No. 17-1853

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

ROSS ABBOTT, COLLEGE LIBERTARIANS AT THE UNIVERSITY OF SOUTH CAROLINA, and YOUNG AMERICANS FOR LIBERTY AT THE UNIVERSITY OF SOUTH CAROLINA,

Plaintiffs-Appellants,

v.

HARRIS PASTIDES, DENNIS PRUITT, BOBBY GIST, and CARL R. WELLS,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA, NO. 3:16-CV-538,
THE HONORABLE MARGARET B. SEYMOUR, PRESIDING

BRIEF OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 26.1 and Fourth Circuit Rule 26.1, Plaintiffs-Appellants Ross Abbott, College Libertarians at the University of South Carolina, and Young Americans for Liberty at the University of South Carolina state that Ross Abbott is an individual for whom no corporate disclosure statement is required, and that neither College Libertarians at the University of South Carolina nor Young Americans for Liberty at the University of South Carolina has a parent corporation, and that no publicly held corporation owns 10% or more of their stock.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This action arises under the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. §§ 1983 and 1988. The District Court and this Court have jurisdiction under 28 U.S.C. §§ 1331 and 1343, and this Court has jurisdiction under 28 U.S.C. § 1292(a)(1) to hear this appeal from the District Court's July 11, 2017, order granting defendants' motion and second motion for summary judgment and denying plaintiffs' cross-motion for summary judgment. Plaintiffs timely filed their notice of appeal under Fed. R. App. P. 4(a)(1)(A) on July 21, 2017.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Appellants have standing to bring a facial challenge under the First Amendment to STAF 6.24, the University of South Carolina's Student Non-Discrimination and Non-Harassment Policy, under which Appellants were investigated for holding a Free Speech Event.

2. Whether STAF 6.24 violates the First Amendment because it allows the University to restrict speech based on broad, vague, and undefined terms, and includes no requirement that the expression subject to regulation be objectively offensive.

3. Whether STAF 6.24 is unconstitutional as applied to the Appellants, where USC has no screening process for meritless or frivolous complaints, where the University does not employ the least restrictive means of reviewing allegations, and where the District Court found the resulting investigation of Appellants chilled their constitutionally-protected speech.

INTRODUCTION

The University of South Carolina ("USC") maintains policies that function as a repressive speech code. The University's overly broad prohibitions and restrictions on harassment and discrimination unlawfully define speech to be restricted, and USC has enforced this unlawful restriction by subjecting speakers to official inquiry that privileges censorship over free expression. In this case, the Appellees, officials at the University, sent a "Notice of Charge" to the Appellants, Ross Abbott, the Young Americans for Liberty at the University of South Carolina ("YAL"), and the College Libertarians at the University of South Carolina ("College Libertarians"), not because they hurled epithets at other students or engaged in harassment, but because they held a *school-approved* Free Speech Event during which a few students were offended by materials of which USC officials had previously been made aware. Appellants tried to open a dialog with the campus community about the importance of free expression, but it resulted in a very different lesson – that you can get in trouble at USC *for simply talking about free speech*.

The District Court erroneously concluded that neither Abbott nor the student groups have standing to challenge the policies under which they were investigated based on the *non sequitur* that the policies do not apply to them. JA 590-592. And it held the policies were constitutional as applied – despite expressly finding

Appellants' speech was chilled by USC's investigation – because their application was an attempt to "balanc[e] … students' rights to freedom of speech and rights to be free from discrimination." JA 587. The holding violates the cardinal principle that there is no right not to be offended, *Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985), and (even if USC's policies could be equated with constitutional commands) the rule that "[w]here the First Amendment is implicated, the tie goes to the speaker, not to the censor." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 474 (2007).

But this case concerns more than just the fact that USC values bureaucratic process over free speech, or that the District Court misapplied fundamental First Amendment principles. It involves nothing less than the purpose of higher education and the soul of the university. As former University of Chicago President Robert M. Hutchins observed, "without a vibrant commitment to free and open inquiry, a university ceases to be a university." It is not the proper role of higher education to shield individuals from ideas or opinions they find unwelcome, disagreeable, or even deeply offensive.

The University of Chicago reaffirmed this commitment to freedom of expression in 2014:

> Although the University greatly values civility, and although all members of the University community share in the responsibility for maintaining a climate of mutual respect, concerns about civility and mutual respect can never be used as a justification for closing off

> discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community.

University of Chicago, Report of the Committee on Freedom of Expression (2014). These are not new concerns. Forty years earlier, a similar inquiry at Yale University found that "[t]he history of intellectual growth and discovery clearly demonstrates the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable." Report of the Committee on Freedom of Expression at Yale (Dec. 23, 1974). The Yale Committee observed that "[t]o curtail free expression strikes twice at intellectual freedom, for whoever deprives another of the right to state unpopular views necessarily also deprives others of the right to listen to those views." *Id*. This Court should help restore those values by reversing the erroneous decision below.

STATEMENT OF CASE

A. Statement of Facts

The Free Speech Event

Appellants held a "Free Speech Event" at USC in November 2015 to raise awareness on campus about threats to freedom of expression in higher education. JA 573. They wanted to highlight recent examples of censorship from other schools, including action by Modesto Junior College to prevent a student from distributing copies of the Constitution on Constitution Day because he was outside the school's ironically-named "Free Speech Zone"; efforts by George Washington

University to suspend and sanction a student who had displayed a small bronze swastika to explain the symbol's ancient Indian origins; and Brandeis University's punishment of a professor who, during a classroom discussion, had defined (and criticized) the slur "wetback." JA 17-19, 42, 48, 52.[1] They also asked students to sign a petition in support of free speech at USC.

Abbott, who was then President of the College Libertarians, obtained advance approval for the Free Speech Event from Kim McMahon, USC's Director of Campus Life. Abbott described the examples of censorship the groups planned to highlight through displays describing how each incident arose, why principles of free expression apply, and how each one was resolved. JA 558-559, 565-566, 573. He explained that the displays would include words or images that likely would be controversial (*e.g.*, an Indian swastika, criticism of the slur "wetback," anti-Israeli sentiment, etc.). JA 573. McMahon approved the proposal, noting: "I see no controversy in educating the campus about what is happening in the world. My goal would be to help you organize in a way that the 'controversy' is a chance to

[1] Other examples included the University of Missouri urging students to report "hateful or hurtful speech" to the police, Chicago State University censoring a faculty blog, Georgetown University's refusal to recognize a pro-choice student organization and limiting free speech areas on campus, California State University-Fullerton's decision to sanction a sorority for hosting a "Taco Tuesday" recruiting event, the University of Illinois's decision to rescind its offer of a faculty position to Professor Steven Salaita because he criticized Israel on his personal Twitter account, and Northwestern University's censorship of an online publication of its medical school. JA 17-19, 39-64.

learn and grow (and even be a bit uncomfortable), not further any intolerance, censorship or acts of incivility." JA 565-566. The Free Speech Event took place as planned without any disruption or threats of unrest.

Student Complaints and the Notice of Charge

Despite the prior approval, Defendant Carl Wells, Assistant Director of USC's Office of Equal Opportunity Programs ("EOP"), sent Abbott a "Notice of Charge" the day after the event. JA 66-76, 575. The Notice appended Formal Complaints of Discrimination that had been filed in response to the Free Speech Event by three students. *Id.* The first complaint alleged Appellants "hung several offensive signs at their event," including a "poster that depicted a swastika," and another that "had the word 'Wetback' on it and described what the slur meant." It alleged that Appellants "seem to want to use university resources and space to post offensive symbols and racial slurs," and described that message as "especially annoying to student organizers" who "make sure that we limit cursing and sexual innuendo in order to make our events more palatable to members of the administration." The complainant urged that the College Libertarians and YAL "should lose access to University funding for future events" as punishment. JA 20-21, 67-68.

The second complaint echoed the first, citing Appellants' "multiple offensive signs" that purportedly illustrated "how bigoted our student body can

be." It demanded that Appellants be prevented from displaying "symbols that could incite a riot," which "subject other students [and] prospective students to seeing inflammatory posters and offensive imagery." JA 21, 72-73. The third complaint alleged Appellants engaged in discrimination by displaying "[a] flag with a Nazi symbol," and by "refus[ing] to remove it, citing 'free speech' as their reason." It further alleged that "[a] jewish friend was violently triggered by seeing the symbol, and now feels unsafe on campus," and demanded that USC authorities find Appellants' event constituted a "hate crime against USC's Jewish population," and "require the event's organizers to apologize." JA 21, 75-76, 575.

The Notice of Charge instructed Abbott to respond within five days over the Thanksgiving holiday to schedule an appointment to "discuss the charges alleged," and said Abbott must participate in mediation to "resolve the complaint." JA 66, 575. Should the parties be unable to mediate, Wells' letter said his office would "investigate the complaint," which would result in "findings and recommendations" for review by USC's Provost, and its President. The Notice of Charge instructed Abbott not to contact any of the complainants, and he was directed not to discuss the matter "with any member of the faculty staff or student body." JA 20, 66, 575.

Abbott contacted Wells, who stated that an investigation into the complaints would be pursuant to University policy EOP 1.01, which details Equal Opportunity

Complaint Processing Procedures. JA 561, 575-576; *see* JA 78-88. He further confirmed that if the investigation resulted in an adverse finding, Appellants would be subject to the EOP Office's authority to impose sanctions ranging from mandatory education/awareness, to suspension, or even expulsion. JA 561.

Meeting With Wells

Abbott met with Wells on December 8, 2015 as directed by the Notice of Charge, and was accompanied by Michael Kriete, President of YAL. JA 561, 569, 576. With Wells' permission, Abbott recorded the forty five-minute meeting. JA 158-194, 561, 569, 576. Abbott presented Wells with a letter pursuant to University policy EOP 1.01, setting forth his defense of the Free Speech Event. JA 104-106, 576. He asked Wells why he was required to attend the meeting to answer for his speech and that of the student organizations since the event had been approved by the University in advance. JA 162-164. Abbott said that he would not agree to a mediated resolution or other kind of "plea bargain" of any complaints because he had done nothing wrong by organizing or participating in the Free Speech Event. JA 104-106, 177, 188.

Abbott's letter suggested several actions USC could take to limit the inquiry's chilling effect. JA 104-106, 576. Specifically, it sought termination of the investigation and written confirmation that no further action would be taken, and no sanctions imposed, against Abbott, the College Libertarians, or YAL

because of the Free Speech Event; it asked that the complaints be expunged from University records; and it sought written clarification of how the University policies are to be interpreted and applied so as not to conflict with students' First Amendment rights. In particular, it sought a commitment that the University would not find illegal discrimination or harassment had occurred unless the behavior in question is severe, pervasive, and objectively offensive, consistent with Supreme Court precedent. It also requested that USC join a statement produced by a committee at the University of Chicago reaffirming the importance of free speech in a university setting. JA 104-106.

Despite McMahon's prior approval of the Free Speech Event, Wells said it was necessary to have the meeting with Abbott and Kriete to determine the event's "context." JA 159, 161-162, 164, 166, 576. However, Wells asked no questions about what happened at the event or about whether there had been any confrontations. Instead, he probed what College Libertarians and YAL were trying to achieve, what their message was, and how it related to the particular examples of speech on other campuses. *E.g.*, JA 166-167.

Two weeks after the meeting, Wells sent Abbott a letter on December 23, 2015, saying the EOP Office would not "move any further in regard to this matter," and "found no cause for investigating." JA 196, 576. Wells did not acknowledge or respond to the requests in Abbott's letter.

Chilling Effects

Because of the November 24, 2015 Notice of Charge, and until the filing of this action on February 23, 2016, the College Libertarians "avoided putting on any public events at USC." JA 562-563, 585-586. Abbott believed that because the College Libertarians' events often touch on "controversial public policy and free speech issues," there was a real possibility that he or other members of the College Libertarians group "would again face possible discipline, or in the least, be called in by Mr. Wells or another administrator to justify our actions." JA 562, 586. As a consequence, before filing suit, Plaintiffs canceled a planned Marijuana Legalization Rally. JA 563-586.

YAL similarly hesitated to put on any public events at USC before the suit was filed, and when they held a pro-capitalism event in February 2016, Kreite said YAL members "were worried that students might find this event offensive and could result in our group and us as individuals being punished by the University for offending students." JA 570, 586. As a result, YAL members "were hesitant to engage with students who disagreed with [their] event out of fear they would complain to the University and [they] would be further punished." JA 570.

USC's Student Non-Discrimination and Non-Harassment Policy

Under USC's Student Non-Discrimination and Non-Harassment Policy, STAF 6.24, a student or campus organization may be sanctioned for engaging in

"unwelcome" or "inappropriate" verbal conduct (meaning "speech"), including "objectionable epithets, demeaning depictions." JA 91-92, 577. The policy does not define these terms, which apply broadly to such things as "unwelcome and inappropriate letters, telephone calls, electronic mail, or other communication," "repeated inappropriate personal comments," speech that employs "sexual innuendos and other sexually suggestive or provocative behavior," and even "suggestive or insulting gestures or sounds." JA 90-99.

STAF 6.24 states that "[n]othing in this policy is intended to impede the exercise of those rights protected under the First Amendment of the U.S. Constitution," JA 90, but otherwise does not describe how the scope of the policy is limited. It prohibits conduct described as "sufficiently severe, pervasive, or persistent" so as to interfere with the educational environment, but does not require that speech subject to regulation be objectively offensive. JA 91-92. Potential penalties for violations can be severe.[2]

[2] Potential sanctions for individuals include the possibility of expulsion, suspension, conduct probation, conditions or restrictions on University privileges, written warnings, fines or restitution, housing sanctions, required attendance at educational or community service events, and "any other sanctions deemed appropriate." JA 84, 97-98. Potential penalties for organizations include permanent revocation of organizational registration, suspension of rights and privileges for a specified time, conduct probation, conditions or restrictions on University privileges, written warnings, fines or restitution, required attendance at educational or community service events, and "any other sanctions deemed appropriate." JA 98.

USC's policies assist students who lodge complaints against speakers in various ways. The University offers pre-complaint counseling, JA 78, provides assistance with filing complaints, JA 79, and facilitates mediation. Under USC's informal resolution procedures, "[t]he alleged offender may be asked, politely but firmly, to cease the offensive behavior," and "[i]nvestigation is optional." JA 79-80. Even if there is an informal resolution, complaints are the subject of official reports.[3]

The policies provide complainants with multiple avenues of recourse if the EOP Office rejects the complaint. If the EOP Office finds no reasonable cause to believe illegal discrimination or harassment has occurred, it may dismiss the complaint, but is required to advise the complainant that if dissatisfied with the decision, he or she may request review by USC's President, or file a complaint with the Office of Civil Rights of the Department of Education ("OCR") or the Department of Justice ("DOJ"). JA 83, 96. Also, even if the EOP Office dismisses a complaint, the school's policies provide that it may "inform the University community of the occurrence(s) in order to educate the community about issues

[3] In the case of mediation, the policy requires "a memorandum for the record indicating the complaint, the action taken and the resolution achieved. This memorandum will be filed in [EOP's] permanent files." JA 80. The EOP Office is required to provide an annual report to the President summarizing discrimination and harassment complaints and their resolution (both informal and formal).

presented by the behavior and reaffirm the University's commitment to equal opportunity." JA 96.

B. Procedural Background

Plaintiff filed this civil rights action asserting three counts: (1) an as-applied challenge to the investigation of Plaintiffs' Free Speech Event under STAF 6.24, and similar restrictions set forth in the Carolinian Creed; (2) a facial challenge to STAF 6.24 and the Carolinian Creed; and (3) a facial challenge to USC's Facilities and Solicitation Policies that created an unconstitutional "Free Speech Zone" that prohibited expression on all but a tiny fraction of campus. On cross-motions for summary judgment, the District Court granted judgment for the Defendants and dismissed the case with prejudice.

The court denied the as-applied challenge to USC policies despite finding that Appellants' speech was chilled by the Notice of Charge. It upheld USC's approach as constitutional because "Defendants chose a narrow approach to addressing the rights of all students on campus: those who participated in the event and those who felt discriminated by it." JA 588. The District Court did not reach the merits of the facial challenge to STAF 6.24 because it concluded Appellants lacked standing to challenge the policy, based on its holdings that the Free Speech Event was "not covered by the sexual harassment and discrimination policy," and that "Plaintiffs have failed to show they intend to violate STAF 6.24." JA 590.

Challenges to the Facilities and Solicitation Policies, and the Carolinian Creed were dismissed as moot after USC amended the policies. JA 101-102, 266-272, 277-285, 593-595.

SUMMARY OF ARGUMENT

The District Court's refusal to consider Appellants' facial challenge to STAF 6.24 is wrong and misconstrues the law. Although the court purported to acknowledge that more relaxed standing requirements apply to First Amendment challenges, it did not apply the correct standard. And its finding that Appellants had failed to demonstrate a "credible threat" that the policies would be enforced against them is inapposite where, as here, the policy *was* applied and enforcement *was* threatened. Standing unquestionably exists where a litigant's speech is chilled by the policy, as the court agreed was in this case. None of the authorities the District Court cites for a lack of standing apply, where the government took steps to enforce the law, as it did in this case.

The court's conclusion that STAF 6.24 does not apply to "academic discussions" like the Free Speech Event, and its reasoning that Wells' eventual dismissal of the complaints should have assured Appellants that the policy would not be enforced against "anything similar to the prior free speech event," contradicts the court's own reasoning and is unsupported by authority. Cases the District Court cites suggesting that "past illegal conduct" does not support

standing, do not apply to laws or policies that impose a continuing burden on First Amendment rights. The court's reasoning that standing requires a future intent to violate the policy is nonsensical when the challenge is to overly broad and vague restrictions that chill student speech. Ultimately, nothing about Appellants' interaction with Wells suggests STAF 6.24 would not apply to future free speech events, and, by the District Court's reasoning, the policy *must* be applied if anyone is offended by student speech in order to fulfill USC's compelling interest in combatting potential discrimination.

On the merits, STAF 6.24 is facially invalid because it empowers USC to restrict constitutionally-protected speech using vague and overly broad terms. Such speech regulations are subject to "the most exacting scrutiny," and virtually all courts that have addressed the substance of campus speech codes like USC's have found them unconstitutional. In particular, STAF 6.24 prohibits broad categories of speech using nebulous descriptions like "objectionable epithets" and "demeaning depictions," and the policy contains no requirement that such speech be "objectively offensive." Such expansive speech prohibitions cannot be cured with a proviso that STAF 6.24 should be enforced consistently with the First Amendment, because the clause adds no clarity to the rules, and such an overbroad policy cannot be saved by the government's promise "to use it responsibly." *United States v. Stevens*, 559 U.S. 460, 480 (2010).

USC's investigation of Appellants pursuant to STAF 6.24 also violated the First Amendment. That the policy was applied to a Free Speech Event that USC now says *should have been entirely exempt* speaks volumes, and is *prima facie* evidence that USC's actions were unconstitutional. It is immaterial that USC did not sanction Appellants for their speech, and the District Court agreed that USC's Notice of Charge had a significant chilling effect. The First Amendment requires that any investigation that threatens to restrict speech must employ the least restrictive means, including a way to screen out meritless complaints. But USC's complaint process, and the way it was used in this case, heavily favors those who seek to limit or punish speech, enabling the process to serve as an unconstitutional heckler's veto. USC officials made no attempt to employ less restrictive enforcement procedures although many were readily available, and it imposed a preemptive gag order on Appellants during the investigation. As a consequence, Appellants' speech was chilled.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews *de novo* the District Court's order granting summary judgment and its ruling that a party lacks standing, *Cahaly v. Larosa*, 796 F.3d 399, 404 (4th Cir. 2015), applying the same legal standards as the District Court. *Smith v. Gilchrist*, 749 F.3d 302, 307 (4th Cir. 2014). *De novo* review also is

required in that, for cases raising First Amendment challenges, "an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *In re Morrissey*, 168 F.3d 134, 137 (4th Cir. 1999) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 499 (1984) (quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 284-86 (1964))).

Summary judgment lies only if there is no genuine dispute as to any material fact, and the movant is entitled to judgment as a matter of law, viewing all facts and reasonable inferences from them in the light most favorable to the nonmoving party. *Gilchrist*, 749 F.3d at 307 (citing, *inter alia*, Fed. R. Civ. P. 56(a)). *See also Educational Media Co. at Va. Tech, Inc. v. Insley*, 731 F.3d 291, 297 (4th Cir. 2013). In reviewing a challenge to a restriction on speech, it is "well established" that the party seeking to uphold the restriction carries the burden of justifying it. *Educational Media*, 731 F.3d at 297 (quoting *Edenfield v. Fane,* 507 U.S. 761, 770 (1993)).

II. USC'S ANTI-DISCRIMINATION POLICY (STAF 6.24) VIOLATES THE FIRST AMENDMENT BECAUSE IT IMPOSES BROADLY-WORDED AND VAGUE RESTRICTIONS ON PROTECTED SPEECH

The First Amendment's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *Times v. Sullivan*, 376 U.S. at 270, is uniquely critical in universities that are "peculiarly the

'marketplace of ideas.'" *Healy v. James*, 408 U.S. 169, 180 (1972). Because of this "background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition," the "first danger to liberty lies in granting the State the power" to limit freedom of expression on college campuses. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995). Constitutional protection is particularly important where speech may cause offense, and the Supreme Court has stressed "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. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973). USC's policies on non-discrimination and non-harassment violate these fundamental requirements by empowering the University to investigate and punish speech that does no more than offend others. The District Court erroneously failed to consider the facial validity of this policy because it incorrectly held Appellants do not have standing to challenge the policy *under which they were investigated and had their speech chilled*.

A. The District Court Erred in Holding Appellants Lack Standing to Challenge STAF 6.24

The District Court's holding that Appellants lack standing to challenge STAF 6.24 is fundamentally at odds with both the facts and the court's own reading of the regulation. It suggested the type of "academic discourse" illustrated by the Free Speech Event "is not speech covered by the sexual harassment and

discrimination policy," JA 590, yet USC in fact *did* threaten enforcement against Appellants' "academic discourse." The court stated that Appellants should have been satisfied following their meeting with Wells that "anything similar to the prior free speech event" would not be subject to future enforcement, *id.*, but by the court's own reasoning, the University would have no choice but to take action against any future event that drew complaints about "discrimination." The District Court also misstates the law to suggest Appellants must show "frequent" or "actual" use of the policy to silence speech to establish standing. The decision is plainly wrong.

1. The Court Misconstrued Applicable Law

Although the District Court acknowledged that rigid standing requirements are relaxed when a case presents a First Amendment challenge, JA 589, it erred in holding Appellants lacked standing for failing to show "frequent actual or threatened use of STAF 6.24 to silence the types of speech in which [they] were engaging." JA 592. This conclusion misconstrues the law. In a First Amendment challenge, there is no requirement that a plaintiff show actual enforcement of the law to silence speech, much less that such censorial acts be frequent. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). And where there has been threatened use of the regulation against a plaintiff's speech – as there was here – the requirement of a "credible threat of enforcement" is quite obviously satisfied. *Susan B. Anthony*

List v. Driehaus, 134 S. Ct. 2334, 2342 (2014); *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013).

This Court has emphasized that "First Amendment cases raise unique standing considerations that tilt dramatically toward a finding of standing." *Cooksey*, 721 F.3d at 235 (quoting *Lopez v. Candaele*, 630 F.3d 775, 781 (9th Cir. 2010)). To demonstrate standing, a plaintiff must have suffered an injury that is "credible," not "imaginary or speculative." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). And in First Amendment cases, "the injury-in-fact element is commonly satisfied by a sufficient showing of 'self-censorship, which occurs when a claimant is chilled from exercising h[is] right to free expression.'" *Cooksey*, 721 F.3d at 235 (quoting *Benham v. City of Charlotte*, 635 F.3d 129, 135 (4th Cir. 2011)). For this reason, even pre-enforcement challenges are permitted where a law threatens to restrict First Amendment activity and speech is chilled as a result. *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999).

The District Court simply misread the law to conclude there is "no credible threat of enforcement," as *none* of the cases it cites relate to the circumstance presented here – where the speakers in fact *were* threatened with enforcement of the challenged regulation. It relies primarily on *Rock for Life-UMBC v.*

Hrabowski, 411 Fed. App'x 541 (4th Cir. 2010), JA 591-592, a case involving a dispute about what campus location would be best-suited for a display of posters opposing abortion. Students challenged the school's decision to move the display to a less prominent location under its facilities use policy, but they also challenged the school's sexual harassment policy (which was not implicated in the move). This Court found standing to challenge the facilities use policy but not the sexual harassment policy because "[u]nlike UMBC's sexual harassment policy and its code of conduct, UMBC actually applied its facilities use policy to regulate the plaintiffs' speech." 411 Fed. App'x at 549.

Rock for Life-UMBC is thus inapposite. The plaintiffs there alleged no facts suggesting officials ever threatened to punish their speech as sexual harassment, there was no suggestion that disciplinary enforcement of the sexual harassment policy was even discussed at any point, and school officials "never undertook a 'concrete act' to investigate or sanction the plaintiffs for a violation of the code of conduct." *Id*. at 548-49. Here, by sharp contrast, Appellants clearly alleged they had been threatened with enforcement of STAF 6.24, USC officials unquestionably considered taking such action, and they initiated concrete steps to do so by sending the Notice of Charge, by invoking University policy EOP 1.01, and by requiring Appellants to attend a meeting to justify their Free Speech Event. They also imposed a gag order for the duration of the investigation.

In addition – and unlike this case – the plaintiffs in *Rock for Life-UMBC* were unable to name any form of expressive activity that was chilled for fear of violating the policy. *Id*. at 548. Here, however, members of both YAL and the College Libertarians cited specific events they cancelled or put off, and described the ways in which their interactions with other students were muted as a result. JA 562-563, 470. The District Court even agreed that "Plaintiff's speech was chilled in that a student of 'ordinary firmness' may have self-censored his or her future speech while awaiting notice from Wells on the status of the official student complaints." JA 586-587. Such a chilling effect is sufficient to confer standing. *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 499-500 (4th Cir. 2005).

It does not matter that USC characterized its investigation as "preliminary," or that it ultimately decided not to pursue charges. *See*, *e.g.*, *Driehaus*, 134 S. Ct. at 2342 (organization had standing to challenge law prohibiting false political speech even though the election had taken place and the complaint withdrawn); *Lopez*, 630 F.3d at 786 ("preliminary efforts to enforce a speech restriction or [] past enforcement" is "strong evidence" of standing). This Court held such a preliminary investigation was sufficient to confer standing in *Cooksey*, 721 F.3d at 236, where the North Carolina Board of Dietetic/Nutrition sent a letter to an individual who offered nutritional advice on his website. The letter was an effort

to seek an informal resolution of complaints that he was operating without a license. Although the Board never took official action and later closed the matter, this Court found the plaintiff had standing to bring a First Amendment claim because he "experienced a non-speculative and objectively reasonable chilling effect of his speech due to the actions of the State Board." *Id*. Appellants have standing to challenge STAF 6.24 for the same reason.

2. Standing and Future Enforcement

The District Court also appears to suggest that, even if Appellants may once have faced possible sanctions under STAF 6.24, they no longer are at risk. The court cites *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974), for the proposition that past exposure to illegal conduct does not demonstrate a current controversy that supports injunctive relief, and states that Appellants should have been satisfied following their meeting with Wells that STAF 6.24 would not be enforced against "anything similar to the prior free speech event." JA 589-590. It concludes that Appellants lack standing because they failed to show, "concretely, that they intend to violate the challenged law." JA 590.

This is wrong both on the law and the facts. Appellants obviously have standing to challenge overly broad and vague speech restrictions, *Joseph H. Munson Co*., 467 U.S. at 956, and their ability to challenge prospective application of the regulations is not undermined by the fact that they already have been the

victims of "past illegal conduct." Just the opposite is true; USC's prior investigation of Appellants' speech illustrates why the threat of future action against them is not "conjectural" and their concerns are not "hypothetical." *See City of Houston v. Hill*, 482 U.S. 451, 459 n.7 (1987) (activist's prior arrests and intent to continue advocacy held sufficient to confer standing to challenge ordinance prohibiting interrupting a police officer).

Cases the District Court cites regarding "past conduct" are irrelevant. They are not First Amendment cases and have nothing to do with overly broad and vague speech restrictions. *O'Shea* involved a civil rights claim in which the plaintiffs sought to enjoin past practices including discriminatory bond setting, sentencing, and jury fee practices. There were no allegations that any relevant state criminal statute was unconstitutional on its face or as applied, and the Court held that the prospect of future injury (and standing) in the absence thereof was entirely speculative, depending on "the likelihood that respondents will again be arrested for and charged with violations of the criminal law and will again be subjected to bond proceedings, trial, or sentencing before petitioners." 414 U.S. at 495-96. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), which the District Court also cites, is much the same.[4]

[4] JA 589. *Lyons* held that a plaintiff lacked standing to seek injunctive relief after having been subjected to an illegal choke-hold unless he could establish "a real and immediate threat that he would again be stopped for a traffic violation,

The Seventh Circuit distinguished *O'Shea* and *Lyons* when it held protestors have standing to challenge an overly broad and vague "disorderly conduct" ordinance. *Bell v. Keating*, 697 F.3d 445, 451-56 (7th Cir. 2012). It explained that, in facial challenges to speech-restrictive laws, litigants have standing to seek relief because "a statute criminalizes the plaintiff's conduct," while in cases like *O'Shea* and *Lyons*, the plaintiff "seeks relief from the defendant's criminal or unconstitutional behavior," where "the putative injury typically proves too remote or attenuated." *Id*. at 451-52. Standing exists for those affected by speech-restrictive laws, the court concluded, because "a plaintiff who wishes to engage in conduct arguably protected by the Constitution, but proscribed by a statute, successfully demonstrates an immediate risk of injury." *Id*. at 451.[5]

Such standing is particularly important – and apparent – where the challenge is that a statute or regulation is vague and/or overbroad. The District Court's

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or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part." 461 U.S. at 105.

[5] More relaxed standing rules also govern facial First Amendment challenges because of a "judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973); *Joseph H. Munson Co*., 467 U.S. at 958 ("Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society—to prevent the statute from chilling the First Amendment rights of other parties not before the court.").

insistence that Appellants lack standing unless they can show "that they intend to violate STAF 6.24," JA 590, is not a meaningful prerequisite where "harassment" is broadly defined (or, as here, undefined) and "[e]very word spoken by a student on campus is subject to [regulation]." *McCauley v. Univ. of V.I.*, 618 F.3d 232, 252 (3d Cir. 2010). Under such codes, "[e]very time a student speaks, she risks causing another student emotional distress and receiving punishment." *Id*. *See also College Republicans at San Fran. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1018 (N.D. Cal. 2007) (attempt to enforce "opaque and malleable" restrictions "intensifies the risk that students will be deterred from engaging in controversial but fully protected activity out of fear of being disciplined for so doing"). It is enough that the record shows Appellants are subject to the challenged policies, that they intended to continue engaging in campus speech activities, and that they were chilled in their endeavors. JA 562-563, 570.

There is no basis for the court's assumption that Appellants should have been assured following the meeting with Wells that "anything similar to the prior free speech event" would not be subject to STAF 6.24. If that were true, Wells could have said so at the meeting, but did not. In fact, Wells said nothing to indicate such events were exempt from the policy despite the fact that Abbott described the full context of the Free Speech Event and told Wells "I don't see how this falls under something that needs to be investigated." JA 166, 178. Even after

the explanation, Wells said he would need to determine whether there had been any violations of USC policy or federal law, and told Abbott "the next step is for us to determine whether we will open an investigation or not." JA 181, 185. Abbott explained how the investigation was chilling the speech activities of the two organizations, and gave Wells a letter asking how USC's policies could possibly apply to "the public discussion of ideas."[6]

Even after all this, Wells said nothing about "academic discourse" being exempt from the policy, and it took another two weeks for him to send a letter saying he did not plan to investigate the matter further. When Wells finally responded, he did not say that such events would be exempt from future investigations and offered no written clarification of USC's policies. JA 196. It is difficult to tell what aspect of this encounter the Appellants should have found reassuring.

Ultimately, however, the District Court's analysis explains why Wells was in no position to provide any "assurances," and its reasoning confirms USC would

[6] The letter stated that "[e]very day this matter is left open, subject to investigations, reports, and sanctions, is a day that the exercise of constitutionally-protected rights is threatened," and it asked Wells to terminate the investigation, expunge any records, and provide written assurance that neither Abbott nor the student organizations would be sanctioned. In addition, it asked USC "to clarify in writing how the University policies are to be interpreted and applied in the future so as not to conflict with students' First Amendment rights." JA 104-106. None of these requests were addressed either in the meeting or afterward.

have no choice but to take action against any future free speech event that caused "offense." In ruling on the as-applied challenge, the court found that universities have a substantial interest in maintaining an educational environment free from discrimination, and that USC has "an obligation" to balance "students' rights to freedom of speech and the rights to be free from discrimination." JA 585. By the court's reasoning, if Appellants held another Free Speech Event tomorrow, and USC received complaints, the school would be *obligated* to take action, just as it did in this case. And if it were true that STAF 6.24 simply does not apply to discussions of free speech or other academic endeavors, USC would simply have dismissed the complaints as having been inappropriately filed, and there would have been no need for any investigation. Consequently, any conclusion that events like Appellants' Free Speech Event do "not constitute speech regulated by the harassment policy" is both internally contradictory and false. JA 590.

But whatever else may be true, USC cannot maintain that enforcing STAF 6.24 in response to the Free Speech Event was necessary to serve a compelling interest, but at the same time claim Appellants lack standing because the policy does not apply to such events. Under the policy's broad terms, there can be no assurance that academic discussions or "free speech events" will not be the target of future enforcement. The same reasons STAF 6.24 it is unconstitutional on its face strongly reinforce Appellants' standing to challenge the policy.

B. The First Amendment Requires Anti-Discrimination Measures to Be Narrowly-Framed, Precisely Defined, and Limited to Pervasive and Objectively-Offensive Harassment

STAF 6.24 operates as a speech code that imposes content-based regulation on student speech. Where such policies regulate expression, USC cannot avoid constitutional scrutiny simply because it purports to pursue the objective of combatting discrimination, and its policies through which it strives to do so are subject to strict First Amendment scrutiny.[7]

"There is no categorical 'harassment exception' to the First Amendment's free speech clause." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001); *Bair v. Shippensberg Univ.*, 280 F. Supp. 2d 357, 372 (M.D. Pa. 2003) (constitutional problems cannot be avoided by "[s]imply utilizing buzzwords applicable to anti-discrimination legislation"). Any regulation of harassment to prevent a hostile learning environment must be drafted and applied with narrow specificity to avoid violating the First Amendment. *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 393 (4th Cir. 1993); *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968, 972 (9th Cir. 1996); *Reed*, 523 F. Supp. 2d 1005. *Cf. Berger*, 779 F.2d at 999; *Rodriguez v. Maricopa Cty. Cmty. Coll.*

[7] The District Court did not address the facial validity of STAF 6.24 because of its erroneous decision on standing. If this Court decides to reverse on standing, there would be no need for a remand, as questions of First Amendment law are reviewed *de novo*. *See supra* 17-18 (citing *In re Morrissey*, 168 F.3d at 137).

Dist., 605 F.3d 703, 709 (9th Cir. 2010) ("First Amendment principles must guide our interpretation of the right to be free of purposeful workplace harassment.").

Such regulations are subject to "the most exacting scrutiny." *Boos v. Barry*, 485 U.S. 312, 321 (1988); *Saxe*, 240 F.3d at 206-07. This demanding standard requires the government to prove its efforts are necessary to serve a compelling interest, and that it is using the least restrictive means to achieve its purpose. *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000). Thus, when anti-discrimination or anti-harassment laws seek to regulate offensive words or symbols, the government is required to prove the expression was "so severe, pervasive, and objectively offensive, and that [it] so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999); *Saxe*, 240 F.3d at 205-06.[8]

Additionally, such restrictions on expressive activity are void for vagueness if their terms are not clearly defined such that a person of ordinary intelligence can readily identify the standards to be applied. *Reno v. ACLU*, 521 U.S. 844, 874-75

[8] *See also Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998) (Title VII is not violated by the "mere utterance of an … epithet which engenders offensive feelings" unless so "severe or pervasive as to alter the conditions of … employment").

(1997); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Such lack of precision vests governmental authorities with unrestricted discretion, which increases the likelihood that the government official may discriminate based upon the content of the speech or the viewpoint of the speaker. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763-64 (1988).

Any restrictions on speech also must be narrowly tailored, and a law is facially invalid if a substantial number of its applications are unconstitutional. *Stevens*, 559 U.S. at 473; *Broadrick*, 413 U.S. at 615. In this respect, the vagueness and overbreadth of a speech regulation are interrelated, because "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Stevens*, 559 U.S. at 474 (quoting *United States v. Williams*, 553 U.S. 285, 293 (2008)). Where such broad and nebulous concepts are used to restrict speech, "'[i]t is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all.'" *Baggett v. Bullitt,* 377 U.S. 360, 374 (1964) (citation omitted).

C. STAF 6.24 is Overly Broad, Vague, and Not Limited to Instances of Actual Discrimination

The prohibitions in STAF 6.24 are neither precise nor narrowly framed as the First Amendment requires. It imposes broad restrictions on speech by banning (without defining) such things as "objectionable epithets, demeaning depictions,"

"unwelcome and inappropriate letters, telephone calls, electronic mail, or other communication," "repeated inappropriate personal comments," speech that employs "sexual innuendos and other sexually suggestive or provocative behavior," and even "suggestive or insulting gestures or sounds." JA 91-92. Virtually every court that has reached the merits of campus speech codes that employ such broad and vague restrictions has invalidated the regulations as a violation of the First Amendment.[9] Here, it is not difficult to envision myriad

[9] *See*, *e.g.*, *McCauley*, 618 F.3d at 247-51 (invalidating campus policies prohibiting unauthorized "offensive or obstructive signs" and "conduct which causes emotional distress"); *DeJohn v. Temple Univ.*, 537 F.3d 301, 305, 317-18 (3d Cir. 2008) (invalidating sexual harassment policy that prohibited all "expressive, visual, or physical conduct of a sexual or gender-motivated nature" when "such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment"); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1182-85 (6th Cir. 1995) (invalidating anti-discrimination and harassment policy prohibiting "demeaning or slurring individuals … because of their racial or ethnic affiliation" or "using symbols, [epithets] or slogans that infer negative connotations about the individual's racial or ethnic affiliation"); *Reed*, 523 F. Supp. 2d at 1016-18 (enjoining provision of Code of Student Conduct requiring students to be "civil to one another and to others in the campus community"); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (striking down campus speech code prohibiting "insults, epithets, ridicule, or personal attacks" as unconstitutionally overbroad); *Bair*, 280 F. Supp. 2d at 373-74 (enjoining provisions of speech code prohibiting "acts of intolerance," requiring communication of beliefs so as not to "provoke, harass, intimidate, or harm another," or participating in "acts of intolerance that demonstrate malicious intentions toward others"); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wisc. Sys.*, 774 F. Supp. 1163, 1165, 1168-80 (E.D. Wisc. 1991) (striking down speech code provisions prohibiting "racist or discriminatory comments, epithets, or other expressive behavior directed at an individual" that demean racial, religious or ethnic groups and create a hostile environment); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (striking down as overly broad

examples of constitutionally protected speech that either are not severe or pervasive, or not objectively offensive, and/or are incapable of denying access to the University, that a USC official could nonetheless believe falls within the broad, undefined categories comprising STAF 6.24's prohibitions, as this case illustrates.

The vague and expansive language of USC's policy cannot be saved by the proviso in STAF 6.24 that "[n]othing in this policy is intended to impede the exercise of those rights protected under the First Amendment of the U.S. Constitution," or the University's demonstrably empty promise not to regulate "academic speech." Such precatory guidance is far from sufficient to provide the necessary clarity or precision, particularly where, as here, USC's policy fails to implement the *Davis* standard regarding harassment.

Basic First Amendment principles do not leave the speaker "at the mercy of *noblesse oblige*." *Stevens*, 559 U.S. at 480. Courts will not uphold a speech regulation that is facially overbroad simply because "the Government promised to use it responsibly." *Id*. Thus, in *Stevens*, the Supreme Court invalidated a broad ban on depictions of animal cruelty despite the fact that the law provided for a number of enumerated exceptions for expression of sufficient merit. *Id*. at 477-78.

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and vague Policy on Discrimination and Discriminatory Harassment prohibiting students from "stigmatizing or victimizing" individuals or enumerated groups).

The Court found the government's assurance that it would apply the law more restrictively than its language provides was "an implicit acknowledgment of the potential constitutional problems with a more natural reading." The Court noted that the prosecution in that case was itself evidence "of the danger in putting faith in government representations of prosecutorial restraint." *Id*. at 480. The same logic applies here.[10]

These principles have special force in cases involving the regulation of free expression at universities. In one of the first cases to consider the constitutionality of a campus speech code, *Doe v. University of Michigan*, 721 F. Supp. at 864, the court rejected the university's argument that "the Policy did not apply to speech that is protected by the First Amendment," and found it unconstitutional on its face and as applied. The court was unimpressed that the Board of Regents adopted a "Statement of Freedom of Speech and Artistic Expression" because the speech code "never articulated any principled way to distinguish sanctionable from protected speech." *Id*. at 867-68. As a consequence, "the University had no idea

[10] Despite the "Limiting Clause" in STAF 6.24, USC officials cannot explain why they did not instantly dismiss the complaints against the Free Speech Event. The answer is that USC's policy lacks discernable standards for regulating speech.

what the limits of the Policy were and it was essentially making up the rules as it went along." *Id*. at 868. Just like here.[11]

Numerous courts have reached the same conclusion that general language promising adherence to the First Amendment cannot save a constitutionally defective speech code.[12] The court in *Reed* cogently explained that the lack of any "'saving' power" in such general provisions lies in the commonsense notion that "[t]he persons being regulated here are college students, not scholars of First Amendment law." *Id*. at 1021. Comparing a list of prohibited language and behavior in a university conduct code alongside a First Amendment "savings clause," the court asked, "What path is a college student who faces this regulatory situation likely to follow?" It concluded the question is "self-answering – and the answer condemns to valuelessness the allegedly 'saving' provision … that

[11] The District Court discussed *Doe* but did not address the merits of its First Amendment analysis. It cited *Doe* only in connection with its standing analysis, and tried to distinguish it in favor of *Rock for Life-UMBC*. JA 591-592. As discussed, *supra* 21-23, the court's standing analysis is wrong.

[12] *See*, *e.g*., *UWM Post*, 774 F. Supp. at 1177-78 (policy held overly broad notwithstanding policy guidance pledging conformity with First Amendment values and offer of narrowing construction); *Dambrot*, 55 F.3d at 1182-83 (pledge of enforcement consistent with constitutional requirements did not save speech code from facial challenge where "there is nothing to ensure the University will not violate First Amendment rights even if that is not their intention"); *Reed*, 523 F. Supp. 2d at 1020 (enjoining university conduct code despite language that "prohibits disciplinary action against students based on behavior protected by the First Amendment").

prohibits violations of the First Amendment." *Id*. Of course, students may not be the only ones confused by such a policy – at USC, the administrators were unable to determine the complaints at issue here were non-actionable, notwithstanding the putative "Limiting Clause."

In addition, STAF 6.24 fails to implement the required constitutional standards for regulating speech. As explained *supra* § II.B, to ensure that laws and policies targeting discrimination or harassment in the educational setting do not conflict with the First Amendment, the Supreme Court held that such policies must be interpreted narrowly, and applied only to conduct that is "severe, pervasive, *and* objectively offensive." *Davis*, 526 U.S. at 651 (emphasis added). Yet the definition of harassment in STAF 6.24 prohibits conduct *and speech* that is "sufficiently severe, pervasive, *or* persistent" so as to interfere with the educational environment, omitting the critical requirement that the language must be "objectively offensive." JA 91-92 (emphasis added).

Not only does the language lack all three elements of the *Davis* test, it is written in the disjunctive so that only one of them is needed to violate the policy. While Appellees defended the standard as "similar" to the *Davis* test, JA 215, the Supreme Court has firmly rejected the ideas that adopting a partial constitutional standard, or a "similar" test for speech, is good enough in First Amendment cases. *See Reno*, 521 U.S. at 872 ("[j]ust because a definition including three limitations

is not vague, it does not follow that one of those limitations, standing by itself, is not vague"); *Stevens*, 559 U.S. at 479 (rejecting argument that government could ban depictions of animal cruelty using a test "largely drawn from our opinion in *Miller*").

Lack of an "objective offensiveness" requirement in STAF 6.24's definition of harassment thus renders the policy facially unconstitutional (as does its conflating other elements of the *Davis* standard). As the Third Circuit reasoned in striking down Temple University's sexual harassment policy, "[a]bsent any requirement … that the conduct objectively and subjectively causes 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. This requirement of an objective test for offensiveness has been a common element of numerous rulings on the constitutionality of university speech codes. *E.g.*, *McCauley*, 618 F.3d at 251-52 (policy is unconstitutionally subjective because it "prohibits speech without any regard for whether the speech is objectively problematic"); *Saxe*, 240 F.3d at 205-06 (harassment must be severe, pervasive and objectively offensive to satisfy First Amendment requirements); *Dambrot*, 55 F.3d at 1184 (delegating university officials task of defining what is "offensive" was ""unrestricted delegation of power' [that] gives rise to … vagueness").

Given the lack of an objective test for harassment in STAF 6.24, it is understandable why USC initiated an investigation of the Free Speech Event after receiving complaints from students who claimed nothing more than having been offended. The policy simply lacks the rigor of the *Davis* test. Even those who complained about the Free Speech Event recited having to "make our events more palatable to members of the administration" to avoid their censorial eye. JA 67. All of this illustrates the problem of speech codes that fail to employ requisite constitutional safeguards – their prohibitions "encompass any speech that might simply be offensive to a listener, or a group of listeners, believing that they are being subjected to or surrounded by hostility." *DeJohn*, 537 F.3d at 320. Consequently, the policy is facially unconstitutional.

III. USC'S INVESTIGATION OF THE FREE SPEECH EVENT AND PREEMPTIVE IMPOSITION OF A GAG ORDER CHILLED APPELLANTS' SPEECH AND VIOLATED THE FIRST AMENDMENT

As a matter of simple logic, STAF 6.24 was applied in an unconstitutional manner and the decision below is wrong. If USC's facial defense of its policies and the District Court's ruling are to be believed – and STAF 6.24 simply does not cover "anything similar to the prior free speech event" – the fact that it *was* applied to the Free Speech Event strongly supports the conclusion that this aberrant application violated the First Amendment. Also, if this Court agrees STAF 6.24 is facially invalid, then *any* such application to the Free Speech Event violates the

First Amendment. This conclusion also follows from the District Court's own reasoning. It accepted the premise that USC's complaint process is subject to strict scrutiny, but then failed to apply that standard.

A. Investigations Must Use the Least Restrictive Means of Regulating Speech, Which Includes Screening Out Frivolous Complaints

The First Amendment requires USC to use the least restrictive means of investigating STAF 6.24 complaints that involve expressive activity, because they inherently implicate First Amendment rights. *E.g.*, *Saxe*, 240 F.3d at 206 ("[W]hen anti-discrimination laws are 'applied to … harassment claims founded solely on verbal insults, pictorial or literary matter, the statute[s] impose[] content-based, viewpoint-discriminatory restrictions on speech.'") (citation omitted). The complaints in this case did little more than report the fact that some students were offended by Appellants' displays, but such "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *Boos v. Barry*, 485 U.S. 312, 320-21 (1988); *Rock for Life-UMBC*, 411 Fed. App'x at 552 (same). Strict scrutiny thus applies not only because these policies are content-based, but also because the complaint process may be employed as a form of "heckler's veto."

This Court has recognized that "[h]istorically, one of the most persistent and insidious threats to first amendment rights has been that posed by the 'heckler's

veto,' imposed by the successful importuning of government to curtail 'offensive' speech at peril of suffering disruptions of public order." *Berger*, 779 F.2d at 1001; *Rock for Life–UMBC*, 411 Fed. App'x at 554. While "this 'veto' has probably been most frequently exercised through legislation responsive to majority sensibilities," the Court has recognized "the same assault on first amendment values of course occurs when, as here, it is exercised by executive action responsive to the sensibilities of a minority." *Berger*, 779 F.2d at 1001.

Strict scrutiny thus governs the complaint process because "the right to free speech ... includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience." *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 243 (6th Cir. 2015) (*en banc*) (quoting *Hill v. Colorado*, 530 U.S. 703, 716 (2000)). Any other rule "'would effectively empower a majority to silence dissidents simply as a matter of personal predilections,'" and the government might be inclined to "regulate" offensive speech as "'a convenient guise for banning the expression of unpopular views.'" *Id*. (quoting *Cohen v. California*, 403 U.S. 15, 21, 26 (1971)).

To forestall such abuse, reviewing courts must examine the record to determine if complaints could be handled without burdening the speaker.[13] The

[13] *E.g.*, *Rock for Life–UMBC*, 411 Fed. App'x at 553 ("Providing a security presence at the Commons Terrace would have been a less restrictive means of ensuring student safety."); *Berger*, 779 F.2d at 1001 ("An appropriate Department

First Amendment thus requires the government to employ some means of weeding out insubstantial or frivolous complaints before probing the speaker's message or motivations. *E.g.*, *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 474-75 (6th Cir. 2016) (on remand after reversal) (law fails strict scrutiny where "[t]here is no process for screening out frivolous complaints or complaints that, on their face, only complain of non-actionable statements"). Any complaint process that lacks a screening process to eliminate meritless complaints necessarily chills speech.[14]

The District Court undertook no such analysis in this case. Although it agreed that Appellants' First Amendment rights are clearly established and that any regulation of student speech must "serve a compelling interest and be narrowly drawn to achieve that end," JA 584 (quoting *Sigma Chi Fraternity*, 993 F.2d at

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response, *perhaps the only one, wholly consistent with the first amendment*, would have been instead to say to those offended by Berger's speech that their right to protest that speech by all peaceable means would be as stringently safeguarded by the Department as would be Berger's right to engage in it.") (emphasis added); *Bible Believers*, 805 F.3d at 254 ("a number of easily identifiable measures … could have been taken short of removing the speaker").

[14] *See Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539, 546 (1963) ("[I]t is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest."). A lax complaint process and a presumption that requires investigating the speaker as a first step necessarily chills protected speech "[b]ecause some people take umbrage at a great many ideas, [and] very soon no one would be able to say much of anything at all." *Rodriguez*, 605 F.3d at 711.

394), it failed to apply strict scrutiny. Instead, the court purported to "balanc[e] both students' right to freedom of speech and rights to be free from discrimination," and concluded that Wells' investigation "was a narrowly drawn solution" to achieving that balance. JA 588. But it reached this conclusion without considering whether less restrictive alternatives existed, and without analyzing whether USC could have resolved the complaints without restricting Appellants' speech. This was clear error.

B. USC's Procedures Favor Complainants and Fail to Apply Non-Restrictive Means

There is no question but that the complainants in this case sought to silence the speech of Abbott, YAL, and the College Libertarians. Missing (or ignoring) the point of the Free Speech Event, they complained to USC officials that they were offended by the words and images on display – the very same ones Abbott described in his proposal to McMahon when he obtained approval for the event. *See supra* 6. While the complaints described "inflammatory posters and offensive imagery," that they misconstrued as illustrating "how bigoted our student body can be," none suggested there had been any actual harassment within the meaning of *Davis*. *See supra* 7-8. Nevertheless, the complainants demanded various sanctions be imposed on Appellants, such as a forced apology, prohibiting the display of "symbols that could incite a riot," and losing access to University funding for future events. JA 67-76.

Immediately after receiving the complaints, Wells sent Abbott the Notice of Charge and required him to schedule a meeting to "discuss the charges alleged," and to participate in mediation to "resolve the complaint." JA 66. The letter also directed Abbott not to discuss the matter with anyone while it was under consideration. It is understandable why Wells targeted the speakers first given the way USC's policies are written. The University's policies heavily favor complainants by offering pre-complaint counseling, JA 78, providing assistance with filing complaints, JA 79, and encouraging mediation where "[t]he alleged offender may be asked, politely but firmly, to cease the offensive behavior." JA 79-80. If the EOP Office ultimately rejects the complaint, the policies provide complainants with multiple avenues of recourse, including review by USC's President, or complaints to OCR or DOJ.

Notwithstanding this institutional bias favoring the complainants, USC had available to it a number of less restrictive approaches it might have followed to resolve the matter without placing the onus on those exercising their First Amendment rights. Rather than immediately sending a Notice of Charge, Wells could have:

- Reviewed the complaints to see if there were any allegations of severe, pervasive and objectively offensive behavior that might implicate STAF 6.24;

- Determined whether the Free Speech Event was an academic discussion that was supposed to be entirely exempt from USC's anti-harassment policies;
- Contacted McMahon, who had approved the event, to determine the context of the Free Speech Event;
- Interviewed the complainants to see if their concerns were that they were merely offended, or if there was any actual substance to their complaints;
- Conducted an independent investigation to determine whether there had been any actual disruptions or confrontations;
- Acted immediately to dismiss the complaints once he determined they fell outside the purview of STAF 6.24 or were without substance;
- Ensured no student records would reflect that meritless complaints had been filed against them.

Wells, however, did none of these things, and instead sent the Notice that effectively threatened Abbott with significant penalties for his role in the Free Speech Event. Even after the Notice of Charge was sent, however, USC still could have mitigated the burden on Appellants' freedom of expression. Wells could have investigated the matter without imposing a gag order, and he might have expedited the process to decide the matter immediately upon learning the event's context rather than requiring Abbott to wait two weeks for a letter terminating the investigation. Or he might have considered accepting the suggestions in Abbott's letter – providing written assurance the Appellants would not be sanctioned and expunging the complaints, clarifying the anti-discrimination policies, and joining

in the University of Chicago's Principles of Free Expression. JA 104-106. Again, neither Wells nor any other USC official took *any* such less restrictive alternatives.

The same goes for the District Court. It held USC was required to balance students' free speech rights with USC policies combatting discrimination, and concluded that the "inquiry by Wells was a narrowly drawn solution" to serve the University's interests. JA 587-860. But it offered no analysis of *why* that approach was ostensibly "narrowly drawn," or of any potential less restrictive approaches, despite expressly finding that Appellants' speech was chilled by the Notice of Charge. JA 585-586. The court thus failed to address the requirements of strict First Amendment scrutiny in achieving the balance it deemed necessary.

C. USC's Investigation Directly Censored Speech, Chilled Student Expression Generally, and Violated the First Amendment

The District Court held that USC did not violate the First Amendment because it "never attempted to silence Plaintiffs' speech, sanction Plaintiffs for their speech, or present students from engaging in similar speech in the future." JA 588. This conclusion, however, misses the point. USC no doubt could have made matters worse by imposing sanctions, but not doing so hardly forestalls a constitutional claim. As this Court has held, "conduct that tends to chill the exercise of constitutional rights might not itself deprive such rights, and a plaintiff need not actually be deprived of her First Amendment rights" in order to establish a valid cause of action. *Constantine*, 411 F.3d at 499-500. *See also Holloman ex*

rel. Holloman v. Harland, 370 F.3d 1252, 1268-69 (11th Cir. 2004) (even a "verbal censure" from a school official "cannot help but have a tremendous chilling effect on … First Amendment rights").

The constitutional violation in this case flows from how USC's policy was administered, by preemptively imposing burdens on the speakers, threatening sanctions, and imposing a gag order. This is almost identical to how the University of Michigan handled complaints under the school's anti-discrimination and anti-harassment policies in *Doe*, where the court held the informal resolution of the complaints violated the First Amendment, even where no official sanctions were imposed. 721 F. Supp. at 865-66.

In *Doe*, the university official charged with enforcing the policy: (1) "generally failed to consider whether a comment was protected by the First Amendment before informing the accused student that a complaint had been filed;" (2) attempted to persuade the accused student to accept a voluntary resolution; and (3) subtly suggested that "the failure to accept such sanctions might result in a formal hearing." *Id*. at 866. Reviewing these factors, the court found "[t]he Administrator's manner of enforcing the Policy was constitutionally indistinguishable from a full blown prosecution," and held "[i]t is clear that the policy was overbroad both on its face and as applied." *Id*. The same conclusion is warranted in this case.

Here, the District Court actually found USC's actions had a substantial chilling effect on Appellants' freedom of expression, but ignored the implications of that finding. It agreed that "[a] student who receives a letter indicating that a 'Notice of Charge' is attached and prohibiting him from discussing the letter with others, could feel that he or she was subject to discipline," and concluded that "speech was chilled in that a student of 'ordinary firmness' may have self-censored his or her future speech while awaiting notice from Wells on the status of the official student complaints." JA 586-587.

These findings are alone sufficient to support a holding that Appellees violated the First Amendment, but they in fact *understate* the record. In addition to the "chilling effect" the court found, the Notice of Charge restricted Appellants' speech directly by barring them from discussing the matter with the complainants or "any member of the faculty, staff or student body." JA 66. This gag order prevented Abbott from discussing the complaints with others on campus, although he "wanted to speak with Ms. McMahon to confirm that the Free Speech Event had not violated any university policy." JA 560. This restriction is an *independent* First Amendment violation. *E.g.*, *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991). In addition, the chilling effect extended beyond the time during which Appellants awaited a response from Wells. Both the College Libertarians and YAL limited their on-campus speech activities for another two months – until after

they filed this case – because Wells' "termination letter" did not limit their potential exposure under USC's policies.[15]

The District Court treated these censorial effects as acceptable collateral damage in USC's attempt to balance students' free speech rights with USC's interest in combatting potential discrimination. Its holding thus violated very basic First Amendment principles: It incorrectly assumed that a university may regulate speech more rigorously by calling it "harassment." *Sigma Chi Fraternity*, 993 F.2d at 389-90, 393; *Saxe*, 240 F.3d at 210-11. It failed to require USC to employ the least restrictive means in administering its complaint process, and it declined even to ask whether less burdensome options might have been used. *Rock for Life–UMBC*, 411 Fed. App'x at 553; *Berger*, 779 F.2d at 1001. And it enabled USC's policies to be used as a heckler's veto to limit speech the complainants disliked. *Id*. The decision is erroneous and must be reversed.

CONCLUSION

The irony in this case would be rich if the consequences it portends were not so dire for free speech at public colleges and universities. If "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American

[15] Between receiving the Notice of Charge on November 24, 2015, and filing this case on February 23, 2016, College Libertarians avoided putting on any public events at USC. JA 562. The investigation likewise chilled speech by members of YAL, who avoided debate with fellow students to avoid additional complaints. JA 570.

schools," *Shelton v. Tucker*, 364 U.S. 479, 487 (1960), college students simply must be free – at a bare minimum – to talk about what kinds of speech should be permissible on campus, and to discuss examples, good and bad, as part of the conversation. The Supreme Court has erected a narrow, carefully crafted standard that limits the speech that educators and administrators may legitimately sanction. USC's actions fall far short of what is constitutionally permissible, and the District Court failed to apply the correct standards. Accordingly, the decision below must be reversed, and an order requiring entry of judgment for Appellants should issue.

Appellants request oral argument before the Court on this appeal.

RESPECTFULLY SUBMITTED this 6th day of September, 2017.

By s/ Robert Corn-Revere

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the requirements of Federal Rules of Civil Procedure 32(a)(7)(B) and Circuit Rule 32(b). The brief is proportionately spaced in Times New Roman 14-point type. According to the word processing system used to prepare the brief, Microsoft Word, the word count of the brief is 11,791, not including the Corporate Disclosure Statement, table of contents, table of authorities, certificate of service, and certificate of compliance.

DATED this 6th day of September, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on September 6, 2017.

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