No. 19-3016

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

TURNING POINT USA AT ARKANSAS STATE UNIVERSITY;
ASHLYN HOGGARD,
Plaintiffs-Appellants,

v.

RON RHODES, in his individual capacity (originally named in his individual and official capacities as member of the Board of Trustees of the Arkansas State University System), et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Arkansas, No. 3:17-cv-327-JLH

AMICUS BRIEF OF SPEECH FIRST, INC. IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Speech First, Inc. has no parent corporation, and no corporation owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE*

Speech First is a membership association of students, parents, faculty, alumni, and concerned citizens. Launched in 2018, Speech First is committed to restoring the freedom of speech on college campuses through advocacy, education, and litigation. For example, Speech First has challenged speech-chilling policies at the University of Michigan, *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019); the University of Texas, *Speech First, Inc. v. Fenves*, No. 19-50529 (5th Cir.); and the University of Illinois, *Speech First, Inc. v. Killeen*, No. 19-2807 (7th Cir.).

Speech First is keenly interested in this important case. As a recent resolution introduced in the U.S. Senate explains: "[D]espite the clarity of the applicable legal precedent and the vital importance of protecting public colleges in the United States as true 'marketplaces of ideas,'" nearly "1 in 10 of the top colleges and universities in the United States quarantine student expression to so-called 'free speech zones'" and "30 percent maintain severely restrictive speech codes that clearly and substantially prohibit constitutionally protected speech." *Campus Free Speech Resolution of 2019*, S. Res. 233, 116th Cong. (June 3, 2019). Regrettably, Arkansas State University is one such university. The University policies at issue here are the kind that Speech First routinely challenges and that the First Amendment clearly forbids.

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* No party's counsel authored this brief in whole or in part; and no party, party's counsel, or person (other than amicus or its counsel) contributed money to fund the brief's preparation or submission. Counsel for all parties consent to the filing of this brief.

SUMMARY OF THE ARGUMENT

The concept of prior restraint is "solidly grounded" in Supreme Court precedent: Distinguished from "subsequent punishments," prior restraints "'forbid[] certain communications … in advance of the time that such communications are to occur'"—for example, by requiring a person "to obtain prior approval for ... expressive activities." *Alexander v. United States*, 509 U.S. 544, 550-51 (1993). Since at least the 1930s, the Supreme Court has held that prior restraints are "an impermissible restraint on First Amendment rights." *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971) (citing *Near v. Minnesota*, 283 U.S. 697 (1931)). Given the obvious "risks of freewheeling censorship," a "free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them … beforehand." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975). This rule against prior restraint is so strong that not even the wartime disclosure of the Pentagon Papers could justify one. *See N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971).

Giving a government official unbridled discretion to approve or reject free speech or association is the hallmark of an unconstitutional prior restraint. As early as 1958, the Supreme Court could state that "[i]t is *settled* by a long line of recent decisions of this Court" that policies making protected expression "contingent upon the uncontrolled will of an official" are "an unconstitutional … prior restraint." *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958) (emphasis added; citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Hague v. Comm. for Indus.*

Org., 307 U.S. 496 (1939); *Schneider v. Town of Irvington*, 308 U.S. 147 (1939); *Largent v. Texas*, 318 U.S. 418 (1943); *Jones v. City of Opelika*, 319 U.S. 103 (1943); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Kunz v. New York*, 340 U.S. 290 (1951)).

Regrettably, the policies challenged here transgress this settled rule. Arkansas State University has banned all students from speaking in so-called "Free Expression Areas," and has banned most students from setting up tables outside the student union, unless they first obtain permission from a University official. Other than a perfunctory nod to content neutrality, these policies place no meaningful constraints on the University's discretion and contain no definitive guidelines on when permission can be granted or denied. "[S]uch … policies … are unconstitutional, because without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker" and "the absence of express standards makes it difficult" to prove otherwise. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 763-64, 758 (1988). While the stakes might not seem as high when the censor is a university administrator rather than a legislature or police officer, "it is from petty tyrannies that large ones take root and grow." *Thomas v. Collins*, 323 U.S. 516, 543 (1945). This Court should reverse.

ARGUMENT

I. The Supreme Court has long held that prior restraints violate the First Amendment.

From the Founding to today, prior restraints have always been considered violations of "the freedom of speech or of the press." U.S. Const., amend. I. Take the

Founders' debates over the Sedition Act, for example. The Sedition Act made it a crime to write or publish "any false, scandalous and malicious writing or writings against the government of the United States." 1 Stat. 596 (1798). The Democratic-Republicans criticized the Act as a flagrant violation of the First Amendment. The Federalists, relying on the English common law, responded that the First Amendment "is merely an exemption from all previous restraints." 8 *Annals of Congress* 2148 (1798); *see* 2 Blackstone, *Commentaries on the Laws of England* *152 ("The liberty of the press … consists in laying no *previous* restraints upon publications"). The Jeffersonians disagreed: In America, Madison explained, "[t]he People, not the Government, possess the absolute sovereignty" and so First Amendment freedoms are "exempt not only from previous restraint" but also "subsequent penalty." *Report on the Virginia Resolutions* (1799), *in* 4 *Letters and Other Writings of James Madison* 515, 542 (J.B. Lippincott & Co. 1865). While the Democratic-Republicans and Federalists disagreed about the constitutionality of the Sedition Act, they started from a shared premise: the First Amendment certainly *does* prohibit prior restraints. *See generally* 2 *Smolla & Nimmer on Freedom of Speech* §15:2.

Perhaps unsurprisingly, then, the first speech regulation that the Supreme Court declared unconstitutional was a prior restraint. In *Near v. Minnesota*, a publisher challenged an injunction that prohibited him from producing any "'malicious, scandalous, or defamatory'" articles in the future. 283 U.S. at 702-05. The Supreme Court stated "[t]he general principle" that the First Amendment prohibits prior restraints, which it divined from the English common law, the Founders' debates over

the Sedition Act, the "entire absence of attempts to impose previous restraints" since then, and "many decisions under the provisions of state constitutions." *Id.* at 713-19. Because prior restraints are justified "only in exceptional cases," the Court declared the law authorizing the injunction unconstitutional. *Id.* at 716, 722-23. That the publisher was free to speak after he received approval from a court was irrelevant; the power of prior approval is simply "the authority of the censor[,] against which the [First Amendment] was erected." *Id.* at 721; *accord Thomas*, 323 U.S. at 543.

By the 1960s, the Supreme Court could declare that "*[a]ny* system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (emphasis added; collecting cases). "Any" meant "any." *Vance v. Universal Amusement Co.*, 445 U.S. 308, 317 (1980); *see also* Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. Rev. 1, 35 n.14 (1989) ("The United States Supreme Court never has found a prior restraint on pure speech to be constitutional."). In several cases, the Supreme Court described the ban on prior restraints as "universally accepted," recognized by "'every member of the Court,'" and "deeply etched in our law." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 557 (1976); *Se. Promotions*, 420 U.S. at 559. "The thread running through all these cases," the Court explained, "is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press*, 427 U.S. at 559.

The Supreme Court has long recognized not only the general rule against prior restraints, but also several specific sub-rules. Most notably, it is a "settled rule" that any policy requiring a person to obtain prior approval before engaging in expressive activities must contain "procedural safeguards designed to obviate the dangers of a censorship system." *Freedman v. Maryland*, 380 U.S. 51, 58 (1965); *accord Se. Promotions*, 420 U.S. at 559 (reiterating this "settled rule"). Those safeguards are lacking when the policy does not specify the governing criteria in advance, or leaves the decision to the government's sole discretion.

Cases applying this principle are decades-old and legion. For example:

- In *Lovell v. City of Griffin* (1938), the Supreme Court held that an ordinance requiring leafletters to obtain a permit from the city manager was an unconstitutional prior restraint. The criteria for denying a permit were not "limited" in advance; the city manager could block leafletting "at any time, at ant place, and in any manner." 303 U.S. at 451.

- In *Niemotko v. Maryland* (1951), the Supreme Court held that an informal practice of requiring groups to obtain a permit to meet in the public park was an unconstitutional prior restraint. This "amorphous 'practice,' whereby all authority to grant permits for the use of the park" was in the city's "limitless discretion," was unacceptable. 340 U.S. at 271-72. "[T]he lack of standards in the license-issuing 'practice' renders that 'practice' a prior restraint." *Id.* at 273.

- In *Kunz v. New York* (1951), the Supreme Court held that an ordinance requiring street preachers to obtain a permit from the police commissioner was an unconstitutional prior restraint. The ordinance did not "mention … reasons for which such a permit application can be refused" and thus gave the police commissioner "discretion in denying … permit applications on the basis of his interpretation, at that time." 340 U.S. at 293. Because the ordinance "gives an administrative official

> discretionary power to control in advance the right of citizens to speak," it "is clearly invalid as a prior restraint." *Id.*

Given these and other precedents, by 1958 the Court could state that "[i]t is settled by a long line of recent decisions of this Court" that policies making protected speech "contingent upon the uncontrolled will of an official" are "an unconstitutional censorship or prior restraint." *Staub*, 355 U.S. at 322.

Public universities "are not enclaves immune" from this settled rule. *Healy v. James*, 408 U.S. 169, 180 (1972). "Quite to the contrary, the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Id.* (cleaned up). Thus, in a case involving the free speech and associational rights of students at a public university, this Court explained that "[t]he Supreme Court has long adhered to the principle that any system of prior restraint of expression bears a heavy presumption against its constitutional validity." *Gay Lib v. Univ. of Mo.*, 558 F.2d 848, 855 n.14 (8th Cir. 1977). It is "axiomatic that the First Amendment must flourish as much in the academic setting as anywhere else," this Court held, and "[t]o invoke censorship in an academic environment [via a prior restraint] is hardly the recognition of a healthy democratic society." *Id.* at 857.

II. The University's challenged policies are unconstitutional prior restraints.

Arkansas State University has policies that flagrantly violate these long-established rules. To speak in a so-called "Free Expression Area," the University requires students to obtain prior approval from a university official. JA45. Other than an

equivocal statement that applications "will be considered in accordance with the principle of content neutrality," the policy does not impose identifiable limits on the University's discretion. *See* JA45-46. Instead of "'narrow, objective, and definite standards to guide the [University's] authority,'" the policy impermissibly "'involves appraisal of facts, the exercise of judgment, and the formation of an opinion' by the [University]." *Forsyth Cty v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969); and *Cantwell*, 310 U.S. at 305). A prior restraint that specifies "some" relevant criteria, but that on its "face … contains no explicit limits on the [University's] discretion," cannot withstand First Amendment scrutiny. *City of Lakewood*, 486 U.S. at 769. "To allow these illusory 'constraints' to constitute the standards necessary to bound a licensor's discretion renders the guarantee against censorship little more than a high-sounding ideal." *Id.* at 769-70.

The University's policy regarding tabling on the paved portion of Heritage Plaza fares no better. Like the "Free Expression Areas" policy, the tabling policy conditions speech on the University's prior approval and imposes no identifiable limits on the University's discretion (other than a vague promise that the University "maintains a position of [content] neutrality"). JA46. If the tabling policy allows speech only by registered student organizations—a limit that appears nowhere in the policy—that fact makes the policy even less defensible. A "policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship"—a "danger" that "is at its zenith when the determination of who may

speak and who may not is left to the unbridled discretion of a government official." *City of Lakewood*, 486 U.S. at 763.

Because the University's policies give it unbridled discretion to approve or deny student expression, the University cannot possibly defend them. The policies cannot be characterized as mere time, place, and manner restrictions: "A government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.'" *Forsyth Cty.*, 505 U.S. at 130 (quoting *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981)). The policies' references to "content neutrality" cannot save them either: The "mere existence of the [University's] unfettered discretion, coupled with the power of prior restraint, intimidates [students] into censoring their own speech, even if the discretion and power are never actually abused." *City of Lakewood*, 486 U.S. at 757. Nor can this Court "write … limits" into the policies that aren't there, or "presume[]the [University] will act in good faith and adhere to standards absent from the [policies'] face." *Id.* at 770. "[T]his is the very presumption that the doctrine forbidding unbridled discretion disallows." *Id.*

This Court's decision in *Bowman v. White* does not support the University's policies. There, a non-student preacher who was notorious for causing disruptions on campus brought an as-applied challenge to several university policies, including a requirement that he obtain a permit before he could "hand out literature, use signs, or engage in symbolic protests" on campus. 444 F.3d 967, 972-74 (8th Cir. 2006). (He was

free to *speak* on campus, however. *Id.* at 973.) After reaffirming the settled rule that such prior restraints cannot "delegate overly broad licensing discretion to a government official," this Court upheld the university's permitting requirement. *Id.* at 980. The policy "d[id] not delegate overly broad discretion to [university] officials," this Court explained, because it applied evenhandedly to "all non-for-profit Non-University Entities" and gave the University the power to deny a permit "only for limited reasons, such as interference with the activities of the institution." *Id.* at 980-81. The same could not be said of the limitless, speaker-based policies challenged here.

Beyond this "unbridled discretion" problem, there are several other reasons why the University's polices are "clearly" unconstitutional. *See* Appellants' Br. 27-36, 40-41. But however this Court rules on the ultimate question in this appeal—qualified immunity—it should exercise its "sound discretion" to definitively resolve the constitutionality of the University's policies. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009); *e.g.*, *Baribeau v. City of Minneapolis*, 596 F.3d 465, 474 (8th Cir. 2010). This case is one where "there would be little if any conservation of judicial resources to be had by beginning and ending with a discussion of the 'clearly established' prong" of qualified immunity. *Pearson*, 555 U.S. at 236. And "[r]esolution of [the merits] will give guidance to officials" at universities in the Eighth Circuit "about how to comply with legal requirements." *Chambers v. Pennycook*, 641 F.3d 898, 904 (8th Cir. 2011). That guidance is badly needed. *See generally* Jose A. Cabranes, *Higher Education's Enemy Within*, Wall St. J. (Nov. 8, 2019), on.wsj.com/2RF2176 (describing the "far-reaching intellectual

confusion that pervades the nation's campuses" about basic and well-established principles of First Amendment law).

CONCLUSION

For all these reasons, the Court should reverse the district court and hold that the University's challenged policies are unconstitutional prior restraints.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 29(a)(5) because it contains 2,761 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it has been prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font. This brief has been scanned for viruses and is virus-free.

s/ Cameron T. Norris
Counsel for Speech First, Inc.
Dated: December 16, 2019

CERTIFICATE OF SERVICE

I filed a true and correct copy of this brief with the Clerk of this Court via the CM/ECF system, which will notify all counsel.

s/ Cameron T. Norris
Counsel for Speech First, Inc.
Dated: December 16, 2019