No. 16-1035

In the Supreme Court of the United States

CRAIG KEEFE,

Petitioner,

v.

BETH ADAMS, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF CATO INSTITUTE, ELECTRONIC FRONTIER FOUNDATION, NATIONAL COALITION AGAINST CENSORSHIP, AND STUDENT PRESS LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

May a public college expel a student from a program on the grounds that his speech outside class (and even outside the campus) is inconsistent with "professional conduct" norms?

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INTEREST OF THE *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation established in 1977 to advance the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies aims to help restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

The Electronic Frontier Foundation is a member-supported, nonprofit civil liberties organization that has worked to protect free speech and privacy rights in the online world for about 25 years. With roughly 37,000 active donors and dues-paying members nationwide, the Foundation represents the interests of technology users in both court cases and broader policy debates surrounding the application of law in the digital age. The Foundation has a particular interest in ensuring that speech on social media enjoys full constitutional protection. The Foundation has filed *amicus* briefs with this Court in many cases involving the application of constitutional principles to emerging technologies. *See, e.g.*, *Elonis* v. *United States*, 135 S. Ct. 2001 (2015); *Packingham* v. *N.C.*, No. 15-1194 (argued Feb. 27, 2017).

The National Coalition Against Censorship is an alliance of more than fifty national nonprofit literary,

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. The parties were notified of *amici*'s intention to file a brief more than ten days before the filing date, and have consented to this filing.

artistic, religious, educational, professional, labor, and civil liberties groups that are united in their commitment to freedom of expression. Since its founding in 1974, the Coalition has worked through education and advocacy to protect the First Amendment rights of thousands of students, teachers, authors, readers, artists, and others around the country. The Coalition is particularly concerned about restrictions on online speech that are likely to disproportionately affect young people who use social media as a primary means of communication, may engage in ill-considered but harmless speech online, and may employ abbreviated and idiosyncratic language that can be easily misinterpreted.

The Student Press Law Center is a nonprofit, nonpartisan organization founded in 1974 to promote youth involvement in civic life through journalism. The Center provides free educational materials and workshops to students across the country about the First Amendment and about ways to protect their freedom of expression, and its attorneys are the authors of the widely used reference text, *Law of the Student Press*.

This case concerns *amici* because it implicates important First Amendment principles regarding student speech and academic freedom.

SUMMARY OF ARGUMENT

The opinion below authorizes college administrators to expel students for their speech, whenever that speech—including speech entirely outside any curricular project—supposedly fails to comply with professional norms.

This principle could easily apply to, for instance, speech about educational policies, proper rules governing sexual relationships, and "social justice." Indeed, it has already been applied to such speech in a precedent on which the opinion below relied.

And this principle could easily apply to law schools, business schools, medical schools, and other programs. Armed with this opinion and other circuit court opinions that it endorses, colleges can revive and broaden campus speech codes under the pretext of applying professional standards.

The opinion below is inconsistent with past circuit and district court cases that have uniformly struck down such speech codes. (The petition helpfully canvasses the split between this case and other circuit precedents. *See* Pet. 14-23.) It is also inconsistent with this Court's precedents. *See Papish* v. *Bd. of Curators of Univ. of Missouri*, 410 U.S. 667, 671 (1973) (*per curiam*); *Healy* v. *James*, 408 U.S. 169, 180 (1972). And it is profoundly damaging to free speech at colleges and universities, on which free speech throughout American society depends.

ARGUMENT

First Amendment protection is critical at universities, "one of the vital centers for the Nation's intellectual life." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835-36 (1995). If uncorrected, the opinion below, and other recent circuit decisions like it, will set a dangerous precedent: Colleges will be able to punish students for expressing their views, based simply on administrators' judgments that certain speech is inconsistent with their subjective understanding of professionalism.

I. The Logic of the Decision Below Would Let Colleges Punish Views That Administrators See as Contrary to Professional Norms

A. The Code of Ethics for Nurses Embodies Ideological Commitments

Central Lakes College expelled Craig Keefe from its nursing program under the program's student code of conduct, which permits such expulsion for "behavior unbecoming of the Nursing Profession" or a "transgression of professional boundaries." Pet. A-12. The court below upheld that decision, on the theory that the First Amendment does not protect "unprofessional speech" such as speech that violates the Nursing Code of Ethics. Pet. A-17.

But this rationale would cover a vast range of speech. The same "professionalism" policy in the Nursing Program handbook also says, for example, "Integral to the profession of nursing is a concern * * * for social justice," Pet. A-53—right before stating that "students who fail to meet the moral, ethical, or professional behavioral standards of the nursing program are not eligible to progress in the nursing program," *id.* If a student can be expelled for speech "unbecoming of the Nursing Profession," he can thus be expelled for lack of "concern * * * for social justice" as well.

Indeed, the Code of Ethics for Nurses expressly endorses many controversial ideological positions. It takes the view that "health is a universal human right." Prov. 8.1.[2] It states, "Nurses must address * * *

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[2] All citations are to American Nursing Ass'n, Nursing Code of Ethics with Interpretive Statements (2001), available at

social determinants of health such as poverty, * * * human rights violations, education, * * * and healthcare disparities." *Id.* Prov. 8.2.

It states, "All nurses * * * must firmly anchor in nursing's professional responsibility to address unjust systems and structures." *Id.* Prov 9.3. It states, "Nurses collaborate with others to change unjust structures and processes," and "should collaborate to create a moral milieu that is sensitive to diverse cultural values and practices." *Id.* Prov. 8.3 (titled "Obligation to Advance Health and Human Rights and Reduce Disparities"). Likewise, it states, "Nursing must * * * advocate for policies, programs, and practices within the healthcare environment that maintain, sustain, and repair the natural world." *Id.* Prov. 9.4 (titled "Social Justice in Nursing and Health Policy").

Presumably students whose political views are inconsistent with these beliefs would be subject to expulsion for "fail[ing] to meet the moral, ethical, or professional behavioral standards of the nursing program." After all, administrators can equally say in such cases that they are merely treating "a graduate student's unprofessional speech" as "lead[ing] to academic disadvantage," Pet. A-17, because the speech constitutes "non-compliance" with "professional ethical standards," *id.*

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http://nursingworld.org/DocumentVault/Ethics-1/Code-of-Ethics-for-Nurses.html; this is the code that the College's policy expressly adopts. Pet. A-21.

B. The Opinion Below Cannot Be Defended as Authorizing Only Viewpoint-Neutral Restrictions

The opinion below defends its reasoning by saying that "teaching and enforcing *viewpoint-neutral* professional codes of ethics are a legitimate part of a professional school's curriculum that do not, at least on their face, run afoul of the First Amendment." Pet. A-17 (emphasis added). But one of the main precedents that the opinion heavily relied on—and cited seven times—involved expulsion precisely for the expression of certain views.

In that case, *Oyama* v. *University of Hawaii*, 813 F.3d 850 (9th Cir. 2015), a student training to be a teacher was expelled for expressing his ideological views regarding the age of consent and education of students with disabilities. Though *Oyama* itself was explicitly restricted to speech inside a classroom, *id.* at 872, the opinion below expands *Oyama*'s reach to any student speech, not just curricular speech.

The opinion below also heavily relies on *Keeton* v. *Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011), which it cites six times. *Keeton* likewise involved a student being disciplined for ideological speech—statements disapproving of homosexuality.

Keeton, if it is sound, must be limited to speech that expresses an intent to violate specific rules of conduct within a college-operated practicum: The Eleventh Circuit held in *Keeton* that a university could discipline a counseling student because "she expressed an intent to impose her personal religious views on her clients" in her upcoming practicum. *Id.* at 872. But the opinion below in this case relies on *Keeton* far outside

any such expressions of intent. And the opinion's reliance on *Keeton* shows that the logic of the opinion extends to ideological positions (as in *Keeton*) and not just to personal gripes.

The speech restriction in this case also cannot be justified as merely embodying a private professional organization's code of conduct. A private association can adopt whatever views of professionalism it chooses; but the First Amendment prevents a public university from embodying such private associations' views into officially enforced speech restrictions.

Nor can the speech restriction upheld by the opinion below be justified on the theory that licensing boards could later reject the student for the views he expressed: Licensing boards cannot exclude applicants based on the applicants' views, either. "The First Amendment's protection of association prohibits a State from excluding a person from a profession or punishing him solely * * * because he holds certain beliefs." *Baird* v. *State Bar of Ariz.*, 401 U.S. 1, 4-6, 8 (1971) (plurality opinion); *see also id.* at 10 (Stewart, J., concurring in the judgment) (likewise concluding that a licensing body may not "recommend denial of admission solely because of an applicant's beliefs that [it] found objectionable").

C. The Opinion Below Cannot Be Defended as Simply Restricting Speech "at the Wrong Place and Time"

The decision below authorizes colleges to regulate their students' speech any time, any place, and on any subject, so long as the college can later justify that regulation by referring to a vague professional conduct code. Keefe's expulsion was not simply an "adverse

consequence on the student for exercising his right to speak at the wrong place and time, like the student who receives a failing grade for submitting a paper on the wrong subject." Pet. A-17. Keefe posted his Facebook comments at home, on his own time, and not as part of any school assignment. If he was speaking at the wrong place and time when he was at home after school, there will never be a proper place and time for him to speak.

Indeed, the opinion below in this respect directly conflicts with this Court's opinion in *Papish* v. *Board of Curators of University of Missouri*, 410 U.S. 667 (1973) (*per curiam*), which rejected the notion that such content-based discipline could be justified as mere "time, place, or manner" restrictions. The graduate student in *Papish* distributed a newspaper containing a political cartoon of policemen raping the Statue of Liberty and the Goddess of Justice, with the caption "With Liberty and Justice for All." *Id.* at 667. The school attempted to expel the student for violating a student conduct code bylaw which prohibited "indecent conduct or speech," *id.* at 668 n.2, and the lower courts agreed.

Yet this Court expressly disapproved of the "language in the opinions below which suggests that the University's action * * * could be viewed as * * * enforc[ing] reasonable regulations as to the time, place, and manner of speech." Instead, this Court held, punishing a student because of "the disapproved *content*" of his speech—there, allegedly indecent content—could not be justified as a restriction on the mere "time, place, or manner of [the] distribution" of speech. *Id.* (emphasis in original). The same is true in this

case: The language in the opinion below which suggests that the University's action could be viewed as enforcing reasonable regulations as to the time and place of speech is inconsistent with *Papish*.

D. University Student Speech Is Protected Against Content-Based Restrictions Even If They Are Viewpoint-Neutral

Papish also makes clear that college student speech is protected even against viewpoint-neutral but content-based speech restrictions, and not just against viewpoint-based ones.

In *Papish*, university officials claimed that the student's speech was punishable because of its lack of "decency," not because it expressed an anti-police viewpoint. Nonetheless, this Court made clear that even restrictions on vulgar and crude expression are unconstitutional. *Id.* at 671. "[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Id.* at 670 (citing *Healy* v. *James*, 408 U.S. 169, 180 (1972)). The assertion in the opinion below that student speech restrictions are permissible so long as they are viewpoint-neutral cannot be reconciled with *Papish*. And the holding of *Papish* must equally apply when speech is being shut off in the name of professionalism rather than of decency.

Letting colleges expel students for their speech based on administrators' subjective interpretation of "professionalism" is especially inappropriate because standards of "professionalism" are often so subjective. This Court has recognized that matters of "taste and style" are not for the government to determine. *Cohen*

v. *California*, 403 U.S. 15, 25 (1971). The same is true of distasteful speech such as Keefe's.

If administrators can show that a student's speech fits within a narrow exception to First Amendment protection, such as for "true threats," they can indeed punish the students on those grounds. But they should not be free to create a new exception for "unprofessional speech" (at least when the speech is outside the curriculum and outside any interactions with specific patients).

II. The Decision Below Jeopardizes Speech in Law Schools, Business Schools, and Many Other University Programs

What the College's nursing program is doing, other colleges can do as well. That is clear for other nursing schools, which similarly rely on the Code of Ethics for Nurses to forbid "[b]ehaviors unbecoming of the Nursing Profession," "[i]nappropriate" or "[u]nprofessional behaviors,"[3] or behaviors that show "lack of professional compatibility."[4]

But the decision below will also authorize punishing speech in law schools, business schools, and other

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[3] Pine Technical and Community College Associate Degree Nursing Program, *Moral and Ethical Responsibilities*, *in* Student Handbook (May 19, 2016), http://www.pine.edu/programs/health-science-and-nursing/nursing/nursing-program-handbook.pdf .

[4] Louisiana State University of Alexandria, *Probation/Suspension/Dismissal*, *in* Department of Nursing Student Handbook (May 2016), https://www.lsua.edu/docs/default-source/department-documents/Nursing-Docs/student-nursing-handbook.pdf?sfvrsn=17 .

schools that recognize similarly vague national standards of professional conduct.[5] A medical school administrator might conclude that a student who supports mercy killing (indeed, considers it a moral imperative) is violating professional norms. *See, e.g.*, Hippocratic Oath, YALE BOOK OF QUOTATIONS 360 (Fred R. Shapiro ed. 2006) ("Neither will I administer a poison to anybody when asked to do so, nor will I suggest such a course."). Or a business school administrator might conclude that a student who condemns the free-market system is likely to betray the interests of stockholders, or to misunderstand economics.

A law school administrator might conclude that a student who argues that the attorney-client privilege is immoral might violate professional norms. After all, the administrator might argue, "The First Amendment did not bar [me] from making the determination"—based on the student's speech—"that [the student] was unable to meet the professional demands of being a [lawyer]." Pet. A-20.

An education school administrator might worry that a student who makes a policy argument against age-of-consent laws might in the future molest students. Indeed, that is precisely the reasoning that the Ninth Circuit approved in *Oyama*. 813 F.3d at 871. All

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[5] The American Medical Association's (AMA) Code of Medical Ethics, Principle II for instance, instructs that "[a] physician shall uphold the standards of professionalism." AMA, CODE OF MEDICAL ETHICS OF THE AMERICAN MEDICAL ASSOCIATION, at xvii (2016). The Code of Ethics of the Chartered Financial Institute (CFA), which governs investment professionals, requires its members "to practice in a professional and ethical manner that will reflect credit on themselves and the profession." 1 CFA INSTITUTE, CFA PROGRAM CURRICULUM 2017 LEVEL I, at 40 (2017).

such student speech could thus lead to discipline and even expulsion. Yet public colleges should not be freed to silence the expression of dissenting views, regardless of what various organizations' standards advocate.

Many courts have struck down campus speech codes in recent decades. In *Dambrot* v. *Central Michigan University*, for instance, the Sixth Circuit held that a speech code restricting written literature or slogans that "infer[red] negative connotations about * * * individual[s'] racial or ethnic affiliation" was unconstitutional. 55 F.3d 1177, 1184-85 (6th Cir. 1995). In *DeJohn* v. *Temple University*, the Third Circuit struck down as unconstitutional a ban on "gender-motivated" speech that was likely to cause disruption. 537 F.3d 301, 316-17, 320 (3d Cir. 2008).

Likewise, in *McCauley* v. *University of the Virgin Islands*, the Third Circuit held that a student code of conduct prohibiting speech that "tends to injure or actually injures, frightens, demeans, degrades or disgraces any person" was unconstitutionally overbroad. 618 F.3d 232, 237-38, 250 (3d Cir. 2010). For more decisions striking down campus speech restrictions, *see Iota Xi Chapter of Sigma Chi Fraternity* v. *George Mason Univ.,* 993 F.3d 386, 388-89, 391, 393 (4th Cir. 1993); *College Republicans* v. *Reed*, 523 F. Supp. 2d 1005, 1010-11, 1021 (N.D. Cal. 2007); *Roberts* v. *Haragan*, 346 F. Supp. 2d 853, 870-72 (N.D. Tex. 2004); *Bair* v. *Shippensburg Univ.*, 280 F. Supp. 2d 357, 373 (M.D. Pa. 2003); *Booher* v. *Bd. of Regents of N. Ky. Univ.*, 1998 U.S. Dist. LEXIS 11404, *28-*31 (E.D. Ky. 1998); *UWM Post, Inc.* v. *Regents*, 774 F. Supp. 1163, 1165-66, 1173, 1177 (E.D. Wis. 1991); *Doe* v. *Univ. of Mich.*, 721 F. Supp. 852, 856, 864-66 (E.D. Mich. 1989). Yet

the opinion below gives administrators a roadmap for speech codes that are even vaguer and broader than the ones struck down in these decisions.

There is ample appetite for such restrictions, as recent events have shown. University administrators often feel pressure from activists, legislators, faculty, or students to impose speech codes; and of course they may support such codes themselves. Thus, to give just a few examples:

- A University of Idaho student was charged under a university speech code with "discrimination" and "harassment" for (a) saying "illegal immigration destroyed my home state of California" in between songs at a musical concert on Cesar Chavez Day, and (b) shouting "liberalism is destroying America" at a "Take Back the Night" march.[6]
- A University of Wisconsin-La Crosse student newspaper published a satirical article titled "Cheney Kills Five Crips in Inner-City Hunting Accident." As a result, the newspaper was charged with "racist, sexist, homophobic, ablest [sic], anti-Semitists [sic] speech" that would

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[6] Foundation for Individual Rights in Education, *University of Idaho: Student Charged With Discrimination and Harassment for 'Offensive' Speech*, https://www.thefire.org/cases/university-of-idaho-student-charged-with-discrimination-and-harassment-for-offensive-speech/ (last visited Mar. 26, 2017) (describing the incident and including source documents).

"threaten the recruitment and retention of students from underrepresented groups," and was ordered to cut its distribution by 97%.[7]

- A Muslim student at William Paterson University received an unsolicited email from a professor discussing a film described as "a lesbian relationship story." He replied with an email asking that he not be sent "any mail about 'Connie and Sally' and 'Adam and Steve.' These are perversions. The absence of God in higher education brings on confusion." The student was charged with sexual harassment for his use of the word "perversion" to refer to homosexuality.[8]

The speakers in these cases were eventually absolved because of First Amendment concerns. But the decision below, and the Ninth Circuit *Oyama* decision on which the decision below relies, takes the view that such constitutional concerns are misplaced—so long as the speech can be labeled "unprofessional speech," it can be punished. Under the reasoning of these decisions (and especially the decision below to extend

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[7] Foundation for Individual Rights in Education, *University of Wisconsin at La Crosse: Censorship of Student Magazine*, https://www.thefire.org/cases/university-of-wisconsin-at-la-crosse-censorship-of-student-magazine/ (last visited Mar. 26, 2017) (describing the incident and including source documents).

[8] Foundation for Individual Rights in Education, *William Paterson University: Punishment on Harassment Charges for Response to Mass E-Mail*, https://www.thefire.org/cases/william-paterson-university-punishment-on-harassment-charges-for-response-to-mass-e-mail/ (last visited Mar. 26, 2017) (describing the incident and including source documents).

Oyama even outside the classroom), all such speech would be subject to suppression.

Indeed, the rationale of the court below could easily apply not just to satire or slogans, but to normal, reasoned, and substantive discussion of contested policy issues, as was the case in *Oyama*. Faced with this danger, even careful and thoughtful students will tend not to express themselves on certain topics, for fear that they will be expelled from their academic programs.

The way "to avoid these ends" is "by avoiding these beginnings." *West Va. Bd. of Ed.* v. *Barnette*, 319 U.S. 624, 641 (1943). This Court should step in and make clear, to the Eighth Circuit, the Ninth Circuit, and other courts—as well as to college administrators—that college students cannot be expelled simply because an administrator concludes that they engaged in "unprofessional speech."

CONCLUSION

The logic of the decision below would let colleges punish a vast range of student views that administrators view as "unprofessional speech." It would apply not just to nursing students, but to students at law schools, business schools, and other academic institutions.

The decision cannot be defended on the grounds that such restrictions are "viewpoint-neutral," or cover only speech "at the wrong place and time." Indeed, it relies on and endorses cases that have upheld viewpoint-based restrictions—and, in any event, even viewpoint-neutral but content-based restrictions on university speech are unconstitutional.

The decision is thus inconsistent with the decisions of this Court, and the decisions of other federal courts. This Court should therefore grant certiorari, and reverse the judgment of the Court of Appeals.

Respectfully submitted,

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