No. 15-113098-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

**NAVID YEASIN,**
Petitioner-Appellee/Cross-Appellant,

v.

**THE UNIVERSITY OF KANSAS,**
Respondent-Appellant/Cross-Appellee

Appeal from the District Court of
Douglas County, Kansas
Honorable Robert W. Fairchild, District Judge
District Court Case No. 2014-CV-102

# BRIEF OF *AMICI CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, INC. AND STUDENT PRESS LAW CENTER IN SUPPORT OF APPELLEE/CROSS APPELLANT

DON SAXTON, #21978
Saxton Law Firm
1000 Broadway, Suite 400
Kansas City, MO 64105
Tel.: (816) 471-1700
Fax: (816) 471-1701
don@saxtonlawfirm.com
*Attorney for* Amici Curiae *Student Press Law Center and Foundation for Individual Rights in Education*

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## INTEREST OF AMICI CURIAE

The Student Press Law Center is a non-profit, non-partisan organization which, since 1974, has been the nation's only legal assistance agency devoted to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment. SPLC regularly appears in federal and state appellate courts to provide additional perspective and context as an advocate with many years of experience working directly with students whose First Amendment rights have been suppressed by school or government officials.

The Foundation for Individual Rights in Education is a non-profit, non-partisan education and civil liberties organization dedicated to promoting and protecting First Amendment rights at our nation's institutions of higher education. FIRE has defended constitutional liberties on behalf of students and faculty at our nation's colleges and universities and participated as *amicus curiae* in many cases. *See, e.g., Barnes v. Zaccari*, 669 F.3d 1295 (11th Cir. 2012); *Adams v. Trs. of the Univ. of N.C. – Wilmington*, 640 F.3d 550 (4th Cir. 2011); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008).

The interpretation of the First Amendment as it applies to college students and the obligation of public institutions to balance Title IX responsibilities with the First Amendment rights of students and faculty are subjects of profound interest to the SPLC and FIRE. The decision in this appeal will affect not only the parties to this action but also the students across the country for whom the SPLC and FIRE advocate.

## INTRODUCTION

While this case ostensibly is about one student's remarks about his former girlfriend on social media, the principles at issue have the potential to apply far more

broadly and to speakers on matters of greater public concern. Across the country, colleges are seeking to expand their punitive authority over students' off-campus, online lives. Students routinely face life-altering disciplinary charges for misunderstood jokes or crude comments—even with no connection to the college—incurring penalties once reserved for violent criminal behavior. True harassment and stalking can, of course, have ruinous consequences. But so can expulsion from college over an out-of-context comment that is misinterpreted, the risk of which is especially great in the jargon-and-shorthand-filled world of social media. It is important for this Court to draw a clear boundary around what disputes are to be resolved in the trustworthy realm of the civil and criminal justice system, and not in the shadowy realm of campus discipline.

It is doubly important that the Court reject the University of Kansas's ("the University's") attempt to categorize Yeasin's social-media insults as "true threats," since truly threatening speech is subject not merely to school discipline, but also to arrest and prosecution. Adopting the University's expansive understanding of a "true threat" to encompass name-calling—including, in the University's view, name-calling that is not even directed at or directly visible to the person being insulted—would criminalize a vast swath of everyday social frictions.

## ARGUMENT

### I. Universities have minimal authority over an adult student's off-campus speech on social media.

No matter how honorable the motivation, a public university does not have limitless disciplinary authority to regulate everything a student says and does off campus. Through decades of jurisprudence, the Supreme Court has made clear that public

universities have limited authority to regulate the speech of adult college students. That limited authority does not extend beyond campus grounds or activities.

*A. Supreme Court precedent recognizes that college students are not subject to the same limits on their speech as schoolchildren.*

The Supreme Court has recognized limited exceptions to the First Amendment in the context of on-campus speech by and aimed at minors in K–12 schools. *See Tinker v. Des Moines Indep. Commty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (holding that the on-campus speech of K–12 students may be punished if it causes a "substantial disruption" in the work and discipline of the school). But the Court's *Tinker* line of school-speech jurisprudence involves children in the K–12 setting, and the underlying policies and regulations have little relevance to college students. Concerns over a captive, highly impressionable audience are inapplicable in the adult world of a college campus at which attendance is non-compulsory. "College students today are no longer minors; they are now regarded as adults in almost every phase of community life . . . ." *Nero v. Kansas State Univ.*, 861 P.2d 768, 774, 778 (Kan. 1993) (quoting *Bradshaw v. Rawlings*, 612 F.2d 135, 139 (3d Cir. 1979) and rejecting the *in loco parentis* doctrine as "outmoded" in a college environment).

The Supreme Court of the United States has made clear that "colleges and universities are not enclaves immune from the sweep of the First Amendment." *Healy v. James*, 408 U.S. 169, 180 (1972). On the contrary, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools," and safeguarding free expression at institutions of higher education is of utmost importance. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). Moreover, the Supreme Court has declared that the college classroom is "peculiarly the 'marketplace of ideas,'" and

that our 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.'" *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (internal citation omitted).

*B. Supreme Court precedent also recognizes that schools cannot restrict off-campus speech to the same extent as on-campus speech.*

The University simply does not have authority to punish students for off-campus speech, and certainly not for a personal disagreement unconnected with school business. Even in the K–12 context, the Supreme Court's student-speech cases all involve speech that took place *at school.* Indeed, *Tinker*'s most quoted passage revolves around the "schoolhouse gate," 393 U.S. at 506 and recognizes that, to achieve their educational mission, schools must be able to restrict speech that takes place on campus, even if the speech would otherwise be beyond their control. Nowhere in *Tinker* did the Court suggest that a school's powers to restrict student speech extends *beyond* the schoolhouse gate, and the Supreme Court has never "allowed schools to punish students for off-campus speech that is not school-sponsored or at a school-sponsored event and that caused no substantial disruption at school." *J.S. ex rel. Snyder v. Blue Mtn. Sch. Dist.*, 650 F.3d 915, 933 (3d Cir. 2011) (*en banc*).

Quite the opposite: The Court has made clear that schools generally *cannot* restrict or punish off-campus speech. For example, in *Morse v. Frederick*, 551 U.S. 393 (2007) the Court reasoned that if the high school student in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986)—who delivered a speech at a school assembly laced with double entendres—had instead "delivered the same speech in a public forum outside the school context, it would have been protected." *Morse*, 551 U.S. at 405 (discussing

*Fraser*, 478 U.S. at 678); *accord Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988).

Scores of lower-court rulings have accepted as a given that speech outside the "schoolhouse gate" is afforded greater protection than on-campus speech. In *Bystrom v. Fridley High School, Independent School District 14*, for example, the Eighth Circuit stated:

> The school district asserts no authority to govern or punish what students say, write, or publish to each other or to the public at any location outside the school buildings and grounds. If school authorities were to claim such a power, quite different issues would be raised, *and the burden of the authorities to justify their policy under the First Amendment would be much greater, perhaps even insurmountable.*

822 F.2d 747, 750 (8th Cir. 1987) (emphasis added); *see also Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 259 (3d Cir. 2002) ("*Tinker* acknowledges what common sense tells us: a much broader 'plainly legitimate' area of speech can be regulated at school than outside school."); *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1050 (2d Cir. 1979) ("[B]ecause school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena.").

The policies that impelled the Court to recognize diminished First Amendment rights in the K–12 in-school setting—the need for the school to achieve its educational mission, to protect impressionable and "captive" children from inappropriate content, and to have some say in speech that may be perceived as reflecting the school's viewpoint (such as in the case of a student newspaper)—simply do not apply here.

Social media postings are not forced on captive viewers. The speech must be affirmatively sought out. The potential audience is not limited to school listeners—indeed, the speech may not even be directed at school listeners at all. It is one thing to say a school can interfere with a student's communications with fellow students; it is quite another to say that a college may interfere with the student's ability to communicate with the general public. While this case is about Twitter, if colleges have control over everything a student says off campus on personal time, that subsumes not just social media but letters to the newspaper, interviews with a TV station, remarks delivered at a Board of Regents meeting, or anything else that a college might desire to regulate.

The University has sufficient ability to preserve safety and good order without violating the First Amendment. Had Yeasin made true threats in person while on campus, university officials would have been well within their authority to ask Yeasin to leave and alert the police. But what Yeasin did—venting about his frustrations on Twitter, in messages viewable to a limited audience that did not include his former girlfriend (and that did not even name her), who learned about the messages indirectly through friends—is categorically different. The First Amendment simply does not allow this kind of off-campus intrusion into student speech.

*C. Name-calling on a social media account does not equate to a "true threat."*

The University's assertion (Resp't Br. at 17–19) that Yeasin's speech was unprotected by the Constitution as a "true threat" misconceives the narrowness of the Supreme Court's jurisprudence on true threats. In *Virginia v. Black*, the Court struck down as overbroad a statute that criminalized burning a cross with intent to intimidate. 538 U.S. 343 (2003). The Tenth Circuit reads *Black* to require proof not only that the

reasonable recipient would understand the speech as posing a threat to do violence but also that it was the speaker's subjective intent to create that fear:

> When the Court says that the speaker must mean to communicate a serious expression of an intent, it is requiring more than a purpose to communicate just the threatening words. ... It is requiring that the speaker want the recipient to believe that the speaker intends to act violently.

*United States v. Heineman*, 767 F.3d 970, 978 (10th Cir. 2014).[1]

Not a single remark in the Twitter postings at issue even hints that Yeasin intends to commit any violence or that he hopes any violence will befall Ms. W. He simply calls her names ("bitch," "psycho," and the like). Though crude and worthy of social condemnation, to conclude that speech can constitute a threat without even *mentioning* violence at all would be a remarkable reconceptualization of true threat jurisprudence.[2] *See, e.g., United States v. Carmichael*, 326 F. Supp. 2d 1267, 1282 (M.D. Ala. 2004) ("[T]hreats of vilification or social ostracism are protected by the First Amendment. . . . It is only when speech crosses the line separating insults from 'true threats' that it loses its First Amendment protection") (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982)) (internal quotes and citation omitted).

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[1] In *Heineman*, the court overturned the conviction of a white supremacist who emailed an explicitly violent poem to a professor calling him a "filthy traitor" and describing in graphic detail the ways he would be stabbed and choked to death, because proof of a subjective intent to instill fear was lacking. *Id.* at 982. *Heineman* involved a defendant whose speech was far more directly targeted to its recipient than Yeasin's rants on Twitter.

[2] Ms. W. undoubtedly is uncomfortable with Yeasin's continued presence on the university campus, as the University asserts, but it is implausible that her discomfort is based on learning secondhand through Twitter that Yeasin thinks she is a "bitch." The record reflects a history of abusive behavior, and it did not take a posting on Twitter for Ms. W. to become aware that Yeasin harbored resentment after their breakup and his subsequent criminal prosecution.

The unique risks of misinterpretation are magnified in the world of social media, it would be extraordinarily dangerous (and inconsistent with constitutional doctrine) to lower the bar for true threats so as to remove social-media speech from the First Amendment simply because the speech is capable of being read and misinterpreted as portending dangerousness. The Court should reject this invitation.

## II. Title IX does not and cannot require public colleges and universities to violate the First Amendment.

The University's unfettered use of its Student Code as authority to police protected speech is, unfortunately, consistent with a nationwide trend. Colleges and universities across the country increasingly use student codes and anti-harassment policies to quash speech under the reasoning that they are required to do so by Title IX.

Courts have reaffirmed the importance of freedom of expression on campus when considering the constitutionality of university harassment policies, and they have repeatedly struck down overbroad and/or vague harassment codes on First Amendment grounds. Accordingly, the U.S. Department of Education's Office for Civil Rights (OCR), the federal agency tasked with enforcing Title IX, has expressly clarified that federal anti-discrimination statutes such as Title IX do not override and must be implemented in accordance with students' and faculty members' First Amendment rights.

Despite this clarity in law, *amici* have witnessed colleges and universities repeatedly prohibit and punish constitutionally protected speech on campus, claiming that they are required to do so by federal law. Indeed, the consequences of failing to draw a line around protected speech in the context of harassment are evident in the case now before this Court: University administrators effectively imposed a gag order on a student

on and off campus, violating his First Amendment rights. To ensure consistency with decades of case law and recent agency clarification, this Court should reaffirm that the First Amendment is paramount on our nation's public college campuses and must be considered when implementing anti-harassment policies.

*A. Both courts and federal agencies have made clear that anti-discrimination statutes like Title IX do not require restrictions on protected speech.*

Title IX requires universities receiving federal funds to prohibit sex-based discrimination, including sexual harassment. Public colleges and universities must do so in a manner consistent with the First Amendment; courts have consistently struck down public university anti-harassment policies that prohibit protected speech. *See, e.g.*, *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232 (3rd. Cir 2010) (invalidating facially overbroad harassment policy); *DeJohn*, 537 F.3d 301 (striking down sexual harassment policy); *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); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of harassment policy due to overbreadth). Despite this consistent treatment by courts, universities continue to employ vague and overbroad harassment policies and enforcement practices that run afoul of the First Amendment.

OCR has explicitly recognized the importance of striking the balance between protecting free speech and addressing peer harassment. In a 2003 "Dear Colleague" letter sent to the presidents of all federally supported college and universities nationwide, the agency made clear that "[n]o OCR regulation should be interpreted to impinge upon

rights protected under the First Amendment to the U.S. Constitution or to require recipients to enact or enforce codes that punish the exercise of such rights." Office for Civil Rights, First Amendment: Dear Colleague Letter (July 28, 2003), *available at* http://tinyurl.com/DCL2003. OCR clarified that federal anti-discrimination statutes like Title IX may not be used to regulate the content of speech and that the "offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR." *Id.* Pledging that the agency was "committed to the full, fair and effective enforcement of these statutes consistent with the requirements of the First Amendment," OCR affirmed that laws like Title IX may not be construed to require the violation of the First Amendment at public universities. *Id.*

In 2014, OCR specifically warned that Title IX policies must not conflict with First Amendment freedoms in a statement titled "Questions and Answers on Title IX and Sexual Violence." Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence (Apr. 29, 2014), *available at* http://tinyurl.com/TitleIXQA. Reaffirming the stance taken in its 2003 letter, OCR declared that Title IX cannot be read to require universities to "restrict the exercise of any expressive activities or speech protected under the U.S. Constitution." *Id.* When public colleges and universities adopt and enforce rules to prevent and address unlawful discrimination, they "must respect the free-speech rights of students, faculty, and other speakers." *Id.* Under OCR's own guidance, the invocation of Title IX to justify restrictions on constitutionally protected speech is inappropriate and unacceptable.

Both courts and OCR recognize that the First Amendment takes precedence over anti-discrimination statutes such as Title IX. Universities should not and cannot punish free speech under the guise of Title IX compulsion.

*B. Colleges and universities nationwide increasingly cite Title IX as justification for investigating and punishing student and faculty speech.*

Despite consistent rulings from federal courts and OCR guidance that Title IX and harassment policies must not infringe on the First Amendment, *amici*'s experience demonstrates that a growing number of schools promulgate and enforce anti-harassment policies wholly inconsistent with First Amendment principles. In seeking to comply with Title IX and respond to pressures to address harassment, these institutions establish policies that are often overbroad, vague, and/or subjective, sweeping constitutionally protected speech into their proscribed conduct.

Such a policy was wielded by the University of North Carolina at Chapel Hill in 2013, when student Landen Gambill faced possible expulsion after publicly complaining that UNC had mishandled her allegation that another student sexually assaulted her. Allie Grasgreen, *Slaying the Messenger?*, Inside Higher Ed (Feb. 26, 2013), http://tinyurl.com/Grasgreen2013. Applying an overbroad and impermissibly subjective policy, UNC charged Gambill with creating an intimidating environment for her alleged rapist by publicly speaking about her experience. *See id.* (policy prohibited "[d]isruptive or intimidating behavior that willfully abuses, disparages, or otherwise interferes with another..."). The policy—intended to protect students from harassment and intimidation—was instead used to silence Gambill's protected speech.

Unfortunately, Gambill's situation is not unusual. For example, in 2013, the University of Alaska Fairbanks subjected student newspaper *The Sun Star* to a nearly

year-long investigation after a professor complained that two articles amounted to sexual harassment under the institution's Title IX obligations. Weston Morrow, *Appeal finds in favor of UAF student newspaper in sexual harassment case*, Fairbanks Daily News-Miner (Feb. 12, 2014), http://tinyurl.com/Morrow2014. Despite the fact that the articles were plainly protected by the First Amendment, it took months of investigation by the university and an outside attorney to determine that the articles were protected expression, not harassment. *Id.* The prolonged investigation created a chilling effect on student journalism at UAF and on student speech and expressive activity as a whole.

In another case, a student at the University of Oregon faced disciplinary charges in 2014 when she jokingly shouted, "I hit it first" out of a dorm room window towards a couple standing outside. Saul Hubbard, *UO action in student verbal tiff contested*, The Register-Guard (Aug. 27, 2014), http://tinyurl.com/SHubbard2014. Despite the fact that her joke constituted protected speech, the student was charged with five separate policy violations, including violation of a discriminatory harassment policy. *See* Letter from Ari Z. Cohn to University of Oregon President Michael Gottfredson, Aug. 1, 2014, *available at* http://tinyurl.com/Cohn2014 (noting a policy defining harassment, in part, as "unreasonable insults, gestures, or abusive words, in the immediate presence, and directed to, another person that may reasonably cause emotional distress or provoke a violent response…").

Anti-harassment policies are increasingly and inappropriately applied not only to protected student expression, but to faculty expression as well. For example, in 2014, a sociology professor at the University of Colorado at Boulder faced investigation after students were left "concerned" by her lecture on prostitution in a "Deviance in U.S.

Society" course, which included a skit in which volunteer teaching assistants portrayed prostitutes. Sarah Kuta, *CU-Boulder: Patti Adler could teach deviance course again if it passes review,* Daily Camera (Dec. 13, 2013), http://tinyurl.com/Kuta2013. Even though the professor had used the lecture in question in her course for more than 20 years, the university then informed Adler that her course would be cancelled—only reversing course in the face of significant public criticism. *Id.*

In 2012, Appalachian State University suspended sociology professor Jammie Price for creating a "hostile learning environment" by showing a documentary about pornography and criticizing the university's response to sexual assault allegations concerning student-athletes. Paul T. Choate, *ASU Professor Jammie Price Keeps Job; Letter from Provost Sets Series of Conditions To Be Complied With*, High Country Press (May 1, 2012), http://tinyurl.com/Choate2012. The university not only found Price guilty under a harassment policy, it sentenced her to a development plan that included "corrective actions" infringing upon her academic freedom, such as unique requirements for teaching "sensitive topics" and "controversial materials." *Id.*

Although harassment policies are intended to address the institution's obligations to combat harassment under Title IX, too often they threaten constitutionally-protected speech—including complaints, jokes, newspaper articles, and classroom lessons. The aforementioned colleges are not alone in maintaining such policies; a recent FIRE survey of policies at more than 400 universities revealed that more than half of schools maintain policies that severely restrict protected speech, many of which are intended as anti-harassment policies. *See* Found. for Individual Rights in Educ., *Spotlight on Speech Codes 2015* 3, 6–7 (2015), *available at* http://tinyurl.com/Spotlight2015.

### C. *This court should acknowledge that Title IX and the First Amendment need not be in tension.*

The widespread abuse of harassment policies under the banner of Title IX enforcement signals to students and faculty that colleges and universities are no longer safe for free speech. The misapplication of Title IX and other anti-harassment statutes affects the speakers directly and also chills other would-be speakers by signaling that engaging in controversial, dissenting, unpopular, or merely inconvenient expression may lead to investigation and discipline.[3] In an atmosphere where students and faculty do not feel free to express and debate different views, ideas, and opinions, the creation and development of knowledge will grind to a halt, to the detriment of not only the university community but also society as a whole.

To be sure, the speech in this case is not speech about issues of broad social or political concern. Nevertheless, a ruling that subordinates the First Amendment to Title IX as the University seeks would undoubtedly be used to silence critics and commentators engaging in speech of more public concern.

As in the above cases, the University of Kansas has imposed restrictions on far more speech than Title IX requires and the First Amendment allows, posing a grave threat to the freedom of expression constitutionally owed to students at a public university. The September 6 email clarifying the no-contact order against Yeasin—warning that he could be disciplined not only for contacting Ms. W. but also for speaking

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[3] This phenomenon was documented in a 2010 study by the American Association of Colleges and Universities (AACU), in which less than 40% of students strongly agreed that it was "safe to hold unpopular positions on campus." Eric L. Dey et al., *Engaging Diverse Viewpoints: What Is the Campus Climate for Perspecive-Taking?* 7 (Washington, D.C.: Association of American Colleges and Universities, 2010), *available at* http://tinyurl.com/Dey2010. When students and faculty no longer feel safe *holding* controversial opinions, it is clear they would also not feel safe *expressing* such opinions.

about her—serves as yet another example of a university erroneously believing it must chip away at protected free speech in order to comply with Title IX. The September 6 email's definition of what is considered "regarding Ms. [W.]" is vague, since such posts need not "state her name specifically." Pet'r's Br. 7–8. This unfairly imposes upon Yeasin responsibility for third parties' interpretations of his tweets. This language forces Yeasin to guess what social media posts third parties might construe as being about Ms. W., even if they were never intended to refer to her. Courts have traditionally required objectiveness and specificity in balancing anti-harassment measures with free expression. *See Dambrot*, 55 F.3d at 1184; *see also UWM Post, Inc v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1172 (E.D. Wis. 1991). In contrast, this far-reaching prohibition on speech is subjective and overbroad, reaching a great deal of protected expression.

## CONCLUSION

For the reasons discussed above, Yeasin's off-campus speech was protected under the First Amendment. The University had no authority to limit or punish this speech, nor was it compelled to do so under Title IX. *Amici* urge this Court to affirm the decision of the District Court.

Respectfully Submitted:

DON SAXTON, #21978
Saxton Law Firm
1000 Broadway, Suite 400
Kansas City, MO 64105
Tel.: (816) 471-1700
Fax: (816) 471-1701
don@saxtonlawfirm.com
*Attorney for* Amici Curiae *Student Press Law Center and Foundation for Individual Rights in Education*

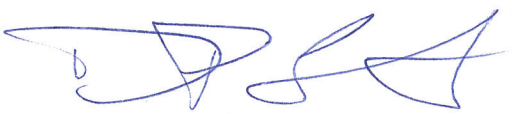
CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that on June 8, 2015, the above and foregoing was served, via email to the following:

Terence E. Liebold
Petefish, Immel, Heeb & Hird, LLP
842 Louisiana Street
Lawrence, KS 66044
tleibold@petefishlaw.com
Attorney for Navid Yeasin

and

Sara L. Trower
Associate General Counsel
245 Strong Hall
1450 Jayhawk Blvd.
Lawrence, KS 66045
strower@ku.edu
Attorney for the University of Kansas



Don P. Saxton