20-2194-cv

United States Court of Appeals

for the

Second Circuit

NORIANA RADWAN,

Plaintiff-Appellant,

– v. –

UNIVERSITY OF CONNECTICUT BOARD OF TRUSTEES, WARDE MANUEL, LEONARD TSANTIRIS, AND MONA LUCAS, Individually and in their Official Capacities,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF AMICI CURIAE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, THE BRECHNER CENTER FOR FREEDOM OF INFORMATION AND STUDENT PRESS LAW CENTER IN SUPPORT OF PLAINTIFF-APPELLANT NORIANA RADWAN AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF FINANCIAL INTEREST

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* certify that

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INTEREST OF *AMICI CURIAE*[1]

The Brechner Center for Freedom of Information in the College of

SUMMARY OF ARGUMENT

Without notice or an opportunity to be heard, student Noriana Radwan received the most severe penalty available to the administrators of her athletic department—revocation of her scholarship, the practical equivalent of dismissal from the University of Connecticut—for a fleeting expression of joy at a soccer competition that her coach and athletic director deemed embarrassing. With this

language simply because it embarrasses administrators, contrary to decades of First Amendment precedent. Compounding the threat to student rights, they will believe themselves able to mete out such unlawful punishment without affording students even the bare minimum of procedural protections. This Court should reverse.

ARGUMENT

I. DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE LAW IS CLEARLY ESTABLISHED THAT COLLEGE STUDENTS ARE ENTITLED TO THE FULL PROTECTION OF THE FIRST AMENDMENT.

It is well established that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). This principle, recognized in *Tinker* at the K-12 level, applies with even greater force to college students on public university campuses. Undergraduate institutions are laboratories for original thought and innovation. A campus community that fosters the free flow of ideas is paramount to this mission. As such, speech restrictions function only to damage a student's ability to choose for themselves a worldview.

A good deal of existing precedent regarding student speech censorship takes place within K-12 institutions. Even there, *Tinker* counsels that an institution bears the burden of demonstrating a "material" or "substantial" disruption to school functions, not—as in this case—c s2.1 9 (Eg(os)8.4r3 (it)8)3.7 (orc)12.0.004veliur

with the community at large. *See Papish v. Bd. of Curators 4.04 -0 0 4.0c 0.. 0.20.004 Tc 0.002T*

"any reasonable officer would know that a citizen who raises her middle finger engages in speech protected by the First Amendment."). This is true even when the

authorities acting *in loco parentis*, to protect children" from exposure to vulgar language. *Id.* at 684–85.

The *in loco parentis* doctrine has long been recognized as a dead letter in the college setting. *Bradshaw v. Rawlings*, 612 F.2d 135, 139–40 (3d Cir. 1979) (explaining that although *in loco parentis* applied to college students in the past, colleges no longer "control the broad arena of general morals."); *Furek v. Univ. of Del.*, 594 A.2d 506, 516–17 (Del. 1991) (stating "the doctrine of *in loco parentis* has all but disappeared in the face of the realities of modern college life where 'students are now regarded as adults . . .'" (citation omitted)); *Nero v. Kan. State Univ.*, 861 P.2d 768, 778 (Kan. 1993) (holding that "the *in loco parentis* doctrine is outmoded and inconsistent with the reality of contemporary collegiate life."). Because *Fraser* is a case about the *in loco parentis* role of K-12 school authorities, Defendants could not reasonably have relied on it in this decisively different setting.

Healy

Id. Further, *Healy* provides that "state colleges and universities are not enclaves

"educational" purposes, nothing about this later-imposed "financial death penalty" finds any support in any First Amendment caselaw.

Even if K-12 First Amendment jurisprudence did apply at the college level, *Fraser* still would not provide "cover" for what the Defendants did here. *Fraser* is a case about a bombardment of "lewd" speech that is unsuitable for its audience because of its sexually graphic content. *Fraser*, 478 U.S. at 685–86. The student in *Fraser* gave his sexually explicit speech to a mandatory assembly full of classmates. *Id.* Here, Radwan's celebratory gesture was directed toward a professional television camera operator, and perhaps viewable by some sharp-eyed college sports fans. Plainly, one who attends a high school student government forum does not expect to be bombarded with sexual imagery—but it would be a thin-skinned and naïve person who attends a college sporting event expecting not to be exposed to a fleeting profanity (assuming that Radwan's gesture even equates to a profanity).

Even if K-12 speech precedent did apply at a college sporting event, the proper precedent would be the *Tinker* case, which gives no quarter for what Defendants did in this case. While *Fraser* provides the standard for the narrow circumstance of sexually explicit speech inappropriate for an underage audience, *Tinker* is otherwise the "default" standard for all K-12 student speech—and nothing in this case crossed the *Tinker* line of protection. Radwan's gesture created

no substantial disruption. *Tinker*, 393 U.S. at 514. The record contains no evidence that anyone on the field complained about or even saw Radwan's gesture, which lasted less than a second. JA981–982. It was not until weeks later that Radwan's coach and athletic director decided to pursue further punishment. While *Tinker* was about the burden that a public school must satisfy to prevent students from wearing protest attire during the school day, Radwan's "protest" ended after one second. Even a suspension from the team was not necessary to quell a "disruption" that lasted one second, *much less* permanent removal from the athletic program.

admission, Defendants did not take the scholarship away from Radwan for

draws out a condition of unrest or stirs anger. *Id.* A state actor cannot censor otherwise protected speech simply because other people overreacted to said speech. This doctrine applies to a school setting as well. *See Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001) (reasoning that a threat someone might become offended as a result of speech is not a justifiable reason to chill that speech). The Supreme Court discussed this phenomenon in *Papish*, stating that student speech on campus "may not be shut off in the name alone of 'conventions of decency.'" 410 U.S. at 670.

After first learning of Radwan's celebratory gesture, Coach Tsantiris initially required only an apology from Radwan. However, the record shows Tsantiris further punished Radwan after the negative responses he received from other soccer coaches. In fact, Tsantiris and Manuel were embarrassed by Radwan's celebration. JA367, JA384. In other words, Tsantiris and Manuel levied additional punishment on Radwan, weeks after the fact, not because of what she said or did, but because of how onlookers overreacted.

Ultimately, holding that qualified immunity applies in this case risks creating a dangerous precedent by which state university officials could escape responsibility for punishing any sharply voiced opinion. Opinions on political and social issues often are expressed using coarse language for effect. Witness the brigade of "pussy hat" marchers protesting President Trump's 2017 inauguration,

waving signs with such slogans as: "My neck / my back / my pussy will grab back" and "Keep your politics off my pussy."[3] If students on college campuses—even, as in this case, outside of the classroom on non-academic time—are limited to the speech that would be considered proper for K-12 children at a school function, then universities will be free to punish core political speech without redress for the speaker.

Leaving the district court's misguided application of qualified immunity undisturbed could result in a disastrous chilling effect. If a fleeting and unserious profanity is considered grounds to end a student's college career, then there is no discernible stopping point to a college's censorship authority, and students invariably will self-censor in fear of stepping over a decisionmaker's subjective line of propriety.

II. THE UNIVERSITY'S PROHIBITION AGAINST "SERIOUS MISCONDUCT" IS IMPERMISSIBLY VAGUE.

The UConn conduct policy under which Radwan was punished is unenforceable because it is vague and overbroad. Vague speech codes that do not define what speech is punishable are disfavored because they invite state officials

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[3] Alanna Vagianos and Damon Dahlen, *89 Badass Feminist Signs From The Women's March On Washington*, HUFFINGTON POST (Jan. 21, 2017), https://www.huffpost.com/entry/89-badass-feminist-signs-from-the-womens-march-on-washington_n_5883ea28e4b070d8cad310cd.

basis of race" or other minority status. *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 856 (E.D. Mich. 1989). The court found that, while well-motivated, the rule was unenforceable as vague: "Stigmatization" lacked a precise definition, and in the absence of guidance, a reasonable speaker could not discern the line between protected and unprotected conduct. *Id.* at 867. As in these analogous cases, the regulation under which UConn disciplined Radwan is fatally vague.

III. THE DISTRICT COURT ALSO ERRED IN DISMISSING PLAINTIFF'S PROCEDURAL DUE PROCESS CLAIM.

Despite their athletic gifts and the benefits they secure, student-athletes like Radwan are in an untenably vulnerable position. As Radwan's predicament demonstrates, UConn believed itself free to terminate an athletic scholarship at will, effectively expelling a student-athlete without notice or an opportunity to be heard. The unjust treatment of student-athletes has generated significant concern

that public institutions provide student-athletes basic procedural protections prior to the termination of a scholarship. To protect Radwan and her fellow student-athletes, this Court should reverse the district court's grant of summary judgment to Defendants on Radwan's due process claim.

A. Radwan Possessed a Protected Property Interest in Her Scholarship.

"To prevail on a procedural due process claim, a plaintiff must demonstrate (1) that she was deprived of a cognizable interest in life, liberty, or property, (2) without receiving constitutionally sufficient process." *Perez de Leon-Garritt v. State Univ. of N.Y.*, 785 F. App'x 896, 898 (2d Cir. 2019). By revoking Radwan's scholarship in the middle of the academic year by a simple phone call, without providing her notice or a meaningful opportunity to tell her side of the story, Defendants violated Radwan's right to procedural due process.

Radwan possessed a property interest in her athletic scholarship. The University of Connecticut sought to benefit from Radwan's unique athletic ability by granting her a full athletic scholarship, making Radwan one of the just two percent of high school athletes nationwide who receive such an award.[8] In return, UConn paid for Radwan's education and housing. Radwan's soccer skill enabled

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her to attend UConn; like student

"claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined[,]" arising from "rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents v. Roth*

University rules, scholarship standards required by the University, and contribution to student life through participation in Women's Soccer," Radwan's agreement with the University of Connecticut supplied her with a place to live, tuition, and books enabling her progress toward a degree. *Id.* at *4–5. More all-encompassing than a simple employment contract, Radwan's athletic scholarship facilitated both her daily life as a student-athlete and her future prospects as a UConn graduate. Its revocation forced Radwan to leave her team, end her studies, and relocate. *Id.* at *27–32.

The district court held that Radwan was not dependent on her scholarship "for either continued enrollment at UConn or for athletic financial aid at another institution." *Id.* at *68. But this conclusion is not supported by the record, and the district court's narrow framing obscures the degree of Radwan's dependence on her UConn scholarship and the impact of its revocation. Defendants' cancellation of Radwan's athletic scholarship constructively ended her academic and athletic career at the university. Radwan depended on her athletic scholarship for her continued enrollment at UConn; as Radwan advised Defendants, her "family d[id] not have any money to support [her] going anywhere else." *Id.* at *21. Both Radwan and Defendants understood that the cancellation of her athletic scholarship effectively terminated her degree progress at UConn. Indeed, recognizing the consequence of the revocation, Defendants were aware that the loss of her

scholarship "could be devastating" to Radwan. *Id*. at *19. Coach Tsantiris recommended that she not attend UConn for the spring semester but instead take classes at a community college. *Id*. at *22. Had Radwan been able to attend UConn without her scholarship, such a recommendation would be unnecessary.

Radwan's ability to subsequently earn an athletic scholarship at a different institution does not obviate her prior reliance on the property interest at issue in this case—her UConn scholarship—nor does it alleviate the harm of its revocation. *See Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir. 1961) (finding that even if "other colleges are open to" admitting student-plaintiffs wrongfully expelled from state university without due process, "plaintiffs would nonetheless be injured by the interruption of their course of studies in mid-term"). Noting that th(e)12.1 ntrnSTc
"Ms. Radwan received an athletic scholarship from Hofstra Unate uptfbviaeksw (-)Tj-0.0shuAhT

enrolled at another institution. When Defendants terminated her scholarship, Radwan was entirely dependent on her scholarship's provision of "tuition, fees, room, board, and books" at UConn. *Id.* at *4. Radwan's later success in securing a second scholarship is irrelevant to UConn's failure to provide her the process she was due.

The district court's dismissal of Radwan's due process claim contradicts both this Court's understanding of protected property rights and holdings from other courts. *See, e.g.*, *Heike v. Guevara*, 519 F. App'x 911, 923–24 (6th Cir. 2013) (assuming possession of property interest in athletic scholarship); *Fluitt v. Univ. of Neb.*, 489 F. Supp. 1194, 1203 (D. Neb. 1980) (assuming that a student-athlete's property interest in scholarship would attach upon notification of receipt of scholarship). Some courts have declined to recognize a property interest in a student's ability to participate on an athletic team—*i.e.*, a "right to play." *See*, *e.g.*, *Spath v. Nat'l Collegiate Athletic Assoc.*, 728 F.2d 25, 29 (1st Cir. 1984) (finding that student-athlete plaintiff "had no right to play hockey"). But playing time and the funding secured by an athletic scholarship present distinct questions, and courts have recognized that the latter constitutes a protected property interest. For example, in *Hysaw v. Washburn University of Topeka*, 690 F. Supp. 940, 944 (D. Kan. 1987), a d8.3 (c)3.5 (taFt)12.2 (igc12.1 (t)8.6 (tc3.6 (o)8.3 (tr)3.7 (etf)12.2 (u)8.3 (tr)8.3 (

had successfully "established a property right in the scholarship funds." Likewise, some courts have declined to find the deprivation of property interest in the non-renewal of an athletic scholarship. *See, e.g.*, *Austin v. Univ. of Or.*, 205 F. Supp. 3d 1214, 1222 (D. Or. 2016) (declining to find property interest in the expected renewal of "one-year scholarships, from which [student-athlete plaintiffs] benefited the full promised year."). But those cases also present distinctly different facts. UConn did not simply decline to renew Radwan's scholarship after its completion, but instead terminated it mid-year. Its revocation deprived her of an agreed-upon benefit without any procedural protections.

Radwan's scholarship facilitated her enrollment at UConn. As Defendants knew, its revocation meant that she would no longer be able to attend her university. Radwan's reliance on her scholarship to continue her progress toward a degree makes her property interest in it clear. Indeed, "no tenet of constitutional law is more clearly established than the rule that a property interest in continued enrollment in a state school is an important entitlement protected by the Due Process Clause of the Fourteenth Amendment." *Barnes v. Zaccari*, 669 F.3d 1295, 1305 (11th Cir. 2012). Student-athletes do not possess any less of a property interest in their continued enrollment than their non-athlete peers.

(1985) (quoting *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950)). The opportunity "to be heard 'at a meaningful time and in a meaningful manner'" is the "fundamental requirement of due process." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation omitted). Accordingly, the necessity of providing students notice and an opportunity to respond to the charges against them before discipline has been clearly established for decades. *See, e.g.*, *Goss v. Lopez*, 419 U.S. 565, 581 (1975); *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018); *Winnick v. Manning*, 460 F.2d 545, 548 (2d Cir. 1972); *Dixon*, 294 F.2d at 157. While courts must often weigh whether a particular set of procedures satisfied the requirements of due process commensurate with the property interest at stake, *Mathews*, 424 U.S. at 334–35, this case does not demand such balancing because Defendants failed to offer Radwan even the barest procedural protections. "The

Meanwhile, Radwan had continued to be treated like a member of the team in good standing—being asked for her shoe order for the next season, for example, and attending an end-of-season meeting. *Id.* at *18. At no point was Radwan provided meaningful notice that her scholarship was at risk, or that she should prepare her objections to its revocation. Instead, Radwan was blindsided in a phone call. Because Defendants entirely failed to provide Radwan with adequate notice prior to depriving her of a protected property interest, they violated Radwan's right to procedural due process.

2. Radwan was not provided a pre-deprivation hearing.

Radwan did not receive any opportunity to be heard before Defendants

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resulting in exactly the kind of arbitrary decision-making that procedural protections are meant to preclude. *Goss*, 419 U.S. at 583 (observing that providing students with notice and a hearing serves as "a meaningful hedge against erroneous action."). In so doing, Defendants acted contrary to the provisions of the 2013–2014 NCAA Division I Manual incorporated into the agreements between Radwan and UConn. *Radwan*, 2020 U.S. Dist. LEXIS 99453 at *5–*8. The Manual provides for mid-year cancellation of an athletic scholarship if a student-athlete "[e]ngages in serious misconduct warranting substantial disciplinary penalty"—but only if the student-athlete is found responsible for such misconduct "*by the university's regular student disciplinary authority*." 2013–2014 NCAA Division I Manual, NAT'L COLLEGIATE ATHLETIC ASS'N, https://www.ncaapublications.com/productdownloads/D114.pdf (emphasis added). As noted by the district court, Radwan's "serious misconduct" was never referred to the UConn Office of Community Standards, nor could that office's director "recall ever having a disciplinary matter referred to the Office of Community Standards based on someone making an obscene gesture." *Radwan*, 2020 U.S. Dist. LEXIS 99453 at *33.

Simply put, Defendants ignored the terms of the agreements entered into with Radwan to discipline her without notice or a hearing of any kind. While "not every deviation from a university's regulations constitutes a deprivation of due

process," *Winnick*,

CERTIFICATE OF COMPLIANCE

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Dated: November 24, 2020

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