Docket No. 19-35849

In the

United States Court of Appeals

For the

Ninth Circuit

R.W.,

Plaintiff-Appellant,

v.

COLUMBIA BASIN COLLEGE, et al.,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the Eastern District of Washington, No. 4:18-cv-05089-RMP · Honorable Rosanna M. Peterson

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF OF FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION AND AMERICAN CIVIL LIBERTIES UNION OF WASHINTON IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

MARIEKE TUTHILL BECK-COON, ESQ.
LINDSIE RANK, ESQ.
FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION
510 Walnut Street, Suite 1250
Philadelphia, Pennsylvania 19106
(215) 717-3473 Telephone
marieke@thefire.org
lindsie.rank@thefire.org

MOLLY TACK-HOOPER, ESQ.
NANCY TALNER, ESQ.
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION
Post Office Box 2728
Seattle, Washington 98111
(206) 624-2184 Telephone
mtackhooper@aclu-wa.org
talner@aclu-wa.org

Attorneys for Amici Curiae Foundation for Individual Rights in Education and American Civil Liberties Union of Washington

COUNSEL PRESS · (213) 680-2300

PRINTED ON RECYCLED PAPER

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

Pursuant to Federal Rule of Appellate Procedure 29, proposed *amici curiae* Foundation for Individual Rights in Education ("FIRE") and the American Civil Liberties Union of Washington ("ACLU") respectfully move for leave to file a brief in support of R.W., the Plaintiff-Appellee. A copy of the proposed brief is attached as an exhibit to this Motion. Counsel for the proposed *amici* endeavored to obtain the consent of all parties to the filing of the brief before moving the Court for permission to file the proposed brief. Counsel for Plaintiff-Appellee has consented to the filing of this brief. Counsel for Defendants-Appellants declined to consent to the filing of this brief by correspondence dated April 28, 2020.

FIRE is a nonpartisan, nonprofit organization dedicated to promoting and protecting civil liberties at our nation's institutions of higher education. Since 1999, FIRE has worked to protect student First Amendment rights at campuses nationwide. FIRE believes that to prepare students for success in our democracy, the law must remain unequivocally on the side of robust free speech rights on campus. FIRE coordinates and engages in litigation and authors *amicus* briefs to ensure that student First Amendment rights are vindicated when violated at public colleges and universities.

The ACLU is a statewide, nonprofit, nonpartisan organization of over 135,000 members and supporters throughout Washington. The ACLU is dedicated to

protecting and advancing freedom, equity, and racial justice for all Washingtonians through litigation, policy advocacy, community organizing, and public education. The ACLU has appeared many times as *amicus curiae* in state and federal cases involving the freedom of speech protected by the United States and Washington constitutions.

This case presents important and far-reaching issues implicating the legal standards applied to analyze the First Amendment rights of all public college and university students within the Ninth Circuit. FIRE and the ACLU submit that their appearance will benefit the Court's consideration of this appeal. As advocates for civil liberties on college campuses and beyond, FIRE and the ACLU are well-acquainted with the First Amendment issues relevant to the disposition of this case, as well as the impact of speech restrictions on young adults at colleges and universities across the State of Washington and the country.

The combined decades of experience of FIRE and the ACLU make them well suited to aid this Court's understanding of the broad and dangerous implications of reversing the District Court's decision. Specifically, where Defendant-Appellants argue that this Court should apply First Amendment standards developed in the context of primary and secondary school education to evaluate the speech rights of an adult college student seeking mental healthcare from professionals, the proposed brief of *amici* endeavors to demonstrate that Defendant-Appellant's proposed rule

marks a departure from precedent and would imperil the First Amendment rights of college students throughout the Circuit. More important still, it would deter future students from seeking help for serious mental health concerns. *Amici* seek to demonstrate that the District Court's decision correctly held that R.W.'s clearly established First Amendment right to freedom of speech was violated and that this decision is not at odds with a public college's obligation to protect the safety of its students and staff.

For these reasons, proposed *amici curiae* FIRE and the ACLU respectfully move for leave to file the attached brief in support of Plaintiff-Appellee R.W.

Dated: June 1, 2020

Respectfully Submitted,

/s Marieke Tuthill Beck-Coon
Marieke Tuthill Beck-Coon, WSBA #56133
Lindsie Rank
FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION
510 Walnut Street, Suite 1250
Philadelphia, PA 19106
(215) 717-3473
marieke@thefire.org
lindsie.rank@thefire.org

Molly Tack-Hooper, WSBA #56356
Nancy Talner, WSBA #11196
AMERICAN CIVIL LIBERTIES
UNION OF
WASHINGTON FOUNDATION
P.O. Box 2728
Seattle, WA 98111
(206) 624-2184
mtackhooper@aclu-wa.org
talner@aclu-wa.org

Attorneys for Amici Curiae Foundation for Individual Rights in Education and American Civil Liberties Union of Washington

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(A) and Circuit Rule 27-1(d). This motion contains 557 words, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f), and does not exceed 20 pages.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac in fourteen (14) point Times New Roman font.

Dated: June 1, 2020

s/ Marieke Tuthill Beck-Coon
Counsel for *Amici Curiae* Foundation for Individual Rights in Education and American Civil Liberties Union of Washington

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2020, an electronic copy of the foregoing Motion for Leave to File *Amici Curiae* Brief of Foundation for Individual Rights in Education and the American Civil Liberties Union of Washington in support of Plaintiff-Appellee was filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system on June 1, 2020.

All participants in this case are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: June 1, 2020

s/ Marieke Tuthill Beck-Coon
Counsel for *Amici Curiae* Foundation for Individual Rights in Education and American Civil Liberties Union of Washington

Docket No. 19-35849

In the

United States Court of Appeals

For the

Ninth Circuit

R.W.,

Plaintiff-Appellant,

v.

COLUMBIA BASIN COLLEGE, et al.,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the Eastern District of Washington, No. 4:18-cv-05089-RMP · Honorable Rosanna M. Peterson

BRIEF OF *AMICI CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION AND AMERICAN CIVIL LIBERTIES UNION OF WASHINTON IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

MARIEKE TUTHILL BECK-COON, ESQ.
LINDSIE RANK, ESQ.
FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION
510 Walnut Street, Suite 1250
Philadelphia, Pennsylvania 19106
(215) 717-3473 Telephone
marieke@thefire.org
lindsie.rank@thefire.org

MOLLY TACK-HOOPER, ESQ.
NANCY TALNER, ESQ.
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION
Post Office Box 2728
Seattle, Washington 98111
(206) 624-2184 Telephone
mtackhooper@aclu-wa.org
talner@aclu-wa.org

Attorneys for Amici Curiae Foundation for Individual Rights in Education and American Civil Liberties Union of Washington

COUNSEL PRESS · (213) 680-2300

PRINTED ON RECYCLED PAPER

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amici curiae* Foundation for Individual Rights in Education and American Civil Liberties Union of Washington certifies that *amici* are nonprofit corporations that do not have any parent corporations, and no publicly held companies hold 10% or more of their stock or other ownership interest.

TABLE OF CONTENTS

RULE 26.1 DISCLOSURE STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 1

BACKGROUND 2

SUMMARY OF THE ARGUMENT 4

ARGUMENT 7

I. The District Court Correctly Held that First Amendment Standards Applicable in the K-12 Environment Do Not Apply to College Students 7

II. Colleges Like CBC Have Other Tools at Their Disposal to Respond to Potential Safety Issues, and Do Not Need to Rely on *Tinker* for This Purpose 14

III. R.W.'s Communication of His Thoughts to Medical Professionals was Protected Speech 15

A. R.W.'s speech does not constitute a true threat. 15

B. There is a constitutional distinction between interim safety measures and disciplinary sanctions based on protected speech 19

IV. The District Court Correctly Held that the Law Was Clearly Established and Denied Qualified Immunity 22

CONCLUSION 26

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES

Bair v. Shippensburg Univ.,
280 F. Supp. 2d 357 (M.D. Pa. 2003)....................24

Bethel Sch. Dist. v. Fraser,
478 U.S. 675 (1986)....................7, 8, 9

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)....................24

Brown v. Li,
308 F.3d 939 (9th Cir. 2002)....................9

Burge v. Colton Sch. Dist. 53,
100 F. Supp. 3d 1057 (D. Or. 2015)....................16

Coll. Republicans v. Reed,
523 F. Supp. 2d 1005 (N.D. Cal. 2007)....................10, 24

D. G. v. Indep. Sch. Dist. No. 11,
No. 00-C-0614-E, 2000 U.S. Dist. LEXIS 12197
(N.D. Okla. Aug. 21, 2000)....................18, 21

Dambrot v. Cent. Mich. Univ.,
55 F.3d 1177 (6th Cir. 1995)....................24

DeJohn v. Temple Univ.,
537 F.3d 301 (3d Cir. 2008)....................10, 24

Doe v. Rector & Visitors of George Mason Univ.,
149 F. Supp. 3d 602 (E.D. Va. 2016)....................14, 21, 22

Doe v. Univ. of Mich.,
721 F. Supp. 852 (E.D. Mich. 1989)....................24

Flint v. Dennison,
488 F.3d 816 (9th Cir. 2007) 10

Harlow v. Fitzgerald,
457 U.S. 800 (1982)..23

Hazelwood Sch. Dist. v. Kuhlmeier,
484 U.S. 260 (1988)..7, 8

Healy v. James,
408 U.S. 169 (1972)..5, 7, 8, 12, 13, 23

Hill v. Colorado,
530 U.S. 703 (2000)..20

Hudson v. Craven,
403 F.3d 691 (9th Cir. 2005) 10, 12

IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ.,
993 F.2d 386 (4th Cir. 1993) 22

LaVine v. Blaine Sch. Dist.,
257 F.3d 981 (9th Cir. 2001) 11, 20, 21

McCauley v. Univ. of the V.I.,
618 F.3d 232 (3d Cir. 2010) 10, 24

McNeil v. Sherwood Sch. Dist. 88J,
918 F.3d 700 (9th Cir. 2019) 11

Menotti v. City of Seattle,
409 F.3d 1113 (9th Cir. 2005) 20

Morse v. Frederick,
551 U.S. 393 (2007)..7, 9

O'Brien v. Welty,
818 F.3d 920 (9th Cir. 2016) 17

Oyama v. Univ. of Haw.,
813 F.3d 850 (9th Cir. 2015) 5, 9, 10, 11

Papish v. Bd. of Curators of the Univ. of Mo.,
410 U.S. 667 (1973)..23

Pearson v. Callahan,
555 U.S. 223 (2009)..23

Police Dep't of Chi. v. Mosley,
408 U.S. 92 (1972)..23

Pro-Life Cougars v. Univ. of Hous.,
259 F. Supp. 2d 575 (S.D. Tex. 2003)...24

Roberts v. Haragan,
346 F. Supp. 2d 853 (N.D. Tex. 2004) 24

Rosenberger v. Rector & Visitors of the Univ. of Va.,
515 U.S. 819 (1995)..9

Sweezy v. New Hampshire,
354 U.S. 234 (1957)..13

Tinker v. Des Moines Indep. Cmty. Sch. Dist.,
393 U.S. 503 (1969)...*passim*

Turner Broad. Sys. v. FCC,
512 U.S. 622 (1994)..23

United States v. Bagdasarian,
652 F.3d 1113 (9th Cir. 2011) 6, 16

United States v. Cassel,
408 F.3d 622 (9th Cir. 2005) 16

UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis.,
774 F. Supp. 1163 (E.D. Wisc. 1991) 24

Virginia v. Black,
538 U.S. 343 (2003)....................16

Widmar v. Vincent,
454 U.S. 263 (1981)....................9

Wynar v. Douglas Cnty. Sch. Dist.,
728 F.3d 1062 (9th Cir. 2013)....................11

COURT RULES

Circuit Rule 29-2....................1

Federal Rules of Appellate, rule 29(a)(4)(E)....................1

OTHER AUTHORITIES

Collin Binkley & Larry Fenn, *More College Students Look for Mental Health Help on Campus*, ASSOCIATED PRESS, Nov. 25, 2019, https://www.usnews.com/news/healthiest-communities/articles/2019-11-25/colleges-struggle-with-soaring-student-demand-for-counseling....................19

Libby Nelson, *Why nearly all colleges have an armed police force,* VOX, July 29, 2015, https://www.vox.com/2015/7/29/9069841 /university-of-cincinnati-police....................14

United States Constitution, First Amendment....................*passim*

INTEREST OF AMICI[1]

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. Since 1999, FIRE has worked to protect student First Amendment rights at campuses nationwide. FIRE believes that to best prepare students for success in our democracy, the law must remain unequivocally on the side of robust free speech rights on campus. FIRE coordinates and engages in targeted litigation and regularly files briefs as *amicus curiae* to ensure that student First Amendment rights are vindicated when violated at public colleges and universities.

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonprofit, nonpartisan organization of over 135,000 members and supporters throughout Washington. The ACLU is dedicated to protecting and advancing freedom, equity, and racial justice for all Washingtonians through litigation, policy advocacy, community organizing, and public education. The ACLU has appeared many times as *amicus curiae* in state and federal cases involving the freedom of speech protected by the United States and Washington constitutions.

---

[1] This *amici curiae* brief is submitted with an accompanying motion for leave under Circuit Rule 29-2. Pursuant to Rule 29(a)(4)(E) 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*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

BACKGROUND

In this First Amendment lawsuit, a nursing student struggling with mental health concerns and violent thoughts about his teachers did what we all hope a person in his position would do: he reached out to medical professionals for help and got it. His college ultimately responded by doing what we should hope an institution in its position would ***not*** do: it punished him for speaking those thoughts.

R.W. was enrolled in the nursing program at Columbia Basin College ("CBC") in the spring of 2017. ER 1087–88. Stressed by the demands of the program and suffering insomnia, depression, and epileptic seizures, he made an appointment in March with his primary care physician to seek treatment for his insomnia and violent thoughts he was experiencing. ER 1088–89. During the appointment, he told his doctor that he had thoughts of killing several instructors in his program who had given him bad grades or feedback. ER 433, 1089. His doctor contacted a crisis center social worker. After speaking with her, R.W. voluntarily committed himself for several days to a psychiatric treatment facility. ER 1089–90. Believing she had an obligation under state law to report him to law enforcement, the social worker reported R.W.'s statements to the police, who notified CBC officials. ER 444, 1090–91. In doing so, the police told CBC officials that R.W. was at the treatment facility getting help and "may not be an immediate threat." ER 1090–91.

CBC issued an interim trespass order banning R.W. from its campuses in March 2017, pending an investigation. ER 980. In April 2017, weeks after R.W. had left the treatment center, CBC officials found him responsible in a disciplinary proceeding for violating CBC's conduct code provision prohibiting "Abusive Conduct" because his thoughts, communicated to medical professionals and ultimately reported to the college, resulted in a "hostile" and "intimidating" environment on campus. ER 1004–05. Based on the violation, CBC continued the trespass order banning him from campus and required him to participate in mental health counseling and mental health evaluation as a condition of any future re-enrollment and lifting of the trespass order. *Id*. R.W. was unenrolled from the nursing program, lost his financial aid, and has been unable to continue taking classes, resulting in his constructive expulsion from the program. ER 71–72.

R.W. brought this civil rights suit alleging, *inter alia*, that CBC violated his First Amendment rights. The District Court granted R.W.'s motion for summary judgment on this claim, declining Appellants' invitation to apply standards applicable to K-12 education and instead applying a traditional First Amendment analysis. ER 68–71. The court held that R.W.'s communications with his doctor and social worker were protected speech, not unprotected "true threats," and that Appellants violated R.W.'s rights by punishing his speech under its conduct code.

ER 72–74, 77–78. The court denied qualified immunity to the individual defendants. ER 81.

SUMMARY OF THE ARGUMENT

This appeal raises critical issues of law and policy for all college students in the Ninth Circuit, particularly those struggling with mental health issues. *Amici* understand that a college must be able to ensure the safety of staff and other students when faced with a potential safety threat. Indeed, we recognize that CBC may have been justified in taking emergency interim measures to keep R.W. from campus while it investigated a potential threat. However, there is a vitally important constitutional distinction between responding to R.W.'s statements by imposing temporary safety measures and constructively expelling R.W. as punishment for the thoughts he shared with medical professionals. If CBC may lawfully punish R.W. for his speech in these circumstances, this would mark an expansion of public colleges' disciplinary jurisdiction over adult students in an unprecedented way with dangerously chilling effects on students' communications with medical professionals—communications that are vital to their ability to obtain care. Indeed, it may deter students from seeking help in similar situations in the future.

On appeal, Appellants insist that the Court must evaluate the off-campus speech of an adult college student under the standard articulated for on-campus K-12 student speech in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503

(1969), and subsequent case law developed in the K-12 setting. Appellants' Br. 19–20. While *Tinker* and later cases recognized several limited exceptions to traditional First Amendment protections in the primary and secondary school context, the Supreme Court has long recognized that "the 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." *Healy v. James*, 408 U.S. 169, 180 (1972). This Court has not extended *Tinker's* K-12 standard to college students' on-campus or off-campus speech, and has declined to extend student speech jurisprudence to higher education in past cases. *Oyama v. Univ. of Haw*., 813 F.3d 850, 863 (9th Cir. 2015).

This Court should not extend *Tinker's* reach in this case. Permitting the college to punish R.W.'s statements to medical professionals under *Tinker* would expand college officials' regulatory and disciplinary authority in a manner that would have a dangerous chilling effect on adult students' communications with their medical providers and would fundamentally erode the character of higher education and the rights of all public college students in the Ninth Circuit.

Applying traditional First Amendment principles, the District Court held that R.W.'s speech was protected. In arguing that R.W.'s speech constitutes an unprotected true threat, Appellants assert for the first time on appeal that courts must apply an "objective reasonableness" true threat test in civil cases based on the

hearer's interpretation of the speech. Appellants' Br. 17–19. However, the Ninth Circuit has made clear—under reasoning that does not support a distinction between civil and criminal cases—that a subjective intent to threaten is the "determinative factor" separating protected expression from unprotected speech. *United States v. Bagdasarian,* 652 F.3d 1113, 1118 (9th Cir. 2011). Using the subjective intent test, the District Court correctly held that no reasonable factfinder could conclude that R.W. intended to threaten or intimidate the instructors who were the subject of his thoughts when he communicated these thoughts to medical professionals in the course of care. ER 74.

The District Court's analysis was correct. R.W. did the right thing for himself and others: he communicated with a doctor to get help. If he may be constructively expelled for seeking help, no public college student struggling with their mental health will knowingly take such a gamble in the future. Nor did CBC need to punish R.W. for his statements in order to ensure safety on campus. A public college has ample tools at its disposal take emergency steps to address potential threats on an interim basis without resort to sanctioning protected speech. Colleges and universities can and must protect *both* the safety and the constitutional rights of their students. For these reasons, the Court should uphold the District Court's ruling that Appellants violated R.W.'s clearly established First Amendment right to be free from punishment for his protected speech.

ARGUMENT

I. The District Court Correctly Held that First Amendment Standards Applicable in the K-12 Environment Do Not Apply to College Students.

The Supreme Court has long recognized the importance of protecting the First Amendment rights of public college and university students on campus. *See*, *e.g.*, *Healy*, 408 U.S. at 180. In the context of public elementary and secondary schools, however, the Court has permitted limited restrictions on otherwise protected student speech at school or in school-controlled contexts. *See Morse v. Frederick*, 551 U.S. 393, 397 (2007) (school may punish speech at school-sponsored event "that can reasonably be regarded as encouraging illegal drug use"); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (school may control content of school-sponsored student speech if "reasonably related to legitimate pedagogical concerns"); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986) (school may punish student for "offensively lewd," "indecent," or "vulgar" speech in school); *Tinker*, 393 U.S. at 513 (student speech may be restricted where it materially and substantially disrupts the work and discipline of the school, or officials reasonably forecast such disruption).

The Supreme Court, this Court, and other circuit courts have not imported the limitations on K-12 student speech permitted by *Tinker* and its progeny to adult college students' extracurricular speech. This is for good reason: The rationales for primary and secondary school speech restrictions are often inapplicable to adult

students and are inconsistent with the mission of higher education. Moreover, the fact that R.W.'s speech took place off-campus and was communicated to a medical professional for the purpose of seeking care makes the application of *Tinker* here even more inappropriate. Neither the Supreme Court nor this Court has ever held that schools have the disciplinary jurisdiction to punish students, let alone adult students, for speech to medical providers that occurs off-campus and outside of school activities. And despite Appellants' arguments to the contrary, neither this Court's decisions regarding off-campus high school speech nor the Supreme Court's *Healy* decision compel this Court to hold that the District Court erred in applying traditional First Amendment standards to such speech.

The Supreme Court has permitted public K-12 schools to restrict or punish certain narrow categories of "student speech that [are] inconsistent with [schools'] 'basic educational mission,' even though the government could not censor similar speech outside the school." *Hazelwood*, 484 U.S. at 266 (quoting *Fraser*, 478 U.S. at 685) (internal citation omitted). One of the reasons the Supreme Court has allowed some restrictions of student speech within primary and secondary schools is because K-12 students are a "captive audience" by way of their mandatory attendance, and "schools must teach by example the shared values of a civilized social order." *Fraser*, 478 U.S. at 683–84.

As the Supreme Court has recognized, these justifications for state censorship are inapplicable outside the hallways, classrooms, and school-sponsored activities of a public K-12 school. *See Morse*, 551 U.S. at 405 (noting that if the high school student in *Fraser* who delivered a sexually-suggestive speech at a school assembly had instead "delivered the same speech in a public forum outside the school context, it would have been protected"). They are particularly inapplicable to a public college campus—a context that, "at least for its students, possesses many of the characteristics of a public forum." *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981). "University students are, of course, young adults," reasonably presumed to be "less impressionable than younger students." *Id. at* 274 n.14. The protection of students' First Amendment rights is especially important in the college and university setting, "where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995).

Accordingly, this Court has not extended the Supreme Court's K-12 student speech doctrine to speech cases arising at public colleges and universities. In fact, this Court has on several occasions explicitly declined to do so.[2] *See Oyama,* 813

[2] In *Brown v. Li*, Judge Graber suggested that "*Hazelwood* provides a workable standard for evaluating a university student's First Amendment claim stemming from *curricular* speech." 308 F.3d 939, 952 (9th Cir. 2002) (emphasis added). But even in an explicitly curricular context, that position did not command a majority of the panel. *Id.* at 956–57 ("I emphasize that there is no agreement between my

F.3d at 863 (9th Cir. 2015) ("This case presents no occasion to extend student speech doctrine to the university setting."); *Flint v. Dennison*, 488 F.3d 816, 829 n. 9 (9th Cir. 2007) (declining to address the question of whether K-12 student speech standards apply at colleges and universities); *Hudson v. Craven*, 403 F.3d 691, 700–01 (9th Cir. 2005) (same).

Other courts have similarly declined to impose the "narrower scope" of grade school speech rights on public college campuses, instead concluding that "for purposes of First Amendment analysis there are very important differences between primary and secondary schools, on the one hand, and colleges and universities, on the other." *Coll. Republicans v. Reed*, 523 F. Supp. 2d 1005, 1015 (N.D. Cal. 2007). For example, in *DeJohn v. Temple Univ.*, the U.S. Court of Appeals for the Third Circuit recognized that college administrators "are 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); *see also McCauley v. Univ. of the V.I.*, 618 F.3d 232, 242, 244 (3d Cir. 2010) (declining to regulate adult college

---

colleagues in the majority as to the legal standard applicable to Brown's First Amendment claims. Thus, there is no majority opinion and no binding precedent with respect to any First Amendment principles. . . . Judge Graber would have us adopt a First Amendment standard regarding the authority of public universities to limit the speech of graduate students that I believe to be wholly inappropriate – a standard that would seriously undermine the rights of all college and graduate students attending state institutions of higher learning. . . .") (Reinhardt, J., concurring in part and dissenting in part). As this Court noted in *Oyama*, Judge Graber's position has not been adopted in the Ninth Circuit. 813 F.3d at 862.

student speech "based solely on rationales propounded specifically for the restriction of speech in public elementary and high schools," in part because "[p]ublic university administrators, officials, and professors do not hold the same power over students" as high school counterparts).

Given that this Court has declined to extend the K-12 student speech doctrine to public college campuses, it is a further stretch still to apply *Tinker* standards to a college student's off-campus speech.

Although the Supreme Court has never held that schools may punish students for off-campus speech on the basis of an anticipated substantial disruption at school, this Court has held, in the high school setting, that "when faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*." *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1069 (9th Cir. 2013); *see also McNeil v. Sherwood Sch. Dist. 88J*, 918 F.3d 700, 707–08 (9th Cir. 2019); *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 990 (9th Cir. 2001). However, none of the Ninth Circuit's applications of *Tinker* to speech originating off-campus dealt with adult college student speech, and, as explained above, the *Oyama* court noted that the K-12 student speech doctrine has not been extended to the university setting. 813 F.3d at 862–63. Contrary to Appellants' arguments, the Ninth Circuit has never held that a public college may

punish an adult's off-campus speech under *Tinker*. As explained in detail below, this Court need not do so now to protect public safety.

Finally, despite Appellant's arguments, *Healy* does not compel a different result and is not contrary to the District Court's application of traditional First Amendment standards in this case. Appellants' Br. 24–25. *Healy* did not involve punishment of a student for disruptive conduct; it was about a college's denial of official recognition to a student organization that administrators feared might engage in disruptive activities. The *Healy* Court cited *Tinker* for certain bedrock principles in public education—for example, that students retain First Amendment rights on campus, 408 U.S. at 180; that restrictions to free expression at public colleges and universities must take place "consistent with fundamental constitutional safeguards," *id*.; and that the "undifferentiated fear or apprehension of disturbance . . . is not enough to overcome the right to freedom of expression," *id*. at 191[3]—and the *Healy* court reasoned that a public college may maintain reasonable rules to prohibit disruptive on-campus conduct, *id*. at 189. *Healy* does not stand for the

[3] This Court similarly cited *Tinker* in *Hudson*, a case involving the First Amendment rights of college faculty, for the proposition that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." 403 F.3d at 700. By the same token, the *Hudson* court expressly declined to determine how *Tinker* and its progeny apply in the college setting. *Id*. at 700–01. Like *Healy*, *Hudson*'s citation to *Tinker* for a bedrock and general principle of law does not indicate a wholesale application of the standards promulgated by the *Tinker* line of cases.

proposition that a public college must apply *Tinker* jurisprudence developed in the K-12 setting to all—or any—college student expression. To the contrary, the Court observed that, even acknowledging the "need for order," its precedents do not apply First Amendment protections "with less force on college campuses than in the community at large." *Id*. at 180. Moreover, given that *Tinker* dealt with on-campus speech and *Healy* with on-campus associational activity, *Healy* certainly does not address whether *Tinker* should be extended to the off-campus speech at issue in this case.

While the speech in this matter—namely, a college student's violent ideations about his instructors, communicated off-campus to his physician—may evoke fear rather than sympathy, the wholesale importation of *Tinker* K-12 case law advocated by Appellants would have far-reaching consequences beyond the speech at issue here. Applying *Tinker* to find this speech punishable would empower college and university administrators to restrict a broad swath of student speech by muddying the traditional distinction between the rights of minor schoolchildren and adult college students. College students would rationally choose to self-censor, to the detriment of our shared future: As the Supreme Court has observed, "[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." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

II. Colleges Like CBC Have Other Tools at Their Disposal to Respond to Potential Safety Issues, and Do Not Need to Rely on Tinker for This Purpose.

Tinker's ill fit to public college and university campuses does not tie the hands of administrators to appropriately respond to potential safety threats. To the extent a public college must take interim or emergency action for investigative and safety purposes, it does not need to rely on *Tinker* K-12 standards to do so. *See Doe v. Rector & Visitors of George Mason Univ.*, 149 F. Supp. 3d 602, 630–31 (E.D. Va. 2016) ("school administrators have tools at their disposal to fulfill their obligation to ensure school safety that fall short of punishing" speech that does not rise to the level of a true threat). Surely public colleges and universities—many of which more closely resemble small towns than grade schools[4]—may be expected to maintain public safety and respond to requests for assistance from community members without eroding core civil liberties. Just as municipalities may take emergency measures to ensure safety, such as restraining the actions of a person who poses a credible danger to himself or others, on-campus officials may do the same, even when the evidence of danger comes in the form of off-campus student speech, and

---

[4] For example, "nearly all universities are in the policing business. Almost all four-year colleges with more than 2,500 students had their own law enforcement agency during the 2011-'12 academic year, according to a survey from the Bureau of Justice Statistics." Libby Nelson, *Why nearly all colleges have an armed police force*, VOX, July 29, 2015, https://www.vox.com/2015/7/29/9069841/university-of-cincinnati-police.

even when that speech was communicated to medical professionals. *See infra* pp. 19-22 (discussing interim safety measures in college environments). *Tinker* primary and secondary school standards are not necessary or appropriate for colleges responding to potential threats to campus safety reflected in off-campus speech. Rather, application of *Tinker* and other K-12 student speech cases to the college context would grant unwarranted and chilling authority to college administrators to regulate student speech.

III. R.W.'s Communication of His Thoughts to Medical Professionals was Protected Speech.

A. R.W.'s speech does not constitute a true threat.

Under traditional First Amendment standards, R.W.'s speech—communicating ideations about physically harming several of his teachers to his doctor and a social worker in the course of seeking medical care—is protected. It is vitally important that it remains so. If a public college may constitutionally punish a vulnerable student because he sought help for his mental health, the resultant chilling effect will silence those who might most need professional care.

Appellants argue that R.W.'s speech may be punished because it was an unprotected true threat. Appellants' Br. 15–19. However, the District Court correctly held that "no reasonable factfinder could conclude that R.W. had the requisite intent to transform his statements into true threats to intimidate his instructors." ER 74. "'True threats' encompass those statements where the speaker means to

communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003). Following the *Black* decision, the Ninth Circuit held that "speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat[,]" clarifying previous circuit case law applying only an objective test. *United States v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005). In *United States v. Bagdasarian*, this Court reiterated that subjective intent to threaten is the "determinative factor" separating protected expression from unprotected speech that can be the basis of criminal sanctions, but clarified that an underlying criminal statute may *also* require proof of an objective element. 652 F.3d 1113, 1118 (9th Cir. 2011).

Appellants incorrectly assert that the Ninth Circuit applies the subjective intent test only in criminal cases and applies an objective standard in civil cases. Appellants' Br. 17–18. Nothing in this Circuit's case law supports the application of a different constitutional standard to civil and criminal cases in determining whether speech is a true threat for First Amendment purposes. To the contrary, as the *Bagdasarian* court noted, *Black* settled the question in this Circuit of whether subjective "intent to threaten is a necessary part of a *constitutionally punishable* threat." 652 F.3d at 1118 (emphasis added); *see also Burge v. Colton Sch. Dist. 53*, 100 F. Supp. 3d 1057, 1068 (D. Or. 2015) (under *Bagdasarian*, "if only one standard

applies in the civil context, it is the subjective standard[,]" but an objective test "may *also* apply, depending on the statute or policy under which the speaker has been punished") (citation omitted) (emphasis added). In other words, subjective intent is necessary in order to remove constitutional protection from speech. Whether the punishment is criminal or civil is immaterial to whether the speech may be sanctioned consistent with the First Amendment.

Appellants cite *O'Brien v. Welty*, 818 F.3d 920, 932 (9th Cir. 2016), to support their theory that an objective true threat test applies in civil cases. However, *O'Brien* is inapposite to the analysis here. There, this Court considered whether a college permissibly applied its student conduct code to punish the plaintiff student's on-campus conduct, which consisted of videotaping several professors in their offices and refusing to leave when asked. *Id*. at 931–32. The court did not consider whether the student's conduct constituted an unprotected true threat. Rather, the court applied forum analysis, finding that the student's conduct took place in a non-public forum, a hallway housing faculty offices, where a content-neutral restriction on speech or expressive conduct need only be reasonable in light of the purpose of the forum. *Id*. at 931. Under the non-public forum test, the court found the school's content-neutral application of the conduct code to plaintiff's conduct constitutional. *Id*. at 932. This analysis is irrelevant to determining whether R.W.'s off-campus speech to third-party medical professionals was an unprotected true threat.

Under the correct true threat test, the District Court's finding is straightforward: the undisputed facts show that R.W. communicated his ideations in private to his doctor and a social worker in order to seek their help. ER 74. There are no facts in the record that could reasonably show he intended to threaten or intimidate his instructors. *Id*. Just the opposite: R.W.'s actions in reaching out to a doctor for help suggest that his thoughts upset *him*. ER 1088–89; *see also D. G. v. Indep. Sch. Dist. No. 11*, No. 00-C-0614-E, 2000 U.S. Dist. LEXIS 12197, at *15 (N.D. Okla. Aug. 21, 2000) (sustaining First Amendment challenge and noting "[a] student cannot be penalized for what they are thinking"). The District Court correctly held that R.W.'s speech was protected speech, not a true threat.

This is the right result under First Amendment precedent, and it also promotes school safety. To hold that a college student's speech seeking medical help in these circumstances is unprotected would have serious and potentially dangerous consequences for students struggling with their mental health and wondering whether to reach out for help. And the chilling effect could have a broad reach. By many reports, students struggling with their mental health make up a dramatically increasing segment of college and university student populations, and institutions nationwide struggle to provide needed resources. According to a 2019 Associated Press report, "For years, national surveys have found rising rates of anxiety and depression among college students. Most colleges that provided data to the AP said

those conditions, and stress, were the most common complaints." Collin Binkley & Larry Fenn, *More College Students Look for Mental Health Help on Campus*, ASSOCIATED PRESS, Nov. 25, 2019, https://www.usnews.com/news/healthiest-communities/articles/2019-11-25/colleges-struggle-with-soaring-student-demand-for-counseling. "On some campuses, the number of students seeking treatment has nearly doubled over the last five years while overall enrollment has remained relatively flat. . . . Universities have expanded their mental health clinics, but the growth is often slow, and demand keeps surging." *Id*.

For both jurisprudential and policy reasons, this Court should affirm the District Court's holding that R.W.'s discussion with third-party medical professionals was protected speech that does not rise to the level of a true threat.

B. There is a constitutional distinction between interim safety measures and disciplinary sanctions based on protected speech.

All public colleges and universities can and must ensure safety *and* protect constitutional freedoms. To that end, it is important to note that this Court is not presented with the question of whether a college may ever respond to off-campus speech by taking appropriately tailored temporary measures to protect campus safety. Rather, the question before this Court is whether the First Amendment allows a public college to impose disciplinary sanctions based on the content of a college student's protected off-campus statements to medical professionals treating him.

Amici do not dispute that every college and university must be able to take necessary safety measures to protect faculty and students on campus, even if they place some burden on a student's constitutional freedoms. It is undisputed, for example, that a college may put fire safety rules in place to maintain ingress and egress from buildings, even if it means a pamphleteer cannot distribute literature directly in front of an entrance.

Faced with an emergency, a college may have a compelling justification to take interim steps, such as temporarily removing a student posing a potential threat to health and safety from campus. *See Menotti v. City of Seattle*, 409 F.3d 1113, 1131 (9th Cir. 2005) (upholding constitutionality of an emergency order prohibiting protesters' access to portions of city where lead-up protests involved violence and significant disruptions, and noting "that 'it is a traditional exercise of the States' police powers to protect the health and safety of their citizens.'") (quoting *Hill v. Colorado*, 530 U.S. 703, 715 (2000)). This does not necessarily extend, however, to penalizing protected speech beyond an institution's emergent needs.

In student First Amendment cases, this Court has recognized that, even in a high school context applying the less-protective *Tinker* standard, there is a distinction between permissible interim safety measures and punishing speech for its own sake. In *Lavine*, the Ninth Circuit held that a high school student's emergency expulsion after showing his teacher a poem that described him shooting

other students did not violate his First Amendment rights. 257 F.3d at 992. However, the court ruled that the school's imposition of a negative mark on the student's record did violate his rights. *Id*. The court reasoned that the school's placement in the student's file of "negative documentation," composed after the "perceived threat had subsided," "created a permanent indictment" of the student that went beyond the school's legitimate safety needs. *Id*. In other words, it amounted to punishment of speech.[5]

One federal district court summed up well the distinction between permissible safety measures and unconstitutional punishment in the case of a college student expelled for a conduct code violation after sending a text to his ex-girlfriend threatening to kill himself. Granting the student's motion for summary judgment on a First Amendment claim, the court reasoned that administrators have "tools at their disposal" to ensure school safety without punishing "empty threats of suicide." *Rector & Visitors of George Mason Univ*., 149 F. Supp. 3d at 630. The court noted that, although the plaintiff's text message "justified intervention by [university]

[5] Similarly, a federal district court held that a high school student's First Amendment rights were violated, applying both a true threat and *Tinker* analysis, when she was placed on a semester long in-school suspension after a poem she wrote—including the words "Killing Mrs. [teacher]" and expressing frustration with the teacher's class—was discovered by the school. *Indep. Sch. Dist. No. 11*, 2000 U.S. Dist. LEXIS 12197, at *3, 18. The court noted that "[a] suspension on a short-term basis until the circumstances could be investigated would have been justified under the law[,]" but that the ongoing punishment based on the student's protected speech was unconstitutional. *Id*. at *18.

administrators to investigate whether a threat was real and to separate plaintiff from other students until a determination was made[,]" the "imposition of a sanction . . . was improper" when it became clear the text was protected speech. *Id*. at 631. "[A] university should not 'silenc[e] speech' where it can 'accomplish[] its goals in some [other] fashion.'" *Id*. at 630 (quoting *IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ*., 993 F.2d 386, 393 (4th Cir. 1993)).

Here, the record makes clear that CBC administrators went far past interim safety measures to penalize R.W. for communicating his thoughts to medical professionals. ER 980, 1004–05. Though the college may have had the right to take interim steps to temporarily ban R.W. from campus and investigate, it did not have the right to later sanction him for communicating his thoughts. ER 71 ("The parties agree that R.W. was sanctioned for the statements he made to his doctor."). Again, were it the case that Appellants could legally punish R.W. for his speech to medical professionals, the chilling consequences for R.W. and all future students struggling with their mental health would be cruel and dangerous.

IV. The District Court Correctly Held that the Law Was Clearly Established and Denied Qualified Immunity.

This Court should uphold the District Court's denial of qualified immunity. The District Court correctly framed the constitutional right at issue and held that the law was clearly established at the time R.W. was removed from CBC's nursing program. Governmental actors performing discretionary functions enjoy qualified

immunity only "insofar as their conduct does not violate clearly established . . . rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The defense must be denied where facts in the record make out a violation of a constitutional right that was clearly established at the time the plaintiff's rights were violated. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

As discussed above, the First Amendment applies to the actions of public college officials as it does to government officials in the broader community. *Healy*, 408 U.S. at 180;[6] *see also Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973) ("the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency'").

It is well established that a content-based restriction of an individual's protected speech violates the First Amendment unless it meets the most exacting constitutional scrutiny. *See Turner Broad. Sys. v. FCC*, 512 U.S. 622, 640–41 (1994) (content-based restrictions on speech must meet strict scrutiny); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95–96 (1972) ("[A]bove all else, the First Amendment

---

[6] Notably, *Healy* involved a public university's refusal to recognize a campus chapter of Students for a Democratic Society (SDS) during a time of intense turmoil on campuses, for fear of the type of "violent and disruptive" activities that had been associated with the national Students for a Democratic Society organization. 408 U.S. at 178.

means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.").

In the college context, as the District Court observed, federal circuit and district courts have for decades invalidated content-based restrictions on speech in student conduct codes or other university policies that permit the punishment of protected student speech.[7] ER 78.

---

[7] *See McCauley*, 618 F.3d at 250, 252 (invalidating university speech policies prohibiting "Conduct Which Causes Emotional Distress"); *DeJohn*, 537 F.3d at 317–18 (striking down university sexual harassment policy where use of the terms "hostile," "offensive" were so broad and subjective they would cover any speech of a "gender-motivated" nature "the content of which offends someone."); *Dambrot v. Cent. Mich. Univ*., 55 F.3d 1177, 1182, 1185 (6th Cir. 1995) (anti-harassment policy prohibiting verbal conduct creating an "intimidating, hostile, or offensive educational . . . environment" was substantially overbroad because it banned speech based on the subjective reaction of listeners); *Coll. Republicans at S.F. St. Univ.*, 523 F. Supp. 2d at 1024 (enjoining enforcement of university civility policy); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 872 (N.D. Tex. 2004) (finding university sexual harassment policy prohibiting "threats, insults, epithets, ridicule, or personal attacks" unconstitutionally overbroad); *Bair v. Shippensburg Univ*., 280 F. Supp. 2d 357, 363 (M.D. Pa. 2003) (enjoining enforcement of policy requiring communicating "in a manner that does not provoke, harass, intimidate, or harm another"); *Pro-Life Cougars v. Univ. of Hous.*, 259 F. Supp. 2d 575, 577–78, 585 (S.D. Tex. 2003) (declaring university policy regulating "potentially disruptive" events unconstitutional); *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) (finding university sexual harassment policy void for vagueness and overbreadth because it relied on a listener's subjective view of offensiveness); *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis*., 774 F. Supp. 1163, 1165 (E.D. Wisc. 1991) (enjoining enforcement of university discriminatory harassment policy prohibiting speech creating an "intimidating, hostile or demeaning environment"); *Doe v. Univ. of Mich*., 721 F. Supp. 852, 866 (E.D. Mich. 1989) (university discriminatory harassment policy was unconstitutional on its face and as applied to student speech).

Against this legal landscape, the District Court came to the unsurprising conclusion that at the time R.W. was punished, it was clearly established that a college or university administrator may not apply a student conduct code to punish a student's protected speech based on the content of the speech. ER 79. Yet that is exactly what Appellants did. Defendant Reagan found R.W. responsible for violating the college's policy on "Abusive Conduct," which prohibits, *inter alia*, "verbal . . . conduct . . . which has the purpose or effect of creating a hostile or intimidating environment." ER 1004. Defendant Reagan explained to R.W., "I understand that the result of your behavior was not to create a hostile or intimidating environment, but it had the same effect." *Id*. The parties do not dispute that the "conduct" at issue was R.W.'s thoughts, communicated to third-party medical professionals. ER 71, 1097. It is likewise undisputed that Reagan imposed disciplinary sanctions as a result of his finding, including indefinitely continuing the interim trespass banning R.W. from campus and, as a consequence, removing him from the nursing program. ER 1004–05.

Appellants sanctioned R.W. for his protected speech based on the content of the speech. Under traditional First Amendment principles, it should have been clear to a reasonable administrator that R.W.'s punishment violated his First Amendment rights. This Court should therefore uphold the district court's denial of qualified immunity.

CONCLUSION

For the foregoing reasons, this Court should hold that *Tinker* K-12 standards do not govern a college student's off-campus speech. Under a traditional First Amendment analysis, the Court should hold that Appellants violated R.W.'s clearly established right to be free from punishment by a public college for his protected communications with medical professionals and uphold the District Court's grant of summary judgment for R.W. and denial of qualified immunity.

Dated: June 1, 2020

Respectfully Submitted,

/s Marieke Tuthill Beck-Coon
Marieke Tuthill Beck-Coon, WSBA #56133
Lindsie Rank
FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION
510 Walnut Street, Suite 1250
Philadelphia, PA 19106
(215) 717-3473
marieke@thefire.org
lindsie.rank@thefire.org

Molly Tack-Hooper, WSBA #56356
Nancy Talner, WSBA #11196
AMERICAN CIVIL LIBERTIES
UNION OF
WASHINGTON FOUNDATION
P.O. Box 2728
Seattle, WA 98111
(206) 624-2184
mtackhooper@aclu-wa.org
talner@aclu-wa.org

Attorneys for Amici Curiae
Foundation for Individual Rights in
Education and American Civil
Liberties Union of Washington

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 19-35849

I am the attorney or self-represented party.

This brief contains 6,394 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[**X**] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated ______________.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Marieke Tuthill Beck-Coon **Date** May 29, 2020
(use "s/[typed name]" to sign electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of *Amici Curiae* Foundation for Individual Rights in Education and American Civil Liberties Union of Washington with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 1, 2020.

All participants in this case are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: June 1, 2020

s/ Marieke Tuthill Beck-Coon
Counsel for *Amici Curiae* Foundation for Individual Rights in Education and American Civil Liberties Union of Washington