JARED NALLY, ET AL., *P* , v. RONALD GRAHAM, ET AL., *D* .	CIVIL ACTION NO.: 21-2113 JURY TRIAL DEMANDED

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *K . B . R* , 385 U.S. 589, 603 (1967) (citation omitted). Haskell, a public institution operated and managed by the United States government, is no exception. But Haskell continually violates the First Amendment rights of its students.

Haskell's Campus Expression Policy, which is contained in its Code of Student Conduct, states that students are free to discuss and express all views, " *H CIRLE* and subject only to requirements for the maintenance of order." Nally Decl. Ex. 1, at 12 (emphasis added). The CIRCLE values include, as operative terms, amorphous concepts like "Integrity" and "Respect." Because those terms are vague and subjective, the Campus Expression Policy directly restricts a broad range of student expression that is protected by the First Amendment, and in fact, has been applied to restrict Plaintiffs' protected speech. Last year, former Haskell President Ronald J. Graham directed Jared Nally to cease and desist certain routine journalistic activities, like asking questions of Haskell administrators, under threat of further punishment. In this "Directive," Graham punished Nally for failing to show Haskell officials respect, one of the CIRCLE values, and specifically invoked concep, e GrahamGraham

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This Court must preliminarily enjoin the Campus Expression Policy because Plaintiffs are likely to succeed on the merits of these claims. Courts have routinely struck down overbroad and vague public university speech policies, like Haskell's Campus Expression Policy. *S , . ., M C . U . V.I.*, 618 F.3d 232, 250, 252 (3d Cir. 2010) (declaring university speech policies overbroad). Additionally, Plaintiffs readily satisfy the remaining criteria for a preliminary injunction. The deprivation of core constitutional rights, even for a brief period of time, is an irreparable injury, and remedying such deprivations is always in the public interest.

Haskell's Campus Expression Policy permits only student expression that is consistent with its

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Haskell is a tribal university founded in 1884 and is now operated by the United States. Nally Decl. ¶ 3. In 2014, Haskell adopted the university's "CIRCLE" values. CIRCLE is an acronym that stands for "Communication, Integrity, Respect, Collaboration, Leadership, and Excellence." Nally Decl. ¶ 8, Ex. 1, at 7–8. Haskell describes conduct consistent with each CIRCLE value. I . For example, and particularly relevant to this case, the value of "Respect" requires students "[t]o honor and promote the diversity of beliefs, rights, responsibilities, cultures, accomplishments of self and others, including our non-human relations." I . Rather than merely serving as statements of Haskell's institutional goals, the CIRCLE values are incorporated into Haskell's Code of Student Conduct and can therefore serve as the basis for student discipline. I . Haskell's Campus Expression Policy, which is contained in the Code of Student Conduct, requires all students to express themselves in accord with the CIRCLE values, including the CIRCLE values' description of "Respect." I . at 12. To this end, policy states: "Discussion and expression of all views is permitted, consistent with Haskell's CIRLE values and subject only to requirements for the maintenance of order." I .

The instant litigation arose when Haskell invoked the Campus Expression Policy to punish a student journalist. Former President Graham used the Code of Student Conduct and the Campus Expression Policy's requirement that student expression exhibit "Respect" to justify punishing Nally for his newsgathering ands -19065 cm BT

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that you are a student first and foremost on this campus, and your conduct falls under the umbrella of the Student Conduct Code." I . at 2. Graham went on to command Nally to "treat fellow students, University staff, and University officials with appropriate respect. Failure to do so may result in disciplinary action." I . The Directive against Nally was ultimately rescinded, but only after several months and a coalition letter from FIRE

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the university's Code of Student Conduct.[2] Plaintiffs also named the Bureau of Indian Education, a division of the U.S. Department of the Interior, and its current Director, Tony L. Dearman,[3] as defendants because the Bureau is responsible for Haskell's management and operation.[4]

T I L has been published since 1897 and has won numerous awards. Nally Decl. ¶ 24. The Indian Leader Association aims to serve the Haskell student body by publishing reporting on issues that impact student academics and campus life. *I* . ¶ 25. The

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T I L routinely includes both original journalism and opinion pieces about Haskell's campus and administration. *I* . ¶ 28.

Plaintiffs are chilled each day in their reporting by the possibility that Defendants will again discipline them under the Campus Expression Policy for their

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Whether Defendants' Campus Expression Policy, which mandates that all student discussion and expression be consistent with amorphous, subjective

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of equities tips in favor of granting the injunction; and (4) that an injunction would be in the public interest. P P A U . H , 828 F.3d 1245, 1252 (10th Cir. 2016) (citing . N . R . D . C , 555 U.S. 7, 20 (2008)) (reversing the district court's denial of preliminary injunction because plaintiff was likely to succeed on the merits of its First Amendment claim). When the government is the opposing party, the balance of the equities and the public interest merge into a single inquiry: whether Plaintiffs have a stronger interest in enjoining the regulation than the government has in enforcing it. S A . B , 958 F.3d 969 (10th Cir. 2020) (citing N . H , 556 U.S. 418, 435 (2009)) (merging the balance of equities and the public interest elements in evaluating

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The Campus Expression Policy is unconstitutionally overbroad because it directly restricts expression, and courts should be especially willing to invalidate government regulations when they restrict pure speech. Plaintiffs are also likely to succeed on the merits of Claim 4 of their Complaint because the Campus Expression Policy fails the more demanding substantial overbreadth test.

By its terms, the Campus Expression Policy directly restricts "discussion and expression," not merely conduct with an incidental effect on speech. Nally Decl. ¶ 8, Ex. 1, at 12. Overbreadth scrutiny is at its most exacting when regulations directly burden expression, rather than conduct, because conduct lies "in the shadow of the First Amendment." $S \quad B \qquad . O \qquad$, 413 U.S. 601, 614 (1973) (noting

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overbroad because it was directed at protected expression. I . The court reasoned that the statute's prohibition "aimed at legal and social change," which are "at the core of First Amendment protections." I .

Like the teachers in N G T F , Plaintiffs regularly engage in expression "aimed at legal and social change" on campus, and have been chilled in that expression by the specter of potential punishment under the Campus Expression Policy. T I L routinely publishes content—including opinion pieces—about Haskell's campus and administration. Nally Decl. ¶ 28. That coverage necessarily involves expression that may be critical of the administration or advocate for change on campus, and is at the core of the First Amendment's protection. S N G T F , 729 F.2d at 1274;

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should find that Plaintiffs are likely to succeed on the merits of their overbreadth claim.

Plaintiffs are also likely to succeed on the merits of Claim 4 because the Campus Expression Policy fails the more exacting substantial overbreadth test applicable to government regulations that restrict both conduct and speech. The Campus Expression Policy restricts a real and substantial amount of student expression protected by the First Amendment— expression or discussion that an administrator subjectively deems to be "disrespectful" or lacking "integrity"— judged in relation to any lawful restriction on student expression.

A regulation violates the First Amendment for overbreadth if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *U S . S* , 559 U.S. 460, 473 (2010) (citation omitted). Even a statute or regulation passed for a legitimate purpose is not insulated from an overbreadth challenge where the "law punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'" *U S . B* , 767 F.3d 1009, 1018 (10th Cir. 2014) (quoting *V . H* , 539 U.S. 113, 118–19 (2003)) (evaluating whether a statute designed to suppress child pornography was nevertheless overbroad).

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Courts confronting such overbroad policies in the context of higher education have routinely declared them unconstitutional and enjoined their enforcement.[5] For example, in $C \quad R \quad S \quad F \quad S \quad U \quad . R$, a federal court considered plaintiffs' overbreadth challenge to several university policies, two of which are particularly relevant here

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sweeping mandates and opaque proscriptions offend the First Amendment" and its continued maintenance caused a "real prospect of . . . a substantial chill of First Amendment rights . . . ." I . at 1024. Here, the CIRCLE values do not provide an explanation of their scope, therefore Plaintiffs (and all Haskell students) are similarly uncertain about what expression is "consistent" with those values. Like the policy enjoined in R , this profound uncertainty causes a substantial chilling effect.

In R , plaintiffs also challenged a second policy that permitted punishment of students who engaged in conduct that was not "civil." I . The court rejected the university's argument that e4fQ q T Q072

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after classes end, on or off campus, during the academic year or during periods between semesters of academic enrollment." Nally Decl. Ex. 1, at 8

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university campus may not be shut off in the name alone of ‘conventions of decency’”);

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violates due process if it is so vague that it does not allow a person of ordinary intelligence to determine what conduct it prohibits. S H . C , 530 U.S. 703, 732 (2000)

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When a public institution like Haskell restricts expression, that restriction must be "capable of reasoned application." M . V A . . M , 138 S. Ct. 1876, 1892 (2018). In M , the Supreme Court found that Minnesota's ban on "political" apparel in polling places was unreasonable because the state presented no workable definition of what was political, "[a]nd the word can be expansive." I . at 1888. Even though the Court found that Minnesota had an interest in regulating the messages conveyed inside polling locations "in light of the special purpose of the polling place itself," the ordinance did not pass constitutional muster. I .

The Campus Expression Policy has the same fatal definitional flaw as the statute at issue in M . E

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have no reliable way to know in advance whether speech will violate the policy because it is "disrespectful" or lacks "integrity." This uncertainty will chill speech and lead students to self-censor in an effort to "steer far wider than the [prohibited] zone . . . than if the boundaries of the forbidden areas were clearly marked." *G* , 408 U.S. at 108–09. The First Amendment demands that Haskell provide students with notice of what it prohibits under university policies, and it has failed to meet this obligation by promulgating and enforcing the Campus Expression Policy and the vague and generic CIRCLE values.

The Campus Expression Policy is also unconstitutionally vague because it invites arbitrary enforcement by giving Haskell administrators unbridled discretion. "A punishment fails to comply with due process if the statute or regulation under which it is obtained . . . is so standardless that it authorizes or encourages seriously discriminatory enforcement." *FCC . F T S , I* ., 567 U.S. 239, 253 (2012) (citation omitted); *M* , 138 S. Ct. at 1891.

The Campus Expression policy allows Haskell administrators unbridled discretion to punish students because the CIRCLE values are so vague they could be employed to punish nearly any student speech. Different students and administrators will naturally come to different conclusions as to whether the same speech is, for example, disrespectful or not based on the amorphous definition included in the Code of Student Conduct. The First Amendment does not permit such a result. *S , . ., D . C . M . U* ., 55 F.3d 1177, 1184–85 (6th

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Cir. 1995) (holding that university policy was vague where it prohibited "offensive" speech since there was no objective way to determine what speech was offensive).

Nally, for example, did not consider his newsgathering or reporting about Haskell's response to the 2020 U.S. Census on behalf of students, an increase in student fees at Haskell, or the death of a beloved Haskell employee to be disrespectful, or otherwise not in accordance with policy. Instead, he considered reporting on these stories as part of his duties as a member the student press. Nally Decl. ¶ 13. But the Campus Expression Policy allows administrators like Graham to target such protected expression by affording them unlimited discretion to enforce the policy arbitrarily based on their own subjective interpretations of terms like "Integrity," "Respect," and "Excellence." Indeed, by issuing the Directive, Graham has already used the amorphous, subjective nature of this unconstitutional policy to punish Nally, and other Haskell administrators could easily do the same.

The Campus Expression Policy poses a significant and ongoing risk to students who face discipline for protected speech based on a purely subjective standard. Its continued maintenance chills the speech of other students, particularly other members of the student press, who reasonably fear that like Nally, they may face threats or punishment for engaging in protected expressive activity.

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Plaintiffs also satisfy the remaining elements necessary to obtain a preliminary injunction, namely, that they would suffer irreparable harm; that the

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the First Amendment. *H* , 408 U.S. at 180 ("[T]he precedents of this Court leave

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another Directive—has already stopped Plaintiffs from publishing newsworthy content in $T \quad I \quad L$. For example, $T \quad I \quad L$ declined to report on Haskell's implementation of new meal plan fees, the Directive against Nally, and a story involving former President Graham's relationship with the Kansas City Chiefs of the National Football League. Nally Decl. ¶ 30.

Because Plaintiffs allege infringement of a constitutional right, this factor weighs in Plaintiffs' favor.

The balance of equities tips strongly in favor of Plaintiffs, as does the public interest. Plaintiffs have a stronger interest in enjoining the Campus Expression Policy than Haskell has in enforcing it. Plaintiffs' interest is significant: the protection of their First Amendment rights. The Defendants have no similar interest; any valid purpose served by the challenged policy can be cured by adopting new, constitutionally acceptable policies that make clear that the CIRCLE values

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respect to Planned Parenthood's First Amendment claim, the court also noted that a preliminary injunction was in the public interest, in part because citizens have an interest in ensuring that the government is not violating constitutional rights. I . at 1265–66. As in P P A U , the violation of Plaintiffs' and all Haskell students' constitutional rights, standing alone, is an irreparable injury, and it is in the public interest to enjoin the policy so that injury does not continue while this litigation is pending.

On Plaintiffs' side of the scale are their constitutional rights to free speech and freedom of the press. In contrast, a preliminary injunction would not interfere in any way with Defendants' ability to perform their duties managing and operating Haskell. According to Defendants' materials, the Code of Student Conduct is promulgated "to promote healthy decision-making and promote the rights of all students." Nally Decl. Ex. 1, at 7. This generalized interest does not support the enforcement of a policy, like the Campus Expression Policy, that suppresses protected expression. C . V , 820 F.3d at 1127 (affirming decision to grant preliminary injunction despite argument about disruption of court proceedings

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student speech codes. For these reasons, Plaintiffs should not be required to provide a security payment.

For the foregoing reasons, this Court should grant Plaintiffs' Motion for Preliminary Injunction on Claims 4 and 5.

Dated: May 19, 2021

Respectfully submitted,

/s/ Stephen Douglas Bonney
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