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 nonprofit, tax-exempt educational and civil liberties organization pursuant to section 501(c)(3) of the Internal Revenue Code dedicated to promoting and protecting First Amendment rights at our nation's institutions of higher education. 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 grant Plaintiff-Appellee Jonathan Lopez rehearing or rehearing *en banc*.

SUMMARY OF ARGUMENT

In ruling that student Jonathan Lopez does not possess standing to challenge the Los Angeles Community College District's ("LACCD's") sexual harassment policy, properly found unconstitutional by the district court, the Ninth Circuit panel discounted Lopez's credible fear of punishment for engaging in protected speech and disregarded the purpose of relaxed standing requirements for First Amendment plaintiffs. While characterizing the case as "disturbing," the panel nevertheless ignored the fact that Lopez was warned that his speech might violate LACCD policy, and that other students reported him as having done so.

Lopez's treatment, and subsequent fear of future punishment, reflects the prevalent threat to free expression on campus today. Despite two decades of decisions striking down unconstitutional speech codes, FIRE's research demonstrates that a majority of universities still maintain policies that prohibit protected speech and frequently invoke them to justify punishment for protected expression. Colleges often enforce their policies using precisely the type of "strained" reading that the Ninth Circuit believed was required to apply LACCD's harassment policy towards Lopez's speech. If allowed to stand, the panel's holding will improperly insulate these

unconstitutional speech restrictions from facial challenge by erecting unreasonably high barriers to student suits.

This result will produce a chilling effect on campus, as students left without access to the courts will choose to self-censor. This result is particularly harmful on a college campus, a traditional locus for free expression that the Supreme Court has long identified as crucially important to our democracy. Additionally, students already face significant obstacles to bringing suit.

Other circuits, following the Supreme Court's dictates, have permitted students to challenge university speech policies with far less of a showing of credible fear of enforcement than Lopez has made. Because the panel's holding leaves students unable to fully exercise or defend their First Amendment rights, rehearing or rehearing *en banc* is necessary.

ARGUMENT

I. CENSORSHIP ON CAMPUS IS A WIDESPREAD PROBLEM

As a government actor, the Los Angeles Community College District (LACCD) may not restrict speech protected by the First Amendment. Yet LACCD maintains a sexual harassment policy that prohibits vast swaths of protected speech, far beyond actionable student-on-student sexual harassment as identified by the Supreme Court.[1] *See Lopez v. Candaele*, No. CV 09-0995-GHK (C.D. Cal. Sept. 16, 2009).

However, LACCD's unconstitutional policy is only one instance of the larger problem of censorship on campuses nationwide. Despite decades of precedent overturning speech codes—university regulations prohibiting constitutionally protected expression—universities continue both to maintain and employ speech codes to punish students for protected expression. If students subject to these policies do not enjoy standing to challenge them, speech codes will continue to stifle debate on campuses, where it should be

[1] 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*, 526 U.S. at 651.

most robust. While some students are punished under speech codes, countless more do not speak their minds for fear of running afoul of overbroad policies like the one at issue.[2]

A. Unconstitutional Speech Codes are Prevalent on Campus, in this Circuit and Across the Nation

Each year, FIRE catalogs thousands of speech-related policies at universities across the country.[3] During the 2009–2010 academic year, FIRE reviewed policies at 286 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 campus. FIRE's research revealed that more than two-thirds of those institutions maintain policies explicitly prohibiting protected speech.[4]

Numerous examples of unconstitutional speech codes may be found at public universities throughout the Ninth Circuit's jurisdiction. While actual

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[2] A recent study found that just 30.3% of college seniors "strongly agreed that it is safe to hold unpopular viewpoints on campus." *See* ERIC L. DEY AND ASSOCIATES, ASSOC. OF AMER. COLLEGES & UNIVERSITIES, ENGAGING DIVERSE VIEWPOINTS: WHAT IS THE CAMPUS CLIMATE FOR PERSPECTIVE-TAKING? 7 (2010).

[3] *See* Spotlight: The Campus Freedom Resource, http://www.thefire.org/spotlight.

[4] FIRE publishes an annual report on speech codes using data from our Spotlight database. Detailed information about FIRE's data and methodology may be found in our most recent report, *Spotlight on Speech Codes 2010: The State of Free Speech on our Nation's Campuses*, which is available at http://www.thefire.org/speechcodereport.

harassment is not protected speech, many university policies prohibit expression that does not rise to anywhere near the level of severity, pervasiveness, and objective offensiveness necessary to constitute peer harassment.[5] These policies violate the "bedrock principle underlying the First Amendment . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[6]

For example, Northern Arizona University prohibits, as harassment, "stereotyping" and "negative comments or jokes" when they are "based upon a person's race, sex, color, national origin, religion, age, disability, veteran status, or sexual orientation."[7] At the University of Idaho, prohibited sexual harassment includes "'Humor' or 'jokes' about sex- or gender-related characteristics."[8] CSU–Fullerton prohibits the electronic transmission of

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[5] *See Davis*, 526 U.S. at 633.

[6] *Texas v. Johnson*, 491 U.S. 397, 414 (1989). *See also Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973) (holding that "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.'")

[7] Safe Working and Learning Environment Policy: The Northern Arizona University Policy Regarding Prohibited Discrimination, Harassment, and Other Inappropriate Behaviors, http://home.nau.edu/images/userimages/lc94/6874/Safe%20policy%208.07.pdf (last visited Oct. 6, 2010).

[8] University of Idaho Office of Diversity & Human Rights, Sexual Harassment Brochure,

"statements or graphic representations that may be construed as discriminatory or offensive by reference to race, national origin, gender, religion, age, disability, sexual orientation, or other legally protected criteria. . . ."[9] In CSU-Monterey Bay's residence halls, "inappropriate comments or language when interacting with community members and/or CSUMB officials may be subject to conduct action."[10] At Central Washington University, "sexually harassing behavior" includes "sexist statements and behavior that convey insulting, degrading, or sexist attitudes . . . ."[11] Unconstitutional speech codes like these chill campus expression in the Ninth Circuit and nationwide.[12]

These policies persist despite decades of precedent invalidating

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http://www.uidaho.edu/~/media/Files/Diversity%20and%20Human%20Rights/SH%20Flyer.ashx (last visited Oct. 6, 2010).

[9] California State University Fullerton Student Life Resource Manual, http://www.fullerton.edu/deanofstudents/studentlife/download/Student_Life_Resource_Manual_2009-2010_doc_DRAFT_-_3rd_Revised.pdf (last visited Oct. 4, 2010).

[10] California State University Monterey Bay Office of Student Housing & Residential Life, Community Standards, http://housing.csumb.org/site/Documents/reslife/Student%20Housing%20&%20Residential%20Life%20Community%20Standards.pdf (last visited Oct. 4, 2010).

[11] Central Washington University Student Conduct Code, http://www.cwu.edu/~saem/index.php?page=student-conduct-code (last visited Oct. 6, 2010).

[12] Additional examples of speech codes in the Ninth Circuit and beyond are available at http://www.thefire.org/spotlight.

speech codes.[13] Universities' defiance in the face of overwhelming precedent demonstrates that the will to censor is strong, and the suppression of student speech will worsen if students are deprived of the ability to challenge speech codes in court.

B. Lopez Reasonably Fears Punishment Under the College's Speech Code, Given Widespread Abuse of Similar Codes

In its opinion, the panel stated it would take a "strained construction of the sexual harassment policy" to "make it applicable to religious speech opposing homosexuality or gay marriage," and that there was no "showing

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[13] *See McCauley v. University of the Virgin Islands*, 2010 U.S. App. LEXIS 17196 (3d Cir. 2010) (declaring speech policies unconstitutional); *DeJohn v. Temple University*, 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).

that the sexual harassment policy even arguably applies or may apply to Lopez's past or intended future speech."[14] In FIRE's experience, however, Lopez's fear that the university might punish his speech as sexual harassment was entirely reasonable, because universities commonly construe their harassment policies broadly to punish protected speech that is merely unpopular, unpleasant, or inconvenient.

For example, at the University of Central Florida (UCF), a student was charged with harassment for referring to a student government candidate as "a jerk and a fool" on Facebook.com.[15] At Tufts University, a student newspaper was found guilty of harassment for publishing an article consisting of quotes from the Koran and unflattering but factual statements about Islam.[16] A disciplinary committee found that the paper had "harassed"

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[14] *Lopez v. Candaele*, No. 09-56238, Slip Opinion ("Op."), Sept. 17, 2010, at 14374.

[15] *See* University of Central Florida Golden Rule Incident Report Form, Sept. 15, 2005, *available at* http://www.thefire.org/public/pdfs/7fdbe0c575a42510cecad418cd164a5b.pdf?direct; Letter from Nicholas A. Olesky, Coordinator, Office of Student Conduct to Matt Walston, Oct. 3, 2005, *available at* http://www.thefire.org/public/pdfs/b60cc54570baa9022a9380f7b1bf4c6f.pdf?direct.

[16] "Islam - Arabic Translation: Submission," *The Primary Source*, Apr. 11, 2007, p.23, *available at* http://www.thefire.org/public/pdfs/f102e5ae4168a0125d295748d41d0558.pdf?direct.

Muslim students and created a hostile environment by publishing the article.[17]

At Indiana University–Purdue University Indianapolis, a student-employee was found guilty of racial harassment for reading the book *Notre Dame vs. the Klan: How the Fighting Irish Defeated the Ku Klux Klan* during his work breaks. The university's Affirmative Action Office stated that the student had "used extremely poor judgment by insisting on openly reading the book related to a historically and racially abhorrent subject in the presence of your Black co-workers."[18] The Affirmative Action Office found that reading the book had satisfied the "legal 'reasonable person standard'" necessary to establish racial harassment.

At the University of Idaho, a student was charged with "discrimination" in violation of the Student Code of Conduct for stating that "illegal immigration destroyed my home state of California" between songs

[17] Outcome of the Committee on Student Life's Hearing of Complaints Brought by David Dennis and the Muslim Student Association Against *The Primary Source*, Apr. 30, 2007, *available at* http://www.thefire.org/public/pdfs/5e4f4b4bdadd652d41a425c952c43e49.pdf?direct.

[18] Letter from Lillian Charleston, Affirmative Action Officer, to Keith Sampson, Nov. 25, 2007, *available at* http://www.thefire.org/public/pdfs/4b26b68ef98eb6b6de987138657f0467.pdf?direct.

at a campus celebration for César Chávez Day.[19]

These are just a handful of many instances in which universities have broadly construed their harassment policies against protected expression.[20] Depriving students of legal recourse to challenge unconstitutional speech codes virtually ensures that such codes will continue to taint our nation's universities.[21]

II. THE NINTH CIRCUIT'S DECISION ERECTS AN IMPOSSIBLY HIGH BARRIER FOR STUDENTS CHALLENGING UNCONSTITUTIONAL UNIVERSITY POLICIES

The Ninth Circuit's decision acknowledges that First Amendment cases raise "unique standing considerations," *see* Op. at 14356 (quoting *Arizona Right to Life Political Action Committee v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003)), that necessitate "relaxed standing requirements." Op. at 14365. The panel also appears to appreciate that "[f]ormal *and informal* enforcement of policies that regulate speech on college campuses raises

[19] Complaint Before the University Judicial Council in the Judicial System of the University of Idaho, University of Idaho v. Alexander R. Rawson, April 5, 2010, *available at* http://www.thefire.org/public/pdfs/102dc04933308881d8a124f5901fac0e.pdf?direct.

[20] Additional examples are available in FIRE's case archive, http://www.thefire.org/cases/all.

[21] *Healy v. James*, 408 U.S. 169, 180 (1972) (internal quotation and citation omitted).

issues of profound concern." Op. at 14377 (emphasis added). Yet, the panel deemed insufficient Lopez's credible fear that LACCD would enforce its harassment policy against him even after he was reprimanded by a professor who cited the policy. *See* Op. at 14370. The panel also overlooked Lopez's claim that he wished to further discuss his religion in a way that had already prompted two students to write letters to the administration seeking punishment for Lopez's "offensive"[22] remarks. *Id. See also* Op. at 14375 ("Lopez fails to allege, let alone offer concrete details . . . regarding his intent to engage in conduct expressly forbidden by the sexual harassment policy.").

A. The Ninth Circuit's Standing Analysis Contravenes the Rationale Behind the Relaxed Standing Rules for First Amendment Plaintiffs

As the Ninth Circuit itself has noted, "[I]n recognition that 'the First Amendment needs breathing space,' the Supreme Court has relaxed the prudential requirements of standing in the First Amendment context." *Canatella v. California*, 304 F.3d 843, 853 (9th Cir. 2002) (quoting

[22] Dean Allison Jones informed Lopez that two students found his speech offensive, and that anyone offended by Lopez's discussion of his religion could report it. *See* ER302 ¶80 ("[A]nyone affected by the offensive conduct" may report it). *See also* ER305 ¶92 (Lopez's claim that he "finds himself constantly engaged in conversations on campus regarding issues implicated by the speech code, including his speech during Speech 101," when he explored his religious beliefs.)

Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973)). Plaintiffs challenging a law regulating speech on overbreadth grounds need not show that their own rights to free expression have been violated. *Broadrick*, 413 U.S. at 612. Overbreadth challenges safeguard the rights of those not before the court "who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985).

The overbreadth doctrine thus reflects the courts' concern that unconstitutional regulations will have a "chilling effect" on speech. *Arizona Right to Life Political Action Committee v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003). If plaintiffs were required to risk punishment in order to test the constitutionality of a statute, "free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1985). Plaintiffs are therefore permitted to bring pre-enforcement actions, under a "'hold your tongue and challenge now' approach." *Bayless*, 320 F.3d at 1006. Because free expression redounds to the benefit of all citizens, a plaintiff who does come forward to challenge a law on First Amendment grounds must show only that "he and others in his position face a credible threat of discipline

under the challenged statutes, and may consequently forego their expressive rights under the First Amendment." *Canatella*, 304 F.3d at 854.

As stated in his complaint, *see* ER302–03, Lopez reasonably believes that his speech is covered by the sexual harassment policy. Given the strong reaction his speech has already provoked, he has a credible fear that his religious views may violate the policy's prohibition against "actions and behavior that convey insulting, intrusive or degrading attitudes/comments about women or men," *see id.*, and he has refrained from speaking as a result.

The panel discounted the instances in which LACCD's policy was invoked against him and may be invoked against him in the future. *See* Lopez Pet. at 2, 5–6, 15. In so doing, the Ninth Circuit essentially required a showing that the policy was enforced against Lopez or someone in a situation dramatically similar to his. This ruling directly contradicts the relaxed standing requirement, designed to allow plaintiffs impacted by a speech restriction to represent others whose speech is chilled by the restriction without anyone risking actual enforcement of the statute.

B. The Panel's Heightened Standing Requirement Conflicts with Two Other Circuits' Decisions in Similar Cases

As detailed in Lopez's petition for rehearing, *Lopez Pet.* at 1–12, the panel's decision conflicts dramatically with similar cases from both the

Third and Sixth Circuits. In *McCauley v. University of the Virgin Islands*, -- F.3d --, 2010 WL 3239471 (3d Cir. Aug. 18, 2010), the Third Circuit ruled that a student had standing to challenge several provisions of a university's speech policy even though the student did not allege that he suffered any deprivation under these provisions. *Id.* at *2–*3. The decision rested on the "judicial prediction or assumption" that restrictions prohibiting "lewd or indecent conduct" and "offensive" signs at sporting events and concerts "may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.* at *3. The Third Circuit required no showing from the plaintiff that he intended to violate the university's speech policy. This decision stands in stark contrast to the Ninth Circuit panel's heightened standing requirement and rejection of Lopez's credible fear of enforcement.

The panel's assessment of what constitutes a credible threat of enforcement also conflicts with the Sixth Circuit's decision in *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995) (overturning university harassment policy prohibiting speech "that stigmatizes or victimizes an individual" on the basis of immutable characteristics like race, age, and sex). The Sixth Circuit found a "realistic danger" that the university would enforce its policy where the "text of the policy" clearly showed that

"language or writing, intentional or unintentional, regardless of political value, can be prohibited upon the initiative of the university." *Id*. at 1183. This holding, if applied in the Ninth Circuit, would provide standing for Lopez.

National uniformity is of special importance in cases concerning federal constitutional rights. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347–48, 4 L. Ed. 97 (1816) (noting "the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution"); *United States v. Laville*, 480 F.3d 187, 193 (3d Cir. 2007) ("[A] patchwork of federal constitutional standards . . . is inconsistent with our single federal constitution."). Rehearing is therefore necessary to safeguard free expression in the Ninth Circuit and to prevent unduly burdensome standing requirements from chilling speech.

C. University Students Already Face High Barriers to Bringing First Amendment Challenges

The Ninth Circuit panel's decision compounds the obstacles already faced by students challenging their universities' unconstitutional speech restrictions, making it even more likely that speech codes will remain official university policy, improperly insulated from constitutional challenge.

First, the doctrine of mootness presents special problems for university students. College students' cases become moot once they are no longer students or subject to university policies. *See DeJohn*, 537 F.3d at 312–13. As a result, there is a small window of time in which an individual student may file a civil rights lawsuit against his or her university, especially given the protracted nature of litigation.

In addition, students charged with violating university policy often wish for the charges to remain confidential to protect their reputations. *See Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 220–21 (3d Cir. 2001) (describing how complaints resolved informally "may remain confidential and no further action is necessary"). Students actually injured by unconstitutional policies, therefore, are less likely to bring suit and jeopardize the confidentiality surrounding university proceedings.

Finally, universities may use the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (FERPA), as a shield when refusing to release information about how their policies affect students. FERPA protects students against universities releasing sensitive information about their grades and conduct without their consent. *See id.* As a consequence of this student-protective law, however, information about university

disciplinary proceedings, and the enforcement of university policies, is further insulated from public scrutiny.[23]

D. Allowing *Lopez* To Stand All But Guarantees That Speech Codes Will Remain on Campuses Indefinitely

If this court allows the ruling in *Lopez* to stand, university students will be barred from challenging unconstitutional speech policies in all but the rarest of cases. The decision would require students facing the chilling effect engendered by the existence of such policies to wait until there is some indication from an official within their institution that a particular policy will be applied against them, even in those instances where a student's expression is clearly limited by the policy and where the student fears official sanction for engaging in the speech. As a result, many unconstitutional speech codes will remain in force, misinforming students of their expressive rights and stifling student dialogue.

[23] FERPA does not confer students with enforceable rights. *Gonzaga v. Doe*, 536 U.S. 273, 287 (2002). As a result, colleges enjoy large discretion to enforce FERPA as they see fit.

III. RELAXED STANDING REQUIREMENTS ARE OF PARTICULAR IMPORTANCE FOR COLLEGE STUDENTS

A. The College Campus is a Special Concern of the First Amendment

The panel's decision, which will affect all First Amendment plaintiffs, will be especially harmful on the university campus. By restricting First Amendment activity and impermissibly chilling speech, speech codes will continue to limit dialogue in the place where it is meant to be freest—the college campus.

Decades of precedent have made clear that the "college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'" *Healy v. James*, 408 U.S. 169, 180 (1972). The Supreme Court has stated that "[f]or 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." *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 836 (1995). *See also id.* at 835 (stating that the "danger . . . to speech from the chilling of individual thought and expression" is "especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition").

Courts have long recognized that students and faculty must be allowed to discuss and debate their views openly and honestly. The Supreme Court has rejected the notion 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. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" *Healy*, 408 U.S. at 180 (citation omitted).

Because of the central importance of unfettered dialogue on campus, students must be allowed to challenge policies that deny them the freedom of expression and to vindicate their precious rights.

B. Speech Codes Misinform Students about Freedom of Expression

The existence of speech codes at colleges and universities is especially harmful because it misinforms students about freedom of speech under the First Amendment. By continuing to maintain these illiberal policies, universities are failing to prepare students for life in a free, democratic society. Rather, students are taught the value of censorship and an illusory "right not to be offended."

Recently, the Ninth Circuit observed that "[t]he Constitution embraces . . . a heated exchange of views, even (perhaps especially) when they

concern sensitive topics like race, where the risk of conflict and insult is high," and noted that "[t]his is particularly so on college campuses." *Rodriguez v. Maricopa County Community College District*, 605 F.3d 703, 708 (9th Cir. 2010). In *Rodriguez*, the Ninth Circuit demonstrated its understanding of the significance of robust dialogue in the academic setting, recognizing that educating students about life in a liberal, democratic society is of utmost importance to the continued health and vitality of our nation.

CONCLUSION

Students must be equipped to challenge restrictions upon their free speech rights so that those crucial rights may be vindicated and protected. The Ninth Circuit's decision in *Lopez* creates an unjust barrier to their ability to do so, and consequently must not be allowed to stand. For all the reasons above, FIRE respectfully asks that this court grant Plaintiff-Appellee Jonathan Lopez rehearing or rehearing *en banc*.

Respectfully submitted,

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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 4,357 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 October 11, 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.

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