No. 09-3735

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

STEPHEN McCAULEY,

Plaintiff-Appellant,

v.

UNIVERSITY OF THE VIRGIN ISLANDS, et al.,

Defendants-Appellees

On Appeal from the United States District Court
of the Virgin Islands, Division of St. Thomas & St. John

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

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CORPORATE DISCLOSURE STATEMENT

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. FIRE believes that, for our nation's colleges and universities to best prepare students for success in our modern liberal democracy, the law must remain clearly and vigorously on the side of free speech on campus. For all of the reasons stated below, this Court must reverse the district court's decision.

SUMMARY OF ARGUMENT

The district court erred by failing to overturn unconstitutionally overbroad speech codes maintained by the University of the Virgin Islands and challenged by plaintiff-appellant. The district court further compounded its error by importing the deferential standards governing the regulation of high school student speech into the collegiate setting. High schools and colleges have profoundly different missions, and the U.S. Supreme Court has emphasized the particular importance of free speech in the university context. Moreover, college students—unlike high school students—are overwhelmingly adults who are old enough to vote, hold public office, and serve in our nation's military. The district court's ruling thus drastically reduces the First Amendment rights of students at public colleges in direct contravention of both this Court's recent ruling in *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008), and decades of legal precedent.

The University of the Virgin Islands is a government actor and thus is prohibited from violating the First Amendment rights of its students. In breach of this legal and moral obligation, the University maintains unconstitutional speech codes that restrict protected expression on campus. Despite the specific guidance provided by this Court in *DeJohn*, and as a

result of inconsistent reasoning, the district court failed to overturn each of the University's overbroad speech codes challenged by plaintiff-appellant. Although it correctly found one challenged policy unconstitutional for overbreadth, the district court inexplicably erred by failing to apply the same analysis to each challenged policy.

Instead of heeding this Court's holding and rationale in *DeJohn*, which reaffirmed that public colleges may not restrict student speech to the extent that public high schools may, the lower court ignored the well-established distinction between the high school and collegiate settings by importing highly deferential high school student speech standards into its analysis of the University's speech codes. Because the lower court derived its erroneous conclusions from the mistaken application of high school speech cases to the collegiate context, the lower court's ruling renders the speech rights of college students functionally equivalent to those of high school students. This dramatic reduction of the First Amendment protections afforded college students directly contradicts rulings from both this Court and the Supreme Court and badly misunderstands the role of the public university in our modern liberal democracy.

If allowed to stand, the lower court's opinion will sanction unconstitutional restrictions of student speech at the University of the Virgin

Islands, blur heretofore sharp distinctions between appropriate standards for student speech regulations at the high school and collegiate levels, and further exacerbate the nationwide problem of censorship on public college campuses. To prevent such an impermissible result and the irreparable harm it would cause, this Court must act again, as it did in *DeJohn*, to defend the First Amendment and preserve robust speech rights on our nation's public college campuses.

ARGUMENT

I. While Correctly Finding the University's "Hazing-Harassment" Policy Overbroad, The District Court's Inconsistent Reasoning Caused It to Uphold Equally Unconstitutional Speech Restrictions

As a public institution, the University of the Virgin Islands is prohibited from punishing speech protected by the First Amendment. Indeed, this Court recently reaffirmed the primacy of the First Amendment on public college and university campuses, "where free speech is of critical importance because it is the lifeblood of academic freedom." *DeJohn v. Temple University*, 537 F.3d 301, 314 (3d Cir. 2008) (applying the overbreadth doctrine to declare a public university's former sexual harassment policy facially unconstitutional). In *DeJohn*, this Court struck down Temple University's former sexual harassment policy on First Amendment grounds, finding that the policy infringed upon protected expression and reaffirming the Supreme Court's declaration that "[t]he college classroom with its surrounding environs is peculiarly the marketplace of ideas." *Id.* at 315 (quoting *Healy v. James*, 408 U.S. 169, 180 (1972) (internal quotation marks omitted)).

Yet despite the guidance this Court provided in *DeJohn*, and because of inconsistencies in the district court's reasoning, the district court failed to strike down the overbroad policies maintained by the University of the Virgin Islands and challenged by plaintiff-appellant in the present case. While the lower court correctly invalidated one challenged policy, relying on this Court's overbreadth analysis in *DeJohn*, it failed to identify similar defects in two other policies challenged. To preserve the clarity of *DeJohn*'s defense of the First Amendment on public college campuses, this Court must correct the district court's oversight.

A. *DeJohn* Required Invalidation of the "Hazing-Harassment" Policy as Unconstitutionally Overbroad

Adhering to this Court's reasoning in *DeJohn*, the district court correctly found the University's "Hazing-Harassment" policy unconstitutionally overbroad.

In *DeJohn*, this Court held that because "overbroad harassment policies can suppress or even chill core protected speech, and are susceptible to selective application amounting to content-based or viewpoint discrimination, the overbreadth doctrine may be invoked in student free speech cases." *DeJohn*, 537 F.3d at 314. In analyzing the balance between Temple's dual obligations to prohibit harassment and guarantee First Amendment freedoms, the *DeJohn* court relied on the standard for student-

on-student hostile environment harassment announced by the Supreme Court in *Davis Next Friend LaShonda D. v. Monroe County Board of Education*, 526 U.S. 629 (1999). In *Davis*, the Supreme Court held that only when student conduct is "so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect" does it become actionable as hostile environment harassment. *Davis*, 526 U.S at 652. Because Temple's harassment policy failed to track *Davis*'s threshold requirements, this Court found that it prohibited a substantial amount of protected speech and was thus void for overbreadth: "Absent any requirement akin to a showing of severity or pervasiveness—that is, a requirement that the conduct objectively and subjectively creates a hostile environment or substantially interferes with an individual's work—the policy provides no shelter for core protected speech." *DeJohn*, 537 F.3d at 317–18.

As challenged, Section IV, paragraph E of the Code of Student Conduct prohibits "[c]ommitting, conspiring to commit, or causing to be committed any act which causes or is likely to cause serious physical or mental harm or which tends to injure or actually injures, frightens, demeans, degrades or disgraces any person." Like Temple's unconstitutional sexual harassment policy, this policy fails to track the *Davis* standard and does not

include "a requirement that the conduct objectively and subjectively creates a hostile environment or substantially interferes with an individual's work." *Id.* Because of this omission, the University's Hazing-Harassment policy reaches a vast amount of protected speech.

The district court recognized this defect. Noting that the sexual harassment policy this Court struck down in *DeJohn* "bears some resemblance" to the University's Hazing-Harassment policy challenged in the instant case, (JA 41), the district court determined that the University's policy "covers any speech, the content of which offends another," while offering "no requirement of pervasiveness or severity." (JA 43). As such, the lower court found the University's Hazing-Harassment policy "difficult to cabin" and correctly deemed it unconstitutionally overbroad. (JA 45). However, inconsistencies in the district court's reasoning resulted in the court upholding two other policies that were equally unconstitutional.

B. The District Court Incorrectly Dismissed Plaintiff-Appellant's Challenge of the "Misbehavior at Sports Events, Concerts, and Social-Cultural Events" Policy

The district court erred in upholding the University's "Misbehavior at Sports Events, Concerts, and Social-Cultural Events" policy. The policy prohibits "[d]isplaying in the field house, softball field, soccer field, cafeteria and

Reichhold Center for the Arts any unauthorized or obscene, offensive or obstructive sign." (JA 46–47).

While the University may lawfully prohibit the display of obscene or obstructive expression on campus consistent with its obligations as a government actor under the First Amendment, it may not prohibit "offensive" expression or institute a system of prior restraint. The vast majority of "offensive" speech enjoys First Amendment protection, and this protection certainly holds on a public university campus. The Supreme Court has made clear 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.'" *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973). As such, the University's regulation is unconstitutionally overbroad.

Further, the Supreme Court has also inveighed against regulations requiring official "authorization" prior to engaging in expressive activity, holding that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150–51 (1969). Because the University's policy prohibits "unauthorized" signage without specifying any standards

establishing the criteria for authorization, it impermissibly restricts the First Amendment rights of students.

While recognizing the display of signs as expressive activity protected by the First Amendment, the district court nevertheless approved the University's overbroad ban on "unauthorized" or "offensive" signs on the grounds that "the displaying of signs by students in the Field House, softball field, soccer field, cafeteria, or Reichhold Center for the Arts may reasonably be viewed as speech of the University itself." (JA 50). However, the district court's pat conclusion is unsupported by any explanation as to why signs displayed by students in certain areas may be "reasonably" presumed to be school-sponsored speech or the University's speech, rather than the sign-carrying students' own expression. Indeed, the district court acknowledged that the University itself did not argue that students' signs could be construed as school-sponsored speech. *Id.* Without reference to the record or arguments before the court, then, the district court flatly decided that any student-made sign, displayed by a student, may be subject to restrictive regulation based on the sign's message because university community members or the general public may mistake that message for that of the University. But the district court's finding that such a mistake would be "reasonable" is counterintuitive, especially given that the policy seeks to

regulate precisely that "offensive" or otherwise "unauthorized" content which a reasonable onlooker would be least likely to ascribe to the University.

Further, by so concluding, the lower court ignored the explicit guidance of this Court; in a ruling acknowledged but not followed by the district court, this Court has held that "school sponsorship of student speech is not lightly to be presumed." *Saxe v. State College Area School District*, 240 F.3d 200, 214 (3d Cir. 2001). By failing to provide even a pretextual rationale for its conclusion, the district court's facile presumption is untenable, particularly in light of the First Amendment rights at stake and the Supreme Court's emphatic proclamation that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Healy*, 408 U.S. at 180.

The district court's errors are precipitated and compounded by its conflation of the highly deferential legal standards governing the regulation of high school student expression with the more exacting standards applicable in the collegiate context. Specifically, in holding that the policy's restrictions are "reasonably related to 'legitimate pedagogical concerns,'" (JA 50), the district court imported a restrictive high school speech standard into the collegiate setting, failing to recognize the longstanding doctrinal

distinction between the comparatively limited speech rights afforded high school students and the full protection of the First Amendment granted to college students. The impact of this confusion on the lower court's reasoning is discussed at length in Section II, *infra.*

C. The District Court Incorrectly Dismissed Plaintiff-Appellant's Challenge of the "Conduct Which Causes Emotional Distress" Policy

The district court erred in failing to find the University's "Conduct which Causes Emotional Distress" policy unconstitutionally overbroad. The policy prohibits "conduct which results in physical manifestations, significant restraints on normal behavior or conduct and/or which compels the victim to seek assistance in dealing with distress." (JA 52). Some expressive conduct or pure speech reached by this policy may indeed be punishable consistent with the First Amendment, insofar as it truly creates a hostile environment and comports with *Davis*'s requirement that the speech in question effectively "denies its victims the equal access to education." *Davis*, 526 U.S at 652.

However, the policy is nevertheless unconstitutionally overbroad because it fails to mandate that the expressive conduct be objectively objectionable—that is, "emotionally distressing" to a reasonable person as opposed to subjectively perceived as such by more sensitive listeners.

Without an objectivity requirement, students' right to engage in free expression is left at the mercy of their most sensitive peers, who might "seek assistance" in dealing with subjective distress felt by them alone in response to perfectly ordinary protected expression. As such, this policy suffers from the same fatal defect as the University's Hazing- Harassment policy and the Temple University sexual harassment policy this Court struck down in *DeJohn*. The district court erred in failing to note the policy's lack of an objectivity requirement, which renders the policy unconstitutionally overbroad.

II. In Analyzing the University's Speech Codes, the District Court Improperly Applied High School Speech Standards to the University Setting

Decades of First Amendment jurisprudence, from the Supreme Court to the circuits, have established an explicit distinction between the comparatively limited First Amendment rights afforded high school students and the full protection enjoyed by college students. In *DeJohn*, this Court explicitly held that college administrators are granted "less leeway" than high school administrators in restricting speech. 537 F.3d at 316. The district court, ignoring *DeJohn*'s holding and rationale, erased this distinction and applied the highly deferential standards governing high school restrictions

on speech to the University of the Virgin Islands' Code of Student Conduct. Intervention by this Court is needed to correct this error.

A. High School Speech Standards Are Inapplicable to the University Setting

Courts have long emphasized the importance of free and open expression on college campuses. As the Supreme Court wrote in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957):

> The essentiality of freedom in the community of American universities is almost self-evident.... Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Id. at 250. By contrast, the Supreme Court has described the mission of public grade and secondary schools in strikingly different terms, stating:

> The role and purpose of the American public school system were well described by two historians, who stated: "[Public] education must prepare pupils for citizenship in the Republic. It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."

Bethel School District v. Fraser, 478 U.S. 675, 681 (1986) (citations omitted).

The Court's different conceptions of the essentiality of free speech for students at the high school and college levels reflects the marked contrast between both the educational mission and the maturity and ability of

students at each stage of schooling. Grade school students must learn "the habits and manners of civility" to prepare for citizenship. *Id.* In contrast, college students enjoy greater freedom of expression so that they may fully participate in our modern liberal democracy as the "intellectual leaders" the Court describes in *Sweezy*. 354 U.S. at 250.

In the nearly fifty years since *Sweezy,* federal and state courts have repeatedly reaffirmed the special importance of robust free expression in higher education. *See e.g.*, *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (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."); *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967) ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'") (citations omitted); *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) ("The university environment is the quintessential 'marketplace of ideas,' which merits full, or indeed heightened, First Amendment protection."); *Linnemeier v. Ind. Univ.—Purdue Univ. Fort Wayne*, 155 F. Supp. 2d 1034, 1042 (N.D. Ind. 2001) ("A

university setting is . . . a 'hub of ideas' and a place citizens traditionally identify with creative inquiry, provocative discourse, and intellectual growth.").

In addition to distinguishing the role of high schools as compared to universities, courts have also noted that while high school students are almost exclusively minors, college students are almost exclusively adults.[1] *See Healy*, 408 U.S. at 197 (Douglas, J., concurring) ("[s]tudents—who, by reason of the Twenty-sixth Amendment, become eligible to vote when 18 years of age—are adults who are members of the college or university community."). *See also Kincaid*, 236 F.3d at 346 (holding that the Supreme Court's decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), did not apply to the college setting because college students are "young adults"); *Bystrom v. Fridley High Sch.*, 822 F.2d 747, 750 (8th Cir. 1987) ("[F]ew college students are minors, and colleges are traditionally places of virtually unlimited free expression."). Treating the First Amendment rights of high school students and university students as

[1] According to the U.S. Census Bureau, only 1.2 percent of undergraduate students are below the age of 18. *See* 2002 U.S. Census Bureau Current Population Survey Report, Table A-6, "Age Distribution of College Students 14 years Old and Over, by Sex: October 1947 to 2002." In addition, an increasingly significant number of university students are substantially older than the traditional 18-22.

functionally equivalent infantilizes college students and deprives them of the unique educational opportunities available at colleges.

Although the circuits have split on how to differentiate speech cases involving high school versus university students, *see* Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split Over College Students' First Amendment Rights*, 14 TEX. J. C. L. & C.R. 27 (2009), this Court in *DeJohn* rejected the view that the same standards apply to both sets of students. *DeJohn* explained that speech that "*cannot be* prohibited to adults *may* be prohibited to public elementary and high school students" because elementary and high schools possess "special needs of school discipline." 537 F.3d at 315 (emphasis in original). By contrast, this "need for order" is inapposite at colleges, and "administrators are granted *less leeway* in regulating student speech than are public elementary or high school administrators." *Id.* at 314, 316.

B. In *DeJohn*, This Court Explicitly Recognized the Difference Between High School and College Speech Standards

The district court disregarded the holding and import of *DeJohn* by applying high school speech cases to the university setting. In *DeJohn*, the court categorically distinguished between First Amendment rules governing speech by students in high school, where administrators acting *in loco parentis* enjoy greater latitude to regulate speech, and the college

environment, where "administrators are granted *less leeway* in regulating student speech than are public elementary or high school administrators." 537 F.3d at 316 (emphasis in original).

Based on this reasoning, this Court invalidated Temple University's former harassment policy in *DeJohn*, holding that the use of subjective terms such as "gender-motivated," "hostile," or "offensive" would impermissibly chill protected political speech. In articulating its holding in *DeJohn*, this Court made reference to the expansive speech protections articulated in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508 (1969) (holding that "[s]tudent expression that is protected by the First Amendment may not be prohibited absent a showing that the expression will materially and substantially interfere with the operation of the school or the rights of others."). According to *DeJohn*, the harassment policy's "focus on motive [was] contrary to *Tinker's* requirement that speech cannot be prohibited in the absence of a tenable threat of disruption." 537 F.3d at 319. *DeJohn* also held that speech that would "substantially interfere with a student's educational performance may satisfy the *Tinker* standard." *Id.* at 320 n.22 (quotation marks omitted).

Although *Tinker* involved high school students, it is a speech-protective case and does not undermine *DeJohn's* holding that different

standards govern university speech cases. *DeJohn* explicitly established *Tinker* as a *de facto* "floor" for speech protections governing public universities. Remarking that "we must proceed with greater caution before imposing speech restrictions on adult students at a college campus," *DeJohn* held that *Tinker* must "*at least* be satisfied" to uphold Temple's policy. *Id.* at 318 (emphasis in original). Because Temple's harassment policy did not even satisfy *Tinker*, this Court was not required to consider the greater protections demanded by the college setting. However, under *DeJohn*, any application of *Tinker* to colleges must necessarily take into account the differences in educational missions and maturity levels of students. When considering whether speech may cause a "tenable threat of disruption," lower courts must consider the fact that college students are adults, and must heed *DeJohn*'s warning that "[d]iscussion by adult students in a college classroom should not be restricted." *Id.* at 315.

In a footnote, this Court's opinion in *DeJohn* noted in passing that "since *Tinker*, the Supreme Court has carved out a number of narrow categories of speech that a school may restrict even without the threat of substantial disruption." 537 F.3d at 317 n.17 (citing *Fraser* and *Hazelwood*). However, neither *Fraser* nor *Hazelwood*, both high school speech cases, were applied by this Court in analyzing the constitutionality of Temple's

harassment policy. These two cases fall well below the floor set by *Tinker*, limiting student speech rights in a way that could not pass constitutional muster if applied to college students. In fact, *DeJohn* specifically quoted *Fraser* for the proposition that "it does not follow, however, that simply because the use of an offensive form of expression may *not* be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school." 537 F.3d at 315 (quoting *Fraser*, 478 U.S. at 682). The *DeJohn* court's reference to these two cases leaves unaltered *DeJohn*'s explicit recognition that separate standards apply to protect college students' rights.

This Circuit has therefore clearly embraced the position that, in light of the mission of the university and the maturity of the student body, university speech codes will be subject to increased scrutiny. The district court's failure to appreciate this holding pervaded its erroneous decision below.

C. The District Court Relied on High School Speech Standards

Although the district court cursorily acknowledged the "difference between the extent to which a school may regulate speech in a public university setting as opposed to a public elementary or high school setting" (JA 34), it nevertheless evaluated the University of the Virgin Islands'

speech restrictions using the deferential standards that govern high school student speech regulations rather than the much stricter standards set forth for collegiate student speech regulations. As a result, the district court muddied the long-established distinction between First Amendment rights afforded students in the high school and collegiate settings and upheld speech restrictions that do not pass constitutional muster when enacted by a public college or university.

1. The District Court Relied on High School Speech Standards in Analyzing the "Hazing-Harassment" Policy

The district court's analysis of the University's Hazing-Harassment policy is predicated on a mistaken application of high school speech cases to the collegiate context. The lower court begins its analysis of the University's policy by recognizing what it deems the "important" distinction between the applicable standards for analyzing restrictions on high school and collegiate speech. (JA 34). The court notes correctly that "public colleges and universities are granted less leeway to restrict speech than public elementary and high schools." *Id.* However, the lower court promptly abandons this crucial distinction by importing highly restrictive high school speech standards into its analysis of the University's Hazing-Harassment policy.

First, the lower court mistakenly cites the Supreme Court's holding in *Fraser* as an applicable exception to *Tinker* for the purposes of analyzing

policies governing the conduct of adult university students. (JA 35). In so doing, the lower court imports *Fraser* wholesale into the university context, disregarding the fact that *Fraser*'s holding is only applicable to those public schools that may impart "essential lessons of civil, mature conduct"—in other words, high schools acting *in loco parentis* to "inculcate the habits and manners of civility" in a way that public colleges and universities cannot. *Fraser*, 478 U.S. at 681 (internal citations omitted). *Fraser* sanctions the prohibition of "lewd, indecent, or offensive speech," but the Supreme Court has explicitly held that "no matter how offensive to good taste," expression on a public college campus may not be banned out of deference to "conventions of decency." *Papish*, 410 U.S. at 670. *Fraser*'s exception to *Tinker*'s "threat of substantial disruption" test is applicable only in the high school setting.[2]

The lower court next compounds its conflation of high school and college speech cases by citing *Hazelwood* for the proposition that a school may exert "control" over student speech when that speech is a part of

[2] As explained in Section II.B, *infra*, *Tinker* is properly understood in the collegiate context only in terms of providing a conceptual "floor" for restrictions on the speech rights of college students. Any regulation of collegiate speech that restricts *more* speech than permissible under *Tinker* must be presumptively unconstitutional on its face, given that *Tinker*'s "threat of substantial disruption" test constitutes the limits of restriction on high school speech, which is subject to greater regulation.

"school-sponsored expressive activities," (JA 36), a power limited only by a requirement that the regulation be "reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273. While relying on *Hazelwood* more explicitly in its analysis of the University's "Misbehavior at Sports Events, Concerts, and Social-Cultural Events" policy (see Section II.C.2, *infra*), the lower court nevertheless invokes *Hazelwood* as part of its flawed understanding of the contours of student speech subject to regulation by public colleges and universities. After determining that university student speech is properly analyzed with reference to *Fraser* and *Hazelwood*, the court proceeds to analyze the university's speech code "with these principles in mind."

2. The District Court Relied on High School Speech Standards in Analyzing the "Misbehavior at Sports Events, Concerts, and Social-Cultural Events" Policy

The district court erroneously applied *Hazelwood* to its analysis of the "Misbehavior at Sports Events, Concerts, and Social-Cultural Events" Policy. In *Hazelwood*, the Supreme Court held that the First Amendment was not violated by a high school's decision to delete student articles on teen pregnancy from a school-sponsored newspaper, written as part of a journalism class. 484 U.S. at 262–66. The district court in the instant case cited *Hazelwood* for the rule that a school may "exercise editorial control

over the style and content of student speech in *school-sponsored expressive activities* as long as its actions are reasonably related to legitimate pedagogical concerns…" (JA 36) (quoting 484 U.S. at 273). Although the district court noted that "[t]his standard 'governs only when a student's school-sponsored speech could reasonably be viewed as speech of the school itself,'" *id.*, it cited another high school case, *Saxe*, for this clarification. (JA 49) (quoting 240 F.3d 200, 213–14 (3d Cir. 2001).

The district court's application of *Hazelwood* to uphold the ban on offensive or unauthorized signs is improper. *Hazelwood* is not only inapplicable in the university classroom, but it is particularly inapposite to the extracurricular setting of the university. *Hazelwood* concerned a high school's ability to control its own message in material subsidized by the school and produced during a journalism class. The need to exercise editorial control in that context stands in dramatic contrast to student expression at extracurricular activities on a college campus, where controversial and "offensive" views must be permitted. Even if *Hazelwood* were to be the appropriate governing law in this context, student signs, which frequently display a variety of contradicting messages, cannot reasonably be considered to communicate the message of the institution akin

to a journalism class project bearing the school's name and disseminated to the school.

D. By Ignoring the Critical Distinction Between College and High School Speech Standards, The District Court's Ruling Diminishes Students' Rights

Both this Court and the Supreme Court have repeatedly affirmed that college students enjoy the same panoply of First Amendment rights on the public college campus that they do as citizens in society at large. By importing and relying on rulings governing the regulation of high school speech into the collegiate context, the lower court effectively erodes this long-established protection. Doing so is dangerous, for it confuses the distinct characteristics of high schools and colleges and opens the door to repeated conflation of the two. Rendering the free speech rights of adult students at a public college equivalent to those of schoolchildren provides university administrators legal justification to restrict speech at public institutions far beyond the bounds of the First Amendment, to the detriment of both college students and American society. As the Supreme Court made clear in *Sweezy*, because public universities play a "vital role in a democracy," freedom of expression is essential on campus, and to restrict the flow of ideas on campus "would imperil the future of our Nation." *Sweezy*, 354 U.S. at 250. Limiting that which may be said on public college

campuses to that which may be said within the halls of public high schools robs our nation of the possibility of the "new maturity and understanding" the Court has recognized as a product of robust free expression on campus. *Id.*

III. If the District Court's Ruling Is Not Overturned, Unconstitutional Speech Codes Will Continue to Proliferate

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, these unconstitutional restrictions persist at the majority of our nation's public colleges and thus continue to deny students the expressive rights to which they are legally and morally entitled. Because both the will and the means to censor already exist on university campuses, this Court's decision in the instant matter is one of great importance.

A. Federal Courts Have Consistently and Unanimously Struck Down Speech Codes on Constitutional Grounds

Over the past two decades, courts have unanimously invalidated speech codes facing a constitutional challenge on the grounds of overbreadth or vagueness. *See DeJohn*, 537 F.3d 301; *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (declaring university discriminatory

harassment policy facially unconstitutional); *Lopez v. Candaele*, No. CV 09-0995 (C.D. Cal. Sept. 16, 2009) (invalidating sexual harassment policy due to overbreadth); *College Republicans at San Francisco State Univ. 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) (finding university harassment and civility policies overbroad); *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); *Corry v. Leland Stanford Junior University*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip op.) (declaring university discriminatory harassment policy facially overbroad); *The UWM Post, Incorporated 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). Taken together, this unbroken string of decisions invalidating speech codes makes clear that their continued existence is legally untenable. *See* Azhar Majeed,

Defying the Constitution: The Rise, Persistence, and Prevalence of Campus Speech Codes, 7 GEO J.L. & PUB. POL'Y 481 (2009).

Two of these decisions took place within the Third Circuit's jurisdiction, including this Court's aforementioned decision in *DeJohn*. In *DeJohn*, the Third Circuit held that the Temple University sexual harassment policy's use of terms which were not clearly self-limiting, such as "hostile," "offensive," and "gender-motivated," rendered it "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." *DeJohn*, 537 F.3d 301, 317 (internal quotations omitted). Crucially, "[t]his could include 'core' political and religious speech, such as gender politics and sexual morality." *Id.* Therefore, this Court concluded, the policy "provide[d] no shelter for core protected speech." *Id.* at 318.

In the other case, *Bair v. Shippensburg University*, 280 F. Supp. 2d 357 (M.D. Pa. 2003), a federal district court in Pennsylvania struck down a university policy requiring students to speak in a manner that "does not provoke, harass, intimidate, or harm another" and to refrain from "acts of intolerance," as well as a policy requiring students to "mirror[]" the university's commitment to "racial tolerance, cultural diversity and social justice" in their "attitudes and behaviors." The district court recognized that

the student-plaintiffs feared discussion of their political, social, or religious views would be punishable due to the terms of the speech codes, making them "reluctant to advance certain controversial theories or ideas regarding any number of political or social issues." *Bair*, 280 F. Supp. 2d 357, 365 (internal citation omitted). The court rejected the university's proffered defense that the speech codes were "merely aspirational and precatory," *id.* at 373, and declared them to be facially overbroad.

B. FIRE's Work Demonstrates That the Will to Censor Exists on Our Nation's Public Campuses

In spite of the overwhelming unanimity of the legal precedent against speech codes, our nation's public colleges and universities continue to maintain illiberal and unconstitutional policies regulating speech. The most recent annual speech code report by the Foundation for Individual Rights in Education (FIRE), *Spotlight on Speech Codes 2010: The State of Free Speech on Our Nation's Campuses*, found that a shocking 71 percent of public colleges and universities reviewed maintain policies restricting protected expression. *Spotlight on Speech Codes 2010*, 6. The report reviewed 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 stubbornly have chosen to continue to deprive their students the expressive rights to which they are legally obligated.

Just a handful of the speech codes maintained by colleges and universities illustrate the problems they typically present. Northern Illinois University, for instance, bans using "words, gestures and actions to annoy, alarm, abuse, embarrass, coerce, intimidate or threaten another person."[3] San Jose State University prohibits "[a]ny form of activity, whether cover or overt, that creates a significantly uncomfortable…environment" in its residence halls, including making "verbal remarks" and "publicly telling offensive jokes."[4] 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)."[5] Keene State College in New Hampshire prohibits any

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[3] "Violations of The Student Code of Conduct: Harassment," *Student Code of Conduct*, available at http://www.thefire.org/spotlight/codes/454.html (last visited Dec. 16, 2009).
[4] "Harassment and/or Assault," *Housing License Agreement Booklet*, available at http://www.thefire.org/spotlight/codes/203.html (last visited Dec. 16, 2009).
[5] "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 Dec. 16, 2009).

"language that is sexist and promotes negative stereotypes and demeans members of our community."[6]

By maintaining speech codes, universities misinform students of their speech rights and place them in fear of unconstitutional punishment. Therefore, 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 censorship and fear has taken shape at too many universities across the country.

C. Clarity is Needed from this Court to Preserve the First Amendment Rights of College Students

If the lower court's opinion is allowed to stand, university administrators will be encouraged to silence merely unwanted student speech by maintaining unconstitutional speech codes, despite the fact that the vast majority of offensive speech is entirely protected by the First Amendment. In light of the lower court's extensive conflation of high school

[6] "Statement on Sexist Language," *Keene State College Student Handbook*, available at http://www.thefire.org/spotlight/codes/981.html (last visited Dec. 16, 2009).

and college speech standards, clarity is especially needed from this Court in order to preserve robust expression on public campuses, consistent with this Court's defense of collegiate student speech rights in *DeJohn*.

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*, 354 U.S. at 250. The district court's decision, if not corrected, will act as this "strait jacket," resulting in a creeping uncertainty about the status of protected speech on campus that might well deter student speech. Students will surely self-censor rather than risk punishment for running afoul of unconstitutional speech codes like the one maintained by the University of the Virgin Islands. Once this chilling effect takes hold, the marketplace of ideas that our universities are meant to enable will cease to exist.

CONCLUSION

In reviewing the lower court's decision, this Court confronts a pernicious blurring of the longstanding distinction between high school and collegiate student speech rights. As it did in *DeJohn*, this Court must again act to preserve the well-established First Amendment protections college

students enjoy on campus—protections vital to freedom of speech, academic freedom and the pursuit of excellence at our nation's universities, and protections thus vital to our nation itself.

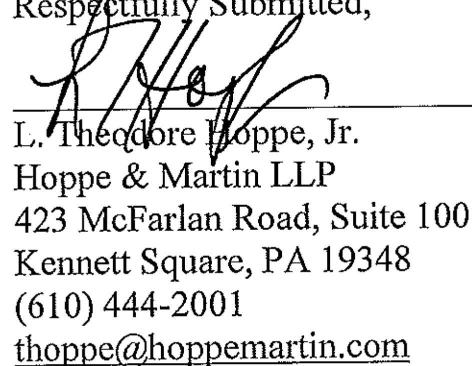
The district court mistakenly deemed it acceptable to transpose the highly deferential standards of *Hazelwood* and *Fraser* into the collegiate context, simply because this Court in *DeJohn* cited *Tinker* as providing a "floor" for First Amendment protections at universities. Importing *Hazelwood* and *Fraser* into the collegiate setting is a grievous error, and contrary to the guidance supplied by this Court. In *DeJohn*, this Court resoundingly closed the door on treating college students and their high school counterparts as functionally equivalent in terms of the speech rights each are accorded; as *DeJohn* explicitly holds, college speech policies must provide greater *protections* than *Tinker*. Therefore, *Hazelwood* and *Fraser*—which provide grade schools with exceptions to *Tinker*'s "threat of substantial disruption" test, allowing greater *restrictions* on student speech—are wholly inapplicable at the collegiate level.

The district court's determination that high school speech cases may be applied to the collegiate setting misapprehends *DeJohn* and will erode free expression at universities if left uncorrected. Because of the extensive threat to free speech already extant on our nation's public campuses in the

form of persistent and pervasive unconstitutional speech codes, any sign from this Court indicating that college administrators enjoy greater leeway than specified under *DeJohn* to censor merely unpopular or "offensive" student speech will only exacerbate the endemic chilling effect gripping our public campuses.

To uphold both *DeJohn* and decades of Supreme Court precedent, and to preserve the American public university as a true marketplace of ideas, this Court must reverse the district court's decision on appeal.

Respectfully Submitted,



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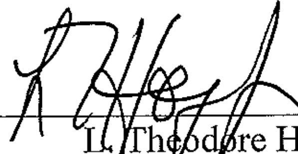
CERTIFICATE OF BAR MEMBERSHIP

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



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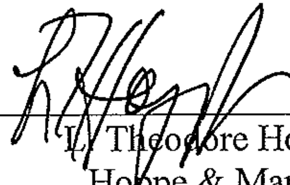

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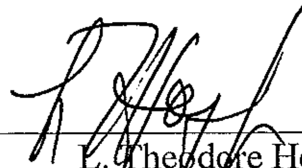

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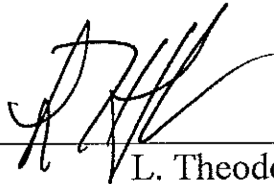

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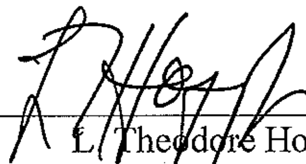

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