No. 20-1066

IN THE

Supreme Court of the United States

ASHLYN HOGGARD,

Petitioner,

v.

RON RHODES, *et al.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* SPEECH FIRST, INC. SUPPORTING PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTION AND STATUTES

OTHER AUTHORITIES

STATEMENT OF INTEREST[1]

Speech First is a membership association of students, parents, faculty, alumni, and other concerned citizens. Launched in 2018, Speech First is committed to restoring the freedom of speech on college campuses through advocacy, education, and litigation. Speech First has challenged speech-chilling policies at, for example, 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*, 979 F.3d 319 (5th Cir. 2020); and the University of Illinois, *Speech First, Inc. v. Killeen*, 968 F.3d 628 (7th Cir. 2020).

Speech First is keenly interested in this important case. As a 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). The University policy at issue

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[1] Per Rule 37.6, this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. All parties received timely notice of this filing and have consented to the filing of this brief.

here is the kind that Speech First routinely challenges and the First Amendment clearly forbids.

INTRODUCTION & 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, this 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, this Court could state that "[i]t is *settled* by a long line of recent decisions" 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 policy challenged here transgressed this settled rule. Arkansas State banned most students from setting up tables outside the student union, unless they first obtained permission from a University official. Other than a perfunctory nod to content neutrality, this policy placed no meaningful constraints on the University's discretion and contained no definitive guidelines on when permission can be granted or denied. Such a policy is "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 high when the censor is a university administrator rather than a legislature or a police officer, "it is from petty tyrannies that large ones take root and grow." *Thomas v. Collins*, 323 U.S. 516, 543 (1945). And when it comes to universities, "courts must be especially

vigilant against assaults on speech." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 339 (5th Cir. 2020). Accordingly, the Court should grant the petition and reverse the decision below.

ARGUMENT

I. This 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 this 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 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, this 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) (collecting cases).

"Any" meant "any." *Vance v. Universal Amusement Co.*, 445 U.S. 308, 317 (1980); *see also* 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 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.

This 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 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 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' render[ed] that 'practice' a prior restraint." *Id.* at 273.

- In *Kunz v. New York* (1951), the 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 gave "an administrative official discretionary power to control in advance the right of citizens to speak," it was "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). Indeed, even in the university context, "[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"; "[t]o invoke censorship in an academic environment [via a prior restraint] is hardly the recognition of a healthy democratic society." *Id.* at 857 (citing *Papish v. Univ. of Mo. Curators*, 410 U.S. 667, 671 (1973); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

II. The University's tabling policy was an unconstitutional prior restraint.

Arkansas State's tabling policy flagrantly violated these long-established rules. To speak or table on the paved portion of Heritage Plaza, the University required students to obtain prior approval from a University official. Pet. App. 4a. Since the policy was unwritten, it imposed no discernable limits on the

official's discretion. Instead of "'narrow, objective, and definite standards to guide the [University's] authority,'" the policy impermissibly "'involve[d] 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 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.

If the tabling policy allowed speech only by registered student organizations—a limit never specified in the text—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," and this "danger … 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." *Id.* at 763. Notably, Elizabeth Rouse, the University official who enforced the policy, admitted in a deposition she believed she had discretion to ignore the registered/unregistered distinction and allow unregistered groups to stay and table. She claimed she chose not to here because the presence of the invited speaker "changed the situation." JA 241.

Because the University's tabling policy gave officials unbridled discretion to approve or deny student expression, the University cannot possibly defend the policy as a mere time, place, and manner restriction: "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 officials' unwritten promises to observe viewpoint 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 courts avoid the unconstitutionality by "writ[ing] … limits" into the policy that aren't there, or by "presum[ing] 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.*

The Eighth Circuit ignored all of this. The court stated that the caselaw governing prior restraints was "inapposite." Pet. App. 19a. The Court of Appeals was mistaken. Even under a forum-based analysis, regulations of limited public forums must be "*reasonable* in light of the purpose served by the forum." *Cornelius v. NAACP*, 473 U.S. 788, 806 (1985) (emphasis added). Blatant prior restraints are not

reasonable—certainly not when no "substantial alternative channels … remain open" for the restricted speech. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 53 (1983); *see also Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 690 (2010); *FFRF v. Abbott*, 955 F.3d 417, 427 (5th Cir. 2020). Although the Eight Circuit correctly found that no alternative avenues existed, Pet. App. 14a-16a, it failed to recognize that without those alternative channels, University officials could not have concluded that their prior restraint was reasonable. *Perry*, 460 U.S. at 48-49.

The Eighth Circuit was wrong to suggest that, based on its decision in *Bowman v. White,* 444 F.3d 967 (8th Cir. 2006), the University "might have reasonably believed the Tabling Policy ... was permissible." Pet. App. 19a. In *Bowman*, a non-student preacher who was notorious for disrupting 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. *Id.* at 972-74. After reaffirming the settled rule that such prior restraints bear a "heavy presumption of unconstitutionality," *id.* at 980, the court held that the licensing policy overcame that strong presumption in light of the facts of that case. Specifically, the plaintiff in *Bowman* was a non-student speaker who drew large crowds and significantly disrupted campus. That is a far cry from the facts here: Petitioner is a student who had never caused a campus disturbance.

The Eighth Circuit itself acknowledged this important difference. Indeed, it specifically stated that the idea that *Bowman* might have led officials to believe that the tabling policy "did not directly involve a prior restraint" and was therefore permissible, "ignored the critical fact that the *Bowman* plaintiff was a non-student, and the speech restrictions were justified by compelling safety and administrative concerns." Pet. App. 19a. Yet because the *Bowman* court ruled in favor of the University administrators, the court held that the officials here "could have reasonably viewed *Bowman* as permitting the Tabling Policy." *Id.* But that view disregards *Bowman*'s "distinguishab[le]" reasoning and the fact that none of the safety and administrative concerns "are present here." Pet. App. 16a-19a; s*ee also* Pet. 18.

Even setting *Bowman* aside, the law governing prior restraints and limited public forums is "clearly established" and put the University on notice that the tabling policy violated the First Amendment. Given the acknowledged absence of alternative channels of speech, no reasonable university official could have believed the tabling policy was constitutional. The Court should grant the petition and reverse the decision below.

III. The Court should grant the petition in light of the ongoing attacks on free speech on college campuses.

In light of the overwhelming caselaw discussed above, the University's actions violated Petitioner's clearly established First Amendment rights. And yet this kind of violation is all too common at universities

across the country. This Court should grant certiorari to weigh in on these important issues in light of the ongoing attacks on free speech on college campuses.

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 v. Board of Regents*, 385 U.S. 589, 603 (1967). Not anymore. Sadly, many universities now prefer to stifle speech in the name of a prevailing campus orthodoxy.

Arkansas State's tabling policy is just the tip of the iceberg. Universities across the nation are outlawing speech that they deem biased, uncivil, or annoying instead of letting the best idea win. *See Spotlight on Speech Codes 2020: The State of Free Speech on Our Nation's Campuses*, FIRE, bit.ly/3pGgizk. Many universities encourage students to report their fellow students for "bias incidents," which almost always means politically unpopular 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 maintained a "severely restrictive" speech policy that "clearly and substantially restricts protected speech." *Id.* at 2.

These practices and policies are taking a toll on students. According to a 2019 study by the Knight Foundation, more than two-thirds of college students believe their campus climate prevents people from speaking freely. *College Students Support the First Amendment, but Some Favor Diversity and Inclusion Over Protecting the Extremes of Free Speech*, Knight Found. (May 13, 2019), kng.ht/31Qsz8w. Campus climate starts at the top—namely, with the policies that university administrators create to regulate what students can and cannot say. The Court's guidance is needed to stem this dangerous tide.

CONCLUSION

For all these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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