No. 18-30148

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

TERESA BUCHANAN,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF LOUISIANA, NO. 3:16-CV-00041-SDD-EWD,
THE HONORABLE SHELLY D.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellant Teresa Buchanan certifies that the following listed persons and entities as described in Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

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<u>GROUNDS FOR REHEARING *EN BANC*</u>

Rehearing *en banc* is warranted for both reasons stated in F.RA.P. 35(a), in that it is necessary to maintain uniformity of this Court’s decisions and to address two issues of exceptional significance:

court considered Appellant's facial challenge, under this Court's decision in *Esfeller v. O'Keefe*

some of Appellant's speech not constitutionally protected, slip op. 6-8, this was only a small part of the speech for which Appellant was inappropriately targeted, and no LSU decision-maker could say what speech was the ultimate reason for termination. This result is inconsistent with this Court's decision in *DeAngelis v. El Paso Municipal Police Officers Ass'n*

TABLE OF CONTENTS

Page

CERTIFICATE OF INTERESTED PERSONS i

GROUNDS FOR REHEARING *EN BANC* ii

TABLE OF AUTHORITIES vi

ISSUES MERITING *EN BANC* CONSIDERATION 1

COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE 3

STATEMENT OF FACTS 3

ARGUMENT AND AUTHORITIES 6

I. THE PANEL DISMISSAL OF BUCHANAN'S FACIAL CHALLENGE CONFLICTS WITH FIFTH CIRCUIT PRECEDENT AND EFFECTIVELY SHUTS THE FEDERAL COURTHOUSE DOOR TO SUCH CLAIMS 6

II. THE PANEL'S REFUSAL TO REVIEW THE FACIAL CHALLENGE SHORT-CIRCUITED THE AS-APPLIED CLAIM AND PRESERVED AN UNCONSTITUTIONAL SPEECH REGULATION 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases

Cozzo v. Tangipahoa Parish Council-President Gov't,
279 F.3d 273 (5th Cir. 2002) 7

Cutler v. Stephen F. Austin State Univ.,
767 F.3d 462 (5th Cir. 2014) ....iv, 14

Dambrot v. Central Mich. Univ.,
55 F.3d 1177 (6th Cir. 1995) 11, 12

Davis v. Monroe Cty. Bd. of Educ.,
526 U.S. 629 (1999)... iii, 13

DeAngelis v. El Paso Municipal Police Officers Ass'n,
51 F.3d 591 (5th Cir. 1995) .... iv, 12, 13

DeJohn v. Temple Univ.,
537 F.3d 301 (3d Cir. 2008) ....*passim*

Delahoussaye v. City of New Iberia,
937 F.2d 1433.9(.)2(.)2.7(.)/F2 .9(r.)1.3( )8 Cir. 1995) ....

.9

McCauley v. Univ. of V.I.,
618 F.3d 232 (3d Cir. 2010) 12, 13

Pastorek v. Trail,
248 F.3d 1140 (5th Cir. 2001) ii

Piggee v. Carl Sandburg Coll.,
464 F.3d 667 (7th Cir. 2006) 11

Raj v. LSU,
714 F.3d 322 (5th Cir. 2013) .... ii, 7

Richardson v. Southern Univ.,
118 F.3d 450 (5th Cir. 1997) ii

Salge v. Edna Ind. Sch. Dist.,
411 F.3d 178 (5th Cir. 2005) ....iv, 14

Saxe v. State Coll. Area Sch. Dist.,
240 F.3d 200 (3d Cir. 2001) 12, 13

Sonnier v. Crain,
613 F.3d 436 (5th Cir. 2010), *opinion withdrawn in part on reh'g*, 634 F.3d 778 (5th Cir. 2011)...9, 10

Sonnier v. Crain,
649 F. Supp. 2d 484 (E.D. La. 2009)...9

Street v. New York,
394 U.S. 576 (1969)...iv, 14

Stromberg v. California,
283 U.S. 359 (1931)...iv, 14

Susan B. Anthony List v. Driehaus,
573 U.S. 149 (2014)..9

U.S. v. Alvarez,
567 U.S. 709 (2012)...14

U.S. v. Stevens,
559 U.S. 460 (2010)...14

Constitutional Provisions

U.S. Const.
amend. I .... *passim*
amend. XI .... *passim*

Statutes

La. R.S. 13:5106(A) 7

Other Authorities

Erwin Chemerinsky and Howard Gillman, FREE SPEECH ON CAMPUS (2017) 11

Free Speech 101: The Assault on the First Amendment on College Campuses: Hearing Before the Sen. Comm. on the Judiciary, 115th Cong. (2017) 11

Greg Lukianoff and Jonathan Haidt, THE CODDLING OF THE AMERICAN MIND (2018) 11

ISSUES MERITING *EN BANC* CONSIDERATION

fail to distinguish protected from unprotected speech, much like policies other circuits have invalidated. *E.g.*, *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008). *See Boh Bros.*, 731 F.3d at 476 n.3 (Jones, J., dissenting) (citing *DeJohn* and suggesting such policies "dramatically curtail free speech on campus in the name of alleviating sex discrimination"). The panel's holding that LSU's policy was constitutional as applied failed to consider that the charges against Appellant did not separate p14.03 Tf 1 0 0 1 72 514.071 0 3.6(h)-5 pJ unpron te F.s.3(p)-5.8(

COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

Plaintiff-Appellant filed this civil rights action asserting an as-applied First Amendment challenge to LSU's sexual harassment policies; an as-applied due process challenge; and a facial First Amendment challenge. ROA.11-49. On cross-motions for summary judgment, the district court granted judgment for Appellees on all counts. ROA.1296-1374, 1375.

On appeal, Plaintiff-Appellant asked this Court to hold that LSU's sexual harassment policies violate the First Amendment on their face, that they are unconstitutional as applied to Appellant, and that Appellees are not protected by qualified immunity. The panel affirmed the decision below on the as-applied challenge, holding that speech alleged in some complaints against Dr. Buchanan did not relate to matters of public concern. It vacated the district court's holding that LSU's sexual harassment policies are facially constitutional, but denied Appellant's facial challenge on grounds that she sued the wrong parties. The panel also held Appellees were entitled to qualified immunity.

STATEMENT OF FACTS

LSU's sexual harassment policies challenged in this case were adopted pursuant to a federal "blueprint for colleges and universities throughout the country"

PS-95. The resulting report catalogued a number of criticisms that spanned a period of years, including occasional use of profanity as well as disagreements that had occurred with personnel in other school districts. ROA.862-75. It included claims by three former students dating to 2012, when Appellant 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. *Id*. The report listed all allegations made, concluded the "reported behavior violates PS-73 & PS-95," but failed to explain that most of the allegations—including the superintendent's complaint—did not relate to the conclusion that LSU's policies had been violated. *Id*.

LSU convened a faculty committee under its policy for Dismissal for Cause for Faculty, PS-104, to determine if Appellant should be terminated. The committee was presented all of the complaints, whether or not they contributed to the report's findings, and committee members evaluated the evidence based on a belief that, under PS-73 and PS-95, any "unwelcome" or "inappropriate" language

Despite this recommendation, Defendant-Appellees, including Dean Damon Andrew, A.G. Monaco, Associate Vice Chancellor of Human Resource Management Gaston Reinoso, and President F. King Alexander advocated termination, each citing the superintendent's complaint about non-sexual use of the word "pussy" as evidence of sexual harassment. Appellees Alexander and Monaco both mistakenly believed the complaint was based on a reference to female genitalia, ROA.441 (Tr. 147:20-148:25), 338-339 (Tr. 151:11-154:15), and Andrew testified it was proof Appellant used "inappropriate" language, regardless of context. ROA.357-359. LSU never investigated whether examples such as the three student complaints from 2012 alleging in-class references to sex were severe, pervasive, and objectively offensive. ROA.873-75.

ARGUMENT AND AUTHORITIES

I.

"proper defendants to a facial challenge are the parties responsible for creating or enforcing the challenged … policy," which, in the panel's categorical view, meant: "The Board [] is the only proper [] defendant to a facial challenge to LSU's policies." *Id*. 8, 9. The panel's dismissal of the facial challenge on this basis

to a state law, but named a private organization as defendant. The panel relies on a

does it cite any case to support its conclusion that the only proper defendant is the one with "ultimate authority."

The panel's reasoning suggests that if the process does not result in termination or other disciplinary action requiring a Board vote, a facial challenge can never be brought because there is no Board involvement. *See* ROA.49 (PS-104 § H). But stopping short of imposing an ultimate sanction cannot immunize a policy from a facial constitutional challenge. *E.g.*, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-59 (2014); *DeJohn*, 537 F.3d at 305. If Appellant had only been denied promotion or censured—neither of which require Board action—she should nevertheless be able to bring a facial challenge.

Esfeller illustrates that LSU officials besides the Board are proper defendants for facial challenges, and that includes the president due to his enforcement role. To similar effect is *Sonnier v. Crain*, 613 F.3d 436 (5th Cir. 2010), *opinion withdrawn in part on reh'g*, 634 F.3d 778 (5th Cir. 2011) (*per curiam*). That case likewise involved a facial constitutional challenge to a speech code at a state university in Louisiana that had as defendants on appeal its interim president, a vice president, and a university police officer, but not the Board, which had been dismissed under the Eleventh Amendment. *Sonnier v. Crain*, 649 F. Supp. 2d 484, 494 (E.D. La. 2009) (citing *Laxey*, 22 F.3d 621). This Court none-theless not only reviewed the facial challenge, but preliminarily enjoined part of

the code. *Sonnier*, 613 F.3d at 447-48; *see*

from suit. Accordingly, the out-of-circuit cases do not support the panel's holding that ***only***

LSU's challenged harassment policies, threatens to "dramatically curtail free speech on campus in the name of alleviating sex discrimination." 731 F.3d at 476 n.3 (Jones, J., dissenting). The opinion also observed how that guidance tracked the speech code that the Third Circuit invalidated in *DeJohn*. *Id*. (citing *DeJohn*, 537 F.3d at 313-20). The panel's decision denies a federal forum for challenges to the constitutionality of such policies in *this* Circuit, and should be corrected on rehearing.

II.

The policies' broad terms conceivably "'cover any speech' of a 'gender-

Bd., 540 F. App'x 429, 434-35 (5th Cir. 2013); *Salge*, 411 F.3d at 184-97. The subsequent investigation and PS-104 process lumped this beef together with other complaints and undifferentiated findings, with no constitutional guidance for what speech may be sanctionable. *See supra* 4-6. Regardless of whether the panel correctly concluded *some* of Appellant's speech did not relate to matters of public concern, the record is clear LSU terminated her, at least in part, based on constitutionally protected speech.

B. Affirmance of Appellant's termination without a ruling on the facial

467, 481-82 (2010) (same under “animal crush videos” statute). Because the panel avoided the merits of the facial challenge, it overlooked this facet of Appellant’s as-applied claim.

C. The Court should order rehearing to require review of the district court judgment that PS-73 and PS-95 are constitutional, and to consider the consequences to Appellant’s as-applied challenge. The threat of public university speech codes “dramatically curtail[ing] free speech on campus” based on “offending speech” is a problem of exceptional importance. *See supra* 11-12 (citing *Boh Bros.*, 731 F.3d at 476 n.3). This Court should grant rehearing *en banc* because LSU cannot constitutionally apply a defective policy, the facial validity of LSU’s polices has been left in limbo, and the panel’s decision regarding “proper defen-

CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the requirements of Federal Rules of Civil

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on April 5, 2019.