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 Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF OF PETITIONERS

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Respondents ignore entirely the Petition's reasons for granting review. Instead, they try to defend the Fourth Circuit decision below as correct and assert various purported disputes of fact. But there are no disagreements of any substance, and the Opposition only underscores the need for review by this Court.

I. RESPONDENTS FAIL TO ADDRESS ANY OF THE REASONS THAT SUPPORT GRANTING REVIEW

a. Respondents decline to engage on the vital importance of setting clear constitutional rules governing the regulation of speech on state university campuses. Pet. 10-12. They try to defend the University of South Carolina's policy (STAF 6.24) as following "this Court's precedents concerning the balance between preventing illegal and discriminatory harassment and preserving free speech," Opp. 25, but overlook the very reason that granting review is essential – that this Court has not weighed in on the validity of campus speech codes. Pet. 27-28 ("[T]his Court has not yet ruled on the constitutionality of such policies, and the absence of clear guidance is producing dissonance among the lower courts.").

b. Respondents do not address the fact that the Fourth Circuit decision below created a split with the Third and Sixth Circuits regarding standing to challenge university speech regulations. *Compare* Opp. 21-24 *with* Pet. 20-26. They do not even cite –

much less discuss – cases such as *McCauley v. Univ. of V.I.*, 618 F.3d 232 (3d Cir. 2010), *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008), and *McGlone v. Bell*, 681 F.3d 718 (6th Cir. 2012), which explain why standing is appropriate in circumstances like those in this case.

Respondents unwittingly illustrate the need for review by endorsing the Fourth Circuit's erroneous criterion for standing, based on whether the speaker intends to "violate" the policy. Opp. 2, 23. This is contrary to basic principles of standing in First Amendment cases.[1] But more to the point, it ignores the Petition's discussion of conflicting holdings from other circuits in cases challenging similar campus speech codes. Pet. 20-26. In *McCauley*, for example, even though the plaintiff said he had no wish to express himself in "an obscene, lewd, [or] indecent manner," the court nevertheless held he had standing to challenge the overbroad and vague anti-harassment policies based on "the potential to chill protected speech." *McCauley*, 618 F.3d at 238-39 & n.3. *See also DeJohn*, 537 F.3d at 314; *McGlone*, 681 F.3d at 729-30.

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[1] *E.g.*, *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2344-45 (2014) (plaintiff is not required "to confess that he will in fact violate that law" to have standing to facially challenge a law regulating speech) ("*SBA List*"); *Babbitt v. United Farm Workers*, 442 U.S. 289, 301 (1979) (case was justiciable even though plaintiffs disavowed any intent to "propagate untruths").

As numerous courts have held, standing is appropriate where the government refuses to disavow the enforcement of broadly-worded speech regulations. Pet. 16-17. *See*, *e.g.*, *SBA List*, 134 S. Ct. at 2345 ("[R]espondents have not disavowed enforcement if petitioners make similar statements in the future."). Far from doing so here, Respondents once again reinforce why established law favors standing. They observe "the complaining students claim[ed] … civil rights violations, *which USC is required to consider and protect within the University setting*." Opp. 24 (emphasis added). *See also* Pet. 17-18.

If, as Respondents maintain, universities are obligated to maintain policies that regulate speech deemed offensive to some, it is all the more essential to clarify the constitutional limits of such regulation. "Where pure expression is involved," as it is here, anti-harassment law "steers into the territory of the First Amendment." *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596 (5th Cir. 1995). And when complaints are "founded solely on verbal insults, pictorial or literary matter, the [regulation] imposes content-based, viewpoint-discriminatory restrictions on speech." *Id.* at 596-97; *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001). *See Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017).

c. Respondents' defense of STAF 6.24 on the merits likewise fails to respond to the reasons for granting the writ. *Compare* Opp. 25-31 *with* Pet. 26-30. They argue the policy is constitutional and try to distinguish this case from others that struck down speech codes by claiming the particular terms of STAF 6.24 are not identical to those other university

policies. Opp. 28 n.13. But that is not the question presented here. While STAF 6.24 has many of the same flaws as other invalid policies, the issue in this case is doctrinal: whether such regulations must include a requirement that the speech at issue be objectively offensive, as the Third, Sixth, and Ninth Circuits have held. Pet. 28-29 (discussing cases). *See Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999). The Fourth Circuit decision conflicts with these rulings, yet the Opposition does not discuss or dispute the split of circuit authority.

The Opposition dwells on the fact that STAF 6.24 was adopted at the behest of the Justice Department, Opp. 3, 8, 17, 19 n.9, 28 n.13, but this is irrelevant. An agency interpretation of law has no bearing on whether a policy can survive judicial review, nor can it immunize state actors who violate the Constitution. *Miller v. Johnson*, 515 U.S. 900, 923 (1995). Such an interpretation also does not address whether or not a circuit split exists that only this Court can resolve.[2]

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[2] The DOJ investigation that resulted in adoption of STAF 6.24 arose from allegations that a USC sorority had excluded members based on race. It is not clear to what extent (if at all) the DOJ weighed First Amendment considerations when it evaluated the proposed policy. However, if Respondents believe the DOJ's views should be considered, Petitioners would not oppose having the Court ask the Solicitor General to weigh in on whether certiorari should be granted in this case.

d. Respondents offer no substantive response to the argument that the First Amendment requires universities to have a process for screening insubstantial or frivolous complaints when regulating student speech, and that the decision below creates a circuit split on this issue. Pet. 30-32. *See Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 474-75 (6th Cir. 2016) (law fails strict scrutiny where "[t]here is no process for screening out frivolous complaints or complaints that, on their face, only complain of non-actionable statements"). The Opposition does not discuss the Sixth Circuit opinion in *SBA List* at all, and merely tries to distinguish other cases cited in the Petition by asserting the facts were different. Opp. 23-24 & n.11.

Respondents assert rhetorically that USC's process was sufficiently targeted, *see* Opp. 22 ("If state actors cannot talk to the people involved in a potential civil rights claim, how can they talk to anyone?"), but this misses the point. The question presented asks what the Constitution requires of the government when processing a complaint *before* it may burden speakers. Other courts, like the Sixth Circuit, hold that use of least restrictive alternatives requires that there must be a process for weeding out insubstantial complaints. But the Fourth Circuit below held it is acceptable to first place the onus on speakers, such as Petitioners here, by summoning them to meet with a university official to justify their speech, threaten heavy sanctions, and impose a gag order that lasts several weeks. 8a-10a, 18a-29a. *See* Pet. 6-8, 31-33.

Only this Court can clarify what strict scrutiny requires in this circumstance. The answer will affect freedom of speech not just at USC, but at every state university and college campus where public officials must decide whether their anti-harassment policies presumptively favor complainants over speakers.

e. Respondents argue that this Court should not grant certiorari to review the Fourth Circuit's decision on qualified immunity because the circuit and district courts already resolved that issue in their favor. As they explain it, because those courts found no First Amendment violation, "how can it be said that the state actor lay persons were on notice or knew the law better than federal judges?" Opp. 21. This is a novel argument indeed, for it would mean this Court could never grant review where the issue involved reversing a qualified immunity finding. It is obviously not the law. *E.g.*, *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007-08 (2017).

Respondents also claim they were not on notice that their actions might violate clearly established rights claiming an absence of Fourth Circuit authority. Opp. 20-21. However, this overlooks longstanding Fourth Circuit case law holding that universities cannot avoid First Amendment claims by asserting their intent is to enforce civil rights laws. *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993). It is likewise well-established in the Fourth Circuit that strict scrutiny governs the process for assessing discrimination complaints that threaten to restrict speech. *See*, *e.g.*, *Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985). Given these clearly established

principles coupled with the extent to which campus speech codes have been routinely invalidated as overly broad and vague, Pet. 27 n.6, 33-34, it is untenable for Respondents to assert they were not on clear notice of the constitutional rules. And in any event, qualified immunity addresses only Petitioners' claims for damages. *See*, *e.g.*, *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998).

II. RESPONDENTS' ATTEMPT TO ASSERT FACTUAL DISPUTES DOES NOT AFFECT THE ISSUES PRESENTED

Respondents' argument that the Petition is "fact intensive, fact dependent, and consistent with this Court's precedent," Opp. 4, is incorrect. Their claim focuses on two assertions – that no "notice of charge" was sent by USC and that Mr. Abbott was the only person affected by it – but neither has any bearing on the issues presented. As explained in the Petition and in the discussion above, the Fourth Circuit decision is entirely *inconsistent* with this Court's First Amendment jurisprudence. Pet. 13-20. *See supra* 1-3. Respondents' factual averments otherwise lack substance for the following reasons:

a. There has never been a dispute about the events that led to this case. In response to holding a "Free Speech Event" on the USC campus, Respondent Wells sent a letter to Ross Abbott in his capacity as President of College Libertarians that included these elements: (1) the subject line said it was a "Formal Complaint of [redacted]" and listed it as "Complaint Number: 20150091"; (2) the first line read, "Enclosed is a copy of the Notice of Charge of

[sic] in this matter, in addition to a copy of the official Complaint of Discrimination filed by the above-cited Complainant"; (3) the letter directed Abbott to contact USC's Office of Equal Opportunity Programs within the next five working days "to fully discuss the charges as alleged"; (4) it said USC would attempt to mediate the complaint "as a matter of policy," but that if mediation failed "we shall move to investigate the complaint" and issue findings to the Provost and University President; (5) it directed Abbott "you are not to contact [redacted] regarding this matter while it is under investigation" and also to "refrain from discussing this complaint with any member of the faculty, staff or student body"; and (6) it was copied to "Henry White, University Lawyer." 151a-152a. Copies of three complaints (with photographs) were attached to Wells' letter. 153a-165a.

Respondents try to make much of the fact that no separate "Notice of Charge" was included in the packet of materials sent to Abbott. Opp. 10 & n.4. A Notice of Charge, apparently, is a one-page administrative form that is meant to accompany such correspondence. The omission of this form makes no difference, because the constitutional claims are based on USC's actions about which there has been no dispute. The District Court found it did not matter whether a "Notice of Charge" form was included with Wells' letter, because "[a] student who receives a letter indicating that a 'Notice of Charge' is attached and prohibiting him from discussing the letter with others, could feel he or she was subject to discipline." 69a.

This Court has long held it necessary to "look through forms to the substance" in evaluating First Amendment claims. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66-67 (1963). *See Barnes v. Zaccari*, 669 F.3d 1295, 1304 n.8 (11th Cir. 2012) (university cannot avoid constitutional claims through "creative labeling" by calling its action an "administrative withdrawal" rather than an "expulsion"). The questions raised in this Petition are based on what USC *did* in response to the Free Speech Event, not on how its actions are labeled.

b. Respondents' claim that the potential sanctions were directed only to Mr. Abbott is both wrong and irrelevant. Opp. 9-10, 24 n.12. The letter was sent to Mr. Abbott as President of College Libertarians, and the complaints targeted the Free Speech Event sponsored by his organization along with Young Americans for Liberty. One of the complaints was directed at "College Libertarians," proposed having USC leadership ensure nothing like the Free Speech Event happened again, and demanded that the group "should lose access to University funding for future events." 154a-155a. Another complaint named the College Libertarians and Young Americans for Liberty and asked the University to prohibit what it called "symbols that could incite a riot to be present on Greene Street." 159a-160a. The third complaint asked the University to require the groups to apologize "for letting the symbol appear and punish the offenders accordingly." 164a.

Even if the investigation and potential sanctions had been directed only to Mr. Abbott, it would make no difference to the issues presented for review.

Regardless of whether the University's actions targeted an individual or a group, there is still standing to challenge broad and vague speech regulations that lack adequate constitutional safeguards, including a mechanism to screen out insubstantial complaints. That the Fourth Circuit held otherwise places it at odds with this Court's jurisprudence as well as decisions of other circuits.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant review in this case.

Respectfully submitted,

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