No. 19-____

IN THE

Supreme Court of the United States

TERESA BUCHANAN,

Petitioner,

v.

F. KING ALEXANDER, DAMON ANDREW, A.G. MONACO, AND GASTON REINOSO,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth 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 Petitioner

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

QUESTIONS PRESENTED

Petitioner, Dr. Teresa Buchanan, was terminated from her tenured position at Louisiana State University under the school's sexual harassment policies. Those policies were adopted pursuant to a federal "blueprint" for enforcing Title IX of the Education Amendments of 1972 that downplayed concerns about the First Amendment and academic freedom, and which directed universities to sanction any "unwelcome verbal … conduct of a sexual nature" without regard to whether it is severe, pervasive, and objectively offensive. Although other circuits have invalidated nearly identical college sexual harassment policies as unconstitutionally vague or overbroad in violation of the First Amendment, the Fifth Circuit upheld Dr. Buchanan's termination without any review of the policies enforced against her. The decision below presents two critical questions of First Amendment law that require this Court's review:

1. Whether the Fifth Circuit erred by foreclosing Petitioner's ability to challenge the constitutional validity of a public university's speech regulation under which she was terminated from her tenured professor position?

2. Whether the Fifth Circuit erred by allowing enforcement of a public university's sexual harassment policies that regulate speech using overly broad and vague terms, contrary to holdings of the Third, Fourth, and Ninth Circuits?

PARTIES TO THE PROCEEDINGS

The petitioner, appellant and plaintiff below, is Teresa Buchanan, a former tenured professor at Louisiana State University ("LSU").

The respondents, appellees and defendants below, are current or former LSU officials F. King Alexander, Damon Andrew, A.G. Monaco, and Gaston Reinoso.

RELATED PROCEEDINGS

1. U.S. District Court for the Middle District of Louisiana

Buchanan v. Alexander, et al.

Docket No.: Civil Action 16-41-SDD-EWD

Date of Entry of Judgment: January 10, 2018

2. U.S. Court of Appeals for the Fifth Circuit

Buchanan v. Alexander, et al.

Docket No. 18-30148

Date of Entry of Judgment: March 22, 2019

Petition for Reconsideration *En Banc* Denied: April 30, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit for which review is sought appears at 919 F.3d 847 (5th Cir. 2019). The decision is included at 1a.

The decision of the United States District Court for the Middle District of Louisiana, appearing at 284 F. Supp. 3d 792 (M.D. La. 2018), is included at 17a.

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 Fifth Circuit, which issued its decision March 22, 2019, and denied rehearing *en banc* on April 30, 2019. The denial of rehearing *en banc* is included at 140a. Petitioner sought and Justice Alito granted an extension of time to petition for certiorari, up to and including August 28, 2019.

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.

The challenged sexual harassment policies maintained by LSU, PS-73 and PS-95, appear in the Appendix pursuant to Rules 14.1(f) and 14.1(i)(v).

INTRODUCTION

Regulation of speech at public universities and intolerance of "views [considered] socially harmful or destructive" has been described by First Amendment experts as "the single greatest threat to free speech in the nation." *Free Speech 101: The Assault on the First Amendment on College Campuses*: Hearing Before the Sen. Comm. on the Judiciary, 115th Cong. (2017) (statement of Floyd Abrams). "Hardly a week goes by without new tensions." Erwin Chemerinsky and Howard Gillman, FREE SPEECH ON CAMPUS 1 (2017).

Such threats to free speech began to arise frequently in connection with university sexual harassment policies after the federal government devised an enforcement "blueprint" for Title IX of the Education Amendments of 1972, and urged schools to take steps to punish any unwelcome speech "of a sexual nature." Under this approach, which reversed decades of guidance designed to preserve academic freedom, schools adopted policies that lacked narrow or clear definitions of sexual harassment.

The result was both widespread and predictable, where "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 and Jonathan Haidt, THE CODDLING OF THE AMERICAN MIND 207 (2018). As a consequence, college professors across the country are adapting their curricula to avoid giving offense. *See*, *e.g.*, Douglas Belkin, *College Faculty's New Focus: Don't Offend*, WALL ST. J., Feb. 27, 2017.

Those failing to do so face serious consequences:

- Northwestern University film professor Laura Kipnis was twice investigated under regulations implementing Title IX for writing articles in the CHRONICLE OF HIGHER EDUCATION—one discussing the wave of sexual paranoia that has swept across university campuses and another that discussed the ordeal of her Title IX "inquisition."[1]

---

[1] Laura Kipnis, *Sexual Paranoia Strikes Academe*, CHRON HIGHER EDUC., Feb. 27, 2015 (https://www.chroni-

- Howard University law professor Reginald Robinson was deemed responsible for sexual harassment in 2017 after two students complained about a test question involving a Brazilian wax and an upset client. After a 504-day investigation, Robinson was required to undergo mandatory sensitivity training, prior administrative review of future test questions, and classroom observation.[2]
- Rowan College at Gloucester County terminated Professor Dawn Tawwater in 2014 for using "indecent language" after she showed two sociology sections a feminist music-video parody of Robin Thicke's song "Blurred Lines," with the gender roles reversed.[3]

---

cle.com/article/Sexual-Paranoia-Strikes/190 351); Laura Kipnis, *My Title IX Inquisition*, CHRON HIGHER EDUC., May 29, 2015 (https://www.chronicle.com/article/My-Title-IX-Inquisition/230489). *See* Jeannie Suk Gersen, *Laura Kipnis's Endless Trial By Title IX*, NEW YORKER, Sept. 20, 2017 (https://www.newyorker.com/news/news-desk/laura-kipniss-endless-trial-by-title).

[2] Colleen Flaherty, *Brazilian Wax Question Lands Professor in Hot Water*, INSIDE HIGHER ED, July 7, 2017 (https://www.insidehighered.com/quicktakes/2017/07/07/brazilian-wax-question-lands-professor-hot-water).

[3] Peter Bonilla, *Fired for Trying to Teach Sociology, Former Professor Takes Rowan College at Gloucester County to Court*, Aug. 12, 2015 (https://www.thefire.org/fired-for-trying-to-teach-sociology-former-professor-takes-rowan-college-at-gloucester-county-to-court/).

This case arose from another such example, where LSU terminated Professor Teresa Buchanan under its sexual harassment policies for allegedly using harsh language with students. The school's policies were so vague, and so broadly worded, that LSU administrators were uncertain just what Dr. Buchanan said that supposedly violated the regulations. They proceeded under the belief that Petitioner could be fired under Title IX if her speech was considered "offensive." The Fifth Circuit left this decision undisturbed without reviewing LSU's policies, either facially or as applied to Dr. Buchanan.

STATEMENT OF THE CASE

A. Background of University Sexual Harassment Regulations

Title IX of the Education Amendments of 1972 prohibits sex discrimination in educational institutions receiving federal funding and is administered by the U.S. Department of Education Office for Civil Rights ("OCR"). Under Title IX, sexual harassment is considered a form of sexual discrimination, and OCR periodically provides policy statements and interpretive guidance to universities regarding compliance with the law. Schools that fail to follow OCR directives risk losing federal funding.

Efforts to define and enforce Title IX can raise First Amendment concerns because OCR defines sexual harassment to include "verbal conduct," *i.e.*, speech. Recognizing this tension, OCR in prior years sought to distinguish constitutionally protected expression from regulable "harassment." In 1997, for example, it advised that "if the alleged harassment involves issues of speech or expression,

a school's obligations may be affected by the application of First Amendment principles." It elaborated: "Title IX is intended to protect students from sex discrimination, not to regulate the content of speech …. [T]he offensiveness of a particular expression … is not a legally sufficient basis to establish a sexually hostile environment."[4]

Over the years, OCR continued to stress that policies implementing Title IX must incorporate First Amendment safeguards. It explained in 2001 that a school "must formulate, interpret, and apply its rules so as to protect academic freedom and free speech."[5] Policy guidance in 2003 likewise emphasized that OCR interprets its regulations to be "consistent with the requirements of the First Amendment, and all actions taken by OCR must comport with First Amendment principles."[6] Under

---

[4] Office of Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12033, 12038, 12045-46 (1997).

[5] *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf (Jan. 2001).

[6] OCR, *First Amendment: Dear Colleague*, July 28, 2003, http://www2.ed.gov/print/about/offices/list/ocr/firstamend.html ("*2003 Dear Colleague Letter*"). The policy statement observed that "OCR has consistently maintained that schools in regulating the conduct of students and faculty to prevent or redress discrimination must formulate, interpret, and apply their rules in a manner that respects the legal rights of students and faculty, including those court precedents interpreting the concept of free speech." *Id.*

this interpretation, alleged harassment "must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive." *2003 Dear Colleague Letter*.

About a decade ago, OCR's approach to interpreting Title IX changed. In an October 2010 Dear Colleague Letter, it omitted the requirement in earlier policy pronouncements that conduct alleged to be harassing must be "objectively offensive," and stated that harassment "does not have to be directed at a specific target, or involve repeated incidents."[7] A 2013 resolution agreement with the University of Montana—which OCR described as a nationwide "blueprint" for Title IX enforcement—redefined harassment as "any unwelcome conduct of a sexual nature," and reiterated that actionable conduct need not be objectively offensive.[8]

In response to the "blueprint," colleges and universities across the nation revised their sexual harassment policies to incorporate the broad definitions OCR prescribed. For example, one university defined of harassment as "unwelcome behavior of a sexual nature" that is actionable even

---

[7] OCR, Dear Colleague Letter, Oct. 26, 2010, http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.

[8] Letter from Anurima Bhargava, Chief, U.S. Dep't of Justice, Civil Rights Division, Educational Opportunities Section, and Gary Jackson, Regional Director, U.S. Dep't of Education Office for Civil Rights, to President Royce Engstrom, University of Montana, May 9, 2013.

where it does not create "an intimidating or hostile environment for study, work, or social living." This was not an isolated case. Foundation for Individual Rights in Education, *Spotlight on Speech Codes 2016* (https://www.thefire.org/resources/spotlight/reports/spotlight-on-speech-codes-2016/#_ftn29).

More recently, the Department of Education has begun to question these interpretive changes. It initiated a proceeding in 2018 to address various Title IX issues, including whether its revised interpretation infringes academic freedom and free speech.[9] The Department cited "significant confusion regarding the intersection of individuals' rights under the U.S. Constitution with a recipient's obligations under Title IX," and reported "concerns that Title IX enforcement has had a chilling effect on free speech." *DOE Title IX Notice*, 83 Fed. Reg. at 61480.

Although the Department now proposes to clarify once again that nothing in Title IX "requires a recipient to infringe upon any individual's rights protected under the First Amendment," *id.*, it is neither empowered, nor does it propose, to substantively set forth what the First Amendment requires. Even if the Department adopts the proposed clarification, that will not rescind university policies

---

[9] Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61462, 61464 (Nov. 29, 2018) ("*DOE Title IX Notice*").

adopted under the "blueprint," nor will it instruct universities how to enforce Title IX.

B. LSU's Sexual Harassment Policies

LSU enforces policies prohibiting sexual harassment pursuant to Title IX. In prior years, its policy reflected OCR's earlier sensitivity to First Amendment concerns, and required showing that prohibited expression was "persistent, extreme or outrageous and 'reasonably likely' to cause harassment or intimidation." *See*, *e.g.*, *Esfeller v. O'Keefe*, 391 F. App'x 337, 341 (5th Cir. 2010). However, after OCR's interpretation changed to de-emphasize concern for academic freedom, LSU revised its policies accordingly to conform to the federal "blueprint for colleges and universities throughout the country." (App. 82a)

LSU's policy on sexual harassment of students, PS-95, adopted the OCR "blueprint" definition of sexual harassment as "unwelcome verbal, visual, or physical behavior of a sexual nature." (App. 150a) LSU's PS-73 likewise defines "sexual harassment" as "unwelcome verbal or physical conduct of a sexual nature or gender-based conduct … [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." (App. 144a-145a)

Both PS-73 and PS-95 list non-exclusive examples of prohibited expression without any definitions or limiting principles. The prohibitions in both policies include "sexually oriented behavior of an intimidating or demeaning nature" and "display of sexually oriented materials." (App. 145a, 151a) PS-95 lists "suggestive comments, offensive language

or … obscene gestures" as prohibited conduct, (App. 151a), while PS-73 lists "deliberate, repeated gender-based humiliation or intimidation." (App. 145a) Neither policy requires prohibited speech to be severe, pervasive, and objectively offensive.

C. LSU's Termination of Professor Buchanan

Petitioner, Dr. Teresa Buchanan, had been a member of the LSU faculty since 1995, and was promoted to Associate Professor with tenure in 2001. Dr. Buchanan created LSU's renowned "Early Childhood Program" which provides teacher education for pre-school through third-grade instruction, and she had demonstrated significant success in securing research funding. In 2013, she was being considered for promotion to full professor when a superintendent of a local school district complained to LSU officials that she had been critical of him and the educational attainments of his district during site-visits evaluating LSU student-teachers. (App. 19a-20a)

When LSU officials asked for details, the superintendent said Dr. Buchanan "talked awful about our schools," and it was reported to him that she said "pussy three times." (App. 21a) He did not perceive Dr. Buchanan's words as a sexual reference and never complained that such language might constitute sexual harassment. (App. 21a-22a) Rather, the superintendent was upset by the perceived criticism of his district and its administration. Regarding his complaint about Dr. Buchanan's use of language, he acknowledged she used the word "pussy" in a nonsexual context (referring to a weak or ineffectual person), to instruct a student-teacher on how to cope

with parents who may use a different vocabulary from their own. (App. 20a-22a)

Prompted by this complaint, and erroneously assuming Petitioner had used a sexual term, LSU investigated to determine whether Dr. Buchanan violated PS-73 or PS-95. The resulting report catalogued intermittent criticisms that spanned a period of years, including her occasional use of profanity as well as two unspecified disagreements with personnel in other school districts. (App. 27a, 30a-32a) It also included claims by three former students dating to 2012, when Petitioner was going through a difficult divorce, that she had made "inappropriate statements" during teaching, including allegedly making references to her sex life and that she had encouraged students to use birth control given the rigors of the program. *Id.* (App. 22a-25a, 28a, 30a).

The report concluded her "actions and behavior" violated the University's Policy Statement on Sexual Harassment PS-73 and PS-95, but did not identify which statements prompted the finding. LSU's director of Human Resources Management, who compiled the report, later acknowledged (but only during this ensuing litigation) that most of the allegations—including the superintendent's initial concern about Dr. Buchanan's language—did not relate to LSU's sexual harassment policies or contribute to the finding. *Id.* (App. 29a-30a)

Based on the report, LSU convened a faculty committee to determine if Dr. Buchanan should be terminated. The committee was presented all complaints, including ones that played no role in the report's conclusion. Committee members evaluated the report based on the understanding that PS-73

and PS-95 implemented an "offensiveness" standard, and that any "unwelcome" or "inappropriate" language qualified as sexual harassment. (App. 35a) Applying this interpretation, the committee found Professor Buchanan had violated PS-73 and PS-95, but recommended censure rather than dismissal, with a goal of having Petitioner modify her teaching methodology to minimize any potentially offensive language. (App. 35a-36a)

Despite this, Respondents advocated termination, each citing the superintendent's initial complaint about Dr. Buchanan's non-sexual use of the word "pussy" as primary evidence of sexual harassment. This was based on the mistaken belief that she used the word as slang female genitalia, and a conclusion that her language was "inappropriate" under LSU's policies, regardless of context. (App. 21a-22a, 85a) Respondents also cited the three student complaints from 2012 alleging in-class references to sex, but never investigated whether such incidents were severe, pervasive, and objectively offensive. (App. 30a)

LSU's Board of Supervisors accepted the Respondents' recommendation and terminated Dr. Buchanan.

D. Proceedings Below

Professor Buchanan challenged her termination, arguing that PS-73 and PS-95 are unconstitutional on their face and as applied to her. The District Court granted summary judgment and dismissed the case. It denied the as-applied challenge, finding the speech for which Professor Buchanan was terminated was not protected under the First Amendment test governing public employee speech set forth in

Connick v. Myers, 461 U.S. 138, 147-50 (1983), and *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). The court also rejected Professor Buchanan's facial challenge, finding that "while the LSU policies could arguably have been crafted better," they did not lack "an objective" sexual harassment standard "akin to severe and pervasive." (App. 116a).

The Fifth Circuit upheld Dr. Buchanan's termination on appeal without any analysis of whether LSU's sexual harassment policies satisfy First Amendment requirements. The court concluded that Professor Buchanan's as-applied challenge failed because her speech did not touch on a matter of public concern under *Pickering* and *Connick* and thus no First Amendment review of the policy was required. (App. 7a-13a) On the facial challenge, the court vacated the district court's decision, and held no constitutional review was necessary because "Dr. Buchanan sued the wrong parties," and should have sued the Board. (App. 13a). It reached this conclusion notwithstanding Fifth Circuit precedent that the University and its Board of Supervisors are immune from such constitutional claims.[10]

---

[10] *E.g.*, *Raj v. LSU*, 714 F.3d 322, 328-29 (5th Cir. 2013); *Pastorek v. Trail*, 248 F.3d 1140, at *2-3 (5th Cir. 2001) (*per curiam*) (unpublished); *Richardson v. Southern Univ.*, 118 F.3d 450, 452-56 (5th Cir. 1997); *Laxey v. Louisiana Bd. of Trs.*, 22 F.3d 621 (5th Cir. 1994); *Delahoussaye v. City of New Iberia*, 937 F.2d 144, 147-48 (5th Cir. 1991).

Petitioner's request for rehearing was denied, and this Petition followed.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit decision presents a vital question that requires this Court's review. It empowers the government to penalize a university professor for her academic speech while shielding the operative regulations from any meaningful constitutional review.

The Fifth Circuit's error flows from its categorical distinction between facial and as-applied challenges to unconstitutional laws, an "uncommonly confused" area of doctrine about which this Court has issued "precious little guidance." Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STANFORD L. REV. 1209, 1232-33 (2010). It held that a court may simply assume the validity of LSU's sexual harassment regulations under which Dr. Buchanan was terminated, without reviewing the particular provisions brought to bear, if the court concludes the speech at issue is unprotected. This reasoning misapprehends the nature of as-applied and facial constitutional challenges and blows a gaping hole in established First Amendment jurisprudence.

Depriving Petitioner of a constitutional remedy is particularly serious in this case, where the federal government nudged universities to adopt unconstitutional speech regulations on a nationwide scale. Such regulations must be subject to judicial review, because "[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001) (Alito, J.).

By constraining Professor Buchanan's ability to bring any kind of challenge to the LSU policies under which she was terminated, the Fifth Circuit is at odds with decisions of the Third, Fourth, and Ninth Circuits, which have held that sexual harassment policies using such overly broad and vague terms violate the First Amendment, regardless whether he challenge is facial or as-applied. It also is inconsistent with the Sixth Circuit, which held sexual harassment complaints like this one at least require a First Amendment balancing analysis.

I. THIS COURT MUST CLARIFY THAT A STATE UNIVERSITY CANNOT VALIDLY PUNISH A PROFESSOR FOR HER SPEECH WITHOUT JUDICIAL REVIEW OF THE RULE BEING APPLIED.

The Fifth Circuit's refusal to conduct any constitutional review of the policies under which Dr. Buchanan was fired resulted from doctrinal confusion about the nature of facial and as-applied challenges to speech regulations. It avoided reviewing the constitutionality of PS-73 or PS-95 as-applied, because it erroneously concluded such scrutiny is not required if it determines the speech at issue is unprotected by the First Amendment. The court avoided addressing the facial challenge (while vacating the district court's ruling upholding the policies), because it artificially limited the ability of an affected party to challenge unconstitutional regulations, contrary to this Court's precedents.

Review by this Court is necessary to make clear that any individual who is sanctioned under a

speech regulation may challenge the constitutional validity of the rules that were applied. Additionally, the scope of such review cannot be truncated (or avoided altogether) simply by categorizing the challenge as either "facial" or "as-applied."

a. By treating Dr. Buchanan's facial and as-applied challenges as hermetically sealed from one another, the Fifth Circuit illegitimately avoided engaging in any First Amendment review of LSU's policies. The court's approach touches on a matter of intense debate both in the academy and this Court where noted scholars have suggested "[t]here is no single distinctive category of facial, as opposed to as-applied, litigation," and "facial challenges are less categorically distinct from as-applied challenges than is often thought."[11]

---

[11] Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1341 (2000). *See also e.g.*, Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1993-94) (describing distinction between facial and as applied challenges as a "deceptively simple principle"); Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL OF RIGHTS J. 657, 664, 673 (2010) ("[T]here is no consensus about whether facial and as-applied challenges doctrine governs severability, the structure of constitutional rights and rules, or some mixture of the two …. The problem goes beyond merely contributing to confusion in the law."); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 422-23 (Dec. 1998) ("[C]onstitutional adjudication gropes forward with generalized and often conflicting judicial preferences, unresolved arguments for doctrinal extensions, and no clear set of rules governing an important feature of resolving constitutional challenges."); Matthew D. Adler, *Rights Against Rules: The*

This Court has agreed the distinction between facial and as-applied challenges "is not so well defined that it has some automatic effect or … must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. FEC*, 558 U.S. 310, 331 (2010). It has acknowledged certain cases have "characteristics of both" types of challenges, but that "[t]he label is not what matters." *Doe v. Reed*, 561 U.S. 186, 191, 194 (2010). *See also City of Chicago v. Morales*, 527 U.S. 41, 55 (1999).

What *does* matter is that "a litigant has always the right to be judged in accordance with a constitutionally valid rule of law" regardless of how her claim is styled. Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3. *See Marbury v. Madison*, 5 U.S. (Cranch) 137, 180 (1803) ("a law repugnant to the constitution is void"). This requirement is particularly critical under the First Amendment, where this Court has long held "[a] person whose activity may be constitutionally regulated nevertheless may argue that the statute under which he is convicted or regulated is invalid on its face" or as-applied.[12] It

---

Moral Structure of American Constitutional Law, 97 MICH L. REV. 1, 106 (Oct. 1998) (questioning the difference between facial and as-applied challenges); Henry Paul Monaghan, *Harmless Error and the Valid Rule Requirement*, 1989 SUP. CT. REV. 195 ("A defendant in a coercive action always has standing to challenge the rule actually applied to him.").

[12] *New York v. Ferber*, 458 U.S. 747, 768 n.21 (1982). *See also e.g.*, *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381-82 n.3 (1992); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-04

also is central to the Fourteenth Amendment, which provides that "[n]o state shall make *or enforce* any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const., amend. XIV (emphasis added).

The Fifth Circuit's assumption that it could decide this case by considering only the expressive act at issue (under the *Pickering-Connick* framework) without also examining the policy being applied is inconsistent with this Court's First Amendment jurisprudence.[13] As a general proposition, the constitutionality of a law regulating speech must be evaluated regardless of whether the expressive act is *per se* protected.

This principle was illustrated in *Texas v. Johnson*, 491 U.S. 397 (1989), where this Court held the First Amendment barred prosecuting an individual for flag burning under a Texas law that prohibited desecration of a venerated object. It explained that First Amendment issues might have been avoided under a different statute (*e.g.*, prohibiting theft of a flag, trespass, or arson), but that the Texas law at issue targeted "the

---

(1985); *Gooding v. Wilson*, 405 U.S. 518, 521-22 (1972); *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971); *Bachellar v. Maryland*, 397 U.S. 564, 569-71 (1970); *Street v. New York*, 394 U.S. 576, 585-87 (1969); *Louisiana v. United States*, 380 U.S. 145, 152-53 (1965); *Terminiello v. Chicago*, 337 U.S. 1, 5 (1949).

[13] As explained *infra* at 29-30, neither *Pickering* nor *Connick* involved application of a speech regulation to public employees' communications.

communicative impact of [Johnson's] actions." *Id.* at 412 nn.7-8. *See also id.* at 418 ("It is not the State's ends, but its means, to which we object."); *R.A.V*, 505 U.S. at 385 ("[B]urning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not.") (citing *Johnson*, 491 U.S. at 406-07).

Johnson was an as-applied challenge and the Court observed that its inquiry was "bounded by the particular facts of this case *and by the statute under which Johnson was convicted*." *Id.* at 412 n.8 (emphasis added). Under this logic, the policies under which Dr. Buchanan was terminated—which directly regulated speech—should have been subjected to First Amendment scrutiny.

b. Calling a case "as-applied" does not permit a reviewing court to avoid ruling on the constitutionality of the law's challenged provisions. Rather, the distinction between facial and as-applied claims "goes to the breadth of the remedy employed by the Court." *Citizens United*, 558 U.S. at 331. *See United States v. Treasury Emps. Union*, 513 U.S. 454, 477-78 (1995). A facial challenge seeks to invalidate a law in all, or virtually all, of its possible applications, while an as-applied challenge focuses on particular aspects of the law as interpreted in the case at bar. *See*, *e.g.*, *Reed*, 561 U.S. at 194; *United States v. Supreme Court of New Mexico*, 839 F.3d 888, 907-08 (10th Cir. 2016), *cert. denied*, 138 S. Ct. 130 (2017).

Numerous courts have observed that "the line between facial and as-applied relief is a fluid one, and many constitutional challenges may occupy an

intermediate position on the spectrum between purely as-applied relief and complete facial invalidation." *Am. Fed'n of State, Cty. & Mun. Emps. Council 79 v. Scott*, 717 F.3d 851, 865 (11th Cir. 2013); *Showtime Entm't, LLC v. Town of Mendon*, 769 F.3d 61, 70 (1st Cir. 2014); *Iowa Right to Life Committee, Inc. v. Tooker*, 717 F.3d 576, 587-88 (8th Cir. 2013); *Supreme Court of New Mexico*, 839 F.3d at 908-09. Many cases have "characteristics of both" —they are as-applied in the sense that they do not seek to strike down a law in all its applications, but facial in that they are "not limited to plaintiffs' particular case." *Reed*, 561 U.S. at 194.

Some circuit courts have referred to this type of as-applied challenge as "quasi-facial in nature." *Supreme Court of New Mexico*, 839 F.3d at 915 n.13 (quoting *Am. Fed'n of State, Cty. & Mun. Emps.*, 717 F.3d 863). Such challenges test the validity of a law's particular provisions but not all of its potential applications. Thus, in *Wisconsin Right to Life*, 551 U.S. at 481, this Court held Section 203 of the Bipartisan Campaign Reform Act unconstitutional as-applied, even though it had previously held the law was facially valid. *See McConnell v. FEC*, 540 U.S. 93 (2003). The case was an as-applied challenge, but it had the effect of invalidating a statutory provision.

This Court has long recognized that the First Amendment requires invalidation of certain *applications* of laws that infringe freedom of speech even where total facial invalidation may be inappropriate. In *Brockett*, 472 U.S. at 501, for example, this Court reversed a Ninth Circuit ruling that invalidated the Washington moral nuisance statute on its face because it contained the

unbounded term "lust" in its definition of obscenity. While the law was not void in all applications, the Court held invalidation was required to the extent it could be applied using the overly broad term "lust." *Id.* at 503-04 ("The statute may forthwith be declared invalid to the extent that it reaches too far, but otherwise left intact."). It cited numerous cases to show that this approach is the norm in First Amendment challenges to defective laws. [14]

c. The Fifth Circuit's avoidance of any constitutional review of LSU's sexual harassment policies is illegitimate regardless of whether Professor Buchanan's challenge is designated as-applied, facial, or "quasi-facial." For obvious reasons, the court did not question Dr. Buchanan's standing to bring an as-applied challenge to her termination, but it artificially limited the scope of review to avoid ruling on any aspect of the policies. As explained above, in ruling on the as-applied challenge the court should have addressed the constitutionality of the

---

[14] *Brockett*, 472 U.S. at 503 (citing *United States v. Grace*, 461 U.S. 171, 175 (1983) (striking down federal law prohibiting demonstrations on Supreme Court grounds as applied to picketing on sidewalks surrounding the building); *NAACP v. Button*, 371 U.S. 415, 419, 439 (1963) (striking down state rules barring solicitation by attorneys as applied to the activities of NAACP); *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (invalidating state trespass law only to the extent state attempted to impose criminal penalties on distribution of literature on the streets of a company town); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (invalidating breach of peace ordinance only to the extent it was construed and applied to prevent peaceful distribution or religious literature)).

applicable provisions of PS-73 and PS-95, particularly their definitions of "sexual harassment."

But it also should have considered and ruled on the policies' facial validity. The Fifth Circuit's refusal to consider the validity of LSU's policies on the basis that Petitioner sued "the wrong parties" not only denied Dr. Buchanan a remedy, but further confused the applicable doctrine. This Court has held that "an individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court." *Brockett*, 472 U.S. at 503. While that statement expresses the First Amendment overbreadth doctrine (and is the basis for third-party standing in free speech cases), it also explains why the Fifth Circuit should have addressed Professor Buchanan's facial challenge.

Once again, the Fifth Circuit's flawed dichotomy of facial versus as-applied review led it astray. This Court has held that once a case is brought before it, "no general categorical line bars [it] from making broader pronouncements of invalidity in properly 'as-applied' cases." *Citizens United*, 558 U.S. at 331 (quoting Fallon, *supra* n.11, at 1339). "[E]ven if a party could somehow waive a facial challenge while preserving an as-applied challenge," it explained, "that would not prevent the Court from … addressing the facial validity of [the law]." *Id.* at 330. Accordingly, this Court should accept review to clarify that the Fifth Circuit erred in declining to consider the facial challenge in this case.

d. Review of LSU's sexual harassment policies is imperative because university speech regulations

implicate vital First Amendment concerns. This Court has made clear "[t]he classroom is peculiarly the 'marketplace of ideas,'" *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967), and that the "essentiality of freedom in the community of American universities is almost self-evident." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Academic freedom is a "transcendent value" and "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian*, 385 U.S. 603.

Broad and poorly defined regulations of academic speech threaten the basic command that the government must regulate with narrow specificity because "First Amendment freedoms need breathing space to survive." *Button*, 371 U.S. at 433. This Court has not hesitated to strike down overly broad or vague speech regulations at public universities where nebulous laws set "no rule or standard at all." *Baggett v. Bullitt*, 377 U.S. 360, 365, 366-67 (1964) (invalidating on vagueness grounds statute requiring teachers to sign oaths affirming they did not "advise[], teach[], abet[], or advocate[]" overthrow of government); *Cramp v. Board of Pub. Instruction*, 368 U.S. 278, 286-87 (1961) (invalidating Florida law requiring loyalty oaths because of "the extraordinary ambiguity of the statutory language").

Policies designed to implement Title IX, though well-intended efforts to address an important governmental interest, may penalize innocent speech and cast a pall of orthodoxy if they fail to take into account First Amendment concerns. In this case, PS-73 and PS-95 implemented a standard no more definite than "offensiveness" as part of what the

Department of Education described as a "blueprint" for schools across the country. Such regulation of speech "strikes at the heart of the First Amendment," for as this Court recently reaffirmed, "public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some … hearers." *Matal v. Tam*, 137 S. Ct. 1744, 1763-64 (2017) (quoting *Street*, 394 U.S. at 592).

Professor Buchanan was terminated from her tenured position under regulations so poorly framed that neither she nor the university officials involved could say what speech led to her ouster. The one point on which all agree is that the investigation was triggered by her criticism of a school district's academic progress and of its superintendent. Unfortunately, Professor Buchanan is not alone. Situations like hers have played out at universities across the U.S. under broad and undefined sexual harassment policies that were adopted at the urging of federal officials. *See supra* 7-8. This Court's guidance is needed to ensure such regulations are adopted and enforced consistently with the First Amendment.

II. THE DECISION BELOW CREATED A SPLIT AMONG THE CIRCUIT COURTS.

The Fifth Circuit holding below is at odds with decisions of the Third, Fourth, and Ninth Circuits, which invalidated vague and overly broad sexual harassment policies, regardless of whether the challenges were characterized as "facial" or "as-applied." It is also inconsistent with the Sixth Circuit which held that, at a minimum, First Amendment balancing is required in a case such as this. By avoiding any analysis of LSU's policies

either as-applied or on their face, the Fifth Circuit decision conflicts with this body of law.

a. Courts have held consistently that sexual harassment policies comparable to LSU's PS-73 and PS-95 violate the First Amendment. In *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968 (9th Cir. 1996), for example, the Ninth Circuit held that a sexual harassment policy that prohibited, in relevant part, "verbal, written, or physical conduct of a sexual nature" that "has the purpose or effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile, or offensive learning environment" was too vague as applied to a professor who was charged with using a "confrontational teaching style designed to shock his students" and using "vulgarities and profanity in the classroom." *Id.* at 971-72. The court held that the policy's application constituted a "legalistic ambush" because the school "applied the Policy's nebulous outer reaches to punish teaching methods that Cohen had used for many years." *Id.* at 972.

The Ninth Circuit found it unnecessary to decide whether Professor Cohen's lectures were protected by the First Amendment, or even if speech "of this nature" could be punished under "a clearer and more precise policy." *Cohen*, 92 F.3d at 972. Accordingly, the Fifth Circuit's attempt to distinguish *Cohen* by concluding that the professor's speech was "at least tangentially related" to the subject matter, while Dr.

Buchanan's speech was not "a matter of public concern" (App. 12a), misses the mark.[15]

The issue is not whether particular speech at issue is protected, but whether the regulatory terms used to define and sanction it satisfy constitutional standards. By this measure, the Ninth Circuit held that the college's sexual harassment policy was too vague to be enforced. *Cohen*, 92 F.3d at 972 ("[W]here the guarantees of the First Amendment are at stake the [Supreme] Court applies its vagueness analysis strictly.") (quoting *Bullfrog Films Inc. v. Wick*, 847 F.2d 502, 512 (9th Cir. 1988)). *See Reed*, 561 U.S. at 194 (as-applied challenge "reach[es] beyond the particular circumstances of these plaintiffs").

The Third Circuit struck down a similar sexual harassment code in *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008). *DeJohn* involved a facial challenge to Temple University's policy that prohibited all forms of sexual harassment, "including … expressive, visual, or physical conduct of a sexual or gender-motivated nature, when … such conduct has the purpose or effect of unreasonably interfering with an individual's work, educational performance, or status; or … has the purpose or effect of creating an intimidating, hostile, or offensive environment."

---

[15] Review of the questions presented does not entail ruling on any "facts of the case." This Petition does not ask the Court to decide whether Professor Buchanan's speech is protected in this particular context (although it clearly is), but whether, as a pure matter of First Amendment doctrine, the court below failed to conduct the necessary constitutional analysis.

537 F.3d at 305. As with the policy in *Cohen*, the terms of Temple's policy were almost identical to LSU's PS-73 and PS-95.

The court observed that "[w]hen laws against harassment attempt to regulate oral or written expression on such topics, however detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications." *Id.* at 316 (quoting *Saxe*, 240 F.3d at 200). The Third Circuit invalidated Temple's policy, holding it provided "no shelter for core protected speech" because it did not require a showing that harassment was severe, pervasive, and objectively offensive. *Id.* at 316 n.14, 317-18 (applying *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 652 (1999)). Under its terms, the prohibitions "could encompass any speech that might simply be offensive to a listener, or a group of listeners, believing that they are being subjected to or surrounded by hostility." *Id.* at 320. *See McCauley v. University of V.I.*, 618 F.3d 232, 251 (3d Cir. 2010) ("[t]he scenarios in which [such speech restrictions] may be implicated are endless").

An early as-applied case from the Fourth Circuit reached the same conclusion. George Mason University had applied the school's Mission Statement and affirmative action plan to discipline a fraternity that performed a racist and sexist skit on campus. *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 388-89 (4th Cir. 1993). The fraternity challenged application of the policy as a violation of the First Amendment, and the Fourth Circuit agreed. Although it found the university had a substantial interest in maintaining an educational environment free of discrimination and in providing gender-neutral education, it held the school failed to

implement policies compatible with the First Amendment. *Id.* at 393.

b. Contrary to these decisions, the Fifth Circuit here conducted no constitutional review of LSU's policies used to terminate Dr. Buchanan. Instead, it examined only a few selected examples of Dr. Buchanan's remarks and applied the test governing public employee speech set forth in *Connick*, 461 U.S. at 147-50 and *Pickering*, 391 U.S. at 568. No constitutional review of any policy was required, the court maintained, for "if Plaintiff's speech does not involve a matter of public concern, it is unnecessary for the court to scrutinize the reason for the discipline." (App. 9a-10a) (quoting *Bonnell v. Lorenzo*, 241 F.3d 800, 810 (6th Cir. 2001).

The Fifth Circuit's abbreviated analysis posed the wrong constitutional question, *see supra* 18-19, and its resolution of the matter only deepened the divide between the circuits in cases of this sort. Neither *Connick* nor *Pickering* involved application of speech regulations to public employees' communications, so there was no occasion to consider whether any policy was drafted with the required precision. The threshold question in both cases was whether the employees spoke on matters of public concern. *Connick*, 461 U.S. at 146 (questionnaire about employee transfer policies is not a matter of public concern); *Pickering*, 391 U.S. at 571 ("the question whether a school system requires additional funds is a matter of legitimate public concern"). There simply was no policy to analyze.

But even under the *Pickering-Connick* framework the Fifth Circuit applied here, the court failed to conduct any constitutional balancing, rendering its

decision inconsistent with the Sixth Circuit. *Bonnell*, the Sixth Circuit case on which the court below relied, did involve a sexual harassment complaint, but the plaintiff there did not challenge the constitutionality of the school's policy, and its terms were not at issue. 241 F.3d at 821-24. That case, like this one, involved a professor who was sanctioned for use of profanity, but unlike the Fifth Circuit here, the *Bonnell* court recognized that First Amendment analysis was required, even where the challenge did not implicate the policy's terms.

The Sixth Circuit observed that "the debate of constitutionally protected speech in the classroom setting—particularly as it relates to sexual harassment and a college's obligations under Title IX—is a heated one where the most learned of academic institutions struggle to find a common ground." *Id.* at 816. *See id.* at 810 ("nowhere is that debate more heated than on university campuses") (citation omitted). Accordingly, it held:

> [T]he subject of profane classroom language which precipitates a sexual harassment complaint lodged against the instructor for his use of this language in relation to the First Amendment, as well as the sanctity of the First Amendment in preserving an individual's right to speak, involves a matter of public import.

Id. at 816. More specifically, the court found "a public interest concern involved in the issue of the extent of a professor's independence and unfettered freedom to speak in an academic setting." *Id.* at 817.

The Sixth Circuit thus held the First Amendment "required [it] to conduct a balancing of the parties'

respective interests," but found on the facts of that case that the balance favored the college's enforcement of its policies. *Id.* at 821, 824. The Fifth Circuit conducted no such analysis here. (App. 9a-10a) ("it is unnecessary for the court to scrutinize the reason for the discipline"). The decision overlooked the fact that this case *does* challenge the terms of the policies, but it also is inconsistent with *Bonnell*'s First Amendment reasoning.

In a case like this, where the constitutionality of a speech regulation is at issue, the Court should clarify that the *Pickering-Connick* framework is not appropriate. Even if it were the proper test, however, review of the decision below is necessary because of the conflict with the Sixth Circuit, which held that First Amendment balancing is required.

Most importantly, this Court should confirm that constitutional review of speech-restrictive policies is required—not just balancing—when public universities enforce a sexual harassment policy against a professor's academic speech. In line with decisions of the Third, Fourth, and Ninth Circuits, it should hold that such a policy violates the First Amendment if it regulates speech using overly broad or vague terms, or is not confined to infractions that are severe, pervasive, and objectively offensive.

CONCLUSION

Professor Buchanan fell victim to a federal "blueprint" that urged universities across the U.S. to downplay First Amendment concerns in enforcing Title IX. LSU, along with numerous other universities, answered that call, and adopted unconstitutionally broad and vague sexual harassment policies. Although the Department of Education now appears

to acknowledge its interpretation led to widespread confusion, those policies remain in place and are being applied under conflicting circuit court rulings regarding their constitutionality. This Court's guidance is now needed more than ever.

For the foregoing reasons, Petitioner respectfully requests that the Court grant this petition for certiorari.

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 Petitioner

August 28, 2019