Docket No. 09-56238

In the

United States Court of Appeals

for the

Ninth Circuit

JONATHAN LOPEZ,

Plaintiff-Appellee,

v.

KELLY G. CANDAELE, et al.,

Defendants-Appellants,

and JOHN MATTESON,
in his individual and official capacities as Professor of Speech
at Los Angeles City College,

Defendant.

Appeal from a Decision of the United States District Court for the Central District of California, No. 09-cv-00995 · Honorable George H. King

BRIEF *AMICUS CURIAE* OF THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amicus* certify that (1) *amicus* does not have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in *amicus*.

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INTEREST OF *AMICUS CURIAE*

The Foundation for Individual Rights in Education, Inc. ("FIRE") is a non-profit, tax-exempt educational and civil liberties organization pursuant to section 501(c)(3) of the Internal Revenue Code interested in promoting and protecting First Amendment rights at our nation's institutions of higher education. FIRE receives hundreds of complaints each year detailing attempts by college administrators to justify punishing student expression through misinterpretations of existing law and the maintenance of unconstitutional speech restrictions. FIRE believes that speech codes—university regulations prohibiting expression that would be constitutionally protected in society at large—dramatically abridge freedom on campus. For our nation's colleges and universities to best prepare students for success in our modern liberal democracy, FIRE believes that the law must remain clearly and vigorously on the side of free speech on campus. For all of the reasons stated below, FIRE respectfully asks that this Court uphold the district court's decision.

SUMMARY OF ARGUMENT

The district court properly concluded that the Los Angeles Community College District's (LACCD's) sexual harassment policy is facially overbroad. If LACCD's policy were permitted to stand, it would pose a grave threat to free speech at Los Angeles Community College, contradict decades of legal precedent invalidating campus speech codes, and exacerbate the free speech crisis on America's college campuses.

LACCD's policy is an unconstitutional campus speech code in violation of the clear standards established by the Supreme Court of the United States and the federal Department of Education regarding what constitutes actionable student-on-student harassment. Like the speech codes consistently overturned by courts since the 1980s, LACCD's policy presents itself as a "harassment" policy, but its language far exceeds the scope of constitutionally unprotected harassment, instead impermissibly prohibiting wide swaths of speech protected by the First Amendment.

In arguing for reversal, appellants ignore long-standing Supreme Court precedent recognizing the essentiality of the First Amendment on our nation's public campuses and misconstrue the fundamental differences between speech protections in the educational and workplace contexts. Further, appellants mistakenly argue that state law trumps the U.S.

Constitution with regard to the policy's prohibition of speech protected by the First Amendment. None of appellants' grounds for appeal has merit, and none alters the unconstitutional reach of the policy at issue.

Far too many colleges and universities across the country are restricting students' free speech rights by maintaining policies that prohibit protected speech. Despite an unbroken string of federal and state court decisions striking down such policies, most universities still maintain impermissibly restrictive speech codes, under which students are frequently

ARGUMENT

I. LACCD's Policy Prohibits Constitutionally Protected Expression

As a government actor, the Los Angeles Community College District

victim-students are effectively denied equal access to an institution's resources and opportunities." *Davis* at 651 (emphasis added).

Similarly, the Department of Education's Office for Civil Rights (OCR)—the agency responsible for the enforcement of federal anti-harassment laws on campus—has directly addressed the extensive abuse of harassment regulations by college administrators to ban clearly protected speech on campus.[1] In 2003, the OCR issued a letter of clarification to all colleges that accept federal funding to inform administrators "in the clearest

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possible terms that OCR's regulations are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution."[2] The letter further made clear that "the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR." OCR has defined hostile environment sexual harassment as behavior that is "*sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment*."[3] Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,038 (Mar. 13, 1997) (emphasis added).

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[2] First Amendment: Dear Colleague, *available at* http://www.ed.gov/about/offices/list/ocr/firstamend.html (last visited Jan. 10, 2010).

[3] In addition to meeting the *Davis* standard, peer-on-peer sexual harassment requires satisfaction of the othe42 Tc7.9(d,n)19.33.9(s)-24.1(i)1eb F-9.9(4.1(uonment)-61i1

B. LACCD'S Policy Disregards This Standard and Is Void for Overbreadth

LACCD's sexual harassment policy entirely disregards the controlling legal standard for peer-on-peer harassment announced by the Supreme Court in *Davis* and enunciated by the Department of Education's Office for Civil Rights in 2003. The District's policy defines sexual harassment as:

> Unwelcome sexual advances, requests for sexual favors, and other verbal, visual or physical conduct of a sexual nature, made by someone from or in the workplace or in the educational setting, under any of the following conditions: ... (3) The conduct has the purpose or effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile or offensive work or educational environment.

Lopez v. Candaele, No. CV 09-0995-GHK (C.D. Cal. Sept. 16, 2009) (internal citation omitted). The policy further provides that sexual harassment may include "'[d]isparaging sexual remarks about your gender, [r]epeated sexist jokes, dirty jokes or sexual slurs about your clothing, body, or sexual activities, and [d]isplay of sexually suggestive objects, pictures, cartoons, posters, screen savers[.]'" *Id.* (internal citation omitted). The policy additionally defines "Sexual Harassment based on your gender" as:

> generalized sexist statements, actions and behavior that convey insulting, intrusive or degrading attitudes/comments about women or men. Examples include insulting remarks; intrusive comments about physical appearance; offensive written material such as

> graffiti, calendars, cartoons, emails; obscene gestures or sounds; sexual slurs, obscene jokes, humor about sex.

Id. (internal citation omitted).

"The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002). Because it explicitly prohibits a large amount of protected speech, LACCD's policy more than satisfies this definition of overbreadth.

First, LACCD's policy contains no threshold requirement of severity or pervasiveness, as required by *Davis*. Without this crucial component, LACCD's policy goes far beyond true harassment to restrict speech that is

harassment, the victim must actually feel harassed; *Davis* requires that the conduct "effectively denie[s]" the victim "equal access to an institution's resources and opportunities" to constitute harassment, not that it was simply intended to do so. *Davis* at 651.

LACCD's policy also includes, as examples of sexual harassment, expression that is in fact protected. The policy bans "[d]isparaging sexual remarks" about another's gender and "generalized sexist statements" that "convey insulting, intrusive or degrading attitudes/comments about women or men." However, much expression which falls under LACCD's purported examples of sexual harassment conveys common—and, again, entirely constitutionally protected—social and political viewpoints. For example, under LACCD's policy, a student may be punished for expressing his or her

objectively harassing may legitimately be prohibited without infringing on the right to free speech. By failing to incorporate this "reasonable person" standard, LACCD's policy grants the most sensitive students a *de facto* veto power over speech with which they disagree, despite the fact that it may enjoy First Amendment protection. As the *Davis* Court stated, "simple acts of teasing and name-calling" and other protected verbal expression do not constitute actionable harassment. *Davis* at 652. Indeed, the Supreme Court has stated that "[i]f 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). *See also Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (declaring that freedom of expression "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.").

By regulating speech on the basis of its content, no matter how "disparaging" or "sexist," LACCD proposes to appoint itself (or complaining students) the judge of what speech shall be allowed on campus. Such a result cannot be squared with the Supreme Court's pronouncement, issued "time and again," that "[r]egulations which permit the government to

discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 135 (1992) (citations omitted).

The district court properly found LACCD's policy overbroad, observing that "[e]ven if speech has a negative effect on or is otherwise offensive to the listener, that in and of itself is insufficient to justify its prohibition" because the First Amendment "affords protection to 'verbal tumult, discord, and even offensive utterance.'" No. CV 09-0995-GHK (C.D. Cal. Sept. 16, 2009), quoting *Cohen v. California*, 403 U.S. 15, 25 (1971). This Court should affirm the lower court's analysis and declare the former LACCD policy facially overbroad.

II. LACCD's Arguments for Reversal Are Without Merit

A. LACCD's Argument Ignores the Crucial Importance of the First Amendment at Public Colleges and Universities

That the First Amendment's protections are especially significant at public colleges is settled law. *See, e.g., Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 836 (1995) ("For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the nation's intellectual life, its college and university campuses"); *Healy v. James*, 408 U.S. 169, 180 (1972) ("the vigilant

protection of constitutional freedoms is nowhere more vital than in the community of American schools"); *Keyishian v. Board of Regents*, 385 U.S. 589, 605–06 (1967) ("[W]e have recognized that the university is a traditional sphere of free expression … fundamental to the functioning of our society."). Allowing a public institution to abandon important First Amendment principles in contravention of these long-standing precedents, as appellants' argument would have this Court do, would severely impair an essential function of the university.

Appellants' assertion that "[t]he bulk of a university campus is not a 'public forum,'" *see* App. Br. at 43, glibly mischaracterizes the law. It is telling that appellants never raised this argument before the district court in

punishment whether or not his or her actions had their intended effect. *Id.* at 317. The Third Circuit found that this result ran counter to the Supreme Court's requirement that "a school must show that speech will cause actual,

policy "on its face, sufficiently broad and subjective that [it] 'could conceivably be applied to cover any speech' of a 'gender-motivated' nature 'the content of which offends someone.'" *Id.* (internal citation omitted). As the Third Circuit recognized, this included "'core' political and religious speech, such as gender politics and sexual morality," meaning that the policy "provide[d] no shelter for core protected speech." *Id.* at 317–18 (internal citation omitted). Due to these flaws, the Third Circuit found the policy overbroad.

protected speech is suppressed even if that speech does not collide with the rights of others." *Id.*

The district court rejected appellants' efforts to distinguish *DeJohn* from the present case. As the court emphasized, "[d]efendants are unable to cite any case where a similar policy survived a constitutional challenge in a college setting so that it might arguably be said to conflict with *DeJohn*." No. CV 09-0995-GHK (C.D. Cal. Sept. 16, 2009).[5] The lower court's reliance on *DeJohn*—a well-reasoned, recent circuit court decision with many similarities to this case—was proper.

C. There Are Profound Differences in the Nature and Purpose of the Educational and Workplace Settings

Appellants attempt to validate their sexual harassment policy by pointing to the Equal Employment Opportunity Commission (EEOC) regulations defining "sexual harassment" as proscribed under Title VII of the Civil Rights Act of 1964. *See* App. Br. at 29. Although appellants correctly note

"restrictions upon workplace speech ultimately do not take away from the workplace's essential functions … [because] [e]mployers for the most part are focused on meeting their bottom lines, and free expression in the workplace is typically not necessary for that purpose."[7] This stands in stark contrast to the university setting, where fostering discussions and expanding knowledge are fundamental concerns.[8]

The cases cited in appellants' brief illustrating judicial approval of the EEOC's regulations defining sexual harassment involve the employment context, *see* App. Br. at 30, where hierarchies of power complicate free speech doctrine and can convert verbal expression into discriminatory

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1997) ("If Title VII's prohibition of hostile environment harassment is troublesome on First Amendment grounds in the workplace, the

conduct.[9] The only case cited by appellants in the college setting concerned a professor's speech toward his student, *see* App. Br. at 31 (citing *Hayut v. State University of New York*, 352 F.3d 733 (2d Cir. 2003)). *Hayut* is therefore more akin to Title VII cases and cannot justify a speech policy controlling student speech. *See Hayut*, 352 F.3d at 744 ("A professor at a state university is vested with a great deal of authority over his students with respect to grades and academic advancement by virtue of that position."). Importantly, as the district court noted, none of the cases cited by appellants involved a First Amendment challenge. No. CV 09-0995-GHK (C.D. Cal. Sept. 16, 2009) at 2. The district court therefore correctly found these cases inapposite and held that workplace sexual harassment standards are inapplicable in the collegiate setting.

D.

Board of Regents of University of Wisconsin, 774 F. Supp. 1163 (E.D. Wisc. 1991). The university in *UWM Post* defended the challenged harassment policy on the grounds that it merely prohibited "discriminatory speech which creates a hostile environment" as required by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. *UWM Post*, 774 F. Supp. 1163, 1177. Rejecting this justification, the district court declared, "Since Title VII is only a statute, it cannot supersede the requirements of the First Amendment." No. CV 09-0995-GHK (C.D. Cal. Sept. 16, 2009). This proposition holds true in the instant case, and the District's argument must fail.[10]

III. Unconstitutional Speech Codes like LACCD's Are Part of a Nationwide Problem on Campus

Speech codes—university regulations prohibiting expression that would be constitutionally protected in society at large—are a pernicious and stubborn threat to freedom of expression on public campuses. Despite two decades of precedential decisions uniformly striking down speech codes on First Amendment grounds, FIRE's work demonstrates that these unconstitutional restrictions persist at the majority of our nation's public

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colleges and thus continue to deny students the expressive rights to which they are entitled.

A. For Over Two Decades, Courts Have Consistently and Unanimously Struck Down Unconstitutional Speech Codes Masquerading as Harassment or Civility Policies

Over the past two decades, courts have uniformly invalidated speech codes facing a constitutional challenge on the grounds of overbreadth, vagueness, or both. *See DeJohn*, 537 F.3d 301 (3d Cir. 2008) (declaring university sexual harassment policy overbroad); *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995) (declaring university discriminatory harassment policy facially unconstitutional); *College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (enjoining enforcement of university civility policy); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (finding university sexual harassment policy unconstitutionally overbroad); *Bair v. Shippensburg University*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of university harassment policy due to overbreadth); *Booher v. Board of Regents*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. Jul. 21, 1998) (finding university sexual harassment policy void for vagueness and overbreadth); *UWM Post, Inc. v. Board of Regents of the University of Wisconsin System*, pat San 03 TD.0013 d fos

racial and discriminatory harassment policy facially unconstitutional); *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989) (enjoining enforcement of university discriminatory harassment policy due to unconstitutionality); *Corry v. Leland Stanford Junior University*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip op.) (declaring university discriminatory harassment policy facially overbroad). Taken together, these decisions make clear that speech codes infringing upon students' First Amendment rights are legally untenable on public university campuses. *See* Azhar Majeed, *Defying the Constitution: The Rise, Persistence, and Prevalence of Campus Speech Codes*, 7 GEO. J.L. & PUB. POL'Y 481 (2009). That every speech code to be litigated to a final decision has ultimately been struck down—and that not a single speech code has been upheld by a court—speaks to the well-established judicial consensus regarding the primacy of robust, unfettered expression on public campuses.

Every speech code decision to date has involved a constitutional challenge to a university harassment or civility policy. In *DeJohn*, for example, the Third Circuit, faced with an overbroad sexual harassment policy, declared that "there is no 'harassment exception' to the First Amendment's Free Speech Clause." *DeJohn*, 537 F.3d at 316. The court emphasized 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.* (internal citations omitted).

In another illustrative case, *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995), the Sixth Circuit struck down a university harassment policy banning conduct "that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment by…demeaning or slurring individuals…or…using symbols,

B. FIRE's Work Demonstrates the Pervasiveness of Unconstitutional Restrictions on Student Speech

FIRE's most recent annual speech code report, *Spotlight on Speech Codes 2010: The State of Free Speech on Our Nation's Campuses*,[11] found that a shocking 71 percent of public colleges and universities reviewed maintain policies restricting protected expression. The report reviewed speech-related policies at 273 of the largest and most prestigious public institutions across the country in order to provide an accurate assessment of the state of free speech on public college campuses. Its findings demonstrate

including making "verbal remarks" and "publicly telling offensive jokes."[12] The State University of New York at Brockport bans all uses of e-mail that "inconvenience others," including "offensive language or graphics (whether or not the receiver objects, since others may come in contact with it)."[13] Keene State College in New Hampshire prohibits any "language that is sexist and promotes negative stereotypes and demeans members of our community."[14]

By maintaining speech codes, universities misinform students of their

censorship and fear has taken shape at too many universities across the country.

C. The Will to Censor Exists on Campus

FIRE has received thousands of case submissions alleging censorship on campus in our decade of existence. Of these submissions, we have documented hundreds of examples of brazen violations of freedom of speech. Cases chosen by FIRE include only those in which the students or faculty members affected were willing to defend their rights and the documentation was clear enough that FIRE believed the alleged violation had occurred and could be addressed. However, given the abuse of privacy laws that allow universities to hide their disciplinary processes from public view, as well as the dearth of students and faculty who both know their rights and have the courage to stand up for them, it is safe to assume that the thousands of case submissions FIRE has received over the years represent only a small proportion of the actual number of abuses.

FIRE's extensive case archives illustrate the propensity for attacks on freedom of expression on our nation's campuses.[15] Instances of such attacks

[15] Moreover, FIRE's record of achieving victories in these cases speaks to our ability to accurately gauge and assess campus abuses. Since FIRE's inception in 1999, FIRE has won 160 public victories for students and faculty members at 121 colleges and universities with a total enrollment of more than 2.6 million students. FIRE has been directly responsible for

are legion. Recently, for example, a student at Georgia's Valdosta State University was deemed a "clear and present danger" for publishing a collage

a policy prohibiting "intimidation" and "harassment." *College Republicans v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007).

During the past two years, Tarrant County College (TCC) in Texas has repeatedly prohibited members of Students for Concealed Carry on Campus (SCCC) from participating in a nationwide "empty holster" protest on TCC's campus. The empty holsters are intended to signify opposition to state laws and school policies denying concealed handgun license holders the right to carry concealed handguns on college campuses. TCC forbade the protesters from wearing empty holsters anywhere on campus, even in the school's designated "free speech zone"—an elevated, circular concrete platform about 12 feet across. TCC informed students it would take adverse action if SCCC members wore empty holsters anywhere, strayed beyond the school's "free speech zone" during their holster-less protest, or even wore T-shirts advocating "violence" or displaying "offensive" material. Recently, after being told that this prohibition would continue, two TCC students filed suit in the United States District Court for the Northern District of Texas,

temporary restraining order against TCC. *Smith v. Tarrant County College District*, Civil Action No. 4:09-CV-658-Y (N.D. Texas, Fort Worth Division, November 6, 2009).

These are just three of hundreds of examples of college administrators attempting to silence protected student speech. FIRE's experience demonstrates that universities will seize upon any ambiguity in the law as a means or justification to censor unwanted speech on campus. For example, one week after the United States Court of Appeals for the Seventh Circuit's decision in

"clearly established" in this area. 412 F.3d at 738–39. Nevertheless, CSU's inclination to read ambiguities in the law in favor of censorship is sadly common on college campuses.

D.

CONCLUSION

The district court correctly concluded that LACCD's sexual harassment policy was unconstitutionally overbroad. For all the reasons above, the district court's decision should be upheld.

Respectfully Submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Ninth Circuit.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1) This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,990 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2) This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2010, I electronically filed the