NO. 14-2988
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT_.004___.004___.004___.004___.004___.004__.00

KEEFE,

Plaintiff-Appellant,

v.

BETH ADAMS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the District of Minnesota
Civil Case No. 13-326 (Honorable Joan N. Ericksen)

BRIEF OF THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION AND ALLIANCE DEFENDING FREEDOM AS *AMICI CURIAE* IN SUPPORT OF APPELLANT URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 8th Cir. R. 26.1A, *amici curiae* state that they have no parent corporations, nor do they issue stock.

Dated: November 19, 2014.

Respectfully submitted,

/s/David J. Hacker

TABLE OF AUTHORITIES

Cases:

Rules:

Other Authorities:

INTEREST OF *AMICI CURIAE*

The **Foundation for Individual Rights in Education**, Inc. ("FIRE"), is a non-profit, tax-exempt educational and civil liberties organization dedicated to promoting and protecting First Amendment rights at our nation's institutions of higher education. FIRE has defended constitutional liberties on behalf of thousands of students and faculty. In the interest of protecting student and faculty rights at our nation's colleges and universities, FIRE has participated as *amicus curiae* in many cases. *See, e.g.*, *Barnes v. Zaccari*, 669 F.3d 1295 (11th Cir. 2012); *Adams v. Trustees of the Univ. of N.C.–Wilmington*, 640 F.3d 550 (4th Cir. 2011); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008).

Alliance Defending Freedom ("ADF") is a non-profit, public interest legal organization that provides strategic planning, training, funding, and direct litigation services to protect our first constitutional liberty—religious freedom. Since its founding in 1994, ADF has played a role in many United States Supreme Court cases, including: *Burwell v. Conestoga Wood Specialties Corp.*, 134 S. Ct. 2751 (2014); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014); *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000);

in a case pending before the Court this term: *Reed v. Town of Gilbert*, 707 F.3d 1057 (9th Cir. 2013), *cert. granted*, 134 S. Ct. 2900 (2014).

ADF's University Project is dedicated to protecting the rights of dissenting

invoke censorship in an academic environment is hardly the recognition of a healthy democratic society.”). Indeed, the Supreme Court has

Nevertheless, the district court below upheld the College's punishment of Mr. Keefe. The lower court relied on case law that does not support its broad holding, disregarded the obvious constitutional flaws presented by amorphous professional standards like the one at issue, and ignored the ways in which colleges may regulate student expression in a manner consistent with their First Amendment obligations. *Amici* have years of experience combating student and faculty censorship and know the urge to censor is strong on our nation's campuses. If allowed to stand, the lower court's blithe acceptance of the College's censorship will establish a dangerous precedent that will be seized upon by college administrators to censor a virtually limitless range of student expression, both on- and offline, on- and off-campus.

For the reasons described below, this Court should reverse the district court's decision and remand this case for further proceedings.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S FIRST AMENDMENT CLAIM.

A. Public Colleges May Not Abandon the First Amendment for Professional Codes of Conduct.

More than twenty-five years ago, public colleges began adopting vague and overbroad "speech codes" to regulate student expression on campus.[1] Whether in the guise of sexual and racial harassment policies, civility mandates, or so-called "free speech zones," courts have uniformly rejected these restrictions on student speech, both facially and as-applied, as clear violations of core First Amendment principles.[2]

Despite the clarity and near-uniformity of this precedent, public institutions like Central Lakes College are increasingly adopting "professional" codes of conduct that regulate student speech both on- and off-campus and lack the constitutional precision necessary to balance pedagogical goals with students' First Amendment rights. Indeed, professional standards like the one at issue in the instant case are as vague and overbroad as the speech codes struck down by federal courts for more than two decades.

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[1] *See* Azhar Majeed, *Defying the Constitution, The Rise, Persistence, and Prevalence of Campus Speech Codes*, 7 GEO. J.L. & PUB. POL'Y 481 (2009).
[2] *See infra* Section II.A.

The district court's opinion below is unsupported by case law, both with respect to the application of professional standards and the regulation of off-campus and online speech. Public colleges possess many lawful and constitutional ways to regulate student misconduct—infringing students' First Amendment rights is not one of them.

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constitutional rights—either inside or outside the classroom. Because the professional standards at issue here are vague and overly broad, as detailed below, the College must ensure that administrators do not apply these vague standards to censor otherwise protected speech—a task at which the College failed here.

2. Professional standards like those at issue in this case are often impermissibly vague when used by the government to restrict expression.

The First Amendment requires that public college policies be written with enough clarity so that students have fair warning about prohibited and permitted conductw 0u9.hwd

First, the plain language of the nursing standards

imposing sanctions under it "would be a denial of due process"). The professional standards here do not contain such precision.

Aside from the litany of cases striking down public college speech codes,

and did not give him fair notice of prohibited and permitted speech. "In order to determine what conduct will be considered '[unbecoming]' or '[unprofessional]' by the university, one must make a subjective reference." *Dambrot*, 55 F.3d at 1184; *see also UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1172 (E.D. Wis. 1991) (holding policy that prohibited comments that "create an intimidating, hostile or demeaning environment for education" was impermissibly vague). The nebulous prohibitions contained in the nursing standards force students to guess as to what speech an administrator may deem "unbecoming" or "unprofessional." The Constitution does not permit such a result because "where a vague statute 'abuts upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of those freedoms.'" *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal citations omitted). "No one may be required at peril of life, liberty or property to speculate as to the meaning" of government prohibitions. *Morales*, 527 U.S. at 58.

Second, the vague professional standards permitted unrestricted and overzealous enforcement by College officials. Just as students like Mr. Keefe cannot determine the meaning of the standards without definitions, administrators charged with their enforcement will have difficulty carrying out their responsibilities. *Id.* The terms are not self-defining. Left undefined, college officials will use the standards to silence disfavored expression. But the First

Amendment protects such expression, whether extreme, *see Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993) (fraternity's "ugly woman contest"); or benign, *see College Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (anti-terrorism rally).

The unconstitutional vagueness of the College's policy is further demonstrated by the fact that Mr. Keefe was charged with violating the standards only after a few students complained that his speech made them "upset, nervous, and uncomfortable." Add. 4A–5A. When the College investigated, it found Mr. Keefe's statements to be "derogatory, inappropriate, and unprofessional." Add. 5A. But courts have routinely struck down policies that allow students and administrators to punish speech based on listeners' subjective reactions. A public college "may not prohibit speech . . . based solely on the [e]motive impact that its offensive content may have on a listener." *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 371 (M.D. Pa. 2003); *see also McCauley v. Univ. of V.I.*, 618 F.3d 232, 250-252 (3d Cir. 2010) (striking down university policy prohibiting "Conduct Which Causes Emotional Distress" because of potential application to "*any*

clear and objective standards to root out true threats of harassment, while steering

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variety of proven, constitutional, methods. *See Iota Xi*, 993 F.2d at 393 (finding the university "has available numerous alternatives to imposing punishment on students based on the viewpoints they express").

First, public colleges may restrict unprotected speech, such as fighting words, libel, and obscenity. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). They may also prohibit student-on-student harassment that is "severe, pervasive, and objectively offensive." *Davis*, 526 U.S. at 651; *see also DeJohn*, 537 F.3d at 320 ("Yet, unless harassment is qualified with a standard akin to a severe or pervasive requirement, a harassment policy may suppress core protected speech."). And public colleges may prohibit true threats of violence. *See Virginia v. Black*, 538 U.S. 343, 359–60 (2003) ("'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."); *Bauer v. Sampson*, 261 F.3d 775, 783–84 (9th Cir. 2001) (finding professor's writing in underground campus newspaper had some violent content, but was "hyperbole of the sort found in non-mainstream political invective and in context ...[and were] patently not true threats"); *Murakowski v. Univ. of Delaware*, 575 F. Supp. 2d 571, 590, (D. Del. 2008) (finding student's comments on university-operated website suggesting that he intends to commit rape, kidnapping

> It makes little sense to extend the influence of school administration to off-campus activity under the theory that such activity might interfere with the function of education. School officials may not judge a student's behavior while he is in his home with his family nor does it seem to this court that they should have jurisdiction over his acts on a public street corner. A student is subject to the same criminal laws and owes the same civil duties as other citizens, and his status as a student should not alter his obligations to others during his private life away from the campus.

Sullivan v. Houston Indep. Sch. Dist., 307 F. Supp. 1328, 1340–41 (S.D. Tex. 1969). If that is true of primary and secondary school students, it is surely true of adult college students who possess more First Amendment freedom. *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) ("The First Amendment guarantees wide freedom in matters of adult public discourse."); *McCauley*, 618 F.3d at 242 ("Public university administrators are granted *less leeway* in r 74(w)4(ay)8d()i-4( )4

both a confidentiality agreement and a consent form that prohibited disseminating precisely the type of patient information patient included on her blog. *Id*. at 545–46.

The district court also relied on *Tatro v. University of Minnesota*, 816 N.W.2d 509 (Minn. 2012). There, a mortuary student made statements on Facebook about a cadaver. *Id*. at 512–13. The University of Minnesota punished her for violating the student code of conduct and laboratory rules. She challenged that punishment as a restriction on her First Amendment rights, and the Minnesota Supreme Court ruled in favor of the university. It did so because the university mortuary sciences professional rules permitted students to discuss their cadaver experiences, but prohibited students from blogging about cadaver dissection. The court determined the rule was narrowly tailored to the professional conduct standards for the mortuary science profession which require professionals to -6 0cd(j 0.t)9(he)

analyze whether the College's rule was narrowly tailored, as in *Tatro*, nor did it find a disregard for clearly stated rules implicating patient privacy concerns, as in *Yoder*. Instead, without much comment at all, the court declared that the College did nothing wrong because it used nursing standards to regulate Mr. Keefe's speech.

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that should have been fully protected by the First Amendment, regardless of whether the speech was offensive, mean-spirited, or appeared to be valueless.[6]

Punishment of off-campus student speech, which the district court sanctioned here, opens the door to far more ominous applications and teaches students the wrong lesson about their First Amendment rights in a modern liberal

155, 2012 WL 2160969, at *1, 5 (S.D. Ohio June 12, 2012). Making this free speech quarantine still more objectionable, UC required students to provide a minimum of five working days' notice prior to staging any "demonstration, picketing, or rally."[7] Citing the minuscule space allotted for "free speech" and the fact that the registration requirement essentially prohibited spontaneous speech, the court found the policy to be "anathema to the nature of a university" and enjoined the university from enforcing it. *Id.* at *5 & 9.

This decision is the latest in a virtually unbroken string of cases affirming the critical importance of First Amendment protections for college students. *See McCauley*, 618 F.3d 232 (invalidating university speech policies, including harassment policy); *DeJohn*, 537 F.3d 301 (striking down university sexual harassment policy); *Dambrot*, 55 F.3d 1177 (declaring university discriminatory harassment policy facially unconstitutional); *Smith v. Tarrant Cnty. Coll. Dist.*, 694 F. Supp. 2d 610 (N.D. Tex. 2010) (finding university "cosponsorship" policy to be overbroad); *College Republicans*, 523 F. Supp. 2d 1005 (enjoining enforcement of university civility policy); *Roberts*, 346 F. SS 2

Life Cougars v. Univ. of Houston, 259 F. Supp. 2d 575 (S.D. Tex. 2003) (declaring university policy regulating "potentially disruptive" events unconstitutional); *Booher v. Bd. of Regents, N. Ky. Univ.*, No. 2:96-cv-135, 1998 WL 35867183, *10 (E.D. Ky. Jul. 22, 1998) (finding university sexual harassment policy void for vagueness and overbreadth); *UWM Post*

college refused to revise its policy, Van Tuinen filed a First Amendment lawsuit.[10] Only after being forced to answer for its censorship in federal court did MJC recognize Van Tuinen's rights, settling the case by abandoning its free speech zone and paying him $50,000 in February.[11]

Sadly, Van Tuinen's case is not an isolated incident. A similar federal lawsuit against the University of Hawaii at Hilo is now pending after administrators there told two students that "it wasn't the 60s anymore" and that they could only protest National Security Agency spying in the university's small, remote "free speech zone."[12] The university has adopted an interim policy while litigation proceeds.[13]

In addition to quarantining expressive activity to isolated areas on campus, public colleges frequently disregard the First Amendment in a misguided attempt to rid campuses of protected expression. This is particularly true when students engage in speech that administrators subjectively deem "unbecoming," illustrating

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[10] *Van Tuinen v. Yosemite Cmty. Coll. Dist.*, No. 1:13-at-00729 (E.D. Cal. filed Oct. 10, 2013).

[11] Jessica Chasmar, *Calif. college student wins $50K settlement in free speech case*, WASH. TIMES, Feb. 26, 2014, *available at* http://www.washingtontimes.com/news/2014/feb/26/california-college-student-wins-50k-settlement-fre.

[12] Compl. for Injunctive & Declaratory Relief & Damages; Exs. A-E; Summons, *Burch v. Univ. of Hawaii Sys.*, No. 1:14-cv-00200 (D. Haw. Apr. 24, 2014).

[13] Dave Smith, *UH-Hilo Issues New Policy in Response to Lawsuit*, BIG ISLAND NOW, May 15, 2014, *available at* http://bigislandnow.com/2014/05/15/uh-hilo-issues-new-policy-in-response-to-lawsuit.

university's men's hockey coach, Ed Gosek, for a class assignment. Myers asked rival coaches their honest opinion of Gosek over email; in reply, Cornell University's coach told Myers that his request was "offensive."[16]

These recent examples are blatant First Amendment violations, prohibited by decades of precedent, but

long-established law. This Court must remind the College that respecting the First Amendment is not optional.

Colleges and universities nationwide are closely watching this case. If the lower court's error is allowed to stand, would-be censors at colleges across the country will seize upon their newfound authority to silence merely dissenting, unwanted, unpopular, or unpleasant student speech by emulating the College's shameful end-run around the First Amendment. If faced with a choice between respecting a student's right to freedom of expression or expelling her, a public college administrator will recall this erroneous result and conclude that punishment is permissible—as long as it is justified by reference to "professional guidelines." Given the Supreme Court's repeated and emphatic recognition of the importance of student civil liberties, this is precisely the wrong result for the health of our democracy. *Sweezy*, 354 U.S. at 250.

The right to speak one's mind without fear of official reprisal for transgressing vague and subjective standards should be beyond question on an American public campus. Because today's students are tomorrow's leaders, protecting this right is of paramount importance to our nation as a whole. For these reasons, the district court's meager understanding of the expressive rights of public college students—even those enrolled in a professional program—must be reversed and remanded.

CONCLUSION

For these reasons, the Court should reverse the judgment of the district court and remand this case for further proceedings.

Dated: November 19, 2014

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