Docket No. 09-56238

In the

United States Court of Appeals

for the

Ninth Circuit

JONATHAN LOPEZ,

Plaintiff-Appellee,

v.

KELLY G. CANDAELE, et al.,

Defendants-Appellants,

and JOHN MATTESON,
in his individual and official capacities as Professor of Speech
at Los Angeles City College,

Defendant.

Appeal from a Decision of the United States District Court for the Central District of California, No. 09-cv-00995 · Honorable George H. King

BRIEF *AMICUS CURIAE* OF THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF APPELLEE

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

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INTEREST OF *AMICUS CURIAE*

The Foundation for Individual Rights in Education, Inc. ("FIRE") is a non-profit, tax-exempt educational and civil liberties organization pursuant to section 501(c)(3) of the Internal Revenue Code interested in promoting and protecting First Amendment rights at our nation's institutions of higher education. FIRE receives hundreds of complaints each year detailing attempts by college administrators to justify punishing student expression through misinterpretations of existing law and the maintenance of unconstitutional speech restrictions. FIRE believes that speech codes—university regulations prohibiting expression that would be constitutionally protected in society at large—dramatically abridge freedom on campus. For our nation's colleges and universities to best prepare students for success in our modern liberal democracy, FIRE believes that the law must remain clearly and vigorously on the side of free speech on campus. For all of the reasons stated below, FIRE respectfully asks that this Court uphold the district court's decision.

SUMMARY OF ARGUMENT

The district court properly concluded that the Los Angeles Community College District's (LACCD's) sexual harassment policy is facially overbroad. If LACCD's policy were permitted to stand, it would pose a grave threat to free speech at Los Angeles Community College, contradict decades of legal precedent invalidating campus speech codes, and exacerbate the free speech crisis on America's college campuses.

LACCD's policy is an unconstitutional campus speech code in violation of the clear standards established by the Supreme Court of the United States and the federal Department of Education regarding what constitutes actionable student-on-student harassment. Like the speech codes consistently overturned by courts since the 1980s, LACCD's policy presents itself as a "harassment" policy, but its language far exceeds the scope of constitutionally unprotected harassment, instead impermissibly prohibiting wide swaths of speech protected by the First Amendment.

In arguing for reversal, appellants ignore long-standing Supreme Court precedent recognizing the essentiality of the First Amendment on our nation's public campuses and misconstrue the fundamental differences between speech protections in the educational and workplace contexts. Further, appellants mistakenly argue that state law trumps the U.S.

Constitution with regard to the policy's prohibition of speech protected by the First Amendment. None of appellants' grounds for appeal has merit, and none alters the unconstitutional reach of the policy at issue.

Far too many colleges and universities across the country are restricting students' free speech rights by maintaining policies that prohibit protected speech. Despite an unbroken string of federal and state court decisions striking down such policies, most universities still maintain impermissibly restrictive speech codes, under which students are frequently punished for protected expression. The district court correctly recognized LACCD's former policy as one such code, and LACCD's appeal must fail.

ARGUMENT

I. LACCD's Policy Prohibits Constitutionally Protected Expression

As a government actor, the Los Angeles Community College District (LACCD) may not punish student speech protected by the First Amendment. Yet, in violation of its binding obligation to respect the constitutional rights of its students, LACCD maintains a sexual harassment policy that prohibits vast swaths of protected student speech and restricts expression far beyond actionable student-on-student sexual harassment as identified by the Supreme Court and the United States Department of Education. In striking down LACCD's policy as facially overbroad, the district court correctly held that the policy violated LACCD students' First Amendment rights. *Lopez v. Candaele*, No. CV 09-0995-GHK (C.D. Cal. Sept. 16, 2009).

A. The Supreme Court and the Department of Education Have Announced a Clear Standard Regarding Student-on-Student Harassment

The Supreme Court's decision in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), sets forth the applicable standard for establishing student-on-student sexual harassment in the educational context. The Court held in *Davis* that "[a] plaintiff must establish sexual harassment of students that is *so severe, pervasive, and objectively offensive* and that so undermines and detracts from the victims' educational experience, *that the*

victim-students are effectively denied equal access to an institution's resources and opportunities." *Davis* at 651 (emphasis added).

Similarly, the Department of Education's Office for Civil Rights (OCR)—the agency responsible for the enforcement of federal anti-harassment laws on campus—has directly addressed the extensive abuse of harassment regulations by college administrators to ban clearly protected speech on campus.[1] In 2003, the OCR issued a letter of clarification to all colleges that accept federal funding to inform administrators "in the clearest

[1] FIRE's research demonstrates that public colleges across the country consistently employ overbroad harassment policies to prohibit and punish protected speech. *See* section III.B, *infra*. For example, the University of Iowa provides that sexual harassment "occurs when somebody says or does something sexually related that you don't want them to say or do, regardless of who it is." Sexual Harassment – The University of Iowa, http://sexualharassment.uiowa.edu (last visited Jan. 12, 2010). Northern Illinois University defines harassment as the "intentional and wrongful use of words, gestures and actions to annoy, alarm, abuse, embarrass, coerce, intimidate or threaten another person." Northern Illinois University – The Student Code of Conduct, http://www.niu.edu/judicial/Code_of_Conduct.pdf (last visited Jan. 12, 2010). At the University of California, Santa Cruz, "examples of sexual harassment and discrimination" include "[t]erms of endearment," "[s]exual jokes, comments, or innuendoes," and "[s]ex based cartoons or visuals that ridicule or denigrate a person." UCSC No Harassment brochure, http://www2.ucsc.edu/title9-sh/brochures/english.pdf (last visited Jan. 12, 2010). As discussed in section III.A, *infra*, the pervasiveness of overbroad harassment policies at public institutions of higher education across the country—despite guidance from the Supreme Court and the Department of Education, as well as the consistent, unanimous invalidation of such policies in federal courts over the past twenty years—suggests a willful disregard for students' First Amendment rights. LACCD's continued defense of its flawed policy is similarly galling.

possible terms that OCR's regulations are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution."[2] The letter further made clear that "the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR." OCR has defined hostile environment sexual harassment as behavior that is "*sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment*."[3] Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,038 (Mar. 13, 1997) (emphasis added).

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[2] First Amendment: Dear Colleague, *available at* http://www.ed.gov/about/offices/list/ocr/firstamend.html (last visited Jan. 10, 2010).

[3] In addition to meeting the *Davis* standard, peer-on-peer sexual harassment requires satisfaction of the other elements required of a Title IX gender discrimination claim. Conduct constituting actionable sexual harassment in the educational context must be unwelcome; discriminatory; on the basis of gender; directed at an individual; and "so severe, pervasive, and objectively offensive, and . . . so undermine[] and detract[] from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. at 12,039.

B. LACCD'S Policy Disregards This Standard and Is Void for Overbreadth

LACCD's sexual harassment policy entirely disregards the controlling legal standard for peer-on-peer harassment announced by the Supreme Court in *Davis* and enunciated by the Department of Education's Office for Civil Rights in 2003. The District's policy defines sexual harassment as:

> Unwelcome sexual advances, requests for sexual favors, and other verbal, visual or physical conduct of a sexual nature, made by someone from or in the workplace or in the educational setting, under any of the following conditions: ... (3) The conduct has the purpose or effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile or offensive work or educational environment.

Lopez v. Candaele, No. CV 09-0995-GHK (C.D. Cal. Sept. 16, 2009) (internal citation omitted). The policy further provides that sexual harassment may include "'[d]isparaging sexual remarks about your gender, [r]epeated sexist jokes, dirty jokes or sexual slurs about your clothing, body, or sexual activities, and [d]isplay of sexually suggestive objects, pictures, cartoons, posters, screen savers[.]'" *Id.* (internal citation omitted). The policy additionally defines "Sexual Harassment based on your gender" as:

> generalized sexist statements, actions and behavior that convey insulting, intrusive or degrading attitudes/comments about women or men. Examples include insulting remarks; intrusive comments about physical appearance; offensive written material such as

> graffiti, calendars, cartoons, emails; obscene gestures or sounds; sexual slurs, obscene jokes, humor about sex.

Id. (internal citation omitted).

"The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002). Because it explicitly prohibits a large amount of protected speech, LACCD's policy more than satisfies this definition of overbreadth.

First, LACCD's policy contains no threshold requirement of severity or pervasiveness, as required by *Davis*. Without this crucial component, LACCD's policy goes far beyond true harassment to restrict speech that is merely "insulting," "degrading," "offensive," or "unwelcome"—the vast majority of which is protected by the First Amendment. As the Supreme Court has held, "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973) (internal citation omitted).

Similarly, LACCD's policy prohibits speech that has the "purpose or effect" of negatively impacting educational performance. However, speech that merely has the *purpose* of harassing the listener—but does not in fact have that *effect*—cannot be true harassment. To constitute actionable

harassment, the victim must actually feel harassed; *Davis* requires that the conduct "effectively denie[s]" the victim "equal access to an institution's resources and opportunities" to constitute harassment, not that it was simply intended to do so. *Davis* at 651.

LACCD's policy also includes, as examples of sexual harassment, expression that is in fact protected. The policy bans "[d]isparaging sexual remarks" about another's gender and "generalized sexist statements" that "convey insulting, intrusive or degrading attitudes/comments about women or men." However, much expression which falls under LACCD's purported examples of sexual harassment conveys common—and, again, entirely constitutionally protected—social and political viewpoints. For example, under LACCD's policy, a student may be punished for expressing his or her views on women in the military, the ability of men to serve as adequate caregivers, the proclivity of men towards violence, and many other social or political issues of the day. That LACCD's policy presumes to ban students from conveying certain "attitudes" is particularly disturbing and is illustrative of the policy's unconstitutional overreach.

Finally, LACCD's policy omits *Davis*'s requirement that the behavior in question be not only severe and pervasive, but "objectively offensive." *Davis* at 651. Per *Davis*, only conduct that is both subjectively and

objectively harassing may legitimately be prohibited without infringing on the right to free speech. By failing to incorporate this "reasonable person" standard, LACCD's policy grants the most sensitive students a *de facto* veto power over speech with which they disagree, despite the fact that it may enjoy First Amendment protection. As the *Davis* Court stated, "simple acts of teasing and name-calling" and other protected verbal expression do not constitute actionable harassment. *Davis* at 652. Indeed, the Supreme Court has stated that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). *See also Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (declaring that freedom of expression "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.").

By regulating speech on the basis of its content, no matter how "disparaging" or "sexist," LACCD proposes to appoint itself (or complaining students) the judge of what speech shall be allowed on campus. Such a result cannot be squared with the Supreme Court's pronouncement, issued "time and again," that "[r]egulations which permit the government to

discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 135 (1992) (citations omitted).

The district court properly found LACCD's policy overbroad, observing that "[e]ven if speech has a negative effect on or is otherwise offensive to the listener, that in and of itself is insufficient to justify its prohibition" because the First Amendment "affords protection to 'verbal tumult, discord, and even offensive utterance.'" No. CV 09-0995-GHK (C.D. Cal. Sept. 16, 2009), quoting *Cohen v. California*, 403 U.S. 15, 25 (1971). This Court should affirm the lower court's analysis and declare the former LACCD policy facially overbroad.

II. LACCD's Arguments for Reversal Are Without Merit

A. LACCD's Argument Ignores the Crucial Importance of the First Amendment at Public Colleges and Universities

That the First Amendment's protections are especially significant at public colleges is settled law. *See, e.g., Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 836 (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 (1972) ("the vigilant

protection of constitutional freedoms is nowhere more vital than in the community of American schools"); *Keyishian v. Board of Regents*, 385 U.S. 589, 605–06 (1967) ("[W]e have recognized that the university is a traditional sphere of free expression … fundamental to the functioning of our society."). Allowing a public institution to abandon important First Amendment principles in contravention of these long-standing precedents, as appellants' argument would have this Court do, would severely impair an essential function of the university.

Appellants' assertion that "[t]he bulk of a university campus is not a 'public forum,'" *see* App. Br. at 43, glibly mischaracterizes the law. It is telling that appellants never raised this argument before the district court in either their opposition to the preliminary injunction or their motion for reconsideration. As the district court remarked when appellants raised new arguments in their motion for reconsideration, "Defendants do not get a mulligan simply because they chose to retain new counsel." No. CV 09-0995-GHK (C.D. Cal. Sept. 16, 2009). They should not receive a mulligan because they wish to try a new argument before this Court.

Even if properly raised, appellants' argument is a baseless attempt to circumvent the Constitution. As the Supreme Court has held, "the campus of a public university, at least for its students, possesses many of the

characteristics of a public forum." *Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981). Although, as appellants note, *Widmar* later noted that "[a] university differs in significant respects from public forums such as streets or parks," this limitation concerned a university's ability to restrict campus access to *non-students*. *Id.* (holding that "[w]ith respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."). *Widmar* in no way limited the speech rights of students. *See also Hays County Guardian v. Supple*, 969 F.2d 111, 116 (5th Cir. 1992) ("The undisputed facts show that the outdoor grounds of the campus such as the sidewalks and plazas are designated public fora for the speech of university students."). For this reason, courts across the country consistently overturn university speech codes at public universities. *See* section III.A, *infra*.

Finally, LACCD's response to Lopez's speech—as well as its speech policy generally—targeted specific viewpoints and is therefore not permitted even in a limited public forum. *See Cogswell v. City of Seattle*, 347 F.3d 809, 814 (9th Cir. 2003) (holding that restrictions in a limited public forum must be reasonable and "not discriminate according to the viewpoint of the speaker"). This Court should not countenance appellants' attempts to ignore precedent and recast the university's function.

B. The District Court Properly Relied on the Third Circuit's Decision in *DeJohn v. Temple University*

In finding the District's former policy overbroad, the district court followed the Third Circuit's analysis in *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008). Contrary to appellants' argument, the lower court's reliance on *DeJohn*, a recent circuit court decision striking down a sexual harassment policy on First Amendment grounds, was proper. The court correctly declared that *DeJohn* was "well reasoned" and that "[d]efendants' scattershot and disjointed arguments do not defeat the reasoning of *DeJohn*." No. CV 09-0995-GHK (C.D. Cal. Sept. 16, 2009).

DeJohn involved a facial challenge to a Temple University sexual harassment policy remarkably similar to LACCD's policy. Temple's policy defined sexual harassment as "expressive, visual, or physical conduct of a sexual or gender-motivated nature" when such conduct has the "purpose or effect of unreasonably interfering with an individual's work, educational performance, or status; or … of creating an intimidating, hostile, or offensive environment." *DeJohn*, 537 F.3d 301, 305.

In finding the policy unconstitutional, the Third Circuit first noted that the policy's focus on the "purpose or effect" of verbal conduct meant that a student who intended to interfere with another student's educational performance or to create a hostile environment would be subject to

punishment whether or not his or her actions had their intended effect. *Id.* at 317. The Third Circuit found that this result ran counter to the Supreme Court's requirement that "a school must show that speech will cause actual, material disruption before prohibiting it." *Id.* (citing *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 509 (1969)).[4]

In addition, *DeJohn* reasoned that the policy's incorporation of vague terms such as "hostile," "offensive," and "gender-motivated" rendered the

[4] Though the Third Circuit cited *Tinker* for this proposition, its reliance on *Tinker*, a high school case, should not be read as endorsing a conflation of the legal standards governing regulation of student speech in secondary schools with the more robust standards governing student speech rights in the college and university setting. *See, e.g.*, *Healy*, 408 U.S. at 180 ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas…'"). As the Third Circuit explicitly recognized in *DeJohn*:

> [T]here is a difference between the extent that a school may regulate student speech in a public university setting as opposed to that of a public elementary or high school.... Discussion by adult students in a college classroom should not be restricted. Certain speech, however, which *cannot be* prohibited to adults *may* be prohibited to public elementary and high school students.

DeJohn, 537 F.3d at 315 (emphasis in original). Rather, the Third Circuit's citation of *Tinker*, a speech-protective case, should properly be read as establishing a floor for university students' First Amendment rights. University students possess at minimum the expressive rights protected by *Tinker*, and greater rights due to their status as adult students at a public university, where the "'special needs of school discipline'" that characterize the high school setting are inapplicable. *Id.* at 315–16 (internal citation omitted).

policy "on its face, sufficiently broad and subjective that [it] 'could conceivably be applied to cover any speech' of a 'gender-motivated' nature 'the content of which offends someone.'" *Id.* (internal citation omitted). As the Third Circuit recognized, this included "'core' political and religious speech, such as gender politics and sexual morality," meaning that the policy "provide[d] no shelter for core protected speech." *Id.* at 317–18 (internal citation omitted). Due to these flaws, the Third Circuit found the policy overbroad.

In the instant matter, the district court correctly cited *DeJohn* for the proposition that other circuits have found sexual harassment policies restricting speech based on the speaker's motives to be unconstitutional. No. CV 09-0995-GHK (C.D. Cal. Jul. 10, 2009). The district court also reasoned that like Temple's policy, LACCD's policy is "so subjective and broad that it applies to protected speech" that it "must be invalidated unless it contains 'a requirement that the conduct objectively and subjectively creates a hostile environment or substantially interferes with an individual's work.'" *Id.*, citing *DeJohn*, 537 F.3d at 318. Lacking such a requirement, LACCD's policy was properly found invalid. The court stated that the policy's focus on the "purpose or effect" of conduct, as well as its use of subjective standards, created the same "concerns expressed by the *DeJohn* court that core

protected speech is suppressed even if that speech does not collide with the rights of others." *Id.*

The district court rejected appellants' efforts to distinguish *DeJohn* from the present case. As the court emphasized, "[d]efendants are unable to cite any case where a similar policy survived a constitutional challenge in a college setting so that it might arguably be said to conflict with *DeJohn*." No. CV 09-0995-GHK (C.D. Cal. Sept. 16, 2009).[5] The lower court's reliance on *DeJohn*—a well-reasoned, recent circuit court decision with many similarities to this case—was proper.

C. There Are Profound Differences in the Nature and Purpose of the Educational and Workplace Settings

Appellants attempt to validate their sexual harassment policy by pointing to the Equal Employment Opportunity Commission (EEOC) regulations defining "sexual harassment" as proscribed under Title VII of the Civil Rights Act of 1964. *See* App. Br. at 29. Although appellants correctly note that this language is "not controlling on the courts," they fail to appreciate the distinction between sexual harassment in the workplace and in the educational setting. *Id.* at 30. The district court correctly held that simply

[5] The court added, "[t]o the contrary, the Third Circuit has rejected a substantially similar policy even in an elementary and high school setting." No. CV 09-0995-GHK (C.D. Cal. Sept. 16, 2009), citing *Saxe v. State College Area School District*, 240 F.3d 200, 216–17 (3d Cir. 2001).

because regulations "might be permissible in the employment context does not necessarily dictate a like result in the college setting." No. CV 09-0995-GHK (C.D. Cal. Sept. 16, 2009) at 2.

As the district court recognized, the workplace is materially different from a college campus, where free expression is paramount. The purpose of Title VII is to afford "employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). However, the collegiate environment must tolerate merely uncivil speech in order to safeguard protected speech and serve its recognized function as "peculiarly the marketplace of ideas." *Healy* at 180 (internal quotations omitted); *see also* section II.A.

A wealth of scholarship further supports the dichotomy between actionable sexual harassment under Title VII and unconstitutional speech codes that import Title VII standards.[6] One scholar has noted that

[6] *See, e.g.*, Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 J.C. & U.L. 385, 446 (2009) ("[S]ome institutions have adopted harassment policies tracking Title VII hostile environment standards, despite the fact that these policies encompass constitutionally protected speech and fail to provide adequate breathing room for student speech on campus."); Robert W. Gall, *The University as an Industrial Plant: How a Workplace Theory of Discriminatory Harassment Creates a "Hostile Environment" for Free Speech in America's Universities*, 60 LAW & CONTEMP. PROBS. 203 (Autumn

"restrictions upon workplace speech ultimately do not take away from the workplace's essential functions … [because] [e]mployers for the most part are focused on meeting their bottom lines, and free expression in the workplace is typically not necessary for that purpose."[7] This stands in stark contrast to the university setting, where fostering discussions and expanding knowledge are fundamental concerns.[8]

The cases cited in appellants' brief illustrating judicial approval of the EEOC's regulations defining sexual harassment involve the employment context, *see* App. Br. at 30, where hierarchies of power complicate free speech doctrine and can convert verbal expression into discriminatory

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1997) ("If Title VII's prohibition of hostile environment harassment is troublesome on First Amendment grounds in the workplace, the incorporation of such a prohibition into a speech code is much more disturbing in the university, a place that supposedly values academic freedom and the unfettered exchange of ideas."); Paul C. Sweeney, *Abuse, Misuse & Abrogation of the Use of Legislative History: Title IX & Peer Sexual Harassment*, 66 UMKC L. REV. 41, 89 (1997) ("The student, unlike any actor in the employment setting, faces problems which are unique to the educational setting…. The purpose of illustrating the differences between the two environments is to make it clear that the two settings must be treated differently.").

[7] Majeed, supra note 6, at 449; *See also* Nadine Strossen, *The Tensions Between Regulating Workplace Harassment and the First Amendment: No Trump*, 71 CHI.-KENT L. REV. 701, 706–07 (1995) ("Far from being the quintessential 'marketplace of ideas' in which speech and counter-speech are freely bandied about, many workplaces are highly regulated environments in which non-work-related speech is at best discouraged, and at worst, banned or restricted.").

[8] *See* Gall, supra note 6, at 211.

conduct.[9] The only case cited by appellants in the college setting concerned a professor's speech toward his student, *see* App. Br. at 31 (citing *Hayut v. State University of New York*, 352 F.3d 733 (2d Cir. 2003)). *Hayut* is therefore more akin to Title VII cases and cannot justify a speech policy controlling student speech. *See Hayut*, 352 F.3d at 744 ("A professor at a state university is vested with a great deal of authority over his students with respect to grades and academic advancement by virtue of that position."). Importantly, as the district court noted, none of the cases cited by appellants involved a First Amendment challenge. No. CV 09-0995-GHK (C.D. Cal. Sept. 16, 2009) at 2. The district court therefore correctly found these cases inapposite and held that workplace sexual harassment standards are inapplicable in the collegiate setting.

D. The District Court Properly Recognized that State Law Does Not Cure the District's Former Sexual Harassment Policy's Constitutional Defects

The district court properly rejected appellants' argument that the policy was free of constitutional flaws because it quoted language from California state law. Specifically, appellants argued the policy followed the

[9] Majeed, supra note 6, at 450 ("[A] target of harassment in the workplace, unlike individuals on a college or university campus, typically cannot resort to the weapon of counter speech to combat allegedly harassing behavior. To do so would be to potentially jeopardize one's job status and earning capacity, which most individuals are highly reluctant to do.").

California Education Code's definition of sexual harassment, which prohibits conduct having "the purpose or effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile, or offensive work or educational environment." Cal. Ed. Code § 212.5(c). In response, the lower court pronounced, "Defendants cite no authority for the dubious proposition that an otherwise unconstitutional policy at a public college becomes constitutional merely because similar language appears in other statutes and regulations." No. CV 09-0995-GHK (C.D. Cal. Sept. 16, 2009).

The rights enshrined in our nation's Constitution, including the guarantees of the First Amendment, are the highest law of the land, and they cannot be superseded by state statute or regulation. *See, e.g., Marbury v. Madison*, 5 U.S. (Cranch) 137, 180 (1803) (holding that "a law repugnant to the constitution is void,"); *Miranda v. Arizona*, 384 U.S. 436, 491 (1966) ("Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.").

Illustrating the necessary conclusion that reliance on state law does not cure constitutional defects in university harassment policies, a federal district court rejected a similar argument in another case arising from a First Amendment challenge to a university harassment policy. *UWM Post, Inc. v.*

Board of Regents of University of Wisconsin, 774 F. Supp. 1163 (E.D. Wisc. 1991). The university in *UWM Post* defended the challenged harassment policy on the grounds that it merely prohibited "discriminatory speech which creates a hostile environment" as required by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. *UWM Post*, 774 F. Supp. 1163, 1177. Rejecting this justification, the district court declared, "Since Title VII is only a statute, it cannot supersede the requirements of the First Amendment." No. CV 09-0995-GHK (C.D. Cal. Sept. 16, 2009). This proposition holds true in the instant case, and the District's argument must fail.[10]

III. Unconstitutional Speech Codes like LACCD's Are Part of a Nationwide Problem on Campus

Speech codes—university regulations prohibiting expression that would be constitutionally protected in society at large—are a pernicious and stubborn threat to freedom of expression on public campuses. Despite two decades of precedential decisions uniformly striking down speech codes on First Amendment grounds, FIRE's work demonstrates that these unconstitutional restrictions persist at the majority of our nation's public

[10] In addition, the District's reliance on the California Education Code is misplaced because that provision conflates hostile environment harassment standards for the employment and educational settings. As discussed *infra*, section II.C, harassment standards for the workplace are inapposite in the university setting.

colleges and thus continue to deny students the expressive rights to which they are entitled.

A. For Over Two Decades, Courts Have Consistently and Unanimously Struck Down Unconstitutional Speech Codes Masquerading as Harassment or Civility Policies

Over the past two decades, courts have uniformly invalidated speech codes facing a constitutional challenge on the grounds of overbreadth, vagueness, or both. *See DeJohn*, 537 F.3d 301 (3d Cir. 2008) (declaring university sexual harassment policy overbroad); *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995) (declaring university discriminatory harassment policy facially unconstitutional); *College Republicans at San Francisco State University 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 University*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of university harassment policy due to overbreadth); *Booher v. Board of Regents*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. Jul. 21, 1998) (finding university sexual harassment policy void for vagueness and overbreadth); *UWM Post, Inc. v. Board of Regents of the University of Wisconsin System*, 774 F. Supp. 1163 (E.D. Wis. 1991) (declaring university

racial and discriminatory harassment policy facially unconstitutional); *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989) (enjoining enforcement of university discriminatory harassment policy due to unconstitutionality); *Corry v. Leland Stanford Junior University*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip op.) (declaring university discriminatory harassment policy facially overbroad). Taken together, these decisions make clear that speech codes infringing upon students' First Amendment rights are legally untenable on public university campuses. *See* Azhar Majeed, *Defying the Constitution: The Rise, Persistence, and Prevalence of Campus Speech Codes*, 7 GEO. J.L. & PUB. POL'Y 481 (2009). That every speech code to be litigated to a final decision has ultimately been struck down—and that not a single speech code has been upheld by a court—speaks to the well-established judicial consensus regarding the primacy of robust, unfettered expression on public campuses.

Every speech code decision to date has involved a constitutional challenge to a university harassment or civility policy. In *DeJohn*, for example, the Third Circuit, faced with an overbroad sexual harassment policy, declared that "there is no 'harassment exception' to the First Amendment's Free Speech Clause." *DeJohn*, 537 F.3d at 316. The court emphasized that "'[w]hen laws against harassment attempt to regulate oral

or written expression on such topics, however detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications.'" *Id.* (internal citations omitted).

In another illustrative case, *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995), the Sixth Circuit struck down a university harassment policy banning conduct "that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment by…demeaning or slurring individuals…or…using symbols, [epithets] or slogans…." *Dambrot,* 55 F.3d at 1182 (internal citation omitted). The Sixth Circuit noted at the onset that "[t]he language of this policy is sweeping and seemingly drafted to include as much and as many types of conduct as possible." *Id.* The court found it "clear from the text of the policy that language or writing, intentional or unintentional, regardless of political value, can be prohibited upon the initiative of the university," creating a fundamental problem of overbreadth. *Id.* at 1183. In addition, the court found that the policy "[did] not provide fair notice of what speech will violate the policy. Defining what is offensive is, in fact, wholly delegated to university officials." *Id.* at 1184. This rendered the policy unconstitutionally vague.

B. FIRE's Work Demonstrates the Pervasiveness of Unconstitutional Restrictions on Student Speech

FIRE's most recent annual speech code report, *Spotlight on Speech Codes 2010: The State of Free Speech on Our Nation's Campuses*,[11] found that a shocking 71 percent of public colleges and universities reviewed maintain policies restricting protected expression. The report reviewed speech-related policies at 273 of the largest and most prestigious public institutions across the country in order to provide an accurate assessment of the state of free speech on public college campuses. Its findings demonstrate that the vast majority of universities have not heeded the lessons of the case law on speech codes. Rather, public universities have chosen to continue to deprive their students of the expressive rights to which they are entitled.

Just a handful of the speech codes maintained by colleges and universities illustrate the problems they typically present. San Jose State University prohibits "[a]ny form of activity, whether covert or overt, that creates a significantly uncomfortable…environment" in its residence halls,

[11] Foundation for Individual Rights in Education, *Spotlight on Speech Codes 2010: The State of Free Speech on Our Nation's Campuses*, available at http://www.thefire.org/public/pdfs/9aed4643c95e93299724a350234a29d6.pdf (last visited Jan. 12, 2010).

including making "verbal remarks" and "publicly telling offensive jokes."[12] The State University of New York at Brockport bans all uses of e-mail that "inconvenience others," including "offensive language or graphics (whether or not the receiver objects, since others may come in contact with it)."[13] Keene State College in New Hampshire prohibits any "language that is sexist and promotes negative stereotypes and demeans members of our community."[14]

By maintaining speech codes, universities misinform students of their speech rights and place them in fear of unconstitutional punishment. As a result, speech codes chill campus dialogue and expression by their very existence. The chilling effect is detrimental to the ability of a university to foster the free exchange of ideas and serve as a true marketplace of ideas. Moreover, speech codes are routinely enforced against constitutionally protected expression, violating students' fundamental speech rights and creating a significant harm on campus. The result is that a culture of

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[12] "Harassment and/or Assault," *Housing License Agreement Booklet*, available at http://www.thefire.org/spotlight/codes/203.html (last visited Jan. 12, 2010).

[13] "Computing Policies and Regulations: Internet/E-mail Rules and Regulations," *Code of Student Social Conduct*, available at http://www.thefire.org/spotlight/codes/1123.html (last visited Jan. 12, 2010).

[14] "Statement on Sexist Language," *Keene State College Student Handbook*, available at http://www.thefire.org/spotlight/codes/981.html (last visited Jan. 12, 2010).

censorship and fear has taken shape at too many universities across the country.

C. The Will to Censor Exists on Campus

FIRE has received thousands of case submissions alleging censorship on campus in our decade of existence. Of these submissions, we have documented hundreds of examples of brazen violations of freedom of speech. Cases chosen by FIRE include only those in which the students or faculty members affected were willing to defend their rights and the documentation was clear enough that FIRE believed the alleged violation had occurred and could be addressed. However, given the abuse of privacy laws that allow universities to hide their disciplinary processes from public view, as well as the dearth of students and faculty who both know their rights and have the courage to stand up for them, it is safe to assume that the thousands of case submissions FIRE has received over the years represent only a small proportion of the actual number of abuses.

FIRE's extensive case archives illustrate the propensity for attacks on freedom of expression on our nation's campuses.[15] Instances of such attacks

[15] Moreover, FIRE's record of achieving victories in these cases speaks to our ability to accurately gauge and assess campus abuses. Since FIRE's inception in 1999, FIRE has won 160 public victories for students and faculty members at 121 colleges and universities with a total enrollment of more than 2.6 million students. FIRE has been directly responsible for

are legion. Recently, for example, a student at Georgia's Valdosta State University was deemed a "clear and present danger" for publishing a collage on the social networking website Facebook.com that mocked his university's president for referring to a proposed parking garage as his "legacy." For this "offense," the university expelled the student and required him to undergo psychological counseling. A federal civil rights lawsuit is now proceeding. *Barnes v. Zaccari, et al.*, No. 1:2008cv00077 (N.D. Ga. filed January 9, 2008).

In another case, San Francisco State University's College Republicans held an anti-terrorism rally at which they stepped on homemade replicas of Hamas and Hezbollah flags. Offended students filed charges of "attempts to incite violence and create a hostile environment" and "actions of incivility," prompting an SFSU "investigation" that lasted five months. In response, the College Republicans brought a constitutional challenge to SFSU's policies in federal district court. The court, siding with the College Republicans, ordered a preliminary injunction barring SFSU and other schools in the California State University system from enforcing several challenged policies, including a requirement that students "be civil to one another." The ruling also limited the California State University system's ability to enforce

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changing 81 unconstitutional or repressive policies affecting nearly 1.7 million students.

a policy prohibiting "intimidation" and "harassment." *College Republicans v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007).

During the past two years, Tarrant County College (TCC) in Texas has repeatedly prohibited members of Students for Concealed Carry on Campus (SCCC) from participating in a nationwide "empty holster" protest on TCC's campus. The empty holsters are intended to signify opposition to state laws and school policies denying concealed handgun license holders the right to carry concealed handguns on college campuses. TCC forbade the protesters from wearing empty holsters anywhere on campus, even in the school's designated "free speech zone"—an elevated, circular concrete platform about 12 feet across. TCC informed students it would take adverse action if SCCC members wore empty holsters anywhere, strayed beyond the school's "free speech zone" during their holster-less protest, or even wore T-shirts advocating "violence" or displaying "offensive" material. Recently, after being told that this prohibition would continue, two TCC students filed suit in the United States District Court for the Northern District of Texas, Fort Worth Division, asking the court to ensure that they be allowed to fully participate in upcoming protests and including a request for a temporary restraining order prohibiting the school from quarantining expression to its "free speech zone." The court granted the students' motion and issued a

temporary restraining order against TCC. *Smith v. Tarrant County College District*, Civil Action No. 4:09-CV-658-Y (N.D. Texas, Fort Worth Division, November 6, 2009).

These are just three of hundreds of examples of college administrators attempting to silence protected student speech. FIRE's experience demonstrates that universities will seize upon any ambiguity in the law as a means or justification to censor unwanted speech 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 (2006) (holding that public colleges may regulate the content of student newspapers in a manner akin to high schools), the general counsel for the California State University (CSU) system penned a memorandum to CSU college presidents in favor of campus censorship, based on the *Hosty* decision. She stated that the decision "appears to signal that CSU campuses may have more latitude than previously believed to censor the content of subsidized student newspapers." 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. 12, 2010). *Hosty*, in fact, held that the decision to censor the student newspaper may have been unconstitutional, but the law was not

"clearly established" in this area. 412 F.3d at 738–39. Nevertheless, CSU's inclination to read ambiguities in the law in favor of censorship is sadly common on college campuses.

D. Reversing the District Court's Decision Would Erode First Amendment Protections on Campuses Across the Country

If the lower court's opinion is reversed, university administrators will be encouraged to silence merely unwelcome student speech by maintaining unconstitutional speech codes, despite the fact that the vast majority of such speech is entirely protected by the First Amendment. The Supreme Court has warned that "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation... 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." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). If this Court overturns the district court's decision, the resulting opinion will act as this "strait jacket," resulting in a creeping uncertainty about the status of protected speech on campus. Students will surely self-censor rather than risk punishment for running afoul of unconstitutional speech codes like the one defended in the present appeal by LACCD. Such a chill is nothing less than an existential threat to open debate and discussion at our nation's colleges, and, therefore, to the marketplace of ideas itself.

CONCLUSION

The district court correctly concluded that LACCD's sexual harassment policy was unconstitutionally overbroad. For all the reasons above, the district court's decision should be upheld.

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CERTIFICATE OF BAR MEMBERSHIP

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1) This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,990 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: *s/ Elizabeth Hong*