No. 15-15240

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MELISSA MILWARD, ELYSE UGALDE, AND ASHLEY ROSE,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

Appeal from the
United States District Court for the Middle District of Florida
Case No. 6:15-cv-785 (Hon. Gregory A. Presnell)

BRIEF OF *AMICI CURIAE* CONCERNED WOMEN FOR AMERICA AND ALLIANCE DEFENDING FREEDOM IN SUPPORT OF PLAINTIFFS-APPELLANTS URGING REVERSAL

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Melissa Milward, et al. v. Linda Shaheen et al.

CERTIFICATE OF INTERESTED PERSONS & CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. 26.1 and 11th Cir. R. 26.1-1, *amici curiae* certify that the persons interested in this case are those listed in the Brief of Plaintiffs-Appellants, plus:

1. Alliance Defending Freedom, as *amicus curiae*;
2. Concerned Women for America, as *amicus curiae*;
3. Cortman, David A., counsel for *amici curiae* Concerned Women for America and Alliance Defending Freedom;
4. Hacker, David J., counsel for *amici curiae* Concerned Women for America and Alliance Defending Freedom; and
5. Waggoner, Kristen K., counsel for *amici curiae* Concerned Women for America and Alliance Defending Freedom.

Concerned Women for America and Alliance Defending Freedom are non-profit corporations that have no parent corporations, are not publicly held, and do not issue stock. *Amici curiae* are not aware of any other person or entity that has an interest in the outcome of this case or appeal.

Dated: February 24, 2016.

Respectfully submitted,

/s/David J. Hacker
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AMICI CURIAE'S IDENTITY, INTERESTS, AND AUTHORITY TO FILE

Concerned Women for America ("CWA") is the largest public policy women's organization in the United States with 500,000 members from all 50 states. Through its grassroots organization, CWA encourages policies that strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare.

CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—average, middle-class American women whose views are not represented by the powerful elite. CWA is profoundly committed to the rights of women in every area of life, including in their First Amendment protections and privacy as related to this case.

Founded in 1994, Alliance Defending Freedom ("ADF") is a non-profit, public interest legal organization that provides strategic planning, training, funding, and direct litigation services to protect our first constitutional liberty—religious freedom. ADF's broad experience in representing clients with constitutional claims is demonstrated by its lead role in many cases before the United States Supreme Court, including: *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015); *Conestoga Wood Specialties Corp. v. Sebelius*, 134 U.S. 2751 (2014); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014); *Arizona Christian School*

Tuition Organization v. Winn, 563 U.S. 125, 131 S. Ct. 1436 (2011); *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 120 S. Ct. 1346 (2000); as well as hundreds more in lower courts.

This term, ADF is counsel in three cases pending before the Court: *Geneva College v. Burwell*, 778 F.3d 422 (3d Cir. 2015), *cert. granted*, 136 S. Ct. 445 (2015), *Southern Nazarene University v. Burwell*, 794 F.3d 1151 (10th Cir. 2015), *cert. granted*, 136 S. Ct. 445 (2015), and *Trinity Lutheran Church v. Pauley*, 788 F.3d 779 (8th Cir. 2015), *cert. granted*, 2016 WL 205949 (Jan. 15, 2016).

ADF's Center for Academic Freedom protects the constitutional rights of students and faculty at public colleges and universities. *See, e.g.*, *OSU Student Alliance v. Ray*, 699 F.3d 1053 (9th Cir. 2012) (invalidating prior restraint on student speech); *Adams v. Trs. of Univ. of N.C.-Wilmington*, 640 F.3d 550 (4th Cir. 2011) (finding retaliation against professor for his speech); *Badger Catholic v. Walsh*, 620 F.3d 775 (7th Cir. 2010) (finding student activity fees discrimination); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (enjoining campus speech code). Most recently in this Court, ADF served as *amicus curiae* in support of the prevailing party in *Barnes v. Zaccari*, 592 Fed. Appx. 859 (11th Cir. 2015), and *Barnes v. Zaccari*, 669 F.3d 1295 (11th Cir. 2012).

This case concerns *Amici* because the lower court's ruling applied the wrong standard to college student speech and if left to stand or adopted by this Court will

further erode the ability of students to speak freely in public colleges, the historic marketplaces of ideas.

Pursuant to Federal Rule of Appellate Procedure 29(a), *Amici* certify that counsel for all parties consented to the filing of this brief.

Under Federal Rule of Appellate Procedure 29(c)(5), *Amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *Amici* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

STATEMENT OF THE ISSUES

A public college is a "marketplace of ideas." The Supreme Court and the courts of appeals treat college students like adults, not like children in public elementary and high schools. This means that college students have the same First Amendment rights as citizens in the community at large. But in evaluating the Plaintiffs-Appellants First Amendment claims, the District Court applied the school-sponsored speech doctrine from *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562 (1988), a doctrine reserved for adjudication of speech claims in primary and secondary schools, not colleges.

This brief will address one issue:

1. Did the District Court err in applying *Hazelwood* to adjudicate the free speech claims of college students?

SUMMARY OF ARGUMENT

For nearly sixty years, the Supreme Court has reaffirmed that the "college classroom with it surrounding environs is peculiarly the 'marketplace of ideas.'" *Healy v. James*, 408 U.S. 169, 180, 92 S. Ct. 2338, 2346 (1972) (quoting *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603, 87 S. Ct. 675, 683 (1967)). This conclusion is generally true, except, unfortunately, for students in the sonography program at Valencia State College. The case at bar would be shocking if the only facts were how Defendants-Appellants (the "College") treated Mss. Milward, Ugalde, and Rose (the "Students") when they complained about the sonography curriculum: shunning, verbal abuse, academic penalties, harsh grading, and threats to "blacklist" the Students from future employment. But the fact that College employees acted this way after mandating that the Students surrender their bodily privacy and undergo transvaginal ultrasounds, not just once, but on multiple occasions throughout the semester, sets this case apart from many others and casts a long shadow of doubt on the District Court's decision to dismiss the case at its inception.

To adjudicate the Students' free speech claims, the District Court erroneously relied on the school-sponsored speech doctrine in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562 (1988), a doctrine reserved for claims of elementary and high school students, not adult college students.

Precedent distinguishes between the rights accorded to college students on the one hand and public elementary and high school students on the other. Courts apply the same First Amendment principles applicable to the community at large when analyzing the free speech claims of college students because the age of these students and the pedagogical mission of public colleges dictate robust First Amendment protection.

Ignoring this precedent, the District Court wrongly applied *Hazelwood* to this case. But precedent is clear. Public colleges and universities have their own free speech rights and their speech is clearly school-sponsored. But colleges cannot label all speech on campus "school-sponsored." Student complaints about the curriculum are not school-sponsored speech. Nor is the speech of faculty school-sponsored. But, importantly, student complaints compliment the pedagogical interests of colleges, and when a case is not a dispute about grades, courts are obliged to examine whether a college's educational interests interfere with students' constitutional rights.

Applying this precedent to the Students' complaint, it is clear that the Students' pleaded a First Amendment retaliation claim and the District Court erred in granting the College's motion to dismiss. For these reasons, *Amici* respectfully requests that this Court reverse the judgment of the District Court.

ARGUMENT

I. THE FIRST AMENDMENT PROVIDES COLLEGE STUDENTS WITH THE SAME RIGHTS AS CITIZENS IN THE COMMUNITY AT LARGE.

"'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" *Keyishian*, 385 U.S. at 603, 87 S. Ct. at 683 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487, 81 S. Ct. 247, 251 (1960)). For this reason, "state colleges and universities are not enclaves immune from the sweep of the First Amendment." *Papish v. Univ. of Mo.*, 410 U.S. 667, 670, 93 S. Ct. 1197, 1199 (1973) (quoting *Healy*, 408 U.S. at 180, 92 S. Ct. at 2345). They are "marketplaces of ideas," where students learn not just basic knowledge, but also how to think. *Healy*, 408 U.S. at 180, 92 S. Ct. at 2346 (quoting *Keyishian*, 385 U.S. at 603, 87 S. Ct. at 683).

The District Court erroneously relied on *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562 (1988), to address the Students' First Amendment claims in this case. Unlike public colleges and universities, public elementary and high schools may constitutionally regulate four categories of student speech: (1) speech promoting illegal drug use, *Morse v. Frederick*, 551 U.S. 393, 127 S. Ct. 2618 (2007); (2) vulgar, lewd, obscene, and plainly offensive speech, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 106 S. Ct. 3159 (1986); (3) school-sponsored speech, *Hazelwood*, 484 U.S. 260, 108 S. Ct. 562; and (4) speech that materially and substantially disrupts the educational environment,

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 89 S. Ct. 733 (1969).

But since free thought and inquiry are so vital to the collegiate experience, college students enjoy the same First Amendment freedoms as members of the general public. The Supreme Court explained long ago 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*, 408 U.S. at 180, 92 S. Ct. at 2346.

When compared to elementary or high school students, the First Amendment grants college students broad protections for at least two critical reasons. First, college students are adults and are "entrusted with a panoply of rights and responsibilities as legal adults." *McCauley v. Univ. of Virgin Islands*, 618 F.3d 232, 246 (3d Cir. 2010). Second, the pedagogical missions of public colleges and public schools are different, with the former serving to impart not just knowledge, but critical thinking. *See Sweezy v. New Hampshire*, 354 U.S. 234, 250, 77 S. Ct. 1203, 1212 (1957) ("Teachers 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.").

A. Unlike elementary and high school students, college students are adults who receive maximum First Amendment protection.

A critical distinction between college students on the one hand and

elementary and high school students on the other is that college students are typically "over the age of 18 and entrusted with a panoply of rights and responsibilities as legal adults." *McCauley*, 618 F.3d at 246. The "students in colleges and universities are not children, but emancipated (by law) adults." *College Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1015 (N.D. Cal. 2007). In fact, the average age of a community college student, like those at Valencia State College, is 29.[1] Moreover, some college students, especially those at community colleges, are second-career individuals in their 30s, 40s, and 50s.[2]

When analyzing the free speech claims of college students, the Supreme Court does not employ standards reserved for public elementary and high school students, it applies normal First Amendment doctrine applicable to the community at large. Even in *Hazelwood*, the Court drew a clear distinction between public school students and adults. *See Hazelwood*, 484 U.S. at 266, 108 S. Ct. at 567 (quoting *Fraser*, 478 U.S. at 682, 106 S. Ct. at 3164) ("We have nonetheless recognized that the First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings.'").

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[1] *See* American Association of Community Colleges, Community College Trends and Statistics, *at* http://www.aacc.nche.edu/AboutCC/Trends/Pages/studentsatcommunitycolleges.aspx (last visited Feb. 16, 2016) ("Community colleges also provide access to education for many nontraditional students, such as adults who are working while enrolled. The average age of a community college student is 29, and two thirds of community college students attend part-time.")

[2] *See* American Association of Community College, 2016 Fact Sheet 2, *at* http://www.aacc.nche.edu/AboutCC/Documents/AACCFactSheetsR2.pdf (last visited Feb. 19, 2016).

In *Papish*, the Court adjudicated whether the University of Missouri improperly expelled a student for publishing a newspaper with "indecent" speech. In direct contrast to its later decision in *Hazelwood*, which also involved student speech in a newspaper, but at the high school level, the Court did not apply a standard deferential to a college's pedagogical interests. The Court simply asked whether the speech fell within one of the limited forms of unprotected speech under the Constitution. Since it did not, the Court held that the university violated the students' First Amendment rights. 410 U.S. at 670, 93 S. Ct. at 1199 ("[N]either the political cartoon nor the headline story involved in this case can be labeled as constitutionally obscene or otherwise unprotected.").

Other circuits also analyze student speech on college campuses under the normal First Amendment standards for citizens. For example, in *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 387–88 (4th Cir. 1993), a fraternity sued George Mason University after it was suspended for hosting a racially charged "ugly woman contest." The Fourth Circuit rejected the university's "substantial interests inherent in educational endeavors" as a mechanism to discriminate against students based on viewpoint. *Id*. at 393. Instead, the court used normal First Amendment standards to examine whether the students' speech was obscene (it was not) and whether it was expressive entertainment (it was). *Id*. at 389 & 391-92. Thus, the court ruled in favor of the

students, holding the university committed viewpoint discrimination. *Id*. at 393; *see also Oyama v. Univ. of Hawaii*, --- F.3d ---, 2015 WL 9466535, *9 (9th Cir. 2015) (rejecting the use of the school-sponsored speech doctrine for college students); *cf. Ala. Student Party v. Student Gov't Ass'n of the Univ. of Ala.*, 867 F.2d 1344, 1346–47 (11th Cir.1989) (applying *Hazelwood* to student government election rules, not student discussion or complaints about curriculum).

In *Fraser*, a case examining the rights of a high school student, the Supreme Court clearly delineated the difference between student speech at the collegiate and primary and secondary school levels. A public school may prohibit the use of vulgar speech. 478 U.S. at 683, 106 S. Ct. at 3164. But the "First Amendment guarantees wide freedom in matters of adult public discourse." 478 U.S. at 682, 106 S. Ct. at 3164. While the First Amendment protects the right to express an offensive antidraft viewpoint in a public place, *Cohen v. California*, 403 U.S. 15, 91 S. Ct. 1780 (1971), "[i]t does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school," *Fraser*, 478 U.S. at 682, 106 S. Ct. at 3164. Thus, "[c]ertain speech … which cannot be prohibited to adults may be prohibited to public elementary and high school students …. This is particularly true when considering that public elementary and high school administrators have the unique

responsibility to act *in loco parentis*." *DeJohn v. Temple Univ.*, 537 F.3d 301, 315 (3d Cir. 2008) (citing *Fraser*, 478 U.S. at 682 & 684, 106 S. Ct. at 3159).

And this raises another critical difference between colleges and public schools: public school administrators act *in loco parentis* while university administrators do not. "The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized society." *Fraser*, 478 U.S. at 683, 106 S. Ct. at 3164. Public schools may address the "'special needs of school discipline' unique to those environs." *McCauley*, 618 F.3d at 245. Thus, "public secondary and elementary school administrators are granted more leeway to restrict speech than public colleges and universities." *DeJohn*, 537 F.3d at 316.

Considerations of maturity and value-inculcation are not as important for university students, who are adults. As a result, public university administrators do not hold the same power over students. The authoritarian college education of old has long been put to rest. *McCauley*, 618 F.3d at 244 (citing *Morse*, 551 U.S. at 412 n.2, 127 S. Ct. at 2631 (Thomas, J., concurring). "Modern-day public universities are intended to function as marketplaces of ideas, where students interact with each other and with their professors in a collaborative learning environment." *Id*.

The age of college students compared to elementary and high school

students shows 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." *College Republicans*, 523 F. Supp. 2d at 1015. Thus, the District Court erred by relying solely on precedent reserved for younger students.

B. The pedagogical missions of public colleges and public schools are different.

Public colleges and universities differ from public schools in another critical way: the pedagogical mission of a public college is to transmit knowledge, encourage critical thinking, and facilitate the ability to question the status quo. *See Keeton v. Anderson-Wiley*, 664 F.3d 865, 882 (11th Cir. 2011) (Pryor, J., concurring) ("But we have never ruled that a public university can discriminate against student speech based on the concern that the student might, in a variety of other circumstances, express views at odds with the preferred viewpoints of the university."). By contrast, the pedagogical mission of a public school is to impart knowledge and inculcate societal values. *See McCauley*, 618 F.3d at 243 ("Public elementary and high school education is as much about learning how to be a good citizen as it is about multiplication tables and United States history.").

Public colleges transmit knowledge, encourage inquiry, and facilitate the challenging of *a priori* assumptions because "[n]o field of education is so thoroughly comprehended by man that new discoveries cannot yet be made."

Sweezy, 354 U.S. at 250, 77 S. Ct. at 1211-12. "The university atmosphere of speculation, experiment, and creation is essential to the quality of higher education. Our public universities require great latitude in expression and inquiry to flourish." *McCauley*, 618 F.3d at 243. Free speech and inquiry "'is the lifeblood of academic freedom'" both for faculty and students. *Id*. (quoting *DeJohn*, 537 F.3d at 314). Thus, "'[d]iscussion by adult students in a college classroom should not be restricted' based solely on rationales propounded specifically for the restriction of speech in public elementary and high schools." *Id*. at 242 (quoting *DeJohn* at 315).

As one court recognized, the nature of a college campus is similar to that of a small town or community. "The campus's function as the site of a community of full-time residents makes it 'a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment,' and suggests an intended role more akin to a public street or park than a non-public forum." *Roberts v. Haragan*, 346 F. Supp. 2d 853, 861 (N.D. Tex. 2004) (quoting *Hays County Guardian v. Supple*, 969 F.2d 111, 117 (5th Cir. 1992)). In such community, "without the right to stand against society's most strongly-held convictions, the marketplace of ideas would decline into a boutique of the banal, as the urge to censor is greatest where debate is most disquieting and orthodoxy most entrenched…. This is particularly so on college campuses." *Rodriguez v. Maricopa Cty. Cmty. Coll.*, 605 F.3d 703, 708 (9th Cir. 2010) (citations omitted).

Public elementary and high schools, however, prioritize the inculcation of a "child [with] cultural values, [to] prepar[e] him for later professional training, and [to] help him to adjust normally to his environment." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493, 74 S. Ct. 686, 691 (1954). "The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order." *Fraser*, 478 U.S. at 683, 106 S. Ct. at 3164. Thus, "[c]ertain speech which *cannot* be prohibited to adults *may* be prohibited to public elementary and high school students." *McCauley*, 618 F.3d at 242 (quoting *DeJohn*, 537 F.3d at 315)) (emphasis in original).

The pedagogical mission of public colleges is to transmit knowledge and encourage critical inquiry. Thus, the District Court erred in relying on a case reserved to public school students. College students are entitled to full First Amendment protection.

II. THE DISTRICT COURT'S RATIONALE FOR APPLYING *HAZELWOOD* IS NOT SUPPORTED BY PRECEDENT.

The District Court's application of *Hazelwood*'s school-sponsored speech doctrine to this case, App. 156, collides with the Supreme Court's rejection of that doctrine for adult students who enter a learning environment designed to encourage critical inquiry. The court reasoned that "educators do not offend the First Amendment by exercising editorial control over the style and content of student

speech in school-sponsored expressive activities." *Id*. Thus, it held that expressing concern about an assignment—being required to surrender one's bodily private and undergo a vaginal probe—and complaining to faculty about this requirement was "not protected speech." *Id*. In support of this conclusion, the District Court reasoned that a complaint about curriculum is school-sponsored speech, that when a student's speech threatens a school's pedagogical and curricular system, the speech is not protected, and that courts cannot interfere with educational decisions. App. 156–57.

The College may engage in its own school-sponsored expression on the topic of sonography curriculum, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833, 115 S. Ct. 2510, 2519 (1995) (finding a university may speak through its curriculum), but asserting that the Students' complaints constitute school-sponsored speech is equivalent to saying that the College is complaining to itself. The student complaints about college activities, whether curricular or extracurricular, are not school-sponsored speech. *See Bishop v. Aronov*, 926 F.2d 1066, 1073 (11th Cir. 1991) ("a student's expression can be more readily identified as a thing independent of the school"). Indeed, even when faculty—employees of public colleges—speak, they have independent free speech rights and are not engaged in school-sponsored speech. *See Demers v. Austin*, 746 F.3d 402, 416 (9th Cir. 2014) (finding faculty speech is protected and not school-sponsored).

Moreover, private student speech critical of college curriculum is entitled to maximum First Amendment protection. *See Keeton*, 664 F.3d at 872 (finding students may complain about the curriculum). And courts are obligated to critically examine supposed educational interests used to justify restrictions on speech when those interests interfere with fundamental constitutional rights. *See Christian Legal Soc'y of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 686, 130 S. Ct. 2971, 2976 (2010) ("This Court is the final arbiter of the question whether a public university has exceeded constitutional constraints, and we owe no deference to universities when we consider that question.").

A. When public colleges and universities speak, they are engaged in school-sponsored speech.

The clearest example of why the District Court erred in applying *Hazelwood* to the Students' speech is that the College possesses its own free speech rights and, thus, contending that the Students' complaints are school-sponsored speech is equivalent to saying that the College is complaining to itself. "When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." *Rosenberger*, 515 U.S. at 833, 115 S. Ct. at 2519; *see Sweezy*, 354 U.S. at 263, 77 S. Ct. at 1218 (Frankfurter, J., concurring) (noting the "four essential freedoms" of a university: "to determine for itself on academic grounds

who may teach, what may be taught, how it shall be taught, and who may be admitted to study."). Thus, in *Morse*, Justice Alito concluded that "*Hazelwood* … allows a school to regulate what is in essence the school's own speech, that is, articles that appear in a publication that is an official school organ." *Morse*, 551 U.S. at 423, 127 S. Ct. at 2637 (Alito, J., concurring) (internal citation omitted).

Here, the "distinction between the [College's] own favored message and the private speech of students is evident in the case before us." *Rosenberger*, 515 U.S. at 834, 115 S. Ct. 2519. The Defendants' reactions to the Students' complaints—threats of blacklisting, academic punishment, and verbal abuse—indicate that the College did not believe the Students' speech bore the imprimatur of the administration. Public colleges and universities may express their own views on sonography curriculum, but they cannot plausibly argue that the Students' views on that topic belong to the College itself. *Hazelwood* applies to the College's own speech, not that of the Students.

B. A student's complaint about the curriculum is not school-sponsored speech.

Student complaints about curricular or extracurricular activities are private speech of individuals contributing to the free inquiry and critical thinking that are vital to the marketplace of ideas. *See Rodriguez*, 605 F.3d at 708 ("Intellectual advancement has traditionally progressed through discord and dissent…."). While citing *Hazelwood*, this Circuit defined what constitutes "school-sponsored

expressive activities:" "'school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.'" *Keeton*, 664 F.3d at 875 (quoting *Hazelwood*, 484 U.S. at 271, 108 S. Ct. at 570). None of these examples is present here. The Students' complaints to College officials were not part of a publication or theatrical production, nor could there be any member of the public who would think that their complaints about privacy violations bore the imprimatur of the College. *See Bishop*, 926 F.2d at 1073 (finding student expression to be independent of a college).

Surely, the College would not contend that every time a student complains, whether it be about the curriculum or the ineptitude of the athletic program, he or she is engaged in speech sponsored by the College. If the Students had written an op-ed in the *Orlando Sentinel* discussing the vaginal sonogram mandate, the College would have no basis to contend that their speech was school-sponsored. That the Students lodged their complaints with faculty and administrators instead does not change the nature of the speech. It is still private expression. Indeed, no one would think that student complaints about the curriculum are school-sponsored speech any more than they would think that student complaints about cafeteria food are school-sponsored. Thus, the District Court's conclusion that the Students'

speech was school-sponsored is not only illogical, but flat wrong based on the facts and law.

C. Faculty research, scholarship, and teaching is not school-sponsored speech at a public college or university.

Even faculty speech at public colleges does not fall into the category of school-sponsored speech. Public employees do not lose their constitutional rights at work. When they speak as citizens on matters of public concern, courts balance their interests in doing so with the government employer's right to promote the efficiency of the workplace. *See Connick v. Myers*, 461 U.S. 138, 142, 103 S. Ct. 1684, 1687 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734 (1968). Curricular matters at public colleges and universities are "public concerns" for First Amendment purposes. *See*, *e.g.*, *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 679 (6th Cir. 2001) (finding professor's "classroom instruction" fell "within the Supreme Court's broad conception of 'public concern'" because it touched on matters of "race, gender, and power conflicts in our society"); *Jeffries v. Harleston*, 52 F.3d 9, 12 (2d Cir. 1995) (holding professor's off-campus speech about curriculum was a matter of "public concern"); *Demers*, 746 F.3d at 416 ("[A]cademics, in the course of their academic duties, also write memoranda, reports, and other documents addressed to such things as a budget, curriculum, departmental structure, and faculty hiring. Depending on its scope and character, such writing may well address matters of public concern under *Pickering*.").

When public employees speak pursuant to their job duties, they receive no First Amendment protection. *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006). But faculty at public colleges and universities are not subject to this general rule, because the Supreme Court explicitly declined to apply the job duties test to faculty at public colleges. *See* 547 U.S. at 425, 126 S. Ct. at 1962 ("[E]xpression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.").

And in two recent faculty cases, the Fourth and Ninth Circuits concluded that faculty may speak freely on matters related to research, scholarship, and teaching. *See Demers*, 746 F.3d at 412 ("We hold that academic employee speech not covered by *Garcetti* is protected under the First Amendment, using the analysis established in *Pickering*."); *Adams v. Trs. of Univ. of N.C.—Wilmington*, 640 F.3d 550, 564 (4th Cir. 2011) ("Applying *Garcetti* to the academic work of a public university faculty member under the facts of this case could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment. That would not appear to be what *Garcetti* intended, nor is it consistent with our long-standing recognition that no individual

loses his ability to speak as a private citizen by virtue of public employment. In light of the above factors, we will not apply *Garcetti* to the circumstances of this case."). If faculty—who work for the College—are not engaged in school-sponsored speech and have independent free speech rights, then surely the private speech of students is not school-sponsored speech under *Hazelwood*.

D. The Students' complaints and criticism of curriculum invigorate the College's pedagogical interests.

Contrary to the District Court's holding that the Students' complaints threaten the College's pedagogical interests, private student expression on a college campus contributes to those interests. The College is a marketplace of ideas and "the core principles of the First Amendment 'acquire a special significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution's educational mission.'" *College Republicans*, 523 F. Supp. 2d at 1016 (quoting *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 863 (E.D. Mich. 1989), and citing *Keyishian*, 385 U.S. at 603, 87 S. Ct. at 683).

The District Court concluded that the College is "tasked with inculcating the necessary knowledge, values, and experience, so that [its] sonography students can become valued and reliable members of the medical community upon graduation." App. 157. But those are interests of elementary and high schools, not colleges. *See Fraser*, 478 U.S. at 683, 106 S. Ct. at 3164 ("schools must teach by example the shared values of a civilized social order").

There is a difference when a student complains about the curriculum and when she states that she will not abide by the rules of her chosen profession. For example, in *Keeton*, 664 F.3d 865, this Court examined the First Amendment claim of a university student studying counseling who allegedly refused to abide by the ethical standards of the profession while engaged in a clinical practicum. The university imposed a remediation plan on the student and this Court found that the plan did not violate the student's rights because she intended to violate the ethical standards. *Id*. at 872. This Court explained that there is a difference between a student complaining about the curriculum and stating that she will not abide by the professional standards: "Keeton remains free to express disagreement with ASU's curriculum and the ethical requirements of the [American Counseling Association], but she cannot block the school's attempts to ensure that she abides by them if she wishes to participate in the clinical practicum…." *Id*. at 874.

Moreover, under the District Court's logic, a college could decide in a religion course that all students must pray to Jesus and then punish a Muslim student for complaining. Similarly, under that logic, a college could compel a Mormon student to step on a piece of paper containing Jesus' name and then charge the student with violating the student code of conduct when he refused.[3] As

[3] Greg Lukianoff, *FAU college student who didn't want to stomp on 'Jesus' runs afoul of speech code*, Forbes (Mar. 26, 2013), *at* http://www.forbes.com/sites/realspin/2013/03/26/fau-college-student-who-didnt-want-to-stomp-on-jesus-runs-afoul-of-speech-code/#58d886c896fa.

discussed above, colleges not only transmit ideas, but also critical thinking.

Thus, according to this Circuit's precedent, the Students' complaints about the mandatory vaginal probe curriculum were protected speech.

E. Courts are obliged to examine the educational justifications of retaliation when those interests infringe constitutionally protected activity.

Since the Students' complaints about the transvaginal sonograms were protected speech, the First Amendment authorizes the courts to examine the decisions of educators—such as decisions to retaliate against students for raising concerns about privacy—when those decisions intrude upon constitutional rights. "[E]ven though the governmental purpose be legitimate and substantial [as with education], that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Keyishian*, 385 U.S. at 602, 87 S. Ct. at 683.

This case is not about the College's assessment of the Students' academic work, which is why the District Court's reliance on *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002), and *Heenan v. Rhodes*, 757 F. Supp. 2d 1229 (M.D. Ala. 2010), was wrong. A157. In *Brown*, a student challenged a university's academic decision to reject his thesis because it included a "Disacknowledgements" section that contained derogatory comments about faculty which violated university policy. 308 F.3d at 949. The Ninth Circuit applied *Hazelwood* and ruled against the

student because the thesis was academic work. *Id*. In *Heenan*, a student sued a university over a grade dispute. The District Court applied *Hazelwood* and declined to interfere with the university's academic decisions. The case at bar, by contrast, involves the First Amendment right of students to complain about curricular mandates that invade their bodily privacy, not a thesis or grade dispute.

Moreover, since *Brown*, the Ninth Circuit has rejected *Hazelwood*'s application to the university setting. *See Oyama*, 2015 WL 9466535, *9 (finding "[n]either of [*Hazelwood*'s] rationales is relevant here" and the "student speech doctrine fails to account for the vital importance of academic freedom at public colleges and universities").

This is a case about the ability of the Students' to be free of retaliation for complaining that the College's curriculum violates their bodily privacy. By applying *Hazelwood*, the District Court erred in dismissing the Students' complaint and gave the College *carte blanche* to retaliate against students for any complaints. This Circuit should reject *Hazelwood*'s application to cases involving college student speech and the District Court's flawed reasoning. Instead, this Court should apply the normal First Amendment retaliation doctrine discussed below.

III. THE STUDENTS PLEADED A VIABLE FIRST AMENDMENT RETALIATION CLAIM.

The District Court erred in dismissing the Students' well-pleaded First Amendment retaliation claims. To survive a Rule 12(b)(6) motion to dismiss, a

complaint must contain factual allegations that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S. Ct. 1955, 1965 (2007)). "[P]leadings are construed broadly," *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295 (11th Cir. 2007), and the Court must "accept[] the complaint's allegations as true and construe[] them in the light most favorable to [plaintiffs]." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1335 (11th Cir. 2012).

To establish a First Amendment retaliation claim, a plaintiff must show that (1) her speech was constitutionally protected; (2) she suffered adverse conduct that would likely deter a person of ordinary firmness from engaging in such speech; and (3) there was a causal relationship between the adverse conduct and the protected speech. *Bennett v. Hendrix*, 423 F.3d 1247, 1250 (11th Cir. 2005). While the only relevant issue on appeal is whether the Students' speech is protected, Appellants' Br. 16, the Students' complaint easily satisfies each element.

First, as discussed above, the First Amendment protects the Students' complaints about the College's transvaginal ultrasound mandate. All of the Students signed a form stating they were not comfortable undergoing vaginal probes. App. 48 ¶ 26. In the fall of 2013, Ms. Milward and Ms. Ugalde complained to Defendant Ball, the program chair, that they did not want to undergo vaginal

probes, especially by a male student. App. 49–50 ¶ 31. Eventually, they capitulated to the College's demands, likely due to fear of punishment. Ms. Rose completely refused to participate in the probes. App. 50 ¶ 32. In March 2014, Ms. Milward complained to Defendant Shaheen about the probes. App. 52 ¶ 38. All of the Students' complaints were protected speech. They did not bear the imprimatur of the College. *See supra* Part II.B.

Second, the Students' suffered adverse conduct that would deter a person of ordinary firmness from exercising First Amendment rights. In Judge Posner's words, "'[t]he effect on freedom of speech may be small, but since there is no justification for harassing people for exercising their constitutional rights it need not be great in order to be actionable.'" *Bennett*, 423 F.3d at 1254 (quoting *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982)); *see also Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 n.8, 110 S. Ct. 2729, 2737 (1990) ("Moreover, the First Amendment, as the court below noted, already protects state employees not only from patronage dismissals but also from 'even an act of retaliation as trivial as failing to hold a birthday party for a public employee ... when intended to punish her for exercising her free speech rights.'") (citation omitted).

In response to the Students' complaints, Defendant Ball told them to find another school to attend, App. 49–50 ¶ 31; Ms. Rose was prohibited from observing the allegedly learning-critical probe technique performed on her peers,

App. 52 ¶ 37; Defendant Shaheen repeatedly stated that the Students would be academically and professionally punished for their nonparticipation, App. 52 ¶ 38; Defendant Bugnacki threatened to blacklist the Students with potential employers, App. 52 ¶ 39; and Defendant Amdot threatened to bar Rose from clinical practice at a local hospital, gave her failing grades, and yelled at her, which resulted in a panic attack, App. 53 ¶ 44. An ordinary college student experiencing these types of threats and punishments would surely be deterred from saying anything else about the College's mandatory transvaginal ultrasounds.

Finally, the complaint alleges that the defendants took adverse action against the Students because of their complaints about the ultrasounds. If the Students had remained silent about the painful and embarrassing invasion of their bodily privacy, none of the Defendants would have taken the actions described above. But since the Students were courageous enough to speak up and challenge the College's unjustified vaginal probe mandate, they suffered academic and professional retaliation. App. 52–53 ¶¶ 37-39, 41-44.

The Students' complaint contained a well-pleaded First Amendment claim. Thus, the District Court erred in dismissing the complaint.

CONCLUSION

The District Court applied the wrong First Amendment standard to adjudicate the Students' free speech claims. The school-sponsored speech doctrine

from *Hazelwood* is not applicable to the First Amendment claims of college students. Instead, the First Amendment grants college students the same free speech rights as citizens in the community at large. Based on this legal error, the judgment of the District Court should be reversed.

Respectfully submitted this 24th day of February, 2016.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 6,493 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

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Dated: February 24, 2016.

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