No. 18-1917

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SPEECH FIRST, INC.
Plaintiff-Appellant

v.

MARK SCHLISSEL, *et al.*,
Defendants-Appellees

ON INTERLOCUTORY APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF *AMICI CURIAE* OF FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION AND ALLIANCE DEFENDING FREEDOM

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amici*

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICI CURIAE[1]

The Foundation for Individual Rights in Education ("FIRE") is a nonpartisan, nonprofit organization dedicated to promoting and protecting civil liberties at our nation's institutions of higher education. Since 1999, FIRE has worked to protect student First Amendment rights at campuses nationwide. FIRE believes that to best prepare students for success in our democracy, the law must remain unequivocally on the side of robust free speech rights on campus.

FIRE coordinates and engages in targeted litigation to ensinates and engagemocracy, the l

This case significantly concerns ADF because it implicates the free speech rights of students nationwide. ADF has represented students in numerous cases challenging campus speech codes, often housed in harassment policies, that stifle free speech on campus. *See, e.g.*, *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir.

SUMMARY OF ARGUMENT

The district court's decision seriously threatens the ability of public college and university students to meaningfully redress constitutional violations and prevent their repetition.

Appellants challenged the operative definitions of "harassment" and "bullying" in policies that, by the university's own admission, resulted in sixteen

This is a real risk: *amici* have documented numerous instances in which universities have revised policies under pressure, only to restrict the same type of speech again at a later time. Moreover, *amici*'s experience suggests that the lower court gave too much weight to Appellees' representation that the definitions challenged by Appellants were already under review prior to the litigation. While

ARGUMENT

I. Students at All Educational Levels from Vindicating their First Amendment Rights in Court.

A. The Policy Changes that Occurred During This Litigation Were Insufficient to Moot the Students' Constitutional Claims

The lower court erred in holding that the University's voluntary cessation met the "heavy burden" necessary to moot the students' challenge to its harassment and bullying policies. *Cty. of Los Angeles v. Davis*

clear judicial precedent delineating the appropriate limits of policies regulating campus speech.

Citrus settled with Sinapi-Riddle, once again agreeing to revise its policies. Settlement Agreement, *Sinapi-Riddle*, (C.D. Cal. Dec. 3, 2014),

Only an injunction from this court can protect students against the possibility that the University will reinstate the old definitions of harassment and bullying, and only a clear statement by this court that those definitions prohibit speech protected by the First Amendment can secure the free speech rights of students at the University and throughout this Circuit against similarly unconstitutional policies going forward.

b.

Representation that its W3Boliieshiede 6n4(1)-3(e3)(i) R d9iepe 7ion

students' free speech rights. Once that pressure dissipates, and/or once the administrators or students involved in the original policy reform effort move on, universities may reinstate problematic policy language. The frequency with which universities make speech-related policy changes under pressure, but state that the policies in question were already under review, illustrates this point.

For example, in November 2016 — less than a month after FIRE sent a

found this, we went out, found it, and had IT scrub it.... We didn't change it because of what FIRE did."[9]

In August 2015, Representative Bob Goodlatte, chairman of the U.S. House Judiciary Committee, sent a letter to the presidents of 161 public colleges and universities that received FIRE's poorest speech code rating, asking them why their policies failed to protect the First Amendment rights of students and faculty.

A number of those institutions responded to say their policies had already been under review before Rep. Goodlatte's letter. The University of Massachusetts, for example, responded that "[t]he policy at issue at UMass Amherst has been under review for some time and as updated will be promulgated during the Fall semester of 2015. Neither the new policy nor its supporting guidance contain the language that FIRE attributes to the University."[10] The University of Georgia responded that "[e]arlier this year, we engaged in a comprehensive review and revision of our Freedom of Expression Policy to address and eliminate hypothetical concerns about unduly restrictive applications."[11] The University of Connecticut

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[9] Susan Du, *Universities*, CITYPAGES, Jan. 25, 2016, http://www.citypages.com/news/free-speech-crusaders-protect-cultural-intolerance-at-minnesota-universities-7985990.

[10] Letter from Brian W. Burke, Senior Counsel, University of Massachusetts – Amherst, to John Coleman, Counsel, House Committee on the Judiciary, Sept. 4, 2015 (on file with *amicus* FIRE).

[11] Letter from Michael M. Raeber, Executive Director for Legal Affairs, University of Georgia, to the Honorable Bob Goodlatte, Chairman, House Committee on the

responded that "in July 2015, the University, on its own initiative to enhance the policy's clarity with respect to our longstanding commitment to freedom of expression, amended the definition of sexual harassment in this policy...."[12]

As Appellant points out, "if this kind of routine review could justify voluntary cessation, then universities would have an unchecked power to moot lawsuits and evade constitutional scrutiny of their policies." Appellant's Br. at 25. The frequency with which universities, when challenged about the constitutionality of a policy, cite to this type of routine review to deflect criticism should give this Court pause about allowing such representations to render a student's claim moot.

c. Facial Challenges Are Critical to Ending the Nationwide Problem of Unconstitutional Speech Codes.

Preserving the ability of students to seek meaningful judicial remedies is critically important because the First Amendment rights of [illegible]

https://www.thefire.org/spotlight-on-speech-codes-2018. These restrictive speech codes are routinely used to silence students and student organizations. *Amici* FIRE and ADF have received thousands of reports of censorship on public college campuses and have successfully defended student and faculty rights in hundreds of instances.

Some of the most important constitutional challenges to campus speech codes — rulings that have laid the groundwork for FIRE's and ADF's successful advocacy over the years — have been facial challenges like the one Speech First

v. Univ. of Mich., 721 F. Supp. 852, 857 (E.D. Mich. 1989) (upholding facial challenge to racial harassment policy by psychology student who feared discussions of controversial theories in his field "might be sanctionable under the Policy.")

Amici and other free-speech advocacy groups have cited these precedents countless times to persuade other universities to revise similarly unconstitutional policies. If universities may moot students' First Amendment claims simply by changing their policies under pressure during litigation, facial challenges like the ones filed in these foundational cases will rarely, if ever, lead to decisions. In practice, therefore, students will have to wait until after they have been the victim of censorship — and are thus able to bring a claim for damages — to challenge the flawed policy in court.

II. Student-Plaintiffs Already Face Additional Significant Procedural Hurdles to Vindicating Their First Amendment Rights.

If allowed to stand, the district court's ruling will erect another significant barrier to enforcing a student's First Amendment rights, adding to the many already faced by civil rights litigants. Student-plaintiffs face substantial and often insurmountable procedural limitations in litigation under 42 U.S.C. § 1983, too often resulting in constitutional violations going without remedy and perpetuating confusion over the state of the law.

source or quantity of existing precedent necessary for a right to be "clearly established." *See Carroll v. Carman*, 135 S. Ct. 348, 350 (2014) (per curiam)

Students are a transient population, with a finite amount of time to seek vindication of their civil rights. Most students at four-year nonprofit colleges graduate after four years.[13] The most vocal and active students are likely to be upperclassmen, who, in turn, are likely to be graduating in two years or less.[14] This problem is exacerbated at community colleges, which are primarily two-year institutions.

Meanwhile, the *median* time it took a federal district court to complete a trial in 2015 was 25.2 months.[15] In the Eastern District of Michigan, from which this appeal originates, that median was 22.5 months.[16] The net result is that students' constitutional claims against public colleges and universities are frequently mooted when students graduate.

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[13] U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS, TABLE 326.10, *available at* https://nces.ed.gov/programs/digest/d16/tables/dt16_326.10.asp.

[14] *See*

Among the students who have seen their rights evaporate while waiting for justice are student prayer leaders,[17] objectors to student prayers,[18] student journalists,[19] ROTC students,[20] valedictorians,[21] students who wanted to demonstrate cookware in their dorms,[22] and other high school students[23] and

[17] *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1225 (10th Cir. 2009) (student forced to apologize for religious valedictory speech held to lack standing to maintain declaratory and injunctive claims); *Cole v. Oroville Union High Sch.*, 228 F.3d 1092, 1098–99 (9th Cir. 2000) (finding First Amendment claims moot where plaintiffs were prevented from giving religious speeches at graduation ceremony).

[18] *Adler v. Duval Cty. Sch. Bd.*, 112 F.3d 1475, 1478 (11th Cir. 1997) (dismissing as moot injunctive and declaratory claims from former students who objected to inclusion of student-initiated prayer at graduation ceremonies).

[19] , 420 U.S. 128 (1975); *Lane v. Simon*, 495 F.3d 1182, 1186–87 (10th Cir. 2007); *Husain v. Springer*, 691 F.Supp.2d 339, 340–41 (E.D.N.Y. 2009).

[20] *Sapp v. Renfroe*, 511 F.2d 175, 175–76 (5th Cir. 1975) (finding challenge to ROTC guidelines moot after graduation).

[21] *See, e.g., Corder*

college students.[24]

asserted an interest in returning to school to finish his education. Short of situations where student-plaintiffs have expressed an interest in returning to the institutions that abused them, however, claims for injunctive and declaratory relief are consistently deemed moot.

It is poor public policy to provide incentives for bad actors to continue acting badly. Affirming the district court's ruling, which is poor public policy, would lead to immeasurable constitutional harm in this Circuit and nationwide. Public institutions will be more likely to violate student rights, especially the rights of students nearing graduation, knowing that mootness will end any non-economic claims well before a court could determine what the institution had done. Even public institutions that make innocent mistakes will have a strong incentive to refuse to admit wrongdoing, casting student civil rights into further doubt and disuse.

CONCLUSION

Campus speech codes have been repeatedly defeated in court in an almost unbroken string of legal precedent stretching back nearly thirty years.[25] Despite the clarity of the legal precedent, however, censorship of student expression on our nation's public campuses continues to run rampant. If a college or university can

[25] *See supra* note 2.

avoid legal consequences simply by revising a policy that has been challenged, protecting students' speech rights becomes a never

CERTIFICATE OF BAR MEMBERSHIP

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

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CERTIFICATE OF COMPLIANCE

1) This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5046 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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