No. 20-3289

In the United States Court of Appeals for the Sixth Circuit

NICHOLAS MERIWETHER,
PLAINTIFF-APPELLANT,
V.
FRANCESCA HARTOP, ET AL.,
DEFENDANTS-APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION
CASE NO. 1:18-CV-753

BRIEF OF THE BADER FAMILY FOUNDATION AND HANS BADER AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: No. 20-3289 Case Name: Meriwether v. Hartop

Name of counsel: **Matthew J. Burkhart (Ohio Bar No. 0068299)**

Pursuant to 6th Cir. R. 26.1, **Bader Family Foundation and Hans Bader**
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

NO

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest.

NO

CERTIFICATE OF SERVICE

I certify that on ___**June 3, 2020**__ the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

/s/ Matthew J. Burkhart

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir R. 26.1 on page 2 of this form.

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INTEREST OF AMICI CURIAE1

The Bader Family Foundation is a nonprofit foundation operating under § 501(c)(3) of the Internal Revenue Code, that promotes civil liberties, free speech, academic freedom, and scholarly research. Hans Bader is the Foundation's trustee, and a lawyer who practiced education law, civil rights law, and administrative law for years, including handling Title IX issues at the U.S. Department of Education's Office for Civil Rights and Office of General Counsel.[2] While in the Office for Civil Rights, Bader drafted rulings in response to appeals from regional offices for the Deputy Assistant Secretary for Enforcement, and vetted agency presentations about what constitutes sexual harassment in violation of Title IX.

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[1] Pursuant to FRAP 29, no party's counsel authored any part of this brief; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *amici*—contributed money that was intended to fund preparing or submitting the brief.

[2] *See, e.g., U.S. v. Morrison*, 529 U.S. 598 (2000) (representing prevailing respondents); *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1996) (representing prevailing intervenor CADAP; rejecting Title VII and Title IX preemption claims); *Parents Involved v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (amicus brief in support of prevailing plaintiff); *In re Competitive Enterprise Inst.*, No. 15-1224 (D.C. Cir. Oct. 23, 2015) (ordering TSA to produce "a schedule for the expeditious issuance" of a passenger screening rule in response to a mandamus petition Bader filed on behalf of Competitive Enterprise Institute and the National Center for Transgender Equality).

SUMMARY OF ARGUMENT

Dr. Meriwether did not deprive anyone of access to an education in the sense Title IX forbids. Courts have found that conduct far more severe and pervasive than anything alleged in this case—including vulgar name-calling—does not deny access to an education when the complainant's grades were unaffected. Here, not only does the alleged conduct fall far below this standard, but Dr. Meriwether treated Doe respectfully at all times. The student's only complaint is that Dr. Meriwether refused to refer to Doe with titles and pronouns for the opposite sex. That is not a denial of educational access.

Similarly, Dr. Meriwether did not violate Shawnee State's policies because he did not deprive anyone of any educational benefits. A hostile environment can sometimes (but not always) deprive the victim of educational benefits. But Dr. Meriwether's conduct was not "severe or pervasive" enough to create a "hostile environment," as defined by federal laws like Title VII. Shawnee State's policies incorporate this same "severe or pervasive" test, so he did not violate Shawnee State's policies either.

The Title IX regulations recently codified by the Department of Education confirm that Dr. Meriwether did not violate federal law, because federal law requires that conduct be "severe" and "pervasive" enough not only to create a

hostile environment but also to deprive the complainant of equal access to an education.

Shawnee State wrongly restricts Professor Meriwether's off-campus speech, even though such speech cannot deprive anyone of educational benefits and is beyond the reach of Title IX.

The university punished Professor Meriwether for speech that its policy did not prohibit by stretching its harassment policy beyond its plain text. That violated his free-speech rights, regardless of whether his speech could be prohibited by a more narrowly drawn policy.[3] Professors are entitled to fair notice regardless of whether their speech could be validly subject to regulation.[4]

If Shawnee State's policy did define interference with educational efforts to reach conduct that has as little impact on a student's ability to learn as Dr. Meriwether's did, then it would reach a vast array of academic speech that offends listeners and would be unconstitutionally vague and overbroad. An otherwise

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[3] *See, e.g., Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996) (overturning professor's discipline under the "nebulous outer reaches" of a college harassment policy due to its vagueness as applied to his speech, because the policy did not make clear that his longstanding teaching techniques were forbidden).

[4] *See Cohen, supra; Nitzberg v. Parks*, 525 F.2d 378, 383 (4th Cir. 1975) (vague speech restriction implementing Supreme Court's *Tinker* standard violated First Amendment; "It does not at all follow that the phrasing of a constitutional standard by which to decide whether a regulation infringes upon rights protected by the first amendment is sufficiently specific in a regulation to convey notice to students or people in general of what is prohibited.").

overbroad harassment policy does not become constitutional solely because it includes a "reasonable person" limit. Nor does it allow a university to ban speech merely because it has a *de minimis* impact on a reasonable student's work.[5]

The government is not allowed to censor speech simply because it is offensive or disagreeable to a reasonable person. Thus, the court below was wrong to reject Dr. Meriwether's First Amendment claim because Shawnee State's harassment policy supposedly has a "reasonable person" limit.

The court below was also mistaken to find that the policy is not viewpoint discriminatory. It is a content-based, viewpoint discriminatory restriction on speech. Applying it expansively would undermine compelling interests by chilling academic debate.

ARGUMENT

I. Meriwether's Speech Did Not Interfere with Educational Access and Thus Was Not At Odds With Title IX

The university claims that Dr. Meriwether committed conduct that "limits, interferes with or denies education benefits." But nothing in the record suggests either that the complainant's grades fell or that the complainant suffered any concrete harm due to how she was addressed. To the contrary, the student remained in Dr. Meriwether's class, contributed freely and frequently, and received

[5] *See DeJohn v. Temple University*, 537 F.3d 301, 319-20 (3d Cir. 2008) ("unreasonable interference with an individual's work").

a good grade based on hard work and participation. See Compl. ¶¶ 159, 176–83, PageID.1477, 1479.

The university asserts that Dr. Meriwether violated "nondiscrimination policies" that "are part of the University's obligations under Title IX."[6] But this is not so. Under Title IX, conduct must be so "severe, pervasive, and objectively offensive" as to deny "equal access" to an education. *See Davis v. Monroe County Board of Education*, 526 U.S. 629, 633, 650, 651, 652, and 654 (1999) (emphasizing five times that the conduct must be "severe, pervasive, and objectively offensive" and interfere with educational access to violate Title IX).

Under this standard, even very offensive name-calling does not violate Title IX when it does not affect a student's grades. *E.g.*, *Burwell v. Pekin Community High School Dist.*, 213 F.Supp.2d 917, 932 (C.D. Ill. 2003) (no Title IX claim, where repeated vulgar insults such as "slut" and "bitch" did not cause plaintiff's grades to fall, and thus did not interfere with educational access), *citing Davis v. Monroe County Board of Education*, 526 U.S. 629, 652-54 (1999) (Title IX claim stated where plaintiff's grades fell in the face of severe verbal and physical harassment, establishing interference with educational access).

[6] *See* Docket Doc. # 36 at 14 (Defendants' Motion to Dismiss Plaintiff's First Amended Complaint, Feb. 11, 2019).

To deny "equal access to education," conduct "must have a 'concrete, negative effect' on the victim's education, such as "dropping grades," "becoming homebound or hospitalized due to harassment," or "physical violence." *Gabrielle M. v. Park Forest-Chicago Heights Sch. Dist.*, 315 F.3d 817, 823 (7th Cir. 2003) (rejecting lawsuit over repeated inappropriate sexual acts, even though plaintiff was diagnosed with psychological problems and became more reluctant to go to school) (*quoting Davis*, 526 U.S. at 654); *see also Manfredi v. Mt. Vernon Bd. of Educ.*, 94 F.Supp.2d 447, 454-55 (S.D.N.Y. 2000).

Far worse conduct has been held not to violate Title IX. *E.g., Pahssen v. Merrill Cmty. Sch. Dist.*, 668 F.3d 356, 363 (6th Cir. 2012) (holding that harassment comprising a shove into a locker, an "obscene sexual gesture," and a "request for oral sex" did "not rise to the level of severe, pervasive, and objectively offensive conduct" forbidden by Title IX).

If repeatedly being called extremely insulting terms like "slut" or a "bitch" by multiple people does not deny equal access to an education, *see Burwell, supra*, then a single professor's declining to use titles and pronouns does not. Dr. Meriwether's word choices are not a "systemic" denial of educational access that satisfies Title IX's severe-and-pervasive test. *Hawkins v. Sarasota Cty. Sch. Bd.*, 322 F.3d 1279 (11th Cir. 2003) (steady barrage of insults did not violate Title IX;

"the effects of the harassment [must] touch the whole or entirety of an educational program or activity" and involve "systemic" denial of access).

II. Because He Did Not Deprive Anyone of Educational Benefits, Meriwether's Speech Did Not Violate Shawnee State's Policy

For similar reasons, Meriwether did not violate Shawnee's policy. He did not deprive anyone of educational benefits, because the complainant got a good grade and continued to attend class and participate. *See Burwell v. Pekin Community High School Dist.*, 213 F.Supp.2d 917, 932 (C.D. Ill. 2003) (insults that did not affect grades did not deny equal access to an education); *Gabrielle M., supra*.

Thus, he did not engage in conduct that "limits, interferes with or denies education benefits," as the policy proscribes. A hostile environment can sometimes (but not always) deprive the victim of educational benefits. But Dr. Meriwether's conduct was not "severe or pervasive" enough to create a "hostile environment," as defined by federal laws like Title VII.

Shawnee State's policy includes this same "severe or pervasive" language,[7] and it claims its policy simply "complies with Title IX" and "its obligations under Title VII and Title IX"[8]; so he did not violate Shawnee State's policies either.

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[7] See Compl., Ex. 2 ¶18.6.1, PageID.1522.

[8] Defendants' Motion to Dismiss, at 14, 13 (Docket Doc. # 36); *see Purgess v. Sharrock*, 33 F.3d 134, 144 (2d Cir. 1994) ("statements in briefs" are "binding

(continued on next page)

Meriwether's conduct was less severe and less pervasive than conduct this circuit has found insufficient to satisfy the "severe or pervasive" test. This Court has found that many demeaning, belittling remarks do not satisfy this standard, or create a hostile environment. One example is a supervisor who repeatedly made sexual jokes and comments about plaintiff's "state of dress," once referred to her as "Hot Lips," and offered to improve her evaluation if she performed sexual favors. *Morris v. Oldham Cty. Fiscal Ct.*, 201 F.3d 784, 787 (6th Cir. 2000). Another is a supervisor who placed a pack of cigarettes in a worker's bra strap, handed her a cough drop saying that she "lost [her] cherry," and made a vulgar remark about her sweater. *Burnett v. Tyco Corp*., 203 F.3d 980 (6th Cir. 2000).

It was also less exclusionary than conduct that courts have found not to be "severe or pervasive" enough to create a hostile work environment in violation of Title VII. *See, e.g., Singh v. U.S. House*, 300 F.Supp.2d 48, 54 (D.D.C. 2004) (fact that employee was frozen "out of important meetings and humiliated at those…she did attend" was not severe or pervasive enough to show hostile environment); *Curry v. Nestle USA*, 2000 WL 1091490, *3–4 (6th Cir. Jul. 27, 2000) (supervisors referred to a female employee as a "f***ing b****h" in front of other employees,

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judicial admissions of fact"). To the extent that the court below relied on these claims to reject plaintiff's challenges to defendants' policy, defendants should be judicially estopped from denying those claims now, or interpreting their policy more broadly. *See Lydon v. Boston Sand & Gravel Co.*, 175 F.3d 6, 13 (1st Cir. 1999); *Alternative Systems Concepts v. Synopsis Inc.*, 374 F.3d 23 (1st Cir. 2004).

asked if it was "her time of the month," and chastised her for returning to work after having a baby); *Swann v. Office of the Architect of the Capitol*, 73 F. Supp. 3d 20 (D.D.C. 2014) (fact that female employee, unlike other employees, did not have access to a locker room for her gender, did not create hostile environment, even coupled with offensive remarks).

III. The Just-Released Title IX Regulation Confirms that Dr. Meriwether Did Not Violate Federal Law

The existence of a hostile environment is typically a necessary—but not a sufficient—condition for a Title IX violation. Not all conduct that offends the complainant and creates a hostile environment interferes with access to an education. The Supreme Court's *Davis* decision requires interference with educational "access," not merely an unpleasant or hostile atmosphere. Under Title IX, conduct must be so "severe, pervasive, and objectively offensive" as to deny "access" to an education. *Davis*, 526 U.S. at 633, 650, 651, 652 and 654 (saying this several times).

The Education Department recently confirmed this understanding by formally codifying the *Davis* standard into its Title IX regulations, requiring interference with educational access, not simply the existence of a hostile environment, for Title IX liability. U.S. Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*: *Final Rule*, 85 Fed. Reg. 30026, 30140-

30142 (May 19, 2020). It noted that commenters agreed with its "proposed rules' requirement that speech must interfere with educational 'access' and not merely create a hostile environment," *id.* at 30140, a requirement adopted in its final rules, *id.* at 30142. It also noted that commenters concurred with this requirement as a way of avoiding potential First Amendment violations.[9]

IV. Shawnee State Was Wrong to Restrict Meriwether's Speech Off Campus and Outside the Classroom.

What's more, University officials' application of their policies to Dr. Meriwether's off-campus and out-of-class speech violates the First Amendment and was not needed to comply with Title IX. Shawnee State has chosen to apply its policy to his speech "both in and out of the classroom," and by "threatening to punish him" for it.[10]

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[9] Commenters noted that "courts have struck down campus racial and gender harassment codes that banned speech that created a hostile environment, but did not cause more tangible harm to students." *Id.* at 30140. *See*, *e.g.*, *UWM Post v. Board of Regents*, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991) (striking down university's hostile-environment racial/gender harassment code, and rejecting argument that it was valid because it was no broader than Title VII workplace harassment rules; "Since Title VII is only a statute, it cannot supersede the requirements of the First Amendment").

[10] Compl., ¶¶61-66, 309, 318, 323, 333, 349, 365, R.34, PageID.1465-66, 1494, 1496-97, 1500, 1502; *see also* Compl. Ex. 2, ¶2.13, PageID.1512 (policy covers "off-campus conduct" that could create a "hostile environment or be detrimental to the University"); R. & R., Doc. 49, PageID.2135 ("defendants do not dispute" their policy reaches beyond the classroom), PageID.2136 (defendants apply their policies to "cover behavior and speech that occurs outside the classroom" including "off-campus").

Title IX case law confirms that off-campus conduct—even very offensive and intimidating conduct—by an instructor off campus does not interfere with educational opportunities or create a hostile educational environment unless it occurs in an event that is sponsored or supervised by the university itself. For example, the Eighth Circuit ruled that an instructor's off-campus assault of a student—whom he forcibly kissed and embraced—did not violate Title IX or contribute to a hostile educational environment, because it did not affect access to education programs and activities as Title IX's plain language requires. *Lam v. University of Missouri Curators*, 122 F.3d 654, 657 (8th Cir. 1998).[11]

Speech that is not protected in the school setting nonetheless may be protected outside of school. For example, K-12 schools can ban vulgarity in school, but a high-school student's vulgar insult to a teacher outside of school was held to be protected by the First Amendment. *Klein v. Smith*, 635 F.Supp. 1440 (D. Me. 1986); *see also J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011) (vulgar parody of principal outside school was protected). Accordingly, the court below was wrong to dismiss plaintiff's challenge to defendants' restriction on his off-campus speech.

[11] *See also Roe v. St. Louis University*, 746 F.3d 874, 884 (8th Cir. 2014) (no Title IX liability for off-campus sexual assault committed by student against plaintiff)).

Under the canon of constitutional doubts, laws like Title IX should not be interpreted as reaching speech that might potentially be constitutionally protected, such as off-campus speech. *See Edward J. DeBartolo v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (narrowly construing National Labor Relations Act to avoid potential First Amendment problems, even though *Chevron* deference would otherwise have been due the agency's broader interpretation of the statute); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (reading exemption for religious schools into the NLRA under the canon of constitutional doubts, to avoid potential First Amendment problems).

But it is not possible to construe the policy *not* to reach off-campus speech to avoid the constitutional problems. The policy's text unambiguously applies to speech that occurs "off-campus" and gives University officials power to determine whether such speech "could reasonably create a hostile environment ***or*** be detrimental to the University"[12] – despite the problems that may create. *See United States v. National Treasury Employees Union*, 513 U.S. 454, 470 (1995) (speech "outside the workplace" is less subject to regulation on "disruption" grounds than speech in the workplace).

[12] Compl. Ex. 2, ¶2.13, R.34-2, PageID.1512 (emphasis added); *see also* R. & R., Doc. 49, PageID.2136 (defendants apply their policies to "cover behavior and speech that occurs outside the classroom" including "off-campus").

V. Shawnee State's Harassment Policy Is Unconstitutionally Overbroad and Vague.

If the university's harassment policy does prohibit Meriwether's speech, as the court below found, then it is unconstitutionally vague and overbroad because of how expansively it interprets interference with educational benefits. Courts have struck down harassment policies that banned speech that unreasonably interferes with a student's work, when the degree of interference required was minor, rather than severe or pervasive. Here, the degree of interference was non-existent: The complainant remained in Dr. Meriwether's class, contributed freely and frequently, and received a good grade. See Compl. ¶¶ 159, 176–83, PageID.1477, 1479.

But even if his conduct somehow "limits, interferes with or denies education benefits," as Shawnee State's policy provides, it did so in such an attenuated way that to reach it, Shawnee State's policy would have to reach even the most trivial impacts – impacts that courts have ruled do not justify restrictions on speech.

The magistrate's ruling, adopted by the court below, effectively allows colleges to punish speech—even when it does not amount to harassment under federal law—just by claiming that the college's harassment policy contains a "reasonable person" limit. R. & R., R.49, Page ID.2133-34, 2136.

The court claimed that Shawnee State's policy is distinguishable from the harassment policy struck down as vague and overbroad in *Doe v. University of*

Michigan, 721 F. Supp. 852 (E.D. Mich. 1991), because it "contained no 'reasonable person' standard." R. & R., PageID.2133.

But the University of Michigan's unconstitutional policy did contain such a standard. It only banned speech that interfered with an individual's academic efforts if that effect was "reasonably foreseeable" or intended. Under it, "a stigmatizing or victimizing comment is sanctionable if it has the purpose or **reasonably foreseeable** effect of interfering with an individual's academic efforts, etc." *Doe v. University of Michigan*, 721 F.Supp. 852, 867 (E.D. Mich. 1989) (emphasis added). But this did not fix the policy's vagueness and overbreadth. As the court explained, "the question is what conduct will be held to 'interfere' with an individual's academic efforts. The language of the policy alone gives no inherent guidance…. Students of common understanding were necessarily forced to guess at whether a comment about a controversial issue would later be found to be sanctionable under the Policy." *Id.*

Other courts have also invalidated discipline under vague or overbroad harassment policies even though they contained "reasonableness" language.

For example, the Ninth Circuit found that a college's sexual harassment policy was unconstitutionally vague as applied to a professor's sexually-themed lectures, even though the college's policy banned only "conduct" that "has the purpose of effect of **unreasonably** interfering with an individual's performance or

creating an intimidating, hostile, or offensive learning environment." *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996) (boldface added).

Similarly, the Third Circuit struck down as overbroad a sexual harassment policy against speech that had the purpose or effect of interfering with work or creating a hostile environment. In doing so, it noted that "the Policy's prong that deals with conduct that 'unreasonably interfere[s] with an individual's work'" probably violated the First Amendment. "If we were to construe 'unreasonable' as encompassing a subjective and objective component, it still does not necessarily follow that speech which effects an unreasonable interference with an individual's work justifies restricting another's First Amendment freedoms," absent a showing of severity or pervasiveness. *DeJohn v. Temple University*, 537 F.3d 301, 319-20 (3d Cir. 2008).

That language in the harassment policy struck down by the Third Circuit is similar to Shawnee State University's policy, which prohibits conduct that "limits, interferes with or denies education benefits."

A. Speech That Offends a "Reasonable Person" Remains Protected.

Even if speech is offensive to all who hear it, it remains protected by the First Amendment. The government may "not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). "The very idea that a noncommercial speech

restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis." *Hurley v. Irish-American Gay Group of Boston*, 515 U.S. 557, 579 (1995).

"The Constitution protects expression and association without regard . . . to the truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U.S. 415, 444-45 (1963). Thus, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Board*, 450 U.S. 707, 713 (1981).

In short, the fact that speech offends a "reasonable person" is not reason enough to prohibit it. *See also Matal v. Tam*, 137 S.Ct. 1744, 1764 (2017) ("Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"); *Doe v. University of Michigan*, 721 F. Supp. 852, 863 (E.D. Mich. 1991) ("Nor could the University proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people.").

Nor is it a sufficiently clear standard to avoid being void for vagueness. *Doe*, 721 F.Supp. at 867 ("reasonably foreseeable" provision gave "no inherent

guidance"). Adjudicators can differ in how they apply even purportedly objective standards, punishing people with different political or religious beliefs for their supposed extremism or unreasonableness. *See Elfbrandt v. Russell*, 384 U.S. 11, 16 (1966) (voiding loyalty oath requirement on First Amendment grounds) ("People often label as 'communist' ideas which they oppose; and they often make up our juries. '[P]rosecutors too are human.'"); *compare Dambrot v. Central Michigan Univ.*, 55 F.3d 1177, 1182-83 (6th Cir. 1995) (broad delegation of power to punish speech rendered policy too vague).

So additional features beyond mere "reasonableness" are needed in a harassment policy to render it constitutionally not overbroad or vague – such as the requirement that conduct be objectively "severe and pervasive" to be punishable, the requirement found in Title IX jurisprudence, *see Saxe v. State College Area School District*, 240 F.3d 200 (3d Cir. 2001) (harassment policy was overbroad "because the Policy's 'hostile environment' prong does not, on its face, require any threshold showing of severity or pervasiveness"); *DeJohn*, 537 F.3d at 319-20 (sexual harassment policy policy's prong banning "conduct that 'unreasonably interfere[s] with an individual's work'" probably violated the First Amendment, even if "unreasonably" encompassed both a "subjective and objective component," absent an additional showing of severity and pervasiveness).

The text of defendants' policy does contain a "severe or pervasive" limit. (See Compl., Ex. 2 ¶18.6.1, PageID.1522). But that limit was disregarded in applying it to Dr. Meriwether's speech, which was clearly not severe or pervasive enough to create a hostile work environment,[13] much less deny access to educational benefits,[14] as case law demonstrates.

This is not to say that a harassment policy should not include a "reasonable person" limit, as one of multiple limiting elements. It should. A "reasonable person" limit helps to cabin the reach of a harassment policy. But it is not enough, by itself, to keep a harassment policy from being unconstitutionally vague or overbroad. *See Reno v. ACLU*, 544 U.S. 821, 873 (1997) (where one element of liability is imprecise, additional limits are needed; fact that "patently offensive" test is acceptable as part of the three-part test for obscenity, and uses objective community standards, did not keep it from being unconstitutionally vague as a standalone test; "Just because a definition including three limitations is not vague, it does not follow that one of those limitations, standing by itself, is not vague").

[13] *See Morris, supra; Singh, supra; Curry, supra.*

[14] *See Pahssen, supra; Burwell, supra; Hawkins, supra.*

Federal workplace harassment law is itself no model of clarity, due to the obvious vagueness of the term "hostile environment."[15] But at least a body of case law has emerged over time under it that sheds some light on what is or isn't forbidden under Title VII, *cf. Cohen*, 92 F.3d at 970-71 (successful as-applied challenge to hostile-environment harassment policy, because there was no interpretive guidance on what it forbade, and professor's speech fell within "nebulous outer reaches" of what constitutes a hostile environment).

But that case law neither sheds light for Meriwether nor provided notice that his conduct was forbidden under the university's harassment policy, precisely because Meriwether's conduct, by itself, is NOT severe or pervasive enough to constitute illegal harassment. *See, e.g., Hawkins, supra; Burwell, supra*.

Indeed, the unenforced "severe or pervasive" language in defendants' policy is a trap for the unwary, creating the false appearance of a safe harbor against punishment for speech that (like plaintiff's) is neither severe nor pervasive. As interpreted by defendants, it is thus void for vagueness. *See Gentile v. State Bar*, 501 U.S. 130 (1991) (confusing safe harbor provision rendered rule too vague).

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[15] *See Pasqua v. Metropolitan Life Ins. Co.*, 101 F.3d 514, 516 (7th Cir. 1996) (harassment claims rooted in "statutory language" that is "vague" and has led to an "expansive" reading); Eugene Volokh, *Freedom of Speech versus Workplace Harassment*, Slate, Sept. 23, 1997 (quoting civil-rights officials' admission that "the legal boundaries" of what constitutes a hostile environment are "poorly marked") (https://slate.com/news-and-politics/1997/09/freedom-of-speech-vs-workplace-harassment-3.html).

Moreover, even in the non-academic workplace, reasonable offense is not necessarily a basis for punishing speech that does not have a serious impact on the complainant, as opposed to causing minor offense. *Cf. Meltebeke v. Bureau of Labor & Indus.*, 903 P.2d 351, 365-66 (Or. 1995) (Unis, J., concurring) (agency's hostile environment religious harassment rule was unconstitutionally overbroad, where it required only an *objectively* hostile work environment, and that the speech be "unwelcome," but not *also* the existence of a *subjectively* hostile environment).

B. Speech That Affects Educational Benefits Can Be Protected.

Speech, including intellectual arguments, can be quite devastating to a reasonable person based on their religion or other protected characteristics,[16] and as a result, interfere with or limit their scholarly efforts by impairing their self-confidence. But that does not render such speech in any way being unprotected or beyond the bounds of the First Amendment, even if the university were to argue that such speech violates its harassment policy against conduct that "limits, interferes with or denies education benefits." *See DeJohn v. Temple University*, 537 F.3d 301, 319-20 (3d Cir. 2008) (provision banning "unreasonable interference with an individual's work" likely violated First Amendment).

[16] *Compare Venters v. City of Delphi*, 123 F.3d 956, 975-76 (7th Cir. 1997) (federal law forbids conduct that creates a religiously hostile work environment).

When the famous Christian apologist C.S. Lewis's logical "argument for the existence of God" was "demolished" by Elizabeth Anscombe, he was reportedly devastated, and as a result, he "never wrote another theological book." *See* Andrew Rilstone, *Were Lewis's Proof of the Existence of God from 'Miracles' Refuted by Elizabeth Anscombe?*, http://web.archive.org/web/20021202084439/http:/www.aslan.demon.co.uk/cslfaq.htm#_Toc5085891

But reasoned criticism such as Anscombe's should not be banned merely because it might negatively impact a "reasonable person" or reduce productivity or academic output. Requiring that speech limit or interfere with an educational benefit fails to provide adequate fair notice and breathing space for First Amendment freedoms. *See DeJohn, supra*. That is true even if the harassment policy in question reaches only speech that has a "reasonably foreseeable effect" of so interfering—i.e., would have such effect on a reasonable person. For example, it was unconstitutionally vague to ban speech that has the "reasonably foreseeable effect of interfering with an individual's academic efforts," even when the university recognized that its policy didn't reach all speech that was "merely offensive" to the complainant. *See Doe,* 721 F.Supp. at 867.

Shawnee State had to stretch its harassment policy considerably to reach Dr. Meriwether's speech, which did not affect the complainant's grades or prevent the complainant from participating in class. Even assuming that he should have to call

all transgender students by pronouns and titles corresponding to their stated gender identity, such a requirement does not fall within the plain language of the harassment policy, and applying it to him thus expands its reach to the point of making it sweepingly overbroad and vague.

VI. The Harassment Policy Is Viewpoint-Discriminatory

The court ruled that Shawnee State's harassment policy was not viewpoint-discriminatory, unlike the hostile-environment harassment policy struck down in *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995), because it targeted "unlawful or prohibited discrimination and harassment."[17]

In fact, Shawnee State has applied its policy to speech that does not interfere with educational access or even create a hostile environment, much less violate Title IX. What's more, it is viewpoint-discriminatory. Hostile-environment regulations are inherently content-based and viewpoint discriminatory, *see Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 206-07 (3d Cir. 2001) (so stating); *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596-97 (5th Cir. 1995) (recognizing that hostile-environment sexual harassment law is content-based and viewpoint-discriminatory) (citing Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. Rev. 1791 (1992); *Weller v. Citation Oil & Gas Corp.*, 84 F.3d 191, 194-95 n.6 (5th Cir. 1996) (same)). Title VII's ban on

[17] R. & R., Doc. 49, p. 42, PageID.2136.

hostile work environments targets bigoted "views" and "the expression of racist or sexist attitudes." *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 350 (6th Cir. 1988).

Harassment law is content-based for an additional reason. Whether a hostile environment exists turns on listeners' reaction to speech, and whether they find it offensive enough to create a hostile environment. *Harris v. Forklift Systems*, 510 U.S. 17, 21-22 (1993) ("If the victim does not subjectively perceive the environment to be abusive…there is no Title VII violation"); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986) ("any sexual harassment claim" requires proof that the conduct was "unwelcome"). "Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992).

As content-based regulations, hostile-environment regulations need to be narrowly-tailored, to restrict the least amount of speech necessary to avoid unlawful discrimination[18] – rather than restricting speech that does not violate the law, the way defendants have done in applying Shawnee State's policy.[19]

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[18] *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

[19] In rare cases, even speech that actually creates a hostile work environment may be protected speech, such as when it is part of political debate, or part of the creative process in an academic or media setting, and is not intended to harm the complainant based on a protected characteristic. *See Lyle v. Warner Brothers*, 42 Cal.Rptr.3d 2, 26-30 (Cal. 2006) (Chin, J., concurring)(so observing, and also noting that courts cannot ban speech as a hostile work environment merely because "a female employee of an art gallery or a female employee of an adult bookstore "

(continued on next page)

VII. The University Harassment Policy Undermines Compelling Interests

If speech can be banned as interference with educational benefits just because it offends a student (even a "reasonable" one), speech about a wide array of racial and sexual issues could be banned. That would undermine important educational and societal interests.

Many people are offended by core political speech about racial and sexual issues, and want to silence opposing viewpoints. Commenters have noted that "under schools' hostile learning environment harassment codes, students and campus newspapers have been charged with racial or sexual harassment for expressing commonplace views about racial or sexual subjects, such as criticizing feminism, affirmative action, sexual harassment regulations, homosexuality, gay marriage . . . or discussing the alleged racism of the criminal justice system." U.S. Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*: *Final Rule*, 85 Fed. Reg. 30026, 30140 (May 19, 2020). Labeling speech as "harassment" or a "hostile environment" merely because it offends listeners – even "reasonable" ones – will result in a vast amount of censorship.

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is upset by the presence of "sexually explicit materials in the workplace"). Even a compelling interest in eradicating discrimination does not always trump First Amendment rights. *See Boy Scouts v. Dale*, 530 U.S. 640 (2000) (freedom of expressive association outweighed state's antidiscrimination law); *Hosanna-Tabor v. EEOC*, 565 U.S. 171 (2011) (freedom of religion limited Title VII's reach).

But it is vital that such debate about racial and sexual topics not be suppressed. Suppressing it would defeat the whole purpose of a university. Our society has a "compelling interest in the unrestrained discussion of racial problems." (*Belyeu v. Coosa County Bd. of Educ.*, 998 F.2d 925, 928 (11th Cir. 1993), and a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." (*New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

Moreover, "the efficient provision of services by" a public university "actually depends, to a degree, on the dissemination in public fora of controversial speech implicating matters of public concern," and "excessive regulation of the speech...may actually impair" its "ability" to "function efficiently." (*Blum v. Schlegel*, 18 F.3d 1005, 1011-12 (2d Cir. 1994)). Censorship is especially pernicious "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. Univ. of Virginia,* 515 U.S. 819, 835 (1995)).

CONCLUSION

For the foregoing reasons, and those stated by the Appellant, the court below should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because it contains 5,814 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(c)(2)(A), I hereby certify that, on June 3, 2020, the foregoing was served on all parties by filing it with the Court's electronic filing system.

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