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

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF FIRST AMENDMENT CLINICS AT DUKE LAW AND ARIZONA STATE UNIVERSITY LAW *AS AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF THE FIRST AMENDMENT CLINICS AT DUKE LAW AND ARIZONA STATE UNIVERSITY LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2(b) of the Rules of this Court, the First Amendment Clinics at Duke Law and Sandra Day O'Connor College of Law at Arizona State University (the "Clinics") move for leave to file the attached *amicus curiae* brief in support of the petition for certiorari in this case.

The Clinics teach law students how to protect and advance the freedoms of speech, press, assembly, and petition by allowing state-certified students to perform supervised legal work both in Court and through public commentary. The Clinics and their student attorneys have a particular interest in ensuring that the constitutional guarantees they are dedicated to protecting are not unduly restricted when the speech at issue is exercised by students on campus. Indeed, the holding in this case is of critical interest to *amici*, organizations that litigate and handle numerous First Amendment matters, including campus speech matters. Further, as organizations situated in the university context, the Clinics and their student attorneys are in a unique position to aid the Court in its consideration of the issues presented.

Counsel for proposed *amicus* made a good-faith effort to obtain the consent of all parties to the filing of their brief. On December 18, 2018, the Clinics sent notice and a request for consent for the filing of an *amicus curiae* brief to counsel for all parties. Petitioners have consented to the filing of this brief,

and their letter of consent has been placed on file with the Clerk. On December 20, 2018, counsel for Respondents sent an electronic message stating that they would not consent to the filing of this brief. Counsel for Respondents did not provide any reason for withholding their consent.

Accordingly, *amici* respectfully request that the Court grant the motion for leave to file an *amicus curiae* brief.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

The First Amendment Clinics at Duke Law and Sandra Day O'Connor College of Law at Arizona State University (the "Clinics"), both founded in 2018, have public missions to protect and advance the freedoms of speech, press, assembly, and petition.[1] The Clinics represent clients with First Amendment claims and provide public commentary and legal analysis on First Amendment issues.

The Clinics and their student attorneys have a particular interest in ensuring that the constitutional guarantees they are dedicated to protecting are not unduly restricted when the speech at issue is exercised by students on campus. This Brief will demonstrate that this petition squarely presents constitutional problems that are a daily reality for students in public colleges and universities across the country.

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties received notice of the Clinics' intention to file this brief at least ten days prior to its due date. Counsel for Petitioners have consented to the filing of this brief, and their letter of consent has been placed on file with the Clerk. On December 20, 2018, counsel for Respondents sent an electronic message stating that they would not consent to the filing of this brief. Counsel for Respondents did not provide any reason for withholding their consent.

No counsel for a party authored this brief in whole or in part, and no one other than *amicus*, its members, or its counsel made any monetary contribution to the brief's preparation or submission.

SUMMARY OF ARGUMENT

This Court has recognized that the rights protected by the First Amendment are "'nowhere more vital' than in our schools and universities." *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972). "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). The campus, perhaps more so than any other location, is, and must be, a "marketplace of ideas." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

Students arrive in this marketplace not yet fully formed as consumers or producers of expression. Indeed, it is among the core purposes of a public college or university to ensure that students "gain new maturity and understanding" and learn to become functional members of the body politic. *See Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 868 (1982).

A student's journey along this path is not a straight line, nor should we expect it to be. Students may not yet be fully capable of articulating what they think and feel, may express their ideals overzealously, and may occasionally speak with a bluntness that offends. In many instances, those qualities may be the highest virtues of student speech; out of the mouths of babes comes wisdom, and "one man's vulgarity is another's lyric." *Cohen v. California*, 403 U.S. 15, 25 (1971).

At the same time, public colleges and universities have various obligations under federal and state law to remain welcoming environments to all students, and especially those—women, people of color, and members of other marginalized communities—who have traditionally been excluded from participation in the intellectual and social community of the academy.

Many college administrators have come to view, incorrectly, their students' speech rights as in tension with their legal obligations to ensure a safe and welcoming campus—in short, viewing student speech as a liability rather than as a university's most valuable asset. These administrators have, by and large, chosen to err on the side of restricting expression. This choice has been a rational response to the incentives they face—decisions like that of the Fourth Circuit below ensure as much. But this dichotomy is not preordained, and the long history of censorship instructs that an environment unwelcoming to student expression is *most* dangerous to the very students that overbroad speech codes are designed to "protect."

The Petition squarely presents this Court with the opportunity to clarify the essential role that the First Amendment plays at public colleges and universities. Such guidance is desperately needed. The decision of the Fourth Circuit below serves to legitimize a swath of school speech codes that, substantively and procedurally, violate the First Amendment.

ARGUMENT

This Court's guidance is urgently needed to guarantee that the constitutional promise of free speech is not unduly restricted at public postsecondary institutions.

Public colleges and universities increasingly enforce campus speech codes that restrict students' protected expression. Students at public postsecondary institutions who value their prospective degrees are faced with an unenviable choice: voice their unique viewpoints or censor themselves to ensure their educational and professional future is not imperiled. This choice becomes especially untenable when speech codes are applied—as one was in this case—to normal, reasoned, and substantive discussion of contested issues. The vibrant political and social discussions that form an important part of a full college experience are thereby thrust into a pall of silence.

Our nation's future is premised on leaders and citizens alike trained through exposure to a robust exchange of ideas. *Keyishian*, 385 U.S. at 603. Truth can only emerge from the operation of a "multitude of tongues," not through "any kind of authoritative selection" of acceptable or correct viewpoints. *Id.* (citation omitted).

Therefore, any restriction on protected expression enforced by public university administrators must be written with enough clarity that students have fair warning about prohibited conduct. The scope of any limitation must be narrowly drawn in accordance with the constitutional principles of content- and viewpoint-neutrality. And

the procedures schools use to investigate and adjudicate complaints premised on protected expression must ease, not amplify, the burdens the policy places on protected expression.

I. The substantive restrictions of speech codes like the ones enforced against Petitioner violate students' rights to free expression by proscribing speech according to overbroad and vague guidelines, and by prohibiting speech that is not objectively offensive.

A. Despite the clear import of the First Amendment, public colleges and universities restrict student speech according to overbroad, vague, undefined guidelines.

Speech codes, like the one enforced by the University of South Carolina,[2] that mandate sanctions for students or student organizations who engage in "unwelcome" or "inappropriate" verbal conduct—speech—are impermissibly vague. Vague

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[2] Under USC's policy, "harassment" includes oral conduct (i.e. speech) that "may include, but is not limited to, objectionable epithets, [and] demeaning depictions or treatment." 88a. Prohibited "verbal conduct" includes "unwelcome and inappropriate letters, telephone calls, electronic mail, or other communication or gifts." 90a.

While USC asserts that "[n]othing in this policy is intended to impede the exercise of those rights protected under the First Amendment of the U.S. Constitution," 86a, it offers no information as to how the scope of its restrictions on those rights are limited. This "savings clause" is discussed further *infra* Part I.C.

speech codes that do not clearly delineate prohibited conduct offend several important constitutional values. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). First, "because we assume that [students are] free to steer between" permitted and prohibited conduct, speech codes must give a student "a reasonable opportunity to know what is prohibited," so that she may act accordingly. *Id.* Second, "if arbitrary and discriminatory enforcement is to be prevented, [speech codes] must provide explicit standards for those who apply them." *Id.* Third, vaguely defined boundaries inevitably cause speakers to "steer far wider of the unlawful zone" than they would "if the boundaries of the forbidden areas were clearly marked." *Id.* at 109; *Wash. Mobilization Comm. v. Cullinane*, 566 F.2d 107, 117 (D.C. Cir. 1977). Speech codes like the one enforced by USC against Petitioners require students not only to understand that their viewpoint is "offensive," but also to calculate to what extent a fellow student will find their "offensive" viewpoint "unwelcome."

Such policies must be written to give students a reasonably clear idea about what speech will be prohibited under the code.

Even if a speech restriction does not inhibit a "substantial amount of constitutionally protected" expression, it may nonetheless be impermissibly vague "because it fails to establish standards" to guide the discretion of those enforcing the regulation. *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). Vague speech regulations create the potential for "the arbitrary deprivation of liberty interests." *Id.* Student speech codes squarely present this concern: university administrators are typically granted

extensive latitude in investigating and punishing violations of speech codes. *See, e.g.*, 102a–103a ("Sanctions for individual student violations may include . . . expulsion, suspension, conduct probation, conditions/restrictions on University privileges, written warning, fines and restitution, housing sanctions, required attendance at educational or community service events, and any other sanctions deemed appropriate."). Faced with an unlimited array of sanctions for an unlimited universe of potential violations, it is no surprise that a majority of students report self-censoring, and that the share doing so increases as the students spend more time at the university. *Speaking Freely*, Fdn. for Indiv. Rights in Educ., 9 (2017), https://perma.cc/XJH8-XP7T (noting that 54% of students report self-censoring in the classroom, with 47% of first-year students and 59% of fourth-year students doing so); *id.* (reporting that 30% of students reported self-censoring "because they thought their peers might consider their words offensive").

Campus speech codes also frequently present a troubling example of overbroad restrictions on protected speech. "The overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'" *Morales*, 527 U.S. at 52 (citation omitted). Thus, where otherwise valid regulation "sweeps so broadly as to impinge upon activity protected by the First Amendment, its very overbreadth may make it unconstitutional." *Dandridge v. Williams*, 397 U.S. 471, 484 (1970).

Across the nation, public universities implement overbroad conduct policies that restrict protected speech. For example, it is readily apparent that protected speech will likely be caught in the sweep of speech codes such as that of Pennsylvania State University, which defines "sexual harassment" as "verbal conduct of a sexual nature . . . that is unwanted, inappropriate, or unconsented to." *AD85 Sexual And/or Gender-Based Harassment and Misconduct*, Penn. State, https://perma.cc/WHM9-7NCF (accessed Dec. 9, 2018).

Campus speech codes are frequently unclear because the proscribed conduct remains undefined and contingent upon another person's reaction to speech. For example, at the University of Montana, a student may be sanctioned with penalties as severe as expulsion if administrators find, after considering whether another student felt that the student's speech was "unwelcome," that the student "engaged in disruptive behavior." *Discrimination, Harassment, Sexual Misconduct, Stalking, and Retaliation*, Univ. of Mont., https://perma.cc/VN4K-VBZ6 (accessed Dec. 9, 2018). The harassment policy at Troy University in Alabama places even harsher restrictions on student speech: "[H]arassment is any *comments* or *conduct consisting of words* or actions that are *unwelcome* or *offensive* to a person . . . .Harassment occurs when it is known or *ought reasonably to be known that such comments . . . . would be unwelcome*." *Oracle Student Handbook and Planner*, Troy Univ. (2018–19), https://perma.cc/3P3Z-C2M7 (emphasis added). That these policies are not always enforced to their full, literal maximum is not a saving grace; indeed, "the mere existence of the [administrator's] unfettered discretion . . . intimidates parties into censoring their

own speech, even if the discretion and power are never actually abused." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988).

Students, like others, are susceptible to being intimidated into self-censorship. For example, in 2012, the University of Cincinnati was enjoined from implementing a permit scheme that restricted all "demonstrations, picketing, and rallies" to a "free speech area" constituting less than 0.1% of the campus grounds in the absence of prior permission to do so outside of the area. *Univ. of Cincinnati Chapter of Young Americans for Liberty v. Williams*, 2012 WL 2160969, at *1, *9 (S.D. Ohio 2012). When a student organization sought to gather signatures on petitions to place an amendment on the ballot in a local election, administrators advised students that they could only gather signatures within the "Free Speech Area" and that if any signature gathering were to occur anywhere else on the campus, the students could be subject to arrest. *Id.* at *1. The court determined that the "breadth and unprecedented nature of [the] regulation . . . [was] indicative of the University's failure to narrowly tailor the regulation to serve a compelling interest." *Id.* at *6.

These policies, furthermore, *do* lead to arbitrary enforcement. USC is not the only school to investigate students for speech it had previously approved. *See* 7a–8a. For instance, as the 2018 election season drew to a close, a student at California State University Bakersfield was granted permission to post flyers that promoted a state ballot proposition and to hold a rally supporting the proposition. Administrators later withdrew permission to post the flyers, citing a policy that barred "politically related"

flyers. *FIRE Letter to California State University, Bakersfield*, Fdn. For Indiv. Rights in Educ. (Oct. 19, 2018), https://perma.cc/VD2P-J8Q6.

* * *

Public universities bring together students from a wide array of backgrounds and experiences not only to confer credentials upon them, but also to facilitate a robust exchange of viewpoints. This Court has repeatedly held the educational benefits of diverse backgrounds and viewpoints to be so compelling a governmental interest as to justify the use of race in university admissions. *See Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 308–09 (2013). The public university is dedicated to and oriented around the idea of multiple voices cherished in First Amendment jurisprudence.

Students' free speech rights "must be applied in light of the special characteristics of the school environment." *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (internal quotation marks omitted). The Court often invokes this principle in preserving the discretion of universities to "exercise[] editorial control over the style and content of student speech in school-sponsored expressive activities." *Id.* at 273. But this context cuts both ways. Students enrolled in public universities are especially vulnerable to the chilling of their First Amendment right to express their views without fear of official sanction. The university and its rules are inseparable from students' daily life. Its administrators wield disproportionate power over students, and students are ill positioned to vindicate their rights when violated. The only effective safeguard against

overbroad, unevenly enforced speech codes by university administrators is clear judicial guidance as to the appropriate limits of campus speech policies. This Court's direction is needed to provide that guidance.

B. Public university speech codes that prohibit speech that is not objectively offensive violate students' First Amendment rights.

Even when reprehensible and offensive, some "harassing" speech is nonetheless entitled to First Amendment protection. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). In fact, this Court has repeatedly affirmed the principle that offensive speech is not only *entitled* to First Amendment protection, but uniquely *in need* of it. *See, e.g.*, *FCC v. Pacifica Fdn.*, 438 U.S. 726, 745–46 (1978) ("[T]hat society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."); *Street v. New York*, 394 U.S. 576, 592 (1969) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (holding prohibition of "particular expression of opinion" must show more than "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint");

Matal v. Tam, 137 S. Ct. 1744, 1763 (2017) ("We have said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'").

This Court has also recognized that even pure expression can be prohibited by universities where it is "so severe, pervasive, *and objectively* offensive that it effectively bars the victim's access to an education opportunity or benefit." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (emphasis added). In fact, allowing such speech, even between students, is a violation of a university's duties under Title IX. *Id.* The Court established the permissible line between conduct creating Title IX liability and conduct the First Amendment protects in *Davis*. Although USC claims to have "modeled" its code "on the essence of the *Davis* standard," and Fourth Circuit law, *see* 32a–33a, its "model" omits the key language of "objectively offensive," and creates a disjunctive rather than conjunctive test. *See* 88a (defining harassment as conduct "that is sufficiently severe, pervasive, *or* persistent so as to interfere with [a student's educational opportunity]") (emphasis added).

By omitting the requirement that speech be objectively offensive and by making the test disjunctive, USC has untethered its policy from this Court's decision in *Davis*. The objectivity requirement is especially important because while "severity" and "pervasiveness" address the degree and timing of the conduct, the requirement that the speech at issue be objectively offensive places a substantive limit on punishable speech.

The "objectively offensive" requirement serves as a threshold limitation on speech that cannot be restricted under *Davis*, and is a critical protection against the chilling effect of broad speech codes discussed above. College is often the first time that a student is exposed to people with unfamiliar, radically different politics, ideologies. While it is often courteous to avoid offense, the default rule in our society is that one cannot be punished for speech simply because it offends. Yet college students—who are attending a public university in large part to prepare them to operate as speakers and listeners in the "real world"—are held by speech codes like USC's to an impossibly higher standard: offend no one, ever.

By removing the requirement that prohibited speech be objectively offensive, USC has not "modeled" the ruling in *Davis*, but exploded it beyond meaningful limit. This "balance" between a school's legal obligations and students' free speech rights is no workable balance at all; it severely errs on the side of chilling and suppressing core First Amendment speech.

C. So-called "savings clauses" do not save otherwise unconstitutional student speech regulations.

STAF 6.24 contains language in its preamble that "[n]othing in this policy is intended to impede the exercise of those rights protected under the First Amendment of the U.S. Constitution," and that the restrictions apply only to speech and conduct that are "not constitutionally protected." 86a. This "savings clause" saves nothing. It does not delineate the conduct prohibited by the rule or explain the policy's

limits to the administrators applying it or the students subject to it. In general, "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entm't Grp., Inc.,* 529 U.S. 803, 816 (2000). Paying cursory tribute to the constitutional guarantee of free expression by invoking the words "First Amendment" and "constitutionally protected," is no talismanic guarantee of a regulation's constitutionality. And declaring that the enforcement of a substantively vague and overbroad regulation will not infringe on First Amendment freedoms does not shield the regulation from judicial scrutiny.

This Court has repeatedly affirmed that citizens do not have to accept the government's claim that it will enforce an overbroad rule in accordance with the Constitution. *See, e.g.*, *City of Lakewood*, 486 U.S. at 757. The First Amendment is precisely a protection *against* such *ad hoc* decision making about whether certain speech is acceptable or will result in punishment. *Thompson v. W. States Med. Ctr.,* 535 U.S. 357, 373 (2002) ("If the First Amendment means anything, it means that regulating speech must be a last—not first—resort.").

"The First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." *United States v. Stevens*, 559 U.S. 460, 480 (2010). The "savings clause" in the preamble does not save the regulation. Instead it highlights the fact that the university is making content-based decisions about what student speech will be considered "constitutionally protected."

This point is especially worth highlighting in the context of university speech codes. "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). A student facing an investigation into her speech by a university would not have to be exceptionally naïve to believe, after reading such language, that the rules being applied to her were presumptively valid; indeed, the literal import of the clause would lead a reader to believe that, if an investigation into her speech had begun, then her speech had already been determined to be "not constitutionally protected." 86a. Public postsecondary educational institutions cannot escape a student's constitutional shield by wishing it away.

II. The procedural mechanisms of speech codes like the ones enforced against Petitioner which fail to screen out frivolous complaints serve to effectively nullify students' rights to free expression.

Policies like the one enforced against the Petitioners here, which lacks *any* procedure to screen out frivolous complaints, tar students with a presumption of guilt for I hiprotected expression. The First Amendment cannot abide such a system. Failure to design adequate procedural safeguards in regulating protected expression is as inexcusable as the substantive deficiencies in the regulation itself. When drafting policies that regulate student speech, universities must ensure that their chosen investigative and adjudicative procedures do not chill students' expression, but to date, universities have broadly failed to do so.

When investigative procedures have the potential to chill speech, a process to screen frivolous complaints is a constitutional minimum. Such screening has already become an important component of First Amendment jurisprudence. *See, e.g.*, *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 474 (6th Cir. 2016) (holding that an Ohio law prohibiting false political statements in the run up to an election was "not narrowly tailored" because of a "lack of a screening process for frivolous complaints"); *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 167 (2d Cir. 2013) (concluding that an FCC regulation was narrowly tailored in part because it "allow[ed] the FCC to screen out frivolous complaints . . . and thereby minimize . . . any possible chilling effect"); *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164, 169, 182 (5th Cir. 2009) (observing growth of anti-SLAPP laws intended "to prevent frivolous torts from chilling exercises of First Amendment rights"); Media L. Res. Ctr., *Anti-SLAPP Statutes and Commentary*, https://perma.cc/Q4UJ-MXZH (accessed Dec. 10, 2018) (reporting that as of January 2018, 29 states had anti-SLAPP statutes, although two were invalidated by state supreme courts).

Public universities, though, appear to be lagging in adopting such procedures. The USC policy applied against the Petitioners had no such mechanism. *See* 25a–26a. Nor does it appear that USC's policy is an extreme outlier. For instance, the student handbook for Adams State University in Alamosa, Colorado, regulates speech. *See* Adams State University, Student Handbook 2016-2020, at 8, *https://www.adams.edu/publications/* (accessed Dec. 4, 2018) (detailing school's anti-harassment policy). Punishment based on mere allegation can be

swift and severe. *See id.* at 9–10 (a "student may be summarily suspended and/or banned from campus upon complaint" when it appears there is probably cause to believe the student poses "a threat to disrupt University functions or activities"). The policy plainly indicates that *every* complaint results, at a minimum, in a meeting between the respondent student and an official responsible for enforcing the school's anti-discrimination policy. *Id.* at 18.[3] ASU and USC are not alone in enforcing speech code regimes that lack adequate screening procedures.[4]

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[3] In the event of complaints involving the University's anti-harassment policy, the handbook provides that "[i]f the alleged victim declines to pursue resolution of the matter through this Procedure, the matter shall be reported to the President who may require an investigation and take such precautionary/disciplinary measures as he/she deems appropriate under the circumstances." *Id.* at 44–45. *See also id.* at 47 ("Even if the Grievance is deemed withdrawn [by the Grievant after the Procedure initiates], the President may require" investigation and may take disciplinary action).

[4] *See, e.g.*, Sam Houston State University, Student Guidelines (last updated Sept. 2018), at 36, 38–39, https://www.shsu.edu/students/guide/StudentGuidelines2013-2016.pdf (accessed Dec. 12, 2018) (prohibiting students from engaging in "campus disruptive activities," which, pursuant to the Guidelines, include use of "abusive, indecent, profane or vulgar language; making offensive gestures or displays that tend to incite a breach of the peace," and subsequently explaining that if anyone complains that this policy has been violated, an investigation will automatically take place and, during that investigation, the complained-of student will be contacted by the Chief Student Affairs Officer or another appointee to "explain the incident" for investigative purposes); Delta State University, Student Regulations (last updated April 24, 2018), https://perma.cc/XFN8-GDMB (providing at ¶ 27 that "Words, behavior, and/or actions which inflict mental or emotional distress on others and/or disrupt the educational environment at

The Fourth Circuit erred in concluding that USC's lack of a screening procedure, which it reframed as an "early chance to respond"—was "a feature of due process, not a bug." 28a.[5]

Where freedom of speech is at risk, investigative and adjudicative procedures carried out by the government have the potential to themselves chill speech, quite apart from the substantive regulation being enforced. Thus, in *Susan B. Anthony List*, the Sixth Circuit rightly concluded that stacking multiple layers of what the Fourth Circuit considered "chance[s] to respond" did not save a speech regulation, but doomed it. *See* 814 F.3d at 470 (describing operation of Ohio's political false statements law, which provided for an additional "probable cause hearing" prior to an adjudicatory hearing if a complaint was filed shortly before an election), *id.* at 474 (concluding that the law was not narrowly tailored in part because "Ohio fails to screen out frivolous complaints *prior* to a probable cause hearing") (emphasis added). *See also Time Warner*,

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Delta State University" violate Student Regulations and subsequently stating on p. 2 that anyone "*charged with* or convicted of" a violation of the Student Regulations "shall be subject to immediate administrative suspension, with or without prejudice") (emphasis added).

[5] The Fourth Circuit also suggested that USC "*did* employ" a sufficient screening procedure when it required some of the Petitioners to meet with an administrator and answer his questions. 9a–10a, 26a. This suggestion runs afoul of the "general rule" of due process that the investigator cannot also be the adjudicator. "[E]ven purportedly fair adjudicators 'are disqualified by their interest in the controversy to be decided.'" *See Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004) (citation omitted).

729 F.3d at 166–67 (rejecting plaintiffs' argument that the First Amendment required "a regime that trigger[ed] less litigation and chill[ed] less speech" in part because the relevant FCC regulation "screen[ed] out frivolous complaints . . . and thereby minimize[d] the litigation burden and any possible chilling effect").

The First Amendment demands an understanding incompatible with the gloss applied by the Fourth Circuit: the procedures described as an "early chance to respond," are, in fact, a premature demand to participate in an inquisition by the state into one's speech. Such probes "place[] 'pressure upon a [person] to avoid'" any speech which might, in the future, "displease those who control [the individual's] . . . destiny." *Application of Stolar*, 401 U.S. 23, 28 (1971) (citation omitted). These procedures thus send a message to students "to protect their future by shunning unpopular or controversial" expression. *Id.* Therefore, procedures that are likely to lead to "extensive interrogation" due to the content of expression violate the First Amendment unless they satisfy strict scrutiny.

Thus, the question is whether public university investigative procedures that do not screen frivolous complaints are "carefully tailored, so that [First Amendment] rights are not needlessly impaired." *United Steelworkers of America v. Sadlowski*, 457 U.S. 102, 111 (1982). Narrow tailoring requires that the government use least restrictive means available to advance its interest. *Playboy Entm't Grp.*, 529 U.S. at 813. And the burden is on the government to show it has done so. *Id.* at 816–17.

Public universities cannot meet that high burden while interrogating students regarding speech complaints that are, on their face, frivolous. After all, "[t]he persons being regulated here are college students, not scholars of First Amendment law." *Reed*, 523 F. Supp. 2d at 1021. College students are less likely to be able to distinguish a frivolous complaint from one with merit and less able to guide their behavior during such an interrogation accordingly. *See* John Villasenor, *Views among college students regarding the First Amendment: Results from a new survey*, Brookings (Sept. 18, 2017), https://perma.cc/E6SY-H5FK ("As the above results make clear, among many current college students there is a significant divergence between the actual and perceived scope of First Amendment freedoms."). As the District Court in this case recognized, "a student of 'ordinary firmness' may have self-censored his or her future speech while awaiting notice . . . on the status of the official student complaints." 69a.

That a student would self-censor when faced even with the most cursory investigation into the most frivolous complaint is almost inevitable.[6]

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[6] As such, the Fourth Circuit's attempt to distinguish the facts of *Susan B. Anthony List* falls short because the court failed to consider the difference between students and the challengers of the Ohio political false statements law. *See* 27a. Political candidates and groups like the plaintiffs in *Susan B. Anthony List* are likely (or, at the very least, *allowed*) to have legal representation, and are—to put it mildly—likely to be significantly more sophisticated actors with respect to First Amendment law. That the administrative process employed by USC is less onerous than the one employed by the Ohio Elections Commission does not therefore make USC's process, and others like it, constitutional.

To be sure, including a screening process for frivolous complaints cannot save an otherwise unconstitutional speech regulation. For instance, in *AFL-CIO v. FEC*, the plaintiffs challenged an FEC regulation that "create[d] an incentive for political groups to file complaints against their opponents in order to gain access to their strategic plans, as well as to chill the opponents' activities." 333 F.3d 168, 170, 172 (D.C. Cir. 2003). Despite "hav[ing] no doubt . . . that the Commission does its best to screen out frivolous complaints," the D.C. Circuit concluded that the regulation was *still* unconstitutional. *Id.* at 178, 179. In contrast, USC makes no effort to screen out frivolous complaints. Because an investigation into such a complaint provokes student self-censorship, and because that chill is by definition needless, USC's failure to provide any screening mechanism on its own renders USC's speech code unconstitutional.

III. The decision below, which denies Petitioners' standing despite a factual finding by the District Court that the Petitioners' speech was chilled, contradicts this Court's precedents, the law of other circuits, and places insurmountable hurdles between a student and the vindication of her free speech rights.

The First Amendment "generally prevents the government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992). Outside certain traditional exceptions to the rule, *see id.* at 383, this broad approach is necessary because the presence of any

content-based regulation has the tendency to chill constitutionally protected speech.

The Court has modified traditional standing doctrine in this area in recognition of the chilling effect a speech code, even without enforcement, can have on core First Amendment expression. *See, e.g., Broadrick*, 413 U.S. at 612 ("[T]he Court has altered its traditional rules of standing to permit . . . [litigants to challenge] a statute not because their own rights of free expression are violated, but 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."). First Amendment standing doctrine has been applied correctly in the Fourth Circuit both before, *Kenny v. Wilson*, 885 F.3d 280, 288 (4th Cir. Mar. 15, 2018), and after, *In re Murphy-Brown, LLC*, 907 F.3d 788, 799 (4th Cir. Oct. 29, 2018), this case. But the Fourth Circuit's decision below sets a dangerous precedent as a roadblock in front of would-be plaintiffs whose First Amendment rights have been infringed.

Despite the District Court's factual "find[ing] that Plaintiffs' speech was chilled." 69a, in this case, the Fourth Circuit held that they lacked standing to challenge the USC policy. The Fourth Circuit's error was in changing the established "credible threat" doctrine into an "actual threat" doctrine. The proper standard, articulated in *Kenny*, is broad, and finds that a threat is credible, "so long as the threat is not 'imaginary or wholly speculative,' 'chimerical,' or 'wholly conjectural.'" *Kenny*, 885 F.3d at 288 (citations omitted).

In distinguishing the decision below from *Kenny*, the Fourth Circuit stated that it found a "'credible threat of future enforcement' of the laws against [the plaintiffs in *Kenny*]—primarily because they had previously been arrested and criminally charged under the very same statutes." 36a. But this Court has explicitly rejected requiring a "threat of criminal prosecution [as] a necessary condition for the entertainment of a facial challenge." *Los Angeles Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32, 39 (1999). The Fourth Circuit's "distinction" between an aborted enforcement in this case and a criminal charge misses the point of the *credible* threat doctrine—namely, that someone need not wait until the threat is made true on to vindicate his or her First Amendment rights in the courts.

The effect of the Fourth Circuit's heightened standing requirement is to place an insurmountable hurdle between students and the vindication of their constitutional rights. As discussed *supra*, public university speech codes often share certain common features—vague prohibitions on undefined sets of speech; reliance on reactions from a third party; a failure to include necessary screening procedures—that, independently and in concert, guarantee that school administrators will make *ad hoc* decisions about student speech and that students will engage in self-censorship. The Fourth Circuit's decision below treats the indeterminate nature of a university's adjudication process as counseling against standing when, in reality, that very indeterminacy adds to the chill that violates the First Amendment.

USC's policy and the Fourth Circuit's ruling will undoubtedly chill more speech together than

either would on its own. By not only upholding a substantively unconstitutional speech standard, but also raising the standing requirements for First Amendment plaintiffs, the Fourth Circuit made clear to students that they are stuck with the restrictive speech codes imposed on them.

CONCLUSION

For the foregoing reasons, and for those stated by the Petitioners, the Court should grant the petition.

Respectfully submitted,

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