STATE OF RHODE ISLAND **SUPREME COURT**

WILLIAM FELKNER,
Plaintiff / Appellant,

v.

RHODE ISLAND COLLEGE, **JOHN NAZARIAN**, individually and in his official capacity as President of Rhode Island College; **CAROL BENNETT-SPEIGHT**, individually and in her official capacity as Dean of the School of Social Work; **JAMES RYCZEK**, individually;

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The Foundation for Individual Rights in Education ("FIRE") is a nonpartisan, nonprofit, tax-exempt education and civil liberties organization dedicated to defending student and faculty rights at our nation's institutions of higher education. Since its founding in 1999, FIRE has effectively and decisively defended constitutional liberties including freedom of speech, legal equality, due process, religious liberty, and sanctity of conscience on behalf of students and faculty nationwide via legal and public advocacy. FIRE believes that if our nation's universities are to best prepare students for success in our democracy, the law must remain clearly on the side of student and faculty rights.

The National Association of Scholars ("NAS") is a network of scholars and citizens united by a commitment to academic freedom, disinterested scholarship, and excellence in American higher education. NAS upholds the principles of academic freedom that include faculty members' and students' freedom to pursue academic research; their freedom to question and to think for themselves; and their freedom from ideological imposition. These freedoms are means toward the pursuit of truth that is essential to higher education. NAS regularly publishes studies that examine curricula and other aspects of higher education policy and practice; files friend-of-the-court briefs in legal cases, defending freedom of speech and conscience, and the civil rights of educators and students; and gives testimony before congressional and legislative committees to engage public support for worthy reforms.

The Cato Institute ("Cato") was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums,

Felkner's First Amendment rights were not violated when he was compelled to lobby against his own beliefs. Third, the trial justice erroneously concluded that the issue of qualified immunity was moot; however, qualified immunity remains a live issue because the trial justice improperly decided Felkner's constitutional claim.

ARGUMENT

I. The First Amendment Does Not Allow the Government to Compel Individuals to Lobby Against Their Beliefs.

The Supreme Court of the United States has consistently held that the government cannot compel an individual to lobby in support of a position with which he or she disagrees. *See, e.g.*, *United Foods, Inc.*, 533 U.S. at 410. The trial justice failed to properly review the evidence and erroneously concluded that Felkner's First Amendment rights were not violated even though he was compelled to lobby against his beliefs. Because the trial justice incorrectly decided the constitutional issue, qualified immunity remains a live issue. *See Felkner v. R.I. College,* No. PC 2007-6702, slip op. (R.I. Super. Ct. 2015), at 35 ("Opinion").

A. The Trial Justice Erred in Finding That Felkner's First Amendment Rights Were Not Violated.

1. The government cannot compel an individual to lobby in support of a position with which he or she disagrees.

The First Amendment prohibits government actors from compelling private citizens to express views with which they disagree. *United Foods, Inc.*, 533 U.S. at 410 ("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 Boston*, 515 U.S. 557, 573 (1995) (government "may not compel affirmance of a belief with which the speaker disagrees."). This prohibition on forced speech encompasses the forced expression of political views. *See Wooley v. Maynard*, 430 U.S.

705, 714 (1977) ("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.").

The First Amendment binds public colleges and universities and protects their students. *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981). Accordingly, public educational institutions cannot compel a student to endorse a particular political opinion or punish a student for refusing to endorse or adopt a political stance. *See W. Va. State Board of Educ. v. Barnette,* 319 U.S. 624, 642 (1943) (holding that compulsory salute and pledge to the flag required of public grade school students "transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is

of the nonmoving party." *Morabit v. Hoag*

speech or suffering a grade reduction. *See Axson-Flynn,* 356 F.3d at 1290; *Id.* at ¶ 28 (“I finally agreed to let him do that [the lobbying project by himself] but advised him that it would adversely affect his grade because it would not be fulfilling an important element of the course requirement; group effort.”). Eventually, Felkner proceeded with the group assignment with participants who were not enrolled in the class; perhaps unsurprisingly, his failure to perform in accordance with class expectations resulted in a grade reduction. *Id*. at ¶ 32. Ryczek then told Felkner that his refusal to lobby for the position chosen by the school would result in “not be[ing] able to meet the academic requirements necessary to obtain a degree,” PX 32. This was confirmed by Felkner’s expert witness who testified that Felkner had to stay in the class and lobby for the required perspective in order to continue his academic career in social work at RIC. *See* PX 94 at 108–09.

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the issue of qualified immunity is not moot. Further, because the facts show that Felkner was penalized for refusing to lobby against his personal beliefs, Defendants violated clearly established law.

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal citation omitted). An official is not entitled to qualified immunity when a plaintiff's allegations constitute a violation of a constitutional right, and that right was clearly established at the time of the alleged violation. *Id.* at 232. The Supreme Court has explained that, for the purposes of qualified immunity, a constitutional right is clearly established when its contours are made sufficiently clear so that any reasonable public official would understand what conduct violates the right. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). The unlawfulness of the conduct must be apparent in light of pre-existing law, *Hope v. Pelzer*, 536 U.S. 730, 739 (2002), and there need not be "a case directly on point"—precedent need only place the "statutory or constitutional question beyond debate." *See Ashcroft*, 563 U.S at 741.

The First Amendment rights of students at public colleges has been established by decades of Supreme Court precedent. *See, e.g.*, *Healy v. James*, 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."). For over 50 years, the Supreme Court has emphasized that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). These cases affirm that a

especially unsuitable given that Felkner is in a master's program, a course of study more advanced than that undertaken by undergraduates. The trial justice further analyzed Felkner's claim under a framework appropriate for a school's regulation of curricular speech—speech that is not disseminated outside the classroom in a context in which the student would be presumed to be speaking only for himself. As discussed above, Felkner was forced to choose between lobbying in favor of a position with which he disagreed or receiving a grade reduction. He was, therefore, effectively punished for not *publicly* espousing an opinion—not for simply refusing to submit to directions regarding curricular, in-class speech heard only by his professors and peers.

A. The Trial Justice Improperly Relied on *Hazelwood v. Kuhlmeier*.

The trial justice correctly noted that the right to freedom of expression is not unlimited. Opinion at 17. When determining whether expression falls outside the boundaries of First Amendment protection, however, it is critically important to use the framework established for the circumstances in question. The trial justice framed her discussion of the limits of First Amendment protections using *Hazelwood*, writing: "It is well settled that 'educators do not offend the First Amendment . . . so long as their actions are reasonably related to legitimate pedagogical concerns.' *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)." To base the court's legal analysis on this standard, however, is to ignore that the context of *Hazelwood* is distinct from the circumstances in this case, and that the proper legal framework for analyzing Felkner's speech is broader than that of *Hazelwood*.

1. *Hazelwood* involved speech that could potentially be viewed as bearing the school's imprimatur.

The text omitted in the trial justice's quotation is significant. More completely quoted, the Supreme Court held "that educators do not offend the First Amendment *by exercising editorial control over the style and content of student speech in school-sponsored expressive*

activities so long as their actions are reasonably related to legitimate pedagogical concerns." 484 U.S. 260, 273 (1988) (emphasis added). In *Hazelwood*, a public high school principal restricted the topics to be published in a "newspaper produced as part of the school's journalism curriculum." 484 U.S. at 262. The administrative control over speech authorized by *Hazelwood* is not universal—it applies in part because "members of the public might reasonably perceive to bear the imprimatur of the school." *Id.* at 271. Further, the Supreme Court itself has observed that *Hazelwood* controls only cases involving speech that could be mistaken for having the school's stamp of approval, and reaches no further. *Morse v. Frederick*, 551 U.S. 393, 405 (2007) ("*Kuhlmeier* does not control this case because no one would reasonably believe that Frederick's banner bore the imprimatur of the school.").

In sharp contrast, the speech RIC sought to compel from Felkner *did* reflect the administrator's views, and Felkner was understandably concerned that if he were to publicly lobby a legislative body in favor of certain positions, his testimony would be viewed as having *his* stamp of approval. The facts of the case put Felkner in essentially the same position as Hazelwood School District—defending himself against the potential of the public's construing the speech as bearing his imprimatur (reasonably, in Felkner's case). Accordingly, the school's interest in "exercising editorial control over the style and content of student speech in school-sponsored expressive activities," as the trial justice fails to specify, is very different from whatever interest RIC may have in compelling students to publicly promote certain ideas, particularly as Felkner was required to speak to state lawmakers.

2. *Hazelwood* involved authors and audiences who were children.

The *Hazelwood* Court also explicitly justified its holding in large part on the young age of the newspaper's audience and reserved the question of whether its holding should be applied

in the context of higher education. It is therefore not an appropriate standard to use in this case, which involves an adult university student speaking only to other adults.

The *Hazelwood* Court relied on the notion that a high school administrator "must be able to take into account the emotional maturity of the intended aud

Southworth, Justice David Souter observed that "cases dealing with the right of teaching institutions to limit expressive freedom of students ha[d] been confined to high schools, . . . whose students and their schools' relation to them are different and at least arguably distinguishable from their counterparts in college education." 529 U.S. 217, 238 n.4 (2000) (Souter, J., concurring in the judgment). The United States Court of Appeals for the Third Circuit explicitly wrote in *DeJohn v. Temple University* that a university administrator is "granted *less leeway* in regulating student speech than are public elementary or high school administrators." 537 F.3d 301, 316 (3d Cir. 2008) (emphasis in original). The Third Circuit similarly wrote in *McCauley v. University of the Virgin Islands*:

> At a minimum, the teachings of *Tinker*, *Fraser*, *Hazelwood*, *Morse*, and other decisions involving speech in public elementary and high schools, cannot be taken as gospel in cases involving public universities. Any application of free speech doctrine derived from these decisions to the university setting should be scrutinized carefully, with an emphasis on the underlying reasoning of the rule to be applied.

618 F.3d 232, 247 (3d Cir. 2010).

Because the interests and responsibilities of high school students and administrators differ so greatly from the rights and responsibilities of college students and administrators, respectively, *Hazelwood* does not provide the appropriate standard for assessing whether restrictions or mandates on Felkner's speech violated his rights under the First Amendment.

B. The Cases Cited by the Trial Justice to Support Her *Hazelwood* Analysis Are Similarly Distinguishable.

In continuing her analysis, the trial justice cites *Brown v. Li*, 308 F.3d 939, 952 (9th Cir. 2002), in writing:

> [S]pecifically, the standard for evaluating a graduate student's First Amendment claim stemming from curricular speech "balances a university's interest in academic freedom and a student's First Amendment rights. It does not immunize the university altogether from First Amendment challenges but, at the same time, appropriately defers to the university's expertise in defining academic standards and teaching students to meet them."

Opinion at 18. The trial justice also relied on a lengthy excerpt from *C.N. v. Ridgewood Board of Education*, 430 F.3d 159, 187 (3rd Cir. 2005), explaining that requiring students to make arguments they don't agree with is sometimes necessary to further the school's "curricular mission." But neither case provides the appropriate framework for assessing Felkner's claims.

While it is true that curricular speech mandated as part of a class assignment may involve voicing opinions different from the students' personal views, cases involving such curricular speech are distinguishable from Felkner's because RIC sought to compel him to speak outside the classroom. As discussed above, the lobbying requirement imposed on Felkner and his peers created the risk that people who were not involved with the class would view Felkner's speech as his own opinions—a reasonable assumption, given that unpaid lobbyists typically believe in the positions they advocate for publicly.

Brown and *C.N.* did not involve the same risk. *Brown* centered on the University of California at Santa Barbara thesis committee's refusal to approve for filing in the university's library a "Disacknowledgments" section of his thesis, which contained criticism of UCSB administrators. At worst, the plaintiff in *Brown* would have to voice his disapproval of those administrators in a forum other than his thesis. He was not compelled, for example, to voice approval of the administrators, only to omit his remarks from a particular piece written as part of the school curriculum.

In *C.N.*, the Third Circuit affirmed a grant of summary judgment to a school district that had allegedly required students to participate in a survey about students' drug use, sexual activity, and other personal matters. 430 F.3d at 190, 161. As the court notes, however, "the information was disclosed in a format that did not permit individualized detection." *Id.* at 189.

lawsuits in defense of student and faculty First Amendment rights.[3] Eight have resulted in settlements favorable for plaintiffs, and one resulted in a favorable court decision. (Four cases are ongoing.) In total, these cases have secured over $400,000 in fees and policy changes benefiting over 250,000 students.[4]

Public campus administrators nationwide will watch this Court's decision closely. If the trial justice's decision is allowed to stand, public college administrators will be presented with a road map for an end-run around decades of First Amendment jurisprudence governing student speech rights. To ensure that the "marketplace of ideas"[5] remains vibrant and that administrative efforts at censorship fail, this Court should reaffirm the importance and the breadth of First Amendment protections for public college students.

A. Despite Well-Established Law, Student First Amendment Rights Are Violated on Public Campuses Nationwide.

The Supreme Court has repeatedly and emphatically affirmed the vital importance of free expression in public higher education. *See*, *e.g.*, *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 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 (1967) ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'") (internal citation omitted).

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[3] Catherine Sevcenko and Katie Barrows, *FIRE's Stand Up For Speech Litigation Project Turns Two*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (July 1, 2016), https://www.thefire.org/fires-stand-up-for-speech-litigation-project-turns-two.
[4] *Id.*
[5] *Keyishian v. Bd.*

Because public universities play a “vital role in a democracy,” the Court has recognized that silencing speech in that context “would imperil the future of our Nation.”

12, 2012). Making this free speech quarantine still more objectionable, UC required students to provide a minimum of five working days' notice prior to staging any "demonstration, picketing, or rally."[6] Citing the minuscule space allotted for "free speech" and the fact that the registration requirement essentially prohibited spontaneous speech, the court found the policy to be "anathema to the nature of a university" and enjoined the university from enforcing it. *Id.* at *26–27.

These decisions are just two in a virtually unbroken string of cases affirming the critical importance of First Amendment protections for college students. *See, e.g.*, *McCauley v. Univ. of the Virgin Islands*, 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. Michigan Univ.*, 55 F.3d 1177 (6th Cir. 1995) (declaring university discriminatory harassment policy facially unconstitutional); *Univ. of Cincinnati Chapter of Young Americans for Liberty v. Williams*, No. 1:12-cv-155 (S.D. Ohio Jun. 12, 2012) (invalidating "free speech zone" policy); *Smith v. Tarrant Cnty. College Dist.*, 694 F. Supp. 2d 610 (N.D. Tex. 2010) (finding university "cosponsorship" policy to be overbroad); *Coll. Republicans at San Francisco 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"

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[6] *See* S.D. Lawrence, *U Cincinnati Free Speech Restrictions Struck Down in Court*, EDUC. NEWS (June 19, 2012), *available at* http://www.educationnews.org/higher-education/u-cincinnati-free-speech-restrictions-struck-down-in-court.

events unconstitutional); *Booher v. Bd. of Regents, Northern Ky. Univ.*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. Jul. 21, 1998) (finding university sexual harassment policy void for vagueness and overbreadth); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wisconsin Sys., 774 F. Supp. 1163 (E.D. Wis. 1991)* (declaring university racial and discriminatory harassment policy facially unconstitutional); *Doe v. Univ. of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989) (enjoining enforcement of university discriminatory harassment policy).

Despite the clarity of the legal precedent, censorship of student expression on our nation's public campuses is rampant. Unfortunately, as in the instant case, public college professors and administrators too often trample students' rights to free expression.

For one recent example of many, in recent years, Northern Michigan University ("NMU") instructed students not to talk to their peers about "self-destructive" thoughts, including thoughts about self-injury and suicide. After a public outcry, NMU pledged to revise its policies and practices, but st

his fellow students on September 17, 2013—Constitution Day.[8] Van Tuinen was informed by MJC staff that he was required to fill out an application to use the college's "free speech area" five days in advance.[9] After the college refused to revise its policy, Van Tuinen filed a First Amendment lawsuit.[10] Only after being forced to answer for its censorship in federal court did MJC recognize Van Tuinen's rights, settling the case by abandoning its free speech zone and paying him $50,000 in February 2014.[11]

In addition to quarantining expressive activity to isolated areas on campus, public colleges frequently disregard the First Amendment in a misguided attempt to rid campuses of protected expression. This is particularly true when students engage in speech that administrators subjectively deem "unbecoming," illustrating just how dangerous the trial justice's reasoning would be if allowed to stand by thi

"puff piece."[13] For this exchange, Myers was charged with "disruptive behavior," placed on interim suspension, ordered to vacate his dormitory, and banned from campus.[14] After FIRE informed Oswego that Myers' email constituted protected speech,[15] the charges were dropped.[16] Were the trial justice's rationale adopted, Oswego could justify its otherwise unconstitutional punishment of Myers' speech by invoking a subjective interpretation of journalistic standards of professionalism.

These recent examples are blatant First Amendment violations, prohibited by decades of precedent, but they represent just a few of the incidents reported to FIRE in recent years.[17] The trial justice's opinion, if allowed to stand, would grant administrators in Rhode Island vast discretion to censor critical, dissenting, joking, or merely inconvenient speech simply by citing vague, subjective "professional standards." This result would be disastrous for student speech.

B. This Court Must Act to Protect the First Amendment Rights of Public College Students.

The routine infringement of student First Amendment rights is having a profound and devastating impact on campus inquiry. In a 2010 survey, the Association of American Colleges and Universities found that just 30 percent of students agree that it is safe to hold unpopular

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[13] William Creeley, *Journalism Student Suspended for Offending Hockey Coaches*, HUFFINGTON POST (Nov. 14, 2012, 11:06 AM), http://www.huffingtonpost.com/will-creeley/suny-oswego-journalism-alex-myer_b_2121906.html.
[14] Glenn Coin, *SUNY Oswego president "heart sick" over case of student suspended for misrepresentation*, SYRACUSE ONLINE (Nov. 16, 2012, 3:23 PM), *available at* http://www.syracuse.com/news/index.ssf/2012/11/suny_oswego_president_heartsic.html.
[15] *See* Letter from Peter Bonilla to State University of New York at Oswego President Deborah F. Stanley, Oct. 26, 2012, *available at* http://thefire.org/article/15094.html.
[16] Glenn Coin, *How an email to three college coaches led to a near suspension for SUNY Oswego student*, SYRACUSE ONLINE (Nov. 13, 2012, 8:24 AM), *available at* http://www.syracuse.com/news/index.ssf/2012/11/how_an_email_to_three_college.html.
[17] *See* Greg Lukianoff, M AM M f S S AN T

views on campus.[18] As discussed above, the Supreme Court has continually and consistently emphasized that the freedom for students to explore and express ideas is vital to the health of our democracy. *Sweezy*, 354 U.S. at 250. In the instant case, Rhode Island College—like too many colleges nationwide—decided to ignore long-established law. This Court must remind Rhode Island College that respecting the First Amendment is not optional.

Colleges and universities nationwide are closely watching this case. If the trial justice's error is allowed to stand, would-be censors at colleges across the country will be emboldened to silence merely dissenting, unwanted, unpopular, or unpleasant student speech by emulating RIC's shameful end-run around the First Amendment. If faced with a choice between respecting a student's right to freedom of expression or expelling her, a public college administrator will recall this erroneous result a

C. Ensuring Students' Freedom to Enjoy Their First Amendment Rights Requires a Denial of Qualified Immunity, Which Will Provide Clarity and Predictability to Students, Professors, and Administrators on Public College Campuses.

Students' First Amendment rights will be respected only if this Court sends an unequivocal message to colleges and universities that RIC's disparate treatment of Felkner based on his viewpoints is untenable under well-established and longstanding law. Accordingly, this Court should reject the defense of qualified immunity.

Granting qualified immunity to Defendants would muddle and distort the law in an area where the Supreme Court has spoken with unmistakable clarity. By protecting government officials from frivolous litigation, qualified immunity provides predictability and certainty for these officials in the performance of their official duties. *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). This doctrine also provides a clear avenue for those seeking a remedy when overzealous government officials violate their clearly established constitutional rights. *See id*. In an area where courts have consistently denied qualified immunity to defendants,[19] a grant of qualified immunity here will harm the ability of students, professors, and administrations at public colleges to determine the contours of First Amendment rights.

The importance of providing public colleges and their students with clarity is paramount when the First Amendment freedoms are at stake. This is becausei M w M

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CONCLUSION

For the foregoing reasons, the Court should reverse the Superior Court's judgment and remand this case for further proceedings.

Respectfully submitted,

Foundation for Individual Rights in Education,
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Cato Institute,
By their Attorney:

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CERTIFICATION

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