No. 21-12583

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SPEECH FIRST, INC.,

Plaintiff-Appellant,

v.

ALEXANDER CARTWRIGHT,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida, Honorable Gregory A. Presnell, Case No. 6:21-cv-00313-GAP-GJK

BRIEF OF *AMICUS CURIAE* ALLIANCE DEFENDING FREEDOM IN SUPPORT OF PLAINTIFF-APPELLANT SPEECH FIRST, INC. AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Local Rules 26.1-1 through 26.1-3, the undersigned certifies that the name of each person, attorney, association of persons, firm, law firm, partnership, and corporation that has or may have an interest in the outcome of this action—including subsidiaries, conglomerates, affiliates, parent corporations, publicly-traded companies that own 10% or more of a party's stock, and all other identifiable legal entities related to any party in the case, in addition to those set forth in the Initial Brief of Appellant Speech First, Inc., include:

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The undersigned will enter this information in the Court's web-based CIP contemporaneously with filing this Certificate of Interested Persons. Alliance Defending Freedom has no parent corporation, and no corporation owns 10% or more of its stock. No publicly traded company or corporation has an interest in the outcome of this case or appeal.

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STATEMENT OF THE ISSUE

At its core, the First Amendment protects the right to express a person's deeply held beliefs and contribute to the marketplace of ideas. It contains no categorical exception for harassment. The Supreme Court has held, however, that punishing educational harassment that is "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access" to educational opportunities does not necessarily offend the First Amendment. *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999). The University of Central Florida maintains a policy that bans "discriminatory harassment," including speech concerning a list of protected characteristics that interferes with another's educational or employment opportunities, "participation in a university program or activity," or "receipt of legitimately-requested services." The university enforces the policy through robust reporting and disciplinary mechanisms. Does the First Amendment allow universities to use excessively broad anti-harassment policies to censor speech with which some disagree and to chill such speech before it even occurs?

INTEREST OF *AMICUS CURIAE*[1]

Alliance Defending Freedom (ADF) is a not-for-profit public-interest legal organization that protects speech, religious liberty, and the

[1] Pursuant to Fed. R. App. P. 29(a) *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and no person or entity other

right to life. ADF regularly defends students, adults, and organizations in cases involving the right to free speech. *E.g.*, *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021); *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021); *Nat'l Inst. of Fam. & Life Advocs. v. Becerra* (*NIFLA*), 138 S. Ct. 2361 (2018); *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). ADF relies on the Free Speech Clause to protect individuals and organizations whose speech is wrongly restricted by government. ADF has a strong interest in ensuring that university policies that censor protected speech undergo the strictest scrutiny.

BACKGROUND

The University of Central Florida's anti-harassment policy admittedly extends to speech. It includes within its definition of discriminatory harassment, "verbal, physical, electronic or other conduct" based upon a laundry list of items, including "religion," "non-religion," "gender identity or expression," "sexual orientation," and "political affiliations." Doc. 3-1 at 18. To drive its point home, the policy reiterates that "[d]iscriminatory harassment may take many forms, including verbal acts, name-calling, graphic or written statements" and even "other conduct that may be humiliating." *Id.*

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than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief.

According to the policy at issue, discriminatory harassment becomes actionable when it turns into "hostile environment harassment." *Id.* But hostile environment harassment extends far beyond the denial of educational opportunities. The policy defines that phrase as discriminatory harassment that is "so severe *or* pervasive" from a "subjective and objective perspective" that it "limits" the "conditions of education," "participation in a university program or activity," or the "receipt of legitimately-requested services." *Id.* at 14, 18 (emphasis added). The policy offers only one example of a "university program or activity"—campus housing—and it defines neither that phrase nor "legitimately-requested services." *Id.* at 14. The policy makes clear, however, that it extends to even "a single or isolated incident"—including a "verbal" incident—"if sufficiently severe." *Id.*

The policy's excessively broad definition of hostile environment harassment chilled the speech of three Central Florida students who hold views "unpopular" and "in the minority on campus." Doc. 30 ¶ 78. Those views range from the immorality of abortion to the immutability of biological sex to opposition to affirmative action and the Black Lives Matter movement. *Id.* ¶¶ 79–81, 97–98, 115. Speech First, Inc. brought suit to vindicate their free speech freedoms. Doc. 1. The district court declined to preliminarily enjoin the anti-harassment policy because, in the court's estimation, it only targeted conduct, not speech. Doc. 46 at 16.

As discussed below, ADF contends that the court's ruling violates the original meaning of the First Amendment and allows the suppression of speech that expresses potentially unpopular ideas.

SUMMARY OF THE ARGUMENT

In an age where many teach that "words wound" and "silence is violence," universities are quick to trample the First Amendment by censoring speech. Universities—like the University of Central Florida here—use excessively broad anti-harassment policies to police speech some do not like. The First Amendment demands more.

Often, universities point to the ills of harassment to justify broad speech restrictions. While overlooked by the court below, the Supreme Court has provided a roadmap for universities to regulate *truly* problematic harassment while abiding by constitutional protections. *Davis*, 526 U.S. at 650. This Court should take this opportunity to make clear that the First Amendment prohibits universities from using excessively broad anti-harassment policies to censor speech with which some disagree and to chill such speech before it even occurs.

Universities often weaponize their speech policies to censor unpopular—yet protected—speech. Numerous ADF university student clients have suffered censorship and punishment as a result of giving voice to their deeply held beliefs. For example, the student senate at Florida State University removed its president, Jack Denton, because

some took subjective offense to what he shared in a respectful message in a private group chat. A college in New York banned student Owen Stevens from some coursework because he asserted his belief in the immutability of biological sex. And a university in California subjected students to a five-month-long investigation for political speech that another student thought violated the university's requirement of "civil" behavior. These examples show the problems inherent with expansive, university anti-harassment policies, such as the one at the University of Central Florida.

The original meaning of the First Amendment and modern jurisprudence counsel against expansive anti-harassment policies, especially when the *Davis* standard is available to curb true bullying and harassment. The First Amendment protects the people's natural, inalienable right to speak their deeply held beliefs. The people must remain free to advance their beliefs in the marketplace of ideas. If universities censor speech, all of society loses out on additional perspectives that contribute to the grand dialogue. Universities eager to restrict speech undermine their central place in the marketplace of ideas.

Given the grave importance of preserving an individual's inalienable right and society's larger interest in constructive dialogue, the First Amendment prohibits schools from adopting loose, overbroad anti-harassment policies that go far beyond *Davis*. The Court crafted its

rule in *Davis*—allowing schools to regulate harassment that is "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access" to educational opportunities—specifically to ensure First Amendment speech remains protected. *Id.* at 649–50. Given the troubling campus trend towards censorship, this Court should hold that the First Amendment prohibits wide-ranging speech-censoring anti-harassment policies like the University of Central Florida's.

ARGUMENT

I. Universities frequently censor student speech that expresses the speaker's deeply held beliefs.

ADF knows firsthand the perils of universities improperly regulating speech. Religious speech, in particular, often provokes debate. But that is precisely why it deserves First Amendment protection. It expresses the speaker's deeply held beliefs and contributes to our marketplace of ideas. In particular, universities serve as institutions dedicated to the pursuit of knowledge and truth and should be even more ready to entertain dialogue. Yet today, they are all too quick to clamp down on protected speech that might cause subjective offense. This is illustrated by Jack Denton, Owen Stevens, and the College Republicans at San Francisco State University, each of whom were censored by university officials for engaging in respectful, protected speech.

A. Florida State University student Jack Denton was punished because of his religious speech.

A devout Catholic, Jack was heavily involved in religious groups and student government at Florida State University. *See* Amended Compl., *Denton v. Thrasher*, no. 4:20-cv-00425-AW-MAF (N.D. Fla. Feb. 11, 2021), ECF No. 69. The student body elected Jack to the student senate, part of the campus student government, an entity created by Florida law as part of the state university, Fla. Stat. § 1004.26(1). And after seeing Jack's collegial work ethic, his fellow senators elected him president of the senate. During the summer after his election as president, Jack sent messages in a private group chat for members of the Catholic Student Union. In response to another student sharing a video raising money for various organizations, Jack expressed a view that some of those groups advocate for causes that contravene the Catholic Church's beliefs, such as abortion, "queer-affirming networks," and transgenderism. Jack told his fellow students that he knew he was speaking on an "emotional topic" and did not want to anger anyone. But out of love for them and the Church, he knew he could not stay silent about unknowing support for organizations acting contrary to his religious beliefs.

Some fellow students disagreed with Jack or found his views offensive. One student took a screenshot of the private messages and shared them publicly on various social media platforms. As a result, a

fellow student in the senate made a motion of no confidence against Jack. The initial motion failed but triggered a massive public campaign. A petition calling for his removal garnered over 6,000 signatures in less than two days. In response, Jack convened a special session of the senate to entertain a second no-confidence motion. Fellow senators called Jack's remarks "abhorrent," "demeaning," and "disgraceful." Other senators said they needed to remove Jack to "do right by the LGBTQ+ community" and not "enabl[e] bigotry." The second no-confidence vote passed, removing Jack from office based solely on his thoughtful religious speech.

University administrators retained power to control any action by student government, but Jack's initial appeals to the university's vice president for student affairs and the student supreme court fell on deaf ears. The student affairs official informed the senate that she believed it followed appropriate procedure. For its part, the student senate initially prevented the supreme court from reaching a quorum. Their actions and inaction forced Jack to file a lawsuit against complicit university officials to vindicate his first freedoms. The district court preliminarily enjoined university officials from withholding Jack's salary as president. And the student supreme court ordered Jack reinstated. Eventually, the parties reached a settlement agreement under which the university released a statement affirming its commitment "to protecting the rights of its students to hold and practice their religious beliefs free of persecution."

B. A New York college punished student Owen Stevens for his speech on the immutability of sex.

State University of New York-Geneseo officials sanctioned Owen Stevens and chilled his future speech because some students were offended by his Instagram posts. In November 2020, Owen was a history major in the school of education, had a 3.6 GPA, and was a member of the history honors society. He is also a Christian, whose faith teaches him that all people are created in the image of God with inherent dignity and value. When he shares his religious beliefs, he speaks the truth in love and strives never to denigrate other people, even if he disagrees with their views.

But Owen's university sought to regulate his speech regardless of its truthful commentary on matters of religious and political importance. Owen posted four videos on his private social media accounts, on his own time, while off campus. The posts discussed his religious and political views. In one of them, he asserted that, as a biological matter, "a man is a man" and "a woman is a woman," and a man cannot become a woman and a woman cannot become a man. In another post, Owen criticized identity-based extracurricular groups for dividing people, rather than uniting them. These videos were not about his university but were statements of Owen's opinions on matters of national debate and concern.

After learning of the videos, the education department's interim director summoned Owen into his (virtual) office to convince him that his

views were unacceptable. Owen was happy to discuss his beliefs and listen to others', but he was unpersuaded. The director then accused Owen of being unwilling to treat all people with respect. Based solely on the four videos, the university banned Owen from student teaching and field work—areas necessary for him to complete his degree—and required his future private social media posts to show respect for diverse personal and cultural values. After Owen appealed the punishment, the Provost removed the suspension but continued to impose other sanctions, including a requirement to self-monitor his social media posts.

C. A California college investigated the College Republicans for allegedly "uncivil" speech.

San Francisco State University has used its anti-harassment policy to chill the political expression of students in the College Republicans student group. *See Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1007 (N.D. Cal. 2007). On October 17, 2006, with ongoing American involvement in Iraq and Afghanistan, the College Republicans held an Anti-Terrorism Rally on campus. Amended Compl., *Coll. Republicans at S.F. State Univ. v. Reed*, no. 4:07-cv-03542-WDB (N.D. Cal. Aug. 30, 2007), ECF No. 45. The College Republicans sought to educate members of the campus community about terrorism, memorialize victims of recent terror attacks, and identify prominent terrorist organizations to spark a dialogue about how to respond to those groups. To symbolize the risk of terrorism, the group painted butcher

paper to resemble the flags of Hamas and Hezbollah, two terrorist organizations in the view of the College Republicans. Unbeknownst to the group, both flags contained the word "God" in Arabic script. At the rally, members of the College Republicans placed the reproduction of the flags on the ground and stepped on them, mimicking the way those organizations have protested the United States.

During the rally, members of the campus community confronted the College Republicans and complained to the group that the flags contained the Arabic word for God. Not wanting to offend Muslims, the College Republicans agreed to allow the complaining students to black out the word for God on the flags. One student, not happy with the compromise, filed a complaint against the College Republicans with the office of student programs which led to a formal investigation of the group. The complainant alleged the group violated the university's anti-harassment policy which required students to "be civil to one another."

The university subjected the College Republicans to a nearly five-month long investigation culminating in a hearing before a university administrative body. One of the officers of the group, Leigh Wolf, spent over two hundred hours defending the image of the College Republicans and preparing for the administrative hearing, causing his grades to drop. Ultimately, the administrative body found no violation of the anti-harassment policy and dismissed the complaint. The College Republicans

filed a successful lawsuit against the university's action and policy to vindicate its first freedoms. In the words of the district court, the "Framers of our Constitution believed that a democracy could remain healthy over time only if its citizens felt free both to invent new ideas and to vent thoughts and feelings that were thoroughly out of fashion." *Coll. Republicans*, 523 F. Supp. 2d at 1018. For fashion "is an agent of repression" and repression is "an agent [in] democracy's death." *Id.*

* * * *

These three real-life situations exemplify the harms caused by excessively broad university speech codes and anti-harassment policies. They show the risks inherent in university anti-harassment policies that look to the subjective effect speech has on its listener. Both Jack and Owen shared their deeply held religious convictions. Jack spoke with love and from a genuine desire to share the truth. Owen, too, shared the truth on matters of public import. And the College Republicans spoke their opinion on a salient political issue. Nonetheless, because some on campus disagreed with the content and viewpoint of their speech, Jack, Owen, and the College Republicans were the target of state-sponsored sanctions. It is a "bedrock principle" that speech may not be suppressed simply because it expresses ideas some find "offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). In places that are supposed to serve as marketplaces of ideas, hecklers drowned out their speech on

matters of religious and social concern. *E.g.*, *Street v. New York*, 394 U.S. 576, 592 (1969) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."); *Mahanoy Area Sch. Dist. v. B.L. by & through Levy*, 141 S. Ct. 2038, 2048 (2021) ("[S]ometimes it is necessary to protect the superfluous in order to preserve the necessary.").

II. The First Amendment promotes our shared pursuit of truth.

A. The First Amendment provides strong protection for expression of deeply held beliefs.

The First Amendment Free Speech Clause's irreducible minimum is the freedom to express our most deeply held beliefs—what we hold to be the truth. The founding fathers considered this core of free speech to be an inalienable natural right that could not be surrendered to the government. Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 281 (2017). Thomas Jefferson wrote in 1789 that all men had the inalienable "rights of thinking, and publishing our thoughts by speaking or writing." *Id.* (quoting Letter from Thomas Jefferson to David Humphreys (Mar. 18, 1789)). In a 1791 congressional debate, Fisher Ames declared that the freedom of speech is "an unalienable right, which you cannot take from [people], nor can they divest themselves of."

Id. at 282 (cleaned up). Thus, Ames considered any governmental attempt to abridge that freedom "nugatory." *Id.*

The inalienable right to freedom of speech sprung from the recognition that civil authorities had no proper role in controlling a person's opinions and beliefs. *Id.* at 280–81. A person's freedom to form and have opinions and beliefs and to speak those beliefs exist independent of any governmental authority. Thus, forming beliefs and speaking them were natural rights retained by the people under any system of government. *Id.* at 274–75. As James Madison said, "Opinions are not the objects of legislation." 4 Annals of Cong. 934 (1794) (statement of Rep. James Madison).

So, at the very least, the First Amendment serves as a recognition of this natural inalienable right to form and hold beliefs and then express them. In the words of a contemporary of the founders, "men should be allowed to express those thoughts, with the same freedom that they arise. In other words—speak, or publish, whatever you believe to be *truth*." Campbell, *supra*, at 282 n.166 (quoting John Thomson, *An Enquiry, Concerning the Liberty, and Licentiousness of the Press, and the Uncountroulable Nature of the Human Mind* 11–12 (New York, Johnson & Stryker 1801)).

The 1792 trial of Thomas Paine for seditious libel shows this original meaning in action. The crown charged Paine with libel for

publishing *The Rights of Man*, which criticized the British government. *The Trial of Thomas Paine for a Libel* 3–4 (I. Thomas & E.T. Andrews 1793), https://bit.ly/3BVWj4H. Relying on a host of Enlightenment figures familiar to the framers, lawyer Thomas Erskine defended Paine's natural right to freedom of speech. In particular, Erskine cited John Milton's defense of free speech in his *Areopagitica*. *Id.* at 38. Surveying these sources, Erskine memorably concluded, "[E]very man, not intending to mislead, but seeking to enlighten others with what his own reason and conscience, however erroneously, have dictated to him as truth, may address himself to the universal reason of a whole nation." William C. Warren, *Community Security vs. Man's Right to Knowledge*, 54 COLUM. L. REV. 667, 670 (1954).

John Milton's thinking frames the core of the First Amendment. His 1644 *Aeropagitica* (putting aside its anti-Catholic premise) offers an influential sketch of the marketplace of ideas. Milton viewed "all the winds of doctrine . . . let loose to play upon the earth." *Aeropagitica: A Speech for the Liberty of Unlicensed Printing to the Parliament of England* (1644), available at https://bit.ly/2XoLwBA. But if "Truth be in the field," we "misdoubt her strength" by "licensing and prohibiting" speech. *Id.* It is better to "[l]et her and Falsehood grapple." *Id.* For, "who ever knew Truth put to the worse, in free and open encounter?" *Id.* "[H]indering and cropping the discovery that might be yet further made

both in religious and civil wisdom," Milton thought, would "discourage[ ] . . . all learning" and cause "the stop of truth." *Id.*

B. Modern free speech jurisprudence conforms to the original meaning regarding the expression of deeply held beliefs.

The development of free speech jurisprudence has hewn closely to this natural right. Beginning in the early 20th Century, Justices Oliver Wendell Holmes Jr. and Louis Brandeis began the First Amendment's ongoing exposition in caselaw. Acknowledging the human instinct to silence opposition, Justice Holmes explained that "the ultimate good desired is better reached by free trade in ideas" because "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Similarly, Justice Brandeis viewed free speech as a tool to lead to truth "pursued in a dialectical process of free debate." Christoph Bezemek, *The Epistemic Neutrality of the "Marketplace of Ideas": Milton, Mill, Brandeis, and Holmes on Falsehood and Freedom of Speech*, 14 FIRST AMEND. L. REV. 159, 174 (2015). According to Justice Brandeis, "[t]hose who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary."

Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). The founders thought that "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth." *Id.* The founders also knew that "order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government." *Id.* Thus, "the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones." *Id.*

Drawing on Holmes and Brandeis, the 20th Century Supreme Court recognized that the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.)). That idea applies with all the more force on college campuses. Indeed, the "college classroom with its surrounding environs is peculiarly the marketplace of ideas." *Healy v. James*, 408 U.S. 169, 180 (1972). There, students pursue the ultimate good through "free trade in ideas." *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

In addition to Holmes and Brandeis, the modern Court has relied on the thinking of John Milton (as discussed above) and John Stuart Mill in discussing why and how the First Amendment promotes the marketplace of ideas. *E.g.*, *N.Y. Times*, 376 U.S. at 279 n.19 (citing John Milton's *Areopagitica* and John Stuart Mill's *On Liberty*). Mill saw a tyranny worse than that of civil authority: "tyranny of the prevailing opinion." John Stuart Mill, *On Liberty* 4 (Kathy Casey ed., Dover Publ'ns 2002) (1859). According to Mill, society has a tendency to impose "its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development, and, if possible, prevent the formation, of any individuality not in harmony with its ways." *Id.* That tyranny imposes a "peculiar evil of silencing the expression of an opinion," which "rob[s] the human race" of either "exchanging error for truth" or "the clearer perception and livelier impression of truth, produced by its collision with error." *Id.* at 14. Even those who believe they hold the truth "ought to be moved by the consideration that however true it may be, if it is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth." *Id.* at 29.

The modern Court remains faithful to the original core of the First Amendment as discussed by the founders and thinkers like Milton and Mill and the jurisprudence of Holmes and Brandeis. Time and again, the Court reaffirms that the First Amendment seeks to "preserve an

uninhibited marketplace of ideas" where "truth will ultimately prevail." *E.g.*, *NIFLA*, 138 S. Ct. at 2374; *accord, e.g.*, *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2046.

In *NIFLA*, the Court held that the free competition of the marketplace of ideas foreclosed California's attempts to force pro-life pregnancy centers to inform their clients about the availability of abortions—"the very practice [the centers] are devoted to opposing." 138 S. Ct. 2371. Professionals, such as those that run the centers, inherently "have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields." *Id.* at 2374–75. For example, "[d]octors and nurses might disagree about the ethics of assisted suicide." *Id.* at 2375. Or "lawyers and marriage counselors might disagree about the prudence of prenuptial agreements or the wisdom of divorce." *Id.* Quoting Holmes, the Court recognized that the marketplace of ideas provides the "best test of truth." *Id.* (quoting *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting)). As the Court put it emphatically: when "the government . . . decid[es] which ideas should prevail," the "people lose." *Id.*

Most recently, the Court invalidated a high school's discipline for vulgar off-campus speech because the school inhibited the free functioning of the marketplace of ideas. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2046. Even in the lower school context, where courts have held that

schools have a greater interest in regulating student conduct and speech, the Court recognized the need to protect "a student's unpopular expression." *Id.* American schools "are the nurseries of democracy." *Id.* But "[o]ur representative democracy *only* works if we protect the marketplace of ideas." *Id.* (emphasis added; cleaned up). The marketplace "facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will." *Id.* The Court reasoned that the marketplace extends its utmost protection to ideas some consider unpopular because "popular ideas have less need for protection." *Id.* The Court thus concluded that our schools should teach all "future generations" the First Amendment aphorism: "I disapprove of what you say, but I will defend to the death your right to say it." *Id.*

III. The First Amendment prohibits anti-harassment policies that exceed the *Davis* standard and censor and chill speech.

This Court should adopt the carefully drawn standard for limiting harassment in Title IX for this Section 1983 speech claim. The Supreme Court's *Davis* decision created a standard for allowing government regulation of "harassment" in the context of Title IX that satisfies the First Amendment's protection of speech. The standard provides the constitutional roadmap for allowing schools to regulate truly problematic harassment while protecting free speech. The First Amendment interests are materially identical. As explained below, the *Davis* standard has

proven to be workable and reliable in protecting students' rights to engage in free speech activity. Thus, to ensure that universities do not encroach on protected speech, this Court should make clear that the First Amendment prohibits universities from going far beyond *Davis* by using excessively broad, anti-harassment policies to censor speech with which some disagree and to chill such speech before it even occurs.

While arising in the context of Title IX, *Davis*'s treatment of government limits on harassment is instructive. In *Davis*, the plaintiff alleged that a male classmate of her fifth-grade daughter sexually harassed her daughter over many months. 526 U.S. at 633. Each time, the victim reported the incident to her teachers and parent, and her parent would follow up with school authorities. *Id.* The harassment caused the victim's grades to drop and led her to consider suicide. *Id.* at 634. The Court held that under Title IX a school can be liable if it is deliberately indifferent to sexual harassment and "exercises substantial control over both the harasser and the context in which the known harassment occurs," and the harassment is "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access" to educational opportunities. *Id.* at 645, 650.

The Supreme Court crafted the standard specifically with the First Amendment in mind. In response to the dissent's concerns that policies restricting "harassment" would burden free speech, the Court charged

that "[t]he dissent fails to appreciate the[ ] very real limitations" on its definition of actionable harassment. *Id.* at 652. That definition excludes mere "teas[ing]" and "offensive name[-calling]." *Id.* The Court "trust[ed] that the dissent's characterization . . . will not mislead courts to impose more sweeping liability than [it] read Title IX to require." *Id.* Liability "depends equally on the alleged persistence and severity of the [harassers'] actions" *Id.* (emphasis added). A "single instance of sufficiently severe one-on-one peer harassment" likely never triggers liability. *Id.* at 652–53. And the Court emphasized 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 *Davis* standard appropriately protects speech while respecting governmental interests. The standard fits well with student speech in the education setting. *See id.* at 667 (Kennedy, J., dissenting) (recognizing that public schools' power to discipline their students is "circumscribed by the First Amendment.") The Court used the *Davis* standard to articulate the scope of schools' civil liability. But it is equally useful as an outer boundary for educational institutions regulating student harassment.

Matching the standard for a school's civil liability to its anti-harassment policy makes eminent sense. To the extent schools have

concerns about liability for harassment, they can regulate it according to the very standard to which they would be held accountable. Indeed, two circuits have recently indicated that the *Davis* standard can withstand First Amendment scrutiny as an anti-harassment policy. *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 691–93 (4th Cir. 2018); *Rowles v. Curators of the Univ. of Mo.*, 983 F.3d 345, 358–59 (8th Cir. 2020).

The *Davis* standard also strikes the right constitutional balance. After all, "[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001) (Alito, J.). Students like Jack, Owen, and the plaintiffs here need at least the *Davis* rule because with any less protective measure, they will lose their freedom to speak their deeply held beliefs.

The University of Central Florida's policy here allows government restrictions on speech that go far beyond what *Davis* would allow, namely targeting even a single verbal incident, including speech based on "political affiliations." Doc. 3 at 14, 18. The policy also censors speech that under a "subjective and objective" analysis limits "participation in a university program or activity," or the "receipt of legitimately-requested services." *Id.* at 14, 18. Those ill-defined categories give officials nearly limitless discretion to censor speech with which they disagree.

Likewise, examples of other university overreach in regulating speech, discussed *supra*, further confirm the wisdom of following the *Davis* standard. Central Florida officials could punish Jack for his speech opposing abortion because it "subjective[ly]" limited another student's participation in "a university program" bringing a pro-choice speaker to campus. Campus officials could prohibit Owen from speaking about the immutability of biological sex because his speech interferes with other students' "legitimately-requested services" from UCF's LGBTQ+ Services. And the university could punish the College Republicans for their speech denouncing alleged terrorist groups because it targets supporters of those groups based on "political affiliations."

These examples are not mere speculation. The student senate removed Jack from his office for a single conversation in a private group chat because some thought his speech "abhorrent," "demeaning," and "disgraceful." And, according to those students, Jack's speech likely limited some students' opportunities because they needed to remove Jack to "do right by the LGBTQ+ community."

Without the *Davis* framework, broad polices that vest officials with unfettered discretion and give veto power to hecklers allow other students and campus authorities to target students' unpopular views and shut them down. The *Davis* rule would protect the speech of Jack, Owen, and the College Republicans. Jack and the College Republicans' speech

occurred in the context of a single incident, while Owen posted only a few videos. *Davis* makes clear that a single incident will almost never create a hostile environment and is certainly not pervasive. 526 U.S. at 652–53. Nor was Jack, Owen, and the College Republicans' speech objectively offensive and severe. All spoke respectfully on matters of religious and political concern. Jack emphasized that he did not want to anger anyone, and the College Republicans offered a compromise when they were informed that their speech might offend Muslims. And the speech in these three examples did not deprive anyone of an educational benefit. Jack, Owen, and the College Republicans did not stop anyone from attending class or cause grades to drop. They did not even direct their speech at certain students. The excessively broad Central Florida anti-harassment policy would sweep in and censor all this speech, while *Davis* properly protects it.

The *Davis* standard is particularly appropriate for universities because of their function as the marketplace of ideas and because they deal with adult students. *Davis* involved 5th grade children. But the Court has long rejected the argument that universities are "enclaves immune from the sweep of the First Amendment." *Healy*, 408 U.S. at 180. Indeed, the Court has also rejected the idea that "First Amendment protections should apply with less force on college campuses than in the community at large." *Id.* Nor do universities "exercise custodial and

tutelary power over their adult students," like grade schools. *Davis*, 526 U.S. at 667 (Kennedy, J., dissenting). Rather, the university is "peculiarly the marketplace of ideas." *Healy*, 408 U.S. at 180 (cleaned up). Thus, universities must comply with the First Amendment's broad protection. They cannot use anti-harassment policies to censor speech with which they disagree. The *Davis* standard affords that protection, and this Court should enjoin the University of Central Florida from enforcing an anti-speech policy that goes far beyond what *Davis* envisioned.

CONCLUSION

"Our representative democracy only works if we protect the 'marketplace of ideas.'" *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2046. But rather than protect that market, the University of Central Florida has chosen to protect those who want to silence ideas and speech with which it disagrees. This Court should hold that *Davis* marks the outer boundary of a public university's speech-regulating authority, and it should enjoin the University of Central Florida's speech-suppressing policy.

Respectfully submitted this 15th day of September, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(a)(5). Exclusive of the sections exempted by Fed. R. App. P. 32(f), the brief contains 5,848 words, according to the word count feature of the software (Microsoft Word 365) used to prepare the brief. The brief has been prepared in proportionately spaced typeface using Century Schoolbook 14 point.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically with the Court's CM-ECF system on this 15th day of September, 2021. Service will be effectuated by the Court's electronic notification system upon all parties and counsel of record.

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