APPEAL NO. 10–14622

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

THOMAS HAYDEN BARNES,
PLAINTIFF-APPELLEE

v.

RONALD M. ZACCARI, *ET AL.*
DEFENDANTS-APPELLANTS

MOTION OF FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, ET AL. FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PLAINTIFF-APPELLEE THOMAS HAYDEN BARNES

The Foundation for Individual Rights in Education, the American Booksellers Foundation for Free Expression, the American Civil Liberties Union Foundation of Georgia, the American Council of Trustees and Alumni, the Cato Institute, the Electronic Frontier Foundation, Feminists for Free Expression, the Individual Rights Foundation, the Libertarian Law Council, the National Association of Scholars, the National Coalition Against Censorship, the National Youth Rights Association, Reason Foundation, Students for Liberty, and the Southeastern Legal Foundation move for leave to file an *amici curiae* brief in support of Plaintiff-Appellee Thomas Hayden Barnes, in the above-captioned case under Federal Rule of Appellate Procedure 29. Movants state the following in support of this Motion:

1. The Foundation for Individual Rights in Education ("FIRE") is a non-

profit, tax-exempt educational and civil liberties organization dedicated to promoting and protecting due process and freedom of expression rights at our nation's institutions of higher education. FIRE believes that if our nation's universities are to best prepare students for success in our democracy, the law must remain clearly on the side of due process and free speech on campus.

2. The American Booksellers Foundation for Free Expression ("ABFFE") is the bookseller's voice in the fight against censorship. Founded by the American Booksellers Association in 1990, ABFFE's mission is to promote and protect the free exchange of ideas, particularly those contained in books, by opposing restrictions on the freedom of speech.

3. The American Civil Liberties Union Foundation ("ACLU") of Georgia is a state affiliate of the ACLU with over 5,000 members. The ACLU of Georgia's mission is to advance the cause of civil liberties in Georgia, 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. This controversy squarely implicates the ACLU of Georgia's concerns for the rights of students.

4. The American Council of Trustees and Alumni ("ACTA") is a 501(c)(3), tax-exempt, non-profit, educational organization committed to academic

freedom, excellence, and accountability at America's colleges and universities. ACTA works with college and university trustees to safeguard the free exchange of ideas, support liberal arts education, uphold high academic standards, and ensure that the next generation receives an open-minded, high quality education at an affordable price.

5. The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs. Cato has a substantial interest in this case because the grant of immunity to the university president here, if upheld, has the potential to erode First Amendment rights on campuses across the nation by giving administrators the power to punish personally objectionable but otherwise protected speech.

6. The Electronic Frontier Foundation ("EFF") is a non-profit, member-supported civil liberties organization working to protect rights in the digital world. EFF actively encourages and challenges industry, government, and the courts to

support free expression, privacy, and openness in the information society. Founded in 1990, EFF has members in all 50 states and maintains one of the most linked-to websites (http://www.eff.org) in the world. As part of its mission, EFF has served as counsel or *amicus* in key cases addressing constitutional rights.

7. Feminists for Free Expression ("FFE") is a group of diverse feminists working to preserve the individual's right to see, hear, and produce materials of her choice without the intervention of the state "for her own good." FFE believes freedom of expression is especially important for women's rights. While messages reflecting sexism pervade our culture in many forms, sexual and nonsexual, suppression of such material will neither reduce harm to women nor further women's goals. There is no feminist code about which words and images are dangerous or sexist. Genuine feminism encourages individuals to choose for themselves. A free and vigorous marketplace of ideas is the best guarantee of democratic self-government and a feminist future.

8. The Individual Rights Foundation ("IRF") was founded in 1993 and is the legal arm of the David Horowitz Freedom Center (founded in 1988 as the Center for the Study of Popular Culture). The IRF is dedicated to supporting free speech, associational rights, and civil rights issues, including student rights on campuses, and its lawyers participate in educating the public about the importance

of constitutional protections. One of the Freedom Center's major initiatives involves promoting academic freedom for university students. To further these goals, IRF attorneys participate in litigation and file *amicus curiae* briefs in appellate cases raising important constitutional issues. The IRF opposes attempts from anywhere along the political spectrum to undermine freedom of speech and dissent, which are basic components of individual rights in a free society.

9. The Libertarian Law Council ("LLC") is a Los Angeles-based organization of lawyers and others interested in the principles underlying a free society, including the right to liberty and property. Founded in 1974, the LLC sponsors meetings and debates concerning constitutional and legal issues and developments; it participates in legislative hearings and public commentary regarding government curtailment of choice and competition, economic liberty, and free speech; and it files briefs *amicus curiae* in cases involving serious threats to liberty.

10. The National Association of Scholars ("NAS") is an organization comprising professors, graduate students, administrators, and trustees at accredited institutions of higher education throughout the United States. NAS has about 3,500 members, organized into 46 state affiliates, and includes within its ranks some of the nation's most distinguished and respected scholars in a wide

range of academic disciplines. The purpose of NAS is to encourage, to foster, and to support rational and open discourse as the foundation of academic life. More particularly, NAS seeks, among other things, to support the freedom to teach and to learn in an environment without politicization or coercion, to nourish the free exchange of ideas and tolerance as essential to the pursuit of truth in education, to maintain the highest possible standards in research, teaching, and academic self-governance, and to foster educational policies that further the goal of liberal education.

11. The National Coalition Against Censorship ("NCAC") is an alliance of more than 50 national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups that are united in their commitment to freedom of expression. Since its founding in 1974, NCAC has defended the First Amendment rights of professors and students in public colleges and universities, as well as the free speech rights of countless artists, authors, teachers, librarians, readers, and others around the country. NCAC regularly appears as *amicus curiae* in free speech cases in the United States Supreme Court and in other courts addressing significant and potentially far-reaching First Amendment issues. The views presented in this brief are those of NCAC and do not necessarily represent the views of each of its participating organizations.

12. The National Youth Rights Association ("NYRA") is a youth-led, non-profit organization committed to defending the civil rights and liberties of young people in the United States. NYRA believes certain basic rights transcend age or status limits, including those rights protected by the First Amendment. Founded in 1998, the organization aims to achieve its goals through educating people about youth rights, empowering young people to work on their own behalf, and by taking direct steps to lessen the burden of ageism. NYRA believes that schools and universities are an important part of the life of young people and essential to a free society, and believes that learning is best done in an environment of mutual respect, free minds, and equality. Schools must be incubators of democracy, not bastions from it. NYRA previously joined *amicus curiae* briefs in *Safford Unified School District v. Redding*, 129 S. Ct. 2633 (2009) and *Schwarzenegger v. Electronic Merchants Association*, No. 08-1448 (argued Nov. 2, 2010).

13. Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to promote liberty by developing, applying, and communicating libertarian principles and policies, including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites,

www.reason.com, www.reason.org, and www.reason.tv, and by issuing policy research reports that promote choice, competition, and a dynamic market economy as the foundation for human dignity and progress. Reason also communicates through books and articles in newspapers and journals, and appearances at conferences and on radio and television, and Reason personnel consult with public officials on the national, state and local level on public policy issues. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues.

14. Students For Liberty ("SFL") is a national secular, non-partisan, 501(c)(3) non-profit educational organization dedicated to providing organizational support for students and student organizations devoted to liberty. Founded and operated by college students, SFL defines liberty as encompassing the economic freedom to choose how to provide for one's life; the social freedom to choose how to live one's life; and intellectual and academic freedom. To promote this understanding of liberty, SFL supports student organizations across the ideological spectrum by providing resources and training to campus leaders and student groups.

15. Founded in 1976, the Southeastern Legal Foundation, Inc. ("SLF") is a non-profit public interest organization that shares and promotes the public

interest in the proper construction and enforcement of the laws and Constitution of the state of Georgia and of the United States. SLF is a constitutional public interest law firm and policy center that advocates for constitutional individual liberties and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before Georgia and United States courts. SLF has a particular interest in protecting the right of citizens to due process under the law and freedom of expression.

16. This case is of deep concern to *amici* because the expulsion of Plaintiff-Appellee Thomas Hayden Barnes by Defendant-Appellant Ronald Zaccari violated Barnes' clearly established due process rights, and the district court thus rightly denied Zaccari qualified immunity. Given the shared commitment of *amici* in preserving constitutional rights on our nation's public campuses, including those within the jurisdiction of this Court, *amici* have a deep interest in securing a just result in this case.

17. *Amici* FIRE's extensive experience defending students whose constitutional rights have been infringed leads it to conclude that, if the district court's decision to deny Zaccari qualified immunity is reversed, administrators across the country will be further emboldened to disregard their constitutional obligations.

18. Under Federal Rule of Appellate Procedure 29(b), the proposed brief is being filed along with this Motion.

19. This Motion for Leave has been filed because although counsel for Appellee has consented to the filing of this *Amici Curiae* brief, counsel for Appellants has denied FIRE's request for consent to file.

Respectfully submitted:

By: _____

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amici* certify that (1) *amici* do not have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in *amici*.

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, counsel for *amici* verify that the persons listed below have or may have an interest in the outcome of this case:

1. American Booksellers Foundation for Free Expression – *Amicus Curiae* on behalf of Plaintiff-Appellee Thomas Hayden Barnes.
2. American Civil Liberties Union of Georgia – *Amicus Curiae* on behalf of Plaintiff-Appellee Thomas Hayden Barnes.
3. American Council of Trustees and Alumni – *Amicus Curiae* on behalf of Plaintiff-Appellee Thomas Hayden Barnes.
4. Barnes, Thomas Hayden – Plaintiff-Appellee.
5. Begner, Cory C. – Counsel of record for *Amici Curiae* on behalf of Plaintiff-Appellee Thomas Hayden Barnes.
6. Board of Regents of the University System of Georgia – Defendant-Appellant.
7. Brannen Searcy and Smith – Law firm for Defendant Laverne Gaskins.
8. Cato Institute – *Amicus Curiae* on behalf of Plaintiff-Appellee Thomas Hayden Barnes.
9. Corn-Revere, Robert – Lead counsel for Plaintiff-Appellee Thomas Hayden

Barnes.

10. Creeley, William – Counsel for *Amici Curiae* on behalf of Plaintiff-Appellee Thomas Hayden Barnes

11. Daley Koster & LaVallee, LLC – Law firm for Defendant Leah McMillan.

12. Davis Wright Tremaine, LLP – Law firm for Plaintiff-Appellee Thomas Hayden Barnes.

13. Electronic Frontier Foundation – *Amicus Curiae* on behalf of Plaintiff-Appellee Thomas Hayden Barnes.

14. Fedeli, Christopher A. – Counsel for Plaintiff-Appellee Thomas Hayden Barnes.

15. Feminists for Free Expression – *Amicus Curaie* on behalf of Plaintiff-Appellee Thomas Hayden Barnes.

16. Foundation for Individual Rights in Education – *Amicus Curiae* on behalf of Plaintiff-Appellee Thomas Hayden Barnes.

17. Gaskins, Laverne – Defendant.

18. Georgia Department of Administrative Services.

19. Hance, Holly – Counsel for Defendants-Appellants Ronald M. Zaccari and Board of Regents of the University System of Georgia; counsel for

Defendants Kurt Keppler, Russ Mast, Valdosta State University.

20. Individual Rights Foundation – *Amicus Curiae* on behalf of Plaintiff-Appellee Thomas Hayden Barnes.

21. Keppler, Kurt – Defendant.

22. Koster, Paul – Counsel for Defendant Leah McMillan.

23. LaVallee, Matthew R. – Counsel for Defendant Leah McMillan.

24. Libertarian Law Council – *Amicus Curiae* on behalf of Plaintiff-Appellee Thomas Hayden Barnes.

25. Mast, Russ – Defendant.

26. McMillan, Leah – Defendant.

27. Morgan, Victor – Director of Valdosta State University Counseling Center.

28. National Association of Scholars – *Amicus Curiae* on behalf of Plaintiff-Appellee Thomas Hayden Barnes.

29. National Coalition Against Censorship – *Amicus Curiae* on behalf of Plaintiff-Appellee Thomas Hayden Barnes.

30. National Youth Rights Association – *Amicus Curiae* on behalf of Plaintiff-Appellee Thomas Hayden Barnes.

31. Pannell, Jr., Honorable Charles A. – District Court Judge for the United States District Court for the Northern District of Georgia, Atlanta Division.

32. Reason Foundation – *Amicus Curiae* on behalf of Plaintiff-Appellee Thomas Hayden Barnes.

33. Reid, Erin Nedenia – counsel for Plaintiff-Appellee Thomas Hayden Barnes.

34. Royal-Will/David C. Will, P.C. – law firm for Defendants-Appellants Ronald M. Zaccari and Board of Regents of the University System of Georgia; counsel for Defendants Kurt Keppler, Russ Mast, Victor Morgan, Valdosta State University.

35. Smith, David R. – counsel for Defendant Laverne Gaskins.

36. Southeastern Legal Foundation – *Amicus Curiae* on behalf of Plaintiff-Appellee Thomas Hayden Barnes.

37. Students for Liberty – *Amicus Curiae* on behalf of Plaintiff-Appellee Thomas Hayden Barnes.

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39. Wiggins, Cary Stephen – Lead counsel for Plaintiff-Appellee Thomas Hayden Barnes.

40. Wiggins Law Group – Law firm for Plaintiff-Appellee Thomas Hayden Barnes.

41. Will, David C. – Lead counsel for Defendants-Appellants Ronald M.

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42. Zaccari, Ronald M. – Defendant-Appellant.

43. Zycherman, Lisa Beth – Counsel for Plaintiff-Appellee Thomas Hayden Barnes.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 11, 2011, two copies of the foregoing Motion of Foundation for Individual Rights in Education, et al. for Leave to File *Amici Curiae* Brief in Support of Plaintiff-Appellee Thomas Hayden Barnes were mailed via U.S. Postal Service, first class mail, to the following:

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Dated: April 11, 2011

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THOMAS HAYDEN BARNES,
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v.

RONALD M. ZACCARI,
BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Georgia, Atlanta Division

BRIEF *AMICI CURIAE* OF FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, AMERICAN CIVIL LIBERTIES UNION OF GEORGIA, AMERICAN COUNCIL OF TRUSTEES AND ALUMNI, CATO INSTITUTE, ELECTRONIC FRONTIER FOUNDATION, FEMINISTS FOR FREE EXPRESSION, INDIVIDUAL RIGHTS FOUNDATION, LIBERTARIAN LAW COUNCIL, NATIONAL ASSOCIATION OF SCHOLARS, NATIONAL YOUTH RIGHTS ASSOCIATION, NATIONAL COALITION AGAINST CENSORSHIP, REASON FOUNDATION, STUDENTS FOR LIBERTY, SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF APPELLEE

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10. Creeley, William: Counsel for *Amici Curiae* on behalf of Plaintiff-Appellee Thomas Hayden Barnes

11. Daley Koster & LaVallee, LLC: Law firm for Defendant Leah McMillan.

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13. Electronic Frontier Foundation: *Amicus Curiae* on behalf of Plaintiff-Appellee Thomas Hayden Barnes.

14. Fedeli, Christopher A.: Counsel for Plaintiff-Appellee Thomas Hayden Barnes.

15. Feminists for Free Expression: *Amicus Curiae* on behalf of Plaintiff-Appellee Thomas Hayden Barnes.

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17. Gaskins, Laverne: Defendant.

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43. Zycherman, Lisa Beth: Counsel for Plaintiff-Appellee Thomas Hayden Barnes.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae represent a broad coalition of organizations from across the political and ideological spectrum united by a common belief in the importance of promoting and protecting core constitutional rights for students on our nation's public college and university campuses.[2] This case is of deep concern to *amici* because despite the clarity of the jurisprudence governing student rights at public colleges and universities, students like Hayden Barnes continue to suffer violations of due process like those now at issue before this Court. Often—as in this case—these denials of due process are triggered when students engage in expression protected by the First Amendment. *Amici* believe that students like Barnes must be accorded the full protection they are due under the Due Process Clause and the First Amendment—and that public university administrators must be held accountable for their unconstitutional actions.

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[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Plaintiff-Appellee consents to the filing of this brief; Defendant-Appellant does not consent to the filing of this brief. Consistent with FRAP 29, *amici* have filed a motion accompanying this brief seeking leave from this Court to file.

[2] A full statement of interest for each *amici* is included with the Motion for Leave to File accompanying this brief.

STATEMENT OF THE ISSUES

1. Whether the district court correctly awarded summary judgment to plaintiff Thomas Hayden Barnes while denying the defense of qualified immunity to a public university president, where the president had ignored both university policy and Barnes' right to due process in expelling him from the public university?

2. Whether the district court correctly determined that ignoring university policy with regard to involuntary student withdrawal constituted a breach of contract?

SUMMARY OF ARGUMENT

For decades, courts have recognized the crucial importance of ensuring that students attending our nation's public colleges and universities enjoy robust constitutional freedoms, including the right to due process of law and the right to freedom of expression. Yet despite this well-established jurisprudence, students like Hayden Barnes continue to suffer violations of their civil liberties. Colleges nationwide are quick to deny students minimum guarantees of due process and readily punish students for engaging in clearly protected expression. These abuses persist in large part because few students stand up for their rights, as Barnes has here. This court must act to remedy the injustice Hayden has suffered—and to ensure that it is not repeated elsewhere.

Barnes' case is a shocking example of the unconstitutional abuses marring our public institutions of higher education. Because Barnes exercised his First Amendment rights by peacefully protesting the planned construction of a parking facility, he was targeted for expulsion by former Valdosta State University President Ronald Zaccari.[3] The record below

[3] Although Barnes' First Amendment retaliation claim is not presently before this Court on appeal, the district court's dismissal of this claim did not hold that Barnes did not engage in protected expression. Op. at 25–27. (Op. refers to the district court's opinion in *Barnes v. Zaccari*, No. 1:08-CV-0077-CAP (N.D. Ga. Sept. 3, 2010).) Instead, it held only that Zaccari acted alone in retaliating against Barnes for his speech. We do not

makes clear that Zaccari, embarrassed and vindictive, entirely disregarded the repeated warnings of his staff in a zealous, single-minded effort to silence Barnes by removing him from campus—but only after cynically painting him as a "threat," despite the complete lack of any evidence to that effect.

Possessing clear knowledge of the constitutional rights to which Barnes was entitled, Zaccari nevertheless ignored longstanding legal precedent, the Valdosta State University Student Handbook, and the counsel of his fellow administrators. While Zaccari had been notified that expelling Barnes without notice of the charges against him or any form of hearing would violate Barnes' due process rights, he chose to do so regardless. Denial of the defense of qualified immunity is entirely appropriate—and, in fact, required—when a public official acts as Zaccari did here, willfully abandoning the constrictions of binding legal precedent in a determined effort to deprive another of constitutional rights.

College administrators nationwide are watching this case closely. The desire of some administrators to censor unwanted, unpopular, or merely inconvenient speech on campus is matched by a willingness to seize upon developments in the law that grant them greater leeway to do so. Given the

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contest the district court's findings here, and include information on First Amendment analysis insofar as it relates to Barnes' due process claim.

egregious nature of the rights violations at issue here, granting Zaccari qualified immunity will have a profound effect on college administrators' sense of obligation to safeguard students' constitutional rights. If students like Hayden Barnes are unable to vindicate their rights after suffering abuses like those before the court, would-be censors across the country will be free to flout constitutional obligations with impunity. If this result is permitted, both our public system of higher education and society at large will suffer.

ARGUMENT

I. Despite Clear Precedent, Students' Rights Are Frequently Ignored

Courts have consistently held that constitutional rights apply with equal force to protect students attending public universities as to protect those in society at large. Students do not sacrifice core constitutional liberties as a condition of matriculation to our nation's public colleges and universities. Despite this well-established jurisprudence, FIRE's eleven years of experience defending students demonstrates that public college administrators across the country continue to disregard court precedent and violate student rights—with the instant case offering an egregious example.

A. Constitutional Rights Are Of Crucial Importance On Public University Campuses

The Supreme Court has made clear that the "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487; 81 S. Ct. 247, 251 (1960). Indeed, in *Sweezy v. New Hampshire*, 354 U.S. 234; 77 S. Ct. 1203 (1957), the Court identified a direct correlation between robust constitutional liberties on public campuses and the health of our nation's liberal democracy:

> The essentiality of freedom in the community of American universities is almost self-evident…. 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.

Id. at 250. Among the most crucial constitutional freedoms enjoyed by students are the right to freedom of expression and the right to due process of law.

Courts have long identified the necessity of affording students attending public schools the basic components of due process of law. Indeed, this court was one of the first to recognize the necessity of due process for public college students, holding in *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 158–59 (5th Cir. 1961) that "due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct." In *Dixon*—which, like the instant case, involved an allegation of misconduct, not of academic failure—this Court held that, based on the particular facts at issue, due process required the production of the names and testimony of adversarial witnesses, the opportunity to call supporting witnesses, the chance to present a defense, and the opportunity to inspect the findings of the hearing. *Id*. at 158–59.

Citing *Dixon*, the Supreme Court ruled nine years later in *Goss v. Lopez*, 419 U.S. 565, 576; 95 S. Ct. 729, 737 (1975) that even a ten-day suspension from a public high school "may not be imposed in complete

disregard of the Due Process Clause." The *Goss* Court further noted that in the wake of this court's decision in *Dixon*, "the lower federal courts have uniformly held the Due Process Clause applicable to decisions made by tax-supported educational institutions to remove a student from the institution long enough for the removal to be classified as an expulsion." *Id*. The Supreme Court's holding in *Goss* requires that students threatened with suspension "must be given *some* kind of notice and afforded *some* kind of hearing." *Id*. at 579 (emphasis in original).

Following *Goss* and *Dixon*, this court has ruled that students at public institutions are entitled to both procedural and substantive due process protections. In *Nash v. Auburn University*, 812 F.2d 655, 667 (11th Cir. 1987), this court noted that *Dixon* "broadly defined the notice and hearing required in cases of student expulsion from college" and established that the right to due process "provides a guarantee against arbitrary decisions that would impair [students'] constitutionally protectable interests" in the context of student expulsions. *Id*. at 667. As a result, a public university's power of expulsion "is not unlimited and cannot be arbitrarily exercised" in the absence of "some reasonable and constitutional ground for expulsion." *Id*. (quoting *Dixon*, 294 F.2d at 157).

The First Amendment is also of particular importance at our nation's public universities.[4] In the more than fifty years following the Court's ruling in *Sweezy,* courts have repeatedly reaffirmed the special importance of robust free expression in higher education. *See e.g.*, *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 836; 115 S. Ct. 2510, 2520 (1995) ("For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses."); *Healy v. James*, 408 U.S. 169, 180; 92 S. Ct. 2338, 2346 (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."); *Keyishian v. Board of Regents of the University of New York*, 385 U.S. 589, 603; 87 S. Ct. 675, 683 (1967) ("The Nation's future depends upon leaders 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.'") (citation omitted). As the Supreme Court made clear in *Sweezy*, because public

[4] Although Barnes' First Amendment retaliation claim is not presently before this Court on appeal, the flouting of First Amendment rights on college campuses by administrators in this circuit and across the country further demonstrates why qualified immunity must be denied to administrators who violate clearly established law.

universities play a "vital role in a democracy," freedom of expression is essential on campus, and to restrict the flow of ideas on campus "would imperil the future of our Nation." *Sweezy*, 354 U.S. at 250.

B. Public Universities Frequently Flout Clearly Established Law Regarding Student Rights

Despite these precedents, public university administrators continue to flagrantly violate students' clearly established First and Fifth Amendment rights. The continuing violation of student rights does not result from a lack of legal clarity; as explained above, the law is well-established with regard to the rights owed students on public campuses. Rather, the ongoing denial of students' rights to due process and freedom of expression likely arises from the false sense of impunity felt by administrators. Because serious abuses too often fail to result in any legal consequences, they continue unabated.

As detailed in the previous section, students facing suspension or other punishments are entitled to certain basic procedural rights—including, at the very least, notice of the charges and an opportunity to be heard.[5] Yet public universities often take serious action against students without affording them these rights.

[5] *See* Section I.A, *supra*.

For example, Binghamton University's Department of Social Work ordered—without a hearing—the suspension of masters' student Andre Massena after Massena anonymously posted flyers criticizing the department for having hired the executive director of the Binghamton Housing Authority (BHA), an agency he believed was responsible for unjustly evicting a woman and her children from their home. A week after Massena posted the flyers, he was notified by school administrators that as a result of his speech, he would be forced to take a two-semester leave of absence from the program, among other punishments.[6] Similarly, Johnson County Community College in Kansas dismissed a nursing student without a hearing in November 2010 after she posted a photograph of herself posing with a placenta on social networking site Facebook.com. The student brought suit against the college and a federal district court found that the student had been denied a fair hearing on her dismissal.[7] Elsewhere, St. Louis Community College at Meramec found student Jun Xiao guilty of hazing, obstruction or disruption of teaching, disorderly conduct, and failure to comply with directions of a college official after he sent his classmates e-

[6] "Written Plan for Andre Massena," Sept. 2, 2008, *available at* http://thefire.org/article/9922.html.

[7] Matt Campbell, *Nursing Student Wins Facebook Placenta Case*, KANSAS CITY STAR, Jan. 6, 2011, *available at* http://www.kansascity.com/2011/01/06/2565611/judge-orders-reinstatement-for.html.

mails inviting them to join him in signing up for a class at another college. Despite the fact that he was never afforded a hearing or written clarification of the charges against him, Xiao was notified that he had been found guilty, placed on "Disciplinary Probation," and forbidden from sending further e-mails.[8]

With regard to First Amendment rights, university administrators have often disregarded existing law in an effort to rid campuses of speech that they find "offensive" or that makes them uncomfortable. In *Davis v. Monroe County Board of Education*, 526 U.S. 629; 119 S. Ct. 1661 (1999), the Supreme Court held that for speech to be considered "hostile environment" harassment in the educational setting, it must be "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis*, 526 U.S. at 633.[9]

Moreover, there is a consistent string of legal precedent, dating back more than 20 years, holding that broadly written public university

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[8] Following assistance from FIRE, the American Civil Liberties Union of Eastern Missouri, and the office of U.S. Representative William Lacy Clay, Xiao was exonerated. Kavita Kumar, *Community College Drops Charges Against Student*, ST. LOUIS POST-DISPATCH, Jan. 31, 2008, *available at* http://thefire.org/article/8899.html.

[9] In July 2003, the Assistant Secretary of the Department of Education's Office for Civil Rights sent a "Dear Colleague" letter to university presidents specifically reminding them that federal anti-harassment laws "are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution," and that harassment "must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive." *See* "First Amendment: Dear Colleague," Jul. 28, 2003, *available at* http://www2.ed.gov/about/offices/list/ocr/firstamend.html.

harassment policies and other similar speech codes are unconstitutional.[10] Yet in spite of this clear judicial consensus, universities continue to maintain overly broad restrictions on student speech and to punish students for speech and expression that does not even approach the legal standard for harassment or any other category of unprotected speech. At William Paterson University in New Jersey, for example, a Muslim student was found guilty of harassment for describing homosexuality as a "perversion" in a single private response to a professor's unsolicited e-mail announcing a screening of a documentary about a lesbian couple.[11] The University of New Hampshire found a student guilty of harassment and evicted him from his dormitory for posting a flier—the intent of which was to express his frustration with the lengthy wait time for the elevators in his dormitory—

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[10] *McCauley v. University of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010) (striking down hazing/harassment policy and prohibition on "emotional distress"); *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008) (sexual harassment policy); *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995) (discriminatory harassment policy); *College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (civility policy); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (prohibition on "insults, epithets, ridicule or personal attacks"); *Bair v. Shippensburg University*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (prohibition on "acts of intolerance"); *Booher v. Northern Kentucky University Board of Regents*, No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998) (sexual harassment policy); *UWM Post, Inc. v. Board of Regents of the University of Wisconsin*, 774 F. Supp. 1163 (E.D. Wisc. 1991) (discriminatory harassment policy); *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989) (discriminatory harassment policy).

[11] See Letter from Greg Lukianoff to William Paterson University President Arnold Speert, Jul. 5, 2005, *available at* http://www.thefire.org/article/6073.html.

suggesting that women could lose the "Freshman 15" by taking the stairs instead of the elevator.[12] The University of Central Florida charged a student with harassment for referring to a candidate for student government as "a Jerk and a Fool" on Facebook.com.[13]

The legal standards for unprotected threats and incitement are equally clear. The Supreme Court has defined "true threats" as only "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359; 123 S. Ct. 1536, 1548 (2003). The standard for incitement to violence is set forth in *Brandenburg v. Ohio*, 395 U.S. 444; 89 S. Ct. 1827 (1969), where the Court held that the state may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action." 395 U.S. at 447 (emphasis in original). Yet administrators continue to pursue disciplinary action against students for speech they deem

[12] *See UNH Student Evicted over Dorm Fliers*, PORTSMOUTH HERALD, Oct. 31, 2004.
[13] *See* Letter from Robert L. Shibley to University of Central Florida President John Hitt, Jan. 31, 2006, *available at* http://www.thefire.org/article/6860.html.

threatening or inciting when the speech falls well short of the applicable legal standard.[14]

In 2007, San Francisco State University put members of its College Republicans on trial for "attempts to incite violence" for hosting an anti-terrorism rally on campus in which participants stepped on makeshift Hezbollah and Hamas flags. Following the rally, students filed a complaint claiming they were offended because the flags—unbeknownst to the protestors—bore the word "Allah" in Arabic script.[15] At Lone Star College in Tomball, Texas, a student group was threatened with probation and derecognition for distributing a jocular flyer listing "Top Ten Gun Safety Tips" at the school's "club rush." When FIRE wrote to remind the college of its First Amendment obligations, the college's general counsel replied that "the mention of firearms and weapons on college campuses … brings fear and concern to students, faculty and staff," and that "the tragedy of Virginia Tech cannot be underestimated when it comes to speech relating to firearms

[14] *See* Greg Lukianoff, *P.C. Never Died*, REASON, Feb. 2010; Greg Lukianoff & Azhar Majeed, *Playing a Dangerous Game*, INSIDE HIGHER ED, Sept. 2, 2005.
[15] *See College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007); *see also* Free Speech on Trial Today at San Francisco State University, FIRE Press Release, Mar. 9, 2007.

—however 'satirical and humorous' the speech may be perceived by some."[16]

C. College Administrators Are Closely Watching This Case

College administrators are quick to seize upon developments in the law that grant them greater discretion to regulate and censor expression on campus. For example, one week after the United States Court of Appeals for the Seventh Circuit's decision in *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (en banc), *cert. denied*, 546 U.S. 1169; 126 S. Ct. 1330 (2006) (holding that public universities may regulate the content of student newspapers in ways similar to high schools), the general counsel for the California State University (CSU) system issued a memorandum to CSU presidents in favor of increased censorship and regulation of the student press, on the basis of the ruling in *Hosty*. The CSU memorandum stated that *Hosty* "appears to signal that CSU campuses may have more latitude than previously believed to censor the content of subsidized student newspapers."[17] However, the Seventh Circuit had actually held in *Hosty* that the decision to censor the student newspaper may have been

[16] *See* E-mail from Brian S. Nelson, General Counsel, Lone Star College System to Adam Kissel, Oct. 14, 2008, *available at* http://www.thefire.org/index.php/article/9815.html.

[17] Memorandum from Christine Helwick, General Counsel, California State University, to CSU Presidents (June 30, 2005), *available at* http://www.splc.org/csu/memo.pdf (last visited Jan. 11, 2011).

unconstitutional, but the law was not "clearly established" on the matter. CSU's inclination to read this ambiguity in the law in favor of increased censorship reflects the tendency of universities to seize upon new legal developments that may afford them greater ability to restrict expression on campus.

Further, while violations of student rights such as the examples discussed above are myriad, there have been surprisingly few cases in which administrators have been forced to invoke the defense of qualified immunity.[18] Reasons for this paucity are readily apparent. For one, college students in pursuit of a diploma are more likely than other citizens denied rights by government actors to tolerate the abuse at issue rather than risk endangering their prospect of graduation by filing a complaint in federal

[18] *Cf. Husain v. Springer*, 494 F.3d 108 (2nd Cir. 2007) (overturning lower court's grant of qualified immunity at summary judgment stage to public university president for violation of student journalists' First Amendment rights, where president had nullified student government election results due to student newspaper's endorsement of specific candidates); *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975) (denying qualified immunity to university president for dismissing student editors of a campus newspaper from their positions and replacing them with administrative personnel, where court found president's rationale of newspaper's substandard "editorial responsibility and competence" lacking because "the right of free speech embodied in the publication of a college student newspaper cannot be controlled except under special circumstances"); *Commissioned II Love, Savannah State Univ. Chapter v. Yarbrough*, 621 F. Supp. 2d 1312 (S.D. Ga. 2007) (denying qualified immunity to university officials at stage of motion to dismiss, where university suspended and ultimately expelled student group from campus due to the religious practices of its members, denying the group official recognition and the ability to assemble on campus as a student organization).

court against their college or university.[19] While a defendant in a criminal case is already embroiled in legal proceedings and has a clear, immediate incentive to seek any and all legal remedies for denials of constitutional rights she may have suffered, a college student may rationally conclude that it is far more advantageous to keep quiet. Additionally, college students are less likely to be fully cognizant of the extent of their rights on campus, and may not even be aware of the fact that they have been denied a right to which they are legally entitled.

Given the relative dearth of cases involving qualified immunity and university administrators, granting qualified immunity to Zaccari in this case—which involves gross violations of clearly established law—will signal to university administrators that they may safely violate clearly established constitutional rights with impunity, thus prompting further abuses. This case presents the court with an opportunity to stem the tide and demonstrate to university administrators that constitutional obligations cannot be ignored without consequence.

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[19] For example, in the instant case, Barnes refrained from engaging in protected expression in order to avoid risking punishment: "Barnes took down his flyers and deleted his entries that were posted on the Facebook webpage. In addition, Barnes wrote a letter to Zaccari stating that he would remove the flyers and expressing a desire not to have an adverse response to his activities." Op. at. 4. Barnes also complied with the "requirements listed in Zaccari's withdrawal notice," despite the fact that the expulsion was predicated on a clear denial of his rights. Op. at 19–20.

II. The Denial of Qualified Immunity is Appropriate and Necessary Here

According to the Supreme Court, "[q]ualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 815 (2009). Qualified immunity is denied when a government official's "conduct violates clearly established [federal] statutory or constitutional rights of which a reasonable person would have known." *Keating v. City of Miami*, 598 F.3d 753, 762 (11th Cir. 2010) (quotation marks omitted). This Circuit has held that "[a] judicial precedent with materially identical facts is not essential for the law to be clearly established, but the preexisting law must make it obvious that the defendant's acts violated the plaintiff's rights in the specific set of circumstances at issue." *Youmans v. Gagnon*, 626 F.3d 557 (11th Cir. 2010).

Former VSU President Ronald Zaccari knowingly violated his clear constitutional duty to provide Barnes with procedural due process prior to expulsion, and he purposely devised a way to circumvent Barnes' rights. This deprivation of due process occurred because Zaccari, who was "personally embarrassed" by Barnes' speech, Op. at 6, ignored the

unequivocal evidence that Barnes was not a threat to himself or others. Instead of following the university's proper procedures to comport with due process, Zaccari insisted on initiating an "administrative withdrawal" that did not require the university to supply any evidence of wrongdoing or mental infirmity, or allow Barnes an immediate administrative appeal at the campus level, before stripping Barnes of his status as a student.

A. Zaccari Knew or Should Have Known His Actions Violated Barnes' Constitutional Right to Procedural Due Process

Former VSU President Zaccari abused his authority in order to expel former student Hayden Barnes without due process based purely on Barnes' speech, which constituted political protest. In a published opinion, the Eleventh Circuit recently ruled that administrators violate due process when they deny an enrolled student a pre-deprivation hearing prior to expulsion, unless the student has displayed behavior severe enough to consider her an immediate threat to the university. *See Castle v. Appalachian Tech. College*, 631 F.3d 1194 (11th Cir. Jan. 27, 2011), at *11–13. In *Castle*, this Court rejected the arguments of college administrators, who had expelled a nursing student without a pre-expulsion hearing, that the student's behavior rose "to the level of seriousness necessary to show that she posed a threat sufficient to deny her a pre-suspension hearing." *Id.* at *13–14. According to this Court, a student who has never been "accused of involvement in any

physical altercation or of creating a public safety hazard," where "many of the complaints against her—including the most serious accusation, that she had threatened other students—were based on incidents that allegedly occurred months before the suspension," is still entitled to notice and a proper hearing *prior* to being suspended or expelled. *Id.* at *14.

The instant case presents an even more obvious due process violation because, in contrast to *Castle*, there was no evidence that Barnes was a threat to himself or others. Barnes was expelled from VSU because, in response to Zaccari's proposal to construct parking facilities costing approximately $30 million, Op. at 3, Barnes raised awareness about the parking structure's negative environmental impacts by posting flyers around school and posting messages on Facebook.com. Op. at 3–4. Most notably, a satirical collage protesting the parking garage referred to the structure as the "S.A.V.E. / Zaccari Memorial Parking Garage," which mocked the former VSU president's perception that the parking structure would be part of his legacy. Op. at 4–5.[20] This collage was attached to the letter placed under Barnes' dormitory room door informing him that he had been expelled. Op. at 19.

[20] VSU's newspaper, *The Spectator*, published a letter to the editor submitted by Barnes. Op. at 6, and Barnes also contacted members of the University's Board of Regents (BOR) to explain his opposition to the proposed construction. According to the district court, "Barnes's message to the BOR members was at all times respectful." Op. at 5.

Despite the fact that Zaccari, who felt "personally embarrassed" by the negative attention his project received, endeavored to uncover information damaging enough to expel Barnes, VSU police officers and counselors informed Zaccari that Barnes did not present a threat to Zaccari or others. *See* Op. at 6, 8–9, 11, 13–14, 15–16. For example, Barnes' counselor at the VSU Counseling Center explained to Zaccari that "she had 'never at anytime observed any behaviors that warranted [her] being concerned that Mr. Barnes was a threat to himself or anyone else' and that he had behaved in a safe way in the past and had expressed 'no suicidal or homicidal ideas.'" Op. at 11. Dean of Students Richard Lee described Zaccari's concerns as "an overreaction." Op. at 12.

Kurt Keppler, Vice President for Student Affairs at VSU, remarked during a meeting with Zaccari that "no one at the counseling center could withdraw Barnes for mental health reasons because there was nothing to support that Barnes was a threat." Op. at 17. Moreover, Major Ann Farmer of the VSU Police found "no kinds of reports where there had been any trouble with Hayden Barnes." Op. at 8. If Zaccari legitimately believed that Zaccari was a threat, this belief was unreasonable, rendering his denial of a pre-deprivation hearing based on that belief unreasonable. *See Lowe v. Aldridge*, 958 F.2d 1565, 1570 (11th Cir. 1992) (reviewing the evidence

known to police officers to determine if that evidence would have prompted a reasonable officer to seek an arrest warrant).

Undeterred by unequivocal evidence and expert opinions that Barnes was not a threat, Zaccari sought ways to remove Barnes from his university. Zaccari wished to use a process called "administrative withdrawal" because the "'mental health' or 'disorderly conduct' withdrawal process was 'cumbersome' [and] would take time and require the President to produce evidence to support his decision." Op. at 13. Zaccari's method of removing Barnes purposely ignored the recommendations of VSU's in-house counsel and other administrators. Although reliance on the advice of counsel may serve as grounds for granting state officials qualified immunity, *see Poulakis v. Rogers*, 341 Fed. Appx. 523, 532–34 (11th Cir. 2009), the district court found "Zaccari's assertion that he relied upon the advice of Gaskins and Neely disingenuous." Op. at 45.

In fact, VSU administrators asserted on numerous occasions that the law clearly required Barnes to be afforded a proper pre-deprivation hearing. During several meetings, Laverne Gaskins, in-house counsel for VSU, "expressed concern" that Zaccari's plans to withdraw Barnes would violate his rights under the First Amendment, the Due Process Clause, and the Americans with Disabilities Act. Op. at 15. Gaskins asserted that Barnes was

"entitled to due process" and that Zaccari's method of administrative withdrawal would "leave the group in a precarious legal position." Op. at 17. According to the district court, the undisputed facts and evidence in this case show that "Gaskins opposed the withdrawal of Barnes, and, whenever given the opportunity, she alerted anyone who would listen of the legal ramifications of taking such action." Op. at 36.

Once Zaccari decided to proceed with the administrative withdrawal, Gaskins expressed even more adamantly that Zaccari was not following proper procedures. When Zaccari instructed Gaskins to draft a letter to Barnes, requiring him to produce documentation proving that he was not a threat in order to maintain his enrollment at VSU, Gaskins wrote at the top of the proposed letter "[y]ou should note that due process dictates that the student be apprised of what particular policy has been violated, an opportunity to be heard and also informed of the appeal process." Op. at 18. Instead of heeding Gaskins' advice and providing these rights to Barnes, Zaccari signed a note, placed under Barnes' door, asserting that Barnes had been administratively withdrawn. Op. at 19. In response, Barnes submitted letters from his own psychologist and his counselor at VSU declaring that he was not a threat, but Zaccari maintained his unsupported opinion that Barnes

was a danger to the University, and informed him that he had 48 hours to vacate his room in his residence hall. Op. at 20.

Under this Court's precedent in *Castle*, Zaccari's actions violated Barnes' due process rights. Although the *Castle* Court held that denial of a pre-suspension hearing violates due process, qualified immunity was awarded in that case based on factors not present in the instant case, including "complicated factual issues surrounding the investigation of Castle's conduct," and the immediate availability of a proper administrative appeal, "which was referred to an independent committee for review." *Castle*, 631 F.3d at *15.

In contrast to the facts in *Castle*, Zaccari knew that Barnes would not be able to bring an appeal at the campus level, let alone an immediate appeal, if he administratively withdrew Barnes. As VSU Vice Chancellor for Legal Affairs at the BOR Elizabeth Neely informed Zaccari, "there is no due process at the campus level" when the university president brings a complaint against a student. Op. at 45. Instead, Barnes was forced to appeal to the Board of Regents, not to Student Affairs or an independent committee. Op. at 20, 45. The Board of Regents referred the case to an Administrative Law Judge, and the entire appeals process took almost nine months. Op. at 20. Barnes, who filed his appeal on May 21, 2007, did not have his

administrative withdrawal rescinded until January 17, 2008—after he filed the lawsuit in the instant case. *Id.* Not only was Barnes' punishment reversed only after the filing of a complaint in federal court, the reversal also followed significant public pressure from FIRE and negative attention from local and national media outlets.[21]

A reasonable university administrator would have known, as Zaccari did, that he was failing to provide Barnes with the process required before depriving an enrolled student of his right to continued enrollment. Zaccari is therefore not entitled to qualified immunity, based on the specific facts of this case. *See Evans v. Stephens*, 407 F.3d 1272, 1282 (11th Cir. 2005) (granting qualified immunity even with no direct case on point because reasonable police officers would have known the strip search performed was unreasonable).

B. The District Court's Ruling on the Breach of Contract Claim Further Demonstrates Why the Denial of Qualified Immunity is Appropriate

Zaccari not only violated Barnes' clearly established due process rights, he also ignored written VSU policies designed to protect and codify

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[21] *See*, *e.g.*, Andy Guess, *Maybe He Shouldn't Have Spoken His Mind*, INSIDE HIGHER ED, Jan. 11, 2008; Carole Hawkins, *VSU Student Battles Expulsion*, FLORIDA TIMES-UNION, Oct. 30, 2007; Brandon Larrabee, *Valdosta State Student Sues After He's Expelled*, ATHENS BANNER-HERALD, Jan. 12, 2008; Letter from William Creeley to Board of Regents of University System of Georgia Chancellor Errol B. Davis, Oct. 23, 2007, *available at* http://thefire.org/article/8523.html.

the constitutional rights guaranteed to students. By overriding the instructions of VSU counsel and demanding that Barnes be administratively withdrawn for his protected speech, *see e.g.*, Op. at 14–15, 17–18, Zaccari knowingly flouted the clauses of the VSU Student Handbook that would have safeguarded Barnes' due process rights. The VSU Student Handbook reflected a solid understanding on the part of administrators and the Board of Regents (BOR) of the due process rights guaranteed to enrolled students. As a result, Zaccari's rogue actions, which led to Barnes' breach of contract claim, cannot form the basis for a qualified immunity defense. *See Jordan v. Mosley*, 487 F.3d 1350, 1354 (11th Cir. 2007) (holding that qualified immunity is not extended to "the plainly incompetent or those who knowingly violate the law.").

The VSU Student Handbook, which is a valid, binding contract between Barnes and the BOR, provides that an "accused student . . . shall be notified in writing of specific charge(s) made against them and of the date, time, and place where a hearing will be held." Op. at 56. According to the district court, Barnes did not receive any notice of any charges against him "prior to Zaccari deciding to withdraw him," nor was Barnes given an opportunity to dispute the charge. *Id.* The district court therefore held as a

matter of law that, as a result of Zaccari's actions, the BOR breached its contract with Barnes. *Id.*

On appeal, the BOR does not dispute the district court's ruling that this provision of the contract, which echoes the most basic due process rights to notice in advance of a hearing, was breached by Zaccari's decision to proceed with administrative withdrawal. *See* App. Br. at 53–55. Indeed, Appellants' brief admits that Zaccari made a "decision to forego the process set out in the handbook." *Id.* at 53.[22] Appellants dispute only whether Georgia's waiver of sovereign immunity for contract claims extends to federal courts. *See id.* at 8, 54–55.[23]

The district court's ruling on Barnes' contract claim further reinforces the fact that Zaccari knowingly initiated a course of conduct that deprived Barnes of due process. As Appellants recognize, Barnes' due process claim is "intertwined with the alleged breach of contract for failure to follow the handbook." Op. at 53–54. This intertwinement results from the fact that the VSU Student Handbook, the terms of which were breached by Zaccari's

[22] Puzzlingly, Appellants assert that "[q]ualified immunity protects Zaccari's decision to forego the process set out in the handbook." App. Br. at 53. However, qualified immunity cannot be asserted by the BOR for its state-law breach of contract claim. *See Jordan*, 48 F.3d at 1354–55 (explaining that qualified immunity is granted for transgressions of *federal law* of which a reasonable person would have thought his actions were lawful).
[23] *Amici* agree with Appellee's position that the BOR has waived its sovereign immunity on this claim. *See* Appellee Br. at 52–54.

insistence on administrative withdrawal, provided the necessary procedure to ensure due process.

As VSU counsel and staff explained to Zaccari, circumventing VSU's established procedures would result in a denial of due process. *See* Op. at 15 (detailing Neeley's email to Zaccari explaining that, if the President brings the complaint, there is "no due process" at the campus level and her fax of documents regarding BOR policies to Zaccari); Op. at 17 (quoting Gaskins' statement to Zaccari and others that "a student accused of violating Board Policy 1902 is entitled to due process"). Gaskins explicitly wrote Zaccari a note that "due process dictates that the student be apprised of what particular policy has been violated, an opportunity to be heard and also informed of the appeal process," and explained that "the following [VSU] policies are implicated," including the "Valdosta State Student Code of Conduct." Op. at 18. Zaccari's single-minded focus on removing Barnes as an immediate threat without having to produce "cumbersome" evidence, *see* Op. at 13, resulted in Zaccari's flouting of VSU policies in a way that mirrored his disregard for the due process rights these policies were designed to protect.

C. Obvious Offenses Such as This One Must Lead to the Denial of Qualified Immunity

Denying Zaccari qualified immunity will not impede the performance of discretionary functions by administrators who interpret the law in good

faith. Qualified immunity protects state actors from liability for conduct that an objective person would not realize is unconstitutional. *Harlow v. Fitzgerald*, 457 U.S. 800, 818; 102 S. Ct. 2727 (1982) ("[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). In the instant case, however, Barnes' due process rights were clear to every administrator and official with whom Zaccari consulted, and they were memorialized in both official VSU policies and the Student Handbook.

In order to circumvent the university's proper procedures and expel Barnes, Zaccari unreasonably and unilaterally deemed Barnes a threat, despite a complete lack of evidence that he posed a danger to himself or others. The defense of qualified immunity, which immunizes from suit those who reasonably believe that their actions are constitutional, is entirely unwarranted per the facts of this case. The district court's decision should therefore be affirmed.

CONCLUSION

The instant case presents clear violations of Barnes' rights, rendering the denial of qualified immunity to Zaccari entirely warranted. If this Court

rules that Zaccari is entitled to qualified immunity, a worrying message will be sent to public university administrators nationwide that even the most blatant and willful violations of clearly established constitutional rights will fail to result in personal liability for punitive damages.

Respectfully Submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Eleventh Circuit.

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CERTIFICATE OF COMPLIANCE

1) This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,775 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2) This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman font.

3) This brief was prepared in compliance with 11th Cir. R. 32–4.

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