20-2194

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NORIANA RADWAN,

Plaintiff-Appellant,

v.

UNIVERSITY OF CONNECTICUT BOARD OF TRUSTEES, WARDE MANUEL, LEONARD TSANTRIS, AND MONA LUCAS, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Connecticut, No. 3:16-cv-2091 (Bolden, J.)

AMICUS BRIEF OF SPEECH FIRST, INC.
IN SUPPORT OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

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

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INTEREST OF AMICUS CURIAE[1]

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.); the University of Illinois, *Speech First, Inc. v. Killeen*, No. 19-2807 (7th Cir.); and Iowa State University, *Speech First, Inc. v. Wintersteen*, No. 4:20-cv-00002 (S.D. Iowa 2020).

Speech First has a strong interest in this case. Despite the importance of free speech on college campuses, universities across the country are failing to protect the free speech rights of their students. The University of Connecticut's punishment of Ms. Radwan for her provocative speech is not unique. Speech First routinely defends students whose First Amendment rights have been violated by universities. The Court should reverse the decision below.

SUMMARY OF THE ARGUMENT

This appeal presents yet another example of university administrators, "in a spirit of panicked damage control, [] delivering hasty and disproportionate punishment

[1] 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 consented to the filing of this brief.

instead of considered reforms.'" *Speech First, Inc. v. Fenves*, No. 19-50529, 2020 WL 6305819, at *15 (5th Cir. Oct. 28, 2020), as revised (Oct. 30, 2020). In such cases, "courts must be especially vigilant against assaults on speech in the Constitution's care." *Id.* The Court should be vigilant here.

In the wake of winning a national championship soccer game, student-athlete Noriana Radwan showed her middle finger to an ESPNU camera on the field. As a result, the University of Connecticut dismissed Ms. Radwan from the team and cancelled her academic scholarship, forcing her to transfer to a new school. The University did so because it believed that Ms. Radwan's speech was "disrespectful" and "embarrassing" for the coach, the team, and the University. That is content-based punishment, which the First Amendment forbids.

That Ms. Radwan's speech was expressive conduct rather than spoken word does not alter its protected status. Indeed, the middle finder gesture is a well-established non-verbal expression, which courts across the country have determined warrants First Amendment protection. Because of that history, the University was on notice that punishing Ms. Radwan for that expression violated her free speech rights.

The University clearly violated Ms. Radwan's First Amendment rights. But however this Court ultimately rules on the qualified immunity question, it should exercise its discretion to resolve the constitutionality of UConn's punishment of Ms. Radwan. While universities were once bastions of free thought and speech, many now prefer to stifle free speech in the name of orthodoxy. Universities across the nation

have alarmingly poor records in protecting their student's free speech rights, and those failures are taking a toll on students. The Court should resolve the First Amendment question on the merits to make clear that universities cannot deprive students of their First Amendment rights.

ARGUMENT

I. The University's punishment of Ms. Radwan for her expressive conduct violated the First Amendment.

A. The First Amendment prohibits content-based punishments on speech.

"It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). That principle applies with equal force in higher-education settings, where "[t]he vigilant protection of constitutional freedoms is nowhere more vital." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). Not only are colleges and universities "not enclaves immune from the sweep of the First Amendment," *Healy v. James*, 408 U.S. 169, 180 (1972), but the First Amendment's importance is at its apex at those institutions, *see Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *Healy*, 408 U.S. at 180; *Sweezy v. N.H. ex rel. Wyman*, 354 U.S. 234, 250 (1957).

The University of Connecticut lost sight of this when it punished Ms. Radwan for briefly "ma[king] an obscene gesture to a television camera" after winning a championship soccer game. JA983. While the Supreme Court has held that a university may require "its students [to] adhere to generally accepted standards of conduct," *Healy*,

408 U.S. at 192, at no point has the Court suggested that college students have diminished First Amendment rights. In fact, the First Amendment's purpose "to guarantee the free exchange of views and energetic debate" is "no less forceful or applicable on campus than it *is in the community at large*." *Carroll v. Blinken*, 957 F.2d 991, 1001 (2d Cir. 1992) (citations omitted) (emphasis added). "Were it otherwise, college would be a very quiet, intellectually diminished and ultimately irrelevant place." *Id.*

According to the University, it dismissed Ms. Radwan from the women's soccer team and cancelled her athletic scholarship because her gesture was "disrespectful." JA982. That is, simply, a content-based restriction on speech; the University is regulating Ms. Radwan's speech "based on its communicative content." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 162 (2015)); *Reno v. ACLU*, 521 U.S. 844, 868 (1997).

University officials told Ms. Radwan in an email that her gesture "was an embarrassment to the University and UConn women's soccer program," JA317, 327, and later testified that her speech "was not something that we want to have on the team or a situation where embarrassing the program, the school, the athletic department." JA419. Although the University may believe that "Ms. Radwan's behavior publicly embarrassed her, the team, and UConn," JA982, and even if Ms. Radwan's gesture was inflammatory, a state official may not restrict speech "in the name alone of 'conventions of decency.'" *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973). "If there is a bedrock principle underlying the First Amendment, it is that the government may

not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Indeed, "the point of all speech protection ... is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 574 (1995). Restrictions because of the "impact that speech has on its listeners ... is the essence of content-based regulation." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 811-12 (2000) (citation and quotations omitted).

As a result, UConn's content-based punishment of Ms. Radwan is "presumptively unconstitutional" and can stand only if the University proves it is "narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163. The University has failed to offer a compelling interest for punishing Ms. Radwan's speech outside of preventing "embarrassment" on its behalf. Any interest the University has in saving face or protecting itself from bad press, however, is not a compelling reason to restrict Ms. Radwan's speech.

B. Ms. Radwan's brief gesture is undoubtably expressive conduct entitled to First Amendment protection.

"The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech." *Virginia v. Black*, 538 U.S. 343, 358 (2003). Ms. Radwan's gesture is undoubtably expressive conduct. Conduct is sufficiently expressive if it "is intended to be communicative and [] in context, would reasonably be understood by the viewer to be communicative." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288,

294 (1984); *see Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47 (2006); *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719, 1742 (2018) (Thomas J., concurring). Ms. Radwan's middle finger gesture fits neatly in that framework.

The Supreme Court has long recognized that the First Amendment protects a wide array of non-verbal gestures and symbols as expressive conduct. Those gestures and symbols include flag-burning,[2] displaying swastikas,[3] taping a peace sign on an upside-down flag,[4] dressing up as a soldier to criticize the government,[5] wearing a black armband to oppose war,[6] conducting a sit-in to protest segregation,[7] refusing to salute the flag,[8] and even flying a flag.[9] In all of those cases, the Court viewed those activities as "sufficiently imbued with elements of communication" so as to be protected speech under the First Amendment. *Johnson*, 491 U.S. at 404. The middle finger gesture is similarly "imbued with elements of communication." *Id.*

Society at large has long understood that raising a middle finger is inherently expressive. Raising a middle finger is "a gesture of insult known for centuries." *Swartz v. Insogna*, 704 F.3d 105, 107 (2d Cir. 2013). But it is also a well-known gesture of

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[2] *Johnson*, 491 U.S. 397.
[3] *Nat'l Socialist Party of Am. v. Skokie*, 432 U.S. 43 (1977).
[4] *Spence v. Washington*, 418 U.S. 405 (1974).
[5] *Schacht v. United States*, 398 U.S. 58 (1970).
[6] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).
[7] *Brown v. Louisiana*, 383 U.S. 131 (1966) (plurality op.).
[8] *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).
[9] *Stromberg v. California*, 283 U.S. 359 (1931).

excitement. At its root, "[t]he middle finger gesture serves as a nonverbal expression of anger, rage, frustration, disdain, protest, defiance, comfort, or even excitement at finding a perfect pair of shoes." Ira P. Robbins, *Digitus Impudicus: The Middle Finger and the Law*, 41 U.C. Davis L. Rev. 1403, 1407-08 (2008). In fact, "the projected middle finger ... convey[s] a message that is sometimes made even more expressive by its bold freedom from a garb of words." *Davis v. Williams*, 598 F.2d 916, 919 n.5 (5th Cir. 1979).

There is a long history in the United States of protecting controversial, non-verbal conduct. Nowhere is this clearer than in the Supreme Court's decision in *Cohen v. California*, 403 U.S. 15 (1971). In *Cohen*, the Petitioner wore a jacket in a courthouse bearing the words "Fuck the Draft." *Id.* at 16. Police arrested him under a California criminal statute targeting disturbances of the peace, but the Court held that, absent a compelling and particularized reason, the First Amendment precludes the government from prohibiting the public display of the "four-letter expletive." *Id.* at 15, 26. The Court famously declared that "words are often chosen as much for their emotive as their cognitive force," *id.* at 26, and that "one man's vulgarity is another's lyric," *id.* at 25. In this case, Ms. Radwan's lyric may be the University's vulgarity, but that difference in viewpoint does not allow for state-sponsored punishment.

In light of *Cohen*, Courts across the country have consistently held that a middle finger gesture implicates the First Amendment. Decades ago, the Sixth Circuit explained that *Cohen* "should leave little doubt in the mind of a reasonable officer that the mere words and gesture 'f—k you' are constitutionally protected speech." *Sandul v. Larion*,

119 F.3d 1250, 1255 (6th Cir. 1997); *see also Cruise-Gulyas v. Minard*, 918 F.3d 494, 497 (6th Cir. 2019) (noting that after *Cohen*, "[a]ny reasonable officer would know that a citizen who raises her middle finger engages in speech protected by the First Amendment"); *Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990) (holding that the First Amendment protects driver who directed "obscene words and gestures" at a police officer); *Nichols v. Chacon*, 110 F. Supp. 2d 1099, 1110 (W.D. Ark. 2000) (holding that it was clearly established that a middle finger gesture was "protected as free speech under the First Amendment").

Similarly, in finding that a high school violated the First Amendment when it punished a disgruntled cheerleader for "post[ing] a picture of herself with the caption 'fuck cheer' to Snapchat," the Third Circuit once again rejected the idea that "vulgar language is low-value speech that can be restricted to a greater extent than would otherwise be permissible," noting the "decades of settled law" to the contrary. *Levy ex rel. B.L. v. Mahanoy Area Sch. Dist.*, 964 F.3d 170, 175, 191 (3d Cir. 2020) (cleaned up) (citing *Cohen*, 403 U.S. at 20).

There is no doubt Ms. Radwan's action was "imbued with elements of communication," *Johnson*, 491 U.S. at 404, and therefore warrants the First Amendment's protection. Indeed, "it is virtually impossible to imagine circumstances in which the middle finger gesture would not constitute expressive conduct." *Robbins*, *supra*, at 1423. And while university administrators "may resent having obscene words and gestures" embarrass them, "they may not exercise the awesome power at their

disposal to punish individuals for conduct that is not merely lawful, but protected by the First Amendment." *Duran*, 904 F.2d at 1378.

At bottom, the Constitution abhors restrictions on speech because of the message being conveyed or the way in which the speaker chooses to convey that message. *See Iancu v. Brunetti*, 139 S. Ct. 2294, 2301-02 (2019). Respondents may have found Ms. Radwan's expression to be disrespectful and embarrassing. But that is not a basis for restricting her right to speak. "One of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation." *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944). Free speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

II. The Court should exercise its discretion to resolve the First Amendment question.

In light of the overwhelming caselaw discussed above, Defendants' actions violated Ms. Radwan's clearly established First Amendment rights. But in any event, when an "official's action ... gives rise to a First Amendment injury," *Husain v. Springer*, 494 F.3d 108, 128 (2d Cir. 2007), the Court should definitively say so. However this Court ultimately rules on the qualified immunity question, it should exercise its "sound discretion" to resolve the constitutionality of UConn's punishment of Ms. Radwan.

Pearson v. Callahan, 555 U.S. 223, 236 (2009). The University clearly violated Ms. Radwan's First Amendment rights. But even if qualified immunity is conceivably justified, deciding whether there has been a constitutional violation "is often appropriate." *Id.* "Resolution of [the merits] will give guidance to officials about how to comply with legal requirements," *Chambers v. Pennycook*, 641 F.3d 898, 904 (8th Cir. 2011), and will help prevent "constitutional stagnation" in this important area of law, *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part) (citation omitted). Moreover, 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.

Universities have alarmingly poor records of protecting the free speech rights of their students. In the past, universities believed that students were best 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." *Keyishian*, 385 U.S. at 603. Sadly, universities now increasingly prefer to stifle free speech in the name of orthodoxy.

UConn's punishment of Ms. Radwan is just the tip of the iceberg. Universities across the nation are outlawing speech that they deem biased, uncivil, or even annoying instead of letting the best idea win. *See* FIRE, *Spotlight on Speech Codes 2020: The State of Free Speech on Our Nation's Campuses*, bit.ly/3pGgizk. Some universities encourage

students to report their fellow students for committing "bias incidents," which almost always means disfavored speech. Others enact speech codes to prevent students from engaging in offensive or unpopular speech in the first place. Indeed, the vast majority of universities maintain practices and policies that unconstitutionally deter, suppress, and punish speech. In 2020, nearly a quarter of the 471 higher-education institutions surveyed by the Foundation for Individual Rights in Education maintain a "severely restrictive" speech policy that "clearly and substantially restricts protected speech," and more than two thirds maintain a policy that could easily be applied to suppress or punish protected expression. *Id.* at 2.

These practices and policies are taking a toll on students. According to a 2019 Knight Foundation study, more than two-thirds of college students believe their campus climate prevents people from speaking freely. Knight Foundation, *College Students Support the First Amendment, but Some Favor Diversity and Inclusion Over Protecting the Extremes of Free Speech* (May 13, 2019), kng.ht/31Qsz8w. The chilling effect cannot be overstated. The Court's guidance is needed to stem this dangerous tide. As the Fifth Circuit recently recognized, "[i]n our current national condition ... in which 'institutional leaders, in a spirit of panicked damage control, are delivering hasty and disproportionate punishment instead of considered reforms,' courts must be especially vigilant against assaults on speech in the Constitution's care." *Speech First,* 2020 WL 6305819, at *15. University officials have forgotten that "the proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought that we hate." *Matal*

v. Tam, 137 S. Ct. 1744, 1764 (2017) (internal quotations omitted). Deciding the First Amendment question here would serve as an important and timely reminder that universities must protect the First Amendment rights of their students.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

November 24, 2020

Respectfully submitted,

/s/ J. Michael Connolly

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CERTIFICATE OF COMPLIANCE

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Dated: November 24, 2020 */s/ J. Michael Connolly*

CERTIFICATE OF SERVICE

On November 24, 2020, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Second Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

By: */s/ J. Michael Connolly*