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**RECORD NO. 17-1853**

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**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

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

*Plaintiffs-Appellants,*

v.

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

*Defendants-Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

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# BRIEF OF APPELLEES

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

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If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 17-1853 Caption: Ross Abbott v. Harris Pastides

Pursuant to FRAP 26.1 and Local Rule 26.1,

Bobby Gist
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Kenneth P. Woodington Date: 07/24/2017

Counsel for: Appellee Bobby Gist

## CERTIFICATE OF SERVICE

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I certify that on 07/24/17 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Kenneth P. Woodington (signature) 07/24/2017 (date)

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No. 17-1853 Caption: Ross Abbott v. Harris Pastides

Pursuant to FRAP 26.1 and Local Rule 26.1,

Harris Pastides
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

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Signature: /s/ Kenneth P. Woodington Date: 07/24/2017

Counsel for: Appellee Harris Pastides

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No. 17-1853 Caption: Ross Abbott v. Harris Pastides

Pursuant to FRAP 26.1 and Local Rule 26.1,

Dennis Pruitt
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Kenneth P. Woodington Date: 07/24/2017

Counsel for: Appellee Dennis Pruitt

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No. 17-1853 Caption: Ross Abbott v. Harris Pastides

Pursuant to FRAP 26.1 and Local Rule 26.1,

Carl R. Wells
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Kenneth P. Woodington Date: 07/24/2017

Counsel for: Appellee Carl R. Wells

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/s/ Kenneth P. Woodington
(signature)

07/24/2017
(date)

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## JURISDICTIONAL STATEMENT

The district court granted Defendants/Appellees (collectively "USC") summary judgment on all Counts. Plaintiffs/Appellants filed a notice of appeal objecting to the grant of summary judgment only as to the following two grounds:

(1) "the district court's decision to grant Defendants' motions for summary judgment as to Defendants Gist and Wells on Count 1;" and

(2) "the district court's dismissal of Plaintiffs' facial challenge to Defendants' Students Non-Discrimination and Non-Harassment Policy, STAF 6.24 . . . As such, Plaintiffs appeal the district court's decision to grant Defendants' motions for summary judgment on Count II."

J.A. 644-45. Those two grounds are further narrowed by Plaintiffs' Statement of Issues Presented for Review, which confirms that the only policy remaining at issue in this case is STAF 6.24.

It appears that Plaintiffs have also attempted to appeal the denial of their motion for partial summary judgment by embedding references to that denial within their notice of appeal. Because the denial of a motion for partial summary judgment is not a final appealable order, the Court should not entertain any argument regarding their denied partial summary judgment motion. The final judgment rule limits appellate review to issues that "end the litigation on the merits and leave nothing for the court to do but execute the judgment." *Robert Bosch,*

*LLC v. Pylon Mfg. Corp.*, 719 F.3d 1305, 1308 (Fed. Cir. 2013) (en banc) (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981)) (internal quotation marks omitted); *see also* 28 U.S.C. § 1295 (a) (1) (2012). An order denying summary judgment is not a final judgment. "It is strictly a pretrial order that decides only one thing—that the case should go to trial." *Switz. Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 25 (1966). Accordingly, the final judgment rule generally "prohibits a party from appealing a district court's denial of a motion for summary judgment." *Lermer Germany GmbH v. Lermer Corp.*, 94 F.3d 1575, 1576 (Fed. Cir. 1996). Accordingly, Plaintiffs' appeal of the district court's denial of their partial summary judgment motion should be dismissed.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Plaintiffs have standing to challenge the constitutionality of University of South Carolina Policy STAF 6.24, the Student Non-Discrimination and Non-Harassment Policy, when they have not engaged, and have not alleged and shown that they intend to engage, in speech or conduct that is punishable under STAF 6.24 in violation of First Amendment of the United States Constitution.

2. Whether University of South Carolina Policy STAF 6.24, the Student Non-Discrimination and Non-Harassment Policy, with its exceptions for all speech protected by the United States Constitution and all academic speech, and which limits its application to speech or 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, violates the First Amendment of the United States Constitution.

3. Whether Defendants Gist and Wells, who are state actors, are entitled to qualified immunity because (i) Gist is not alleged to have done anything and (ii) Wells' limited inquiry to ascertain whether any civil rights have been violated did not violate a federal right that was clearly established at the time the he acted.

4. Whether this matter is moot as to Plaintiff Abbott, who is no longer a student at the University of South Carolina.

## STATEMENT OF THE CASE

### 1. Factual Summary

Two student groups, the College Libertarians at USC ("Libertarians"), and the Young Americans for Liberty at USC ("YAL") through Plaintiff Ross Abbott, submitted a time, place, and manner facilities request for a "Free Speech Event,"

an event the student group considered controversial. USC granted the facilities request exactly as the student group requested and the event occurred at the time and place the student group requested. USC received three written complaints about the event, including concerns that the event participants were engaging rudely with USC students, saying sexist and racist statements, and concerns that the event discriminated against protected groups and created a hostile environment. Pursuant to his duties at USC's Office of Equal Opportunity Programs, Defendant Carl Wells sought to understand what occurred at the event, so he sent a letter to Abbott requesting a meeting and providing him with a copy of the complaints. No notice of charge was sent or intended to be sent.

Wells and Abbott met briefly and informally (along with Michael Kriete, then an officer of YAL, who attended voluntarily. Abbott recorded the meeting. Wells advised Abbott that he had not been charged with anything, and that Wells was at the pre-investigation stage to try to understand if anything happened at the event that might require further inquiry. Wells then sent Abbott a letter letting him know the EOP office would not be investigating the matter.

**2. Procedural History**

Plaintiffs/Appellants Ross Abbott (a former student and now graduate of USC), the Libertarians and YAL filed a complaint on February 23, 2016, alleging free speech violations against USC officials/administrators Harris Pastides, Dennis

Pruitt, Bobby Gist, and Carl R. Wells. J.A. 12-124. Pastides is the President of USC, Pruitt is the Vice President for Student Affairs, Gist, now retired, was the Executive Assistant to the President for Equal Opportunity Programs, and Wells is the Assistant Director of the Office of Equal Opportunity Programs ("EOP") and Deputy Title IX Coordinator.

Gist and Wells, the only two Defendants against whom damage claims were pled, filed a Motion for Summary Judgment on October 3, 2016 seeking, among other things, dismissal based on qualified immunity. J.A. 137-207.

USC filed a Motion for Summary Judgment (Remaining Issues) as to all remaining issues on October 25, 2016. J.A. 211-285.

Plaintiffs filed a cross-motion for partial summary judgment on December 9, 2016. J.A. 406-473.

On July 11, 2016, the district court granted Defendants Gist and Wells' Motion for Summary Judgment and USC's Motion for Summary Judgment (Remaining Issues), and denied Plaintiff's Motion for Partial Summary Judgment, thereby disposing of the case. J.A. 573-595.

Plaintiffs filed a notice of appeal on July 21, 2016. J.A. 644-45.

## STATEMENT OF FACTS

Plaintiffs are a student, Ross Abbott (who has now graduated) and two student organizations at USC that held an event they entitled the "Free Speech Event" at USC on November 23, 2015. Complaint, ¶ 24, J.A. 16-19. The student organizations are the Libertarians and YAL. It is undisputed that before the event, Plaintiffs sought and obtained permission for the space, date, and time they wanted to hold the event from Kim McMahon, Director of Campus Life and the Russell House University Union. See Complaint ¶ 20 and 23., J.A. 16, 17.[1] The Plaintiffs self-described the event's content as "controversial." Complaint ¶ 20, J.A. 16. That did not deter or cause USC to waiver in its policy to apply a content neutral policy for student requests to hold events on campus.

Consistent with USC's content neutral policy, Plaintiffs received no objection from the University to hold their event as planned. In fact, Ms. McMahon advised Abbott that "[m]y goal would be to help you to organize it in a way that the 'controversy' is a chance to learn and grow (and even be a bit uncomfortable), not further any intolerance, censorship or acts of incivility." J.A. 151.

Plaintiffs held their event unfettered by the University in the space and on the date they requested. While the event was occurring, several complaints were

[1] Only policy STAF 6.24 is the subject of this appeal.

forwarded by e-mail to Kim McMahon. She was tied up in a training event at the time, but advised that "This is free speech . . . and if they are being respectful and trying to help learn and create dialogue then I am not sure how to help those who are uncomfortable by it." J.A. 154. A few minutes later, in response to another e-mail from a USC staffer, Ms. McMahon stated that "Discomfort is not surprising but they are hosting a free speech education event with a variety of situations that have been cited as examples of violation of free speech on other campuses. As I am not there I can't provide context and if group is doing what their event said it would." J.A. 156.

The USC EOP office also received three written student complaints about Plaintiffs' event and the Plaintiffs' *behavior* at the event. Students complained about the display of a swastika, use of the word "wetback" and other concerns related to the event, including Plaintiffs "engaging rudely with USC students, saying sexist and racist statements." J.A. 65-76, 72. The students' complaints included concerns that the event discriminated against protected groups and created a hostile environment. J.A 67-68, 72, 75.

To ensure that the three students who filed complaints were not suffering illegal discrimination or harassment, EOP Assistant Director Carl Wells sent Abbott a letter informing him of the complaints and began the process to

understand the students' complaints and what occurred that day.[2] J.A. 66. In response to Wells' letter, Abbott met with Wells for 45 minutes on December 8, 2015. Michael Kriete joined Abbott for the meeting voluntarily. J.A. 24. Abbott made a recording of the meeting and provided Wells with a copy of the recording. Defendants placed a transcript of the meeting in the record. J.A. 157-193.

At the outset of the meeting, Wells advised Abbott about the preliminary nature of the meeting, describing it as "pre-complaint mode" or "pre-investigation mode:"

> [A]s of today, I'm just talking with you about that, just to get a sense of what the event was and why it was presented and who sponsored it. I guess the who, what, when, whys and hows, is where we are, just to get a sense of it since there was such a amount of a concern that surfaced. . . . We are in pre-complaint mode where we are trying to determine and we are assessing whether or not, because we don't have enough information right now, we're trying to assess whether or not what was presented to us by members of this community actually rise to a level of something that would be a complaint or whether we're going to do an investigation or not. So, again, we are in pre-investigation mode.

[2] Wells sent the letter to Abbott individually. Only Abbott received a letter from Wells and only Abbott was asked about the event. Accordingly, in an as-applied cause of action, only Abbott could be the plaintiff and only Wells could be the defendant because they are the only two people involved in the as-applied issue Plaintiffs raised. Abbott confirmed this in his letter to Wells in which he stated that no complaints were filed against the Plaintiff organizations. J.A. 105. In fact, the other Plaintiffs only became aware that the EOP office had received complaints because Abbott told them, not because of any action by the EOP office.

J.A. 158-59. These characterizations were repeated throughout the meeting. Wells further advised Abbott that "I'm just trying to discover what the context was." J.A. 161. Shortly thereafter, he reiterated that

> Because I get a picture from someone, because I get a complaint from someone, does not mean that we are investigating. I just need to know the context. So we're here exploring with you now what was your event and what was the context of it.

J.A. 164. Later in the meeting, at which Abbott did most of the talking, Wells again advised that "the next step is for us to determine whether we will open an investigation or not." J.A. 185.

The policy governing discrimination complaints involving students (EOP 6.24, Student Non-Discrimination and Non-Harassment Policy, Part II, , J.A. 92-99), outlines the process regarding complaints such as those filed by students regarding Plaintiffs' event. One resolution available to USC is to not pursue the complaints. This is what USC decided to do after Wells' brief review of what occurred according to Abbott and his review of the complaints in light of the information Abbott provided. On December 23, 2015, Wells sent a letter to Abbott notifying him that the EOP office would not pursue the matter as it had "found no cause for investigating this matter." J.A. 196.[3] No action has occurred nor is any

[3] Although there were over 80 pages of attachments to the Complaint, those attachments did not include this December 23, 2015, letter advising that the EOP office "found no cause for investigating this matter."

intended on the part of USC, which is consistent with its letter to Abbot that the EOP office found no cause to investigate.

## SUMMARY OF ARGUMENT

Despite Plaintiffs' efforts to paint this entire situation as one involving a university overreacting to the concerns of a few hypersensitive students, the undisputed facts show that just the opposite occurred. The Libertarians' Free Speech Event was given USC's blessing right from the outset, with one administrator noting that the proposed event would provide an opportunity for the university community "to learn and grow (and even be a bit uncomfortable). . . ." J.A. 154. When the complaints started to come in as the event proceeded, that same official refused to take any action regarding the event, noting that "[t]his is free speech . . . and if they are being respectful and trying to help learn and create dialogue then I am not sure how to help those who are uncomfortable by it." J.A. 156. At the same time, the official quite properly advised that "[a]s I am not there I can't provide context and if group is doing what their event said it would." *Id.*

When written complaints were provided shortly thereafter to a different USC official (Defendants Wells) in a different department, the EOP, that official did not file charges against anyone, despite Plaintiffs' consistent misrepresentation of the record in this regard. Instead, he convened an informal meeting between Abbott and himself, noting that "I can't charge you because I don't know what your event

was. I don't know the context of that. . . . If anyplace, I would say we are in pre-complaint mode where I'm just gathering information, trying to figure out now, what is the context of this?" J.A. 162. After Wells learned about the event from Abbott, the matter was dropped without the filing of charges or the initiation of a formal investigation process. In other words, Wells did what was necessary to ensure that no civil rights violations had occurred, thereby protecting any potential victims of any such alleged violations, while at the same time not subjecting Abbott or the other Plaintiffs to formal charges or a formal investigation.[4]

Wells and Gist, the two defendants against whom Plaintiffs sought damages, were entitled to qualified immunity, as the district court determined. Wells did not violate a federal right nor did he violate a federal right that was clearly established at the time. *Gist is not alleged to have done anything*, which makes it hard to fathom why Gist was included as a defendant.

The district court found that "USC never attempted to silence Plaintiffs' speech, sanction Plaintiffs for their speech, or prevent students from engaging in

[4] Wells restricted his inquiry to one person, in a limited approach to ascertaining what occurred at the approved event. To the extent any other person or organization claims their speech was "chilled" as a result of Wells' letter, that could only have occurred because Abbott involved them and misrepresented to them that a Notice of Charge had been filed. Abbott could have, and arguably should have, asked about the referenced notice of charge that was not included in the letter before attempting to scare other students about a non-issue. This entire situation bears the earmarks of a calculated effort to create a First Amendment violation. It failed, but the Plaintiffs filed this lawsuit anyway.

similar speech in the future. Instead, 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." J.A. 588. The district court then concluded that "the inquiry by Wells was a narrowly drawn solution that was necessary to serve USC's compelling interest in protecting students' rights to be free from discrimination based on race, gender, religion, or other attributes." *Id.*

Plaintiffs also claim that STAF 6.24 is facially invalid; however, the district court correctly held that Plaintiffs lack standing to present such a challenge, because the policy does not apply to the speech in which Plaintiffs intend to participate. J.A. 592. This Court has reached the same conclusion in *Rock for Life-UMBC v. Hrabowski*, 411 F. App'x 541, 547 (4th Cir. 2010), cert. denied, 565 U.S. 814 (2011), another case in which persons who wanted to engage in one kind of speech were held to have no standing to challenge a regulation pertaining to other kinds of speech. Plaintiffs have made no claim that they intend to engage in any speech prohibited by STAF 6.24.

Even if Plaintiffs had standing to challenge STAF 6.24, which they manifestly do not, their challenge fails, because that policy is narrowly drawn to serve a compelling state interest. Plaintiffs do not contend that the aims of the policy, which are to prevent harassment of a racial or sexual nature, are anything other than a compelling state interest. Although they complain about several terms

used in the policy, which they isolate and discuss out of context, they devote almost none of their argument to a discussion of those specific terms, some of which have such well-established meanings that courts use them without further definition. Nor do they cite any cases in which the words they challenge were limited and constrained by their context and by other limiting aspects of the regulations as is the case here. STAF 6.24 is narrowly tailored and limited to non-constitutionally protected speech. It was drafted at the behest of and its language approved by the Department of Justice to protect the civil rights of USC students and staff, without abridging anyone's First Amendment rights.

## STANDARD OF REVIEW

Review of the summary judgment issues in this case is de novo. *Webster v. U.S. Dept. of Agriculture*, 685 F.3d 411, 421 (4th Cir. 2012). In addition, this Court may "affirm on any ground appearing in the record, including theories not relied upon or rejected by the district court." *Scott v. United States*, 328 F.3d 132, 137 (4th Cir. 2003).

## ARGUMENT

### 1. The district court correctly held that Plaintiffs lacked standing to challenge STAF 6.24, the Student Non-Discrimination and Non-Harassment Policy.

#### a. STAF 6.24.

The only USC policy Plaintiffs challenge in this appeal is Policy STAF 6.24, the Student Non-Discrimination and Non-Harassment Policy. J.A. 225-234. STAF 6.24 was mandated and approved by the United States Department of Justice. USC enacted that policy as a result of a 2009 investigation by the Civil Rights Division of the Department of Justice under the Civil Rights Act. The letter from the Department of Justice which commenced the investigation is in the record at J.A. 236-239. Eventually, USC contracted with the Nelson, Mullins law firm, which drafted the policy that became STAF 6.24. *See* J.A. 241. That draft policy was acceptable to USC and to the Department of Justice, see J.A. 253-54, 256 and took effect on April 9, 2013.

As indicated by its first paragraph, the purpose of STAF 6.24 is to "foster an academic, social, and living environment that is free from discrimination and harassment on the basis of race, color, national origin, religion, sex, gender, age, disability, sexual orientation, genetics, veteran status, or any other category protected by law." The categories include well-known protected categories under prevailing civil rights laws.

The second paragraph of STAF 6.24 contains a limiting clause that advises USC students and personnel that the policy does not extend to constitutionally protected speech: "Nothing in this policy is intended to impede the exercise of those rights protected under the First Amendment of the U.S. Constitution" (the "Limiting Clause"). This limiting clause ensures students and employees that the policy does not reach or impede protected First Amendment rights.[5]

Additionally, STAF 6.24 I (B) (2) and (3), the Harassment and Sexual Harassment sections of the policy, are narrowly drawn. The Harassment section only 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." This language is based on similar language in *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999). The policy also specifically does not apply to "the use of materials by students or discussions involving students. . . for academic purposes appropriate to the academic context." Plaintiffs' Free Speech Event, which they described as educational, falls within this exception. The Harassment section is also further constrained by the Limiting

[5] Plaintiffs rely on *United States v. Stevens*, 559 U.S. 460, 480 (2010) for the proposition that the limiting language is irrelevant to the facial challenge of STAF 6.24. That position misreads *Stevens* because in that case there was no similar limiting clause. A limiting clause is a binding provision on government action just as each other provision is binding. *Stevens* is factually inapplicable to this case.

Clause that protects First Amendment rights cited above. Policy 6.24 is therefore narrowly drawn and specifically does not apply to constitutionally protected speech.

**b. Plaintiffs lack standing to bring a facial challenge to a policy they neither violated nor plan to violate.**

The starting point for any discussion of standing is the three-part test set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, (1992), which holds that a plaintiff must show: (1) injury-in-fact; (2) a causal connection or traceability; and (3) redressability. 504 U.S. at 560–61. The alleged injury-in-fact must be both "concrete and particularized and actual or imminent." *Id*. at 560. The term "particularized" means that "the injury must affect the plaintiff in a personal and individual way." *Id*. at 560 n. 1. Finally, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (internal quotation marks omitted). In other words, "A regulation that burdens speech creates a justiciable injury if on its face it restricts expressive activity by the class to which the plaintiff belongs, or if its presence otherwise tends to chill the plaintiff's exercise of First Amendment rights." *Rock for Life-UMBC v. Hrabowski*, 411 F. App'x 541, 547 (4th Cir. 2010), cert. denied, 565 U.S. 814 (2011), citing *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir.1999) and quoted by the district court in the present case. J.A. 588.

All of these considerations come into play when a plaintiff who wishes to engage in one kind of speech (issue-oriented) seeks to challenge a regulation that pertains to a different kind of speech (for example, sexual harassment). This situation was presented in *Rock for Life-UMBC v. Hrabowski*, *supra.* In that case, student organization plaintiffs who erected an anti-abortion display on a college campus were denied standing to challenge the university's sexual harassment policy.[6] This Court held that although the display "seeks to convey a message related to abortion, which necessarily touches upon issues related to gender and reproduction, this type of speech is simply not 'conduct of a sexual nature' covered by the policy." 411 F.App'x. at 548. The court cited several facts to bolster its conclusion that no standing was present:

- No aspect of the display was readily applicable to the policy's definition of "sexual harassment" *(Nor is STAF 6.24 "readily applicable" to the kind of speech found in Plaintiffs' Free Speech Event.)*

[6] That policy, which is similar to STAF 6.24 (but not as precisely or narrowly written), defined "sexual harassment," as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when: (1) Such conduct has the purpose or effect of unreasonably interfering with an individual's academic or work performance, or of creating an intimidating, hostile, or offensive educational or working environment . . . " 411 F.App'x. at 544. The language of STAF 6.24 similarly provides that "Sexual harassment is a specific type of discrimination which is defined as unwelcome conduct of a sexual nature that is sufficiently severe or pervasive that it adversely affects a student's or student group's ability to participate in or benefit from the programs and services provided by the University." J.A. 91-92.

- Plaintiffs did not allege facts suggesting that UMBC officials ever threatened to punish their speech as sexual harassment. *(Wells' conversation with Abbott resulted in a decision to take no action and he confirmed to Abbott that there would be no investigation. This confirmed that STAF 6.24 did not apply to the Free Speech Event. Abbott graduated without any action having been taken and is no longer at USC to engage in any speech.)*

- Plaintiffs' display by the time of the decision had been shown twice, and the plaintiffs did not face threatened or actual disciplinary action for sexual harassment. *(Nor did Plaintiffs in the present case face any disciplinary action and Wells' confirmed that to Abbott in his December 23, 2015 letter. Nor is there any allegation or evidence in the record that the Plaintiffs ever suffered any threat or actual disciplinary action of any of their events in the past or since the Free Speech Event.*)

- Although the plaintiffs claimed a chilling effect to their speech, they were unable at oral argument to name any form of expressive activity that Rock for Life or its members wish to engage in, but refrain from in fear of violating UMBC's sexual harassment policy. *(The same is true here—Plaintiffs make only the vaguest assertions of a chilling effect, unsupported by any realistic indication of a future threat. Moreover, only Abbott could even make such a claim because only he received a letter from Wells. Even in Abbott's case, such a claim is hollow under the facts of this case.)*[7]

[7] Pointedly, even those vague assertions did not materialize until Defendants had fully briefed their motions for summary judgment and could no longer provide a written response. Summary judgment motions are not opportunities for Plaintiffs to enhance the factual allegations pled in their complaint in a desperate attempt to

Plaintiffs' standing claim accordingly fails the *Rock for Life* analysis.

Similarly, in *Lopez v. Candaele*, 630 F.3d 775 (9th Cir. 2010), also cited by the district court, J.A. 590, the Ninth Circuit held that plaintiffs asserting the kind of challenge here made must:

> (a) show "a reasonable likelihood that the government will enforce the challenged law against them;"
>
> (b) establish, "with some degree of concrete detail, that they intend to violate the challenged law;" and
>
> (c) demonstrate that the challenged law is applicable to the plaintiffs, either by its terms or as interpreted by the government.

630 F.3d at 786.

Plaintiffs fail all three of these tests. They have incorrectly tried to shoehorn their academic discussion of free speech issues into the ambit of prohibitions against actually conducting harassment by the use of such speech. There is no likelihood that Plaintiffs might be subjected in the future to disciplinary action under STAF 6.24 for engaging in the only kinds of activities in which they have already engaged and have suggested an intent to undertake in the future. Plaintiffs

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avoid dismissal of their claims. Plaintiffs filed a detailed complaint, not a bare-bones complaint; thus, the last-minute affidavits should be given no weight. Even the timing of alleged chilled speech listed in those affidavits does not add up. The Free Speech Event occurred immediately before Thanksgiving break, after which only one week of classes remained prior to finals and winter break. No activities planned by either Plaintiff group were cancelled from November 24, 2015 – December 23, 2015, nor does either group make such an allegation. Students did not return for classes until January 11, 2016, well after Wells' December 23, 2015 letter to Abbott.

do not contend that they intend to commit acts of harassment prohibited by STAF 6.24 and therefore, lack standing to challenge it. *See, e.g., Mississippi State Democratic Party v. Barbour*, 529 F.3d 538, 545 (5th Cir. 2008) ("[t]o prove standing to raise a First Amendment facial challenge, . . . a plaintiff must produce evidence of an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, (1979)). *See also, e.g., St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 487–88 (8th Cir. 2006) (requiring "a specific intent to pursue conduct in violation of the challenged statute"); *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir.2000) (requiring evidence of "concrete plans" to violate statute).

Like the plaintiffs in *Rock for Life*, Plaintiffs in this case did not engage in speech that included sexual harassment. In *Rock for Life*, university officials had a definite idea of the precise nature of the speech in which the plaintiffs intended to engage.[8] Before the event, a university official had viewed a website associated with the creators of the display signs which the plaintiffs proposed to set up on

[8] On appeal, Plaintiffs argue that *Rock for Life, supra*, is inapposite, quoting a part of this Court's opinion which noted that "UMBC never undertook a 'concrete act' to investigate or sanction the plaintiffs for violation of the code of conduct." Br. of Appellants at 22, quoting *Rock for Life*, 411 F. App'x at 549. Plaintiffs quote a part of the opinion which did not deal with the sexual harassment policy, but which instead discussed the broader "code of conduct," which prohibited, but did not define, "physical or emotional harassment."

campus. 411 F. App'x at 544. Additionally, on the day of the event, another university official witnessed the setting up of the display and informed plaintiffs that it needed to be moved to another location. Finally, as this Court noted,

> no aspect of the GAP display is readily applicable to the policy's definition of "sexual harassment," which is limited to "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature...." Although the GAP display seeks to convey a message related to abortion, which necessarily touches upon issues related to gender and reproduction, this type of speech is simply not "conduct of a sexual nature" covered by the policy.

411 F. App'x at 548. In the present case, Plaintiffs held their event at the time, place, and manner that they themselves requested. But unlike *Rock for Life*, Wells did not have knowledge as to how the event went that day, other than the complaints he received, which included a complaint that referenced verbal "racist and sexist statements." Thus, the possibility of sexual harassment could not be automatically ruled out, because one of the three complainants to USC complained of verbal "racist and sexist statements." J.A. 72. As a result, Mr. Wells did need to look into the facts.

As discussed elsewhere, this minimal review by Wells did not amount to "threatened or actual disciplinary action for sexual harassment." 411 F. App'x at

548.[9] Even if Wells' minimal inquiry could be regarded as "threatened . . . disciplinary action," the test is whether any past university action would support plaintiffs' claim of a future "credible threat of enforcement of disciplinary action under [the university's] sexual harassment policy." *Id.* These Plaintiffs are no more likely to be subjected to a future threat than were the plaintiffs in *Rock for Life*, because the type of speech in which Plaintiffs seek to engage "is simply not . . . covered by" STAF 6.24. *Id.*[10]

Plaintiffs also attempt to fit themselves within the caselaw that holds that standing exists when a regulation "tends to chill the exercise of First Amendment rights. *N. Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999). However, in addition to the absence of a credible threat of enforcement, Plaintiffs' claims in this regard lack factual support. Given that USC found nothing about

[9] In fact, sexual harassment was not mentioned during the meeting between Wells and the students. The closest the discussion came to that topic was one question by Wells: "Was there a slur related to sexual orientation transgender students, a symbol or a case example that you all have used?" J.A. 176. Abbott answered only that "I suppose the closest you would get the Nazis were not particularly pro-transgender or pro-LGBTQIA+, but that's certainly as close as I can think of." J.A. 177.

[10] Plaintiffs assert that "[m]ore relaxed standing rules . . . govern facial First Amendment challenges," but as *Rock for Life* points out, *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the source of the term "relaxed," "does not circumvent the requirement that a plaintiff suffer an individual injury from the existence of the contested provision to begin with." 411 F. App'x at 548. *Broadrick* "relaxes prudential, but not Article III, standing requirement." *Id.*

Plaintiffs' event that implicated the university's harassment policy, it cannot reasonably be argued that Plaintiffs had any reason to feel chilled in their speech. This is true generally and even more emphatically true after Abbott and Wells met and after the December 23, 2015 Wells' letter to Abbott indicating that USC had found "no cause for investigating this matter." J.A. 196.

Nonetheless, giving Plaintiffs every benefit of the doubt at this stage of the litigation, the district court found that at most, and for purposes of summary judgment, "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." J.A. 586-7 (emphasis added). While Defendants disagree that such a person could reasonably have felt chilled even for that brief period, Plaintiffs do not allege that they engaged in any self-censorship during the period from November 24, 2015, the date of the first Wells letter, to December 23, 2015, when Wells advised that the matter would not be pursued. Plaintiffs claim that they did not hold a kick-off event for the new semester beginning January 2016,[11] Abbott Decl., ¶ 23, J.A. 562, but that event would have occurred after Wells' second letter,

[11] A review of the USC calendar for 2015, of which the Court may take judicial notice, indicates that the Wells letter was sent on the Tuesday before Thanksgiving, which was the last day of classes before Thanksgiving. There was only one more week of classes in 2015, running from November 30 through December 4. Plaintiffs do not allege that they had anything planned for that brief window of time. The calendar is online at https://www.sc.edu/about/offices and_divisions/registrar/academic_calendars/2015-16_calendar.php.

advising that nothing would happen as a result of the November event. Plaintiffs also allege that they did not hold their annual Marijuana Legalization Rally in 2016 until after this action was filed in February 2016. Abbott Decl., ¶ 25, J.A. 563, but this only serves to emphasize the complete disconnect between the speech Plaintiffs claim to be threatened, on the one hand, and the very limited and specific reach of the harassment provisions of STAF 6.24 on the other.[12] As was the case with the display in *Rock for Life*, no aspect of such an event "is readily applicable to the policy's definition of 'sexual harassment'. . . ." 411 F. App'x at 548.[13]

Plaintiffs mistakenly rely on *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014), which granted the plaintiffs in that case standing because they had previously run afoul of the law, it was enforced against them, and they alleged they

[12] Further illustrating this disconnect is the statement of Michael Kriete, the head of YAL, who claims to have had concerns that a proposed pro-capitalism event in February 2016 might be found offensive by students. Kriete Decl. ¶ 11, J.A. 570. It is hard to imagine how such an event has any relevance to STAF 6.24.

[13] Plaintiffs misapply the facts of *Cooksey v. Futrell*, 721 F.3d 226 (4th Cir. 2013), cited at Br. of Appellant at 21, 23, with those of the present case. *Cooksey* involved a state licensing board which accused the plaintiff of practicing dietetics/nutrition without a license. The board made a "red pen review" of the plaintiff's website and asked that he change the website accordingly. 721 F.3d at 231-32. The plaintiff changed his website to the board's satisfaction, but the board advised that it "reserve[d] the right to continue to monitor this situation. *Id.* at 233. This Court held that the plaintiff in that case could reasonably feel a chilling effect from being "told, in effect, that he would remain under the watchful eye of the State Board." *Id.* at 237. There is nothing in the present case to indicate that USC would be on the lookout for future alleged violations by Plaintiffs.

planned to engage in substantially similar activity in the future. 134 S. Ct. at 2340. Plaintiffs in this case, however, cannot show that they intend to participate in any future action that would be likely to subject them to a genuine threat of enforcement of STAF 6.24. As a result, they have no standing to make a facial challenge to STAF 6.24. Accordingly, the district court's standing decision should be affirmed.

**2. Even if Plaintiffs had standing to challenge it, STAF 6.24 is constitutional.**

Because the district court held that Plaintiffs lacked standing to make a facial challenge to STAF 6.24, the court did not reach the question of SATF 6.24's facial validity. USC agrees with the district court's standing analysis. Nonetheless, STAF 6.24 is constitutional. It contains numerous exclusions that severely limit its application. The exercise of rights protected under the First Amendment of the U.S. Constitution are specifically excluded -- the policy announces at its outset that it simply does not apply to limit, abridge, or deny constitutionally protected free speech rights. In its initial paragraphs, the policy provides as follows:

> [T]he University believes it should foster an academic, social, and living environment that is free from discrimination and harassment on the basis of race, color, national origin, religion, sex, gender, age, disability, sexual orientation, genetics, veteran status, or any other category protected by law.
>
> The University is also committed to the principles of academic freedom and believes that a learning

> environment where the open exchange of ideas is encouraged is integral to the mission of the University. The University vigorously embraces students' rights to the legitimate freedom of expression, speech, and association. Nothing in this policy is intended to impede the exercise of those rights protected under the First Amendment of the U.S. Constitution. The University recognizes that the conduct prohibited in this policy extends to behavior and speech that is not constitutionally protected and which limits or denies the rights of students to participate or benefit in the educational program.

J.A. 90 (emphasis added).

STAF 6.24 also specifically exempts academic discussions from its reach:

> Harassment does not include the use of materials by students or discussions involving students related to any characteristic articulated in Section II for academic purposes appropriate to the academic context.

STAF 6.24, § I(B) (2), J.A. 91. Accordingly, STAF 6.24 by its terms did not apply to Plaintiffs' Free Speech Event.

The policy further limits its prohibitions to conduct or speech 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," *Id.* at 3, or which is "sufficiently severe or pervasive that it adversely affects a student's or student group's ability to participate in or benefit from the programs and services provided by the University." *Id.*at 4.

Considering all the limitations and exclusions together, they add up to at least three limitations on the policy. To violate STAF 6.24, speech or conduct must

- Go beyond students' rights to the legitimate freedom of expression, speech, and association, that is, exceed the exercise of those rights protected under the First Amendment of the U.S. Constitution.
- Not be related to discussions for academic purposes appropriate to the academic context.
- Seriously interfere with a student's or student group's ability to participate in or benefit from the programs and services provided by the University.

In other words, if a student's speech or conduct falls within the established protections of the First Amendment, STAF 6.24 does not prohibit it. In addition, the policy does not cover discussions in academic contexts. This limitation is particularly apropos when the interested party is a person or organization such as the individual Plaintiff or organizational Plaintiffs, who seek to engage in academic discussions by citing examples of speech that some have tried to claim is unduly harassing. The policy also excludes any speech that is not "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." J.A. 91.

As Plaintiffs described their event, it was intended to evoke a discussion of censorship by displaying "symbols and speeches that have been censored in the

past" on college campuses. J.A. 566. In other words, their display was intended to communicate that some colleges had found various words, phrases, or statements objectionable and banned their use. USC did not. The passersby could then decide for themselves what they thought about the varying communications and the responses of different universities to them in an academic context.

The legal test applied to regulations such as STAF 6.24 is that if they are deemed to be content-based, the government is required "to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest. . . ." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2231 (2015). Plaintiffs have not challenged the district court's conclusion that USC has a compelling interest "in protecting students' rights to be free from discrimination based on race, gender, religion, or other attributes." J.A. 588.[14] Plaintiffs could hardly argue otherwise. In *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001), a case on which Plaintiffs rely, the court was careful to note that

[14] Plaintiffs argue that "when anti-discrimination or anti-harassment laws seek to regulate offensive words or symbols, the government is required to prove that 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.'" Br. of Appellants at 31, quoting *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999). However, this contention merely points to the absence of standing and a live controversy in this case because Plaintiffs have not uttered, and do not propose to utter, any specific speech that would fall within the prohibition of STAF 6.24.

> We do not suggest, of course, that no application of anti-harassment law to expressive speech can survive First Amendment scrutiny. Certainly, preventing discrimination in the workplace—and in the schools—is not only a legitimate, but a compelling, government interest. *See, e.g., Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987). And, as some courts and commentators have suggested, speech may be more readily subject to restrictions when a school or workplace audience is "captive" and cannot avoid the objectionable speech.

240 F.3d at 209-10.

Thus, the sole issue is whether STAF 6.24 is narrowly tailored. In reviewing the policy, it must be kept in mind that "[t]he First Amendment requires that [a regulation of speech] be narrowly tailored, not that it be 'perfectly tailored.'" *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1671 (2015).

The portions of STAF 6.24 which Plaintiffs single out for attack are few. Those portions of the policy are quoted in a total of seven lines at pp. 32-33 of the Brief of Apellants. The actual language of the policy is not mentioned again during Plaintiffs' discussion of alleged vagueness of the policy. Brief of Appellants at 32-39. Plaintiffs refer first to the terms "objectionable epithets" and demeaning descriptions." *Id.* at 32. These terms are found in the part of STAF 6.24 which deals with "Harassment." J.A. 91. The same paragraph also contains the limiting language that in order to constitute harassment, the complained-of speech or conduct must be

> 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

STAF 6.24(I) (B) (2), J. A. 91. Plaintiffs attempt to take phrases out of context and claim they are vague. The phrases are not vague and are limited in their application.

Plaintiffs attempt to contrast the language above with the language in *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999), which states that "an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." Br. of Appellant at 37. Plaintiffs contend in effect that any regulation of speech which does not consist of a verbatim mirror of that language cannot stand. However, Plaintiffs' argument on this point tries to place more weight on that single phrase than the Court itself did. This Court has also not read that language from *Davis* as rigidly as Plaintiffs would have the Court do.

The opinion in *Davis* does not repeat the phrase "severe, pervasive, and objectively offensive" as a talismanic invocation that must be complied with word for word. In fact, the phrase was used not as part of the language of a policy or regulation, but rather as guidance in determining whether an educational institution is liable for damages as a result of deliberate indifference to known acts of harassment in its programs. 526 U.S. at 633. The Court noted that "[w]hether

gender-oriented conduct rises to the level of actionable harassment thus depends on a constellation of surrounding circumstances, expectations, and relationships. . . ." 526 U.S. at 651, quoting in part *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 82 (1998) (emphasis added). The Court elsewhere merely noted that "student-on-student sexual harassment, if sufficiently severe, can . . . rise to the level of discrimination actionable." 526 U.S. at 650 (emphasis added). The Court also cited with approval language from *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986), which stated that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment" (emphasis added).

This Court has not required the rigidity that Plaintiffs claim to be necessary. *See, e.g., Jennings v. Univ. of N. Carolina*, 482 F.3d 686, 695 (4th Cir. 2007) (en banc) ("[t]o establish a Title IX claim on the basis of sexual harassment, a plaintiff must show that . . . (3) the harassment was sufficiently severe or pervasive to create a hostile (or abusive) environment in an educational program or activity" (emphasis added; citing *Davis)*; *see also, e.g., Mother Doe 203 v. Berkeley Cty. Sch. Dist.*, 2016 WL 6627900, at *3 (D.S.C. 2016) ("[i]n *Davis*, the Supreme Court stated that such harassment, 'if sufficiently severe,' can constitute the sex-based discrimination that Title IX prohibits" (emphasis added). There can be no doubt

that the language of STAF 6.24 captures the concept expressed in *Davis* and many later cases, even though it does not copy every word of a phrase found in *Davis*.

Turning to the language of STAF 6.24, Plaintiffs complain about the terms "objectionable epithets" and "demeaning descriptions". Defendants' research has found no cases in which the use of either term has been invalidated. [15] The few cases in which the terms are to be found are ones in which the courts themselves use the terms without further definition. In *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 391 (1992), the Supreme Court noted that "[d]isplays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views," 505 U.S. at 391, and therefore did not constitute a restriction of speech on disfavored topics. *See, also e.g.*, *Fallon v. Fallon*, 111 N.J. Eq. 512, 526, 162 A. 406, 412 (1932) (plaintiff heard her husband describing her parents "by the same objectionable epithets as he had previously employed on similar occasions"); *In re Addleman*, 151 Wash. 2d 769, 92 P.3d 221 (2004) (prisoner convicted of first degree statutory rape was not rehabilitated when, among other things, he

[15] Plaintiffs assert that many cases that they string-cite in footnote n.4 have invalidated "such broad and vague restrictions." Br. of Appellants at 33 and 33 n.4. However, a review of the actual language at issue in those cases indicates that none of them contain either of the two phrases found in STAF 6.24. In addition, the policies reviewed in those cases typically are devoid of the kind of limiting language included in abundance in STAF 6.24. Perhaps most telling is that few, if any, of the policies in those cases contained any exception for academic discussions, such as that contained in STAF 6.24. Nor were those policies mandated and approved by the Department of Justice.

maintained a slang dictionary of sexual terms reflecting degrading and demeaning descriptions of women).

A reading of the other specific terms of STAF 6.24 in their context indicates that those terms also are narrowly defined. Plaintiffs mention, although they do not discuss, the policy's references to "unwelcome" or "inappropriate" speech. Br. of Appellant at 33. However, the term "unwelcome" appears only in the part of STAF 6.24 which addresses severe or pervasive sexual harassment. The specific context is as shown below:

> Sexual harassment is a specific type of discrimination which is defined as unwelcome conduct of a sexual nature that is sufficiently severe or pervasive that it adversely affects a student's or student group's ability to participate in or benefit from the programs and services provided by the University.

STAF 6.24(I) (B) (3), J.A. 91-92 (emphasis added). The policy limits the term "unwelcome" in several different ways: it has to be "of a sexual nature" and must be "sufficiently severe and pervasive" as to have an adverse effect on a student's ability to receive an education. Moreover, the term "unwelcome" is far from being too vague or broad to be understood. To the contrary, the term has long been a part of the definition of sexual harassment as found in many reported cases. *See, e.g.*, *Ocheltree v. Scollon Productions, Inc.*, 335 F.3d 325, 331 (4th Cir. 2003) (to establish a sexual discrimination claim, "a claimant must show that the offending conduct was (1) unwelcome; (2) based on her sex; (3) sufficiently severe or

pervasive to alter the conditions of her employment and create an abusive work environment; and (4) imputable to her employer"). Obviously, this Court has had no problem with understanding what is meant by "unwelcome" sexual conduct in this context.

The term "inappropriate," about which Plaintiffs also complain, is likewise a term found only in the portion of STAF 6.24 pertaining to sexual harassment. *See* STAF 6.24(I) (B) (3) (c) (iv) and –(v), J.A. 92 (defining unwelcome sexual harassment as including "[r]epeated inappropriate verbal comments" and "inappropriate letters, telephone calls, electronic mail, or other communication or gifts[.]" As with the term "unwelcome" in this context, the term "inappropriate" is frequently and routinely used in cases, without further definition, to describe a defendant's sexually harassing conduct. *See., e.g., E.E.O.C. v. Cent. Wholesalers, Inc.*, 573 F.3d 167, 170 (4th Cir. 2009) (record indicated that defendant "engaged in inappropriate . . . gender-based conduct").

Plaintiffs also complain about the term "Sexual innuendos and other sexually suggestive or provocative behavior," Complaint ¶ 92, J.A. 31-32, but again, these are terms which have never been held to be unconstitutionally vague, and which instead are part of the common parlance used by courts in sexual harassment cases. *See, e.g., Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983) (workplace "was pervaded with sexual slur, insult and innuendo"). Finally,

Plaintiffs complain about the term "suggestive or insulting gestures or sounds." Complaint, ¶ 92, J.A. 31-32. These phrases are also ones that no case has ever found a need to define.

In summary, all the challenged terms are found in a context that limits their application to situations where the speech would interfere with or adversely affect students' educational opportunities. It has long been settled that "[f]acial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). The challenged terms of STAF 6.24 must be construed in context:

> Standing alone, the terms "intimidation" and "harassment" are not clearly self-limiting and could be understood, reasonably, to proscribe at least some expressive activity that would be protected by the First Amendment. These challenged words, however, do not stand alone. They appear in a specific context. * * * In the case at bar, the structure of the challenged provision itself suggests (arguably compels) such a limiting construction. The words "intimidation" and "harassment" appear in this provision in a dependent clause [proscribing only the sub-category of intimidation or harassment that "threatens or endangers the health or safety of any person"] whose terms appear to have been intended to acquire operative effect only when the conditions set forth in the first and primary clause are met.

*Coll. Republicans at San Francisco State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1021–22 (N.D. Cal. 2007).

STAF 6.24 therefore is narrowly and tightly drawn. It exempts academic discussions, provides for the protection of First Amendment rights, and limits its reach to severe and pervasive speech or conduct which deprives others of educational opportunities. In short, STAF 6.24 is constitutional.

**3. Appellees Gist and Wells Are Entitled to Qualified Immunity**

Count I of Plaintiffs' complaint alleged an as-applied (damages) claim against Defendants Gist and Wells. The district court correctly granted Appellees' summary judgment motion on Count I based on qualified immunity. While there were no allegations against Gist in the entire complaint, the allegations against Wells were based solely on Wells' November 2015 and December 23, 2015 letters to Abbott and his meeting with Abbott.[16] Additionally, as discussed in this brief and in footnote 2, only Abbott could be a plaintiff as to Count 1.

Fourth Circuit jurisprudence on qualified immunity provides:

> The qualified immunity inquiry asks (1) whether an official violated a federal right, and (2) whether that right was clearly established at the time the official acted. *See Saucier v. Katz*, 533 U.S. 194, 200 (2001). A court may address the second question-whether a right is clearly established-without ruling on the first-existence of the right. *Pearson v. Callahan*, 555U.S. 223, 232, 236 (2009).

[16] Additionally, as to Defendant Gist, the Complaint is devoid of allegations of personal involvement by him. As a result, summary judgment as to Gist was also proper and should be affirmed because Plaintiffs failed to allege the necessary element in a Section 1983 claim of personal participation by a state official. *See e.g., Wright v. Collins*, 766 F.2d 841, 849-850 (4th Cir. 1985) (defendant in a Section 1983 action must be affirmatively shown to have acted personally in the deprivation of the Plaintiff's rights).

*Hensley v. Koller*, 722 F.3d 177, 181 (4th Cir. 2013). In *Wilson v. Layne*, 141 F.3d 111 (4th Cir. 1998), the Fourth Circuit held that "[t]he law is clearly established such that an officer's conduct transgresses a bright line when the law has been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state." 141 F.3d at 114. *See also*, *Doe ex rel. Johnson v. South Carolina Dept. of Social Services*, 597 F.3d 163, 176-77 (4th Cir. 2010) (granting qualified immunity where no precedent from Supreme Court or the Fourth Circuit clearly established existence of constitutional right). Thus, the district court could have granted summary judgment either because no federal right was violated or because such right was not clearly established at the time.

To analyze the qualified immunity claim, one misstatement in the facts needs to be clarified for the Court. Plaintiffs have misstated the record on appeal. There are at least seventeen references in their brief to the factually-erroneous assertion that Wells sent Abbott a "Notice of Charge," thereby instituting a formal disciplinary process.[17] However, it is undisputed that no such notice of charge

[17] Plaintiffs make numerous factual errors in their brief. For example, Plaintiffs assert that Wells' letter "said Abbot *must* participate in mediation to 'resolve the complaint'" (italics added) and that Michael Kriete must come to the meeting. App. Br. 8, 10. Wells' letter said no such thing. J.A. 66. Plaintiffs also assert that officials at the University sent a "Notice of Charge" to the Plaintiffs, Ross Abbott, YAL and the Libertarians. App. Br. 3. Again, Wells did no such thing nor is there any record support for this statement. Wells only sent a letter to Abbott. J.A. 66. Plaintiffs begin their brief with another inaccuracy when they state that USC

accompanied the November 24, 2015, letter from Wells to Abbott. Plaintiffs did not file a copy of any notice of charge in the record, because it does not exist. As a result, the asserted factual predicate for Plaintiffs' damage claim is simply missing.

The letter from Wells to Abbott, ECF No. 1-14 at 2, did include a scrivener's error that "Enclosed is a copy of the Notice of Charge in this matter. . . ," but no such notice was in fact enclosed. Nor was the omission of the notice accidental. As Wells explained repeatedly during the meeting between him and Abbott, Abbott had not been charged with anything:

> MR. ABBOTT: Right. Well, I guess I'm still confused as to where we are in the process. It looks to me reading through the policy, I'm seeing a mismatch of where we are. I know what you're saying. The problem that I'm having is the notice of charge section. It looks -- I'm confused because it looks very much like we're already in the formal procedure section.
>
> MR. WELLS: We are not. Let me show you where we are. We're not in the formal procedure.
>
> MR. ABBOTT: We're on the first page. But I did receive a notice of charge, that's what the -- the letter that you sent me said it was.
>
> MR. WELLS: Well, we need to take a step back then and let you know that right now I can't charge you because I don't know what your event was. I don't know the context of that. Like I say, I got a complaint and I got some pictures. Pictures and a complaint don't constitute if I

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"maintains *policies* that function as a repressive speech code. App. Br. 3. This appeal is about a single policy – not policies. Also, STAF 6.24 is not a repressive speech code.

> convene an investigation. If anyplace, I would say we are in pre-complaint mode where I'm just gathering information, trying to figure out now, what is the context of this?

J.A. 161-62 (emphases added). The district court noted that a notice of charge had not been filed. J.A. 566, and acknowledged Defendants' uncontradicted statement that the reference to a notice of charge was a scrivener's error. J.A. 575 n.2. Surely the law is not that a scrivener's error rises to a constitutional violation.

**a. The district court correctly granted Defendants summary judgment as to Plaintiffs' as-applied claim (Count I) and should be affirmed.**

Applying qualified immunity principles, the district court held that "Plaintiffs' rights to freedom of expression are clearly established," but that USC's minimal inquiry was "a narrowly drawn solution that was necessary to serve USC's compelling interest in protecting students' rights to be free from discrimination based on race, gender, religion, or other attributes." J.A. 584, 588. The district court determined that the constitutional right pertinent to this inquiry is the generalized right to free speech, but that no federal right was violated because Defendants applied a narrowly drawn solution to serve a compelling state interest.[18] "The

[18] While the district court found for purposes of summary judgment that Plaintiffs' speech was chilled, the district court also found that "even if Abbott believed before attending the meeting that he was in danger of disciplinary action, these fears should have been assuaged after he attended the meeting, which was held fifteen days later." J.A. 587 n.4. Tellingly, no Plaintiff alleged any self-censorship

Supreme Court has held repeatedly that a content-based regulation of protected expression survives judicial scrutiny if it is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." J.A. 584-5. quoting *Iota XI of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 394 (4th Cir. 1993) (Murnaghan, J., concurring and quoting *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 602 U.A. 105, 118 (1991) (internal quotation marks omitted). As Judge Murnaghan further noted, as quoted by the district court, J. A. 585, "the Supreme Court has recognized that regulation of speech based on its content is not only permissible but, in limited circumstances, justified." In addition, it is unremarkable to note that "[u]nder certain circumstances racial and ethnic epithets, slurs, and insults might fall within this description and could constitutionally be prohibited by the University." *Doe v. Univ. of Michigan*, 721 F. Supp. 852, 862 (E.D. Mich. 1989).

The district court correctly determined that Wells' actions were sufficiently narrowly tailored to serve the state's compelling interest. Put simply, USC needed to find out what happened in order to determine whether to initiate the formal civil rights complaint process. The pre-event exchange of information between Abbott and Kim McMahon provided USC with information about the nature of the intended event, but did not reveal the actual displays. J. A. 151-52. Nor, obviously,

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prior to receiving Well's December 23, 2015, letter, nor were any events cancelled. Even Abbott did not censor himself when he discussed Wells' letter with others.

did that exchange of pre-event information include what was said, done, or displayed at the event. As that USC official, Kim McMahon, advised someone who was complaining about the event even as it was occurring, "[a]s I am not there I can't provide context and if group is doing what their event said it would." J.A. 156.[19] Plaintiffs incorrectly state that none of the three student complaints "suggested that there had been any actual harassment within the meaning of *Davis*." Br. of Appellants at 43. In fact, although omitted from Plaintiffs' statement of facts, one of the students alleged that Plaintiffs were "engaging rudely with USC students, saying sexist and racist statements." J.A. 72.

Absent Wells' review, USC would not have had an informed basis either to move forward or to decline to move forward with a discrimination or hostile environment complaint. Abbott complains that he received a letter from the EOP about the students' complaints and that he was asked to respond to their allegations. As noted earlier, one of the complaints received by Wells alleged that Plaintiffs were "engaging rudely with USC students, saying sexist and racist statements." J.A. 72. It is difficult to see how Wells could have performed his duties, which include the remediation of racial or sexual harassment, without inquiring into what happened. Abbott also complains that mediation was required. App, Br. 8, 44. In

[19] The district court was therefore not quite correct in stating that "USC knew of the content of the Free Speech Event. . . ." J.A. 588. And Plaintiffs are completely wrong in implying that the EOP could have known what occurred without further inquiry.

fact, mediation was never required. Mutually agreeable mediation was offered. Abbott claims both these circumstances violated his free speech rights; however, he fails to acknowledge that universities must review discrimination complaints brought to them. The offered mutually-agreeable mediation is voluntary and often used as a way for students to begin a dialogue about issues affecting the University community members, not as a punishment of any student. See STAF 6.24 II (B) (1). J.A. 95. (complaint may be resolved informally through mediation). The district court understood USC's obligations,

> USC was required under Title VI of the Civil Rights Act of 1964 and mandates from the United States Department of Education to ensure that no students had been unlawfully discriminated against as a result of the Free Speech Event. To do so, USC had an obligation to employ a method of balancing both students' rights to freedom of speech and rights to be free from discrimination.

J.A. 587 [footnote omitted.] The district court also acknowledged the minimal nature of Wells' actions:

> Even if Abbott believed before attending the meeting that he was in danger of disciplinary action, those fears should have been assuaged after he attended the meeting, which was held fifteen days later. Throughout the meeting, Wells clarified that there were no charges against Abbott, and that the meeting was being held to obtain Abbott's response to the student complaints. Finally, USC declined to pursue an investigation of the event after confirming with Plaintiffs that the event had been held as Plaintiffs represented it would be. ECF No. 27-6.

J.A. 587 n. 4.

Plaintiffs set forth a list of ideas of their own creation as to how Wells might have conducted his inquiry rather than asking Abbott to come in to discuss the events with him. Brief of Appellants at 45. Most of these would not have resulted in Wells' obtaining reliable information about what happened. The action Wells took was the one that was most favorable to Abbott, permitting him to provide his side of the story, and then taking his word for it.[20] USC, as the district court held, "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." J.A. 588.[21]

Accordingly, the Court should affirm the district court's grant of summary judgment as to Count I.

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[20] Wells limited his inquiry to obtaining information from only Abbott, rather than sending letters to all the Plaintiffs or all the members of the student groups involved in the event.

[21] The district court, J.A. 585-87, engaged in a discussion of whether Wells' inquiry would have been "likely [to] deter a person of ordinary firmness from the exercise of First Amendment rights." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir.2005) (internal quotation marks omitted). The court concluded that any fears Abbott had should have been assuaged after he attended the meeting with Wells. J.A. 587 n. 4. In addition, as noted above, the period of alleged "chill" minimal at best, and did not actually stop Plaintiffs from putting on any other events.

**b. Plaintiffs had no constitutional right to be free from the minimal inquiry Wells undertook.**

This Court may affirm the district court's decision to grant summary judgment as to Count I on any basis for which Wells and Gist are entitled to qualified immunity. Plaintiffs' essentially assert that they have a constitutional right not to have any inquiry at all made into allegations that conduct or speech amounted to racial or sexual discrimination or harassment. In fact, there is no such right, much less a clearly established right of that nature.

Plaintiffs' argument on this point amounts to saying that they have an absolute right to say anything they wish, and that even if the speech is alleged to have infringed on the civil rights of others, USC may not inquire into the circumstances to determine what they said. This, however, cannot be a correct statement of the law. The right of other students to be free from objectively offensive speech operates as at least some degree of a brake on Plaintiffs' right to speak. Thus, for instance, in another area in which a person's rights come into collision with the state's duty to inquire into possible violations of the rights of others, it has been held that "There is no constitutional right to be free from child abuse investigations." *Kauch v. Dep't for Children, Youth & their Families*, 321 F.3d 1, 4 (1st Cir. 2003). *See also, e.g., Popovic v. United States*, 997 F. Supp. 672, 678 (D. Md. 1998), aff'd, 175 F.3d 1015 (4th Cir. 1999) ("[a]n individual has no constitutional right not to be investigated for suspected violations by agencies

authorized to conduct such authorizations"); *Fortner v. Cty. of El Paso*, 2016 WL 806751, at *5 (D. Colo. 2016) ("[a]voiding an investigation is not a protected property or liberty interest").

Wells, who did not personally observe the Free Speech Event while it was going on, could not have known what happened without conducting some degree of inquiry. Plaintiffs' argument that a short meeting to inquire as to what occurred at the event violated Plaintiffs' First Amendment rights is simply unfounded.

First, the event had already occurred unfettered, so free speech rights were not violated. As the district court stated, "USC never attempted to silence Plaintiffs' speech, sanction Plaintiffs for their speech, or prevent students from engaging in similar speech in the future." J.A. 588. Second, an informal meeting to discuss what happened at the event did not violate free speech rights. Anything could have happened at the event and complaints received by Wells alleged that Plaintiffs were "engaging rudely with USC students, saying sexist and racist statements." J.A. 72. Thus, it was appropriate for Wells to inquire as to what happened considering the complaints the University received. Plaintiffs argue that Wells should have been satisfied that Abbott properly conducted the event because the words and images on display were "the very same ones Abbott described in his proposal to McMahon when he obtained approval for the event." Br. of Appellants at 43. However, Plaintiffs' representations before the event about what would occur in the future did

not constitute a guarantee that Plaintiffs would not go beyond the realm of protected speech during the actual course of the event. Thus, Plaintiffs' efforts to show that the event stayed within First Amendment bounds is irrelevant to the issue of Wells' liability, when he did not know at the time of his inquiry exactly what occurred. He did not personally observe the Free Speech Event. Wells' conduct cannot be judged under First Amendment standards until he knew what happened.[22] Moreover, once he knew what happened, he made it clear that USC would take no action.

Additionally, according to Abbott, the information Abbott provided at the meeting with Wells was the same information Abbott had previously voluntarily provided to McMahon at a meeting that *Abbott* had requested with McMahon. How can it have violated Plaintiffs' First Amendment rights to provide the same information to Wells that Abbott previously provided to McMahon? That makes no

[22] In connection with their summary judgment motion, Plaintiffs complain that Wells' letter "imposed a 'gag order' on Plaintiffs, prohibiting them from discussing the matter with complainants or others in the university community. . . ." Br. of Appellants at 48. While this point is briefly mentioned in the Complaint, J.A. 20, ¶ 33), it is not asserted as a basis for any of Plaintiffs' claims. It is well settled that a motion for summary judgment cannot enlarge upon the relief sought in the complaint. *See, e.g., White v. Roche Biomedical Laboratories, Inc*., 807 F.Supp. 1212, 1216 (D.S.C.1992) ("a party is generally not permitted to raise a new claim in response to a motion for summary judgment"); *Bridgeport Music, Inc. v. WM Music Corp.*, 508 F.3d 394, 400 (6th Cir.2007) (holding that a party may not expand its claims to assert new theories in response to summary judgment). Moreover, it is appropriate for a university to discourage retaliation or intimidation against persons filing complaints and to maintain the status quo regarding what witnesses know during fact finding. Additionally, Abbott obviously did not feel "gagged," because he told others about the letter.

sense. There is no constitutional right to be free from telling a second university official what he already told another university official on his own volition.

This principle applies even more strongly where, as here, the process never reached the point where an investigation had commenced. *See, e.g.*, J.A. 159, where Wells advised that "we are in pre-investigation mode." There is obviously no right to be free from any inquiry whatsoever into what a person may have said. To hold otherwise would be to vitiate the protection of students against harassing speech that is objectively offensive, and thus would be to contravene such cases as *Davis, supra.*

Wells was merely determining the scope of the speech and the complaints to determine whether the speech was constitutionally protected speech. Wells performed his job reasonably within the often-murky area at the intersection of constitutionally protected free speech and federally protected groups' rights to not be subjected to illegal discrimination and harassment. Plaintiffs cited no case law or statute that would alert Wells that reviewing multiple complainants' discrimination and hostile environment complaints with Abbott would violate Abbott's civil rights. Plaintiffs fail to comprehend or acknowledge that the right to not suffer discrimination is a civil right as well, and sometimes competing rights warrant examination of the facts and circumstances at issue before a clearer understanding of the appropriate way to proceed is determined. It is Wells' job to

examine complaints, talk with all parties, and decide whether the complaint warrants further action.

None of the Plaintiffs were damaged by Wells' brief and low-key review of the November 23, 2015, event. Universities are charged with protecting the rights of all the parties involved in this situation, which may require an inquiry to sort out whose rights prevail. Wells therefore did not violate any constitutional rights of the Plaintiffs, much less any clearly established constitutional rights, and therefore is entitled to qualified immunity.

Finally, citing essentially only one case, Plaintiffs argue that the process Wells used did not have a method for screening out frivolous complaints. Br. of Appellants at 41-43. The one case cited by Plaintiffs for this proposition, *Susan B. Anthony List v. Driehaus*, 814 F.3d 466 (6th Cir. 2016), involved a very different set of facts. There, a statute criminalized the making of false statements about candidates during political campaigns. While there was a process for a probable cause hearing on a given complaint, the need to hold such hearings without a pre-screening process "provides frivolous complainants an audience and requires purported violators to respond to a potentially frivolous complaint." 814 F.3d at 474. Those facts bear no relation to those of the present case, where Wells' brief inquiry remained confidential and had no practical effect on the activities of the

Plaintiffs.[23] Moreover, rather than leading to a formal charge, Wells' actions in this case show that unfounded complaints can indeed be dismissed short of initiating a formal resolution process. Thus, Plaintiffs have failed to meet their burden of the first prong in *Hensley* and this Court could affirm the grant of summary judgment as to Count I on this basis.

**4. This Matter Is Moot As To Abbott Because He Is No Longer A Student At USC.**

This case is moot as to Abbott because he graduated from and is no longer a student at USC. [24] Accordingly, there is no longer a case or controversy between Abbott and USC that this case can remedy. *Grimm v. Gloucester City School Board*, Opinion No. 15-2056 (4th Cir. August 2, 2017)("Of course, at any stage of litigation, a federal court must have jurisdiction to resolve the merits of a dispute, as an absence of jurisdiction deprives a court of the power to act. . . . Jurisdiction, when questioned or when questionable, must always be determined first, as it is "always an antecedent question."). *Id*. at 101.

[23] Straying far afield from the issues at hand, Plaintiffs cite *Bible Believers v. Wayne Cty., Mich.*, 805 F.3d 228, 254 (6th Cir. 2015), for the idea that "there were a number of easily identifiable measures that could have been taken short of removing the speaker. . . ." Since no speaker was "removed" in this case, it is difficult to see how that line of cases could be deemed to have any relevance whatever.

[24] The case is moot as to Abbott's claims except Abbott's claim for damages which fails due to qualified immunity.

Abbott is the only Plaintiff to whom USC sent a letter to inquire about what happened at the event and therefore only Abbott could have any claims against USC for Count I. Mootness as to Abbott highlights serious issues as to Libertarians and YAL's standing, whose allegations are vague, rely on Abbott, and were precipitated by Abbott having provided the letter to them.

**5. The Amici Curiae Briefs Do Not Add Anything New to the Discussion**

The amici curiae briefs simply repeat Plaintiffs' arguments and do not bring anything additional to the discussion.

## CONCLUSION

For the foregoing reasons, Defendants-Appellees respectfully submit that the order and judgment of the district court should be affirmed.

Respectfully submitted,

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October 5, 2017

## CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Robert Lawrence Corn-Revere
Dr. John C. Eastman
Mr. Edward T. Fenno
Ronald London
Mr. Ryan W. Marth
Mr. Carl Frederick Muller
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*s/ Kenneth P. Woodington*

## 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 words processing systems used to prepare the brief, Microsoft Word, the word count of the brief is 12,532, not including the Corporate Disclosure Statement, table of contents, table of authorities, certificate of service, and certificate of compliance.

Dated this 5th day of October 2017.

*s/ Kenneth P. Woodington*