No. 18-704

In The
Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This action arises out of a self-described and intentionally controversial free speech event (the "Event") held by Petitioners at the University of South Carolina ("USC"). USC approved the Event and made no effort to interfere with it. After USC received complaints naming Petitioner Abbott and alleging that discrimination and sexual harassment occurred at the Event, USC employee Respondent Wells inquired into what occurred to ascertain whether any students' civil rights had been violated. Wells decided not to pursue the matter and found no cause to investigate. Nonetheless, he was sued, as well as two other USC employees who were not involved.

The Petitioners also challenged USC policy STAF 6.24, the Student Non-Discrimination and Non-Harassment Policy as-applied and facially as a violation of their right to free speech. 85a. The district and appeals courts both held that Respondents did not violate Petitioners' constitutional rights, and that Respondents were entitled to qualified immunity as to the as-applied claim. Both courts also held that Petitioners lacked standing to bring a facial challenge. As a result, neither court addressed the merits of Petitioners' attempted facial challenge. Petitioners' Questions Presented do not reflect the court of appeals' decision. More properly,

The Questions Presented are:

1. Whether the court of appeals correctly dismissed Petitioners' as-applied claim because Respondent

QUESTIONS PRESENTED – Continued

Wells conducted only a limited and informal inquiry that did not violate the First Amendment or any federal right that was clearly established.

2. Whether the court of appeals correctly held that Petitioners lacked standing to bring a facial challenge to Policy STAF 6.24 because they could not show that their past conduct or proposed future conduct was likely to be affected by that policy.

3. Whether, even if Petitioners had standing to challenge it, STAF 6.24 is constitutional.

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BRIEF IN OPPOSITION

INTRODUCTION

Petitioners held an intentionally controversial free speech event. USC approved the Event in advance and made no effort to interfere with it. During and after the Event, USC received complaints alleging that discrimination and sexual harassment occurred at the Event, some during the Event itself. Respondent Wells met with Petitioner Abbott for 30-45 minutes. Consistent with its obligation to ascertain whether any students' civil rights had been violated, Wells asked Abbott what occurred. After the meeting, Wells decided not to pursue the matter and found no cause to investigate.

The only University policy at issue is STAF 6.24, the Student Non-Discrimination and Non-Harassment Policy. 85a. Petitioners have challenged STAF 6.24 as-applied and facially. The district court and court of appeals both held that Wells' minimal inquiry did not present a constitutional violation and that even if it had, Respondents were entitled to qualified immunity as to the as-applied claim. 16a. Both courts also held that Petitioners, who did not allege future conduct that was likely to violate any USC policy, lacked standing to bring a facial challenge to Policy STAF 6.24.

In affirming the dismissal of Petitioners' as-applied claim, the court of appeals stated, "Here . . . we have a University that approved and encouraged a speech event intended to be controversial with the knowledge that it would cause '[d]iscomfort.' And in

the face of student complaints, the University made no effort to sanction that speech after the fact." 44a.[1] The court of appeals accordingly held that Respondents Wells and Gist were entitled to qualified immunity because USC's "prompt and minimally intrusive resolution of subsequent student complaints does not rise to the level of a First Amendment violation." 4a.

Petitioners also brought a facial challenge to University policy STAF 6.24, the Student Non-Discrimination and Non-Harassment Policy. However, because Petitioners never violated STAF 6.24, nor did they allege that they intended to violate the policy in the future, both the district court and the court of appeals held that Petitioners lacked standing to bring a facial challenge to the policy. 4a, 42a-43a, 33a-34a. The court of appeals elaborated, "Even an objectively reasonable 'threat' that the plaintiffs might someday have to meet briefly with a University official in a non-adversarial format, to provide their own version of events in response to student complaints, cannot be characterized as the equivalent of a credible threat of 'enforcement' or as the kind of 'extraordinarily intrusive' process

[1] The district court similarly held that "USC knew of the content of the Free Speech Event, approved the event, and ultimately determined that the event was an acceptable exercise of Plaintiffs' First Amendment rights. USC never attempted to silence Plaintiffs' speech, sanction Plaintiffs for their speech, or prevent students from engaging in similar speech in the future. Instead, [Respondents] 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." 14a.

that might make self-censorship an objectively reasonable response." 42a.

Neither the district court nor the court of appeals reached the merits of STAF 6.24, which was drafted at the behest of and its language approved by the United States Department of Justice in 2013 to protect the civil rights of USC students and staff, without abridging anyone's First Amendment rights. 33a. STAF 6.24 is narrowly tailored and limited to non-constitutionally protected speech. STAF 6.24 expressly excludes "the use of materials by students or discussions involving students . . . for academic purposes appropriate to the academic context."

Petitioners include mistakes of fact in their Petition. These are set forth in the Factual Background section of this Brief in Opposition. In First Amendment free speech cases, the facts matter and must be accurately and precisely articulated for the courts. The facts in this case matter – the court of appeals repeatedly cited the facts unique to this case and held that, "Our decision today is limited to the facts before us. . . ." 44a.

Petitioners also attempt to characterize the court of appeals' decision as a departure from this Court's precedent and as a split from other circuits. No such departure or circuit split has occurred. As the court of appeals in this case stated repeatedly, "This is an unusual First Amendment claim." 16a. The court of appeals found the case unusual because, unlike the factual scenarios in the cases upon which Petitioners

rely, USC did nothing to prohibit Petitioners' planned speech event and did not sanction them afterwards. As the court of appeals correctly observed,

> University officials approved the plaintiffs' Free Speech Event, knowing that it would include displays of a swastika and other controversial material; allowed the plaintiffs to hold their Event in the precise campus location they requested; did nothing to interfere with the Event as it transpired; and imposed no sanction on the plaintiffs after the fact, notwithstanding student complaints.

16a-17a. Accordingly, as that court held, the only thing Petitioners could argue was that "the very fact of a University inquiry into [student] complaints," including "the requirement that Abbott meet with Wells to discuss the complaints and the Event – violated Petitioners' First Amendment rights." 17a. The courts below emphatically rejected Petitioners' claim that such a minimal inquiry violated the First Amendment.

Petitioners thus mistakenly ask this Court to review a decision that is fact intensive, fact dependent, and consistent with this Court's precedent.

STATEMENT OF THE CASE

Factual Background

Petitioners 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. The student organizations are the College Libertarians at USC ("Libertarians") and Young Americans for Liberty at USC ("YAL"). Abbott, submitted a time, place, and manner facilities request for the Event, an event the student groups considered controversial. 6a. That did not deter or cause USC to waver in its policy to apply a content neutral policy for student requests to hold events on campus. USC granted the facilities request exactly as requested, and the event occurred at the time and place requested. 3a.

Far from prohibiting Petitioners' Event, USC official Kim McMahon advised Petitioner Abbott that "she saw 'no controversy in educating [the] campus about what is happening in the world,' and that she hoped the Event would be a 'chance to learn and grow (and even be a bit uncomfortable), not further any intolerance, censorship or acts of incivility.'" 7a.

Plaintiffs held their event unfettered by the University in the space and on the date they requested. 7a. While the event was occurring, several complaints were forwarded by e-mail to Ms. McMahon. She was tied up in a training event at the time, but her "response was to defend the Event: '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.'" 7a. She "clarified, however, that because she was not at the scene, she could not 'provide context' or confirm that the Event was being conducted in the manner she had approved." 7a.

The USC Office of Equal Opportunity Programs (the "EOP") also received "three written student complaints from students about the Event, one of which named Ross Abbott as an 'involved part[y].'" 8a. Students complained about the display of a swastika, use of the word "wetback" and other concerns related to the event, "and one student complained about the sponsoring students' behavior on the scene, alleging that they 'engag[ed] rudely with USC students and made 'sexist and racist statements' to them." 8a. "According to the complaining students, the Event and the associated conduct constituted discrimination or harassment against protected groups." 8a.

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. 8a.[2] In response to Wells' letter, Abbott met with Wells for 45 minutes on December 8, 2015. Another student joined Abbott for the meeting voluntarily, apparently at Abbott's

[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. Abbott confirmed this in his letter to Wells in which Abbott stated that no complaints were filed against the Plaintiff organizations. 166a. In fact, the other Petitioners only became aware that EOP had received complaints when Abbott told them, not because of any action by EOP itself.

request. 9a. Abbott made a recording of the meeting and provided Wells with a copy of the recording. 9a. A transcript of the meeting is in the record. 9a.

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":

> We are in pre-complaint mode where . . . 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.

9a-10a. These characterizations were repeated throughout the meeting.

> Wells reiterated the point on several occasions. Near the end of the meeting for instance, he told Abbott: "I'm going to emphasize to you again, we are at the point in our exploration to make sure [we] understand what happened here and to decide if this is something we respond to or not. The decision to respond or not has not been made. We're just trying to understand. . . . The next step is for us to determine whether we will open an investigation or not."

10a.

One resolution available to USC was to decline to pursue the complaints. This is what USC did, following Wells' review of the complaints considering the information Abbott provided. On December 23, 2015, Wells sent a letter to Abbott notifying him that USC would not pursue the matter as it had "found no cause for investigating" this matter and "would not move any further in regard to this matter." 11a. Petitioners then filed their complaint in February 2016. 11a.

The only USC policy Petitioners challenged on appeal was STAF 6.24, the Student Non-Discrimination and Non-Harassment Policy. 85a-105a. That policy was mandated and approved by the Department of Justice. 4a. 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. USC hired Nelson, Mullins, Riley & Scarborough, a prominent multistate law firm, which drafted the policy that became STAF 6.24. It took effect in 2013. 4a.

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.

STAF 6.24 specifically does not apply to "the use of materials by students or discussions involving students . . . for academic purposes appropriate to the

academic context." The Free Speech Event, which Petitioners described as educational, falls within this exception. The Harassment and Sexual Harassment sections of the policy address harassment directed at specific students. That 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 (1999).

Also, 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.[3]

Petitioners include mistakes of fact in their Petition that must be called to the Court's attention. For

[3] Petitioners rely on *United States v. Stevens*, 559 U.S. 460 (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.

example, Wells sent a letter *only* to Ross Abbott individually and not to any other Petitioners. Petitioners erroneously state otherwise. Pet. 2. Petitioners claim they got "in trouble at USC *simply for talking about free speech*." Pet. 3 (emphasis in original). Petitioners were never "in trouble," as both the district court, court of appeals, and the facts confirmed. 16a-17a, 14a. Petitioners claim Abbott was served a "Notice of Charge." That never happened, they are fully aware it never happened, and it was not intended to happen. *See, e.g.*, Pet. 2, 6, 8, 9, 32. A scrivener's error is not a constitutional deprivation, especially when such error is corrected at the first instance of awareness.[4] The court of appeals also recognized it did not happen. 9a. fn. 1.

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[4] One of Petitioners' core contentions is that USC subjected them to "disciplinary proceedings," Pet. 23, but that contention is based on the false factual premise that a "Notice of Charge" was served on Abbott. Petitioners' reference to the service of a "Notice of Charge" is made six times in the Petition (Pet. 2, 6, 8 (twice), 9 and 32). However, it is uncontroverted that while the letter to Abbott referred to an attached Notice of Charge, no such document was attached, and the use of a form letter that referred to a Notice of Charge was a clerical error. The court of appeals concurred that there was no Notice of Charge and that the term "Notice of Charge" appears only in a USC policy that applies to "*non-student* University personnel," 9a fn. 3. The court also found that Wells "assured the students that notwithstanding the letter's reference to a 'Notice of Charge,' nobody had been charged with a violation of STAF 6.24." 9a. Thus, Petitioners' claims are based on false assertions about matters that did not occur. Under these circumstances, it is not surprising that the Fourth Circuit took care to note that "Our decision today is limited to the facts before us, and the courthouse door remains open to the claims of students who experience cognizable restrictions on their right to free expression." 44a.

Petitioners misrepresent STAF 6.24 by taking out of context certain phrases. STAF 6.24 in its entirety begins at 85a. Petitioners included an Equal Opportunity Protection Policy 1.01 that does not pertain to this matter, at 107a-128a, and misrepresented that the policy "facilitates mediation that provides for dismissal of a complaint only if the accused agrees to cease the cited behavior." Pet. 4. That policy, which applies to employee situations and is not the policy at issue in this case, allows but does not require mediation and does not require that mediation result in ceased behavior. 111a. The court of appeals also found that Policy 1.01 did not apply to this case. Moreover, any disagreement with Policy 1.01 was not preserved for appeal. Petitioners also assert that Wells' letter provided that Abbott "must participate in mediation." Pet. 6. However, the letter Petitioners cite for this assertion does not state that mediation is required – it is merely offered as one informal way to resolve disputes among students. 151a.

Proceedings Below

Petitioners 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. Pastides is the President of USC, Pruitt is the Vice President for Student Affairs, Gist is the Executive Assistant to the President for Equal Opportunity Programs, and Wells is the Assistant Director of the Office of Equal Opportunity Programs 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. USC filed a Motion for Summary Judgment (Remaining Issues) as to all remaining issues on October 25, 2016. Plaintiffs filed a Cross-Motion for Partial Summary Judgment on December 9, 2016.

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. 45a.

Plaintiffs filed a notice of appeal on July 21, 2016, to the court of appeals 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 (the as-applied claim for damages)"; 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 appealed the district court's decision to grant Defendants' motions for summary judgment on Count 2."

Those two grounds were further narrowed by Plaintiffs' Statement of Issues Presented for Review filed in their brief in the court of appeals, which confirmed that

the *only* policy remaining at issue on appeal in this case is STAF 6.24.

The court of appeals affirmed the district court on August 16, 2018 and unanimously denied rehearing *en banc* on September 18, 2018. 1a, 83a. Judge Pamela Harris, writing for the unanimous panel, held that Respondents had not violated Petitioners' First Amendment rights, that Wells and Gist were entitled to qualified immunity as to the as-applied claim, and that Petitioners lacked standing to bring a facial challenge to STAF 6.24. The court first determined that the Petitioners could not establish a "past 'chill' sufficient to sustain their damages claim" because they failed to allege "that STAF 6.24 deterred some specific intended act of expressions protected by the First Amendment."[5] 23a. It also concluded that USC's preliminary inquiry into the complaints did not amount to a cognizable restriction on Petitioners' speech and that even if it had, USC used a "minimally burdensome process [that was]

[5] The court of appeals noted that Petitioners' "chilling" argument, which seeks damages for a previous occurrence (the University's minimal inquiry following the event) instead of seeking prospective relief, was also "an unusual First Amendment argument." 18a. To present such a chilling claim, Petitioners had to show actual First Amendment harm in the form of deterrence of "some specific act of expression protected by the First Amendment." 22a-23a. However, the supposed period of "chilling" was very specific and very limited. At most, it arguably ran from November 24, the date of the initial letter to Abbott, to December 23, the date of the final letter to Abbott. Between the Thanksgiving holidays, final exams and the winter vacation, there was only one week of normal class time, and it was undisputed that no plaintiff "identified any speech event they had planned or wished to sponsor during the brief time period in question." 23a.

narrowly tailored to the relevant state interest and so survives strict scrutiny." 29a. As a result, the court concluded, USC did not violate Petitioners' First Amendment rights.

The court of appeals then reasoned that even if its holdings above were not correct, Respondents were entitled to qualified immunity. Government officials are protected under the doctrine of qualified immunity when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. "Unless 'existing precedent' has 'placed the statutory or constitutional question beyond debate,' the defendants may not be held liable. *Reichle v. Howards*, 566 U.S. 658, 664 (2012)." 31a. Applying Supreme Court precedent, the court of appeals held:

> And even assuming, arguendo, that it were possible to find that the University's response to student complaints arising out of the Free Speech Event transgressed some First Amendment limit, the plaintiffs are unable to identify any precedent – and we have found none – that would put that result 'beyond debate.'
>
> . . .
>
> And as we have noted, the plaintiff's' claim for damages relief in connection with a speech event that the University approved and for which they were never sanctioned presents some especially novel questions. At a minimum, the University defendants were not on

> clear notice that their response to student complaints regarding the Free Speech Event violated the First Amendment, and for that reason alone they are entitled to qualified immunity.

31a.

The court of appeals held that Petitioners' lacked standing to bring a facial challenge to STAF 6.24 because they could establish no ongoing or future injury. 33a. The court has "recognized two ways in which litigants may establish the requisite ongoing injury when seeking to enjoin government policies alleged to have violated the First Amendment." 34a. Petitioners met neither of them. Petitioners had to show either that (i) "they intend to engage in conduct at least arguably protected by the First Amendment but also proscribed by the policy they wish to challenge, and there is at least a 'credible threat' that the policy will be enforced against them when they do so," or (ii) that they "may refrain from exposing themselves to sanctions under the policy, instead making a 'sufficient showing of self-censorship' – establishing, that is, a 'chilling effect' on their free expression that is 'objectively reasonable.'" 34a-35a. In either event, "a credible threat of enforcement is critical; without one, a putative plaintiff can establish neither a realistic threat of legal sanction . . . nor an objectively good reason for refraining from speaking and 'self-censoring' instead." 35a. The court of appeals held that Petitioners could not establish a credible threat of enforcement and that another meeting like the one Abbott had with Wells for any future

speech also would not meet the test. 38a, 42a. Accordingly, Petitioners did not have standing to bring a facial challenge to STAF 6.24.[6]

Petitioners now petition for a Writ of Certiorari in this Court. The Petition should be denied.

REASONS FOR DENYING THE PETITION

The Petition should be denied because the Fourth Circuit's decision does not involve the creation of any new or novel proposition of law and likewise does not create a conflict with any decision by another circuit. Rather, the court of appeals faithfully applied this Court's recent precedents regarding the requirements of standing, strict scrutiny analysis in First Amendment cases, and well-established law regarding qualified immunity.

Petitioners argue that "This Court's review is essential to restore uniformity among the circuits and to

[6] The court of appeals also noted "a mismatch between the plaintiffs' facial challenge to STAF 6.24, limited to certain substantive provisions of that policy, and a theory of standing that rests on a threatened meeting or other administrative process governed by a different section of STAF 6.24 devoted to complaint procedures." 43a. Respondents share the court of appeals' additional standing concern resulting from Petitioners attempt to piggy-back standing as to one section of the policy by alleging standing as to a different section of the policy. Thus, even if Petitioners could overcome the standing obstacle as to the process within STAF 6.24, they would still have the hurdle of establishing standing as to the substance of the non-discrimination and sexual harassment provisions.

ensure the First Amendment's guarantees are not eroded"; however, Petitioners have been unable to show that free speech was restrained in any way.[7] Nor do Petitioners cite to a single case in this section of their petition in which the court of appeals' opinion was inconsistent with a decision of this Court or with another court of appeals. Pet. 12. Petitioners string cite cases they allege hold that "overly broad and undefined regulation of speech in the university setting violated the First Amendment," but they make no effort to analyze any of those cases or apply those cases to the facts of this case. Pet. 12.

The court of appeals' opinion here is not at odds with those cases. Each case that examines speech in the university context does so based on the facts and circumstances of that case. In this case, the policy at issue was drafted at the behest of and approved by the Department of Justice to address discrimination and sexual harassment at USC. Because Petitioners' Event resulted in complaints that discrimination and sexual harassment occurred, USC undertook a limited review of what occurred, in a single, short meeting with Abbott, to assess whether to investigate possible civil rights violations. As the court of appeals stated, "It bears repeating that the University here did not seek

[7] Petitioners argue that the Court should grant their petition to address what Petitioners assert is an assault upon free speech on college campuses. Regardless of whether there is or has been such an assault elsewhere, this is not the case the Court should use as a vehicle to examine this assertion, because no assault on free speech occurred here.

to advance its end of maintaining a campus environment free of illegal discrimination and harassment through the kinds of broad steps that most commonly lead to First Amendment litigation." 29a.

Simply put, if the Court desires to review a college campus free speech case, this is not the one. As the court of appeals cautioned, overlooking the differences between this case and those like *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989), upon which Petitioners erroneously rely, "would do a disservice to the good-faith efforts of university officials to mind the details, crafting harassment policies so that they protect the 'open exchange of ideas.'" 39a.

Using this case as a proxy to sort out Petitioners' national college free speech concerns has additional problems. In this case, the courts below did not reach the merits of STAF 6.24 because they did not need to do so to resolve any of Petitioners' claims.[8] Additionally, this case has standing issues, which the court of appeals decided adversely to Petitioners and noted that even if the specific standing issue decided against Petitioners were resolved, another standing issue waited in their path. 43a fn. 10.

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[8] Accordingly, any cases Petitioners cite throughout their Petition for the proposition that the court of appeals' decision here is in conflict with a case in another circuit based on the substantive provisions of a speech policy, would be erroneously relied upon because the court of appeals did not examine STAF 6.24 substantive provisions.

I. The court of appeals correctly dismissed Petitioners' as-applied claim because Respondent Wells conducted only a limited and informal inquiry that did not violate the First Amendment or any Federal right that was clearly established.

The Court should deny the Petition because the court of appeals decided the as-applied claim adverse to Petitioners on three separate grounds: (i) there was no First Amendment violation; (ii) the means selected by USC to address these First Amendment issues was permissible because it was narrowly tailored to serve a compelling state interest; and (iii) in any event, Respondents were entitled to qualified immunity because they were not on clear notice that their action would violate a federal right.[9] Under any of these approaches, Petitioners' as-applied claim fails.

The court of appeals held that the facts and circumstances of this case presented novel questions for which Petitioners presented no precedent (and for which the court also did not find any precedent). The novelty of the case confirms that the state actors would not have been on notice that they would violate the

[9] Petitioners state that "It would be a dull university administrator indeed who would fail to appreciate the constitutional problems of enforcing broad or vague campus speech rules." Pet. 34. Both the district court and the court of appeals did not find Respondents were on clear notice. Additionally, the Department of Justice approved USC's policy only two years before the Event, which legal experts of the Department would not have done had they thought it unconstitutional. Thus, it is reasonable for USC administrators to believe STAF 6.24 is constitutional.

First Amendment at the time of the alleged First Amendment violation. Therefore, even if Petitioners could prevail on Petitioners' Question Presented 3 and prove that a federal right had been violated, they could not prevail on Petitioners' Question Presented 4 because the Respondents were not on clear notice they would violate any rights when they acted and were therefore entitled to qualified immunity.[10] 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*, 555 U.S. 223, 232, 236 (2009).

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

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[10] Petitioners' reliance on *Gerlich v. Leath,* 861 F.3d 697, 704-09 (8th Cir. 2017); *Barnes v. Zacarri,* 669 F.3d 1295, 1306-07 (11th Cir. 2012); *McGlone v. Bell,* 681 F.3d 718, 735 (6th Cir. 2012); and *Comm. for the First Amendment v. Campbell*, 962 F.2d 1517, 1526-27 (10th Cir.1992), does not alter the decision in this case, because such cases are necessarily fact-intensive and the court of appeals did not reach the merits of STAF 6.24 except to the extent necessary to consider the process in which Wells engaged.

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 the Supreme Court or the Fourth Circuit clearly established existence of constitutional right). Thus, the court of appeals could have granted summary judgment either because no federal right was violated or because such right was not clearly established at the time.

When both the district court and the court of appeals agree there was no First Amendment violation, as occurred here, how can it be said that the state actor lay persons were on notice or knew the law better than federal judges?

II. The court of appeals correctly held that Petitioners lacked standing to bring a facial challenge to Policy STAF 6.24 because they could not show that their past conduct or proposed future conduct was likely to be affected by that policy.

The Court should also deny the Writ because the court of appeals correctly held that Petitioners lacked standing to challenge STAF 6.24. Petitioners' facial challenge rested on a claim that in response to civil rights complaints, Abbott was asked to participate in an informal discussion to ascertain what occurred. The court noted that being heard early "generally is considered a feature of due process, not a bug." 28a. For

Petitioners to have standing to challenge STAF 6.24 as a result of that limited informal discussion would tie one hand behind the back of every law enforcement personnel and every state actor who needed to engage in an informal discussion with a citizen in order to effectively do their job. If state actors cannot talk to the people involved in a potential civil rights claim, how can they talk to anyone? Wells simply asked Abbott some questions about what occurred at the Event. If that 30-45-minute discussion leads to widespread grants of standing to challenge policies, then the courtroom door is open to challenge all sorts of things. Petitioners' position would mean that every university student at every university has standing to challenge every university policy the day they matriculate. That is not how standing does or should work.

The court of appeals addressed the cases upon which Petitioners rely for standing and Respondents adopt the court of appeals' analysis of those cases to the facts and circumstances of this case. The court of appeals has not departed from the Court's precedent, nor has it split from any other circuit – it has simply applied the facts and circumstances of this case to the law in those cases while remaining mindful of the different facts in this case. The court of appeals correctly held in this case that Petitioners lack standing to present a facial challenge to STAF 6.24, because the policy does not apply to the speech in which Petitioners intend to engage. The Fourth Circuit 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. The court of appeals found as a factual matter that Petitioners made no claim that they intend to engage in any speech prohibited by STAF 6.24. Petitioners misapply *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014), and wrongly assert that the court of appeals decided this case contrary to that decision. In *Susan B.* the Court granted the plaintiffs standing because they had previously run afoul of the law, it was enforced against them, and they alleged they planned to engage in substantially similar activity in the future. 134 S. Ct. at 2340. Petitioners 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. The court of appeals said as much; *Susan B.* "is not to the contrary. . . . We do not think that Well's single and decidedly non-adversarial meeting with Abbott can be compared to the full adjudicatory process at issue in *Susan B. Anthony List.*" 27a. As a result, the court of appeals correctly decided Petitioners had no standing to make a facial challenge to STAF 6.24 mindful of and consistent with this Court's precedent.[11]

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[11] Petitioners' reliance on *Bible Believers v. Wayne Cty., Mich.*, 805 F.3d 228, 254 (6th Cir. 2015), is also inapplicable as no speaker was removed in the present case. Moreover, the court of appeals determined none of the complaints filed about the Event were frivolous. 26a.

The transcript of the meeting between Wells and Abbott makes clear that Abbot desperately wanted to be a victim.[12] But as much as he demands redress to elevate slights he perceives to his rights, he asks this Court to ignore the rights of other people who felt discriminated or harassed by the Event by arguing that the University was not allowed to even ask him what happened. This case involved the complaining students' claims to civil rights violations, which USC is required to consider and protect within the University setting. Despite Petitioners' 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 Free Speech Event was given USC's blessing right from the outset. If Petitioners were to have standing in this case, it is hard to imagine where the new line for future cases involving standing would be drawn.

[12] Wells limited 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 involving 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 Petitioners filed this lawsuit anyway.

III. Even if Petitioners had standing to challenge it, STAF 6.24 is constitutional.

Because both the district court and the court of appeals held that Petitioners lacked standing to make a facial challenge to STAF 6.24, neither court reached the question of STAF 6.24's facial validity. USC agrees with the courts' standing analysis. Nonetheless, STAF 6.24 is constitutional. It follows this Court's precedents concerning the balance between preventing illegal and discriminatory harassment and preserving free speech. It also contains numerous exclusions that severely limit its application. In fact, all the policy limits is what violates the law. Students are subject to the law regardless of whether STAF 6.24 exists or not. Consistent with this, the policy provides as follows:

> 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.

86a. (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.

88a-89a.

In accordance with this Court's precedents, 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," 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." 88a. This embraces the language in *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) ("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") and *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) ("[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).

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.

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). Petitioners 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. Petitioners could hardly argue otherwise. In *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001), a case on which Petitioners rely, the court was careful to note that:

> 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. Petitioners complain about the terms "objectionable epithets" and "demeaning descriptions." Pet. 4. These terms are found in the part of STAF 6.24 which deals with "Harassment." 88a. Respondents' research has found no cases in which the use of either term has been invalidated.[13] The few

[13] Petitioners assert that many cases that they string-cite have invalidated "such broad and vague restrictions." 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

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, 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 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. Pet. 4. 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*

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in those cases contained any exception for academic discussions, such as that contained in STAF 6.24. Nor were those policies drafted at the behest of and approved by the Department of Justice.

> *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.

89a. (emphasis added). The policy limits the term "unwelcome" in several different ways: it must be "of a sexual nature" and must be "sufficiently severe or pervasive" so 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, courts have no problem with understanding what is meant by "unwelcome" sexual conduct in this context.

The term "inappropriate," about which Petitioners also complain, is likewise a term found only in the portion of STAF 6.24 pertaining to sexual harassment. *See* 89a (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").

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). As shown above, STAF 6.24 is narrowly drawn. It exempts academic discussions, provides for the protection of First Amendment rights, and limits its reach to severe or pervasive speech or conduct which deprives others of educational opportunities. In short, STAF 6.24 is constitutional. The Court should deny the petition because even if Petitioners were found to have standing, they would not prevail.

IV. Neither amicus curiae brief adds anything new to the discussion.

Amici present the same arguments and legal theories upon which Petitioners rely. Neither brief needs any additional response beyond what is already presented above.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit the petition for writ of certiorari should be denied.

Respectfully submitted,

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