NO. 17-1853
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROSS ABBOTT, ET AL.,

Plaintiffs-Appellants,

v.

HARRIS PASTIDES, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the District of South Carolina
The Honorable Margaret B. Seymour, Senior Judge Presiding
Civil Case No. 3:16-cv-00538-MBS

BRIEF OF STUDENTS FOR LIFE OF AMERICA AS *AMICUS CURIAE*
IN SUPPORT OF APPELLANTS URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 4th Cir. R. 26.1(b), A*micus* C*uriae* submit the following corporate disclosure statement:

Students for Life of America is a non-profit organization. It has no parent corporation and no publicly held company holds 10% of its stock.

Dated: September 14, 2017.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

Students for Life of America ("SFLA") is a national non-profit educational organization dedicated to training and equipping college, high school, medical, and law school students to advocate for the sanctity of human life. SFLA has established over 900 student groups at campuses nationwide. As one of the most active pro-life organizations in the nation, SFLA's on-campus advocacy for human life provides many opportunities for university administrators to prohibit or inhibit SFLA's expression. While SFLA does not seek to offend anyone and is not objectively offensive, students opposed to its message often take offense at its support for unborn life, demanding that universities apply speech codes to censor or punish its pro-life speech.

SUMMARY OF ARGUMENT

It is well-established that "state colleges and universities are not enclaves immune from the sweep of the First Amendment." *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973) (internal citation omitted). Indeed, the Supreme Court has declared the public college campus to be "peculiarly the 'marketplace of ideas.'" *Healy v. James*, 408 U.S. 169, 180 (1972). Accordingly, "a public

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[1] All parties have consented to the filing of this brief. F.R.A.P. 29(a)(2). No counsel for any party authored this brief in whole or in part, and no person or entity, other than *Amicus* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. F.R.A.P. 29(c)(5).

educational institution exceeds constitutional bounds… when it 'restrict[s] speech or association simply because it finds the views expressed by [students] to be abhorrent.'" *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 683-84 (2010) (quoting *Healy*, 408 U.S. at 187–88).

In contravention of these and other longstanding precedents, the University of South Carolina (the "University") employs a speech code that permits it to punish student speech based solely on the subjective offense of any listener. Accordingly, it launched an investigation against Plaintiffs for simply engaging in speech that is unequivocally protected by the First Amendment. The University attempts to justify its disregard for its constitutional obligations by invoking a duty to prevent "discrimination." But like the overly broad and vague college speech codes struck down by federal courts across the country, the University's purported justification for regulating and punishing protected student expression fails to pass First Amendment scrutiny. Public institutions may not require students to conform to speech codes that violate the First Amendment. Nor may they interpret such speech codes to permit punishment of students for speech otherwise protected by the First Amendment.

Nevertheless, the court below dismissed Plaintiffs' challenge to this unconstitutional speech code. In doing so, that court disregarded the speech code's constitutional flaws. *Amicus* has years of experience combating student and faculty

censorship and knows the urge to censor is strong on our nation's campuses. If allowed to stand, the lower court's blithe acceptance of the University's actions will establish a dangerous precedent that college administrators will seize upon to censor a virtually limitless range of student expression.

For the reasons described below, this Court should reverse the district court's decision and remand this case for further proceedings.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' AS-APPLIED FIRST AMENDMENT CLAIM.

More than four decades ago, the Supreme Court made clear that public college students do not sacrifice their constitutional rights when they arrive on campus, finding "no room for the view that … First Amendment protections should apply with less force on college campuses than in the community at large." *Healy*, 408 U.S. at 180. Public college students are entitled to full First Amendment rights—and safeguarding those rights is of paramount importance. *See Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools").

Yet fifteen years after *Healy*, public colleges began adopting vague and overbroad "speech codes" to regulate student expression on campus.[2] Whether under

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

the guise of broadly written "harassment" policies or civility mandates, courts have near-uniformly rejected these restrictions on student speech, both facially and as-applied, as clear violations of core First Amendment principles.[3]

Despite the clarity of this precedent, public institutions like the University of South Carolina continue to adopt and enforce policies that regulate student speech without the constitutional precision necessary to pass First Amendment muster. Indeed, policies like the one at issue here are as vague and overbroad as the speech codes struck down by federal courts for more than two decades. If allowed to stand the lower court's unsupported reasoning will provide public college administrators with a license to silence unpopular student speech. This appeal presents this Court the opportunity to reaffirm decades of precedent protecting freedom of expression for whom it arguably matters most: our nation's future leaders on our college campuses.

A. The viewpoint discriminatory enforcement of campus speech codes is a common problem.

The Supreme Court has repeatedly and emphatically affirmed the vital importance of free expression in public higher education. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 836 (1995) ("For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the

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[3] *See infra* Section I.A.

suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses."); *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967) ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'" (internal citation omitted).) Because public universities play a "vital role in a democracy," the Court has recognized that silencing student speech "would imperil the future of our Nation." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Accordingly, "[m]ere unorthodoxy or dissent from the prevailing mores is not to be condemned." *Id.* at 251.

Recent jurisprudence protecting public college students' First Amendment rights is equally unambiguous. In 2016, a federal district court struck down North Carolina State University's ("NC State") speech policy, which forbade students from distributing any "written material" or engaging in any "oral communication with a passerby" anywhere on the public institution's campus without prior permission from University administrators. *See Grace Christian Life v. Woodson*, No. 5:16-cv-202-D, 2016 WL 3194365 (E.D.N.C. June 4, 2016). Although the policy was facially neutral, NC State enforced it in a viewpoint-discriminatory manner by prohibiting Grace Christian Life, a recognized student organization, from speaking with other students without a permit but allowing other students and student organizations to

do so. Based upon its breadth and discriminatory enforcement, the court enjoined the university from enforcing the policy. *Id.* at *1.

This decision is the latest in a virtually unbroken string of cases affirming the critical importance of First Amendment protections for college students. *See McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010) (invalidating university speech policies, including a harassment policy); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (striking down university sexual harassment policy); *Dambrot v. Central Michigan*, 55 F.3d 1177 (6th Cir. 1995) (declaring university discriminatory harassment policy facially unconstitutional); *Smith v. Tarrant Cty. Coll. Dist.*, 694 F.Supp.2d 610 (N.D. Tex. 2010) (finding university "cosponsorship" policy to be overbroad); *College Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (enjoining enforcement of university civility policy); *Roberts v. Haragan*, 346 F.Supp.2d 853 (N.D. Tex. 2004) (finding university sexual harassment policy unconstitutionally overbroad); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of university harassment policy due to overbreadth); *Pro-Life Cougars v. Univ. of Houston*, 259 F.Supp.2d 575 (S.D. Tex. 2003) (declaring university policy regulating "potentially disruptive" events unconstitutional); *Booher v. Bd. of Regents, N. Ky. Univ.*, No. 2:96-cv-135, 1998 WL 35867183, *10 (E.D. Ky. July 22, 1998) (finding university sexual harassment policy void for vagueness and

overbreadth); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F.Supp. 1163 (E.D. Wis. 1991) (declaring university racial and discriminatory harassment policy facially unconstitutional); *Doe v. Univ. of Mich.*, 721 F.Supp. 852 (E.D. Mich. 1989) (enjoining enforcement of university discriminatory harassment policy).

Despite the clarity of the legal precedent, censorship of student expression through enforcement of speech codes is rampant. Scholars and commentators posit various explanations behind the origins of speech codes and reasons that universities continue to enforce the codes in spite of the weight of the law against them.[4] Regardless of the reasons behind speech codes, it is undeniable that they have had a tremendously harmful impact on free speech on college campuses.[5] The *amicus* is a student organization that has experienced this first hand and all too often. The following is just a small sampling of the recent application of these unconstitutional speech codes to *amicus*.

Earlier this year, members of the Students for Life chapter at Kutztown University wrote life-affirming messages onto various sidewalks and other uncovered walkways on campus as part of National Pro-Life Chalk Day. However, university officials erased the messages because they said that the messages were in violation of the university's "Posting and Chalking Guidelines," which prohibit

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[4] *See* Majeed, *supra* note 1, at 486-93.

[5] *Id*. at 488.

speech that "advertise[s] activities, events, or groups … incompatible with the University's Statement on Non-Discrimination." The University agreed to modify the policy after Students for Life's counsel sent a letter demanding the policy be changed to remove all content- and viewpoint-based restrictions.

In *Abolitionists for Life v. Kustra*, No. 14-00257 (D. Idaho, filed June 27, 2014), a pro-life student group at Boise State University obtained permission to hold a free speech event on campus, but was required to post notices—so-called "trigger warnings"—advising students that they would be exposed to the group's message, including images of abortion, if they walked by their event. Boise State cited a policy requiring students and groups to "utilize reasonable methods to allow the public a choice about viewing or receiving certain material that the Vice President deems may not be suitable for a general audience or that are inconsistent with the University's legitimate interests in maintaining a public area that is freely accessible to all members of the public." But Boise State did not apply this policy to require a Planned Parenthood student group to post notices when it engaged in expressive activities or to require the Secular Student Alliance to give students advance warning of its "Does God Exist" fliers.

In *University at Buffalo Students for Life v. Tripathi,* No. 13-00685 (W.D.N.Y. filed June 28, 2013), a pro-life student group was charged $600 in "security fees" for an academic debate under a university policy requiring student

groups to pay this fee for "controversial" events. Other "controversial" events, including a debate on the existence of God in the same building on the same evening, were not required to pay this fee.

Utah State University Students for Life sought to express its pro-life views by writing chalk messages on sidewalks, a common practice on many campuses. The group was prevented from expressing its message when the University explained that student groups were not permitted to affect the campus grounds in any way that would damage the lawns, including the use of chalk on sidewalks. At the same time, however, the University permitted Students for Choice, a pro-abortion student group, to chalk campus sidewalks. The administration simply claimed that the Students for Choice group may have been erroneously given permission, but Students for Choice was nevertheless permitted to continue while the supposedly neutral chalking policy was applied to deny the same opportunity to Students for Life. *See* Eric Owens, *Taxpayer-Funded Campus Cops Force Pro-Life Students to SWEEP AWAY Chalk Messages*, THE DAILY CALLER (Sept. 25, 2015), http://dailycaller.com/2015/09/25/taxpayer-funded-campus-cops-force-pro-life-students-to-sweep-away-chalk-messages/.

Students for Life at the University of Iowa recently experienced a similar incident. The group expressed its pro-life message in chalk on a designated sidewalk where chalking was permitted. But the university quickly removed its messages,

leaving the student radio station's chalk messages untouched directly beside Students for Life's. University administrators explained that the pro-life speech violated a policy requiring that the chalk messages reference a specific event. When the students explained that other groups, including the radio station, had also not referenced an event and their messages had not been removed, administrators claimed that "enforcement of the policy is complaint driven." *See* Jeff Charis-Carlson, Iowa Students Fight For Right to Chalk, IOWA CITY PRESS-CITIZEN (Apr. 20, 2016), http://www.press-citizen.com/story/news/2016/04/20/iowa-students-fight-right-chalk/83208750/). While no one complained about other groups' messages, the pro-choice group had complained about their pro-life message.

Amicus is not alone in being silenced by speech codes. In *Dunn v. Leath*, No. 4:16-cv-00553 (S.D. Iowa, filed October 17, 2016), Iowa State University told Robert Dunn that his graduation would be put on hold if he did not certify that he would comply with a speech code. The speech code provided that it "may cover those activities which, although not severe, persistent, or pervasive enough to meet the legal definition of harassment, are unacceptable…" and that even "First Amendment protected speech activities" may constitute harassment "depending on the circumstances," including whether other students believe the speech is not "legitimate," not "necessary," or lacks a "constructive purpose." After Dunn refused and filed a lawsuit, the university agreed to modify its policies to comply with the

First Amendment.

At San Francisco State University, the College Republicans were investigated for more than 5 months after a student complained that their anti-terrorism rally violated a university policy that required students to "be civil" to one another. After the university determined that they did not violate the policy, the College Republicans filed a lawsuit challenging the policy. *College Republicans*, 523 F.Supp.2d at 1005. The court struck down the speech code as overbroad, finding that it violated the First Amendment because "students will be deterred from engaging in controversial but fully protected activity out of fear of being disciplined for so doing." *Id*. at 1018. Importantly, the court allowed the College Republicans to challenge the policy even though the university did not impose any punishment but simply initiated an investigation pursuant to the policy.

In 2007, the Affirmative Action Office of Indiana University-Purdue University Indianapolis ("IUPUI") found Keith Sampson, a student-employee, guilty of racial harassment for merely reading the book, "Notre Dame vs. the Klan: How the Fighting Irish Defeated the Ku Klux Klan," during his work breaks at the school's janitorial department. IUPUI ordered Sampson not to read the book in front of his co-workers and informed him that future conduct of a similar nature could result in "serious disciplinary action." After more than six months and multiple letters from Sampson's counsel, IUPUI finally reversed the finding of racial

harassment and removed any mention of the incident from Sampson's file. *Victory at IUPUI: Student-Employee Found Guilty of Racial Harassment for Reading a Book Now Cleared of All Charges*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (FIRE) (May 1, 2008), https://www.thefire.org/victory-at-iupui-student-employee-found-guilty-of-racial-harassment-for-reading-a-book-now-cleared-of-all-charges/.

This is only a small and recent sample of several students' and student organizations' experiences with overly broad university speech codes. Similar stories happen almost daily on college campuses.

And, of course, the presence of these policies chills student speech, causing students to fear expressing opinions that others may deem offensive—a category that seems to be growing daily. In a 2015 survey, William F. Buckley, Jr. Program at Yale found that 54% of students at four-year colleges are intimidated to share unpopular views on campus.[6] Yet the Supreme Court has made clear that if students are not free to explore and express ideas, then "our civilization will stagnate and die." *Sweezy*, 354 U.S. at 250. In the instant case, the University—like too many colleges nationwide—decided to ignore long-established law. The routine

[6] McLaughlin & Assoc., *National Undergraduate Study* (Oct. 26, 2015), https://www.dropbox.com/s/sfmpoeytvqc3cl2/NATL%20College%2010-25-15%20Presentation.pdf?dl=0.

infringement of student First Amendment rights is having a profound and devastating impact on campus inquiry. This Court must remind the University that respecting the First Amendment is not optional.

B. The University's speech code, STAF 6.24[7], is unconstitutionally overbroad because it prohibits and punishes speech based on listeners' subjective opinions.

"The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002). This is because the "First Amendment needs breathing space and [policies] attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn." *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973); *see Newsom ex rel. Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 258 (4th Cir. 2003) ("To prevail, an overbreadth plaintiff … must demonstrate that a regulation's overbreadth is not only real, but substantial as well, judged in relation to the challenged regulation's plainly legitimate sweep, and also that no limiting construction or partial invalidation could remove the seeming threat or deterrence to constitutionally protected expression." (internal quotations omitted).) Public colleges must narrowly craft any regulation that impacts speech. *See Rust v. Sullivan,* 500 U.S. 173, 200 (1991) ("[W]e have recognized that the

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[7] *Student Non-Discrimination and Non-Harassment Policy*, STAF 6.24, Student Affairs and Academic Support, University of South Carolina (Apr. 9, 2013), http://www.sc.edu/policies/policiesbydivision.php.

university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech … is restricted by the vagueness and overbreadth doctrines of the First Amendment").

STAF 6.24 is unconstitutionally overbroad. Federal courts across the country have declared speech codes similar to the University's standards to be overbroad because they are based on listeners' subjective reactions and sweep within their ambit too much protected speech.

In regulating harassment, the Supreme Court requires schools to write policies with narrow specificity, lest they prohibit protected speech. Anti-harassment policies must use clear and objective standards to root out true threats of harassment, while steering far clear of speech the First Amendment protects. *Davis v. Monroe Cty. Bd. of Educ*., 526 U.S. 629 (1999). In *Davis*, the Court defined harassment in the educational context as conduct that is "so severe, pervasive, *and objectively offensive* that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Id*. at 650 (emphasis added). The Court made clear that the purpose of a harassment policy is to prevent students from being "denied access to educational benefits and opportunities" due to unlawful harassment—not to prevent students from hearing offensive speech. *Id.* And the Court acknowledged that having an overly broad policy would expose a university to constitutional claims. *Id.* at 649. Thus, the Court emphasized that a policy must include all three

elements—severe, pervasive, and objectively offensive—to pass constitutional muster.

STAF 6.24 plainly fails to satisfy this standard, subjecting to punishment far more student speech. STAF 6.24 defines harassment to include conduct "that is sufficiently severe, pervasive, or persistent so as to interfere with or limit the ability of an individual or group to participate in or benefit from the programs, services, and activities provided by the University." This definition is overbroad for two reasons. First, it fails to include the objective offensiveness requirement. Under this standard, the University may punish a student for engaging in speech which another student subjectively believes is offensive. This policy acts as a heckler's veto by effectively allowing a complaint by one student to shut down the speech of another based solely upon the student's subjective opinion of offensiveness. Thus, the failure to include the objective offensiveness requirement is a fatal defect.

Second, the policy prohibits conduct that is severe, pervasive, *or* persistent. Thus, under this policy, the University can punish as "harassment," expression that is uttered only once (not persistent or pervasive although perhaps "severe"). Similarly, the University can punish conduct that is pervasive or persistent but is not "severe"—mild comments to which some other individual claims offense. But *Davis* mandates that conduct may only be prohibited as harassment if it is severe, pervasive, *and* objectively offensive. The *Davis* Court explains that "students often

engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it" but they cannot be punished "for simple acts of teasing and name-calling." *Id.* at 651-52. Instead, students can only be punished "where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education." *Id.* at 652. STAF 6.24 fails to satisfy this standard and is unconstitutional.

The Third Circuit struck down a similar policy in *DeJohn*. The court found Temple University's use of the terms "hostile," "offensive," and "gender-motivated" in an anti-harassment policy so broad and subjective it would cover any speech of a "gender-motivated" nature "the content of which offends someone." 537 F.3d at 317 (citation omitted). "'Harassing' or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections." *Id.* at 314 (citations omitted); *see also Dambrot*, 55 F.3d at 1182-83 (finding the use of the term "offensive" rendered an anti-harassment policy substantially overbroad because it banned speech based on the subjective reaction of listeners).

Federal district courts have reached similar conclusions when examining public college policies that regulate student speech and conduct. *See Roberts*, 346 F.Supp.2d at 872 (striking down university policy prohibiting "insults, epithets, ridicule, or personal attacks"); *Bair*, 280 F.Supp.2d at 370-72 (enjoining as

overbroad university policy prohibiting "acts of intolerance"); *Doe*, 721 F.Supp. at 856, 864 (enjoining university policy prohibiting "'stigmatizing or victimizing' individuals or groups" in specified categories).

STAF 6.24 is overbroad under these precedents. The policy allows the University to punish expression that a listener asserts is subjectively offensive and does not even limit its scope to repeated statements—allowing a single comment by a student to be punished as "harassment." This broad prohibition on speech chills free expression and is unconstitutional.

C. The University's speech code, STAF 6.24, is unconstitutionally vague because it does not provide fair notice to students of what is prohibited conduct.

The First Amendment requires that public college policies be written with enough clarity so that students have fair warning about prohibited and permitted conduct. *See Dambrot*, 55 F.3d at 1183 ("A vague ordinance denies fair notice of the standard of conduct to which a citizen is held accountable."). A government policy is void for vagueness when persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). Additionally, a regulation is vague if it "invites arbitrary, discriminatory and overzealous enforcement." *Dambrot*, 55 F.3d at 1184; *accord City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). STAF 6.24 is unconstitutionally vague because it (1) denies students fair notice of prohibited conduct; (2) permits

the unrestricted enforcement of the standards against any student, thereby inviting arbitrary, discriminatory, and overzealous enforcement; and (3) chills speech.

First, the plain language of STAF 6.24 does not provide fair notice to students of prohibited conduct. The policy prohibits conduct that is "sufficiently severe, pervasive, or persistent so as to interfere with or limit the ability of an individual or group to participate in or benefit from the programs, services, and activities provided by the University." As discussed above, the policy fails to require that such prohibited conduct also must be objectively offensive. A prohibition on student speech that necessarily turns on the subjective feelings of any one of thousands of other students is patently vague and provides no fair notice of what expression is prohibited.

The First Amendment obligates the College to regulate speech with narrow specificity. *See Shelton*, 364 U.S. at 488 (holding that state's goals "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved"). Policies based upon subjective feelings rather than objective criteria are vague and do not give fair notice of prohibited and permitted speech. In *Dambrot*, the Third Circuit invalidated the policy because "[i]n order to determine what conduct will be considered '[unbecoming]' or '[unprofessional]' by the university, one must make a subjective reference." *Dambrot*, 55 F.3d at 1184; *see also UWM Post,* 774 F.Supp. at 1172 (holding policy that prohibited comments

that "create an intimidating, hostile or demeaning environment for education" was impermissibly vague). The nebulous prohibitions contained in STAF 6.24 force students to guess as to what speech an administrator or student may deem "sufficiently severe, pervasive, or persistent" subjectively rather than under a standard of objective offensiveness. The Constitution does not permit such a result because "where a vague statute 'abuts upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of those freedoms.'" *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal citations omitted). "No one may be required at peril of life, liberty or property to speculate as to the meaning" of government prohibitions. *Morales*, 527 U.S. at 58. STAF 6.24 requires a student to choose between speculating as to its meaning and risking punishment, including expulsion, or not speaking. This chills speech and is unconstitutional.

Second, STAF 6.24 permits unrestricted and overzealous enforcement by University officials. Just as students like Plaintiffs cannot determine the meaning of a policy without definitions, administrators charged with enforcement will have difficulty carrying out their responsibilities. *Id*. The terms are not self-defining. Left undefined, college officials will be pressured to use the standards to silence disfavored expression. But the First Amendment protects such expression, whether extreme, *see Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993

F.2d 386 (4th Cir. 1993) (fraternity's "ugly woman contest"), or benign, *see College Republicans*, 523 F.Supp.2d at 1005 (anti-terrorism rally).

The unconstitutional vagueness of the University's policy is further demonstrated by the fact that Plaintiffs were charged with violating the standards only after a few students complained. But courts have routinely struck down policies that allow students and administrators to punish speech based on listeners' subjective reactions. A public college "may not prohibit speech … based solely on the [e]motive impact that its offensive content may have on a listener." *Bair*, 280 F.Supp.2d at 371; *see also McCauley*, 618 F.3d at 250-52 (striking down university policy prohibiting "Conduct Which Causes Emotional Distress" because of potential application to "*any* protected speech, without forewarning, based on the subjective reaction of the listener"); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 (2001) ("The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it."). What is offensive varies from one person to another. *See Cohen v. California*, 403 U.S. 15, 25 (1971) ("[O]ne man's vulgarity is another's lyric"); *Dambrot*, 55 F.3d at 1184 ("Though some statements might be seen as universally offensive, different people find different things offensive.").

Third, reliance on the subjective whims of administrators and fellow students leads to arbitrary and discriminatory enforcement by government officials—causing students to self-censor for fear of punishment and chilling speech. Because STAF 6.24 is both "opaque and malleable, the University's failure even to try to define [what is prohibited] 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." *College Republicans*, 523 F.Supp.2d at 1018. This subjective standard leads to arbitrary enforcement where the same expression may be permissible or prohibited depending solely on the level of offense of the listener. In fact, these vague standards enabled the University to enforce STAF 6.24 against Plaintiffs' protected speech simply because a few students and administrators disliked it.

II. THE DISTRICT COURT ERRED IN HOLDING THAT PLAINTIFFS LACKED STANDING TO FACIALLY CHALLENGE STAF 6.24.

The Supreme Court's holding in *Susan B. Anthony List v. Driehaus* makes it clear that the district court erred in holding that the Plaintiffs lacked standing to facially challenge STAF 6.24. 134 S.Ct. 2334 (2014) ("*SBA List*"). The Supreme Court held that a plaintiff has standing to maintain a pre-enforcement challenge to a law where he "alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Id.* at 2342 (internal citation omitted). The district court erred in holding that (i) Plaintiffs did not sufficiently allege an intention to

engage in conduct that would arguably be proscribed by STAF 6.24, and (ii) there was no credible threat that STAF 6.24 would be enforced against Plaintiffs.

The Plaintiff in *SBA List* , a pro-life advocacy organization, issued a press release condemning certain members of Congress for voting for the Patient Protection and Affordable Care Act (ACA). *Id.* at 2339. The press release stated that SBA was going to educate voters that their representative voted for a health care bill that includes taxpayer-funded abortion. And the release also included a list of the names of the Congressmen who voted for the bill, including Congressman Steve Driehaus. SBA also sought to display a billboard in Driehaus's district condemning that vote, but the billboard company refused to display the message after Driehaus threatened to file a complaint with the Ohio Elections Commission. *Id.*

Shortly before the election, Driehaus filed a complaint with the Ohio Elections Commission alleging that SBA had violated Ohio Rev. Code Ann. §§ 3517.21(B)(9) and (10), which prohibit certain "false statements" during the course of any campaign for nomination or election to public office. The Commission found probable cause that a violation had occurred and set a hearing date for 10 days later. Prior to the hearing, SBA filed a lawsuit alleging that the statute violated its First and Fourteenth Amendment rights. *SBA List*, 134 S.Ct. at 2339. The district court dismissed the lawsuit on standing and ripeness grounds. *Id.* at 2340. The Sixth Circuit affirmed the ruling. *Id*. at 2340-41.

The Supreme Court reversed and held that SBA had standing to challenge the law. *Id*. at 2341. The Court based its ruling on three findings: (1) SBA alleged an intention to engage in a course of conduct arguably affected with a constitutional interest; (2) the intended conduct is arguably proscribed by the statute SBA wishes to challenge; and (3) the threat of future enforcement is substantial. *Id.* at 2343-45.

As to the first finding, SBA alleged that it made statements in the previous election cycle—that certain members of Congress voted for taxpayer-funded abortion—and that it intended to make similar statements in future elections. The Court held that this conduct concerned political speech and thus "it is certainly affected with a constitutional interest." *Id.* at 2344 (internal quotations omitted).

Regarding the second finding, the Court noted that the scope of the statute swept broadly and the Commission already found probable cause to believe that SBA violated the statute when it stated that Driehaus had supported taxpayer-funded abortion. This is the same statement that SBA intended to make in future elections. Under those circumstances, the Court had "no difficulty concluding that petitioners' intended speech is 'arguably proscribed' by the law." *Id.* at 2344. The Court then addressed the Sixth Circuit's reasoning that SBA did not allege that it intended to violate the law because the SBA did not plan to lie or recklessly disregard the veracity of its speech. The Court forcefully rejected this reasoning. *Id*. "Nothing in

this Court's decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate the law." *Id*. at 2345.

Finally, the Court found that the threat of future enforcement of the statute was substantial. The Court based its finding on three facts. First, there was a history of past enforcement because SBA was the subject of a complaint in the last election cycle. The Court "observed that past enforcement against the same conduct is good evidence that the threat of enforcement is not chimerical." *Id.* (internal quotations omitted). Second, the credibility of the threat is bolstered by the fact that authority to file a complaint with the Commission is not limited to a prosecutor or an agency. Rather, the statute allows any person with knowledge of the purported violation to file a complaint. This creates a real risk of complaints from political opponents. Third, Commission proceedings are not a rare occurrence. The Commission handles 20 to 80 false statements complaints per year. Based on these facts, the Court held "the prospect of future enforcement is far from imaginary or speculative." *Id.* (internal quotations omitted).

All of the facts underlying the Court's decision finding standing in *SBA List* are also present in this action. First, there is no dispute that Plaintiffs intend to engage in conduct that is affected with a constitutional interest. Both the district court and the University acknowledge that fact. Order, p. 18.

Second, Plaintiffs' intended conduct is arguably prohibited by STAF 6.24. Indeed, as explained above, this policy prohibits any student speech that subjectively offends any other individual. The district court reasoned that Plaintiffs failed to show that they intended to violate the law because Defendant Wells stated that "anything similar to the prior free speech event" does not constitute speech regulated by the policy. But Defendant Wells' statement does not override the express terms of STAF 6.24. Additionally, Plaintiffs and other students can have no refuge in a vague promise that "similar" speech will not be deemed to violate the policy.

The Supreme Court specifically rejected the District Court's reasoning in *SBA List*. There, the statute only prohibited false statements. Yet, the Supreme Court held that SBA List alleged an intention to violate the law even though it specifically argued that it did not intend to make any false statements—because its speech could be punished based solely on the determinations by future government employees that SBA List's speech was "false." The Court held that the statute sweeps broadly and chills SBA's intended speech.

The University's speech code covers far more speech and is even less defined than the law at issue in *SBA List*. STAF 6.24 "applies to the conduct of students in all aspects of academic, residential, athletic, and social activities, operations, and programs at the University." Ex. 1, Defendants' Motion for Summary Judgment. Examples of prohibited conduct include "objectionable epithets, demeaning

depictions or treatment, and threatened or actual abuse or harm." *Id.* And as discussed above, the policy prohibits as little as a single mild utterance that subjectively offends another student. Accordingly, the policy potentially covers any conduct, including speech, that Plaintiffs intend to engage in at the University. Clearly, the Plaintiffs' intention to engage in future free speech events is covered by the broad sweep of STAF 6.24.

Finally, the threat of future enforcement of STAF 6.24 against Plaintiffs is substantial. All three of the factors regarding future enforcement present in *SBA List* are also present here. First, there is a history of past enforcement. In *SBA List*, the Court held that there was a history of past enforcement because "SBA was the subject of a complaint in a recent election cycle." *SBA List,* 134 S. Ct. at 2345. Similarly, Plaintiffs were the subject of three complaints as a result of the free speech event. Accordingly, there is a history of past enforcement.

Second, the filing of a complaint is not limited to an administrator of the University. Rather, a complaint can be filed by any student or faculty member at the University. Just as in *SBA List*, this creates "a real risk of complaints from … political opponents." *Id.*

Third, proceedings under STAF 6.24 are not a rare occurrence. In the 2012-2013 academic year, the University's Office of Equal Opportunity Programs

received 118 complaints of discrimination.[8] Further, the trend shows the number of complaints to be increasing exponentially each year. The number of complaints in the two years prior to that was 51 and 83 respectively. Contrast that with *SBA List*, where there were only 20 to 80 complaints per year across the entire state of Ohio. Yet, the Court found that complaints were not a rare occurrence and the prospect of future enforcement was far from imaginary or speculative. Similarly, the number of complaints in the instant matter demonstrates that they are not a rare occurrence and the prospect of future enforcement of STAF 6.24 against Plaintiffs is not imaginary or speculative.

It is important to remember that, as in this case, "when the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing" because "the alleged danger [in these actions] is, in large measure, one of self-censorship; a harm that can be realized even without actual prosecution." *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000) (citing *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 386, 393 (1988)). Thus, "the tendency to find standing absent actual, impending enforcement against the plaintiff is stronger in First Amendment cases, for free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." *Id.*

[8] This number includes complaints of discrimination against both the University and against individual students.

(internal quotations omitted). Consequently, Plaintiffs have standing to facially challenge STAF 6.24.

CONCLUSION

Colleges and universities nationwide are closely watching this case. If the lower court's error is allowed to stand, would-be censors at colleges across the country will seize upon their newfound authority to silence merely dissenting, unwanted, unpopular, or unpleasant student speech by emulating the University's shameful end-run around the First Amendment. If faced with a choice between respecting a student's right to freedom of expression or punishing him, a public college administrator will recall this erroneous result and conclude that punishment is permissible—as long as it is justified by a student's subjective determination of offense. Given the Supreme Court's repeated and emphatic recognition of the importance of student civil liberties, this is precisely the wrong result for the health of our democracy. *Sweezy*, 354 U.S. at 250.

The right to speak one's mind without fear of official reprisal for transgressing vague and subjective standards should be beyond question on an American public campus. Because today's students are tomorrow's leaders, protecting this right is of paramount importance to the whole nation. The district court's opinion, if allowed to stand, would allow administrators nationwide virtually limitless discretion to censor critical, dissenting, joking, or merely inconvenient speech simply by citing

vague, subjective speech codes. This result would be disastrous for student speech and for a nation whose future leaders are trained on those campuses.

For these reasons, the Court should reverse the judgment of the district court and remand this case for further proceedings.

Dated: September 14, 2017

Respectfully submitted,

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Dated: September 14, 2017

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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