No. 10-1136

APR 18 2011

IN THE

Supreme Court of the United States

JONATHAN LOPEZ,

Petitioner,

v.

KELLY G. CANDAELE, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights in Education, Inc. ("FIRE") is a nonpartisan, 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 Jonathan Lopez's petition for writ of certiorari.

SUMMARY OF ARGUMENT

Certiorari is warranted in this case because the Ninth Circuit's decision will render students essentially unable to challenge unconstitutional speech codes without first risking punishment. In ruling that student Jonathan Lopez did 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 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

1. Counsel of record for the parties in this case have received timely notice of the intent to file this brief and have consented to its filing. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. The consents of the parties are being lodged herewith.

characterizing the case as "disturbing," the Ninth Circuit 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, reflect the pervasive threat to free expression on campus today. Despite two decades of decisions striking down unconstitutional speech codes, FIRE's research demonstrates that a substantial majority of universities still maintain harassment policies that prohibit protected speech. Administrators often enforce these policies using precisely the type of "strained" reading that the Ninth Circuit believed was required to apply LACCD's harassment policy toward Lopez's speech. If allowed to stand, the Ninth Circuit'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 meaningful access to the courts will have little choice but to self-censor. This result is particularly harmful on a public college campus, a traditional locus for free expression that this Court has long identified as crucially important to our democracy. University students already face significant legal and practical obstacles to bringing suit; the Ninth Circuit's decision exacerbates the problem for students whose speech is chilled by unconstitutional speech codes.

Other circuits, following this Court's dictates, have permitted students to challenge university speech policies with a showing of credible fear of enforcement,

which Lopez has made. The Ninth Circuit's decision now conflicts with those of its fellow circuits, creating confusion regarding the appropriate showing that must be made before students (and potentially citizens at large) may bring First Amendment challenges. Because the Ninth Circuit's holding leaves students unable to fully exercise or defend their First Amendment rights, the Court should grant the petition for writ of certiorari and reverse the Ninth Circuit's decision.

ARGUMENT

I. CENSORSHIP ON CAMPUS IS A WIDESPREAD PROBLEM

As a government actor, the Los Angeles Community College District is subject to the limits of the First Amendment when regulating student speech. Yet LACCD maintains a sexual harassment policy that prohibits vast swaths of protected speech,[2] far beyond actionable student-on-student sexual harassment as identified by this Court.[3]

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2. Relevant sections of the LACCD policy are cited in the Ninth Circuit's opinion. *See* Order Amending Opinion and Amended Opinion in *Lopez v. Candaele*, No. 09-56238 (9th Cir. 2010), Appendix to Petition for Writ of Certiorari ("App.") at 6a–7a.

3. *See Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999) (holding that applicable standard for student-on-student sexual harassment is "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").

LACCD's unconstitutional policy, however, 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 to employ speech codes restricting expression that does not rise to anywhere near the level of severity, pervasiveness, and objective offensiveness necessary to constitute peer harassment under *Davis*. *See* 526 U.S. at 633. While some students are punished under speech codes, countless more do not speak their minds for fear they may run afoul of overbroad policies like the one at issue.[4] If a student inarguably subject to such a policy lacks standing to challenge it until he or she can prove the administration intends to take punitive action, speech codes will continue to cast a pall over the marketplace of ideas on campus, where vigorous debate is essential.

A. Overbroad Speech Codes Persist on Campuses Across the Nation, Despite Decades of Precedent Striking Them Down

Each year, FIRE catalogs thousands of speech-related policies at universities nationwide. During the 2009–2010 academic year, FIRE reviewed policies at 286 of the country's largest and most prestigious public institutions in order to assess the state of free speech on campus. FIRE's research revealed that more than two-

4. In a recent study out of the University of Michigan, just 30.3% of college seniors "strongly agreed that it is safe to hold unpopular viewpoints on campus." *See* Eric L. Dey and Associates, *Engaging Diverse Viewpoints: What Is the Campus Climate for Perspective-Taking?* (Assoc. of Amer. Colleges & Universities 2010).

thirds of those institutions maintain policies explicitly prohibiting protected speech.[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] In California State University–Monterey Bay's residence halls, "inappropriate comments or language . . . may be subject to conduct action."[8] At Central Washington University, "sexually harassing behavior" includes "sexist statements and

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5. Detailed information about FIRE's data and methodology may be found in our most recent annual report on speech codes, *Spotlight on Speech Codes 2011: The State of Free Speech on our Nation's Campuses*, available at http://www.thefire.org/code/speechcodereport.

6. *Texas v. Johnson*, 491 U.S. 397, 414 (1989). *See also Papish v. Bd. of Curators*, 410 U.S. 667, 670 (1973) ("[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'")

7. Safe Working and Learning Environment Policy, http://home.nau.edu/images/userimages/lc94/6874/Safe%20policy%208.07.pdf (last visited Apr. 11, 2011).

8. CSU-Monterey Bay Student Housing & Residential Life Handbook, http://housing.csumb.org/sites/default/files/68/igx_migrate/files/17775-1L-CalStateMonterey%20-%20final%20draft.pdf (last visited Apr. 13, 2011).

behavior that convey insulting, degrading, or sexist attitudes."[9] Of course, merely "stereotyping," "negative," "inappropriate," "insulting," "degrading," or "sexist" statements—however disagreeable or offensive—are all protected by the First Amendment, meaning that these policies prohibit much protected speech on their face.

Unconstitutionally overbroad speech codes like these chill campus expression in the Ninth Circuit and nationwide.[10] Indeed, as this case demonstrates, such codes chill expression not merely in the dormitory and the student center, but also in the classroom—where nascent purveyors in the marketplace of ideas should be least fearful of government restriction. Yet, despite decades of precedent invalidating speech codes,[11] far too many universities have declined to revise their policies and restore student speech to its rightful position in the marketplace.

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9. Central Washington University Student Conduct Code, http://www.cwu.edu/~saem/index.php?page=student-conduct-code (last visited Apr. 11, 2011).

10. Additional examples of speech codes maintained by universities across the country are available at FIRE's Spotlight: The Campus Freedom Resource, http://www.thefire.org/spotlight.

11. *See, e.g.*, *McCauley v. Univ. of Virgin Islands*, 618 F.3d 232 (3d Cir. 2010) (declaring speech policies unconstitutional); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (declaring university sexual harassment policy overbroad); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (declaring university discriminatory harassment policy facially unconstitutional); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (finding university sexual harassment policy unconstitutionally overbroad); *UWM Post, Inc. v. Bd. of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991) (declaring university racial and discriminatory harassment policy facially unconstitutional).

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

In denying Lopez standing, the Ninth Circuit 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 that the sexual harassment policy even arguably applies or may apply to Lopez's past or intended future speech."[12] FIRE's experience demonstrates, however, that Lopez's fear that the university might punish his religiously-based views on sexual morality as "harassment" was entirely reasonable. Universities commonly construe their harassment policies broadly to punish controversial but protected speech that other students find unpopular, unpleasant, or offensive, regardless of its scholarly or political merit.

For example, at Tufts University, a student newspaper was charged with harassment for publishing an article consisting of quotes from the Koran and factual statements about Islam that were deemed unflattering.[13] A disciplinary committee found that the paper had "harassed" Muslim students and created a hostile environment by publishing the article because some felt "psychologically intimidated" by the piece.[14]

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12. App. at 28a.

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

14. Outcome of the Committee on Student Life's Hearing of Complaints Brought by David Dennis and the Muslim Student

At Indiana University–Purdue University Indianapolis, a student-employee was investigated 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 opined 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 [the student's] Black co-workers," who found the book "inflammatory and offensive."[15] Similarly, the University of Idaho instituted proceedings based on a complaint of "discrimination" in violation of the Student Code of Conduct due to a student's remark that "illegal immigration destroyed [his] home state of California" between songs at a campus celebration for César Chávez Day.[16, 17]

Troublingly, the language of the LACCD policy embraces similarly overbroad conceptions of "harassing" and "offensive" speech. On its face, the policy applies to all

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Association Against *The Primary Source*, Apr. 30, 2007, *available at* http://www.thefire.org/public/pdfs/5e4f4b4bdadd652d41a425c952c43e49.pdf?direct.

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

16. Complaint Before the University Judicial Council, *Univ. of Id. v. Alexander R. Rawson* (Apr. 5, 2010), *available at* http://www.thefire.org/public/pdfs/102dc04933308881d8a124f5901fac0e.pdf?direct.

17. Additional examples of the overbroad construction of school harassment policies are available in FIRE's case archive, http://www.thefire.org/cases/all.

students and prohibits "conduct [that] has the purpose *or effect* of . . . creating an intimidating, hostile or offensive work or educational environment."[18] By characterizing harassment in terms of its effect—without reference to objective criteria—the policy invites censorship on the basis of other students' subjective reactions to the challenged speech. Moreover, the policy makes no exception for serious, sincere political commentary, scholarly criticism, religious expression, or other speech at the core of First Amendment protection. A student may reasonably conclude, therefore, that the policy would apply to any speech a faculty member or other student might subjectively find "intimidating, hostile, or offensive," no matter how unreasonably.[19]

Accordingly, LACCD's policy, like numerous others across the nation, may be invoked against a sizeable unchartered territory of protected speech. Depriving students of a legal avenue to challenge unconstitutional speech codes virtually ensures that such codes will persist at our nation's universities.

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18. App. at 7a (emphasis added).

19. *Id. See also* App. at 9a (quoting Office of Diversity Programs website that warns, "If [you are] unsure if certain comments are offensive, do not do it, do not say it."); *id.* (quoting Compliance Office website defining harassment as "generalized sexist statements, actions or behavior that convey insulting, intrusive, or degrading attitudes/comments about women or men").

II. THE NINTH CIRCUIT'S DECISION ERECTS AN IMPOSSIBLY HIGH BARRIER THAT EXACERBATES THE DIFFICULTIES ALREADY FACED BY STUDENTS CHALLENGING UNCONSTITUTIONAL UNIVERSITY POLICIES

The Ninth Circuit's decision acknowledges that First Amendment cases raise "unique standing considerations," *see* App. at 5a (quoting *Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003)), that necessitate "relaxed standing requirements." App. at 35a. The Ninth Circuit also appears to appreciate that "[f]ormal *and informal* enforcement of policies that regulate speech on college campuses raises issues of profound concern." App. at 34a (emphasis added). Yet the Ninth Circuit 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* App. at 11a. The Ninth Circuit further overlooked Lopez's claim that he wished to discuss his religion in the future in a way that had already resulted in the same professor silencing his speech on grounds that it was "offensive" (using the vague and subjective language of the harassment policy), and had prompted two students to write letters to the administration seeking punishment for Lopez's "offensive" remarks.[20] *Id. See also* App. at 29a ("Lopez fails to allege, let alone offer concrete details . . . regarding his intent to engage in conduct expressly forbidden by the sexual harassment policy.").

20. *See* Verified Complaint for Injunctive and Declaratory Relief, Monetary Damages, and Attorneys' Fees and Costs, App. at 126a (Lopez's claim that he "finds himself consistently engaged in conversations on campus regarding issues implicated by the speech code, including his speech during Speech 101," in which he explored his religious beliefs).

Notwithstanding the fact that the harassment policy *was* expressly invoked against Lopez by his professor, the Ninth Circuit required too much. *Cf. Laird v. Tatum*, 408 U.S. 1, 11 (1972) ("[C]onstitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a *direct prohibition* against the exercise of *First Amendment* rights.") (first emphasis added). The precise point of a vagueness and overbreadth challenge is that the language of the policy is unclear as to what types of speech come within its reach; because of the ambiguity, speech that is protected by the First Amendment is chilled. Lopez had a credible fear that LACCD's vague and overbroad harassment policy would be enforced against him—a result threatened by his professor and requested by his peers.

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 *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). Accordingly, in a First Amendment overbreadth case, "standing arises 'not because [the plaintiff's] own rights of free expression are violated, but because of a judicial prediction or assumption that the [challenged statute's] very existence may cause others not before the court to refrain from constitutionally protected speech." *Canatella*, 304 F.3d at 853.

The overbreadth doctrine thus reflects the courts' concern that unconstitutional regulations will have a "chilling effect" on speech. *Bayless*, 320 F.3d at 1006. If plaintiffs were required to risk punishment 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 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.

The Ninth Circuit articulated three related inquiries to determine whether pre-enforcement plaintiffs face a credible threat of adverse state action: (i) whether there is a reasonable likelihood that the government will enforce the challenged law against the plaintiffs; (ii) whether the plaintiffs establish that they intend to violate the challenged law; and (iii) whether the challenged law is applicable to the plaintiffs, either by its terms or as

interpreted by the government. App. at 17a. In spelling out each of these factors, however, the Ninth Circuit cited largely non-analogous cases to arrive at a standard much more stringent than the relaxed standard required for First Amendment overbreadth claims, essentially demanding Lopez to make a clear showing that the harassment policy was enforced against him or someone in a situation dramatically similar to his.

In defining how much plaintiffs must show to satisfy the first requirement—a reasonable likelihood that the law will be enforced against them—the Ninth Circuit largely relied on cases not involving overbreadth challenges,[21] and thus applied this factor too strictly to Lopez's claim.[22] In *Rincon*, for example, a Native American group brought an action for declaratory and injunctive relief against enforcement on its reservation of a county gambling ordinance on the ground that the ordinance was an

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21. *See e.g., Rincon Band of Mission Indians v. County of San Diego*, 495 F.2d 1 (9th Cir. 1974); *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (*en banc*); *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75 (1947).

22. Even the cases cited that did involve overbreadth claims involved unique circumstances, not present here, which weighed against a finding of standing. *See, e.g., Younger v. Harris*, 401 U.S. 37, 42 (1971) (involving the "serious matter" of a federal suit to enjoin a pending state prosecution); *Mitchell*, 330 U.S. at 89, 90 (holding that suit by federal employees to enjoin enforcement of statute proscribing involvement in political campaigns was "really an attack on the political expediency of the [statute], not the presentation of legal issues"); *Laird*, 408 U.S. at 11 (distinguishing challenge to mere existence of Army's data-gathering system from typical overbreadth challenges to "regulatory, proscriptive, or compulsory" statutes).

encumbrance on or regulation of trust property. 495 F.2d at 2, 3. Not only was there no claim that the ordinance was overbroad, *Rincon* was not even a First Amendment case. *See id.* at 6 (noting that plaintiffs did not "allege actual interference with fundamental rights" and attempting to distinguish a case cited by the dissent on the grounds that "[p]erhaps [the dissent's case] is a special case involving First Amendment issues that makes it sui generis"). It is precisely this action's nature as a First Amendment overbreadth challenge that sets it apart from many of the cases cited by the Ninth Circuit.

The Ninth Circuit relied largely on *Thomas* (again, not an overbreadth case) to define the second requirement that plaintiffs establish with some degree of concrete detail that they intend to violate the challenged law. In so doing, the Ninth Circuit required Lopez to "'articulate[ ] a "concrete plan" to violate the law in question' by giving details about [his] future speech such as 'when, to whom, where, or under what circumstances.'" App. at 20a (quoting *Thomas*, 220 F.3d at 1139). But this standard overstates the level of specificity required for First Amendment claims based on vagueness and overbreadth. *See Getman v. Cal. Pro-Life Council, Inc.*, 328 F.3d 1088, 1094 (9th Cir. 2003) ("Our ruling in *Thomas* did not purport to overrule years of Ninth Circuit and Supreme Court precedent recognizing the validity of pre-enforcement challenges to statutes infringing upon constitutional rights . . . . Particularly in the First Amendment-protected speech context, the Supreme Court has dispensed with rigid standing requirements."), *appealed on remand*, *Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172 (9th Cir. 2007), *abrogated on other grounds by Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010).

With respect to the third factor, the Ninth Circuit indicated that plaintiffs' claims of future harm lack credibility where: (i) the challenged speech restriction by its terms is not applicable to the plaintiffs; or (ii) the government has affirmatively disavowed an intent to enforce the challenged statute. App. at 21a. The cases cited by the Ninth Circuit involved challenged speech restrictions that specifically applied to groups to which the plaintiff did not belong.[23] Moreover, in some of the cases, state authorities affirmatively disavowed "any interpretation of [the statute] that would make it applicable in any way to [plaintiffs]." *Stuart*, 702 F.2d at 195.

This case concerns neither a speech restriction which by its terms is not applicable to the plaintiff, nor a statute that the government has affirmatively disavowed an intent to enforce. The LACCD harassment policy by its terms applies to "students" like Lopez. App. at 6a. Moreover, the College has never disavowed any intent to enforce the harassment policy. Rather, the policy is prominently displayed in two Board Rules, the LACC Student Handbook, and four webpages. *Id.* at 6a–9a.

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23. *See Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1994) (holding that collective bargaining agreement "by its plain language applie[d] only to the Union and not to its individual members"); *Johnson v. Stuart*, 702 F.2d 193, 195 (9th Cir. 1983) (holding that Oregon teachers had no standing to challenge textbook selection statute because language of statute applied "only to those empowered to select textbooks for the schools," which did not include "teachers"; and distinguishing cases "aimed directly at those asserting standing to challenge them").

As stated in his complaint (*see* App. at 126a–127a), Lopez reasonably believes that his speech is covered by the sexual harassment policy.[24] Given the strong reaction his speech has already provoked, he has a credible fear that expressing his religious views on "issues of marriage, gender, and sex," *see* Petition for Writ of Certiorari ("Pet'n") at 10, may violate the policy's prohibition against "actions and behavior that convey insulting, intrusive or degrading attitudes/comments about women or men," *see* App. at 123a, and he has refrained from speaking as a result.

The Ninth Circuit discounted the instances in which LACCD's policy was invoked against Lopez and may be invoked against him in the future. *See* Pet'n 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 dramatically similar situation. Thus, the Ninth Circuit's ruling directly contradicts the purpose of the relaxed standing requirement.

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

As detailed in Lopez's petition, Pet'n at 16–26, the Ninth Circuit's decision conflicts dramatically with similar cases

24. "The combination of Defendant Matteson's censorship and hostility toward Mr. Lopez's Christian viewpoints, Defendant Moore's and Jones' accusations that Lopez's speech 'offended' others, and the District's sexual harassment policies that prohibit students from saying anything 'offensive,' has chilled Mr. Lopez's expression at the College and caused him to refrain from discussing his beliefs with respect to political, social, and cultural issues and events." App. at 127a.

from both the Third and Sixth Circuit Courts of Appeal.[25] In *McCauley v. University of the Virgin Islands*, 618 F.3d at 238, 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. 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.* The Third Circuit required no showing from the plaintiff that he intended to violate the university's speech policy. This decision properly applies First Amendment standing doctrine, in stark contrast to the Ninth Circuit's heightened standing requirement.

The Ninth Circuit's amended opinion attempts to distinguish *McCauley* by asserting that the plaintiff student had standing to assert the First Amendment rights of others bound by the challenged provisions only because he had suffered an injury-in-fact when he was disciplined for violating another provision in the speech code. App. at 32a. But nowhere in the *McCauley* opinion did the Third Circuit condition the plaintiff's standing to bring a facial challenge against portions of the policy on the fact that he was disciplined under another provision. Rather, the Third Circuit held that the plaintiff had standing to mount a facial challenge—even though "he conceded that he had suffered no deprivations" from the challenged provisions—because "his speech and the

25. The decision also conflicts with the recently decided *Zamenick v. Indian Prairie Sch. Dist. #204*, Nos. 10-2485, 10-3635, --- F.3d ----, 2011 WL 692059 (7th Cir. Mar. 1, 2011).

speech of other students was chilled by the Code," and because those provisions "all ha[d] the potential to chill protected speech." 618 F.3d at 238. Since courts should "freely grant[] standing to raise overbreadth claims," the chilling effect of the challenged provisions on the plaintiff's and other students' speech was a sufficient basis for standing. *Id.*

The Ninth Circuit'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 at 1183 n.5 (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.[26] 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 (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");

26. The Sixth Circuit also recognized that neither a court nor a student ought to accept a school's representation that an overbroad speech code will not be interpreted to restrict First Amendment rights. *See Dambrot*, 55 F.3d at 1183.

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."). It is, therefore, necessary for this Court to intervene and resolve the confusion over whether college students have standing to challenge their schools' speech codes under the First Amendment.

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

The Ninth Circuit'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. *Doe v. Madison Sch. Dist.*, 177 F.3d 789, 798 (9th Cir. 1999) ("A student's graduation moots claims for declaratory and injunctive relief . . . ."); *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974) (holding that law student's challenge to school policy was moot where student was in final semester and would "receive his diploma regardless of any decision this Court might reach on the merits of this case"). 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 Coll. Area Sch. Dist.*, 240 F.3d 200, 220–21 (3d Cir. 2001) (describing school district policy that informal resolution of harassment complaints "may remain confidential and no further action is necessary"); *see also* LACCD Prohibited Discrimination and Harassment Policy, at § 15005, *available at* http://www.laccd.edu/board_rules/documents/ChapterXV.doc (providing for the confidentiality of all complaints under the harassment policy). 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 ("FERPA"), 20 U.S.C. § 1232g, as a shield when refusing to release information about how their policies affect students. FERPA withholds federal funds from educational institutions which have a "policy or practice" of releasing student records without 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. *See, e.g.*, Jamie Ball, *This Will Go Down on Your Permanent Record (But We'll Never Tell): How the Federal Educational Rights and Privacy Act May Help Colleges and Universities Keep Hazing a Secret*, 33 Sw. U. L. Rev. 477, 485 (2004) (noting that FERPA has raised "significant questions where [the] right to privacy conflicts with countervailing interests in access to information").

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 an official within their institution indicates that a particular policy will be applied against them. On the contrary, pre-enforcement plaintiffs challenging provisions on First Amendment grounds should not have to "show that the authorities have threatened to prosecute [them]; the threat is latent in the existence of the statute . . . . [I]f it arguably covers [the plaintiffs' intended speech], . . . there is standing." *Getman*, 328 F.3d at 1095 n.10. As a result of the Ninth Circuit's failure to apply the relaxed standard of First Amendment overbreadth cases, many unconstitutional speech codes will remain in force, misinforming students of their expressive rights and stifling student dialogue.

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

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

This Court's review is necessary because the Ninth Circuit's decision, which will affect all First Amendment plaintiffs, will be especially harmful on the university campus. By impermissibly chilling speech, speech codes

will continue to limit dialogue in the place where it is meant to be freest—the college campus. Indeed, Lopez's case offers an unusually stark example of the chilling effect on academic development and scholarly debate, as it arose within the four walls of a Speech 101 classroom.

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). As this Court has stated, "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." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 836 (1995).

Courts have long recognized that students and faculty must be allowed to discuss and debate their views openly and honestly. This Court has rejected the paternalistic 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." *Healy*, 408 U.S. at 180. "Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" *Id.* Indeed, as the Fourth Circuit Court of Appeals recently reaffirmed, the First Amendment protects even inconvenient or uncomfortable faculty speech made for scholarly and pedagogical purposes.[27] If employees of a university deserve unfettered First

27. *See Adams v. Trustees of Univ. of N.C.-Wilmington*, No. 10-1413, --- F.3d ----, 2011 WL 1289054, at *12 (4th Cir. Apr. 6, 2011).

Amendment protection for their academic work, students deserve no less.[28] Yet the standing doctrine adopted by the Ninth Circuit effectively requires students to disrupt order unnecessarily, pick a constitutional fight with their superiors, and risk attendant academic and reputational consequences in order to vindicate their rights.

B. Speech Codes Misinform Students About Freedom of Expression

Likewise, the existence of speech codes at colleges and universities is especially harmful because it misinforms students about the nature and operation of the First Amendment itself. Critically, the First Amendment confers an individual right to speak freely—enforceable against the government—not an individual right to avoid being offended, enforceable against other speakers. Speech codes undermine not only the freedom to speak but also its attendant responsibilities by fortifying some students' unreasonably "thin skin" with a shell of government protection. By continuing to maintain these illiberal policies, universities are failing to prepare students for life in a free, democratic society, instead teaching them to censor.

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28. Moreover, the Ninth Circuit failed to recognize that Lopez's intended speech—sincere commentary of a religious nature—implicates even more profoundly the First Amendment values at stake in this case. Accordingly, the Ninth Circuit's restrictive standing doctrine endangers not merely "vigorous, argumentative, unmeasured, and even distinctly unpleasant" speech, *see Rodriguez v. Maricopa County Cmty. Coll. Dist.*, 605 F.3d 703, 708–09 (9th Cir. 2010); it also silences the expression of sincerely-held religious beliefs, speech at the core of First Amendment protection. *See Murdock v. Pennsylvania*, 319 U.S. 105, 109 (1943).

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*, 605 F.3d at 708. 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. With its ruling below, however, the Ninth Circuit has contradicted and endangered this long-recognized understanding of the university's role. This Court must act to correct its error.

CONCLUSION

Standing should not pose a barrier to judicial review of a campus policy that undoubtedly applies to a student and may reasonably be interpreted to restrict the student's intended speech. The Ninth Circuit's decision in *Lopez* contradicts the law of other circuits and creates an unjust barrier to students' ability to challenge such policies. For the foregoing reasons, FIRE respectfully asks that this Court grant Jonathan Lopez's petition for writ of certiorari.

Respectfully submitted,

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