APPEAL NO. 09-56238

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JONATHAN LOPEZ,

Plaintiff-Appellee,

v.

KELLY G. CANDAELE, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court for the Central District of California
Civil Case No. 09-0995 GHK FFMx
The Honorable George H. King

PLAINTIFF-APPELLEE JONATHAN LOPEZ'S PETITION FOR PANEL REHEARING AND SUGGESTION FOR REHEARING EN BANC

David J. Hacker
Heather Gebelin Hacker
ALLIANCE DEFENSE FUND
101 Parkshore Drive, Suite 100
Folsom, California 95630
Tel: (916) 932-2850
Fax: (916) 932-2851

David A. French
ALLIANCE DEFENSE FUND
12 Public Square
Columbia, Tennessee 38401
Tel: (931) 490-0591
Fax: (931) 490-7989

Sam Kim
Michael L. Parker
SAM KIM AND ASSOCIATES, P.C.
5661 Beach Boulevard
Buena Park, California 90621
Tel: (714) 736-5501
Fax: (714) 736-9901

Attorneys for Plaintiff-Appellee Jonathan Lopez

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INTRODUCTION

In its September 17, 2010 opinion denying Appellee Jonathan Lopez standing to challenge a manifestly unconstitutional college speech code, the Panel created a sharp circuit split with two federal circuits. (*Lopez v. Candaele*, No. 09-56238, Slip Opinion ("Op."), Sept. 17, 2010, at 14376-14377.) Specifically, the Panel's decision (1) directly conflicts with the Third Circuit's decision in *McCauley v. University of the Virgin Islands*, -- F.3d --, 2010 WL 3239471, *3 (3d Cir. Aug. 18, 2010), and the Sixth Circuit's decision in *Dambrot v. Central Michigan University*, 55 F.3d 1177, 1182 (6th Cir. 1995); (2) stands alone among decisions examining student facial challenges to overbroad school speech codes, including *high school* speech codes, (3) involves questions of exceptional importance, namely, the ability of students at public colleges and universities to facially challenge overbroad policies that directly restrict their speech at all times on campus, and (4) overlooks critical facts. Lopez respectfully requests rehearing or rehearing en banc pursuant to Fed. R. App. P. 35 & 40.

ARGUMENT

I. The Panel's Decision Creates a Circuit Split with the Third and Sixth Circuits.

The Panel determined that Lopez lacked standing because he allegedly did not show a credible threat of enforcement (Op. at 14370-72), did not show his intended speech violates the speech code (*id*. at 14373), and did not show that the

Los Angeles Community College District ("College") will likely enforce the code against him (*id*. at 14375-76). Although Lopez suffered a "bruising encounter" with his professor (*id*. at 14378), which included the censorship of his in-class speech due to the "offensive" views it expressed, threats of expulsion based on that speech, a threat of punishment based on unspecified College policies, and objections by his fellow students and an administrator that Lopez "offended" them, the Panel viewed those facts as insufficient to establish a credible threat of enforcement. The Panel also concluded that Lopez did not show that the speech code arguably applies to his intended speech, and that his allegation of a chill was insufficient for standing. These conclusions stand in direct conflict with the Third and Sixth Circuits.

A. The Panel's Decision Squarely Conflicts with *McCauley v. University of the Virgin Islands*.

In *McCauley*, 2010 WL 3239471, *3, the Third Circuit held that a student had standing to facially challenge several university policies despite his testimony that he not only never suffered a deprivation based on the policies but that his speech was not even "chilled" by the policy's more egregious elements. The university previously charged McCauley with violating Paragraph E of the Student Code of Conduct, which prohibited causing physical or mental harm to another person. *Id*. at *1-2. After receiving notice of the charge, McCauley filed a lawsuit against the university, challenging not only Paragraph E of the Code, but also

Paragraphs B, H, and R, which had nothing to do with the underlying charge against him. *Id*. at *2. Paragraph B prohibited "lewd or indecent conduct"; Paragraph H prohibited conduct that caused "emotional distress, including conduct … which compels the victim to seek assistance in dealing with the distress"; and Paragraph R prohibited the "display of unauthorized or offensive signs." *Id*. at *3.

McCauley asserted facial challenges to Paragraphs B, H, and R despite conceding he suffered no deprivations from these policies and despite conceding he did not feel the paragraphs chilled his speech. *Id*. at *2. The Third Circuit noted that McCauley's concession "raise[d] concerns about McCauley's standing." *Id*. Despite McCauley's concessions, the Third Circuit held he had standing to challenge those policies because of the "judicial prediction or assumption" that they may "cause others not before the court to refrain from constitutionally protected speech or expression." *Id*. at *3 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)). The court noted:

> Ideally, McCauley would have responded to questions at trial regarding injury by stating that his speech and the speech of other students was chilled by the Code. Yet his failure to provide this lawyerly response is not fatal to his claim, given that we should "freely grant standing to raise overbreadth claims."

Id. (citation omitted). "Paragraphs B, H, and R, all have the potential to chill protected speech…. As such, under the 'relaxed' rules of standing for First

Amendment overbreadth claims, McCauley has standing to assert facial challenges to those paragraphs." *Id*. (citation omitted).

In reaching this decision, the Third Circuit was informed by the "critical importance" free speech has in our public universities. *Id*. at *6 (citing *DeJohn v. Temple Univ*., 537 F.3d 301, 314 (3d Cir. 2008)). University life is unique to our society. University students "often reside in dormitories on campus, so they remain subject to university rules at almost all hours of the day." *Id*. at *11. The "student is constantly within the confines of the schoolhouse" and subject to the university's regulation. *Id*. Thus, even though McCauley was never threatened with punishment under the policies, never articulated how they chilled his speech, and even admitted that they did not deprive his freedom to speak, the Third Circuit still found he had standing to challenge their facial overbreadth. *Id*. at *3; *see also G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1076 (6th Cir. 1994) ("It is well-settled that a chilling effect on one's constitutional rights constitutes a present injury in fact."); *Levin v. Harleston*, 966 F.2d 85, 89-90 (2d Cir. 1992) (finding in professor's case against university, "[i]t is the chilling effect on free speech that violates the First Amendment, and it is plain that an implicit threat can chill as forcibly as an explicit threat.")

The Panel's decision squarely conflicts with the Third Circuit because the facts show that Lopez has an even stronger foundation for standing than McCauley

did. McCauley was not threatened with punishment under the policies he challenged, nor was his speech censored by university officials using exact language from the policies. However, Lopez repeatedly experienced actual and threatened censorship by College officials.

When Lopez gave his informative speech about Christianity and marriage, reading the definition of marriage as consisting of the union of one man and one woman, he made a "generalized sexist statement" prohibited by the College's speech code. (ER302-03 ¶84.) Given the contentious debate about marriage in California at the time and the strong feelings it elicited, Professor Matteson believed that Lopez's speech created an "offensive environment" under the speech code, because anyone who voted in favor of Proposition 8 and anyone who espoused Lopez's views was a "fascist bastard" according to Matteson. (ER294-95 ¶¶32-45; 299 ¶66; 305-06 ¶¶94-96.) Matteson censored Lopez's speech and called it "offensive," invoking the exact policy language challenged by Lopez. (ER294 ¶¶35-36; 299 ¶66.) He even refused to grade Lopez's speech and threatened him with expulsion. (ER295 ¶39; 296 ¶49.) Later, Matteson instructed Lopez to comply with the College's student code of conduct, which requires compliance with the speech code. (ER300 ¶72; 305 ¶93; 411; 424; 454.) This admonition clearly came in the context of Lopez's speech. In his Verified Complaint Lopez stated that Matteson took these actions pursuant to the speech

code, which caused Lopez to refrain from discussing similar topics in the future for fear of punishment. (ER305-06 ¶¶94-96; 306 ¶104.) Dean Jones even told Lopez that his speech offended other students, who have the right to file a complaint about Lopez's speech pursuant to the speech code. (*See* ER302 ¶80 ("anyone affected by the offensive conduct" may report it).) And under that very code, the mere fact that they were offended is sufficient to prove harassment. (ER301-02 ¶79.)

The Panel concluded that these did not constitute credible threats of enforcement, despite the fact that each time someone opined about Lopez's speech on Christianity and marriage, they labeled it as "offensive." And Lopez stated that he felt that each of these interactions was a threat to not "create an offensive environment." (ER299 ¶66; 305-06 ¶¶95-96.) Lopez also states that Matteson threatened him with punishment under the speech code, which the Panel must accept as true because Matteson defaulted, rendering each allegation against him as admitted. *See DIRECTV, Inc. v. Hoa Huynh*, 503 F.3d 847, 851 (9th Cir. 2007) ("in defaulting, defendants are deemed to have admitted all well-pleaded factual allegations contained in the complaints").

In *McCauley*, the student was not threatened with enforcement of most of the challenged policies, nor did he express what he wanted to say that would violate the policies. Instead, he admitted he suffered no specific deprivation and

his speech was not even chilled. Nevertheless, the university required him to comply with the policies at all times on campus. The "chill" was an objective reality not a subjective experience, and was sufficient to give him facial overbreadth standing. But here, the Panel did not grant Lopez similar standing, even though College officials and his peers actually threatened enforcement of the speech code. The Panel faulted Lopez for not showing actual application of the policy by name, but in doing so the Panel misapplied the doctrine of facial overbreadth standing and created a circuit split with *McCauley*. For these reasons, the Panel's decision should be reheard or reheard en banc.

B. The Panel's Decision Squarely Conflicts with *Dambrot v. Central Michigan University*.

In *Dambrot*, 55 F.3d at 1182, student members of the basketball team challenged the facial overbreadth of the university's policy on racial and ethnic harassment after the university fired their coach for using a racial slur in the locker room. The university had not threatened enforcement of the policy against the students, nor did the students plead that they intended to violate it. *Id*. at 1182-83. They only pleaded that they used the word that resulted in the coach's dismissal. *Id*. at 1180. The Sixth Circuit found standing to challenge the harassment policy on its face because the "overbreadth doctrine … allows parties not yet affected by a statute to bring actions under the First Amendment *based on a belief that a*

certain statute is so broad as to 'chill' the exercise of free speech and expression." *Id*. at 1182 (emphasis added).

In reaching this conclusion, the Sixth Circuit encountered a similar argument presented by the College in this case: that the university "enforces the policy with respect to First Amendment rights." *Id*. at 1182-83. The court rejected that argument because there was "nothing to ensure the University will not violate First Amendment rights even if that is not their intention." *Id*. at 1183. The "text of the policy" clearly showed that "language or writing, intentional or unintentional, regardless of political value, can be prohibited upon the initiative of the university." *Id*. This, the court found, presents a "realistic danger" of enforcement. *Id*.

In this case, the Panel concluded that when Jones responded to Lopez's threat of litigation, and wrote that "First Amendment rights will not be violated," this statement indicated that the College "did not intend to take any action against Lopez." (Op. at 14375.) The Panel also found that the language of the policy does not arguably apply to Lopez's past or future speech. (*Id*. at 14373.) The Panel's conclusion sharply conflicts with *Dambrot*'s conclusion that a college's intent not to enforce a harassment policy is insufficient to destroy standing, when the plain language of the policy shows that the college can enforce it at any time. Here, like *Dambrot*, the speech code prohibits both intentional and unintentional speech by

its prohibition on speech that has the "purpose or effect of … creating an intimidating, hostile or offensive work or educational environment." (ER299 ¶66.) And Lopez provided even more facts about how his intended speech will violate the speech code based on the interpretations of the code provided by the College. The Panel's decision should be reheard or reheard en banc to resolve the conflict in the circuits.

II. The Panel's Decision Stands Alone Among Overbreadth Standing Precedent.

The Panel creates a circuit split not only with *McCauley* and *Dambrot*, but also with other circuits that have examined a student's facial challenge to a school speech policy, which found the students had standing to challenge the policies on thinner facts than this case. The Panel's decision also erodes the doctrine that a non-moribund law may be challenged on overbreadth grounds when it chills speech.

A. The Panel's Decision Is Contrary to Circuit Precedent Addressing Student Facial Challenges to Overbroad School Policies.

Besides *McCauley*, the Third Circuit has granted students standing to facially challenge college and school harassment policies that chill their speech. In *DeJohn v. Temple University*, 537 F.3d at 305, a student had standing to facially challenge the overbreadth of a sexual harassment policy, nearly identical to the one in this case, by pleading that "he felt inhibited in expressing his opinions in class

concerning women in combat and women in the military," because he "found himself engaged in issues he believed were implicated by the policy." This caused the student to "be concerned that discussing his social, cultural, political, and/or religious views regarding these issues might be sanctionable by the University." *Id*. Thus, the "policy had a chilling effect on his ability to exercise his constitutionally protected rights." *Id*.

Further, in *Saxe v. State College Area School District*, 240 F.3d 200, 203 (3d Cir. 2001), the Third Circuit held that two high school students could facially challenge the overbreadth of a sexual harassment policy merely by showing it chilled their speech. The policy was nearly identical to the one at issue in this case. *Id*. at 202. The students pleaded they had standing because they "identif[ied] themselves as Christians," "they believe[d], and their religion teaches, that homosexuality is a sin," and that "they ha[d] a right to speak out about the sinful nature and harmful effects of homosexuality." *Id*. at 203. "[T]hey feared that they were likely to be punished under the Policy for speaking out about their religious beliefs." *Id*. The district court found they had standing to challenge the sexual harassment policy on its face as overbroad and vague. The Third Circuit agreed in a decision authored by Judge Alito (now Justice Alito).[1] *Id*. at 214-15, 217.

[1] *See Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 251 (3d Cir. 2002) (finding standing to challenge harassment policy as overbroad even though student was threatened with enforcement under a different policy); *Trotman v. Bd.*

Similarly, in *Newsom v. Albemarle County School Board*, 354 F.3d 249, 252-53 (4th Cir. 2003), a teacher instructed a middle school student to turn his National Rifle Association (NRA) t-shirt inside out, citing school policy. But school policy said nothing about the t-shirt. *Id.* After the incident, the school amended the policy to prohibit clothing containing "messages … that relate to … weapons" but then failed to enforce the new policy. Then the student wore an NRA t-shirt repeatedly without any punishment, enforcement, or even a warning. *Id*. at 253-54. The Fourth Circuit found the student had standing to facially challenge the *unenforced* policy as overbroad, because "overbreadth doctrine constitutes 'a departure from the traditional rules of standing.'" *Id*. at 257 (quoting *Broadrick*, 413 U.S. at 613).

Lopez pleaded uncontroverted facts similar to those in *DeJohn*, *Saxe*, and *Newsom*. Lopez "shares his beliefs about Christianity with others, particularly, his fellow students." (ER293 ¶25.) He "often discusses his faith and how it applies to guide his views on political, social, and cultural issues and events." (*Id*.) He "looks for opportunities to speak with other students about his faith … between classes among friends and fellow students, and sometimes during appropriate class opportunities." (*Id*. ¶26.) Lopez also states that he "finds himself constantly

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of Trustees of Lincoln Univ., 635 F.2d 216, 228-29 (3d Cir. 1980) (finding professors who received letters implicitly threatening discipline had standing to sue university for chilling speech).

engaged in conversations on campus regarding issues implicated by the speech code, including his speech during Speech 101," when he discussed his religious beliefs and marriage. (ER305 ¶92.) But Lopez "fears that the discussion of his religious, political, social and/or cultural views regarding these issues may be sanctionable under the speech code." (*Id*.) Indeed, Lopez states that "Matteson's actions chilled [his] expression pursuant to the District's speech code" (*id*. ¶94), which "caused him to refrain from discussing his beliefs with respect to political, social, and cultural issues and events" (*id*. ¶95). Thus, Lopez pleaded nearly identical facts as the students in *DeJohn* and *Saxe*, and suffered censorship of his expression in class when he "offended" others, which shows more of a nexus between the policy and the censorship than the student proffered in *Newsom*. Yet the Panel found Lopez did not show a credible threat of enforcement. The Panel's conflicting decision warrants rehearing.

B. The Panel's Decision Erodes the Overbreadth Standing Doctrine.

The Panel ignores the doctrine that a non-moribund law may be challenged on overbreadth grounds when it chills speech. Relying on *Laird v. Tatum*, 408 U.S. 1, 9 (1972), which involved a policy with no enforcement mechanism, the Panel concluded that a chill upon speech is not sufficient to demonstrate a credible threat of enforcement. (Op. at 14367.) However, federal precedent is to the contrary. In *Virginia v. American Booksellers Association*, 484 U.S. 383, 392-93

(1988), the Supreme Court found that booksellers had standing to challenge an obscenity law because it was "aimed directly" at entities like the plaintiffs, and the "State ha[d] not suggested that the newly enacted law will not be enforced." The "danger of this statute" was "self-censorship," which is "a harm that can be realized even without an actual prosecution." *Id*. at 393.

"A non-moribund statute that facially restrict[s] expressive activity by the class to which the plaintiff belongs presents such a credible threat, and a case or controversy thus exists in the absence of compelling evidence to the contrary." *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999) (citing *N.H. Right to Life PAC v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996)). "This presumption is particularly appropriate when the presence of a statute tends to chill the exercise of First Amendment rights." *Id.*; *see Chamber of Commerce v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) (finding standing to facially challenge a regulation even without danger of enforcement); *Wilson v. Stocker*, 819 F.2d 943, 946-47 (10th Cir. 1987) (holding plaintiff may facially challenge statute even without history or threat of enforcement). The Panel's decision erodes this established authority and merits rehearing.

III. Protecting Students' Ability to Facially Challenge Overbroad Policies that Chill Speech Is of Exceptional Importance.

The Panel's decision creates an unreasonable barrier to students trying to secure their First Amendment rights by challenging campus speech codes. In the

Panel's judgment, a student like Lopez cannot facially challenge the only policy that prohibits "offensive" speech at the College even after being silenced by his professor for "offensive" speech, threatened with expulsion, and told by another administrator that he "offended" other students.

Public universities present unique characteristics unlike other speech fora. They are the "marketplace of ideas." *Healy v. James*, 408 U.S. 169, 180 (1972). They encourage students to posit competing and disfavored ideas, *id.* at 181-82, even when student views "are at war with the ones which the college has traditionally espoused or indoctrinated," *McCauley*, 2010 WL 3239471, *9. Students often reside on campus and are subject to university rules at almost all hours of the day. *Id*. at *11. Thus, application of facial overbreadth standing should be informed by the "'critical importance' free speech has in our public universities." *Id*. at *6-7.

Despite these unique characteristics, the Panel erects a barrier to students who read a campus policy prohibiting various vague forms of speech, believe it might apply to their speech (perhaps because they have unorthodox views), and who then self-censor their speech for fear of punishment. To have standing to challenge those policies, the Panel requires students to risk their college degrees with possible expulsion by violating the policies or prove that during a threat of enforcement the administrator named the exact policy they violated. Alternatively,

the Panel requires students who read a college harassment policy that prohibits subjectively "offensive" speech to plead in court that they want to harass another student—risking punishment by the statement—or admit that their speech is "offensive," which no student would do when they do not believe it so. The Panel places students in a Catch-22.

Matteson and the students labeled Lopez speech as "offensive" due to the atmosphere of censorship created on campus by the speech code. The code prohibits students from "creating an intimidating, hostile or *offensive* work or educational environment." (ER299 ¶66) (emphasis added). The Panel finds that Matteson and the students never specifically mentioned Policy 15003 by name and number. But an exact citation is not necessary for standing to sue, when those who enforce the code used the exact terms of the policy to threaten Lopez.

None of the Panel's supporting citations involved college student speech. Instead, the Panel misapplies pre-enforcement cases. In these cases, the plaintiffs had to avail themselves of the laws before those laws could even remotely apply to their speech. For example, the ordinance in *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022 (9th Cir. 2006), would not apply to the plaintiffs but for their desire to conduct marches in the city. By contrast, college students like Lopez must comply with campus policies because they avail themselves of the speech policies by attending the college. Harassment policies and student codes of

conduct apply to *every human interaction on campus*. The only way to escape the policy is to leave the college. At all times students must keep in mind the prohibitions of these policies. The Panel's oversight of these exceptionally important distinctions merits rehearing.

IV. The Panel Overlooked Facts that Demonstrate Lopez's Injury.

The Panel overlooked critical facts that show Lopez faces a credible threat of enforcement. First, the Panel's analysis of whether the speech code applies to Lopez's past or future speech overlooks key portions of the policy that directly restrict Lopez's speech on any topic, at any time. (Op. at 14373.) The speech code instructs students "[i]f you are unsure if certain comments or behaviors are offensive do not say it, do not do it" and "[a]sk if something you do or say is being perceived as offensive, pervasive or unwelcome. If the answer is yes, stop the behavior." (ER301-02 ¶79; 304-05 ¶90.) It also prohibits "verbal harassment" (ER301 ¶78), "generalized sexist statements," "actions and behavior that convey insulting, intrusive or degrading attitudes/comments about women or men," "insulting remarks" (ER302-03 ¶84), and having a "negative impact" (ER304 ¶89). The Panel overlooks these facts. (Op. at 14373.)

Similar policy interpretations were grounds to confer standing in *Doe v. University of Michigan*, 721 F. Supp. 852, 860 (E.D. Mich. 1989), because they show how the College applies the policy. The speech code's definition of sexual

harassment is, on its face, not as narrow as the Panel concludes. Thus, Lopez's fear of enforcement was credible given the broad language of the speech code and the several threats that he "offended" others—one of the prohibitions of the speech code. *See Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003) (finding statutory definition was so broad that it resulted in self-censorship, which merits standing).

Second, the Panel found that Lopez "cannot say when, to whom, where, or under what circumstances he will actually give a speech that would violate the sexual harassment policy."[2] (Op. at 14375.) However, Lopez pleaded "when": he "often discusses his faith," (ER293 ¶25), and "looks for opportunities" to do this, "sometimes … between classes among friends and fellow students, and sometimes during appropriate class opportunities," (*id.* ¶26). He "consistently engage[s] in conversations on campus regarding issues implicated by the speech code, including his speech during Speech 101." (ER305 ¶92.) Lopez pleaded "to whom": his "friends and fellow students" and in class. (ER293 ¶26; 294 ¶32-34.) Lopez pleaded "where" and "under what circumstances": "between classes," during "class opportunities," and "on campus." (ER293 ¶26; 305 ¶92.) And Lopez described how his speech may violate the speech code. The code prohibits

[2] Lopez satisfied these factors because he was punished under the speech code for his discussion of religion and marriage in Speech 101. (ER287 ¶3; 294-96 ¶¶28-49.)

creating an "offensive … environment" and this causes Lopez to not "freely and openly engage in appropriate discussions of his religious, political, social, and/or cultural beliefs." (ER305-06 ¶96.) Because the speech code is overbroad and vague, and allows censorship based on listeners' subjective reactions, it restricts all of these topics from discussion. The Panel overlooked these facts, which resulted in misapplication of *Food Not Bombs*, 450 F.3d 1022, and *Arizona Right to Life Political Action Committee v. Bayless*, 320 F.3d 1002 (9th Cir. 2003). (Op. at 14374-75.) The Panel's decision merits rehearing.

CONCLUSION

The Court should grant rehearing or rehearing en banc because the Panel's decision directly conflicts with the Third and Sixth Circuits, stands alone among courts that have examined facial standing for students, involves an issue of exceptional importance, and overlooks critical facts.

Dated: September 30, 2010

Respectfully submitted,

David J. Hacker
David J. Hacker
ALLIANCE DEFENSE FUND
Attorney for Plaintiff-Appellee

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellee states that he is not aware of any related cases pending in this Court.

Dated: September 30, 2010

/s/David J. Hacker
David J. Hacker
Attorney for Plaintiff-Appellee

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(c)(2) and Circuit Rules 35-4(a) & 40-1(a) because this brief contains 4,189 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. Civ. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman.

Dated: September 30, 2010

David J. Hacker
David J. Hacker
Attorney for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document via UPS Ground (guaranteed delivery by end of second business day), to the following non-CM/ECF participants:

Mary L. Dowell
LIEBERT CASSIDY WHITMORE
6033 West Century Boulevard, Suite 500
Los Angeles, California 90045-6415
Attorney for Defendants-Appellants

and

Sam Kim
Michael L. Parker
SAM KIM and ASSOCIATES
5661 Beach Boulevard
Buena Park, California 90621
Attorneys for Plaintiff-Appellee

David J. Hacker
David J. Hacker
Attorney for Plaintiff-Appellee

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JONATHAN LOPEZ,
Plaintiff-Appellee,

v.

KELLY G. CANDAELE, in his individual and official capacities as member of the Los Angeles Community College District Board of Trustees; MONA FIELD, in her individual and official capacities as member of the Los Angeles Community College District Board of Trustees; GEORGIA L. MERCER, in her individual and official capacities as member of the Los Angeles Community College District Board of Trustees; NANCY PEARLMAN, in her individual and official capacities as member of the Los Angeles Community College District Board of Trustees; ANGELA J. REDDOCK, in her individual and official capacities as member of the Los Angeles Community College District Board of Trustees; MIGUEL SANTIAGO, in his individual and official capacities as member of the Los Angeles Community College District Board of Trustees;

SYLVIA SCOTT-HAYES, in her individual and official capacities as member of the Los Angeles Community College District Board of Trustees; GENE LITTLE, in his individual and official capacities as Director of the Los Angeles Community College District Office of Diversity Programs; JAMILLAH MOORE, in her individual and official capacities as President of Los Angeles City College; ALLISON JONES, in her individual and official capacities as Dean of Academic Affairs at Los Angeles City College; CRISTY PASSMAN, in her individual and official capacities as Compliance Officer at Los Angeles City College,

Defendants-Appellants,

and

JOHN MATTESON, in his individual and official capacities as Professor of Speech at Los Angeles City College,

Defendant.

No. 09-56238

D.C. No. 2:09-cv-00995-GHK-FFM

OPINION

Appeal from the United States District Court
for the Central District of California
George H. King, District Judge, Presiding

Argued and Submitted
March 3, 2010—Pasadena, California

Filed September 17, 2010

Before: Ronald M. Gould, Sandra S. Ikuta and N. Randy Smith, Circuit Judges.

Opinion by Judge Ikuta

COUNSEL

Mary L. Dowell and David A. Urban, Liebert Cassidy Whitmore, P.C., Los Angeles, California, for the appellants.

David J. Hacker and Heather G. Hacker, Alliance Defense Fund, Folsom, California; David A. French, Alliance Defense Fund, Columbia, Tennessee, for the appellee.

Sam Kim and Michael L. Parker, Sam Kim and Associates, P.C., Buena Park, California, for the appellee.

OPINION

IKUTA, Circuit Judge:

Today we consider a student's First Amendment challenge to a community college sexual harassment policy. First Amendment cases raise "unique standing considerations," *Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003), that "tilt[ ] dramatically toward a finding of standing," *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000). Despite this lowered threshold for establishing standing and the disturbing facts of this case, we conclude that the student failed to make a clear showing that his intended speech on religious topics gave rise to a specific and credible threat of adverse action from college officials under the college's sexual harassment policy. Because the stu-

dent failed to carry the burden of proving he suffered an injury in fact, he does not satisfy the "irreducible constitutional minimum of standing" necessary to challenge the policy. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

I

For the limited purpose of reviewing the preliminary injunction at issue, the salient facts are undisputed.

A

In the fall of 2008, plaintiff Jonathan Lopez was a student at Los Angeles City College (LACC), which is one of the public colleges within the Los Angeles Community College District (the District). At the time Lopez attended LACC, the District had promulgated a sexual harassment policy comprising a chapter of the District's "Board Rules and Administrative Regulations," as authorized under state law. *See* Cal. Educ. Code §§ 66300, 70902. LACC is subject to the District's regulations, including its sexual harassment policy. Two sections of this sexual harassment policy are relevant here. Section 15001 sets forth the District's general policy on this issue, stating in relevant part:

> The policy of the Los Angeles Community College District is to provide an educational, employment and business environment free from unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communications constituting sexual harassment. Employees, students, or other persons acting on behalf of the District who engage in sexual harassment as defined in this policy or by state or federal law shall be subject to discipline, up to and including discharge, expulsion or termination of contract.

Section 15003(A) defines "sexual harassment" as including:

> Unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the workplace or in the educational setting, under any of the following conditions: . . . (3) The conduct has the purpose or effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile or offensive work or educational environment.[1]

According to the policy, the District's Director of Affirmative Action Programs oversees the implementation of the sexual harassment policy, but may delegate these duties to an individual Sexual Harassment Compliance Officer. District officials may take disciplinary action only in accordance with due process rights as well as any applicable collective bargaining agreement. For students, "disciplinary action" ranges from verbal warnings to expulsion. For employees, "disciplinary action" ranges from verbal warnings to dismissals. According to Allison Jones, LACC's Dean of Academic Affairs, neither LACC nor the District has enforced the sexual harassment policy against any teacher, student or employee. Lopez does not dispute this statement.

Sections 15001 and 15003 of the policy appear in various other official documents. For example, the quoted portion of Section 15001 appears twice in the LACC student handbook. The "Rules for Student Conduct" section of the handbook states that "[s]tudent conduct in all of the Los Angeles Com-

[1]The defendants argue that this version of the sexual harassment policy is no longer applicable, as it was superseded in 2007 by a new policy that redefined the term "sexual harassment," and therefore Lopez's challenge is moot. We do not reach this argument, because we decide the case on standing grounds. *See Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (holding that there is "no mandatory sequencing of jurisdictional issues," and we have "leeway to choose among threshold grounds for denying audience to a case on the merits" (citations and internal quotation marks omitted)).

munity Colleges must conform to District and [LACC] rules and regulations," and that violations will result in disciplinary action. In addition, the website of the District's Office of Diversity Programs contains relevant portions of Section 15003, and gives some examples of sexual harassment, including "[v]erbal harassment," "[d]isparaging sexual remarks about your gender," "[d]isplay of sexually suggestive objects, pictures, cartoons, posters, screen savers," and "[m]aking unwelcome, unsolicited contact with sexual overtones (written, verbal, physical and/or visual contact)." The website also offers "[s]imple guidelines for avoiding sexual harassment," which include the admonition, "If [you are] unsure if certain comments or behavior are offensive do not do it, do not say it." The LACC Compliance Office's website likewise includes the relevant portions of Section 15003, and defines one form of sexual harassment as "generalized sexist statements, actions and behavior that convey insulting, intrusive or degrading attitudes/comments about women or men. Examples include insulting remarks; intrusive comments about physical appearance; offensive written material such as graffiti, calendars, cartoons, emails; obscene gestures or sounds; sexual slurs, obscene jokes, humor about sex."

B

During the fall semester, Lopez was a student in Speech 101, taught by Professor John Matteson. For one assignment, Matteson directed his students to make an informative speech on a topic of their choosing. Lopez is a devout Christian who believes, as a tenet of his faith, that he must share his religious beliefs with others. For this assignment, Lopez chose to speak about God and the ways in which he had witnessed God act both in his life and in the lives of others. In the course of giving his speech, Lopez read a dictionary definition of marriage as being a union between a man and a woman, and read two verses from the Bible.[2] After Lopez made these statements,

[2]Though the text of Lopez's speech is not in the record, Lopez's appellate brief states that the speech quoted *Romans* 10:9 ("[t]hat if you confess

but while still in the middle of his speech, Matteson interrupted Lopez, called Lopez a "fascist bastard," and refused to allow Lopez to finish his speech. Matteson told the class that anyone who was offended could leave. When no one left, Matteson dismissed the class. In lieu of giving Lopez a grade, Matteson wrote on Lopez's speech evaluation form, "[a]sk God what your grade is" and "pros[elytising] is inappropriate in public school."

The day after this incident, Lopez met with Jones to complain about Matteson's actions. As Dean of Academic Affairs, Jones supervises the LACC faculty and oversees certain student matters and the policies and procedures that govern LACC. Jones told Lopez to put his complaint against Matteson in writing. When Lopez delivered his written complaint to Jones, Matteson observed this interaction. Matteson subsequently threatened Lopez, stating that he would make sure that Lopez was expelled from school.

On December 2, the day after this threat, Lopez turned in another Speech 101 assignment. Lopez's paper contained a list of proposed topics for a persuasive speech, including one on how to "exercise your freedom of speech right," which would include a discussion of how one should "[a]lways stand up for what you believe in." Matteson gave Lopez an "A" for this assignment, but wrote the following below the "free speech" proposed topic: "(Remember — you agree to Student Code of Conduct as a student at LACC)."

By this time, Lopez had obtained legal representation. On the same day that Lopez submitted his list of proposed topics,

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with your mouth, 'Jesus is Lord,' and believe in your heart that God raised Him from the dead, you will be saved;") and *Matthew* 22:37-38 ("Jesus said to him, 'You shall love the Lord your God with all your heart, with all your soul, and with all your mind.' This is the first and greatest commandment.").

Lopez's lawyer sent Jones and Jamillah Moore, the LACC President, a letter demanding that Lopez receive a fair grade on his informative speech, that LACC discipline Matteson and require him to make a public apology to Lopez, and that LACC and its faculty provide written assurance that they would respect Lopez and other students' First Amendment rights.

Jones responded by letter two days later. The letter stated that Jones had met with Lopez twice and had asked him to put his complaints in writing and submit written corroboration of his version of the informative speech incident from other students in the class. The letter also stated that Jones had started a "progressive discipline process" with respect to Matteson, but that both collective bargaining rules and LACC's restrictions on discussing personnel matters prevented her from disclosing details about any discipline that Matteson might receive. The letter made clear that "action is being taken, but specific details may not be shared with Mr. Lopez or [his lawyer]."

The same letter also reported that Jones had received statements from two students who were "deeply offended" by Lopez's informative speech. One student wrote that Lopez's speech "was not of the informative style that our assignment called for, but rather a preachy, persuasive speech that was completely inappropriate and deeply offensive." The student further stated that although she respected Lopez's right to free speech, "I also do not believe that our classroom is the proper platform for him to spout his hateful propaganda." The second student wrote that "I don't know what kind of actions can be taken in this situation, but I expect that this student should have to pay some price for preaching hate in the classroom." After quoting the two statements, however, the letter stated:

> [r]egardless of the other students' reactions to Mr. Lopez'[s] speech, Mr. Matteson will still be disciplined. First amendment rights will not be violated

> as is evidenced by the fact that even though many of the students were offended by Mr. Lopez'[s] speech, no action will be taken against any of them for expressing their opinions.

The letter also stated that Lopez would receive a "fair grade" for both his informative speech and for the entire class.

Lopez eventually received an "A" in the class, though he alleged he never received a grade for his informative speech. In a subsequent affidavit, Jones disavowed Matteson's actions, declaring that Matteson's behavior was spontaneous and not in accordance with any LACC or District "handbooks, regulations[,] and codes." The affidavit also confirmed that "Matteson was disciplined for [his] conduct." Lopez had no subsequent interactions with Matteson, and the record contains no other complaints or other allegations of enforcement actions taken against Lopez due to his speech. Nor did the District or LACC take any enforcement action against Lopez under the sexual harassment policy.

C

Lopez ultimately filed suit against Matteson, Jones and other District and college officials.[3] Lopez brought four causes of action against the Defendants under 42 U.S.C. § 1983. The first three causes of action alleged that Matteson's conduct violated Lopez's First Amendment and equal protection rights. In his fourth cause of action, the only one relevant here, Lopez claimed that the District's sexual harass-

[3]In addition to Matteson and Jones, Lopez sued Moore, the president of LACC, Cristy Passman, the LACC Compliance Officer, Gene Little, Director of the District's Office of Diversity Programs, and the District's Board of Trustees (Kelly G. Candaele, Mona Field, Georgia L. Mercer, Nancy Pearlman, Angela J. Reddock, Miguel Santiago, and Sylvia Scott-Hayes.) Except for Matteson, who is not a named defendant in this appeal, we refer to the defendants by name or collectively as Defendants.

ment policy violated the First Amendment because it was unconstitutionally overbroad and vague.[4]

Lopez moved for a preliminary injunction to enjoin the Defendants from enforcing the sexual harassment policy. In entertaining this motion, the district court first concluded that Lopez had standing to bring a facial challenge to the policy because it applied to Lopez by virtue of his enrollment at LACC, the policy likely reached the speech in which Lopez wanted to engage, and Lopez has censored himself for fear of discipline under the policy.[5] The district court then concluded that the policy was unconstitutionally overbroad and could not be narrowed, and granted Lopez's motion to enjoin the District from enforcing the policy. While this appeal of the court's preliminary injunction was pending, the district court granted the Defendants' previously filed motion to dismiss the remaining causes of action, with limited leave for Lopez to amend.

II

We review *de novo* the district court's determination that Lopez has standing. *Am.-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501, 506 (9th Cir. 1992). Lopez bears the burden of establishing standing because he is the party invoking federal jurisdiction. *LSO*, 205 F.3d at 1152. We review the district court's grant of a preliminary injunction for abuse of discretion. *Johnson v. Couturier*, 572 F.3d 1067, 1078 (9th Cir. 2009). "This review is 'limited and deferential' and it does not extend to the underlying merits of the case." *Id.* (quoting *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009)).

[4]Matteson failed to respond to Lopez's complaint, and as such the district court clerk entered default; however, the district court delayed granting a default judgment against Matteson until after this appeal is resolved.

[5]The district court therefore did not reach Lopez's as-applied challenge.

A

[1] In order to invoke the jurisdiction of the federal courts, a plaintiff must establish "the irreducible constitutional minimum of standing," consisting of three elements: injury in fact, causation, and a likelihood that a favorable decision will redress the plaintiff's alleged injury. *Lujan*, 504 U.S. at 560-61; *see Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1093 (9th Cir. 2003). The injury in fact must constitute "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal citations and quotations omitted). The plaintiff must prove injury in fact "in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561. Therefore, at the preliminary injunction stage, a plaintiff must make a "clear showing" of his injury in fact. *Winter v. Natural Resources Def. Council, Inc.*, 129 S. Ct. 365, 376 (2008).

[2] Because "[c]onstitutional challenges based on the First Amendment present unique standing considerations," plaintiffs may establish an injury in fact without first suffering a direct injury from the challenged restriction. *Bayless*, 320 F.3d at 1006. "In an effort to avoid the chilling effect of sweeping restrictions, the Supreme Court has endorsed what might be called a 'hold your tongue and challenge now' approach rather than requiring litigants to speak first and take their chances with the consequences." *Id.*; *Getman*, 328 F.3d at 1094. In such pre-enforcement cases, the plaintiff may meet constitutional standing requirements by "demonstrat[ing] a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979); *see LSO*, 205 F.3d at 1154. To show such a "realistic danger," a plaintiff must "allege[ ] an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed

by a statute, and . . . a credible threat of prosecution thereunder." *Babbitt*, 442 U.S. at 298; *see Bayless*, 320 F.3d at 1006; *LSO*, 205 F.3d at 1154-55.

[3] Despite this "relaxed standing analysis" for pre-enforcement challenges, *Canatella v. California*, 304 F.3d 843, 853 n.11 (9th Cir. 2002), plaintiffs must still show an actual or imminent injury to a legally protected interest. *See Lujan*, 504 U.S. at 560. Even when plaintiffs bring an overbreadth challenge to a speech restriction, i.e., when plaintiffs challenge the constitutionality of a restriction on the ground that it may unconstitutionally chill the First Amendment rights of parties not before the court, they must still satisfy "the rigid constitutional requirement that plaintiffs must demonstrate an injury in fact to invoke a federal court's jurisdiction." *Dream Palace v. Cnty. of Maricopa*, 384 F.3d 990, 999 (9th Cir. 2004) (quoting *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1112 (9th Cir. 1999)); *see also Sec'y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984). The touchstone for determining injury in fact is whether the plaintiff has suffered an injury or threat of injury that is credible, not "imaginary or speculative." *Babbitt*, 442 U.S. at 298 (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971)).

We look at a number of factors to determine whether plaintiffs who bring suit prior to violating a statute, so-called "pre-enforcement plaintiffs," have failed to show that they face a credible threat of adverse state action sufficient to establish standing. As discussed in more detail below, in this context we have conducted three related inquiries. First, we have considered whether pre-enforcement plaintiffs have failed to show a reasonable likelihood that the government will enforce the challenged law against them. Second, we have considered whether the plaintiffs have failed to establish, with some degree of concrete detail, that they intend to violate the challenged law. We have also considered a third factor, whether the challenged law is inapplicable to the plaintiffs, either by its terms or as interpreted by the government. Such inapplica-

bility weighs against both the plaintiffs' claims that they intend to violate the law, and also their claims that the government intends to enforce the law against them.

B

Beginning with the first factor, we have considered a government's preliminary efforts to enforce a speech restriction or its past enforcement of a restriction to be strong evidence (although not dispositive, *LSO*, 205 F.3d at 1155) that pre-enforcement plaintiffs face a credible threat of adverse state action. For example, a threat of government prosecution is credible if the government has indicted or arrested the plaintiffs, *Younger*, 401 U.S. at 41-42, if "prosecuting authorities have communicated a specific warning or threat to initiate proceedings" under the challenged speech restriction, or if there is a "history of past prosecution or enforcement under the challenged statute." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc). *See, e.g.*, *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (plaintiff established injury in fact where the government twice warned him to stop distributing handbills and threatened him with prosecution under a Georgia statute if he continued to distribute the handbills); *Culinary Workers Union v. Del Papa*, 200 F.3d 614, 616, 618 (9th Cir. 1999) (per curiam) (plaintiff had established injury in fact under a Nevada statute when the attorney general wrote a "precise and exact" letter to the union which quoted the statute in full and threatened to refer the prosecution to "local criminal authorities").

The threatened state action need not necessarily be a prosecution. *See, e.g.*, *Meese v. Keene*, 481 U.S. 465, 472-73 (1987) (holding that the plaintiff established standing by proving harms flowing from the government's designation of three films as "political propaganda"); *Canatella*, 304 F.3d at 852-53 (holding that the plaintiff had standing to challenge state bar statutes and professional rules where he had previously been subject to state bar disciplinary proceedings and

could be subject to them in the future). Moreover, the plaintiffs themselves need not be the direct target of government enforcement. A history of past enforcement against parties similarly situated to the plaintiffs cuts in favor of a conclusion that a threat is specific and credible. *See Adult Video Ass'n v. Barr*, 960 F.2d 781, 785 (9th Cir. 1992), *vacated sub nom. Reno v. Adult Video Ass'n*, 509 U.S. 917 (1993), *reinstated in relevant part*, 41 F.3d 503 (9th Cir. 1994).

[4] But "general threat[s] by officials to enforce those laws which they are charged to administer" do not create the necessary injury in fact. *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 88 (1947); *see Rincon Band of Mission Indians v. San Diego Cnty.*, 495 F.2d 1, 4 (9th Cir. 1974) (concluding that the sheriff's statement that "all of the laws of San Diego, State, Federal and County, will be enforced within our jurisdiction" was insufficient to create a justiciable case (citing, among other cases, *Poe v. Ullman*, 367 U.S. 497, 501 (1961))). Thus, where multiple plaintiffs challenged a California law that criminalized teaching communism, the Supreme Court concluded that three of the plaintiffs, who had not alleged that "they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible," but merely that they felt "inhibited" in advocating political ideas or in teaching about communism, did not have standing. *Younger*, 401 U.S. at 42. Mere "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972).

Turning to the second factor, we have concluded that pre-enforcement plaintiffs who failed to allege a concrete intent to violate the challenged law could not establish a credible threat of enforcement. Because "the Constitution requires something more than a hypothetical intent to violate the law," plaintiffs must "articulate[ ] a 'concrete plan' to violate the law in question" by giving details about their future speech

such as "when, to whom, where, or under what circumstances." *Thomas*, 220 F.3d at 1139. The plaintiffs' allegations must be specific enough so that a court need not "speculate as to the kinds of political activity the [plaintiffs] desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication." *Mitchell*, 330 U.S. at 90. For example, a plaintiff challenging the licensing provisions of a state regulatory regime failed the injury in fact requirement because the plaintiff "ha[d] never indicated that it intends to pursue another license," and therefore could not "assert that it will ever again be subject to the licensing provisions." *4805 Convoy*, 183 F.3d at 1112-13; *see also, e.g.*, *Thornburgh*, 970 F.2d at 510 (organization does not have standing when the only evidence that it would be subject to a law penalizing membership in an alleged terrorist group was that its members received two publications which espoused the terrorist group's views). By contrast, plaintiffs may carry their burden of establishing injury in fact when they provide adequate details about their intended speech. *See, e.g.*, *ACLU v. Heller*, 378 F.3d 979, 984 (9th Cir. 2004) (holding that a group had standing when an individual member alleged he desired to produce and distribute flyers regarding a specific ballot initiative); *Getman*, 328 F.3d at 1093 (holding that a group had standing when the group showed, among other things, that it had planned to spend over $1000 to defeat a specific California proposition in the November 2000 election). Without these kinds of details, a court is left with mere " 'some day' intentions," which "do not support a finding of the 'actual or imminent' injury that our cases require." *Thomas*, 220 F.3d at 1140 (quoting *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1127 (9th Cir. 1996)).

[5] Finally, we have indicated that plaintiffs' claims of future harm lack credibility when the challenged speech restriction by its terms is not applicable to the plaintiffs, or the enforcing authority has disavowed the applicability of the challenged law to the plaintiffs. In the First Amendment con-

text, "a fear of prosecution will only inure if the plaintiff's intended speech arguably falls within the statute's reach." *Getman*, 328 F.3d at 1095 (citing *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392 (1988)). Thus, in *Leonard v. Clark*, we held that individual firemen did not have standing to challenge a portion of their union's collective bargaining agreement because the provision at issue "by its plain language applie[d] only to the Union and not to its individual members." 12 F.3d 885, 888-89 (9th Cir. 1994); *see also Getman*, 328 F.3d at 1095 (indicating that a plaintiff has not established an injury in fact where the statute "clearly fails to cover [the plaintiff's] conduct" (quoting *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003))).

Likewise, we have held that plaintiffs did not demonstrate the necessary injury in fact where the enforcing authority expressly interpreted the challenged law as not applying to the plaintiffs' activities. Thus, a group of school teachers did not have standing to challenge an Oregon textbook selection statute when both the Oregon Attorney General and the school district's lawyer "disavowed any interpretation of [the statute] that would make it applicable in any way to teachers." *Johnson v. Stuart*, 702 F.2d 193, 195 (9th Cir. 1983); *cf. LSO*, 205 F.3d at 1155 (collecting cases where the government failed to affirmatively disavow an intent to enforce a challenged statute). Of course, the government's disavowal must be more than a mere litigation position. *See Thornburgh*, 970 F.2d at 508 (holding that aliens had standing to challenge speech restriction statutes, even though the government dropped charges based on those statutes four days before the district court hearing, because, among other things, the government could easily reinstate those charges and was bringing similar charges against other aliens).

III

We apply these principles to the facts of this case to determine whether Lopez has carried his burden of making a clear

showing of injury in fact. *See Winter*, 129 S. Ct. at 376; *Lujan*, 504 U.S. at 560. Lopez claims he suffered such an injury because he faced a specific, credible threat of adverse state action under the District's sexual harassment policy.

A

Lopez identifies three actions on the part of LACC employees that, he claims, constitute a credible threat. According to Lopez, Matteson threatened to enforce the sexual harassment policy against him first on November 24, when Matteson interrupted Lopez's informative speech and told the class that they could leave if they were "offended," and second on December 2, when Matteson wrote on Lopez's assignment that Lopez had agreed to the "Student Code of Conduct" as a student at LACC. Third, Lopez claims that Jones's letter constituted a threat to enforce the policy because it informed Lopez that his speech had offended other students. We consider each incident in turn.

[6] In the November 24 incident, Matteson aggressively abused Lopez for his statements regarding marriage, prevented Lopez from speaking, asked whether other students were offended, and warned Lopez against proselytizing in school. However, Matteson did not threaten to enforce the sexual harassment policy against Lopez or even suggest that Lopez was violating the policy. Therefore the November 24 incident, while raising serious concerns, does not help Lopez carry his burden of clearly showing he suffered an injury in fact from the sexual harassment policy. Lopez argues that because Matteson told students they could leave if they were "offended," and Section 15003(A) defines "sexual harassment" as including conduct that has the purpose or effect of creating an "offensive work or educational environment," Matteson was implicitly invoking the District's sexual harassment policy. We conclude that any link between Matteson's use of the word "offended" and the sexual harassment policy's use of the word "offensive" in this context is too attenu-

ated and remote to rise to the level of "a threat of specific future harm" required to show an injury in fact arising from the policy. *Cf. Laird*, 408 U.S. at 14 (requiring such a threat in order to avoid advisory opinions); *Del Papa*, 200 F.3d at 616, 618 (holding that a "precise and exact" threat of prosecution was more than adequate to establish injury in fact).

[7] The December 2 incident involved a different assignment Lopez had written for Speech 101. It is plausible to read Matteson's comment on the paper, namely that Lopez had agreed to abide by the Student Code of Conduct,[6] as an implicit threat that Lopez should take care not to raise certain topics (such as those relating to marriage as being between a man and a woman, which had elicited Matteson's ire previously), and that such topics could violate the school's policies. Again, however, such an implied threat does not meet the standard necessary to show injury in fact. This assignment did not mention Lopez's religious beliefs or discuss the nature of marriage, and on its face, Matteson's comment does not indicate that Lopez's speech on marriage or religion would constitute sexual harassment or otherwise violate the sexual harassment policy. Nor does Matteson's comment constitute a threat to initiate proceedings if Lopez made such remarks on marriage or religion. Rather, in the context in which this remark appeared, Matteson's comment is, at most, a "general threat" to enforce the Student Code of Conduct, rather than a "direct threat of punishment." *Mitchell*, 330 U.S. at 88. Such general threats are insufficient to establish an injury in fact.

[8] Finally, Lopez argues that Jones's December 4 letter is a threat to enforce the sexual harassment policy by taking action against him. Lopez points to the letter's statement that

[6]Although there is no document entitled "Student Code of Conduct" in the record, we assume for purposes of this analysis that the comment refers to the "Rules for Student Conduct" section of the LACC student handbook, which also contains Section 15001 of the sexual harassment policy.

two students were offended by Lopez's speech, and one student wrote that the speech was "hateful propaganda." Read in context, however, Jones's letter does not constitute a threat of enforcement action. The letter makes clear that Matteson, not Lopez, is the target of the LACC's disciplinary actions, and states that LACC will not take action against any students, impliedly including Lopez, for exercise of their First Amendment rights. Moreover, while Jones makes the rejoinder to Lopez's attorney that two other students were offended by Lopez's speech, the students she quotes do not complain about statements of a sexual nature or suggest they regarded Lopez's speech as constituting sexual harassment; rather, they complained that Lopez's informative speech was "hateful" or "preached hate." We therefore agree with the district court's later conclusion that "the content of [Jones's] letter cannot reasonably be characterized as threatening future punishment on the basis of such [student] complaints."

[9] Even when we view Jones's letter and the two Speech 101 incidents collectively, they do not constitute a credible threat to discipline Lopez under the sexual harassment policy. No LACC official or student invoked or even mentioned the policy, nor did anyone suggest that Lopez's November 24 speech constituted sexual harassment. Indeed, even the demand letter Lopez's attorney sent to LACC did not reference that policy. While Matteson and the students quoted in Jones's letter apparently were offended or angered by Lopez's November 24 speech in class, there is no indication that they, or anyone else, deemed it to be sexual harassment.

B

Other factors likewise indicate that Lopez's claims of threatened enforcement are not sufficiently concrete to meet even the minimum injury in fact threshold. As noted above, we consider both Lopez's stated intent to violate the policy and the likelihood that the District or LACC will enforce the policy against Lopez.

[10] Here Lopez has not adequately proven his intent to violate the policy because Lopez has not shown that the sexual harassment policy even arguably applies to his past or intended future speech. *See Getman*, 328 F.3d at 1095 (plaintiff must show that his "intended speech arguably falls within the statute's reach"). As we previously explained, the District's policy (per Sections 15001 and 15003(A)) precludes students from engaging in sexual harassment, which, in its most wide-reaching formulation, includes "verbal, visual, or physical conduct of a sexual nature" that has the purpose or effect of creating a "hostile or offensive work or educational environment." Lopez's November 24 speech included quotes from two Bible passages relating to salvation and the love of God, and a dictionary definition of marriage as "between a man and a woman." Lopez has given us few details about his intended future speech: he alleges only that in the future, he desires to discuss "his Christian views on politics, morality, social issues, religion, and the like," and that he wishes to "share[ ] his beliefs about Christianity with others," which means "discuss[ing] his faith and how it applies to guide his views on political, social, and cultural issues and events." Comparing Lopez's past and proposed future speech to the plain language of the District's sexual harassment policy, we do not see, nor does Lopez explain, how the policy applies to him, given that his statements and proposed topics do not, on their face, constitute "verbal . . . conduct of a sexual nature." While the District Office of Diversity Programs and LACC Compliance Office websites suggest broader definitions of sexual harassment than contained in Section 15003(A), Lopez's speech on topics of religious concern does not, on its face, meet even those broader definitions, which focus on conduct or expression specifically related to sex (e.g., classifying as sexual harassment the "[d]isplay of sexually suggestive objects, pictures, cartoons, posters, [or] screen savers," or "[d]isparaging sexual remarks about [one's] gender"). Lopez does not argue otherwise. In short, Lopez has not shown how his past or intended speech would violate the challenged policy.

[11] Even if we assume (though Lopez does not argue) that Lopez intends to express religious opposition to homosexuality or same sex marriages, and even if we also assume (which again, Lopez does not argue) that college officials, teachers or students could adopt a strained construction of the sexual harassment policy that would make it applicable to religious speech opposing homosexuality or gay marriage, Lopez does not claim that anyone has done so or may do so in the future. In the absence of any argument by Lopez urging this point, we decline to give the policy such an interpretation on our own accord. Moreover, nothing in the record suggests that the District or LACC has adopted an expansive reading of the policy. Rather, Jones's uncontroverted statement that the District or LACC have never charged any teacher, student, or employee with sexual harassment under the policy points in the opposite direction. In the absence of any showing that the sexual harassment policy even arguably applies or may apply to Lopez's past or intended future speech, Lopez cannot show a concrete intent to violate the policy, and therefore cannot show a credible threat that the Defendants will enforce the policy against him.

For this reason, Lopez's reliance on *Santa Monica Food Not Bombs v. City of Santa Monica* (*Food Not Bombs*), 450 F.3d 1022 (9th Cir. 2006) and *Bayless*, 320 F.3d 1002, is misplaced. In those cases, we held that an organization can establish injury in fact sufficient for pre-enforcement standing merely by showing that it altered its expressive activities to comply with the statutes at issue and alleging its apprehension that the relevant statutes would be enforced against it. *See Food Not Bombs*, 450 F.3d at 1034; *Bayless*, 320 F.3d at 1006. Lopez argues that he is similarly situated, because he has self-censored his speech on religious topics in order to avoid violating the sexual harassment policy. However, in *Bayless* and *Food Not Bombs*, the organizations proved they had a specific, concrete intent to engage in activities that were clearly barred by the challenged law. *See Food Not Bombs*, 450 F.3d at 1034 (holding that a plaintiff that organized

marches and demonstrations had standing to challenge a Santa Monica ordinance that required it to obtain a permit before engaging in marches or demonstrations); *Bayless*, 320 F.3d at 1006 (holding that a right-to-life political action committee, whose primary purpose was to present political advertising, had standing to challenge a state election statute that placed limitations on political advertising within ten days before an election). By contrast, Lopez fails to allege, let alone offer concrete details such as those supplied in *Bayless* or *Food Not Bombs*, regarding his intent to engage in conduct expressly forbidden by the sexual harassment policy; he "cannot say when, to whom, where, or under what circumstances" he will actually give a speech that would violate the sexual harassment policy. *Thomas*, 220 F.3d at 1139.

We reach the same conclusion when we inquire whether the District or LACC will likely enforce the policy against Lopez. As noted above, the inapplicability of the plain language of the sexual harassment policy to Lopez's speech, and the absence of any official interpretation of the policy as applying to Lopez's speech, cut against the existence of a credible threat of enforcement. Moreover, Jones's letter indicated that LACC did not intend to take any action against Lopez. As noted above, the letter stated that Jones intended to address Lopez's complaints, discipline Matteson, and ensure that Lopez received a fair grade in the class. Further, the letter stated that although several students were offended by Lopez's speech, "First amendment rights will not be violated," and no action will be taken against any of the students, implicitly including Lopez. As Jones is the administration official with responsibility for overseeing college policies and procedures generally, her statement that no action will be taken against students for expressing their opinions is entitled to significant weight, and vitiates Lopez's claim that he faces a credible threat of enforcement. *Cf. LSO*, 205 F.3d at 1155 (concluding that "failure to disavow 'is an attitudinal factor the net effect of which would seem to impart some substance to the fears of plaintiffs' " (brackets omitted) (quoting *Thorn-*

burgh, 970 F.2d at 508)). Nor is this a situation like *Thornburgh*, in which the government dropped charges "not because [the charges] were considered inapplicable, but for tactical reasons," 970 F.2d at 508, because here LACC had not taken any steps to enforce the sexual harassment policy against Lopez, either before or after Lopez's threat to sue the school.

Although Lopez alleges that his speech was chilled by the existence of the sexual harassment policy, self-censorship alone is insufficient to show injury. *See, e.g.*, *Laird*, 408 U.S. at 13-14 ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm . . . ."); *Getman*, 328 F.3d at 1095 ("We do not mean to suggest that any plaintiff may challenge the constitutionality of a statute on First Amendment grounds by nakedly asserting that his or her speech was chilled by the statute. The self-censorship door to standing does not open for every plaintiff."). Nor does Lopez have standing merely because, as the district court concluded, he may have "more than a general interest shared with the student body at large" in challenging the policy because he is a devout Christian. Leaving aside the question whether the sexual harassment policy has special applicability to Christians, the district court's conclusion is misguided: our inquiry into injury-in-fact does not turn on the strength of plaintiffs' concerns about a law, but rather on the credibility of the threat that the challenged law will be enforced against them. *See Babbitt*, 442 U.S. at 298-99.

[12] In sum, Lopez has not proposed an interpretation of the policy that would arguably apply to his intended speech and has not given any details about what he intends to say. Therefore, he has failed to prove his intent to violate the policy. Moreover, Lopez has not shown that the District or LACC has enforced the sexual harassment policy against him, interprets the sexual harassment policy as applying to his speech, or is likely to enforce the policy against him in the

future. Under these circumstances, we must conclude that Lopez fails to meet the standard required of a pre-enforcement plaintiff to prove injury in fact, because he has not met the low threshold of clearly showing that he faces a specific, credible threat of adverse government action based on a violation of the sexual harassment policy.

C

[13] Lopez also argues that the overbreadth doctrine allows him to assert the rights of his fellow students who are not before the court. However, Lopez properly recognized that he may only assert the rights of others "[s]o long as [he] satisfies the injury in fact requirement." Plaintiffs who have suffered no injury themselves cannot invoke federal jurisdiction by pointing to an injury incurred only by third parties. *See Munson*, 467 U.S. at 958 (noting that Munson could not assert the rights of third parties unless Munson itself had suffered an injury in fact). Because Lopez fails to establish the necessary injury in fact, he cannot raise the claims of third parties as part of an overbreadth challenge.

IV

Formal and informal enforcement of policies that regulate speech on college campuses raises issues of profound concern. As we have noted in *Rodriguez v. Maricopa County Community College District*,

> If colleges are forced to act as the hall monitors of academia, subject to constant threats of litigation both from [those] who wish to speak and listeners who wish to have them silenced, "many school districts would undoubtedly prefer to 'steer far' from any controversial [speaker] and instead substitute 'safe' ones in order to reduce the possibility of civil liability and the expensive and time-consuming burdens of a lawsuit."

605 F.3d 703, 709 (9th Cir. 2010) (brackets omitted) (quoting *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1030 (9th Cir. 1998)). Such policies, well intentioned though they may be, carry significant risks of suppressing speech. "Because some people take umbrage at a great many ideas, very soon no one would be able to say much of anything at all," *id.* at 711, an outcome that would be anathema for universities, our nation's "marketplace of ideas." *Healy v. James*, 408 U.S. 169, 180 (1972). Rather, the First Amendment protects a speaker's "freedom to express himself on . . . issues in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms." *Rodriguez*, 605 F.3d at 708-09 (quoting *Adamian v. Jacobsen*, 523 F.2d 929, 934 (9th Cir. 1975)); *see also Cohen v. California*, 403 U.S. 15, 24-25 (1971) ("To many, the immediate consequence of this freedom [of speech] may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve.").

[14] Despite the serious concerns raised by policies that regulate speech on college campuses, we remain bound by the strictures of our jurisdiction, and must decline to hear cases where there is no genuine case or controversy. Under the relaxed standard applicable to First Amendment cases, Lopez's arguments come to the very edge of showing injury in fact. But Lopez has not made it over the threshold, and "[w]e will not manufacture arguments for [a party]." *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994). Taking the record and Lopez's arguments as we find them, we conclude that Lopez failed to make a clear showing of a specific and concrete threat that the sexual harassment policy would be enforced against him. While Lopez alleged a bruising encounter with Matteson, Lopez's suit against Matteson is not before us today, and neither Matteson nor any other Defendant ever invoked the District's sexual harassment policy against Lopez. Lopez consequently does not have standing to chal-

lenge the District's sexual harassment policy. Therefore, the order granting the preliminary injunction is **REVERSED**, the preliminary injunction is **VACATED**, and we **REMAND** for further proceedings consistent with this opinion.