PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-3735

STEPHEN MCCAULEY,

Appellant

v.

UNIVERSITY OF THE VIRGIN ISLANDS; SEAN GEORGES, in H

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The District

After reviewing the record, we agree with the District Court on the first and third issues. UVI is an arm of the Territory of the Virgin Islands and, therefore, not a "person" for purposes of § 1983. Ragster and Georges, as employees of UVI acting in their official capacities, were likewise not "persons" for purposes of § 1983. Adjudication of McCauley's as-applied challenge to Major Infraction Paragraph E was unnecessary because the District Court had already concluded that the paragraph was facially unconstitutional. The District Court went astray, however, in its adjudication of McCauley's other challenges to the Code. Setting aside Major Infraction Paragraph E, two of the four remaining challenged provisions were unconstitutional infringements on students' First

that charge, McCauley visited Piasecki's dorm room to talk to her about the alleged rape. Piasecki complained to UVI officials after the visit that McCauley harassed her.

Later that month, UVI officials twice warned McCauley to avoid contact with Piasecki. Georges told McCauley that Piasecki had complained of harassment and that he should stay away from her to avoid repercussions under the Code. McCauley was later approached by other UVI officials and was warned to avoid all contact with Piasecki. On or about November 7, 2005, UVI charged McCauley with violating Major Infraction Paragraph E of the Code and began disciplinary proceedings against him.[2] Major Infraction Paragraph E prohibits:

> Committing, conspiring to commit, or causing to be committed any act which causes or is likely to cause serious physical or mental harm or which tends to injure or actually injures, frightens, demeans, degrades or disgraces any person. This includes but is not limited to violation of the University policies on hazing, sexual harassment or sexual assault.

[2] The Code distinguished between major, general, and minor infractions. The maximum sanction for each was expulsion, suspension, and disciplinary probation, respectively.

McCauley pled not guilty to the charge.

Shortly after receiving notice of the charge against him, McCauley filed a § 1983 suit against UVI, Georges, Ragster, and other unidentified defendants for violating his First Amendment rights to free speech and freedom of association. McCauley challenged, *inter alia*, the constitutionality of Major Infraction Paragraphs C ("Paragraph C"), E ("Paragraph E"), and R ("Paragraph R"), General Infraction Paragraph B ("Paragraph B"), and Minor Infraction Paragraph H ("Paragraph H"). He alleged that all the paragraphs were facially unconstitutional and that Paragraph E was unconstitutional as applied to him.

After McCauley received notice of the charge against him, he was criminally charged with witness tampering, and UVI agreed to postpone its disciplinary hearing against him until the criminal charges were resolved. On March 31, 2009, after the criminal charges were resolved, UVI sent McCauley a second notice of charges, which listed the same charges from the November 2005 notice and added violations of UVI's drug and alcohol policy. The second notice stated that the Paragraph E charge was based on (1) McCauley's visit to Piasecki's dorm room on the day Carlson was charged with rape; (2) an allegedly harassing phone call McCauley made to Piasecki on October 18, 2005; and (3) McCauley's alleged harassment of Piasecki at an off-campus bar on October 20, 2005.

On April 28, 2009, McCauley was found guilty of violating Paragraph E and another paragraph not at issue in this appeal. As punishment, he was ordered to write a letter of apology to Piasecki and pay a $200 fine.

The next month, a non-jury trial was conducted on McCauley's § 1983 action. On August 21, 2009, the District Court: dismissed all claims against UVI because it was not a "person" under § 1983, entered judgment in favor of McCauley on his facial challenge to Paragraph E, enjoined Ragster, as president of UVI, and Georges, as housing director of UVI, from enforcing Paragraph E, and entered judgment in favor of t

[3] For Paragraph B, McCauley admitted that he did not wish to express himself "in an obscene, lewd, [or] indecent manner[.]" He also conceded that he did not want to "verbally

These concessions raise concerns about McCauley's standing to assert the claims alleged in his complaint. Because "we are required to raise issues of standing *sua sponte* if such issues exist," *Addiction Specialists, Inc v. Twp. of Hampton*, 411 F.3d 399, 405 (3d Cir. 2005) (internal quotation marks omitted), before considering the merits of this appeal, we first consider whether McCauley has standing.[4]

Our inquiry into Paragraph E is promptly resolved. McCauley obviously has standing to challenge Paragraph E, as UVI charged him with violating that paragraph. The other paragraphs, however, require closer examination. Litigants asserting facial challenges involving overbreadth under the First Amendment have standing where "their own rights of free expression are [not] violated" because "of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601,

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assault others on [UVI] property." When McCauley was asked whether he had "suffered a deprivation of any kind" due to Paragraph H, he replied "no." McCauley similarly conceded that he had not suffered any deprivation in connection with Paragraph C.

[4] "We exercise plenary review of standing issues, but review the factual elements underlying the District Court's determination of standing on a clear error standard." *Goode v. City of Philadelphia*, 539 F.3d 311, 316 (3d Cir. 2008).

612 (1973); *Pitt News v. Fisher*, 215 F.3d 354, 363 (3d Cir. 2000) ("[W]hen a plaintiff attempts to challenge a statute as being an overbroad restriction on First Amendment rights, the requirement that an impediment exist to the third party asserting his or her own rights should be relaxed[.]") (citing *Sec'y of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956-57 (1984)); *Amato v. Wilentz*, 952 F.2d 742, 753 (3d Cir. 1991) ("The Supreme Court rather freely grants standing to raise overbreadth claims, on the ground that an overbroad . . . regulation may chill

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[5] McCauley's Complaint explicitly alleges the chilling of student speech as a harm:

> The [Code] has a chilling effect on Plaintiff's and other students' right to freely and openly engage in appropriate discussions on theories, beliefs, ideas, and to debate such ideas with persons holding opposing viewpoints.

stating that his speech and the speech of other students was chilled by the Code. Yet his failure to provide this lawyerly response is not fatal to his claims, given that we should "freely grant[] standing to raise overbreadth claims[.]" *Amato*, 952 F.2d at 753. Paragraphs B, H, and R, all have the potential to chill protected speech. Paragraph B prohibits, *inter alia*, lewd or indecent conduct. Paragraph H prohibits conduct which causes emotional distress, including "conduct . . . which compels the victim to seek assistance in dealing with the distress." Paragraph R prohibits misbehavior at sports events, concerts, and social-cultural events, including the display of unauthorized or offensive signs. As such, under the "relaxed" rules of standing for First Amendment overbreadth claims, *Pitt News*, 215 F.3d at 363, McCauley has standing to assert facial challenges to those paragraphs.

McCauley lacks standing to challenge Paragraph C, which requires students to report witnessed violations of Major Infraction Paragraph B. Paragraph C, and its companion paragraph, Major Infraction Paragraph B, state:

> B. Assault/Infliction or Threat of Bodily Harm to a Person:
>
> This includes inflicting or threatening to inflict bodily harm or coercing or restraining any person while on or about University premises. This also includes

brandishing of weapons.

C. Aiding and Abetting or Complicity in Threatening Bodily Harm and/or Committing Bodily Harm to a Person:

This i

us what it is.

[MCCAULEY]: I believe that just because someone is present when a violation is being committed, but does not report that person, it basically implies that a student has to enforce the provisions of the Code of Conduct at all times, and I don't believe that'

[6] In so doing, we do not rule out the possibility that a plaintiff alleging a different injury could have standing to assert a facial overbreadth challenge to Paragraph C, nor do we imply anything about the constitutionality of Paragraph C.

"inconclusive" is belied by the record. The District Court, after an exhaustive analysis of each factor, determined that two of the three factors weighed in favor of UVI being an arm of the Territory: UVI's status under Virgin Islands law and its level of autonomy. Only the funding factor weighed slightly against the conclusion that

cannot seek money damages against them. He may only seek prospective injunctive relief. *Id.* n.10; *see Brow*, 994 F.2d at 1037 n.12 (noting that we cannot rule out the possibility of "section 1983 actions for prospective injunctive relief against territorial officials in their official capacities").

IV.

Having disposed of the threshold questions of standing and whether UVI, Georges, and Ragster are "persons" for purposes of § 1983, we turn to the core of this appeal—the

[8] We exercise plenary review over legal questions pertaining to the First Amendment. *See Schiff*, 602 F.3d at 160. "Although we generally review a district court's factual findings for clear error, [i]n the First Amendment context, reviewing courts have a duty to engage in a searching, independent factual review of the full record." *ACLU v. Mukasey*, 534 F.3d 181, 186 (3d Cir. 2008) (internal quotation marks omitted).

A regulation of speech may be struck down on its face if its

employed." *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999). "Because of the wide-reaching effects of striking down a statute on its face . . . we have recognized that the overbreadth doctrine is strong medicine and have employed it with hesitation, and then only as a last resort." *Id.* (internal quotation marks omitted).

"The fir

[9] *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us[,] . . . [t]hat freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."); *Healy*, 408 U.S. at 180; *see Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995) (stating that the university has a "background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition"); *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 671 (1973) (per curiam) (s

environs is peculiarly the marketplace of ideas[,] and [t]he First Amendment guarantees wide freedom in matters of adult public discourse." *Id.* at 315 (citations and internal quotation marks omitted).

Indeed, for this reason, and several others we will elaborate on, our Circuit recognizes that "there is a difference between the extent that a school may regulate student speech in a public university setting as opposed to that of a public elementary or high school." *Id.* at 315. Public university "administrators are granted *less leeway* in regulating student speech than are public elementary or high school administrators." *Id.* at 316 (emphasis in original). "Discussion by adult students in a college classroom should not be restricted," *id.* at 315, based solely on rationales propounded specifically for the restriction of speech in public elementary and high schools, *see id.* *Cf. Sypniewski*

to university rules at almost all times.

First, the pedagogical missionss

> understanding; otherwise our civilization will stagnate and die.

Sweezy, 354 U.S. at 250. Free speech "is the lifeblood of academic freedom." *DeJohn*, 537 F.3d at 314. Public elementary and high schools, on the other hand, are tasked with inculcating a "child [with] cultural values, [to] prepar[e] him for later professional training, and [to] help[] him to adjust normally to his environment." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *see Ambach v. Norwick*, 441 U.S. 68, 76-79 (1979). "The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986). As a result, "teachers—and indeed the older students—[must] demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class." *Id.* School attendance exposes students to "role models" who are to provide "essential lessons of civil, mature conduct." *Id.* Public elementary and high school education is as much about learning how to be a good citizen as it is about multiplication tables and United States history.

Second, "public elementary and high school administrators," unlike their counterparts at public universities, "have the unique responsibility to act *in loco parentis*." *DeJohn*, 537 F.3d at 315; *e.g.*, *Fraser*, 478 U.S. at 684 (recognizing "the

college education of old, described in Justice Thomas's concurrence in *Frederick v. Morse*, 551 U.S. 393 (2007), has long since been put to rest. Justice Thomas explained that in the colonial era:

> Even at the college level, strict obedience was required of students: "The English model fostered absolute institutional control of students by faculty both inside and outside the classroom. At all the early American schools, students lived and worked under a vast array of rules and restrictions. This one-sided relationship between the student and the college mirrored the situation at English schools where the emphasis on hierarchical authority stemmed from medieval Christian theology and the unique legal privileges afforded the university corporation."

Id. at 412 n.2 (Thomas, J., concurring) (quoting Note, *The Lingering Legacy of* In Loco Parentis: *An Historical Survey and Proposal for Reform*, 44 Vand. L. Rev. 1135, 1140 (1991) (footnote omitted)). The public university has evolved into a vastly different creature. Modern-day public universities are intended to function as marketplaces of ideas, where students interact with each other and with their professors in a collaborative learning environment. Indeed, students "often have values, views, and ideologies that are at war with the ones which the college has traditionally espoused or indoctrinated," *Healy*, 408 U.S. at 197 (Douglas, J., concurring). This is a far

cry from the "one-sided relationship," *Morse*, 551 U.S. at 412 n.2 (Thomas, J., concurring), that once existed.

Over thirty years ago, in *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979), we recognized that "[w]hatever may have been its responsibility in an earlier era, the authoritarian role of today's college administrations has been notably diluted":

> Trustees, administrators, and faculties have been required to yield to the expanding rights and privileges of their students. By constitutional amendment, written and unwritten law, and through the evolution of new customs, rights formerly possessed by college administrations have been transferred to students. College students today are no longer minors; they are now regarded as adults in almost every phase of community life. . . . . [E]ighteen year old students are now identified with an expansive bundle of individual and social interests and possess discrete rights not held by college students from decades past. There was a time when college administrators and faculties assumed a role In loco parentis. Students were committed to their charge because the students were considered minors. A special relationship was created between college and student that imposed a duty upon the latter. That unwritten relationship

college. The campus revolutions of the late sixties and early seventies were a direct attack by the students on rigid controls by the colleges and were an all-pervasive affirmative demand for more student rights. In general, the students succeeded, peaceably and otherwise, in acquiring a new status at colleges throughout the country. These movements, taking place almost simultaneously with legislation and case law lowering the age of majority, produced fundamental changes in our society. A dramatic reapportionment of responsibilities and social interests of general security took place. Regulation by the college of student life on and off campus has become limited. Adult students now demand and receive expanded rights of privacy in their college life including, for example, liberal, if not unlimited, partial visiting hours. College administrators no longer control the broad arena of general morals. At one time, exercising their rights and duties In loco parentis, colleges were able to impose strict regulations

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universities exercise strict control over students via an *in loco parentis* relationship has decayed to the point of irrelevance. *See Guest v. Hansen*, 603 F.3d 15, 21 (2d Cir. 2010) (stating that, under New York law, colleges do not act *in loco parentis*); *Freeman v. Busch*, 349 F.3d 582, 587 (8th Cir. 2003) ("[S]ince the late 1970s, the general rule is that no special relationship exists between a college and its own students because a college is not an insurer of the safety of its students.") (emphasis omitted).

Closely related to the *in loco parentis* issue is the third observation, that public elementary and high schools must be empowered to address the "special needs of school discipline" unique to those environs. *DeJohn*, 537 F.3d at 315-16. In *T.L.O.*, the Supreme Court, in discussing the scope of a public high school student's Fourth Amendment rights, stated that teachers and administrators in public high schools have a substantial interest in "maintaining discipline in the classroom and on school grounds": "Maintaining or aintainions

attendance laws automatically inhibit the liberty interest afforded public school students, as the law compels students to attend school in the first place [and] [o]nce under the control of the school, students' movement and location are subject to the ordering and direction of teachers and administrators." *Shuman v. Penn Manor Sch. Dist.*, 422 F.3d 141, 149 (3d Cir. 2005) (internal citations and quotation marks omitted). Unlike the strictly controlled, smaller environments of public elementary and high schools, where a student's course schedule, class times, lunch time, and curriculum are determined by school administrators, public universities operate in a manner that gives students great latitude: for example, university students routinely (and unwisely) skip class; they are often entrusted to responsibly use laptops in the classroom; they bring snacks and drinks into class; and they choose their own classes.[11] In short, public university students are given opportunities to acquit themselves as adults. Those same opportunities are not afforded to public elementary and high school students.

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[11] It would be naive to assume that drug use and violent crime are not issues in our public universities; that is not our contention. Instead, we note that the concept of maintaining discipline in a public university classroom is markedly different from elementary and high school classrooms. In general, there is no educational component to discipline in a university setting. There is no demerit system for bad behavior or reward for good behavior in the classroom. Nor is there a "conduct" grade on a public university student's grade report at the end of each term.

Fourth, public elementary and high school administrators "must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988); *see, e.g.*, *Fraser*, 478 U.S. at 683 (noting concern that "[t]he speech [at issue] could well be seriously damaging to its less mature audience"); *accord Lee v. Weisman*, 505 U.S. 577, 592 (1992) ("[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."). Considerations of maturity are not nearly as important for university students, most of whom are already over the age of 18 and entrusted with a panoply of rights and responsibilities as legal adults. *E.g.*, U.S. Const. amend. XXVI; Restatement (Second) of Contracts §§ 12, 14 (1981) (explaining limited contractual capacity of "infants"); *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that individuals may not be given the death penalty for crimes they committed while under the age of 18). "University students are . . . young adults [and] are less impressionable than younger students[.]" *Widmar v. Vincent*, 454 U.S 263, 274 n.14 (1981); *e.g.*, *Tilton*, 403 U.S. at 686 ("There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination.").

Moreover, research has confirmed the common sense

observation that younger members of our society, children and teens, lack the maturity found in adults. The Supreme Court has recognized, albeit while discussing juvenile offenders, that "scientific and sociological studies . . . tend to confirm, [a] l

"Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact." *Id.* at 513. Yet this is exactly what would occur for students residing on university campuses were we to grant public university administrators the speech-prohibiting power afforded to public elementary and high school administrators. Those students would constantly be subject to a circumscription of their free speech rights due to university rules.

The reasons we have provided are by no means exhaustive, but they are consistent with the view we espoused in *DeJohn*, 537 F.3d at 315-16, and *Sypniewski*, 307 F.3d at 260. Public universities have significantly less leeway in regulating student speech than public elementary or high schools. Admittedly, it is difficult to explain how this principle should be applied in practice and it is unlikely that any broad categorical rules will emerge from its application. At a minimum, the teachings of *Tinker*, *Fraser*, *Hazelwood*, *Morse*, and other decisions involving speech in public elementary and high schools, cannot be taken as gospel in cases involving public universities. Any application of free speech doctrine derived from these decisions to the university setting should be scrutinized carefully, with an emphasis on the underlying reasoning of the rule to be applied.

V.

Applying the overbreadth doctrine to Paragraphs R, H,

McCauley focuses his challenge on subsection (

The age and maturity of the listener was a primary concern of the *Fraser* Court. As support[11]

[it] could conceivably be applied to cover any speech . . . th[at] offends someone." *DeJohn*, 537 F.3d at 317 (internal quotation marks omitted). "Absent any requirement akin to a showing of severity or pervasiveness—that is, a requirement that the conduct objectively and subjectively creates a hostile environment or substantially interferes with an individual's work [or study]—[Paragraph R] provides no shelter for core protected speech." *Id.* at 317-18. "[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Papish*, 410 U.S. at 670; *see Tinker*, 393 U.S. at 509 (stating that "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" is insufficient to justify prohibition of a particular expression of opinion); *Sypniewski*, 307 F.3d at 259 n.16 (noting that "mere offensiveness does not qualify as 'disruptive' speech"); *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001). Second, the *Hazelwood* decision does not speak to the issue of authorization. Neither UVI nor McCauley discuss what procedures must be followed for a sign to be "authorized" and the University Student Handbook does not contain any procedures for authorization. Based on the record before us, Paragraph R's authorization requirement lacks any criteria for determining whether authorization should be granted and, thus, permits arbitrary, unpredictable enforcement that is violative of the First Amendment. *Cf. Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969) ("[A] law subjecting the exercise of First Amendment freedoms to the

prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority is unconstitutional.").

Overlooking the fatal flaws of attempting to prohibit "offensive" speech and requiring authorization for signs yet providing no means for receiving authorization, and assuming that *Hazelwood* applies in the university setting, the District Court erroneously applied that precedent. While the District Court correctly noted that "*Hazelwood*'s permissive 'legitimate pedagogical concern' test governs only when a student's school-sponsored speech could reasonably be viewed as speech of the school itself," *Saxe*, 240 F.3d at 213-14, and that "school 'sponsorship' of student speech is not lightly to be presumed," *id*. at 214, it then determined, despite UVI's failure to raise the issue, that the displaying of signs by students in the Field House, softball field, soccer field, cafeteria, or Reichhold Center for the Arts may reasonably be viewed as UVI's speech. It further concluded that Paragraph R was reasonably related to legitimate pedagogical concerns.

Neither of these determinations was supported by the facts or legal authority. Logic suggests that the District Court's assumption that signs displayed during sporting events, concerts, and social-cultural events at the locations listed in Paragraph R could be construed as school-sponsored speech was incorrect. The more offensive or outlandish a sign is, the less likely it is that people would attribute it to UVI. For example, in *Morse*,

the Supreme Court summarily dismissed the application of *Hazelwood* in a case involving a banner displaying the nonsensical phrase: "BONG HiTS 4 JESUS," *Morse*, 551 U.S. at 397. *Id*. at 405. It did so because "no one would reasonably believe that [the] banner bore the school's imprimatur." *Id*. Similar reasoning would apply to offensive signs displayed by UVI students. Indeed, the signs perhaps most likely to be prohibited, those containing socially-valueless, extremely

[12] In reaching our conclusion today, we decline to consider whether the teachings of *Hazelwood* apply in the university setting or whether *Hazelwood* is limited to curricular activities.

[13] Attempts at connecting Paragraph H to a legal definition of "emotional distress" fail. The Virgin Islands recognize intentional infliction

the last prong of the paragraph—"conduct . . . which compels the victim to seek assistance in dealing with the distress." This prong prohibits speech without any regard for whether the speech is objectively problematic. The fact that the provision only lists a few non-exclusive examples of when it may be invoked does not help its case for constitutionality. Emotional distress for purposes of Paragraph H "includes" the examples listed in the paragraph, but it also includes other scenarios that are not illustrated in the paragraph.

The scenarios in which this prong may be implicated are endless: a religious student organization inviting an atheist to attend a group prayer meeting on campus could prompt him to seek assistance in dealing with the distress of being invited to the event; minority students may feel emotional distress when other students protest against affirmative action; a pro-life

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not bear any clear relationship to free speech. Not all extreme and outrageous conduct involving speech is necessarily unprotected by the First Amendment. Moreover, the tort of intentional infliction of emotional distress requires intent on the part of the tortfeasor. *Id.* No such intent element is required under Paragraph H. The Virgin Islands also recognize negligent infliction of emotional distress, *e.g.*, *Fenton v. C&C Constr. & Maint., Inc.*, 48 V.I. 263, 276 (V.I. Super. Ct. 2007), but that tort requires the plaintiff have been in danger and have suffered some physical harm as a result of the emotional distress. *Id.* No similar requirements exist for Paragraph H.

student may feel emotional distress when a pro-choice student distributes Planned Parenthood pamphlets on campus; even simple name-calling could be punished. The reason all these scenarios are plausible applications of Paragraph H is that the paragraph is not based on the speech at all. It is based on a listener's reaction to the speech. "The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it." *Saxe*, 240 F.3d at 215; *see Papish*, 410 U.S. at 670; *Tinker*, 393 U.S. at 509; *Sypniewski*, 307 F.3d at 259 n.16. While "[t]he precise scope of *Tinker*'s 'interference with the rights of others' language is unclear" it is "certainly not enough that the speech is merely offensive to some listener." *Saxe*, 240 F.3d at 217.

Also, the *Tinker* doctrine may only be invoked to address "substantial disruption[s] of or material interference with school activities[.]" *Tinker*, 393 U.S. at 514. Here, a lone individual who has a negative reaction may subject the speaker to disciplinary proceedings. That simply was not what was envisioned in *Tinker*:

> [I]n our system, undif

> class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello v. Chicago*, 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Id. at 508-09.

Given that Paragraph H may be used to punish *any* protected speech, without for

on conduct "which compels [a] victim to seek assistance in dealing with . . . distress"—a broad, subjective prohibition for which no objective indicia are offered to explain when the provision would be violated. As such, we conclude that Paragraph H is overbroad in violation of the First Amendmen

"obscene," could collectively be interpreted to prohibit only speech that is unprotected by the First Amendment under the *Miller* obscenity test, *see Miller*, 413 U.S. at 24-25. Thus, Paragraph B, on its face

deemed not to be "persons" for purposes of § 1983. On remand, McCauley's challenge to Paragraph C should be dismissed for lack of standing because any injury from that paragraph was not based on chilled speech. The District Court's dismissal of Paragraph B for lack of an injury should be reversed and judgment should be entered in favor of Georges and Ragster because that paragraph has a limited, constitutional construction. The other two paragraphs, Paragraphs H and R, are largely subjective and lack limiting constructions to save them from violating the First Amendment. Therefore, on remand, the District Court should enter judgment in favor of McCauley and against Georges and Ragster (in their official capacities) with respect to both those paragraphs. The other aspects of the District Court's judgment should remain undisturbed.