21-12583

United States Court of Appeals

for the

Eleventh Circuit

SPEECH FIRST, INC.,

Plaintiff/Appellant,

– v. –

ALEXANDER CARTWRIGHT, in his individual capacity and his official capacity as President of the University of Central Florida,

Defendant/Appellee,

DANA JUNTENEN, in her official capacity as Director of the University of Central Florida Office of Student Rights and Responsibilities and Assistant Dean of Students, *et al.*,

Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
CASE NO: 6:21-cv-00313-GAP-GJK
(Hon. Gregory A. Presnell)

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following listed persons and entities as described in 11th Cir. R. 26.1-2(a) have an interest in the outcome of this case, and were not included in the Certificates of Interested Persons in briefs that were previously filed per 11th Cir. R. 26.1-2(b).

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2. The Foundation for Individual Rights in Education
3. London, Ronald

The Foundation for Individual Rights in Education (FIRE) is a nonprofit corporation exempt from income tax under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). FIRE does not have a parent corporation, and no publicly held company has a 10 percent or greater ownership interest in it.

Dated: September 15, 2021

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Other Authorities:

Statutes & Rules:

INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending civil liberties at our nation's colleges and universities. FIRE believes that to best prepare students for success in our democracy, the law must remain unequivocally on the side of robust free-speech protections for students and faculty. Since 1999, FIRE has successfully defended the rights of tens of thousands of students at institutions nationwide through public advocacy, targeted litigation, and participation as *amicus curiae* in cases implicating student rights, like that presently before the Court. *See, e.g.*, Brief for FIRE as *Amicus Curiae* Supporting Plaintiffs-Appellants, *Uzuegbunam v. Preczewski*, 781 F. App'x 824 (11th Cir. 2019), *rev'd*, 141 S. Ct. 792 (2021); Brief for FIRE, et al. as *Amici Curiae* Supporting Plaintiffs-Appellants, *Doe v. Valencia Coll. Bd. of Trs.*, 838 F.3d 1207 (11th Cir. 2016); Brief for FIRE as *Amicus Curiae* Supporting Plaintiff-Appellee, *Barnes v. Zaccari*, 669 F.3d 1295 (11th Cir. 2012). *See also* Br. of Appellant Speech First, 2–6, 7–8.

[1] Because Defendant-Appellee did not consent to its filing, this *amicus curiae* brief is submitted with an accompanying motion for leave under Fed. R. App. P. 29(a)(3). Pursuant to Fed. R. App. P. 29(a)(4)(E), counsel for *amicus* states that no counsel for a party authored this brief in whole or part and no person made a monetary contribution to its preparation or submission, other than *amicus*, its members, or its counsel.

STATEMENT OF THE ISSUES

1. Whether the district court erred by applying the Supreme Court's standard for restrictions on the speech of grade school students from *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), in analyzing the constitutionality of restrictions on speech of public university students.
2. Whether the district court erred by upholding the constitutionality of a public university harassment policy that failed to track the definition of harassment the Supreme Court established in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).

SUMMARY OF ARGUMENT

The district court's decision confuses the First Amendment rights of public college students with those of grade school children and misconstrues applicable doctrine governing discriminatory harassment. *Amicus* FIRE's extensive experience defending campus speech rights makes clear that if allowed to stand, the ruling will threaten expressive rights on campus within the Eleventh Circuit, and nationwide.

In assessing the constitutionality of restrictions on student speech at the University of Central Florida ("UCF"), the district court centered its analysis on *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the Supreme Court's landmark decision governing student speech restrictions in the K-12 setting. It did so in error. Decades of First Amendment jurisprudence make clear that while public college students possess full First Amendment rights, the speech of public grade school students under the supervision of school authorities is subject to certain limits based on administrators' *in loco parentis* status and other factors absent from collegiate settings.

Despite this distinction, the district court's analysis of UCF's policies rested on the incorrect premise that "[w]hen a plaintiff challenges a public university's policies the question is whether those policies simply address unprotected conduct under *Tinker* or whether they also reach constitutionally protected conduct." *Speech First v. Cartwright*, No. 6:21-cv-313-GAP-GJK, 2021 U.S. Dist. LEXIS 146466, at

*14 (M.D. Fla. July 29, 2021). As made clear in the Supreme Court's most recent opportunity to revisit *Tinker*, speech restrictions applicable in the grade school context "raise very different questions" when applied to public university students. *Mahanoy Area School District v. B.L.*, 141 S. Ct. 2038, 2049 n.2 (2021) (Alito, J., concurring). Analyzing public university policies that restrict what adult college students may say through the lens of a ruling crafted for grade schoolers under administrative supervision flouts both well-settled law and common sense.

Compounding the problem posed by mismatching grade school standards with university speech codes, the district court's reliance on *Tinker* also led its analysis of UCF's harassment policy astray. The Supreme Court defined actionable discriminatory harassment in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), striking a careful balance between the institutional obligations to honor First Amendment rights and complying with federal anti-discrimination law. The *Davis* standard proscribes conduct that is "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Id*. at 650.

University harassment policies that precisely track *Davis* pass constitutional muster. Those that do not—like UCF's policy, which instead prohibits conduct "so severe or pervasive that it unreasonably interferes with, limits, deprives, or alters the terms or conditions of education"—threaten speech protected by the First

Amendment. Rather than assess UCF's policy against longstanding precedent governing public colleges and *Davis*' constitutional requirements, the district court again mistakenly turned to *Tinker*—and, in the process, purported to discover a new student "right" to be free from encountering even speech that falls short of *Davis*' standard.

Permitting discriminatory harassment policies to regulate expression beyond *Davis*' scope chills speech exactly where it should be most free: our colleges and universities. The harm of silencing speech "is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995). Despite a plethora of decisions striking down unconstitutional harassment policies at institutions nationwide, too many colleges and universities still maintain policies that fail to track the constitutional definition the Supreme Court established in *Davis*. *Amicus* FIRE's decades of experience defending student and faculty rights demonstrates that overly broad harassment policies are routinely abused by colleges and universities to punish protected expression.

This Court should make clear that grade school standards do not dictate what public college students may say, and that harassment policies deviating from *Davis*

do not pass constitutional muster. To protect First Amendment rights at UCF and on campuses nationwide, the judgment below must be reversed.

ARGUMENT

I. *Tinker* and its progeny should not govern the First Amendment rights of public college students.

The law is clear: Public college students possess full First Amendment rights, even if grade school students under supervision of school authorities may face certain restrictions. The district court nevertheless analyzed Speech First's constitutional challenge to UCF's harassment policy under *Tinker*, the Supreme Court's foundational decision on the limits on speech allowable under the First Amendment for grade school children supervised by school authorities. Before evaluating Speech First's claim, the district court declared that it "must first consider whether the Policy, 'when read as a whole, covers conduct that *Tinker* allows schools to regulate.'" *Speech First*, 2021 U.S. Dist. LEXIS 146466, at *15 (quoting *Doe v. Valencia Coll.*, 903 F.3d at 1232). Such analysis of college policies by reference to K-12 jurisprudence defies both Supreme Court precedent and common sense. Given the intervening decision this Term by the Supreme Court in *Mahanoy Area School District v. B.L.*, 141 S. Ct. 2038, which further clarified the context-specific justifications for administrative authority over K-12 student speech, this Court must revisit its prior application of grade school standards to college students. *Tinker* and its progeny should have no direct application and little if any purchase on the public

college campus, where adult 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." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

A. Public college students possess full First Amendment rights.

For decades, it has been well-settled that students attending state institutions like UCF possess First Amendment expressive rights coextensive with those of the public at large. *See, e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) ("With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."); *Healy v. James*, 408 U.S. 169, 180 (1972) ("[P]recedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."). For students and faculty, our public universities serve as the quintessential "marketplace of ideas." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). Accordingly, as this Court has recognized, the dangers posed by restricting speech "are *heightened* in the university setting." *Gay Lesbian Bisexual All. v. Pryor*, 110 F.3d 1543, 1550 (11th Cir. 1997). Because "state-funded universities . . . are government property, 'not enclaves immune from the sweep of the First Amendment,'" they must respect student First Amendment rights. *Bloedorn v. Grube*, 631 F.3d 1218, 1231 (11th Cir. 2011) (quoting *Healy*, 408 U.S. at 180).

B. Public grade school students under the supervision of school authorities face limitations on their First Amendment rights.

Tinker and its progeny make clear, in contrast, that public grade school students under the supervision of school authorities possess more limited expressive rights. The Supreme Court has permitted restrictions on K-12 student speakers at school or in school-controlled contexts that would be prohibited by the First Amendment anywhere else—including public college campuses. *See Morse v. Frederick*, 551 U.S. 393, 397 (2007) (grade school may punish speech at school-sponsored event "that can reasonably be regarded as encouraging illegal drug use"); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (grade school may control content of school-sponsored student speech if "reasonably related to legitimate pedagogical concerns"); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (grade school may punish student for "offensively lewd," "indecent," or "vulgar" speech in school); *Tinker*, 393 U.S. at 513 (grade school student speech may be restricted if it materially and substantially disrupts the work and discipline of the school, officials reasonably forecast such disruption, or it "inva[des] of the rights of others"); *cf. Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2046 (grade school student speech outside school's supervision "diminish[es] the strength of the unique educational characteristics that might call for special First Amendment leeway").

While the Supreme Court has emphasized the importance of protecting the First Amendment rights of public college students, *Healy*, 408 U.S. at 180, it has permitted restrictions on grade school student speech that would be impermissible on a public college campus. For example, in *Fraser*, the Court held the First Amendment offered no protection against punishment for a student who had "deliberately used sexual innuendo" while speaking to his peers during a public high school assembly. 478 U.S. at 678. "Surely it is a highly appropriate function of public school education," the Court wrote, "to prohibit the use of vulgar and offensive terms in public discourse." *Id*. at 683.

The Court's conclusion in *Fraser* contrasts starkly with its holding a decade earlier in *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973). In *Papish*, the Court overturned the expulsion of a graduate student who had distributed a student publication containing profanity and a cartoon depicting policemen sexually assaulting the Statue of Liberty and Lady Justice, holding that "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.'" *Id*. at 670.

The contrast between the Court's treatment of the rights of the high schooler in *Fraser* and the graduate student in *Papish* neatly captures the difference between the two lines of jurisprudence. As the Court remarked in *Fraser*: "It does not follow

. . . that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school." 478 U.S at 682. The inverse is equally true: It does not follow that simply because offensive speech may be restricted amongst children in a public school, the same restrictions are constitutionally permissible when applied to adult students attending a public college. The robust expressive rights possessed by public college students necessarily exceed the First Amendment rights retained by public grade school students under supervision of school authorities, and require separate analytical approaches.

C. Conflating the speech rights of grade school students with public college students is at odds with both well-settled law and common sense.

Imposing speech standards crafted to govern schoolchildren upon the public college campus makes little sense because the jurisprudential rationales for grade school speech restrictions are inapplicable to adult college students. It is true a student's First Amendment rights "must be analyzed 'in light of the special characteristics of the school environment.'" *Widmar*, 454 U.S. at 267 n.5 (quoting *Tinker*, 393 U.S. at 506). But those "special characteristics" differ sharply from grade school to college, and one size does not fit all.

First, the educational missions of public grade schools and public colleges fundamentally differ. Our public grade schools are charged with "teaching students the boundaries of socially appropriate behavior." *Fraser*, 478 U.S. at 681. Public universities, in contrast, serve as "one of the vital centers for the Nation's intellectual life," the locus of "a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger*, 515 U.S. at 835, 836. Whereas the former's purpose allows some degree of speech regulation, the latter cannot function without full freedom of expression. "To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." *Sweezy*, 354 U.S. at 250.

Second, *Tinker*'s recognition of administrative authority to regulate student speech within "the special characteristics of the school environment" relies on the fact that in the grade school context, administrators stand *in loco parentis*. *Tinker*, 393 U.S. at 506; *accord Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2047 (high schooler's social media post protected by First Amendment in significant part because student "spoke under circumstances where the school did not stand *in loco parentis*"). School administrators are granted leeway to regulate speech within their walls because of their "custodial and tutelary responsibility" for students. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995). When students participate in grade school activities, administrators "act[] *in loco parentis*, to protect children," *Fraser*,

478 U.S. at 684, and facilitate "a supervised learning experience." *Hazelwood Sch. Dist.*, 484 U.S. at 270. Given these responsibilities, *Tinker* permits grade school administrators a freer hand to regulate otherwise protected speech that causes or is reasonably likely to cause "disturbances or disorders on the school premises." *Tinker*, 393 U.S. at 514. These considerations are simply not present with adult college students on public college campuses.[2]

Third, speech restrictions that may be necessary to keep order amongst grade schoolers make little sense in college given the disparity between the age and maturity of the respective cohorts. "University students are, of course, young adults," and reasonably may be presumed "less impressionable than younger students." *Widmar*, 454 U.S. at 274 n.14. The Supreme Court has allowed restrictions of student speech within grade schools because K-12 students are a "captive audience" due to mandatory attendance, *Fraser*, 478 U.S. at 684, a justification inapplicable outside the hallways, classrooms, and school-sponsored activities of public grade schools. The Court has even noted that if the high school student in *Fraser* who delivered a sexually suggestive speech at a high school

[2] Public colleges and universities are not without power to address disruptive student speech. *See, e.g.*, *Healy*, 408 U.S. at 192–93. ("Just as in the community at large, reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related activities must be respected."). But they must do so consistently with existing First Amendment standards, satisfied only when a public college's "line between permissible speech and impermissible conduct tracks the constitutional requirement." *Id*. at 189.

assembly had instead "delivered the same speech in a public forum outside the school context, it would have been protected." *See Morse*, 551 U.S. at 405. The "captive audience" justification does not apply to the adult college students attending voluntarily, and is particularly inapplicable to public college campuses—a context that, "at least for its students, possesses many of the characteristics of a public forum." *Widmar*, 454 U.S. at 267 n.5.

Fourth, many public college students live on campus. Restrictions on their speech thus follow them at all times. As a result, the "concept of the 'schoolhouse gate,' and the idea that students may lose some aspects of their First Amendment right to freedom of speech while in school, does not translate well to an environment where the student is constantly within the confines of the schoolhouse." *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 247 (3d Cir. 2010) (internal citation omitted). Even in the grade school context, the Supreme Court recently cautioned in *Mahanoy Area School District*—which reinforces the points enumerated above—that when administrators assert omnipresent authority over "all the speech a student utters during the full 24-hour day," reviewing courts "must be more skeptical." 141 S. Ct. at 2046–48; *id.* at 2049–53 (Alito, J., concurring). Those concerns are only heightened when applied to public college students.

D. This Court should explicitly distinguish grade school and college speech standards.

This Court and others have previously imported K-12 speech standards into cases involving public university students' First Amendment rights. *See, e.g.*, *Valencia Coll.*, 903 F.3d at 1230; *Ward v. Polite*, 667 F.3d 727, 733 (6th Cir. 2012); *Hosty v. Carter*, 412 F.3d 731, 735 (7th Cir. 2005). But given the factors described above, reliance on grade school cases in the college context is misplaced. As Justice Alito recently reminded us, speech restrictions that may be constitutionally permissible in the grade school context "raise very different questions" when applied to public university students for "several reasons, including the age, independence, and living arrangements of such students," and should not be understood to apply in the public university context. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2049 n.2 (Alito, J., concurring).

The detailed discussion in *Mahanoy Area School District* of factors permitting broader powers for K-12 administrators to regulate grade school students' speech—and the concurrence's acknowledgment of their absence in the collegiate setting—suggests this Court should revisit its prior reliance on grade school standards in First Amendment cases involving public college students. This Court "may decline to follow a decision of a prior panel if such action is necessary in order to give full effect to a decision of the United States Supreme Court." *United States v. Giltner*, 972 F.2d 1563, 1566 (11th Cir.1992) (on rehearing). Given the decision in *Mahanoy*

Area School District, this Court should take the opportunity presented by this case to explicitly recognize, as have other courts, the distinction between grade school and college speech standards.

As those courts have concluded, "for purposes of First Amendment analysis there are very important differences between primary and secondary schools, on the one hand, and colleges and universities, on the other." *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1015 (N.D. Cal. 2007). For example, in *DeJohn v. Temple University*, the Third Circuit recognized college administrators "are granted *less leeway* in regulating student speech than are public elementary or high school administrators." 537 F.3d 301, 316 (3d Cir. 2008). Likewise, in *McCauley*, the Third Circuit explicitly declined to regulate adult college student speech "based solely on rationales propounded specifically for the restriction of speech in public elementary and high schools," in part because "[p]ublic university administrators, officials, and professors do not hold the same power over students" as their grade school counterparts. 618 F.3d at 242, 244.

These decisions correctly recognize the developmental, pedagogical, and legal distance between the schoolyard and public college campuses. Just as "the government may not 'reduce the adult population . . . to reading only what is fit for children,'" neither should courts bind adult college students to rulings intended for minors a decade or more their junior. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S.

60, 73–74 (1983) (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)). Following *Mahanoy Area School District*, the circuit split over use of grade school standards in campus speech cases is untenable.

Perhaps recognizing the incongruity of treating adult college students and grade school children alike, even the district court here acknowledged in a footnote that "universities and colleges have less latitude to regulate the speech and conduct of their adult students." *Speech First*, 2021 U.S. Dist. LEXIS 146466, at *14 n.9. But it incorrectly insisted "*Tinker* still applies to them," and centered its analysis of UCF's policies on *Tinker*. *Id*. In doing so, the court did not even mention *Mahanoy Area School District*, despite the case being decided over a month before the court ruled, and despite its plain elucidation of constitutionally significant factors found in grade school that are absent in post-secondary education.

Ultimately, framing "the question" as whether "a public university's policies . . . simply address unprotected conduct under *Tinker* or . . . also reach constitutionally protected conduct," *id*. at *14, mistakenly assumes all expression that may lawfully be regulated in grade school under *Tinker* may also be lawfully regulated in the public university context. This assumption, at odds with both decades of First Amendment jurisprudence and common sense, is incorrect—and it led the district court's analysis of UCF's harassment policy astray.

II. *Davis* provides the constitutional standard for discriminatory harassment policies.

In *Davis v. Monroe County Board of Education*, 526 U.S. 629, the Supreme Court established a definition of discriminatory harassment for educational contexts that strikes a constitutional balance between the First Amendment and federal anti-discrimination statutes like Title IX. To comply with the First Amendment, public colleges must employ *Davis*' definition in their harassment policies. Those that do not—like UCF here—impermissibly regulate protected speech. Because public college students possess full First Amendment rights, courts have consistently struck down vague or broad harassment policies in a nearly unbroken line of precedent stretching back decades. Instead of following their lead, the district court incorrectly analyzed UCF's policy under *Tinker*, effectively finding a purported "right" to be free from speech that does not constitute harassment under *Davis*. Because no such right exists, the district court's ruling was in error.

A. The *Davis* standard strikes the proper constitutional balance between protecting expression and prohibiting actionable harassment.

Public colleges and universities are legally obligated under federal anti-discrimination statutes to address discriminatory harassment on their campuses.[3]

[3] "Discrimination on the basis of race, color, and national origin is prohibited by Title VI of the Civil Rights Act of 1964; sex discrimination is prohibited by Title IX of the Education Amendments of 1972; discrimination on the basis of disability is prohibited by Section 504 of the Rehabilitation Act of 1973; and age

They must also honor student First Amendment rights. In *Davis*, the Supreme Court defined student-on-student harassment in the educational context as discriminatory conduct "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." 526 U.S. at 650. To be sure, the Court addressed institutional liability for third-party harassment, but first—and fundamentally—it "define[d] the scope of the behavior that Title IX proscribes" in a constitutionally permissible manner. *Id*. at 639. In crafting the *Davis* standard with the precision the First Amendment requires, the Court struck a careful balance between protecting student speech and prohibiting actionable harassment.

The *Davis* Court specifically addressed concerns that, if it left undefined educational institutions' responsibility to address harassment, schools would use that obligation to justify censorship. In dissent, Justice Kennedy warned of "campus speech codes that, in the name of preventing a hostile educational environment, may infringe students' First Amendment rights." *Davis*, 526 U.S. at 682 (Kennedy, J.,

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dissenting). Justice Kennedy further worried that "a student's claim that the school should remedy a sexually hostile environment will conflict with the alleged harasser's claim that his speech, even if offensive, is protected by the First Amendment." *Id*. at 683. Speaking precisely to these concerns, Justice O'Connor assured the dissenting Justices that it would be "entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims." *Id.* at 649. The majority's exacting standard was designed to impose what Justice O'Connor characterized as "very real limitations" on liability in part to protect student speech rights. *Id*. at 652.

As the only Supreme Court ruling defining discriminatory harassment in the educational context, the *Davis* standard—no more and no less—is the only permissible standard for public university discrimination policies.[4] Courts thus use it to evaluate the constitutionality of campus policies. *See*, *e.g.*, *DeJohn*, 537 F.3d at

[4] Though *Davis* concerned Title IX's prohibition on sex-based discrimination, courts regularly apply it to cases involving other federal anti-discrimination statutes, such as Title VI, which bars discrimination based on race, color, or national origin. *See, e.g.*, *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 665 n.10 (2d Cir. 2012) (applying *Davis* to Title VI claim and observing that "[a]lthough the harassment in *Davis*, and the 'deliberate indifference' standard outlined by the Supreme Court, arose under Title IX, we have endorsed the *Davis* framework . . . outside the scope of Title IX"); *Bryant v. Indep. Sch. Dist. No. I-38 of Garvin Cnty.*, 334 F.3d 928, 934 (10th Cir. 2003) (applying *Davis* to a Title VI student-on-student harassment claim); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 n.5 (3d Cir. 2001) (observing that *Davis* "applies equally" to harassment under Title VI or other federal anti-discrimination statutes).

319 (citing failure to fulfill *Davis*' objectivity requirement in invalidating sexual harassment policy). Courts also have effectively protected students' expressive rights by applying the standard.[5] Significantly, the sexual harassment definition required by current Title IX regulations tracks *Davis* exactly in order to comply with the First Amendment.[6] Regulating speech beyond *Davis*' boundary as "harassment," as does UCF's policy, is unconstitutional.

Defining peer-on-peer harassment as no more or less than the *Davis* standard ensures institutions meet their obligations to address discriminatory harassment while also protecting free speech. Institutions with harassment policies that precisely track *Davis* constitutionally fulfill both requirements. Those that do not—like UCF, which maintains a policy that stretches beyond *Davis* to instead prohibit conduct "so

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[5] *See, e.g.*, *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F. 3d 293 (3d Cir. 2013) (holding school district could not invoke Title IX to prohibit students from wearing "I <3 boobies" bracelets intended to increase breast cancer awareness); *Nungesser v. Columbia Univ.*, 244 F. Supp. 3d 345, 366–67 (S.D.N.Y. 2017) (holding student accused of rape could not invoke Title IX to "censor the use of the terms 'rapist' and 'rape'" by the alleged victim of the crime on the grounds that the accusation bred an environment of pervasive and severe sexual harassment for the accused student); *cf. Felber v. Yudof*, 851 F. Supp. 2d 1182, 1188 (N.D. Cal. 2011) (dismissing Title VI claim because students' criticisms of Israel and support for Hamas and Hezbollah were pure political speech and expressive conduct that did not suffice to create a hostile environment).

[6] "Including the *Davis* definition of sexual harassment for Title IX purposes as 'severe, pervasive, and objectively offensive' conduct that effectively denies a person equal educational access helps ensure that Title IX is enforced consistent with the First Amendment." Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30033 (May 19, 2020).

severe or pervasive that it unreasonably interferes with, limits, deprives, or alters the terms or conditions of education"—regulate speech protected by the First Amendment.

B. The district court discounted *Davis* and misapplied *Tinker* in improperly analyzing the university's harassment policy.

Because public college students possess full First Amendment rights, courts nationwide have consistently invalidated overly broad harassment policies at public colleges and universities.[7] In reviewing UCF's harassment policy, the district court should have followed their lead. Instead, it incorrectly relied on *Tinker*'s recitation that, in the grade school context, expression that "materially disrupts classwork or involves substantial disorder or *invasion of the rights of others* is . . . not immunized

[7] *See, e.g.*, *DeJohn*, 537 F.3d at 319 (invalidating sexual harassment policy on First Amendment grounds and holding that because policy failed to require that speech in question "objectively" created a hostile environment, it provided "no shelter for core protected speech"); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (declaring discriminatory harassment policy facially unconstitutional); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (finding university sexual harassment policy unconstitutionally overbroad); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of harassment policy due to overbreadth); *Booher v. Bd. of Regents*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998) (finding university sexual harassment policy void for vagueness and overbreadth); *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip op.) (declaring "harassment by personal vilification" policy unconstitutional); *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (declaring racial and discriminatory harassment policy facially unconstitutional); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (enjoining enforcement of unconstitutional discriminatory harassment policy).

by the constitutional guarantee of freedom of speech." 393 U.S. at 513 (emphasis added). This led the court to uphold UCF's harassment policy as "clearly aimed at regulating unprotected conduct under *Tinker*—conduct that unreasonably invades the rights of other students." *Speech First*, 2021 U.S. Dist. LEXIS 146466, at *16. That holding constitutes reversible error.

The district court did not specify which "right" UCF's policy protects from being "invaded." But presuming it meant a student's right to equal access to educational opportunities under federal anti-discrimination laws like Title IX, its conclusion was misplaced. *Davis* "define[s] the scope of the behavior that Title IX proscribes," 526 U.S. at 639—and, consequently, the speech that Title IX cannot constitutionally prohibit. By failing to track *Davis*, UCF's policy regulates expression beyond that boundary. Public university students do not have a "right" to be free from encountering pure speech that, however disagreeable, does not rise to the level of discriminatory harassment under *Davis*.[8]

[8] Other courts have questioned *Davis*'s application to harassment allegations that target pure speech. *See Easton Area Sch. Dist.*, 725 F.3d at 323 n.2 ("Even . . . under Title IX, the School District has not offered any explanation or evidence of how passively wearing the 'I ♥ boobies! (KEEP A BREAST)' bracelets would create such a severe and pervasive environment in the Middle School."); *see also Speech First, Inc. v. Fenves*, 979 F.3d 319, 337 n.16 (5th Cir. 2020) ("Whether *Davis* may constitutionally support purely verbal harassment claims, much less speech-related proscriptions outside Title IX protected categories has not been decided by the Supreme Court or this court and seems self-evidently dubious.").

Because its policy is broader than *Davis*' definition of discriminatory harassment, UCF necessarily regulates expression that does not invade any other student's rights. "[T]he precise scope of Tinker's 'interference with the rights of others' language is unclear," but cannot be read to encompass a right to avoid speech protected by the First Amendment. *Saxe*, 240 F.3d at 217 (quoting *Tinker*, 393 U.S. at 504). Even under *Tinker*'s framework—misapplied by the district court to the public college context—UCF's policy reaches a substantial amount of speech protected by the First Amendment and is thus overly broad.

As this Court has observed, "[a] good rule of thumb for reading [Supreme Court] decisions is that what they say and what they mean are one and the same." *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 888 F.3d 1163, 1177 (11th Cir. 2018) (quoting *Mathis v. United States*, 136 S. Ct. 2243, 2254 (2016)). In *Davis*, the Court said what it meant and meant what it said: Only conduct "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school" may be constitutionally prohibited as harassment. 526 U.S. at 650. By deviating from the *Davis* standard—substituting "or" for "and," and prohibiting not just conduct that deprives another student of access to educational opportunities or benefits, but simply "interferes with" or "alters" the "terms or conditions of education"—UCF's harassment policy reaches speech beyond *Davis*' scope and is overly broad.

III. Allowing the district court's ruling to stand will erode student and faculty First Amendment rights nationwide.

Federal courts have consistently invalidated on First Amendment grounds flawed university harassment policies for over two decades, in a "consistent line of cases that have uniformly found campus speech codes unconstitutionally overbroad or vague." *Fenves*, 979 F.3d at 338–39. Yet *amicus* FIRE's research demonstrates that unconstitutional definitions of harassment remain widespread—and are abused to silence protected expression. To ensure college students nationwide may exercise First Amendment rights without interference, this Court should reverse the decision below.

A. *Amicus* FIRE's research indicates colleges and universities nationwide continue to maintain overly broad harassment policies.

Despite the Supreme Court's clear guidance, *amicus* FIRE's research indicates universities continue to maintain harassment policies falling far short of *Davis*' standard and prohibiting or threatening speech the First Amendment protects. For example:

- Portland State University's policy defines sexual harassment in part as "verbal comments, graphic or written statements" that "interfere[] with an individual's work or educational experience and create[] an intimidating, hostile, or offensive working environment," before labeling "sexual or derogatory comments" and "sending letters, notes, cartoons, emails, text or audio messages of a sexually suggestive nature" as examples of "inappropriate behavior."[9]

[9] *Prohibited Discrimination & Harassment Policy*, PORTLAND ST. UNIV. (Sept. 28, 2017), docs.google.com/document/d/e/2PACX-

- Indiana State University explains that prohibited harassment can be expressed or implied, "creating and/or inciting a foreseeable hostile environment."[10]
- Union College defines harassment as "aggressive and hostile" acts "which are intended to humiliate, mentally, or physically injure or intimidate, and/or control" others.[11]

Of the 478 sets of college and university policies FIRE reviewed in 2020, 432 included harassment policies that threaten expression that is or would be protected by the First Amendment.[12] Unfortunately, FIRE's work demonstrates not only the widespread existence of illiberal harassment policies, but also their routine abuse.

B. *Amicus* FIRE's experience demonstrates that overly broad harassment policies are routinely used to silence student and faculty speech.

Public and private institutions nationwide regularly investigate and punish protected speech that does not meet the *Davis* standard. For example, 18 students, all members of Syracuse University's Theta Tau fraternity, were removed from classes after a private video of them participating in satirical skits *mocking* bigoted beliefs was leaked to the public.[13] A female student at the University of Oregon faced

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[10] *Misconduct against Persons*, IND. ST. UNIV. (July 31, 2020), indstate.edu/code-of-student-conduct/prohibited-conduct/against-persons.

[11] *Union College Student Handbook*, UNION COLL. (Aug. 2021), https://www.union.edu/sites/default/files/community-standards/202108/studenthandbook2021-202282021.pdf.

[12] *Spotlight Database*, FIRE, https://www.thefire.org/resources/spotlight (last visited Sept. 9, 2021).

[13] Astonishingly, campus administrators did not recognize the skits' satirical nature

five misconduct charges, including an allegation of "harassment," for yelling "I hit it first" at a passing couple she did not know.[14] And two Babson University students were charged with harassment for waving a Trump flag on Wellesley University's campus the day after the 2016 presidential election.[15]

Further examples demonstrate the long-standing nature of the threat. Starting in April 2013, the University of Alaska Fairbanks' student newspaper endured a 10-month investigation because a professor repeatedly claimed two articles constituted sexual harassment prohibited by Title IX.[16] One was an April Fool's Day article about a "building in the shape of a vagina," the other, a factual report about the public "UAF Confessions" Facebook page.[17] Student journalists told FIRE this baseless

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and instead summarily suspended the students, citing Syracuse's overbroad anti-harassment policy. Lauren del Valle, *Their fraternity is expelled. They're removed from classes. And another disturbing Syracuse frat video surfaces*, CNN (Apr. 23, 2018), https://www.cnn.com/2018/04/23/us/new-video-syracuse-university-theta-thau-frat/index.html.

[14] Tim Cushing, *University of Oregon Slaps Student With Five Conduct Charges Over Four Words*, TECHDIRT (Aug. 28, 2014), https://www.techdirt.com/articles/20140827/12064428343/university-oregon-slaps-student-with-five-conduct-charges-over-four-words.shtml.

[15] Bob McGovern, *Attorneys: Babson will not punish pro-Trump duo for Wellesley ride*, BOSTON HERALD (Dec. 19, 2016), https://www.bostonherald.com/2016/12/19/attorneys-babson-will-not-punish-pro-trump-duo-for-wellesley-ride.

[16] Sam Friedman, *Appeal seeks re-examination of sexual harassment complaints against UAF student newspaper*, FAIRBANKS DAILY NEWS-MINER (Nov. 11, 2013), http://www.newsminer.com/news/local_news/appeal-seeks-re-examination-of-sexual-harassment-complaints-against-uaf/article_82c9309e-4ab0-11e3-b059-0019bb30f31a.html.

[17] Susan Kruth, *VIDEO: University of Alaska Fairbanks Newspaper Investigated*

investigation chilled reporting, and even left the then-editor-in-chief too apprehensive to publish an informational article about sexual assault on campus.

In 2007, Indiana University-Purdue University Indianapolis found student-employee Keith John Sampson guilty of racial harassment for merely reading the book *Notre Dame vs. The Klan: How the Fighting Irish Defeated the Ku Klux Klan*—silently, to himself. Only after successful intervention by FIRE did the university reverse its racial harassment finding against him.[18]

These examples demonstrate that universities' policies and practices often bear no resemblance to the legal principles governing discriminatory harassment. In other words, when not properly cabined to *Davis*' standard, overly broad university harassment policies like the one UCF maintains routinely punish students and faculty, often with absurd, illiberal results. To prevent increased censorship and chilled speech in the name of combating "harassment," this Court should make clear that only the *Davis* standard constitutionally suffices on campus.

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for Nearly a Year for Protected Speech, THE TORCH (Sept. 19, 2014), https://www.thefire.org/video-university-alaska- fairbanks-newspaper-investigated-nearly-year-protected-speech.

[18] *University says sorry to janitor over KKK book*, ASSOCIATED PRESS (July 15, 2008), http://www.nbcnews.com/id/25680655/ns/us_news-life/t/university-says-sorry-janitor-over-kkk-book.

CONCLUSION

For the reasons above, and to protect First Amendment rights at the University of Central Florida and across the nation, this Court should reverse.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5). This brief contains 6,373 words, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in fourteen (14) point Times New Roman font.

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CERTIFICATE OF SERVICE

The undersigned certifies that on September 15, 2021, an electronic copy of the *Amicus Curiae* Brief of Foundation for Individual Rights in Education in Support of the Plaintiff-Appellant Urging Reversal was filed with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system. The undersigned also certifies all parties in this case are represented by counsel who are registered CM/ECF users and that service of the Brief will be accomplished by the CM/ECF system.

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