No. 15–15240

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MELISSA MILWARD, ELYSE UGALDE,
and ASHLEY ROSE,

Plaintiffs-Appellants,

v.

LINDA SHAHEEN, BARBARA BALL, MAUREEN BUGNACKI,
SUDA AMODT, and DISTRICT BOARD OF
TRUSTEES OF VALENCIA COLLEGE, FLORIDA,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida, Orlando Division

BRIEF *AMICI CURIAE* OF FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, STUDENT PRESS LAW CENTER, AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, and WOODHULL FREEDOM FOUNDATION IN SUPPORT OF APPELLANTS AND IN SUPPORT OF REVERSAL.

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CORPORATE DISCLOSURE STATEMENT

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

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure Rule 26.1 and Eleventh Circuit Rule 26.1-1, counsel for *amici* verify that the persons listed below have or may have an interest in the outcome of this case:

1. American Society of Journalists and Authors: Amicus Curiae in support of Plaintiffs-Appellants.
2. Amodt, Suda: Defendant-Appellee.
3. Ball, Barbara: Defendant-Appellee.
4. Bugnacki, Maureen, Defendant-Appellee.
5. Carlson, Bruce: Vice-Chair of the District Board of Trustees of Valencia College.
6. Covington & Burling LLP: Counsel for Plaintiffs-Appellants.
7. Crossman, John: Member of the Valencia College District Board of Trustees.
8. Deal, Kate: Counsel for Plaintiffs-Appellants.
9. Dillingham, Christopher R., II: Former counsel for Plaintiffs-Appellants.
10. District Board of Trustees of Valencia College, Florida: Defendant-

Appellee.

11. Eisele, Justin: Former counsel for Plaintiffs-Appellants.
12. Foundation for Individual Rights in Education: Amicus Curiae in support of Plaintiffs-Appellants.
13. Gagnon Eisele Dillingham, P.A. (formerly Gagnon Eisele, P.A.): Former counsel for Plaintiffs-Appellants.
14. Gagnon, Michael: Former counsel for Plaintiffs-Appellants.
15. GrayRobinson, P.A.: Counsel for Defendants-Appellees.
16. Grulich, Maria: Member of the District Board of Trustees of Valencia College.
17. Hansen, Guillermo: Member of the District Board of Trustees of Valencia College.
18. Henslee, Elizabeth: Former counsel for Plaintiffs-Appellants.
19. Huff, Sara N.: Counsel for Defendants-Appellees.
20. Kudzin, Matthew: Counsel for Plaintiffs-Appellants.
21. Kuntz, Jeffrey T.: Counsel for Defendant-Appellees.
22. Lopez-Cid, Daisy: Member of the District Board of Trustees of Valencia College.
23. Maguire, III, Raymer F.: Member of the District Board of Trustees of Valencia College.

24. Milward, Melissa: Plaintiff-Appellant.
25. Mitchell, Richard E.: Counsel for Defendants-Appellees.
26. Oliver, Lew: Chair of the District Board of Trustees of Valencia College.
27. Pistilli, Christian: Counsel for Plaintiffs-Appellants.
28. Presnell, Hon. Gregory A.: Presiding United States District Judge.
29. Qin, Michael: Counsel for Plaintiffs-Appellants.
30. Rose, Ashley: Plaintiff-Appellant.
31. Shaheen, Linda: Defendant-Appellee.
32. Smith, Hon. Thomas B.: Presiding United States Magistrate Judge.
33. Student Press Law Center: Amicus Curiae in support of Plaintiffs-Appellants.
34. Ugalde, Elyse: Plaintiff-Appellant.
35. Walters, Lawrence G.: Counsel for Amici Curiae in support of Plaintiffs-Appellants.
36. Walters Law Group: Law firm for Amici Curiae in support of Plaintiffs-Appellants.
37. Woodhull Freedom Foundation: Amicus Curiae in support of Plaintiffs-Appellants.

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INTEREST OF AMICI CURIAE[1]

Amici curiae share a common belief in the importance of promoting and protecting constitutional rights, including the rights to freedom of expression and due process of law enjoyed by our nation's public college students. This case is of deep concern to *amici.* Despite the clarity of the jurisprudence governing their rights, students like Melissa Milward, Elyse Ugalde, and Ashley Rose continue to suffer from censorship and unjust punishment. *Amici* believe that to safeguard the public university's traditional and necessary role as the marketplace of ideas, courts must hold public university administrators accountable for violations of student First Amendment rights.

The Foundation for Individual Rights in Education ("FIRE") is a nonpartisan, nonprofit organization dedicated to promoting and protecting civil liberties at our nation's institutions of higher education. FIRE believes that to best prepare students for success in our democracy, the law must remain clearly on the side of robust free speech rights on campus.

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

The Student Press Law Center ("SPLC") is a nonprofit, non-partisan organization which, since 1974, has been the nation's only legal assistance agency devoted exclusively to educating student journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of the United States. The SPLC provides free legal assistance, information and educational materials for student journalists on a variety of legal topics. The SPLC is a recognized authority on the law governing the rights of student speakers, it tracks reported instances of censorship nationally on the www.splc.org website, and its staff of attorneys have authored the most widely used reference book in the field, *Law of the Student Press* (3rd ed. 2008).

The American Society of Journalists and Authors ("ASJA") is the professional non-profit association of independent nonfiction writers. ASJA, founded in 1948, represents 1,200 professional freelance writers and non-fiction book authors. ASJA supports all writers through legal and legislative advocacy.

The Woodhull Freedom Foundation is a non-profit organization that works to advance the recognition of sexual freedom, gender equality, and family diversity. The organization works to improve the well-being, rights, and autonomy of every individual through advocacy, education, and action. Woodhull is concerned that affirmance of the district court's ruling in the instant case could

jeopardize the rights of students to speak out on a wide range of issues, and could further encourage unbridled censorship by university officials.

STATEMENT OF THE ISSUES

1. Whether the district court erred in holding that Plaintiffs' speech was not protected expression, and that Defendants therefore did not violate Plaintiffs' First Amendment rights in taking action against them.

SUMMARY OF ARGUMENT

In an unbroken series of decisions dating back more than a half-century, the Supreme Court of the United States has repeatedly and consistently emphasized the importance of protecting the First Amendment rights of students on our nation's public college campuses. Nevertheless, administrators frequently abandon their obligations under the First Amendment and silence or censor students simply because they disapprove of their constitutionally protected expression—as Defendants did here.

In a misguided attempt to excuse the punishment of student expression at a public college campus, the district court erroneously applied the constitutional analysis *Hazelwood v. Kuhlmeier*, 484 U.S. 260; 108 S. Ct. 562 (1988), a case involving censorship of high school students' curricular speech. In doing so, the court demonstrated a misunderstanding of both *Hazelwood*'s scope and its holding, which rests on concerns about high school students' maturity and the appearance of the school's imprimatur, neither of which is relevant in this case.

If allowed to stand, the district court's opinion would permit administrative censorship of a breathtakingly broad range of protected student expression on public campuses, including any criticism of an institution's curriculum. To avoid

this unconstitutional result and the impermissible chill it would engender, the district court's decision must be reversed.

ARGUMENT

I. The District Court Erred in Applying *Hazelwood v. Kuhlmeier* to Speech by College Students to Administrators.

While enrolled in Valencia College's Sonography Program, Plaintiffs Melissa Milward, Elyse Ugalde, and Ashley Rose objected to the practice of being required to undergo transvaginal ultrasounds performed by other students in the program. Dismissing Plaintiffs' First Amendment claim, the district court wrote: "Plaintiffs allege that they 'expressed concern to Defendant Ball' about undergoing the vaginal probes and that Milward 'complained to Defendant Shaheen' about the probes. This is not protected speech."

To support this conclusion, the district court cited *Hazelwood v. Kuhlmeier*, 484 U.S. 260; 108 S. Ct. 562 (1988). The court reasoned that because "Defendants are tasked with inculcating [Plaintiffs with] the necessary knowledge, values, and experience," and because students' "practicing on each other" furthers that goal, Defendants' punishment of Plaintiffs for their complaints about the ultrasounds was "reasonably related to legitimate pedagogical concerns" and therefore permissible under *Hazelwood*. This reliance is misplaced.

A. The *Hazelwood* Standard Was Created Specifically for High School Student Expression and Is Inappropriate for College and University Students.

In *Hazelwood*, the Supreme Court of the United States found that a public high school principal's censorship of articles in a student newspaper did not violate the First Amendment. The Court's reasoning rested on factors specific to the high school context that are inapplicable to the public college setting.

In practice, *Hazelwood* has been applied to grant virtually limitless authority, requiring merely a rationalization in the vicinity of reasonableness that is afforded highly deferential review. Whatever one thinks of offering minors in a "captive audience" K–12 setting no meaningful ability to dissent from school policies, such near-total control is plainly unsuited to the college campus environment. In applying *Hazelwood*'s weak speech protections to adult students and refusing to hold administrators accountable for brazen acts of viewpoint-based punishment, the district court opinion threatens the vibrancy and effectiveness of our nation's colleges and universities.

1. The First Amendment Applies in Full on Public College and University Campuses.

The Supreme Court has stated that there is "no doubt that the First Amendment rights of speech and association extend to the campuses of state universities." *Widmar v. Vincent*, 454 U.S. 263, 268–69; 102 S. Ct. 269, 274

(1981). The Court made clear in *Healy v. James*, 408 U.S. 169, 180; 92 S. Ct. 2338, 2346 (1972), that public college students do not sacrifice their constitutional rights when they arrive on campus, finding "no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large."[2]

The Court has continually reiterated this principle, particularly with respect to student speech of which university administrators may disapprove. "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." *Rosenberger v. Rectors & Visitors of the Univ. of Va*., 515 U.S. 819, 836; 115 S. Ct. 2510, 2520 (1995). "[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the

[2] *See also Sweezy v. New Hampshire*, 354 U.S. 234, 250; 77 S. Ct. 1203, 1211 (1957) ("The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."); *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603; 87 S. Ct. 675, 683 (1967) ("The classroom is peculiarly the 'marketplace of ideas.' 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.'") (citations omitted).

name alone of 'conventions of decency.'" *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670; 93 S. Ct. 1197, 1199 (1973).

Thus, while *amici* believe administrative censorship of students is troubling even in primary and secondary schools, the danger in relying on a high school ruling to justify censorship of student speech at a public college is unmistakable.

2. *Hazelwood*'s Reasoning Rests on the Age and Maturity of High School Students.

In holding that a public high school administrator may censor stories in a school publication if the censorship is "reasonably related to legitimate pedagogical concerns," 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 audience in determining whether to disseminate student speech on potentially sensitive topics." *Hazelwood*, 484 U.S. at 273, 272; 108 S. Ct. at 571, 570. The Court even went so far as to observe that censorship of the publication was permissible because students' younger siblings who live at home may find and read the newspaper, an outcome the Court suggested would be inappropriate. *Id.* at 274–75; 108 S. Ct. at 572. Here, the audience of Plaintiffs' speech comprises only college staff, whom the law presumes to be fully mature adults. Even if other students overheard Plaintiffs' remarks or became aware of them secondhand, they, too, are overwhelmingly adults.

Justice David Souter has 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." *Board of Regents of the Univ. of Wisconsin System v. Southworth*, 529 U.S. 217, 238; 120 S. Ct. 1346, 1359 n.4 (2000) (Souter, J., concurring in the judgment). The *Hazelwood* Court itself acknowledged the differences between a high school environment and a college environment when it reserved the question of whether the same restrictive standard it had imposed would apply at the college and university level. *Hazelwood*, 484 U.S. at 273; 108 S. Ct. at 571 n.7 ("We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.").

Lower courts have also distinguished between censorship by high schools and speech restrictions at universities. In *McCauley v. University of the Virgin Islands*, 618 F.3d 232, 242–43 (3d Cir. 2010), for example, the Third Circuit explained its holding that a university speech code was unconstitutionally overbroad:

> We reach this conclusion in light of the differing pedagogical goals of each institution, the *in loco parentis* role of public elementary and high school administrators, the special needs of school discipline in public elementary and high schools, the maturity of the students, and,

> finally, the fact that many university students reside on campus and thus are subject to university rules at almost all times.

At the very least, the court wrote, "[a]ny application of free speech doctrine derived from [high school cases] to the university setting should be scrutinized carefully, with an emphasis on the underlying reasoning of the rule to be applied." *Id.* at 247 n.19.[3]

Further, one of the federal appellate cases the lower court relied on in applying *Hazelwood* here—*Brown v. Li*, 308 F.3d 939 (9th Cir. 2002)—was recently characterized by the same circuit as *not* constituting adequate precedent to extend *Hazelwood* to the university setting. In *Oyama v. University of Hawaii*, No. 13-16524, 2015 U.S. App. LEXIS 22766 at *24 (9th Cir. Dec. 29, 2015), the U.S. Court of Appeals for the Ninth Circuit rejected the lower court's reliance on *Brown* in applying *Hazelwood*, noting that "the Supreme Court has yet to extend this doctrine to a public university setting." Relying on *Brown* in any fashion for the present case is therefore improper, and cannot justify curtailing the well-established First Amendment rights of public college students by means of a standard the Supreme Court never intended to impose upon them.

[3] *See also DeJohn v. Temple University*, 537 F.3d 301, 315 (3d Cir. 2008) ("[T]here is a difference between the extent that a school may regulate student speech in a public university setting as opposed to that of a public elementary or high school.").

3. Application of *Hazelwood*'s Age-Based Rationale for Content Regulation to Plaintiffs' Speech Is Irrational Given the Facts of the Case.

In *Hazelwood*, the Court was concerned about exposing students to content that was deemed "inappropriate for some of the younger students at the school." *Hazelwood*, 484 U.S. at 263; 108 S. Ct. at 566. But the instant case concerns adult students' right to criticize institutionally-compelled invasive physical examinations conducted by their own classmates. For a college to claim the authority to protect the delicate ears of immature listeners, so as to force its students to submit without complaint to invasion of their bodies, is self-evidently ridiculous. If *participation* in this program is not "inappropriate," then *discussing* the program cannot be said to be "inappropriate"—at least not in any way suggested by *Hazelwood*.

B. *Hazelwood* Applies Only in Cases Involving Speech That Bears the School's Imprimatur, Unlike the Speech at Issue Here.

A significant factor undergirding *Hazelwood*'s reasoning was that the stories in the student newspaper could be mistaken for the opinion of the school itself, since the newspaper was produced as part of a school-sponsored activity on school property using school resources. The Court itself has since 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; 127 S. Ct. 2618, 2627 (2007) ("*Kuhlmeier* does not control this case

because no one would reasonably believe that Frederick's banner bore the imprimatur of the school.").

Appellate courts nationwide have held the same.[4] This Circuit, for example, wrote in *Bannon v. Sch. Dist.*, 387 F.3d 1208, 1214 (11th Cir. 2004): "*Hazelwood* controls all expression that (1) bears the imprimatur of the school, and (2) occurs in a curricular activity."

In the instant case, the university has not been asked or forced to promote Plaintiffs' speech, nor could Plaintiffs' criticism be reasonably mistaken as bearing the imprimatur of the school. Plaintiffs expressed concerns about being made to participate in an invasive procedure they were initially made to believe was voluntary. They spoke only to instructors; nothing in the record shows that the students attempted to reach a public audience in a way that, like a newspaper bearing the school's logo, might be mistaken for a school-sponsored message. That that Plaintiffs were dissenting from and seeking to change the institution's policies made their speech instantly recognizable to any potential listener as non-school-

[4] *See, e.g.*, *B.H. v. Easton Area Sch. Dist.*, 725 F.3d 293, 304 (3d Cir. 2013), *A.M. v. Taconic Hills Cent. Sch. Dist.*, 510 Fed. Appx. 3, 10 (2d Cir. 2013), *Ward v. Polite*, 667 F.3d 727, 734 (6th Cir. 2012), *Morgan v. Swanson*, 659 F.3d 359, 375–76 (5th Cir. 2011), *Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 257 (4th Cir. 2003), *Lavine v. Blaine Sch. Dist.*, 279 F.3d 719, 727 (9th Cir. 2002), *Gillman v. Sch. Bd. for Holmes County*, 567 F. Supp. 2d 1359, 1365 (N.D. Fla. 2008).

sponsored. It is therefore impossible for this speech to be mistaken for the school's opinion, rendering *Hazelwood*'s application to this situation untenable.

The lower court improperly used two appellate court decisions to bolster its argument that the *Hazelwood* standard should apply in this case. In *Curry ex rel Curry v. Hensiner*, 513 F.3d 570, 579 (6th Cir. 2008), the U.S. Court of Appeals for the Sixth Circuit held that a school's desire to avoid subjecting young children to an "unsolicited religious promotional message . . . qualifies as a valid educational purpose." However, the purportedly religious message in the speech involved a product one student was selling to other students as a part of a classroom curriculum. *Id*. at 574. *Curry* may correctly be compared to *Hazelwood* because, like the newspaper stories in *Hazelwood*, the *Curry* product was a part of a curriculum and could have reasonably been interpreted to bear the school's imprimatur. But *Curry*'s fit with *Hazelwood*'s facts renders it distinguishable from the instant case because the students' speech here could not reasonably be interpreted to bear the school's imprimatur.

The same can be said for the second case relied upon here by the district court, *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002), which involved a student-written thesis that a university refused to approve in its final form because of a section it deemed unprofessional. When the student sought to file his thesis in the library, as

university rules required, he was not allowed to file it with the unapproved section. *Id*. at 943–44. A published thesis filed in a university library could be reasonably seen as bearing the imprimatur of the school, particularly among those who know the work has been through a university-sanctioned approval process. Again, any analogy to the instant case is inapt.

The *Bannon* court's additional prerequisite for applying *Hazelwood*—that the speech itself be part of a "curricular activity"—only makes more obvious that Plaintiffs' speech should not be governed by *Hazelwood*. In 2012, a Florida district court cited *Hazelwood* in stating, "A curricular activity is one that is supervised by faculty and designed to impart particular knowledge or skills." *Gilio v. Sch. Bd.*, 905 F. Supp. 2d 1262, 1267 (M.D. Fla. 2012). Plaintiff's speech was plainly not "designed to impart particular knowledge or skills" in the way that the court meant—that is, designed by school staff to impart knowledge. *Hazelwood* applies where the speech is *itself* a part of the curriculum; it cannot be expanded to encompass all speech *about* the curriculum.

Moreover, the language and reasoning of the *Hazelwood* opinion itself have no rational parallel in a case contemplating speech by a student to college staff. For example, the *Hazelwood* Court observed that the high school's journalism teacher "was the final authority with respect to almost every aspect of the production and

publication of [the newspaper], including its content," and that he regularly made decisions regarding the paper without consulting the journalism students. *Hazelwood*, 484 U.S. at 268; 108 S. Ct. at 568. With that and other factors in mind, the Court found that the newspaper was not a public forum. *Id.* at 270; 108 S. Ct. at 569.

Applying this analysis to the speech at issue here strains reason. Plaintiffs' initial expressions of concern about having transvaginal ultrasounds performed on them were in response to a "Sonography Questionnaire" provided by Defendant Shaheen before orientation. No forum analysis is necessary; the sole purpose of the question was to elicit students' opinions about transvaginal ultrasounds, and Plaintiffs provided such opinions. Any punishment for speech within that scope is necessarily unconstitutional viewpoint discrimination.[5] It cannot be argued that the forum was not intended for the use of students like Plaintiffs or for the topic of their feelings on transvaginal ultrasounds, and no claim has been made that Plaintiffs' responses included speech that may lawfully be punished on another basis (such as true threats).

In the following months, Plaintiffs voiced complaints about the transvaginal ultrasounds again to Shaheen and to other college staff. Like Plaintiffs'

[5] *See also* § II.A., *infra*.

questionnaire responses, this speech is not analogous to articles in a curricular student newspaper. No one exercises "final authority" over a student's speech directed to a staff member except that student—in large part because the interests at stake in *Hazelwood* are irrelevant in this circumstance. *Hazelwood* contemplates the way that public high school administrators may prepare and present student speech to a third party; its reasoning has no bearing on how administrators should, themselves, receive speech from students.

The *Hazelwood* court explicitly "conclude[d] that the standard articulated in *Tinker* [*v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503; 89 S. Ct. 733 (1969)] for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression." *Hazelwood*, 484 U.S. at 272–73; 108 S. Ct. at 571. In doing so, the Court cited several considerations that may motivate a school not to lend its name to expression, such as the desire to avoid apparent advocacy for controversial opinions or illegal activities. These considerations are irrelevant here. Plaintiffs' only audience is college staff, and the speech is being disseminated by the students themselves, not by the school. Plaintiffs' opinions could not rationally be construed by the audience—that is, Defendants—as belonging to anyone but Plaintiffs themselves.

C. Protests of School Policies Are Protected Under *Tinker*, Which Establishes a Minimum for Speech Protections Afforded to Non-School-Sponsored Speech.

In cases involving expression that clearly does not bear the institution's imprimatur, and where the maturity of the audience is not a consideration, *Tinker* establishes the bare minimum for speech protections. Expression at a public college should be protected more broadly than expression in primary or secondary school.[6] However, even under the *Tinker* standard, Plaintiffs' speech is afforded full constitutional protection. The Supreme Court held in *Tinker* that "where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained." *Tinker*, 393 U.S. at 509; 89 S. Ct. at 738 (internal citation omitted). (That any particular student does or does not oppose participating in an ultrasound exam patently cannot be a "disruption," since male students do not undergo the procedure and are not regarded as "disruptors.") Defendants have not pointed to any disruption or expected disruption of school activities. Plaintiffs' speech, therefore, does not rise to the level of that which may be prohibited or punished under *Tinker*.

[6] *See also* §§ I.A., *supra*.

In *Lowry ex rel. Crow v. Watson Chapel School District*, 540 F. 3d 752 (8th Cir. 2008), the Eighth Circuit drew a parallel between the facts of that case and *Tinker* in affirming the lower court's holding that the school violated students' First Amendment rights by disciplining them for their expressive conduct. That parallel applies equally here. The *Lowry* court wrote:

> Defendants attempt to distinguish *Tinker* by emphasizing that the *Tinker* students protested the federal government's Vietnam war policy, whereas here the protest object was merely a school dress code. This distinction is immaterial. Whether student speech protests national foreign policy or local school board policy is not constitutionally significant. . . .
>
> [. . .]
>
> We hold that *Tinker* is so similar in all constitutionally relevant facts that its holding is dispositive. In both cases, a school district punished students based on their non-disruptive protest of a government policy.

Id. at 759–60. As in *Lowry* and in *Tinker*, Plaintiffs in this case have been punished based on the non-disruptive communication of their concerns about the policies and practices of their public educational institution.

II. Even Assuming *Hazelwood* Were Applicable, the Court Misapplied Its Standard to the Speech at Issue.

A. *Hazelwood* Does Not Permit Viewpoint-Based Censorship.

In *Bannon*, this court unequivocally agreed that "although *Hazelwood* permits subject-matter-based restrictions on school-sponsored student expression, it does not permit viewpoint-based discrimination."

387 F.3d at 1215. *See also Searcey v. Harris*, 888 F.2d 1314, 1325 (11th Cir. 1989) ("Although *Hazelwood* provides reasons for allowing a school official to discriminate based on content, we do not believe it offers any justification for allowing educators to discriminate based on viewpoint."). Defendants in the instant case engaged in viewpoint-based censorship. It is inconceivable that speaking positively or neutrally about the practice of students performing transvaginal ultrasounds on each other would have prompted Defendants to take action against Plaintiffs. The Plaintiffs' critical view of this invasive procedure resulted in their punishment. On this basis alone, Defendants' retaliation against Plaintiffs violated their First Amendment rights, even under *Hazelwood*.

The district court's finding that Plaintiffs' speech is unprotected because it "touches upon internal school matters of pedagogical and curricular concern" does not change this analysis. Even if *Hazelwood* were applicable, its scope is not so broad as to allow censorship of any speech that merely *touches upon* pedagogical concerns.[7] Viewpoint discrimination is unconstitutional even within a range of speech that is not protected under the First Amendment. In *R. A. V. v. St. Paul*, 505 U.S. 377; 112 S. Ct. 2538 (1992), the Court held that a statute forbidding "'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion

[7] *See also* § II.B., *infra*.

or gender'" was unconstitutional because, although it regulated only unprotected "fighting words," it placed restrictions specifically on fighting words reflecting certain viewpoints. *Id.* at 391; 112 S. Ct. at 2547. Similarly, Defendants' actions against Plaintiffs for their expressed viewpoints are unconstitutional absent a policy or practice of punishing the expression of *all* viewpoints related to the curriculum (a policy which, itself, would struggle to pass constitutional muster).

B. No Evidence Suggests That Plaintiffs' Speech Presented a Threat to the School's "Pedagogical and Curricular System."

The lower court asserted that "[w]here a student's speech threatens a school's pedagogical and curricular system, it is not subject to the expansive protections applied to student political speech."[8] For this proposition, the district court cites only *Heenan v. Rhodes*, 757 F. Supp. 1229, 1238 (M.D. Ala. 2010). The *Heenan* district court, however, based this conclusion on the premise that school staff must retain the ability to assess and grade *curricular* work, *e.g.*, correcting a student's grammar in his homework. Unfortunately, the court failed to properly distinguish a student's complaints *about* the curriculum from speech that occurs as

[8] The district court did not elaborate on how speech *about* a curriculum necessarily "threatens" that curriculum. If Plaintiffs' expression of concern about having transvaginal ultrasounds performed on them *was* a threat to the curriculum, it is unclear why Defendant Shaheen distributed a questionnaire specifically asking students, "How do you feel about allowing practice of transvaginal exams on you?"

a necessary part of participating in the curriculum, such as the text of a classroom assignment. However, it did characterize the plaintiff-student's speech—her objection to part of the grading system—as "solely to her own benefit," rather than potentially relating to matters of public concern. There was ample evidence in *Heenan* that the student would have been dismissed from her school for other reasons unrelated to her viewpoint about the grading system, and the court suggested that both her complaints about the grading system and the First Amendment claim were essentially efforts to evade the consequences of poor academic performance. In contrast, Plaintiffs' speech is not an attempt at self-preservation during a larger pattern of inappropriate conduct. Rather, it was feedback meant to improve conditions for *all* students. For these reasons, and because *Heenan* is not binding precedent on this court, the lower court's reliance on *Heenan* to conclude that Plaintiffs' speech threatens the curriculum, and therefore is unprotected, is inappropriate.

Further, because no explanation of what precisely was "threatening" about Plaintiffs' criticism of these classroom practices is provided, the district court's ruling would allow punishment for *any* criticism of an institution's curriculum, no matter how appropriate. Students being asked to perform surgery on each other with no anesthetic, for example, would be prohibited from complaining. Forcing Valencia students to choose between silently accepting any program activities no

matter how dangerous or immoral or leaving school is wildly inconsistent with both basic considerations of public policy and the Court's declaration in *Sweezy v. New Hampshire*, 354 U.S. 234, 250; 77 S. Ct. 1203, 1212 (1957) that "[t]eachers 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."

The district court's unequivocal statement that Plaintiffs' complaints are not protected speech is also at odds with this court's analysis in *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011). In *Keeton*, this court found that a counseling program student's First Amendment rights were not violated when she was required to participate in a "remediation plan" after expressing an intent to counsel GLBTQ clients in a manner contrary to the American Counseling Association's Code of Ethics.[9] Importantly, the court contrasted the facts of that case with a

[9] The court in *Keeton* repeatedly emphasized that Augusta State University's treatment of the plaintiff was motivated by her stated intent to treat clients differently based on their sexuality and that she was not required to change her *beliefs* in order to complete the program. This makes *Keeton* readily distinguishable from the instant case, in which there is no discussion of how Plaintiffs might treat future patients, much less evidence that they will violate professional standards when dealing with patients.

This distinction also underscores the inappropriateness of applying *Hazelwood* in this case as discussed in § I.B., *supra*. Keeton's planned expression to third parties—that is, clients—could be seen as having the university's imprimatur; the university therefore has an interest in controlling that expression. In contrast, there are no allegations that Plaintiffs planned on engaging in objectionable speech to patients, only to administrators, who would not mistake such speech as the college's own.

hypothetical that matches the issue presented here, writing: "Indeed, *Keeton remains free to express disagreement with [Augusta State University's] curriculum and the ethical requirements of the ACA*, but she cannot block the school's attempts to ensure that she abides by them if she wishes to participate in the clinical practicum, which involves one-on-one counseling, and graduate from the program." *Id.* at 874 (emphasis added). Just as Keeton retained the right to openly disagree with her university's curriculum, Plaintiffs here have a First Amendment right to express disagreement with Valencia College's curriculum, including its requirement that female students undergo transvaginal ultrasounds.

Further, courts have recognized, even at the K–12 level, that curricular decisions can violate students' constitutional rights. For instance, in *Arce v. Douglas*, 793 F.3d 968 (9th Cir. 2015), the Ninth Circuit recognized the state of Arizona's prohibition on "ethnic studies" courses as a viewpoint-based infringement on the First Amendment rights of student learners. If the district court's ruling here becomes the law of the Eleventh Circuit, students whose schools make similarly unconstitutional curricular decisions will be at risk of disciplinary sanctions just for complaining.

Because there is no evidence that Plaintiffs' speech poses a threat to the curriculum, and no other specific harm was alleged, censorship of the speech does not further a pedagogical purpose.

C. Reading *Hazelwood* to Allow for Punishment of Student Speech Violates Principles of Due Process.

As noted above, *Hazelwood* sets forth the standard for when a school may exercise editorial control over speech that could be seen as bearing its imprimatur: when the school's "actions are reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273; 108 S. Ct. at 571. As the *Hazelwood* Court noted, "[t]he question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech." *Id.* at 270–71; 108 S. Ct. at 570.

However, Plaintiffs here were not censored via prior review, as in *Hazelwood*, but instead later punished for their speech. The school went further than declining to *promote* the speech; it didn't *tolerate* it. Specifically, Plaintiffs were threatened with lower grades and impediments to employment. *Hazelwood* does not establish a new standard for when an institution may *punish* student speech, and its standard cannot be reframed as a standard for punishment of student speech without violating principles of due process.

The *Hazelwood* standard may guide administrators in assessing whether to facilitate student speech. But applied as a standard for post-hoc discipline, it cannot give students sufficient notice of what speech they may engage in, because students cannot be expected to speculate as to every possible "legitimate pedagogical purpose" an administrator might rely on in refusing to distribute materials. In contrast, the *Tinker* standard can be framed as a prohibition that gives students reasonable notice of what speech they may not in engage in: "Do not engage in speech that substantially disrupts school activities." This requires students to anticipate only the behavior of their peers. The *Hazelwood* standard, however, would require students to anticipate the pedagogical decision-making and personal opinions of adult administrators.

Further, *Hazelwood* does not hold that the information cut from the student newspaper could have formed the basis of institutional action if shared through a non-school-sponsored medium. If *Hazelwood* were a new standard for punishable speech more broadly, it would effectively require students to limit their personal expression to that to which they know the school would lend its imprimatur. Such a result is flatly incompatible with the purpose of the First Amendment: to protect the expression of ideas that differ from the official position of governmental entities.

III. If Allowed to Stand, the District Court's Decision Will Erode the First Amendment Rights of College Students and Embolden Would-Be Censors.

Despite the unmistakable clarity of Supreme Court precedent, the First Amendment rights of public college students are violated with alarming frequency. *Amici* have taken action against hundreds of instances of campus censorship and have received reports of thousands more. If allowed to stand, the lower court's unsupported reasoning will provide public college administrators with clear guidance on how to silence criticism of the institution. This appeal presents this court the opportunity to reaffirm decades of precedent protecting freedom of expression for whom it arguably matters most: our nation's college students.

A. Colleges and Universities Nationwide Violate Students' First Amendment Rights with Depressing Frequency.

In a survey of 336 public colleges and universities across the country, conducted this year by *amicus* FIRE, 45.8 percent of institutions maintained at least one restriction on speech that clearly and substantially prohibits constitutionally protected expression.[10] In addition, 48.2 percent of remaining institutions maintained at least one policy that can easily be abused to punish

[10] Found. for Individual Rights in Educ., *Spotlight on Speech Codes 2016: The State of Free Speech on Our Nation's Campuses*, *available at* https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2013/06/27212854/SCR_Final-Single_Pages.pdf.

protected speech. Recent jurisprudence further demonstrates at once the clarity of the law and colleges' continual attempts at disregarding it.

For example, in 2012, a federal district court struck down the University of Cincinnati's "free speech zone" policy, which forbade students from engaging in protected speech on all but 0.1 percent of the public institution's campus. *See Univ. of Cincinnati Chapter of Young Am. for Liberty v. Williams*, 2012 U.S. Dist. LEXIS 80967 (S.D. Ohio Jun. 12, 2012). Making this free speech quarantine still more objectionable, the university required students to provide a minimum of five working days' notice prior to staging any "demonstration, picketing, or rally."[11] 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 *5 & 9.

This decision is but one in a virtually unbroken string of cases affirming the critical importance of First Amendment protections on college campuses by striking down overbroad or vague restrictions on speech as unconstitutional.

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

McCauley v. Univ. of the V.I., 618 F.3d 232 (3d Cir. 2010); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995); *Smith v. Tarrant Cty. Coll. Dist.*, 694 F. Supp. 2d 610 (N.D. Tex. 2010); *Coll. Republicans at S.F. St. Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003); *Booher v. N. Ky. Univ. Bd. of Regents*, No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998); *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis.*, 774 F. Supp. 1163 (E.D. Wisc. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

But censorship of student expression on our nation's public campuses remains rampant—as evidenced in part by the fact that lawsuits continue to be filed and continue to end in settlements or rulings in favor of the student-plaintiffs. In the past two years alone, *amicus* FIRE has coordinated six lawsuits against colleges that prohibited students from leafleting and petitioning in the open areas of their campus: a traditional method of engaging in constitutionally protected expression.[12] For example, in 2013, a Modesto Junior College student was told by

[12] Settlement Agreement, *Van Tuinen v. Yosemite Cmty. Coll. Dist.*, No. 1:13-at-00729 (E.D. Cal. Feb. 24, 2014), Settlement Agreement, *Burch v. Univ. of Haw. Sys.*, No. 1:14-cv-00200-HG-KSG (C.D. Cal. Dec. 1, 2014), Settlement Agreement, *Sinapi-Riddle v. Citrus Cmty. Coll. Dist.*, No. 2:14-cv-05104-FMO-RZ

MJC staff that he was required to fill out an application to use the college's "free speech area" five days in advance just to hand out copies of the U.S. Constitution.[13] Similarly, University of Hawaii at Hilo administrators told two students that "it wasn't the '60s anymore" and that they could protest National Security Agency spying only in the university's small, remote "free speech zone."[14] In both cases, the institutions recognized the students' rights only after federal lawsuits were filed.[15]

The same is true in the Eleventh Circuit case of *Barnes v. Zaccari*, in which Valdosta State University student Hayden Barnes was expelled without a hearing for a satirical environmentalist collage he posted on his personal Facebook page.[16] The suit was finally settled in the plaintiff's favor after an eight-year court battle,

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(C.D. Cal. Dec. 3, 2014), Complaint, *Jergins v. Williams*, No. 2:15-cv-00144-PMW (D. Utah Mar. 4, 2015), Complaint, *Tomas v. Coley*, No. 2:15-cv-02355 (C.D. Cal. Mar. 31, 2015), Complaint, *Sanders v. Guzman*, No. 1:15-cv-00426 (W.D. Tex. May 20, 2015).

[13] Nan Austin, *MJC student files freedom of speech lawsuit against college*, MODESTO BEE, Oct. 10, 2013, *available at* http://www.modbee.com/news/local/education/article3155056.html.

[14] Found. for Individual Rights in Educ., *U. of Hawaii Settles Lawsuit Over Handing Out Constitutions*, Dec. 2, 2014, https://www.thefire.org/u-hawaii-settles-lawsuit-handing-constitutions.

[15] *Id.*; Jessica Chasmar, Calif. college student wins $50K settlement in free speech case, WASH. TIMES, Feb. 26, 2014, available at http://www.washingtontimes.com/news/2014/feb/26/california-college-student-wins-50k-settlement-fre.

[16] *Barnes v. Zaccari*, 669 F.3d 1295 (11th Cir. 2012).

which included this court holding that the university president could be held liable for violations of Barnes' due process rights.[17]

Unfortunately, these cases are likely just the tip of the iceberg—every year, far more instances of censorship occur but do not result in a lawsuit being filed. Public colleges frequently disregard the First Amendment in an attempt to rid campuses of viewpoints administrators do not like, as in the present case. As lamentable as the current climate for campus free speech is, it will become worse still if the lower court's decision is allowed to stand.

B. Clarity Is Needed to Preserve the First Amendment Rights of 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 views on campus.[18] Yet the Supreme Court has made clear that if students are not free to explore and express ideas, then

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[17] Found. for Individual Rights in Educ., *Eight Years After Student's Unjust Expulsion from Valdosta State U., $900K Settlement Ends 'Barnes v. Zaccari'* (July 23, 2015), *available at* https://www.thefire.org/eight-years-after-students-unjust-expulsion-from-valdosta-state-u-900k-settlement-ends-barnes-v-zaccari.

[18] Eric L. Dey et. al., *Engaging Diverse Viewpoints: What Is the Campus Climate for Perspective-Taking?* (Washington, D.C.: Association of American Colleges and Universities, 2010), *available at* http://www.aacu.org/core_commitments/documents/Engaging_Diverse_Viewpoints.pdf.

"our civilization will stagnate and die." *Sweezy*, 354 U.S. at 250; 77 S. Ct. at 1212. In the instant case, Valencia College—like too many colleges nationwide—decided to ignore long-established law. This court must remind the College that respecting the First Amendment is not optional.

Colleges and universities nationwide may be closely watching this case. If the lower court's error is allowed to stand, would-be censors at colleges across the country will seize upon their newfound authority to silence merely unwanted or unpleasant student speech by emulating the college's shameful end-run around the First Amendment. If tempted to ignore a student's right to free speech and punish her in order to silence criticism of the college or its staff, a public college administrator will recall this erroneous result and conclude that punishment is permissible—as long as it is justified by reference to "pedagogical concerns."

Given the Supreme Court's repeated and emphatic recognition of the importance of student civil liberties, this is precisely the wrong result for the health of our democracy. The right to speak one's mind without fear of official reprisal should be beyond question on an American public campus. Because today's students are tomorrow's leaders, protecting this right is of paramount importance to our nation as a whole.

CONCLUSION

For these reasons, the district court's serious misunderstanding of the expressive rights of public college students must be corrected. The lower court's opinion should be reversed and remanded.

Date: February 24, 2016

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CERTIFICATE OF BAR MEMBERSHIP

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1) This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,964 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

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I HEREBY CERTIFY that on February 24, 2016, a true and correct copy of this document has been served by the Electronic Case Filing system to those on the attached Service List.

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