No. 18-____

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

PETITION FOR WRIT OF CERTIORARI

ROBERT CORN-REVERE
Counsel of Record
RONALD G. LONDON
LISA B. ZYCHERMAN
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Ave., N.W.
Suite 800
Washington, DC 20006
(202) 973-4200
bobcornrevere@dwt.com

Counsel for Petitioners

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

QUESTIONS PRESENTED

1. Whether a student and student organizations investigated for possibly violating a public university's regulations governing on-campus speech have standing to bring a First Amendment challenge to the vagueness and overbreadth of the regulations where the university declined either to clarify the regulations or disavow future enforcement?

2. Whether a public university's anti-harassment policy violates the First Amendment where it authorizes the university to restrict speech based on broad, vague, and undefined terms, and does not require that prohibited speech be objectively offensive?

3. Whether a public university violates the First Amendment when its campus speech regulations lack any process for screening insubstantial or frivolous complaints and its investigative procedures impose burdens on speakers, including a gag order, during pendency of the investigation?

4. Whether university officials are entitled to qualified immunity when they enforce university anti-discrimination policies by placing the burden on speakers to justify their engagement in controversial speech?

PARTIES TO THE PROCEEDINGS

The petitioners, appellants and plaintiffs below, are Ross Abbott, College Libertarians at the University of South Carolina, and Young Americans for Liberty at the University of South Carolina.

The respondents, appellees and defendants below, are Harris Pastides, Dennis Pruitt, Bobby Gist, and Carl R. Wells.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

INTRODUCTION 2

STATEMENT OF THE CASE 4

A. USC's Anti-Harassment Policy and the Free Speech Event 4

B. Complaints About the Free Speech Event, USC's Response, and the Impact on Petitioners 6

C. Proceedings Below 8

REASONS FOR GRANTING THE WRIT 9

I. THIS COURT'S REVIEW IS NEEDED TO ADDRESS A RECURRING PROBLEM OF EXCEPTIONAL IMPORTANCE. 10

II. THE FOURTH CIRCUIT'S DECISION VIOLATES THIS COURT'S RULINGS GOVERNING STANDING TO FACIALLY CHALLENGE VIEWPOINT-BASED SPEECH RESTRICTIONS AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS. 13

A. Relaxed Standing Principles Govern Facial First Amendment Challenges..... 13

B. The Fourth Circuit Flouted Basic Principles Governing Standing..... 15

C. The Decision Below Conflicts With Other Circuit Court Rulings Governing Standing to Challenge Campus Speech Regulations 20

III. THE FOURTH CIRCUIT'S DECISION TO UPHOLD APPLICATION OF OVERLY BROAD SPEECH REGULATIONS THAT LACK ANY MECHANISM TO SCREEN INSUBSTANTIAL COMPLAINTS VIOLATES THIS COURT'S PRECEDENTS AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS. 26

A. The Decision Below Conflicts With Other Circuit Court Rulings Invalidating Campus Speech Regulations 26

B. The Decision Below Conflicts With Other Circuit Court Rulings That Subject Complaint Procedures to Strict Scrutiny 30

C. The Fourth Circuit's Finding of Qualified Immunity is Erroneous and Conflicts With Decisions of Other Circuits 33

CONCLUSION 34

APPENDIX

Appendix A — Opinion of the U.S. Court of Appeals for the Fourth Circuit, *Abbott v. Pastides*, 900 F.3d 160 (4th Cir. 2018) 1a

Appendix B — Decision of the U.S. District Court for the District of South Carolina, *Abbott v. Pastides*, 263 F. Supp. 3d 565 (D.S.C. 2017) 45a

Appendix C — Order of the U.S. Court of Appeals for the Fourth Circuit denying petition for rehearing en banc 83a

Appendix D — Selected Exhibits to the
Complaint for Injunctive and
Declaratory Relief and Damages 85a

TABLE OF AUTHORITIES

Page(s)

Cases

Ashcroft v. ACLU,
542 U.S. 656 (2004).....32

Ashcroft v. Free Speech Coalition,
535 U.S. 234 (2002).....13

Babbitt v. United Farm Workers Nat'l Union,
442 U.S. 289 (1979).....14, 16, 17, 25

Bair v. Shippensberg Univ.,
280 F. Supp. 2d 357 (M.D. Pa. 2003) 27

Barnes v. Zacarri,
669 F.3d 1295 (11th Cir. 2012).....33

Bell v. Keating,
697 F.3d 445 (7th Cir. 2012).....16

Bible Believers v. Wayne Cty.,
805 F.3d 228 (6th Cir. 2015).....31

Boos v. Barry,
485 U.S. 312 (1988).....30

Broadrick v. Oklahoma,
413 U.S. 601 (1973).....14, 19

Brown v. Entm't Merchs. Ass'n,
564 U.S. 786 (2011).....32

Cohen v. California,
403 U.S. 15 (1971).....31

Cohen v. San Bernardino Valley Coll.,
92 F.3d 968 (9th Cir. 1996).....29, 30

College Republicans at San Fran. State Univ. v. Reed,
523 F. Supp. 2d 1005
(N.D. Cal. 2007) 20

Comm. for the First Amendment v. Campbell,
962 F.2d 1517 (10th Cir. 1992).....33

Dambrot v. Central Mich. Univ.,
55 F.3d 1177 (6th Cir. 1995).....12, 21, 27, 29

Davis v. Monroe Cty. Bd. of Educ.,
526 U.S. 629 (1999).....28

DeJohn v. Temple Univ.,
537 F.3d 301 (3d Cir. 2008) .....*passim*

Doe v. Bolton,
410 U.S. 179 (1973).....16

Doe v. Univ. of Mich.,
721 F. Supp. 852 (E.D. Mich. 1989) 21, 27, 28

FEC v. Wisconsin Right to Life, Inc.,
551 U.S. 449 (2007).....33

Forsyth Cty. v. Nationalist Movement,
505 U.S. 123 (1992).....30

Gerlich v. Leath,
861 F.3d 697 (8th Cir. 2017).....33

Healy v. James,
408 U.S. 169 (1972).....11

Hill v. Colorado,
530 U.S. 703 (2000).....31

Holder v. Humanitarian Law Project,
561 U.S. 1 (2010).....17

Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.,
993 F.2d 386 (4th Cir. 1993).....12

Laird v. Tatum,
408 U.S. 1 (1972).....20

Lopez v. Candaele,
630 F.3d 775 (9th Cir. 2010).....27

Matal v. Tam,
137 S. Ct. 1744 (2017).....12, 30

McCauley v. University of V.I.,
618 F.3d 232 (3d Cir. 2010) .....*passim*

McGlone v. Bell,
2010 WL 3619846 (M.D. Tenn. Sept. 8, 2010) 25

McGlone v. Bell,
681 F.3d 718 (6th Cir. 2012).....25, 33

Morgan v. Swanson, 755 F.3d 757 (5th Cir. 2014).....33

New Hampshire Right to Life Political Action Comm. v. Gardner, 99 F.3d 8 (1st Cir. 1996).....14

New York Times Co. v. Sullivan, 376 U.S. 254 (1960).....11

O'Shea v. Littleton, 414 U.S. 488 (1974).....13, 15, 16

Papish v. Bd. of Curators of Univ. of Mo., 410 U.S. 667 (1973).....11, 13

Platt v. Board of Comm'rs on Grievances & Discipline of Ohio Supreme Court, 769 F.3d 447 (6th Cir. 2014).....16

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).....16

Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015).....32

Roberts v. Haragan, 346 F. Supp. 2d 853 (N.D. Tex. 2004).....28

Rodriguez v. Maricopa Cty. Cmty. Coll. Dist., 605 F.3d 703 (9th Cir. 2010).....31, 35

Rosenberger v. Rector & Visitors of Univ. of Va.,
515 U.S. 819 (1995).....3, 11

Saxe v. State Coll. Area Sch. Dist.,
240 F.3d 200 (3d Cir. 2001).....12, 24, 29, 30

Secretary of State of Md. v. Joseph H. Munson Co.,
467 U.S. 947 (1984).....14, 19

Steffel v. Thompson,
415 U.S. 452 (1974).....14

Street v. New York,
394 U.S. 576 (1969).....12

Susan B. Anthony List v. Driehaus,
134 S. Ct. 2334 (2014).....14, 17, 19, 31

Susan B. Anthony List v. Driehaus,
814 F.3d 466 (6th Cir. 2016).....31

United States v. Playboy Entm't Grp., Inc.,
529 U.S. 803 (2000).....32

United States v. Stevens,
559 U.S. 460 (2010).....19

UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.,
774 F. Supp. 1163 (E.D. Wisc. 1991).....21, 27

Virginia v. American Booksellers Ass'n,
484 U.S. 383 (1988).....13, 17, 19

Wollschlaeger v. Governor of Fla.,
848 F.3d 1293 (11th Cir. 2017).....16

Constitutional Provisions

U. S. Const. amend. I.....*passim*

U. S. Const. amend. XIV.....2

Statutes

28 U.S.C. § 1254(1).....1

Other Authorities

Erwin Chemerinsky & Howard Gillman, FREE SPEECH ON CAMPUS (Yale Univ. Press 2017).....3, 10

Greg Lukianoff & Jonathan Haidt, THE CODDLING OF THE AMERICAN MIND (2018).....11

Hearing Before the S. Comm. on the Judiciary, 115th Cong. (2017).....10

Report of the Committee on Freedom of Expression at Yale (Dec. 23, 1974).....3

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit for which review is sought, appears at 900 F.3d 160 (4th Cir. 2018). The decision is included at 1a.

The decision of the United States District Court for the District of South Carolina, appearing at 263 F. Supp. 3d 565 (D.S.C. 2017), is included at 45a.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the decision of the United States Court of Appeals for the Fourth Circuit, which issued its decision on August 16, 2018, and denied rehearing *en banc* on September 18, 2018. The denial of rehearing *en banc* is included at 83a.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Fourteenth Amendment:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

The University of South Carolina ("USC") maintains vague and overly broad regulations that seek to prevent harassment or discrimination, and it enforces these restrictions by subjecting protected speech to official inquiry that privileges censorship over free expression. In this case, officials at the University sent a "Notice of Charge" to the Petitioners, Ross Abbott, the Young Americans for Liberty at the University of South Carolina ("YAL"), and the College Libertarians at the University of South Carolina ("College Libertarians"), after several students complained they were offended by Petitioners' school-approved Free Speech Event. Petitioners had tried to open a dialogue with the

campus community about the importance of free expression by describing free speech controversies that had occurred at other schools, but learned a very different lesson – that you can get in trouble at USC *simply for talking about free speech*.

The Fourth Circuit held Petitioners lacked standing to challenge the constitutionality of USC's policy on its face and upheld the policy as applied despite the fact that it imposed preemptive burdens on the speakers and chilled Petitioners' expressive activities. The holding below is wrong under this Court's First Amendment precedents, conflicts with decisions of other circuits, and raises an issue of exceptional importance.

As former University of Chicago President Robert M. Hutchins observed, "without a vibrant commitment to free and open inquiry, a university ceases to be a university." *See* Erwin Chemerinsky & Howard Gillman, FREE SPEECH ON CAMPUS 146 n.87 (Yale Univ. Press 2017). A Yale University report more than four decades ago likewise stressed the importance of freedom "to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable." Report of the Committee on Freedom of Expression at Yale (Dec. 23, 1974). Review by this Court is needed to ensure public universities continue to provide the "background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995).

STATEMENT OF THE CASE

A. USC's Anti-Harassment Policy and the Free Speech Event

Under its Student Non-Discrimination and Non-Harassment Policy, STAF 6.24, USC can sanction students and campus organizations for "unwelcome" or "inappropriate" "verbal conduct" (that is, speech), including "objectionable epithets" and "demeaning depictions," and conduct "sufficiently severe, pervasive, or persistent" as to interfere with the educational environment. STAF 6.24 does not require that speech be objectively offensive in order to violate the policy. 85a-90a. Although it states that "[n]othing in this policy is intended to impede the exercise of [] rights protected under the First Amendment," 86a, it lacks definitions to cabin the policy's broad prohibitions on speech.

In various ways, USC's policies aid students who wish to lodge complaints against speakers. The University offers pre-complaint counseling, 108a-109a, provides assistance filing complaints, 109a-110a, and facilitates mediation that provides for dismissal of a complaint only if the accused agrees to cease the cited behavior. Even if the USC's Equal Opportunity Programs ("EOP") Office rejects a complaint for lacking substance, it must advise the complainant(s) that, if dissatisfied with that outcome, they may seek review by USC's President, or complain to the Department of Justice. 98a; 118a.

Petitioners held a Free Speech Event in USC's "free speech zone" in November 2015 to highlight threats to free expression in higher education and to invite students to sign a pro-speech petition. 149a-

150a. Displays at the event depicted speech that had been censored at other schools, explained the context and applicable constitutional principles, and noted the resolution of each case. 46a. Cited incidents included George Washington University's punishment of a student who displayed a small bronze swastika to explain the symbol's ancient Indian origins, and Brandeis' sanction of a professor who, in a classroom discussion, defined—and criticized—the term "wetback" as a slur. 137a-138a, 141a-142a.[1]

Petitioner Abbott had obtained advance approval for the Free Speech Event from USC's Director of Campus Life after describing the incidents the groups planned to highlight, the relevant context, and how each had been resolved. 6a-7a, 47a. The event proceeded as planned without disruption, threat of unrest, or need for any intervention by USC officials. 7a-8a, 47a-48a.

---

[1] Numerous other free speech controversies were presented and contextualized as well. 129a-148a. These included action by Modesto Junior College to prevent distribution of copies of the Constitution on Constitution Day because the student was outside the school's ironically-named "Free Speech Zone," Chicago State University censoring a faculty blog, California State University-Fullerton's sanction of a sorority for hosting a "Taco Tuesday" recruiting event, the University of Illinois's rescission of its offer of a faculty position because the candidate criticized Israel on his personal Twitter account, and Northwestern University's censorship of an online publication of its medical school. *Id.*

B. Complaints About the Free Speech Event, USC's Response, and the Impact on Petitioners

The day after the Free Speech Event, Petitioner Abbott (then the President of College Libertarians) received a "Notice of Charge" from Respondent Wells, the Assistant Director of the EOP Office. 8a-9a; 48a-49a. The letter had a case number and was copied to University counsel. It attached three Formal Complaints of Discrimination regarding the Free Speech Event, instructed Abbott to set an appointment in the five days over Thanksgiving to "discuss the charges," and said he must participate in mediation to "resolve" them. 151a-165a. It also stated that, should the parties be unable to mediate, the EOP Office would "investigate the complaint" and issue "findings and recommendations" to USC's Provost and President. The Notice directed Abbott not to contact any complainant or discuss the matter "with any member of the faculty staff or student body." 152a.

The complaints focused on the event's displays. One complained of a "poster that depicted a swastika" and that one "had the word 'Wetback' on it and described what [it] meant," while a second complainant echoed concerns about "multiple offensive signs" as illustrating "how bigoted our student body can be." The third complained of the "Nazi symbol" and Petitioners' "refus[al] to remove it, citing 'free speech' as their reason." 153a-156a, 158a-161a, 163a-165a. That complaint briefly alluded to the sponsors' behavior on the scene, alleging some unnamed person or persons "engag[ed] rudely with [] students" and made "sexist and racist

statements." 8a, 159a. The complaint provided no details about what allegedly had been said, and offered no facts to suggest epithets were directed to anyone. The complaints sought specific sanctions, including defunding College Libertarians and YAL, prohibition of future events that "subject other students" to "inflammatory posters and offensive imagery," and apologies from the organizers. 48a-49a, 153a-155a, 157a-161a, 163a-165a.

Wells confirmed that if USC found Petitioners in violation of STAF 6.24, potential sanctions included mandatory education/awareness, suspension, and expulsion. 50a; *see* 107a-128a. Abbott objected to being compelled to answer for constitutionally protected speech that administrators had pre-approved, but gave Wells a letter defending the Free Speech Event. 50a, 166a-172a. Abbott sought written confirmation that no sanctions would be imposed, expungement of the complaints from USC's records, and written clarification of USC's policies to prevent chilling future events.

At the meeting, Wells did not ask whether any confrontations had occurred at the event, or if Petitioners said anything "rude," "racist" or "sexist." His questions focused entirely on the content of their displays, asking Abbott to explain and justify their selection of each depicted example of censorship from other schools. *E.g.*, 9a-10a, 50a. Two weeks later, Wells wrote Abbott that the EOP Office would not "move any further [on] this matter," but did not acknowledge or respond to any of the requests in Abbott's letter. 50a-51a. Wells' letter said nothing of complainants' ongoing ability to pursue the matter further with USC's Provost and President, or to

appeal to the Department of Education. USC has not clarified its policies nor disavowed application of STAF 6.24 to other assemblies like the Free Speech Event.

This inquiry, and USC's refusal to rule out future enforcement or clarify STAF 6.24, chilled Petitioners' speech. 19a-20a, 67a-69a. After receiving the Notice of Charge, College Libertarians "avoided putting on any public events at USC" until after filing this action. 67a-68a. During the month the complaints were under review, Abbott was constrained from discussing the charges with USC's administrator who approved the Free Speech Event (or with anyone else), because the Notice of Charge prohibited raising the matter "with any member of the faculty staff or student body." 8a-9a, 49a, 152a.

YAL was similarly affected. Even after Wells' letter declining to pursue complaints about the Free Speech Event, YAL's members muted their responses to other students at a pro-capitalism event because they "were hesitant to engage with students who disagreed … out of fear they would complain to [EOP] and [YAL] would be further punished." 68a-69a.

C. Proceedings Below

Petitioners asserted both facial and as-applied challenges to STAF 6.24. In addition, Petitioners challenged other speech restrictions in USC's Carolinian Creed, and its Facilities and Solicitation Policies' "Free Speech Zone." USC revised these two policies to avoid any adverse impact on student speech and the District Court dismissed those challenges as moot. 12a n.3. As to STAF 6.24, the

court granted Appellees' cross-motion for summary judgment and dismissed the case with prejudice. 63a-78a, 82a.

The Fourth Circuit affirmed. It held Petitioners lacked standing because STAF 6.24 was not "enforced against" their speech, nor did they show USC would change its position regarding its application to such speech, and that USC promised to enforce it consistently with the First Amendment. 35a-43a. It also affirmed dismissal of the as-applied challenge, holding USC's procedures for investigating complaints under STAF 6.24 were sufficiently tailored, and that having a mechanism to screen out frivolous complaints was not constitutionally required. 16a-29a. The Fourth Circuit held the chill to Petitioners' speech, and the month-long gag order imposed by the Notice of Charge, were only "incidental" and acceptable burdens on speech. 29a n.7. Petitioners sought *en banc* rehearing, but the court denied further review.

This Petition followed.

REASONS FOR GRANTING THE WRIT

This case poses the question of whether a university anti-harassment policy that casts too wide a net over protected speech and that employs insufficiently protective enforcement procedures violates the First Amendment on its face and as applied. Such policies are increasingly being used to challenge or silence controversial campus speech. The Fourth Circuit ruling that even actual chill and temporary silencing under such a policy cannot confer standing for a challenge misapplies this Court's precedent for justiciability in First

Amendment cases, and is an outlier among the circuits. Students and others in the university community require a clear path to constitutionally challenge regulations that directly regulate speech and limit the permissible scope of discourse on campus.

This Court also has never opined on the constitutionality of university regulations that target speech in the name of reducing harassment or discrimination. Guidance is required regarding how such policies must be drafted precisely to avoid chilling free and open debate; what level of constitutional scrutiny the policies must satisfy; and what procedural features are required to protect speakers. Only this Court can make clear that traditional First Amendment protections apply fully in the university setting.

I. THIS COURT'S REVIEW IS NEEDED TO ADDRESS A RECURRING PROBLEM OF EXCEPTIONAL IMPORTANCE.

The regulation of free expression on public university campuses represents "the single greatest threat to free speech in the nation," according to veteran First Amendment lawyer Floyd Abrams, because of complaints by students who simply will not tolerate "expression of views which they view as socially harmful or destructive." Free Speech 101: The Assault on the First Amendment on College Campuses: Hearing Before the S. Comm. on the Judiciary, 115th Cong. 2 (2017) (statement of Floyd Abrams). "Hardly a week goes by without new tensions around this question." Chemerinsky &

Gillman, *supra* 3, at 1. In this environment, "many universities use the concept of harassment to justify punishing one-time utterances that could be construed as offensive but don't really look anything like harassment." Greg Lukianoff & Jonathan Haidt, THE CODDLING OF THE AMERICAN MIND 207 (2018).

This situation is incompatible with the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1960). The commitment to open discourse is uniquely critical in our institutions of higher learning because universities and their "surrounding environs" are "peculiarly the 'marketplace of ideas.'" *Healy v. James*, 408 U.S. 169, 180 (1972). For this reason, the "first danger to liberty lies in granting the State the power" to limit freedom of expression on campuses in contravention of the "background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995).

This includes the principle that "the mere dissemination of ideas – no matter how offensive to good taste – on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973) (*per curiam*). As this Court has recently reaffirmed, the First Amendment does not permit the government to punish speech because some may find it disparaging, because "[g]iving offense is a viewpoint," and "the public expression of ideas may not be prohibited merely because the

ideas are themselves offensive to some of their hearers." *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)).

Numerous cases have held that overly broad and undefined regulation of speech in the university setting violates the First Amendment. *E.g.*, *Papish*, 410 U.S. at 669-70 & n.2. *See McCauley v. University of V.I.*, 618 F.3d 232, 247-51 (3d Cir. 2010); *DeJohn v. Temple Univ.*, 537 F.3d 301, 305, 317-18 (3d Cir. 2008); *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1182-85 (6th Cir. 1995); *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993). *Cf. Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 210 (3d Cir. 2001) (Alito, J.) ("[W]e have found no categorical rule that divests 'harassing' speech … of First Amendment protection."). However, that body of law can do little to protect constitutional interests where, as here, the Fourth Circuit held that Petitioners lacked standing to facially challenge speech regulations notwithstanding their chilling effect.

This Court's review is essential to restore uniformity among the circuits and to ensure the First Amendment's guarantees are not eroded through overly broad and vague speech restrictions, lax procedural protections, and denial of access to a judicial forum.

II. THE FOURTH CIRCUIT'S DECISION VIOLATES THIS COURT'S RULINGS GOVERNING STANDING TO FACIALLY CHALLENGE VIEWPOINT-BASED SPEECH RESTRICTIONS AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

The Fourth Circuit held that Petitioners lacked standing to facially challenge STAF 6.24 despite the fact that their speech was subject to ongoing regulation under the policy and the University threatened enforcement over the Free Speech Event. The court noted that Petitioners could not rely on USC's past conduct of investigating Petitioners for a possible violation (citing *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)), and had failed to establish a "credible threat" of future enforcement. 34a-35a. This is deeply at odds with this Court's jurisprudence on standing in First Amendment cases and contradicts decisions in other circuits.

A. Relaxed Standing Principles Govern Facial First Amendment Challenges

Because the Constitution "gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere," pre-enforcement challenges are permitted where a law threatens to restrict First Amendment activity. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002); *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988). More relaxed standing rules govern facial First Amendment challenges because of a "judicial prediction or assumption that the statute's very existence may

cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973); *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984) ("Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society.").

This Court has reaffirmed in recent years that "actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging [a] law" that regulates speech. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014) ("*SBA List*"). *See Steffel v. Thompson*, 415 U.S. 452, 459 (1974). To demonstrate standing, a plaintiff must have suffered an injury that is "credible," not "imaginary or speculative." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (citations omitted). As various courts have held, when regulations "facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence." *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996).

A party thus has standing to challenge overly broad or vague speech regulations where he or she alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Babbitt*, 442 U.S. at 298; *SBA List*, 134 S. Ct. at 2342-45. However, the Fourth Circuit held that Petitioners lacked standing to challenge STAF 6.24 despite the fact that it directly regulates speech using broad and

undefined terms, and notwithstanding its acknowledgement that "[t]here is no question that the plaintiffs belong to the 'class' governed by STAF 6.24." 39a n.9. Likewise, there was never a question about the fact that Petitioners intended to continue engaging in on-campus political activities but limited their activism because of concern about possible enforcement of USC's speech code. 67a-68a. Denying standing in these circumstances is wrong and sets a dangerous precedent.

B. The Fourth Circuit Flouted Basic Principles Governing Standing

The Fourth Circuit based its holding solely on the conclusion that Petitioners had failed to show a "credible threat" of future enforcement under STAF 6.24. In doing so, it fundamentally misapplied this Court's First Amendment jurisprudence.

First, the Fourth Circuit applied inapposite precedent to conclude that past exposure to illegal conduct does not demonstrate a current controversy that supports standing, based on this Court's holding in *O'Shea*. 414 U.S. at 495-96. *See* 34a. *O'Shea* involved a civil rights claim in which the plaintiffs sought to enjoin past practices including "illegal bond setting, sentencing, and jury-fee practices." 414 U.S. at 495-96. It did not address standing in the First Amendment context and does not relate to the situation Petitioners face, where their speech activities are subject to ongoing regulation under the expansive and nebulous requirements of STAF 6.24.

The Seventh Circuit distinguished *O'Shea* in an analogous setting when it held protestors have standing to challenge an overly broad and vague

"disorderly conduct" ordinance. *Bell v. Keating*, 697 F.3d 445, 451-56 (7th Cir. 2012). It explained that, in facial challenges to speech-restrictive laws, litigants have standing to seek relief because "a statute criminalizes the plaintiff's conduct," while in cases like *O'Shea*, the plaintiff "seeks relief from the defendant's criminal or unconstitutional behavior," and "the putative injury typically proves too remote or attenuated." *Id.* at 451-52. By contrast, standing is presumed where the conduct to be regulated is speech and the rule in question is "substantively overbroad," meaning it "restrict[s] more speech than the Constitution permits … because it is content based." *Id.* at 453 n.2 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 n.3 (1992)).

Second, the Fourth Circuit's conclusion that there was no "credible threat" of future enforcement because USC did not pursue these particular complaints misreads this Court's holdings on standing. 35a-37a. Contrary to the reasoning below, this Court's precedents do not require Petitioners to show "frequent actual or threatened use of STAF 6.24 to silence the types of speech" at issue. *E.g.*, *Babbitt*, 442 U.S. at 302 (standing exists even though government maintains law limiting speech that "has not yet been applied and may never be applied"); *Doe v. Bolton*, 410 U.S. 179, 188 (1973) ("Georgia-licensed doctors … have standing despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes."). Other circuits have properly applied this guidance. *E.g.*, *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1304-05 (11th Cir. 2017); *Platt v.*

Board of Comm'rs on Grievances & Discipline of Ohio Supreme Court, 769 F.3d 447, 451-52 (6th Cir. 2014).

The fact that USC refrained from imposing penalties under STAF 6.24 on this one occasion does not defeat standing. What is more telling is the fact that the University declined to expunge the complaints or forestall possible appeals from its initial decision, refused to clarify the policy to reduce any chilling effects, and did not disavow future enforcement against Petitioners. The Fourth Circuit even acknowledged that USC "did not go on to specify that no action would be taken in response to similar events in the future." Instead, it erroneously held "it is up to the plaintiffs to show some objective reason to believe the University would change its position." 36a-37a.

This misstates the law. Where a regulation targets speech, and particularly where the government has placed speakers on notice it is watching what they say, it is the state's burden to show the law will *not* be enforced. *See*, *e.g.*, *SBA List*, 134 S. Ct. at 2345 ("[R]espondents have not disavowed enforcement if petitioners make similar statements in the future."); *American Booksellers Ass'n,* 484 U.S. 392-93 ("The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise."); *Babbitt*, 442 U.S. at 302 ("[T]he State has not disavowed any intention of invoking the criminal penalty provision against unions that commit unfair labor practices."). *See also Holder v. Humanitarian Law Project*, 561 U.S. 1, 16 (2010) ("The Government has not argued

to this Court that plaintiffs will not be prosecuted if they do what they say they wish to do.").

In this case, far from disavowing future enforcement of STAF 6.24 against Petitioners, USC argued that when it received a complaint, "the possibility of sexual harassment could not be ruled out" and the University necessarily must delve into "the often-murky area at the intersection of constitutionally-protected free speech and federally protected groups' rights not to be subjected to discrimination and harassment." Brief of Appellees at 21, 47. This proclivity to see speech restrictions as the answer is the problem, and it is the reason why standing exists to bring a constitutional challenge.

For two other policies initially included in Petitioners' case, USC responded to the lawsuit by making formal changes to ensure they would not interfere with Petitioners' speech activities.[2] Not so with STAF 6.24. USC vigorously defended this policy and insisted that if Petitioners engaged in similar speech in the future, the University was *obligated* to review their speech for potential violations. That is enough to support standing under applicable precedent, particularly where anyone who may be offended by a student's speech can trigger an

---

[2] USC amended its Facilities and Solicitation Policies and the Carolinian Creed to limit their application so as not to restrict speech, and challenges to those policies were dismissed as moot. 78a-82a.

investigation. *E.g.*, *SBA List*, 134 S. Ct. at 2345 (standing exists to challenge Ohio false statement statute where "any person" with knowledge of the purported violation may file a complaint).

Third, the Fourth Circuit's conclusion that Petitioners lacked a "credible threat" of prosecution because STAF 6.24 states it "does not regulate academic speech" further misreads the law governing standing. 38a-39a. This Court has specifically rejected the notion that a law regulating protected speech cannot be challenged "merely because the Government promised to use it responsibly." *United States v. Stevens*, 559 U.S. 460, 480 (2010). Where a policy's prohibitions are broad and nonspecific, as they are here, this Court has freely granted standing to protect against chilling effects. *Broadrick*, 413 U.S. at 612; *Joseph H. Munson Co.*, 467 U.S. at 956-57. The Seventh Circuit, unlike the Fourth Circuit here, has properly applied this precedent. *See Bell*, 697 F.3d at 455 ("when one cannot know what triggers the ordinance …, he may fairly assume that it can and will always be enforced and that total abstention from the protected activity is necessary").

Because of STAF 6.24's vague and overly broad prohibitions and the risk Petitioners faced from prospective complaints, they took the precaution of limiting their on-campus activities and muted their engagement with other students. 67a-68a. Such a chilling effect supports standing to challenge USC's policies, and the Fourth Circuit misread the law in concluding otherwise. *E.g.*, *American Booksellers Ass'n,* 484 U.S. at 393 ("[T]he alleged danger of this statute is, in large measure, one of self-censorship; a

harm that can be realized even without an actual prosecution."); *Laird v. Tatum*, 408 U.S. 1, 11 (1972) (standing exists where the exercise of government power is "regulatory, proscriptive, or compulsory in nature, and [plaintiff] was either presently or prospectively subject to the regulations").

C. The Decision Below Conflicts With Other Circuit Court Rulings Governing Standing to Challenge Campus Speech Regulations

The Fourth Circuit's conclusion that Petitioners had no objective basis for concern after meeting with Wells and because STAF 6.24 is not "intended to impede the exercise of [] rights protected under the First Amendment" misunderstands the impact of speech regulations on university students. 39a n.9. It also directly conflicts with decisions of other circuits holding that students and others affected by campus speech codes have standing to challenge the regulations.

Numerous courts have examined campus speech policies and have concluded that students can derive no reassurance from either formal or informal pledges to respect constitutional rights. The reason for this is simple: "The persons being regulated here are college students, not scholars of First Amendment law." *College Republicans at San Fran. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1021 (N.D. Cal. 2007). When a student is faced with specific prohibitions like those in STAF 6.24 (prohibiting "unwelcome" or "inappropriate" verbal conduct, including "objectionable epithets" and "demeaning depictions") alongside a pledge not to

violate the First Amendment, "[w]hat path is a college student who faces this regulatory situation likely to follow?" The court in *Reed* found this question answered itself—"and the answer condemns to valuelessness the allegedly 'saving' provision … that prohibits violations of the First Amendment." *Id.* Contrary to the Fourth Circuit decision below, numerous other courts, including the Sixth Circuit, have held that such "savings clauses" cannot forestall constitutional scrutiny.[3]

The decision below thus cannot be reconciled with decisions of other circuits that have held students and others may bring facial challenges to anti-discrimination policies that regulate speech on college campuses. The Third Circuit in particular has held that standing exists to challenge policies

---

[3] *See*, *e.g.*, *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1182-83 (6th Cir. 1995) (pledge of enforcement consistent with constitutional requirements did not save speech code from facial challenge where "there is nothing to ensure the University will not violate First Amendment rights even if that is not their intention"); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1177-78 (E.D. Wisc. 1991) (policy held overly broad notwithstanding its guidance pledging conformity with First Amendment values and offer of narrowing construction); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 864-68 (E.D. Mich. 1989) (rejecting university's argument that anti-harassment policy "did not apply to speech that is protected by the First Amendment" despite Board of Regents "Statement of Freedom of Speech and Artistic Expression," because the speech code "never articulated any principled way to distinguish sanctionable from protected speech").

that interfere with the ability of students to engage in "discussions on theories, beliefs, ideas, and to debate such ideas with persons holding opposing viewpoints." *McCauley*, 618 F.3d at 238-39 & n.5. *See also DeJohn v. Temple Univ.*, 537 F.3d 301, 305, 317-18 (3d Cir. 2008).

In *McCauley*, for example, it held that a student had standing to facially challenge several anti-harassment policies, including one that prohibited "any act" that "frightens, demeans, degrades or disgraces any person" including any violations of "sexual harassment" policies; another that prohibited "lewd or indecent conduct;" a third that prohibited conduct "which causes emotional distress," including conduct "which compels the victim to seek assistance in dealing with the distress;" and a fourth that prohibited "unauthorized or offensive signs." *McCauley*, 618 F.3d at 237-39. The Court held that McCauley had standing to facially challenge each of these policies despite the fact that he had been charged with an infraction under only the first policy. It reached this conclusion in the face of the student's testimony that he had suffered no deprivations under the other three policies and despite his statement that he had no wish to express himself in "an obscene, lewd, [or] indecent manner." *Id.* & n.3.

Applying this Court's standing rules for First Amendment overbreadth challenges, the Third Circuit held that McCauley's Article III standing stemmed from the fact that each of the policies has "the potential to chill protected speech." *Id.* at 238. In applying the overbreadth doctrine, the court stressed "the 'critical importance' free speech has in

our public universities." *Id.* at 242 (quoting *DeJohn*, 537 F.3d at 314, quoting *Healy*, 408 U.S. at 180). It explained how expansive campus anti-harassment codes that lack objective standards have the potential to undermine the university's core mission as an open forum for the exchange of ideas:

> The scenarios in which [the policy] may be implicated are endless: a religious student organization inviting an atheist to attend a group prayer meeting on campus could prompt him to seek assistance in dealing with the distress of being invited to the event; minority students may feel emotional distress when other students protest against affirmative action; a pro-life student may feel emotional distress when a pro-choice student distributes Planned Parenthood pamphlets on campus; even simple name-calling could be punished.

Id. at 251.

The Third Circuit observed that "the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it," *id.* (quoting *Saxe*, 240 F.3d at 215), and was concerned that "a lone individual who has a negative reaction may subject the speaker to disciplinary proceedings." *Id.* The court added that "[e]very time a student speaks, she risks causing another student emotional distress and receiving punishment," and that "[t]his is a heavy weight for students to bear." *Id.* at 252.

Similarly, the Third Circuit entertained a facial challenge to Temple University's prohibition on

sexual harassment in its Student Code of Conduct when a graduate student complained that the policy's overly broad terms chilled his ability to voice his opinions in class concerning women in combat and women in the military. *DeJohn*, 537 F.3d at 305. The court considered the challenge despite the fact that the University rescinded the policy, finding the "voluntary cessation" of an unconstitutional rule did not allow the school to evade review, and it adjudicated the constitutionality of the prior policy based on its overbreadth. *Id.* at 309, 314. *See also Saxe*, 240 F.3d at 204 (pre-enforcement challenge to school Anti-Harassment Policy based on over-breadth).

DeJohn stands in sharp contrast to the Fourth Circuit decision below, where the court held it lacked jurisdiction because USC announced it was not pursuing the STAF 6.24 complaints. In *DeJohn*, however, where the school actually *changed* its policy, the court still considered the constitutional challenge because it had "no assurance that Temple will not reimplement its [prior] sexual harassment policy." It observed that the university "defended and continues to defend not only the constitutionality of its prior sexual harassment policy, but also the need for the former policy." 537 F.3d at 309. In this case, USC not only retained its policy and continues to defend it, the Fourth Circuit even underscored that the University never suggested "that no action would be taken in response to similar events in the future." 37a. The Fourth Circuit's

refusal to consider the overbreadth challenge in these circumstances is deeply at odds with *DeJohn*. [4]

It also conflicts with the Sixth Circuit's holding in *McGlone v. Bell*, 681 F.3d 718 (6th Cir. 2012). *McGlone* held that a Christian evangelist had standing to facially challenge a university regulation governing where he could speak even though he had refused to submit an application and the campus included areas he could speak without any restriction. The district court had denied standing, concluding (like the Fourth Circuit here) that he had alleged only subjective chill of his ability to speak and therefore had no injury in fact. *McGlone v. Bell*, 2010 WL 3619846, at *2 (M.D. Tenn. Sept. 8, 2010). But the Sixth Circuit reversed, applied *Babbitt* and *Doe*, and held that plaintiffs have standing "even if they have never been prosecuted or threatened with prosecution." *McGlone*, 681 F.3d at 729-30. The court explained that "McGlone's intention to engage in expression regulated by [Tennessee Tech University's] policy is sufficient to support his assertion that the policy objectively chills his desired speech." *Id.* at 730.

As noted, the Fourth Circuit's denial of standing to challenge overly broad and vague regulations of campus speech directly conflicts with decisions of the

---

[4] Although the court in *DeJohn* analyzed its jurisdiction as a question of mootness rather than standing, its discussion is relevant to the jurisdictional questions relating to First Amendment overbreadth challenges.

Third and Sixth Circuits, and is in tension with others as well.[5] This Court's review is necessary to restore uniformity to this important area of First Amendment jurisprudence.

III. THE FOURTH CIRCUIT'S DECISION TO UPHOLD APPLICATION OF OVERLY BROAD SPEECH REGULATIONS THAT LACK ANY MECHANISM TO SCREEN INSUBSTANTIAL COMPLAINTS VIOLATES THIS COURT'S PRECEDENTS AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

A. The Decision Below Conflicts With Other Circuit Court Rulings Invalidating Campus Speech Regulations

The Fourth Circuit's decision to avoid addressing the scope of STAF 6.24 and its application to Petitioners places it at odds with this Court's First Amendment jurisprudence and with numerous circuit and district court decisions. As a general matter, courts that address the merits of policies

---

[5] *See*, *e.g.*, *Lopez v. Candaele*, 630 F.3d 775, 783-84, 789-90 (9th Cir. 2010), where the Ninth Circuit denied standing to challenge a university harassment policy, but only because the school took no action to investigate a complaint, expressly disavowed any possibility the policy would apply to in-class statements, and made clear the student involved would not be punished even if others had been offended by his words.

that employ such broad and undefined terms find them to be constitutionally deficient.[6] However, this

[6] *See*, *e.g.*, *McCauley*, 618 F.3d at 237, 247-51 (invalidating campus policies prohibiting "any act" that "frightens, demeans, degrades or disgraces any person" including any violations of "sexual harassment" and "unauthorized or offensive signs"); *DeJohn*, 537 F.3d at 305, 317-18 (invalidating sexual harassment policy that prohibited all "expressive, visual, or physical conduct of a sexual or gender-motivated nature" when "such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment"); *Dambrot*, 55 F.3d at 1182-85 (invalidating anti-discrimination and harassment policy prohibiting "demeaning or slurring individuals … because of their racial or ethnic affiliation" or "using symbols, [epithets] or slogans that infer negative connotations about the individual's racial or ethnic affiliation"); *Reed*, 523 F. Supp. 2d at 1016-18 (enjoining provision of Code of Student Conduct requiring students to be "civil to one another and to others in the campus community"); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (striking down campus speech code prohibiting "insults, epithets, ridicule, or personal attacks" as unconstitutionally overbroad); *Bair v. Shippensberg Univ.*, 280 F. Supp. 2d 357, 373-74 (M.D. Pa. 2003) (enjoining provisions of speech code prohibiting "acts of intolerance," requiring communication of beliefs so as not to "provoke, harass, intimidate, or harm another," or participating in "acts of intolerance that demonstrate malicious intentions toward others"); *UWM Post, Inc.*, 774 F. Supp. at 1165, 1168-80 (striking down speech code provisions prohibiting "racist or discriminatory comments, epithets, or other expressive behavior directed at an individual" that demean racial, religious or ethnic groups and create a hostile environment); *Doe v. University of Mich.*, 721 F. Supp. 852, 868 (E.D. Mich. 1989) (striking down as overly broad and vague Policy on Discrimination and Discriminatory Harassment prohibiting students from "stigmatizing or victimizing" individuals or enumerated groups).

Court has not yet ruled on the constitutionality of such policies, and the absence of clear guidance is producing dissonance among the lower courts.

STAF 6.24, by its plain terms, regulates speech and is not limited to discriminatory conduct. Its terms are expansive and undefined, prohibiting "inappropriate" comments, "objectionable epithets, [or] demeaning depictions," as well as "unwelcome and inappropriate letters, telephone calls, electronic mail, or other communication," "repeated inappropriate personal comments," speech that employs "sexual innuendos and other sexually suggestive or provocative behavior," and even "suggestive or insulting gestures or sounds." 52a-55a; 89a-90a. Although STAF 6.24 purports to regulate such speech only when it is severe or pervasive, nothing in the policy requires it to be "objectively offensive" as well, as this Court's precedents require. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999).

Petitioners were required to justify their Free Speech Event and faced the threat of punishment because USC officials had no objective guidelines for assessing the complaints they received. Where university officials themselves cannot describe the boundaries of behavior they seek to regulate and the policy provides no clear guidance, it places officials in a position of "making up the rules as [they go] along." *Doe*, 721 F. Supp. at 868. Any policy that forces students to justify their exercise of First Amendment rights raises serious constitutional issues, because even an informal inquiry under a university speech code can be "constitutionally indistinguishable from a full blown prosecution." *Id.* at 866.

The Fourth Circuit's holding that there was no constitutional problem in applying STAF 6.24 to Petitioners despite its lack of an "objective offensiveness" requirement directly conflicts with decisions of the Third, Sixth, and Ninth Circuits. In striking down Temple University's sexual harassment policy, the Third Circuit explained that "[a]bsent any requirement … that the conduct objectively and subjectively creates a hostile environment or substantially interferes with an individual's work – the policy provides no shelter for core protected speech." *DeJohn*, 537 F.3d at 317-18. *See also McCauley*, 618 F.3d at 251-52 (policy is unconstitutionally subjective because it "prohibits speech without any regard for whether the speech is objectively problematic"); *Saxe*, 240 F.3d at 205-06 (harassment must be severe, pervasive, and objectively offensive to satisfy First Amendment requirements). Likewise, the Sixth Circuit has held that delegating to university officials the task of defining what is "offensive" is "'unrestricted delegation of power' [that] gives rise to … vagueness." *Dambrot*, 55 F.3d at 1184. *See also Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968, 972 (9th Cir. 1996) (sexual harassment policy without clear guidelines applied on "an ad hoc basis" is unconstitutionally vague).

These decisions from other circuits conflict with the Fourth Circuit's holding that there was no First Amendment violation in summoning Petitioners to defend their Free Speech Event (and imposing a gag order in the interim). 17a-20a. The court's conclusion that it was not "objectively reasonable" for Petitioners to be chilled by the prospect of punishment under STAF 6.24's subjective standards

has it backwards. When campus speech regulations place a cloud of doubt over the ability to speak freely, "the harm done to students' speech rights is substantial and requires vindication." *McCauley*, 618 F.3d at 252; *Cohen*, 92 F.3d at 972 ("we hold that the [sexual harassment] Policy is simply too vague as applied"). Consequently, review by this Court is needed.

B. The Decision Below Conflicts With Other Circuit Court Rulings That Subject Complaint Procedures to Strict Scrutiny

The Fourth Circuit decision also diverges from this Court's holdings and those of other circuits governing what procedures apply when the government conducts investigations that may result in penalizing speech. Strict scrutiny governs any such process, because regulations like STAF 6.24 are both content and viewpoint-based. This is because "[l]isteners' reaction to speech is not a content-neutral basis for regulation."[7] When anti-discrimination laws "are 'applied to … harassment claims founded solely on verbal insults, pictorial or literary matter, the statute[s] impose[] content-based, viewpoint-discriminatory restrictions on speech.'" *Saxe*, 240 F.3d at 206 (citation omitted).

---

[7] *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *Boos v. Barry*, 485 U.S. 312, 320-21 (1988). *See Matal*, 137 S. Ct. at 1767 (Kennedy, J., concurring) ("[A] speech burden based on audience reactions is simply government hostility and intervention in a different guise.").

Strict scrutiny governs the complaint process because "the right to free speech ... includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience." *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 243 (6th Cir. 2015) (*en banc*) (quoting *Hill v. Colorado*, 530 U.S. 703, 716 (2000)). Any other rule "'would effectively empower a majority to silence dissidents simply as a matter of personal predilections,'" and the government might be inclined to "regulate" offensive speech as "'a convenient guise for banning the expression of unpopular views.'" *Id.* (quoting *Cohen v. California*, 403 U.S. 15, 21, 26 (1971)). *See SBA List*, 134 S. Ct. at 2345 ("[T]here is a real risk of complaints from … political opponents.").

To forestall such abuse, the First Amendment requires the government to employ effective means of weeding out insubstantial or frivolous complaints before probing the speaker's message or motivations. *E.g.*, *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 474-75 (6th Cir. 2016) (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"); *Bible Believers*, 805 F.3d at 254 ("a number of easily identifiable measures … could have been taken short of removing the speaker"); *Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 711 (9th Cir. 2010) ("Because some people take umbrage at a great many ideas, very soon no one would be able to say much of anything at all.").

Once again, the Fourth Circuit's analysis got this backwards. Although it acknowledged that "a

college student reasonably might be alarmed and thus deterred by an official letter from a University authority referring to an attached "Notice of Charge," it described summoning the speakers for an official meeting to justify their speech as "a feature of due process, not a bug," and concluded that USC's approach was appropriately tailored. 25a-29a. It formulated the question under strict scrutiny as follows: "whether the complaint procedures utilized by the University are narrowly drawn to advance the *state* interest, not the *plaintiffs'* interest." 29a n.7.

This formulation of strict scrutiny that subordinates speakers' interests is completely wrong. Strict scrutiny places the burden on *the government*, not the speaker. To satisfy strict scrutiny, the University must prove that no "less restrictive alternative would serve the Government's purpose." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011). This means the law may limit speech "no further than necessary to achieve the goal" so as to "ensure that legitimate speech is not chilled or punished." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

Petitioners posited a number of ways USC could have investigated whether there might be any substance to the complaints, including something as simple as asking the complainants to supply details. Appellants' Opening Br. 44-45. Pursuing this course would have been an easy fix, given that USC's policies provide assistance for those wishing to file complaints. But the University opted to impose the threat of sanctions first, including a gag order on the

matter as the investigation was pending, losing sight of the rule that "[w]here the First Amendment is implicated, the tie goes to the speaker, not to the censor." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 474 (2007).

The Fourth Circuit decision misapplied basic First Amendment principles, is inconsistent with decisions of other circuits, and requires correction by this Court.

C. The Fourth Circuit's Finding of Qualified Immunity is Erroneous and Conflicts With Decisions of Other Circuits

The Fourth Circuit's holding that USC officials are protected by qualified immunity is based on that court's flawed First Amendment analysis and should be reviewed for the same reasons. 30a-32a. The court simply noted that "First Amendment parameters may be especially difficult to discern in the school context" and relied on dictum from a case involving elementary school students that "educators are rarely denied qualified immunity from liability arising out of First-Amendment disputes." *Id.* (quoting *Morgan v. Swanson*, 755 F.3d 757, 760 (5th Cir. 2014)).

This conclusory analysis ignores the various decisions of other circuits denying qualified immunity defenses when officials violate the clearly established rights of university students or other speakers. *See*, *e.g.*, *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*, 681 F.3d at 735. *See also Comm. for the First Amendment v.*

Campbell, 962 F.2d 1517, 1526-27 (10th Cir. 1992) (review of qualified immunity decision required where dismissal is based on erroneous First Amendment analysis).

More importantly, the Fourth Circuit failed to come to grips with the specific First Amendment issues presented in this case. Its conclusion that "University defendants were not on clear notice that their response to student complaints regarding the Free Speech Event violated the First Amendment," 32a, rings hollow in light of the many cases invalidating similar campus speech codes at other schools, including Temple University, the University of the Virgin Islands, Central Michigan University, San Francisco State University, Tennessee Tech University, Shippensburg University, the University of Wisconsin, and the University of Michigan, among others. *See* authority cited at note 6 *supra*. It would be a dull university administrator indeed who would fail to appreciate the constitutional problems of enforcing overly broad or vague campus speech rules.

The decision below misapplied basic and well-established First Amendment principles to reach an erroneous conclusion about qualified immunity that is at odds with numerous other circuit court decisions. Review by this Court is required.

CONCLUSION

American universities have traditionally fostered the exchange of ideas in which intellectual advancement has been forged through a process of discord and dissent. But this essential function "will not survive if certain points of view may be declared

beyond the pale." *Rodriguez*, 605 F.3d at 708. Protection of First Amendment rights is most essential to protect this special environment and to foster a spirit of civic engagement. "Without the right to stand against society's most strongly-held convictions, the marketplace of ideas would decline into a boutique of the banal, as the urge to censor is greatest where debate is most disquieting and orthodoxy most entrenched." *Id.* To help prevent such a result, *certiorari* should be granted to review of the Fourth Circuit decision.

Respectfully submitted,

ROBERT CORN-REVERE
Counsel of Record
RONALD G. LONDON
LISA B. ZYCHERMAN
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Ave., N.W.
Suite 800
Washington, DC 20006
(202) 973-4200

Counsel for Petitioners

November 21, 2018