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NO. 13-193

IN THE

Supreme Court of the United States

SUSAN B. ANTHONY LIST and COALITION OPPOSED TO ADDITIONAL SPENDING AND TAXES,

Petitioners,

v.

STEVEN DRIEHAUS, JOHN MROCZKOWSKI, BRYAN FELMET, JAYME SMOOT, HARVEY SHAPIRO, DEGEE WILHELM, LARRY WOLPERT, PHILIP RICHTER, CHARLES CALVERT, OHIO ELECTIONS COMMISSION, AND JON HUSTED,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* ALLIANCE DEFENDING FREEDOM IN SUPPORT OF PETITIONERS

HEATHER GEBELIN HACKER
DAVID J. HACKER
ALLIANCE DEFENDING FREEDOM
101 Parkshore Dr, Ste. 100
Folsom, California 95630
(916) 932-2850

DAVID A. CORTMAN
Counsel of Record
KEVIN H. THERIOT
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd.
N.E., Ste. D-1100
Lawrenceville, Georgia 30043
(770) 339-0774
dcortman@alliancedefendingfreedom.org

Counsel for Amicus Curiae

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INTEREST OF AMICUS[1]

Alliance Defending Freedom 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, Alliance Defending Freedom has played a role, either directly or indirectly, in many cases before this Court, including *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011); *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); as well as hundreds more in lower courts.

Additionally, Alliance Defending Freedom is counsel in two cases pending before the Court this term: *Galloway v. Town of Greece*, 681 F.3d 20 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 2388 (U.S. May 20, 2013); and *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (U.S. Nov. 26, 2013).

Many of our cases involve the proper application of the Free Speech Clause in educational contexts. Scores of public colleges and universities use

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[1] The parties have consented to the filing of this brief and that consent is on file with the Clerk of the Court. As required by Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

unconstitutionally overbroad and vague policies to regulate speech on campus, and students subject to those policies suffer a chilling effect on their expressive activities in violation of the First Amendment, even if the policy has never been applied to them. Recognizing that the Court's decision in this case could have an impact on the ability of those individuals to protect their First Amendment rights through pre-enforcement facial challenges to speech codes, Alliance Defending Freedom submits this *amicus curiae* brief to raise awareness of these issues.

SUMMARY OF THE ARGUMENT

Public colleges and universities in this country are uniquely situated as centers for learning and knowledge. The free exchange of ideas on these campuses is critical to preserving their innovative influence on our culture. This atmosphere is stifled, however, when colleges enact policies restricting speech on campus. Such policies are unfortunately common, despite the fact that they are clearly unconstitutional. The only way students can protect their First Amendment rights without risking punishment is by challenging the policies on their face in court. But some courts are beginning to misinterpret standing doctrine under Article III. They defy the common sense principle that students are able to bring constitutional challenges to policies that chill their speech, even if the policies have not been applied to them. The present case contains reasoning which, if not carefully cabined by the Court, could further erode students' abilities to protect their free speech rights on campus. The

Court should therefore specifically clarify standing doctrine for pre-enforcement facial challenges, making clear that students are not required to risk punishment in order to challenge policies that chill their speech on campus. Were it otherwise, "free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965).

ARGUMENT

I. BACKGROUND FOR WHY PUBLIC UNIVERSITY SPEECH CODES THREATEN THE AMERICAN UNIVERSITY'S UNIQUE STATUS AS THE "MARKETPLACE OF IDEAS."

It is well settled that at public colleges and universities, the free exchange of ideas is of critical importance to both the atmosphere of inquiry and the pursuit of knowledge on campus. Vigorous protection of civil liberties, particularly First Amendment rights, is therefore of the utmost importance in these enclaves of learning, especially because of their unique influence on our society as a whole. "'The essentiality of freedom in the community of American universities is almost self-evident. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.'" *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)). For that reason, the First

Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom." *Id*.

Written over forty years ago, these words remain a clarion call for a particular vision of the American public university—as a "marketplace of ideas," *Healy v. James*, 408 U.S. 169, 180 (1972), a place where students learn not what to think, but how to think, a place where our civilization transmits the essential values of liberty and free inquiry. Unfortunately, this vision of liberty has been under sustained assault.

For more than twenty years, universities have too often attempted to marginalize and exclude students that are outside the political mainstream of campus. Alan Charles Kors & Harvey Silverglate, *The Shadow University: The Betrayal of Liberty on America's Campuses* (Harper, 1999). Perhaps the most pernicious and persistent of the various methods of campus censorship is the speech code. Designed to broadly prohibit so-called "offensive" or "harassing" communications, these codes have chilled free speech at campuses from coast to coast. *See* Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 J.C. & U.L. 385, 390-405 (2009); Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split Over College Students' First Amendment Rights*, 14 TEX. J. C.L. & C.R. 27, 33-35 (2008). Facially vague and overbroad, speech codes deter untold thousands of students from speaking freely on critical issues of race, gender, sexuality, and religion. Arbitrarily enforced, they tend to

become weapons of the dominant political culture, wielded against dissenters in an effort to replace the "marketplace of ideas" with an ideological monopoly.

According to the non-partisan Foundation for Individual Rights in Education, which conducts the leading annual study on university speech policies, nearly sixty percent of the 427 public colleges and universities surveyed have an unconstitutional speech code. *Spotlight on Speech Codes 2014: The State of Free Speech on Our Nation's Campuses* 2 (2014), http://issuu.com/thefireorg/docs/2014_speech_code_report_final (last visited Feb. 28, 2014). The unique nature of the public university campus, where students often live on campus or spend most of their time there, means that students are often subject to these policies virtually every waking moment. *McCauley v. Univ. of V.I.*, 618 F.3d 232, 247 (3d Cir. 2010). Nearly every on-campus human interaction is regulated by these codes, and colleges are expanding the scope of these policies to restrict even off-campus and internet speech.[2]

Universities often argue that their speech codes are nothing more than legislatively and judicially approved anti-harassment policies. But the terms of these policies are much broader and enable colleges to restrict much more than sexual or racial harassment. Typically, these codes prohibit what

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[2] *See* Darryn Cathryn Beckstrom, Comment, *Who's Looking at Your Facebook Profile? The Use of Student Conduct Codes to Censor College Students' Online Speech*, 45 WILLAMETTE L. REV. 261 (2008) (discussing the rise of public university student conduct codes that regulate student speech off-campus and on the internet).

they term "offensive," "intolerant," "biased," "sexist," "hateful," or "uncivil" speech.[3] The subjectivity built into these codes allows colleges to punish speech based on the motivations of the speaker or the subjective reaction of listeners. Most college harassment policies violate this Court's holding in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999), by allowing colleges to restrict harassment that is not severe, pervasive, or objectively offensive.

Left in place, these speech codes allow colleges to selectively prohibit unpopular speech based on the subjective whims of listeners or administrators. Thus, many students are left in free speech limbo as they question whether their speech will result in punishment. Consequently, they refrain from speaking out, leaving the "marketplace of ideas" to slowly disintegrate.[4]

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[3] For example, the University of Nevada-Las Vegas prohibits "disrespect for persons," and the University of Central Missouri prohibits impeding the "social experiences" of students. *Spotlight on Speech Codes* at 13. *See also, e.g., McCauley*, 618 F.3d at 248-49 (banning "offensive" speech); *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1016 (N.D. Cal. 2007) (requiring students to "be civil"); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 370 (M.D. Pa. 2003) (prohibiting "acts of intolerance").

[4] It should be noted that this insidious chilling effect still occurs even if the college never actually intends to enforce its overbroad speech code against anyone. It is not unreasonable to assume that if a college has a policy on its books, it will enforce it. *See Act Now to Stop War & End Racism Coalition (ANSWER) v. District of Columbia*, 589 F.3d 433, 435–36 (D.C. Cir. 2009) (It is a "'conventional background expectation' that the government will enforce the law.")

II. PRE-ENFORCEMENT FACIAL CHALLENGES TO SPEECH CODES ARE CRITICAL FOR PRESERVING FREEDOM IN HIGHER EDUCATION.

From the inception of speech codes in the 1980s, courts have uniformly struck them down as unconstitutional, when they are able to reach the merits. *See McCauley*, 618 F.3d at 250, 252; *DeJohn v. Temple Univ.*, 537 F.3d 301, 320 (3d Cir. 2008); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (Alito, J.); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1185 (6th Cir. 1995); *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 392-93 (4th Cir. 1993); *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1021 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 872 (N.D. Tex. 2004); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 373 (M.D. Pa. 2003); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575, 584 (S.D. Tex. 2003); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1181 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 866-67 (E.D. Mich. 1989); *Booher v. Bd. of Regents, N. Ky. Univ.*, No. 96-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 22, 1998); *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip op.).

This combination of circuit and district precedent should have ended speech codes at universities across the nation, yet they continue to exist at the

majority of schools.[5] This means that the courts must still remain available to students attempting to protect their free speech rights.

A. Clarification Is Needed to Preserve Pre-Enforcement Challenges in First Amendment Cases, Especially For College Students and Facial Challenges.

Recently, some courts have applied reasoning similar to that of the Sixth Circuit below and rejected college students' facial challenges because they were not actually punished under the challenged speech code. This functionally prevents judicial review of clearly unconstitutional policies.

For example, in *Lopez v. Candaele*, 630 F.3d 775 (9th Cir. 2010), the Ninth Circuit held that a college student had failed to show a credible threat of enforcement and thus lacked standing to challenge a community college's broad sexual harassment policy. The student, however, had been threatened with expulsion by his professor after he made comments supporting traditional marriage and about his Christian religious beliefs during a class assigned speech. *Id.* at 782-83. In a subsequent assignment, the student wrote about free speech rights, and his professor wrote a reminder that he had "agreed to

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[5] Just last year, the United States Department of Education and the Department of Justice recommended a speech code blueprint to public universities nationwide. Letter from Anurima Bhargava, U.S. Dep't of Justice, et al., to Royce Engstrom, President of Univ. of Mont., et al. (May 9, 2013), http://www.justice.gov/crt/about/edu/documents/montanaletter.pdf.

abide by the Student Code of Conduct." *Id*. at 783. The student alleged in his complaint that he wished to discuss the topics of marriage, sexuality, and gender on campus from a Christian perspective. He refrained from doing so due to fear of punishment, given the broad language of the sexual harassment policy coupled with his prior experience with his professor. *Id*. at 784.

The college's sexual harassment policy prohibited

> [u]nwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the workplace or in the educational setting, under any of the following conditions: ... (3) The conduct has the purpose or effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile or offensive work or educational environment.

Id. at 781.

The college's website went on to define sexual harassment as "generalized sexist statements, actions and behavior that convey insulting, intrusive or degrading attitudes/comments about women or men. *Id*. at 782. Examples include insulting remarks; intrusive comments about physical appearance; offensive written material such as graffiti, calendars, cartoons, emails; obscene gestures or sounds; sexual slurs, obscene jokes, humor about sex," and advised students that "[i]f

[you are] unsure if certain comments or behavior are offensive do not do it, do not say it." *Id.*

Even though the policy applied to the student and reasonably applied to the speech he wanted to engage in, the Ninth Circuit concluded that Lopez lacked standing to challenge the policy because it had not actually been applied to him. It drew this conclusion despite the fact that he had been threatened with punishment as a result of his speech. *Id*. at 788-90. The result was that unless he was willing to try to violate the policy in order to invoke punishment, the student was barred from challenging it.

This result fundamentally contradicts the Court's jurisprudence on facial challenges in the First Amendment context, which makes clear that plaintiffs challenging the overbreadth of a speech-related restriction are not required to actually risk punishment in order to have standing. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988); *see id*. at 393 ("the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution."); *see also Dombrowski,* 380 U.S. at 486 (recognizing the "sensitive nature of constitutionally protected expression," in permitting a pre-enforcement action involving the First Amendment).

Indeed, the high bar for standing in *Lopez* is contradictory to the underlying philosophy behind facial overbreadth challenges, where the potential harm to the plaintiff is secondary to the harm being

inflicted upon society as a whole. Facial challenges to overly broad statutes are

> allowed not primarily for the benefit of the litigant, but for the benefit of society—to prevent the statute from chilling the First Amendment rights of other parties not before the court. [The plaintiff's] ability to serve that function has nothing to do with whether or not its own First Amendment rights are at stake.

Sec'y of State of Md. v. Joseph H. Munson Co., Inc., 467 U.S. 947, 958 (1984).

Lopez is not an isolated case. In *Rock for Life—UMBC v. Hrabowski*, 411 Fed. Appx. 541, 548-49 (4th Cir. 2010), the Fourth Circuit held that a pro-life student group lacked standing to challenge an overbroad sexual harassment policy, even though a university official serving as both in-house counsel and director of the department charged with enforcing the policies at issue had labeled their speech "emotionally harassing," a term found in one of the overlapping policies on campus prohibiting harassment. These speech codes used similar language, shared the same goals (*i.e.*, protecting students' emotional sensibilities), and punished the same behavior and expression. Based on the official's concern about the student group's speech being "emotionally harassing," the university moved the group's planned event to an isolated area of campus on the morning of the event. *Id.* at 544-45.

The student plaintiffs testified that given the broad language of the policies, and the censorship relating to their speech on the basis of it being "emotionally harassing," they felt chilled in expressing their views relating to abortion on campus. *Id*. at 548. The Fourth Circuit, however, found that the students lacked standing to challenge the sexual harassment policy despite the chilling effect on their speech because they had not been punished under the policy, making their claim of an injury in fact too attenuated. *Id*. at 548-49.

Citing to *Lopez*, the Fourth Circuit stated that "To demonstrate a credible threat that a sexual harassment policy is likely to be enforced in the future, a history of threatened or actual enforcement of the policy against the plaintiff or other similarly situated parties will often suffice. *Id*. at 548 (citing *Lopez*, 630 F.3d at 786). Thus, a plaintiff must either be specifically threatened with punishment, punished, or present facts showing someone similarly situated was threatened or punished in order to have standing to bring an overbreadth challenge. That does not sound much like a "pre-enforcement" challenge, and does not take into account the fact that the *chill* caused by overbroad policies is what gives rise to the injury in fact—the plaintiffs specifically do not want to have to guess how far they can push the envelope between threatened and actual punishment, and therefore avoid speaking in ways that might reasonably invoke the policy.

The reasoning in both *Lopez* and *Rock for Life*, like the present case, overlooks the injurious effect

an investigation can have on a plaintiff, even if the investigation does not ultimately result in actual enforcement or punishment. *College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005, is a good illustration of the harm that can be done even without an actual punishment under a speech code, and the facts are similar to this case in that they involve an investigation without enforcement.

In *College Republicans*, a student group held an anti-terrorism rally in which they defaced the flags of Hezbollah and Hamas in a symbolic response to the protests of these groups against the United States which include the burning of the United States flag. *Id*. at 1007-08. Unbeknownst to the students, the Arabic writing on these flags includes the name of Allah. The rally drew vehement protest and afterward, one student submitted a written complaint about the event stating that the students had acted with "incivility" in violation of a provision of the student code which stated, "students are expected to be ... civil to one another and to others in the campus community." *Id.* at 1008. This complaint prompted the university to first conduct an informal inquiry into the incident, and a university official decided to initiate a formal investigation which lasted several months. *Id*. at 1010.

After this lengthy period of bureaucratic limbo, the investigative panel found no wrongdoing pursuant to university policies and no punishment was issued. *Id*. Yet the court still assumed the plaintiffs had standing to challenge the policies at

issue, even though there were no additional complaints pending against them and even though they were not actually punished or found guilty of any wrongdoing. *Id.* at 1011. The university's argument that the language of the policy was merely hortatory was not convincing—the fact that it was in the student code amidst language relating to enforcement, as well as the fact that the language was the basis for the (ultimately fruitless) investigation, meant that the "students would have a reasonable basis to fear that the University might in fact seek to discipline them if the University felt that their conduct was not 'civil.'" *Id.* at 1017. As a result, a preliminary injunction was issued against a clearly overbroad and unconstitutional policy that restricted free speech on SFSU's campus—exactly the result that should occur in order to protect our most precious freedoms. *Id.* at 1024.

But under the Sixth Circuit's logic below, even being investigated as the College Republicans were would not be enough for standing. According to the lower court's reasoning, the investigation does not create a reasonable fear of punishment if the university merely finds probable cause to start an investigation—only an actual finding of guilt is enough. This overlooks the fact that the investigation itself causes an unacceptable chilling effect on the exercise of First Amendment rights. *See, e.g., White v. Lee,* 227 F.3d 1214, 1228-29 (9th Cir. 2000) (finding government investigation of HUD residents caused chilling effect on speech, even though no speech was curtailed by officials and no charges were ultimately brought). Asking students to incur punishment to be eligible to challenge

unconstitutional speech policies is inconsistent with this Court's precedent and the First Amendment.

B. Clarity on the Standing Requirements for Pre-Enforcement Facial Challenges Is Needed Because of Inconsistent Application in the Lower Courts.

The need for the Court to clarify the standing doctrine for these types of cases is further illustrated by the fact that there has been arbitrary and inconsistent application of the standing and ripeness doctrines in the lower courts—even within the same circuits.

1. There is inconsistency among the circuits.

In contrast to *Lopez* and *Rock For Life*, as discussed above, other circuits have applied the doctrine correctly. These courts have held that a student subject to a policy that restricts his or her speech on campus has Article III standing to challenge that policy on its face, even if the policy had not been applied to the student. *See Zamecnik v. Indian Prairie Sch. Dist. #204*, 636 F.3d 874 (7th Cir. 2011); *McCauley*, 618 F.3d 232; *DeJohn*, 537 F.3d 301; *Saxe*, 240 F.3d 200; *see also Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 251 (3d Cir. 2002) (finding Article III standing to challenge harassment policy as overbroad even though student was threatened with enforcement under a different policy); *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992) (professor had standing to challenge ad hoc committee's actions investigating

extent of his free speech rights because they were implied threats and chilled the professor's speech, even though the committee had no power to actually punish him and had not threatened to); *Trotman v. Bd. of Trustees of Lincoln Univ.*, 635 F.2d 216, 228-29 (3d Cir. 1980) (finding professors who received letters implicitly, but not overtly, threatening discipline had Article III standing to sue university for chilling speech). This means that a student's right to facially challenge a speech code is dependent upon their geographic location, which warrants the Court's clarification on this point.

2. There are inconsistencies within circuits.

Differences in the interpretation of standing doctrine are even found within circuits. For instance, the Ninth Circuit's standing analysis in *Lopez* contradicted its own precedent in *Arizona Right to Life Political Action Committee v. Bayless*, 320 F.3d 1002 (9th Cir. 2003). In *Bayless*, the Ninth Circuit held that a right-to-life political action committee, whose primary purpose was to present political advertising, had standing to challenge a state election statute that placed limitations on political advertising within ten days before an election, even though there was no indication that the statute would be enforced against it. *Id.* at 1006. The plaintiff was able to describe the specific speech it refrained from engaging in because the law was specific about the prohibited activity.

The *Lopez* panel attempted to distinguish *Bayless* by arguing that the student simply wasn't specific

enough about the speech he wanted to engage in that would violate the policy, since he neglected to give full details about "when, to whom, where, or under what circumstances' he will actually give a speech that would violate the sexual harassment policy." *Lopez*, 630 F.3d at 787 (internal quotation omitted).

But when dealing with a vague, overbroad policy restricting speech based on its content, such as a policy restricting "offensive" speech, plaintiffs cannot know exactly what speech might be punished under the policy. That is precisely why such policies are so pernicious—the chilling effect is substantial and far broader than any legitimate scope of the policy. A vague, overbroad policy causes people to self-censor far more speech than a policy with specificity. Thus, specificity did not justify the difference in outcomes between *Lopez* and *Bayless*. As it did in *Bayless*, the Ninth Circuit should have found Lopez had standing even though he had not been punished under the policy. In fact, Lopez had an even stronger case for standing because there was not even a general threat of sanction against the plaintiff in *Bayless*, whereas Lopez had been threatened with expulsion by his professor.

In *Rock For Life*, the Fourth Circuit contradicted its own precedent when it applied reasoning similar to *Lopez*. It had previously found a student had standing to facially challenge a policy that had never been applied to him. *See Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 257 (4th Cir. 2003) (holding middle school student had standing to facially challenge dress code that was never applied to him because he was subject to it at all times on campus).

In this case, the Sixth Circuit likewise failed to follow its own precedent. It rejected the plaintiffs' claims based on ripeness in part because they were never actually sanctioned under the law, but in *Dambrot v. Central Michigan University*, 55 F.3d 1177, the Sixth Circuit held that students had standing to challenge a speech code that was not applied to them and that they were not threatened with. In *Dambrot,* student members of the basketball team challenged the facial overbreadth of the university's policy on racial and ethnic harassment after the university fired their coach for using a racial slur in the locker room. *Id.* at 1182. The policy contained language similar to the speech code in *Lopez*. *See id.* (defining harassment as "any intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment"). The university never threatened enforcement of the policy against the students, nor did the students plead that they intended to violate the policy. *Id.* at 1182-83. They only pleaded that they occasionally used the same word that resulted in the coach's dismissal and feared similar punishment. *Id.* at 1180.

The *Dambrot* court affirmed the district court's finding that the students had Article III standing facially to challenge the harassment policy because the "overbreadth doctrine . . . allows parties not yet affected by a statute to bring actions under the First Amendment based on a belief that a certain statute is so broad as to 'chill' the exercise of free speech and expression." *Id.* at 1182.

It found the lack of actual enforcement against the plaintiff students to be irrelevant. The students had Article III standing because the "text of the policy" stated that "language or writing, intentional or unintentional, regardless of political value, can be prohibited upon the initiative of the university." *Id.* at 1183. The mere existence of such language presented a "realistic danger" of enforcement. *Id.*

The lack of consistency among (and within) circuits demonstrates the need for the Court to reiterate that litigants like college students have Article III standing to facially challenge overbroad speech policies.

CONCLUSION

Requiring students to demonstrate actual enforcement of an overbroad or speech-restrictive policy to establish an injury-in-fact sufficient for a facial challenge effectively bars courts from confronting the merits of these unconstitutional policies. Their chilling effect is unchecked unless the rare student is willing to gamble with their academic record (and their future career) to raise a challenge. Thus, it is critical that in examining this case, the Court should explicitly allow for pre-enforcement facial challenges to restrictive speech policies in a way that would enable students to challenge speech codes without risking punishment.

Respectfully submitted,

DAVID A. CORTMAN
Counsel of Record
KEVIN H. THERIOT
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd. NE, Ste. D-1100
Lawrenceville, Georgia 30043
(770) 339-0774
dcortman@alliancedefendingfreedom.org

HEATHER GEBELIN HACKER
DAVID J. HACKER
ALLIANCE DEFENDING FREEDOM
101 Parkshore Drive, Ste. 100
Folsom, California 95630
(916) 932-2850

Counsel for Amicus Curiae

March 3, 2014