These various actions by public universities have caused organizations of various ideological bents to raise the tocsin about contemporary attitudes on campus toward freedoms of speech and association. The Goldwater Institute summarizes as follows:

> [C]hallenge[s] to campus free speech [are] . . . now widespread. Surveys show that student support for restrictive speech codes and speaker bans is at historic heights. Violent protests have shut down speakers on campuses across the country, and administrators are not standing up to protect speakers' and students' First Amendment rights. As both a deeply held commitment and a living tradition, freedom of speech is dying on our college campuses and is increasingly imperiled in society at large.[18]

The National Coalition Against Censorship concurs:

California's Citrus College over its free speech zones, which its board resolved by rescinding the policies; in 2013, FIRE would sue them *again* for the same type of restrictive policy, a case they settled." https://reason.com/2018/09/12/speech-code-hokey-pokey-how-campus-speec/ (last visited Dec. 2, 2019).

[17] The "Volokh Conspiracy" authors reported that "California's Peralta Community College District settled a 2010 lawsuit about interfering with student prayer, then immediately considered a restrictive "free speech zone" policy calculated to achieve the same end." *Id.*

[18] https://goldwaterinstitute.org/campus-free-speech/ (last visited Nov. 29, 2019).

> The practice [of limiting speech] is most egregious on college campuses . . . . For example, . . . [at] Colorado Mesa University, how is it possible for a student body of nearly 10,000 to express their ideas freely on a thumb-size patio of free speech? . . . . [S]tudents at Modesto Junior College were barred from handing out copies of the U.S. Constitution on Constitution Day. Do students, faculty, staff, and administrators value the right of not being offended more than the right to free speech?[19]

And the American Association of University Professors in its statement "On Freedom of Expression and Campus Speech Codes" concluded as follows:

> Freedom of thought and expression is essential to any institution of higher learning. Universities and colleges exist not only to transmit knowledge[,] . . . . they interpret, explore, and expand that knowledge by testing the old and proposing the new. This mission guides learning outside the classroom quite as much as in class . . . . In the process, views will be expressed that may seem to many wrong, distasteful, or offensive. Such is the nature of freedom to sift and winnow ideas. . . .
>
> To some persons who support speech codes, measures . . . relying . . . on suasion rather than sanctions . . . may seem inadequate. But freedom of expression requires toleration of "ideas we hate," as Justice Holmes put it. . . . Free speech is not simply an aspect of the educational enterprise . . . . It is the very precondition of the academic enterprise itself.[20]

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[19] https://ncac.org/news/blog/top-40-threats-to-free-speech-right-now (last visited Dec. 3, 2019).

[20] https://www.aaup.org/report/freedom-expression-and-campus-speech-codes (emphasis added) (last visited Nov. 29, 2019).

This convergence from organizations with widely different viewpoints on many social issues confirms the need to firmly and unambiguously reinforce the constitutional guarantees of free speech and assembly and to remind those in positions of authority on public colleges and universities of their responsibility to foster and protect these foundational freedoms.

III. Section 1983 Immunity Must Be Reasonable in the Particular Circumstances, and University Policy Making and Ratification Is a Very Different Context Than Split-Second Police Actions

The Supreme Court has established a uniform, two-pronged standard for application of qualified immunity: (a) whether an applicable right has been violated; and (b) if so, whether that right was clearly established at the time of the violation. *See, e.g.*, *D.C. v. Wesby*, 138 S. Ct. 577, 589 (2018); *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015). At the same time, and in part due to the broad range of circumstances in which the standard is applied, the Supreme Court has emphasized that, when examining the "clearly established" prong, courts must be cognizant of the particular circumstances involved. *See Wesby*, 138 S. Ct. at 590; *White v. Pauly*, 137 S. Ct. 548, 552 (2017); *Mullenix*, 136 S.

Ct. at 308; *Estate of Walker v. Wallace*, 881 F.3d 1056, 1061 (8th Cir. 2018) ("[c]ontext is critical"). The standard looks to reasonableness measured objectively: what would a reasonable person have known and done in the circumstances. *See Mullenix*, 136 S. Ct. at 308; *Estate of Walker*, 881 F.3d at 1060.

Many of the Supreme Court's §1983 decisions have arisen in the context of police officers making arrests, with the key consideration being whether it was clearly established that a reasonable officer, in the circumstances, had probable cause. *See, e.g.*, *Wesby*, 138 S. Ct. at 592; *Anderson v. Creighton*, 483 U.S. 635 (1987). The Supreme Court's most recent decision in this area, *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), provides a helpful roadmap to illustrate that an arrest scene involves very different circumstances than a university trustee reviewing and approving campus speech policies, the situtation presented here. *See A.N. ex rel. Ponder v. Syling*, 928 F.3d 1191, 1198-99 (10th Cir. 2019) (finding that an equal protection challenge, to be clearly established, needs lesser overlap in prior precedent than a probable cause for arrest situation).

The Supreme Court in *Nieves* set out seven characteristics of its prior cases for why probable cause should typically (but not always) insulate an arresting officer from §1983 liability, even when the arrestee argues that the officer was retaliating for the arrestee's exercise of protected speech. Those characteristics helpfully distinguish the situation presented here.

1. <u>Causal Connection.</u> The *Nieves* Court first noted that cases alleging an arrest in retaliation for free speech for which there is also probable cause "present a tenuous causal connection between the defendant's alleged [retaliatory] animus and the plaintiff's injury." 139 S. Ct. at 1723 (quoting *Reichle v. Howards*, 566 U.S. 658, 668 (2012)). In other words, in "retaliatory arrest" cases, probable cause for the arrest on grounds independent of the alleged retaliation for the protected speech normally breaks the "but for" connection needed to prove retaliatory causation.

This is not true for campus free speech policies. If such policies are defective, they have a direct causal connection to the violation of students' free speech rights.

2. Speech Content. The *Nieves* Court next noted that the §1983 inquiry also becomes "complex" in retaliatory speech cases "because protected speech is often a 'wholly legitimate consideration' for officers when deciding whether to make an arrest." 139 S. Ct. at 1724 (quoting and citing *Reichle*, 566 U.S. at 668, and *Lozman v. Riviera Beach*, 138 S. Ct. 1945, 1953 (2018).

Of course, in an open forum situation on campus, if the content of the speech is a consideration, there is automatically a clear constitutional violation absent compelling countervailing interests. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). And even in limited public forums, the use of content to regulate is carefully circumscribed. *See, e.g.*, *Widmar*, 454 U.S. at 268-69.

3. Split-Second Judgments. The Supreme Court in *Nieves*, as it has in many previous decisions, also put great stress on the fact that police officers "frequently must make 'split-second judgments' when deciding whether to arrest, and the content and manner of a suspect's speech may convey vital information—for example, if he is 'ready to cooperate' or rather 'present[s] a continuing threat.'" 139 S. Ct. at 1724

(quoting *Lozman*, 136 S. Ct. at 1953, and citing *Wesby*, 138 S. Ct. at 587-88).

This important factor also is not present in a university trustee policy setting. Instead, a reasonable trustee when reviewing free speech policies is in a setting that allows for calm and careful deliberation. Moreover, it must be assumed that the reasonable trustee of a public university has access to legal counsel. And, of course, it should be well known to every reasonable trustee that First Amendment rights are among our most sacred and that colleges and universities are places in which free speech and assembly are most important. "Indeed, those who govern and administer the University, above all, should most clearly recognize the peculiar importance of the University as a 'marketplace of ideas' and should insist that their policies and regulations make adequate provision to that end." *Roberts,* 346 F. Supp. 2d at 863.

4. Evidentiary Weight. The *Nieves* Court next explained that the presence or absence of probable cause for a challenged arrest will "provide weighty evidence" of retaliatory intent by the officer, one way or the other. 139 S. Ct. at 1724. Nevertheless, the Court crafted a new

exception to the rule immunizing an officer if there were probable cause when the arrestee can show that arrests were not typically made by officers in similar situations. *Id.* at 1727.

Again, when a trustee reviews or adopts a campus speech policy, the situation is very different. A trustee is not presented with a multifaceted situation requiring a balancing of different, independent rationales for action. The reasonable trustee has a single-minded focus to assure that First Amendment freedoms are not improperly curtailed and that any limitations are fully justified by, and narrowly tailored to, legitimate, content-neutral interests.

5. <u>Criminal Activity.</u> Of course, as the *Nieves* Court next pointed out, an officer when making an arrest is assessing "potentially criminal conduct." *Id.* at 1724. This raises the stakes and the need to protect police officers, as they must act swiftly to apprehend and stop criminal behavior and there is a strong public interest in allowing them to do so.

No such interests come into play when trustees consider campus free speech policies. The policies deal with regulation of cherished freedoms, not criminal behavior that is likely to have adverse

consequences on innocent individuals. Indeed, the Supreme Court long ago established that free speech, even if objectionable to many or most of its listeners, must be protected:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

Terminiello v. Chicago, 337 U.S. 1, 4 (1949); *accord Snyder v. Phelps*, 562 U.S. 443 (2011) (finding speech including posters stating ”America is Doomed,” “Semper Fi Fags,” “God Hates Fags,” “Pope in Hell,” and “You’re Going to Hell” to be constitutionally protected).

6. <u>Undue Apprehension.</u> Related to the need for prompt action when potentially criminal activity is involved, the *Nieves* Court next observed that it is important to “ensure that officers may go about their work without undue apprehension of being sued,” noting that police

make approximately 29,000 arrests every day—a dangerous task that requires making quick decisions in "circumstances that are tense, uncertain, and rapidly evolving." 139 S. Ct. at 1725 (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989).)

Trustees when reviewing free speech policies are not engaging in a "dangerous task"—unless the danger is understood to be that they may improperly restrict the free speech and assembly rights of students and others. That trustees lack a "safe harbor" like police enjoy with the probable cause standard for arrests cannot reasonably give them "undue apprehension" when they are performing their policy work. Indeed, the fact that such work can be done by them and other high-ranking officials in a deliberative fashion, on their own schedules, underscores that, in their circumstances, trustees have little excuse to approve unconstitutional policies.

7. Unflinching and Evenhanded Enforcement. Finally, the *Nieves* Court expressed concern that, if a subjective test were used, it might put a pall over officers and lead to unequal enforcement throughout the country:

> As a result, policing certain events like an unruly protest would pose overwhelming litigation risks. Any inartful turn

> of phrase or perceived slight during a legitimate arrest could land an officer in years of litigation. Bartlett's standard would thus "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2nd Cir. 1949) (Learned Hand, C.J.). It would also compromise evenhanded application of the law by making the constitutionality of an arrest "vary from place to place and from time to time" depending on the personal motives of individual officers. *Devenpeck [v. Alford]*, 543 U.S. [146,] at 154 [(2004)]. Yet another "predictable consequence" of such a rule is that officers would simply minimize their communication during arrests to avoid having their words scrutinized for hints of improper motive—a result that would leave everyone worse off. *Id*. at 155.

139 S. Ct. at 1725.

We do not argue for a subjective test for university trustees. But we do note that, once again, the concerns that motivate the Court in §1983 actions challenging police arrests are not present for trustees adopting campus policies: trustees are not responding quickly to dangerous and rapidly evolving situations; they are not directly interacting with the public; they are deliberative when performing their duties properly; and they may seek counsel before acting. Trustees are applying constitutional standards that are uniform throughout the country, and they have easy access to court decisions, not just issued by their own circuit court, but also those issued by other courts, such that

they can reasonably and readily be held to know when there is a general consensus of views about relevant First Amendment issues. *See Wesby*, 138 S. Ct. at 589 ("robust consensus" of decisions); *Lane v. Nading*, 927 F.3d 1018, 1022 (8th Cir. 2019).

Conclusion

When applying §1983 principles to trustees or other high-ranking officials of a public college or university who draft, review, or approve free speech and assembly policies, the liberality often shown police in making split-second judgment calls is inappropriate. Instead, trustees should be held to the highest standards. If performing their job correctly, they are dealing, in a deliberative and protective fashion, with First Amendment rights that are their institutions' life blood. Trustees have the time and resources to get it right, the first time, and they should be held liable when they do not.

Respectfully submitted,
this 16th day of December, 2019,

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Certificate of Compliance

I certify that this Brief complies with the type-volume limitations of F.R.A.P. 32(a)7(B)(i) and F.R.A.P. 29(a)(5). Exclusive of the exempted portions, this Brief contains 5,448 words, including footnotes, in 14 point Century Schoolbook font. This total was calculated with the Word Count function of Microsoft Word the latest update to Office 365.

Pursuant to Circuit Rule 28(A)(h)(2), I further certify that the brief has been scanned for viruses, and the brief is virus free.

/s/ Steven W. Fitschen

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Certificate of Service

On December 16, 2019, I filed this Brief with the Clerk of the Eighth Circuit Court of Appeals using the CM/ECF system, which will send notice of the electronic filing to all Counsel for the Parties, all of whom are registered users.

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