No. 18-704

In The Supreme Court of the United States

ROSS ABBOTT, COLLEGE LIBERTARIANS AT THE UNIVERSITY OF SOUTH CAROLINA, AND YOUNG AMERICANS FOR LIBERTY AT THE UNIVERSITY OF SOUTH CAROLINA,

Petitioners,

v.

HARRIS PASTIDES, DENNIS PRUITT, BOBBY GIST, AND CARL R. WELLS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR THE SOUTH CAROLINA ACLU, THE DKT LIBERTY PROJECT, THE CATO INSTITUTE AND REASON FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* SUPPORTING PETITIONERS

The American Civil Liberties Union of South Carolina, DKT Liberty Project, Cato Institute, and Reason Foundation hereby move, pursuant to Supreme Court Rule 37.2, for leave to file a brief *amici curiae* in support of the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit. All parties were provided with timely notice of intent to file the brief. The petitioners consented. The respondents declined to consent. A copy of the proposed brief is attached. This case deeply concerns the *amici*, which are dedicated to the preservation of individual liberty.

The American Civil Liberties Union ("ACLU") of South Carolina is a state affiliate of the national ACLU. The ACLU of South Carolina's mission is to advance the cause of civil liberties in South Carolina, with emphasis on rights of free speech, free assembly, freedom of religion, and due process of law, and to take all legitimate action in the furtherance of such purposes without political partisanship.

The DKT Liberty Project ("DKT") is a nonprofit organization founded to promote individual liberty against encroachment by all levels of government. DKT is committed to protecting privacy, guarding against government overreaching, and protecting the freedom of all citizens to engage in expression without government interference. DKT has filed numerous friend-of-the-court briefs supporting free speech rights.

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of constitutional government that are the foundation of liberty. To these ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*. This case concerns Cato because free discourse by students at public institutions of higher learning is vital to the advancement of individual liberty.

Reason Foundation, established in 1978, is a nonpartisan and nonprofit public-policy organization dedicated to advancing a free society. Reason develops and promotes policies that advance free markets, individual liberty, and the rule of law. To support these principles, Reason publishes *Reason* magazine, produces commentary on its websites, and issues policy research reports. And in significant public-policy cases, Reason selectively files *amicus curiae* briefs.

Amici have no direct interest, financial or otherwise, in the outcome of this case. Their sole interest in filing this brief is to safeguard the First Amendment rights of public college students. Three of the four *amici*—The ACLU of South Carolina, The DKT Liberty Project, and Reason Foundation—were *amici* before the court of appeals. Accordingly, The ACLU of South Carolina, The DKT Liberty Project, The Cato Institute, and Reason Foundation respectfully request that they

be allowed to participate in this case by filing the attached brief.

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INTEREST OF THE *AMICI CURIAE*[1]

Amici represent a coalition of organizations from across the political and ideological spectrum united by a common belief in the importance of promoting and protecting constitutional rights, including the rights to freedom of expression and due process of law enjoyed by our nation's public college students.

The American Civil Liberties Union of South Carolina is a state affiliate of the national ACLU. Its mission is to advance the cause of civil liberties in South Carolina, with emphasis on rights of free speech, free assembly, freedom of religion, and due process of law, and to take all legitimate action in the furtherance of such purposes without political partisanship.

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[1] Rule 37 statement: All parties received timely notice of intent to file this brief. The petitioners consented to its filing. The respondents declined to consent. No counsel for any party authored any part of this brief and no person or entity other than *amici* funded its preparation or submission.

government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of constitutional government that are the foundation of liberty. To these ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

Reason Foundation was established in 1978 as a nonpartisan and nonprofit public-policy organization dedicated to advancing a free society. Reason develops and promotes policies that advance free markets, individual liberty, and the rule of law—which allow individuals and private institutions to flourish. To support these principles, Reason publishes *Reason* magazine, produces commentary on its websites, and issues policy research reports. And in significant public-policy cases, Reason selectively files *amicus curiae* briefs.

This case concerns the *amici* because the lower court's decision is an outlier from a broader jurisprudence that supports student First Amendment rights. Yet, as here, students continue to suffer from unjust inquisitorial investigations triggered by the exercise of protected speech. To safeguard student civil liberties, it is vital for this Court to address the First Amendment issues at stake here.

INTRODUCTION AND SUMMARY OF ARGUMENT

For decades, this Court has recognized the importance of ensuring that students in our nation's

public colleges and universities enjoy the full protection of the First Amendment to speak freely without fear of punishment or retribution. Yet in recent years, many of those institutions, facing pressure from constituencies that would erode that protection to further other objectives, have established campus speech codes. The codes are often implemented by procedures that, as here, subject students to inquisitorial investigations triggered by unquestionably protected speech.

This Court has yet to address those codes. This case raises issues that highlight their most egregious aspects, and thus merits the Court's review. Many public universities uncritically reject criticism that they should not subject students to an inquisitorial process for exercising their First Amendment rights. They claim that the process is proper as long as it does not ultimately impose any punishment or retribution for protected speech. But that response ignores the critical point that the "process *is* the punishment."[2]

The protections of the First Amendment would be of little value if university officials could, with impunity, subject students to unreasonable and burdensome procedures simply for engaging in protected speech. This Court should make clear that public universities violate the First Amendment by subjecting their

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[2] *See generally* Malcolm M. Freeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court* (1979) (arguing that the real cost of the criminal justice system is not the fines and sentences meted out, but those incurred before the case even comes before the judge, including lost wages, bail costs, attorneys' fees, and wasted time).

students to investigations for having exercised their First Amendment rights, and that "no harm, no foul" is not a defense to the unconstitutional conduct.

ARGUMENT

THIS CASE RAISES IMPORTANT ISSUES THAT ARISE UNDER THE MOST EGREGIOUS ASPECTS OF HIGHER EDUCATION SPEECH CODES

A. The First Amendment Protects The Expressive Activities Of Public College Students

In compliance with the University of South Carolina's time and place regulations governing non-commercial solicitations on campus, petitioners displayed posters and handouts referencing censorship incidents at other universities. That conduct was classic expressive activity at the core of the First Amendment. *See Martin v. Struthers*, 319 U.S. 141, 146-47 (1943) ("Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved.").

The fact that the expressive activity occurred on a public university campus did not diminish the students' First Amendment rights. This Court has long held that college students are entitled to the Amendment's full protection. *Healy v. James*, 408 U.S. 169, 180 (1972) ("[T]he 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."); *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973) (*per curiam*) ("[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 of 'conventions of decency.' ").

Indeed, the "danger ["from the chilling of individual thought and expression"] is especially real in the university setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995). Thus the Court has not only clarified that public college students are entitled to full expressive rights, but has emphasized the importance of safeguarding these rights. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

B. Campus Speech Codes Threaten The Free Speech Rights Of Public College Students

Public university administrators, often believing that competing values outweigh the expressive rights of their students, all too frequently ignore that right. That clash between students and administrators is not new. *Healy*, 408 U.S. at 197 ("[Students] often have values, views, and ideologies that are at war with the ones

which the college has traditionally espoused or indoctrinated. When they ask for change, they, the students, speak in the tradition of Jefferson and Madison and the First Amendment.") (Douglas, J., concurring).

What is new is the schools' systematic adoption of sweeping speech codes that contradict the Court's basic First Amendment jurisprudence. Even worse, virtually as fast as lower courts invalidate policies that unconstitutionally restrict student speech,[3] the

[3] *See, e.g.*, *McCauley v. Univ. of the V.I.*, 618 F.3d 232 (3d Cir. 2010) (invalidating university speech policies, including harassment policy); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (striking down sexual harassment policy); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (declaring university discriminatory harassment policy facially unconstitutional); *Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, No. 1:12-cv-155, 2012 WL 2160969 (S.D. Ohio June 12, 2012) (invalidating "free speech zone" policy); *Smith v. Tarrant Cty. Coll. Dist.*, 694 F. Supp. 2d 610 (N.D. Tex. 2010) (finding university "cosponsorship" policy to be overbroad); *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (enjoining enforcement of university civility policy); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (finding university sexual harassment policy unconstitutionally overbroad); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of university harassment policy due to overbreadth); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575 (S.D. Tex. 2003) (declaring university policy regulating "potentially disruptive" events unconstitutional), *appeal dismissed for want of appellate jurisdiction*, 67 Fed. App'x 251 (5th Cir. 2003); *Booher v. Bd. of Regents, N. Ky. Univ.*, No. 2:96-CV-135, 1998 WL 35867183 (E.D. Ky. July 22, 1998) (finding university sexual harassment policy void for vagueness and overbreadth), *appeal dismissed for want of appellate jurisdiction*, 163 F.3d 395 (6th Cir. 1998); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (declaring university racial and discriminatory harassment policy facially unconstitutional);

institutions impose new at least equally restrictive policies. By enforcing those policies, public college students are now regularly subject to unconstitutional inquisitorial investigations triggered by the exercise of rights that the First Amendment fully protects. *See* Floyd Abrams, Free Speech 101: The Assault on the First Amendment on College Campuses: Hearing Before S. Comm. on the Judiciary, 115th Cong. 2 (2017) (statement of Floyd Abrams) ("single greatest threat to free speech in the nation"); Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind* (2018).

College students have been improperly subjected to investigation, retribution, denial of benefits, and even arrest. The investigations of protected activities have gone even so far as to reach the distribution of copies of the U.S. Constitution. Cecilia Capuzzi Simon, *Want a Copy of the Constitution? Now, That's Controversial*, N.Y. Times (Aug. 1, 2016), https://nyti.ms/2LxGE2N. Other such investigated activities have been distributing pro-choice flyers,[4] writing an article critical of a faculty member,[5] placing a campaign sign on a dorm room window,[6] defending the view that hate speech is

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Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989) (enjoining university discriminatory harassment policy).

[4] Ed Enoch, *University of Alabama at Center of Free Speech Debate*, Tuscaloosa News, July 11, 2013, https://bit.ly/2CyZbbX.

[5] Glenn Coin, *How an email to three college coaches led to a near suspension for SUNY Oswego student*, syracuse.com (Nov. 12, 2012), https://bit.ly/2LxWRVs.

[6] Sara Gonzalez, *University tried to make student remove Trump sign from his dorm window, but the student fought back*, The Blaze (Apr. 17, 2017), https://bit.ly/2oi7LT4.

protected speech,[7] displaying in text examples of harassment for a sexual assault awareness program,[8] performing a play satirizing racial stereotypes,[9] sharing thoughts of self-harm on social media,[10] selling t-shirts advocating marijuana legalization,[11] publishing an April Fools' Day edition of a student newspaper,[12] encouraging students to write thoughts on a "free speech ball,"[13] holding an ethnically themed recruitment event,[14] and telling a joke with a sexual innuendo.[15]

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[7] Matthew Kelly, *SGA votes against recognizing controversial Young Americans for Liberty group*, The Sunflower (Apr. 6, 2017), https://bit.ly/2EOdSu1.

[8] Patrick McNeil, *This College Student Put Up a Street Harassment Display. It Was Immediately Censored*, Huffington Post (Apr. 1, 2017), https://bit.ly/2oExw3k.

[9] Andrew R. Chow, *A Charged Title. A Canceled Show. Now a Cal State Official Resigns*, N.Y. Times (Sept. 13, 2016), https://nyti.ms/2SgWiSp.

[10] Jesse Singal, *A University Threatened to Punish Students Who Discussed Their Suicidal Thoughts With Friends*, N.Y. Magazine, https://sciof.us/2cLjqGh.

[11] Zach Baker, *NORML chapter clashes with MU over proposed T-shirt designs*, Missourian (June 20, 2016), https://bit.ly/2Va9ryD.

[12] Lisa Kaczke, *UWS closes investigation into April Fools' Day issue of student paper*, Duluth News Tribute (Apr. 22, 2016), https://bit.ly/2EQs0SC.

[13] Scott Jaschik, *Dispute Over Phallic Drawing on Beach Ball*, Insider Higher Ed. (Apr. 18, 2016), https://bit.ly/2TdMpFs.

[14] Chris Haire, *Cal State Fullerton sorority sanctioned for 'Taco Tuesday' party*, Orange County Register (Sept. 19, 2014), https://bit.ly/2ENi2ld.

[15] Saul Hubbard, *Letter says UO drops case against student*, The Register-Guard (Aug. 29, 2014), https://bit.ly/2RgHPZH.

Those inquisitorial investigations are having the effect, whether or not intended, of restricting and narrowing the viewpoints voiced on college campuses. *See* Jonathan R. Cole, *The Chilling Effect of Fear at America's Colleges*, Atlantic (June 9, 2016), https://bit.ly/2B5MvGo. Indeed, a 2015 survey of college students' free-speech attitudes shows that 49 percent of survey participants admitted that they felt intimidated to share beliefs that differ from their professors, and fully half of respondents said they had "often felt intimidated" to express beliefs different from those of their classmates. Press Release, McLaughlin & Associates, *The William F. Buckley, Jr. Program at Yale: Almost Half (49%) of U.S. College Students "Intimidated" by Professors when Sharing Differing Beliefs: Survey* (Oct. 26, 2015), https://bit.ly/2T6F6z2.[16]

In this case, the lower court shielded the University of South Carolina's free speech-deficient code from challenge only by disregarding and distorting basic First Amendment doctrine. That doctrine provides for a relaxed standard for determining standing to challenge laws that regulate freedom of expression. *See Ashcroft v. The Free Speech Coalition*, 535 U.S. 234, 244 (2002). Here, petitioners not only had to live under the weight of the university's speech-inhibiting code, but actually had the code's process invoked against them

[16] A 2016 survey yielded similar results, with a majority (54 percent) of college students surveyed agreeing that "[t]he climate on my campus prevents some people from saying things they believe because others might find them offensive." Gallup, *Free Expression on Campus: A Survey of U.S. College Students and U.S. Adults*, https://kng.ht/2ummHag.

in a case in which the university had previously authorized the event in question. Yet the court of appeals surprisingly found itself unable to envision how petitioners could be entitled to challenge the offending code provision.

C. The First Amendment Prohibits Inquisitorial Investigations Of Protected Speech

A university may regulate expressive conduct "that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *See Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999). Accordingly, it may establish procedures for investigating allegations of such severe harassment. The First Amendment, however, places important limitations on those procedures, in this case regulating the circumstances under which an accused student may be burdened by the initiation of a proceeding.

The First Amendment prohibits not only governmental action that restricts or prohibits protected expressive activity, but also action that can chill or discourage it. *See Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 793-94 (1988); *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 402 (1950) ("[T]he fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the

exercise of First Amendment rights as imprisonment, fines, injunctions or taxes."); *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 499-500 (4th Cir. 2005).

The Court has long recognized that the power of the government to subject individuals to investigation for exercising expressive activity can unduly chill or discourage protected speech. Consequently, "it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." *Gibson v. Fla. Leg. Investigation Comm.*, 372 U.S. 539, 546 (1963). Inquisitions in a university setting require even greater scrutiny. *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957) ("It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas, particularly in the academic community.").

Assuming that the government can establish a compelling interest that warrants an investigation of protected expressive activity, the power to investigate is still subject to strict scrutiny to ensure that the interference is minimized. Among other restrictions, the government must ensure that its investigations are not prompted by frivolous accusations or accusations

that are not within the compelling interest. Thus, the government must screen accusations before commencing an inquisitorial investigation in order to eliminate insubstantial or frivolous complaints. *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 474-75 (6th Cir. 2016) ("There is no process for screening out frivolous complaints or complaints that, on their face, only complain of non-actionable statements, such as opinions."). *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2345 (2014) ("*SBA List*") ("[A]dministrative action, like arrest or prosecution, may give rise to harm sufficient to justify pre-enforcement review."); *White v. Lee*, 227 F.3d 1214, 1233 (9th Cir. 2000) ("Because the plaintiffs' lawsuit could have been actionable under the FHA if and only if it were a sham, the officials were obligated to first determine that the suit was objectively baseless before proceeding with any potentially chilling investigation into the plaintiffs' protected speech and other petitioning activity—even for the stated purpose of determining whether the plaintiffs had filed the suit with an unlawful discriminatory intent.").

The First Amendment's functional limitation on inquisitorial investigations is critical. Without that limitation, the government could subject targets to frivolous investigations. While the targets might ultimately be vindicated, that vindication would often come only after their having incurred substantial expense and great loss of time. And that assumes that they would have the necessary resources to challenge the government's actions.

Even "an ultimate disposition in favor of the target often amounts to merely a pyrrhic victory." *See SBA List*, 134 S. Ct. at 2346 ("The burdens that Commission proceedings can impose on electoral speech are of particular concern here."); *Gordon v. Marrone*, 155 Misc. 2d 726, 736, 590 N.Y.S.2d 649, 657 (Sup. Ct. 1992) (concerning so-called "SLAPP" lawsuits brought by private citizens in order to interfere with free speech rights). Thus, in recognition that the process should not be the punishment, most states provide procedural protections against "SLAPP" lawsuits.[17] When it comes to government action, including by public university administrators, the First Amendment affords no less protection to student targets of investigations.

In this case, while the complainants alleged that the petitioners' speech was "offensive," the complainants did not allege any severe harassment that could be punished consistent with the First Amendment. Nevertheless, without any even colorable allegation of conduct justifying permissible punishment, the University of South Carolina still required petitioners to participate in the investigation and to justify their behavior. Thus, the University violated petitioners' First Amendment rights when it failed to screen the complaints before it acted vis-a-vis the petitioners.

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[17] Public Participation Project, *State Anti-SLAPP Laws*, https://bit.ly/2AhUJwO.

D. The First Amendment Forbids Blanket Prior Restraints On Speech, Like The Prohibition Imposed In This Case

Prior restraints bear "a heavy presumption against [their] constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Such restraints are highly suspect because "a free society prefers to punish the few who abuse rights of free speech after they break the law [rather] than to throttle them and all others beforehand." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

Moreover, prior restraints, by their advance prohibition of speech of a defined content, trigger the core First Amendment presumption against content-based regulation. *See Nat'l Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (presumption against content-based restrictions); *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (The "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

The University of South Carolina, by forbidding petitioner Abbott not to contact any complainant or discuss the matter "with any member of the faculty staff or student body" (Pet. App. 152a) effectively imposed a "gag order" comparable to those that courts have enforced and that have been subjected to strict scrutiny. Such a bare order, issued without any support, cannot survive that level of review. *See Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 569 (1976); *In re Murphy-Brown, LLC*, 907 F.3d 788 (4th Cir. 2018).

CONCLUSION

For these reasons, and those stated by the petitioners, the Court should grant the petition.

Respectfully submitted,

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