APPENDIX A

United States Court of Appeals
Fourth Circuit

Ross ABBOTT; College Libertarians at the University of South Carolina; Young Americans for Liberty at the University of South Carolina,
Plaintiffs – Appellants,

v.

Harris PASTIDES; Dennis Pruitt; Bobby Gist; Carl R. Wells,
Defendants – Appellees.

No. 17-1853

Argued: March 22, 2018
Decided: August 16, 2018

Appeal from the United States District Court for the District of South Carolina, at Columbia. Margaret B. Seymour, Senior District Judge.
(3:16-cv-00538-MBS)

Attorneys and Law Firms

ARGUED: Robert Corn-Revere, DAVIS WRIGHT TREMAINE LLP, Washington, D.C., for Appellants.

Carl Frederick Muller, CARL F. MULLER, ATTORNEY AT LAW, PA, Greenville, South Carolina, for Appellees. ON BRIEF: Edward T. Fenno, FENNO LAW FIRM, LLC, Charleston, South Carolina; Ronald G. London, Lisa B. Zycherman, DAVIS WRIGHT TREMAINE LLP, Washington, D.C., for Appellants. William H. Davidson, II, Kenneth P. Woodington, DAVIDSON & LINDEMANN, P.A., Columbia, South Carolina, for Appellees. John C. Eastman, Anthony T. Caso, Center for Constitutional Jurisprudence, CHAPMAN UNIVERSITY FOWLER SCHOOL OF LAW, Orange, California, for Amicus Students for Life of America. Ryan W. Marth, Minneapolis, Minnesota, David B. Shemano, ROBINS KAPLAN LLP, Los Angeles, California, for Amici ACLU of South Carolina, DKT Liberty Project, Individual Rights Foundation, National Coalition Against Censorship, Reason Foundation, and Student Press Law Center.
Before MOTZ, DUNCAN, and HARRIS, Circuit Judges.

Opinion

Affirmed by published opinion. Judge Harris wrote the opinion, in which Judge Motz and Judge Duncan joined.

PAMELA HARRIS, Circuit Judge:

In 2015, two student groups at the University of South Carolina sought approval for a “Free Speech Event” to

highlight perceived threats to free expression on college campuses. According to the groups, the event they were planning would include visual displays of material that had provoked free-speech controversies at other schools, including a swastika. The University approved, and the Free Speech Event took place on campus without interference.

The event did, however, generate complaints from other students, who objected to the displays and accused its sponsors of making sexist and racist statements at the scene. A University official met with Ross Abbott, one of the event's student sponsors, to review the complaints and determine whether an investigation was warranted. A few weeks later, he notified Abbott that there was no cause for investigation and that the matter had been dropped.

The result was a First Amendment action against the University, filed by Abbott and the two student groups behind the Free Speech Event. According to Abbott and the other plaintiffs, University officials violated their First Amendment rights when they required Abbott to attend a meeting to discuss complaints about their event. The plaintiffs also mounted a facial challenge to the University's general policy on harassment, arguing that it is unconstitutionally vague and overly broad. The district court rejected both claims and entered summary judgment for the University defendants.

We agree with the district court and affirm on both counts. The University neither prevented the plaintiffs from holding their Free Speech Event nor sanctioned them after the fact. Its prompt and minimally intrusive resolution of subsequent student complaints does not rise to the level of a First Amendment violation. And because the plaintiffs cannot show a credible threat that the University will enforce its harassment policy against their speech in the future, they lack standing to pursue their facial attack on the policy.

I.

A.

In 2009, the United States Department of Justice ("DOJ") opened an investigation into allegations of racial discrimination at the University of South Carolina ("USC" or "University"). In response, the University hired outside counsel to draft a "Student Non-Discrimination and Non-Harassment Policy." Pursuant to an agreement between the University and DOJ, DOJ reviewed and approved the final language of the new harassment policy, which was formally adopted in 2013 as "STAF 6.24."

In its introduction, STAF 6.24 sets out the University's dual commitments to preventing discrimination and harassment and to upholding "principles of academic freedom" and free expression. J.A. 90. The policy is

designed to achieve both those ends by fostering "an academic, social and living environment that is free from discrimination and harassment" and encourages "the open exchange of ideas." *Id.* At the outset, STAF 6.24 clarifies that its strictures will extend only to "behavior and speech that is not constitutionally protected and which limits or denies the rights of students to participate or benefit in the educational program." *Id.*

Prohibited harassment is defined by STAF 6.24 as a "specific type of illegal discrimination" consisting of conduct – which may be "written," "oral," or "graphic," as well as "physical" – directed at students because of a protected characteristic such as race, religion, national origin, or sex. J.A. 91. Consistent with STAF 6.24's introduction, the definition of harassment is limited to conduct that is "sufficiently severe, pervasive, or persistent so as to interfere with or limit the ability" of the targeted students to "participate in or benefit from the programs, services, and activities provided by the University." *Id.*; *cf. Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999) (describing student-on-student sexual harassment actionable under Title IX as "severe, pervasive and objectively offensive" conduct that "undermines and detracts from the victims' educational experience"). Examples of such "harmful conduct" may include "objectionable epithets" and "demeaning depictions or treatment," as well as "threatened or actual abuse or harm." J.A. 91. But

STAF 6.24 also expressly excludes from the definition of harassment any use of materials or discussions "for academic purposes appropriate to the academic context." *Id.*

STAF 6.24 goes on to establish a complaint procedure for students. Any student may file a complaint with the University's Office of Equal Opportunity Programs against another student "believed to have violated this policy or otherwise engaged in discriminatory or harassing behavior." J.A. 92. The Office then will designate a staff member to handle the complaint and "ensure that [it] is fairly and expeditiously investigated and if necessary, that appropriate sanctions are assessed." J.A. 93. Anonymous complaints will be handled by interviewing any identified witnesses and alleged offenders. *Id.*

B.

This case began when Ross Abbott, on behalf of two student groups – the College Libertarians and Young Americans for Liberty – sought approval to hold a "Free Speech Event" at the University of South Carolina. Abbott, then president of the College Libertarians, met with Kim McMahon, USC's Director of Campus Life, and described an event intended to "draw attention to the various threats to free speech on campuses." J.A. 152. As part of that effort, Abbott explained, the groups planned to "create mock versions ***165** of several symbols and speeches that have been

censored in the past," including an "Indian good luck symbol that resembles a swastika." J.A. 152. McMahon approved the Free Speech Event (the "Event") as described. In her email to Abbott, McMahon said that she saw "no controversy in educating [the] campus about what is happening in the world," and that she hoped the Event would be "a chance to learn and grow (and even be a bit uncomfortable), not further any intolerance, censorship or acts of incivility." J.A. 151.

The Event proceeded as planned on November 23, 2015, in front of USC's Russell House Union Building, as the sponsoring students had requested. Posters at the Event included one depicting a large red swastika and another featuring the word "wetback" in outsized print. J.A. 69. Abbott and the other students distributed handouts referring to what they viewed as incidents of censorship at USC and on other campuses, and explaining their displays as examples of such incidents. The Event lasted for several hours, during which several complaints from faculty and other USC community members were forwarded to McMahon by email. McMahon's response was to defend the Event: "This is free speech and ... if they are being respectful and trying to help learn and create dialogue then I am not sure how to help those who are uncomfortable[.]" J.A. 154. McMahon clarified, however, that because she was not at the scene, she could not "provide context" or confirm that the Event was being conducted in the manner she had approved. J.A. 156. The Event concluded without any intervention from

University officials.

Almost immediately, the University's Office of Equal Opportunity Programs ("EOP Office") received three written complaints from students about the Event, one of which named Ross Abbott as an "involved part[y]," J.A. 67, and two of which appear to have been submitted anonymously. The complaints objected to the display of "offensive symbols and racial slurs," *id.* – in particular, the swastika and the "wetback" sign. *See* J.A. 67–76. One student also complained about the sponsoring students' behavior on the scene, alleging that they "engag[ed] rudely with USC students" and made "sexist and racist statements" to them. J.A. 72. According to the complaining students, the Event and the associated conduct constituted discrimination or harassment against protected groups.

The next day, on November 24, 2015, Carl Wells, USC's Assistant Director of the EOP Office and Deputy Title IX Coordinator, sent Abbott a letter informing him of the complaints. "Please contact this office," the letter directed, "within the next five (5) working days ... to arrange an appointment to fully discuss the charges as alleged." J.A. 66. If the matter could not be resolved otherwise, Wells told Abbott, then "we shall move to investigate the complaint," culminating with a recommendation to the Provost and President of the University. *Id.* In the meantime, Abbott should not contact the named complainant, or discuss the complaints with any member of the

University community. Though the letter purported to attach a "Notice of Charge" in addition to copies of the complaints about the Event, only the complaints were enclosed. Use of the term "Notice of Charge," the University later said, was a clerical error.[1]

***166** Approximately two weeks later, on December 8, 2015, Wells met with Abbott and Michael Kriete, the president of Young Americans for Liberty, to discuss the complaints. Because Abbott recorded the meeting (with Wells's apparent consent), there is no dispute as to what transpired. Wells assured the students that notwithstanding the letter's reference to a "Notice of Charge," nobody had been charged with a violation of STAF 6.24. The meeting, Wells explained, was a standard "practice of the University" in response to complaints, J.A. 177, intended simply to gather information – the "who, what, when, whys, and hows" of the Event. J.A. 158. Indeed, the University had yet to determine whether it even would investigate the incident:

> We are in pre-complaint mode ... because we don't have enough information right now, we're trying to assess whether or

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[1]The term "Notice of Charge" appears in a different USC policy, "EOP 1.01," concerning harassment complaints against *non*-student University personnel. *See* J.A. 91 n.2; J.A. 81. STAF 6.24, by contrast, which governs complaints against students, makes no reference to a "Notice of Charge."

> not what was presented to us by members of this community actually rise to a level of something that would be a complaint or whether we're going to do an investigation or not. So, again, we are in pre-investigation mode.

J.A. 159. Wells reiterated the point on several occasions. Near the end of the meeting, for instance, he told Abbott: "I'm going to emphasize to you again, we are at the point in our exploration to make sure [we] understand what happened here and to decide if this is something we respond to or not. The decision to respond or not respond has not been made. We're just trying to understand." J.A. 181; *see also* J.A. 185 ("the next step is for us to determine whether we will open an investigation or not").

For his part, Abbott explained that the Event was held to raise awareness about campus free-speech issues and emphasized that he had prior authorization for the displays. Abbott also expressed discomfort at being required to attend the meeting, telling Wells: "I ... do not like that I have to be here for this meeting," and that "the University is not upholding its obligation to respect my free-speech rights by requiring me to be here." J.A. 179, 180. The meeting lasted for approximately 30 to 45 minutes.

On December 23, 2015, approximately one month after the Free Speech Event and two weeks after the

meeting, Wells sent Abbott another letter. The EOP Office, Wells informed Abbott, had "found no cause for investigating" the complaints related to the Free Speech Event, and would "not move any further in regard to this matter." J.A. 196.

C.

Two months later, in February 2016, Abbott, the College Libertarians, and Young Americans for Liberty (together, the "plaintiffs"[2]) filed a § 1983 suit against multiple USC officials, including Carl Wells, alleging violations of their First Amendment rights. In their first, "as-applied" claim, they argued that by "investigating" Abbott in connection with the Free Speech Event, University officials impermissibly chilled their free expression, entitling them to damages. J.A. 30–31. In a second count, the plaintiffs alleged that the University's harassment policy on its face violates the First Amendment because it is overly broad and too vague to be capable of precise definition or application, and ***167** sought a permanent

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[2]Although Abbott has since graduated from USC, the parties agree that he retains standing as a plaintiff to pursue retrospective relief in the form of damages under § 1983. And the standing of the College Libertarians and Young Americans for Liberty to seek relief as organizational plaintiffs remains unaffected by Abbott's graduation from college. *See White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 458 (4th Cir. 2005).

injunction restraining its future enforcement.[3]

Both parties moved for summary judgment. With respect to the plaintiffs' as-applied claim, the University defendants, sued for damages in their personal capacity, argued that they had not violated the First Amendment as a matter of law and that qualified immunity protects them from damages liability. And, the defendants contended, the plaintiffs have no standing to pursue their facial challenge to STAF 6.24, which in any event is fully consistent with the First Amendment.

The district court granted summary judgment to the University defendants. *Abbott v. Pastides*, 263 F.Supp.3d 565 (D.S.C. 2017). The court disposed of the as-applied challenge on the merits, holding as a matter of law that the University's inquiry into the Free Speech Event did not violate the First Amendment. *Id.* at 578. The First Amendment, the court recognized at the outset, applies with equal force on college campuses as in the wider community. *Id.* at 575

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[3]Two additional claims presented to the district court no longer are at issue in this case. In their complaint, the plaintiffs also raised First Amendment objections to a University statement of ideals, termed the *Carolinian Creed*, and University policies designating "Free Speech Zones" on campus. After the suit was filed, however, USC revised those policies, and the district court dismissed the challenges as moot. *Abbott v. Pastides*, 263 F.Supp.3d 565, 580–82 (D.S.C. 2017). The plaintiffs do not challenge that ruling on appeal.

(quoting *Healy v. James*, 408 U.S. 169, 180, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972)). At the same time, the court continued, First Amendment rights are not absolute, and content-based prohibitions on speech will be upheld where they are necessary to serve a compelling governmental interest and narrowly drawn to achieve that end. *Id.* at 575–76 (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991)).

Against that backdrop, the district court went on to analyze the plaintiffs' claim that University officials violated the First Amendment by requiring Abbott to attend a meeting regarding the Free Speech Event. Because the University had not taken any action against the Event or its sponsors, the first question was whether the plaintiffs' speech had been restricted at all. The court ruled that it had, crediting the plaintiffs' claim that they had experienced a First Amendment injury in the form of "self-censorship," or a "chilling effect" on their speech. *Id.* at 576–77. Once Abbott received Wells's letter, the court reasoned, with its reference to a "Notice of Charge," the plaintiffs reasonably could have feared they were subject to discipline, and self-censored protected speech while awaiting notice regarding the status of the complaints. And that notice did not come until roughly two weeks later, when it became clear at the meeting with Wells that in fact there were no charges against any student, or perhaps until roughly two weeks after that, when

Wells notified Abbott by letter that the University would not be conducting an investigation or further pursuing the matter. *Id.* at 577 & n.4.

Nevertheless, the court held, this temporary chill on the plaintiffs' speech did not violate the First Amendment. Applying the strict-scrutiny standard that governs content-based speech restrictions, the court concluded that the University's inquiry into the student complaints was permissible as a "narrowly drawn solution that was necessary to serve USC's compelling interest in protecting students' rights to be free *168 from discrimination." *Id.* at 578. As the court explained:

> USC knew of the content of the Free Speech Event, approved the event, and ultimately determined that the event was an acceptable exercise of Plaintiffs' First Amendment rights. USC never attempted to silence Plaintiffs' speech, sanction Plaintiffs for their speech, or prevent students from engaging in similar speech in the future. Instead, Defendants chose a narrow approach to addressing the rights of all students on campus: those who participated in the event and those who felt discriminated by it.

Id.

As to the facial challenge to STAF 6.24, the district court agreed with the University defendants that the plaintiffs lacked standing to seek an injunction against the policy's future enforcement. Plaintiffs seeking prospective relief against ongoing or imminent First Amendment violations, as opposed to damages for past First Amendment injuries, may not rely on prior harms for standing, the court explained. Instead, there must be a non-speculative claim of "future injury," usually in the form of a "credible threat" that the challenged law will be enforced against the putative plaintiffs. *Id.* at 578–79. Here, the court found, the University's resolution of the complaints regarding the Free Speech Event should have satisfied the plaintiffs that no similar events they planned to host would "constitute speech regulated by the harassment policy." *Id.* at 579. Moreover, the court reasoned, the plaintiffs had presented no evidence of actual or threatened use of STAF 6.24 to silence the kind of speech in which they wished to engage, and the policy's own terms – which specifically exclude "academic speech" from its ambit – made it clear that the policy "would not be applied to the speech in which Plaintiffs or similarly situated students intend to participate." *Id.* at 580. Accordingly, the court concluded, the plaintiffs were without standing to mount their facial challenge to STAF 6.24.

This timely appeal followed.

II.

[1]We begin with the plaintiffs' as-applied challenge to the University inquiry into student complaints about their Event. As the district court recognized, the University defendants[4] are entitled to qualified immunity as to damages liability on this claim unless the plaintiffs can establish both (a) the violation of a constitutional right, and (b) that the right was "clearly established" at the time of the violation. *Abbott*, 263 F.Supp.3d at 575; *see Pearson v. Callahan*, 555 U.S. 223, 232, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). The district court resolved the claim under the first prong of this analysis, holding as a matter of law that there was no First Amendment violation. *Abbott*, 263 F.Supp.3d at 578. We review that determination de novo, *see Estate of Armstrong ex rel. Armstrong v. Vill. of Pinehurst*, 810 F.3d 892, 895 (4th Cir. 2016), and we agree.

This is an unusual First Amendment claim. University officials approved the plaintiffs' Free Speech Event, knowing that it would include displays of a swastika and other controversial material; allowed ***169** the plaintiffs to hold their Event in the precise campus

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[4]In this count of their complaint, the plaintiffs sought damages not only from Wells, but also from his supervisor, Bobby Gist. Before the plaintiffs had the opportunity to develop facts concerning Gist's potential role in the matter, the district court stayed discovery and ruled on the pending summary judgment motions. Accordingly, although the plaintiffs make no specific allegations as to Gist's conduct, we, like the district court, consider the two defendants together.

location they requested; did nothing to interfere with the Event as it transpired; and imposed no sanction on the plaintiffs after the fact, notwithstanding student complaints. *Cf., e.g.*, *Rock for Life-UMBC v. Hrabowski*, 594 F.Supp.2d 598, 602–03 (D. Md. 2009), *aff'd*, 411 F. App'x 541 (4th Cir. 2010) (describing First Amendment challenge to university denial of preferred location for campus display); *IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 388–89 (4th Cir. 1993) (sustaining First Amendment challenge to university sanctions on fraternity speech, including suspension of fraternity activities). As a result, the plaintiffs are left to argue that the very fact of a University inquiry into those complaints – and, in particular, the requirement that Abbott meet with Wells to discuss the complaints and the Event – violated their First Amendment rights. *See Abbott*, 263 F.Supp.3d at 575 (describing plaintiffs' claim).

In support of that claim, the plaintiffs advance two arguments. First, they contend that the inquiry "chilled" their exercise of protected speech rights, because they reasonably feared disciplinary action if they sponsored other events similar to the Free Speech Event. And second, in operating as a speech restriction subject to strict scrutiny, the inquiry violated the First Amendment because it was not the least restrictive means of handling the student complaints. We address those arguments in turn.

A.

[2]We start with the plaintiffs' contention that their speech was restricted for First Amendment purposes when the University "chilled" the exercise of their right to host on-campus speech events, entitling them to damages. This, too, is an unusual First Amendment argument. Typically, claims for retrospective damages relief under the First Amendment allege direct prohibitions or limitations on speech; it is claims for prospective relief, such as injunctions, that sometimes rest on the prospect of a future injury in the form of self-censorship or unconstitutionally chilled speech that "fall[s] short of a direct prohibition." *See Laird v. Tatum*, 408 U.S. 1, 11–14, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972). Here, the plaintiffs are using the concept of constitutional chill differently, to establish a *past* restriction or infringement on protected speech that triggers strict scrutiny under the First Amendment. *See Abbott*, 263 F.Supp.3d at 577.

[3] [4]We have recognized a similar claim in at least one published opinion. *See Reyes v. City of Lynchburg*, 300 F.3d 449, 453, 455 n.8 (4th Cir. 2002) (adjudicating claim that plaintiff is entitled to damages under § 1983 for a past period during which he alleged his First Amendment rights were chilled); *see also Rock for Life-UMBC*, 411 F. App'x at 549 (same). But we have made clear, as the district court recognized, that such a chilling effect amounts to a cognizable First Amendment injury only if it is

"objectively reasonable" – that is, if the challenged government action is "likely to deter a person of ordinary firmness from the exercise of First Amendment rights." *See Abbott*, 263 F.Supp.3d at 576 (quoting *Benham v. City of Charlotte*, 635 F.3d 129, 135 (4th Cir. 2011)). And we have indicated that when damages are sought for a prior period of unconstitutional chill, the plaintiff must establish that he was deterred from some specific, intended act of expression. *See Reyes*, 300 F.3d at 455 n.8.

[5]Here, the plaintiffs allege that once Abbott received Wells's November 24 letter about student complaints arising from their Free Speech Event – attaching copies *170 of the complaints, referring to a "Notice of Charge," and instructing Abbott to attend a meeting and to refrain from otherwise discussing the matter – they reasonably believed, as would any student of "ordinary firmness," that they might be subjected to discipline if they engaged in similar speech activities. As a result, they say, they "planned to cancel [an] annual Marijuana Legalization Rally," typically held in April, and otherwise "avoided putting on any public events at USC," or, if they did, "hesita[ted] to engage with students" on the scene. J.A. 562–63, 570. According to the plaintiffs, the period during which they were chilled from fully exercising their First Amendment rights extended from the date of Wells's letter until the day on which they filed this suit, February 23, 2016, at which point they again felt "comfortable" engaging in speech activities similar to

the Free Speech Event. J.A. 563.

The district court rejected this claim as to the period of time after Abbott's December 8 meeting with Wells or, at the latest, the December 23 letter informing Abbott that there would be no investigation or further action with respect to the Free Speech Event, finding that any reasonable fear of discipline "should have been assuaged" by then. *Abbott*, 263 F.Supp.3d at 577 & n.4. We agree. By the time Abbott received Wells's December 23 letter, it had become clear that in fact no student had been charged with a violation of STAF 6.24; that the December 8 meeting was standard practice in response to student complaints, and did not reflect any prior determination by the University that the complaints should be investigated; and, finally, that the University had concluded that the display of a swastika and a "wetback" sign, in the context of the plaintiffs' Free Speech Event, did not warrant an investigation under STAF 6.24, let alone the imposition of sanctions. At that point, a student of "ordinary firmness" would have had no reason to refrain from sponsoring, say, a Marijuana Legalization Rally, or to worry that speaking in favor of capitalism, *see* J.A. 570 (alleging hesitation regarding pro-capitalism rally and speech), might lead to punishment.

The plaintiffs rely for their chilling-effect claim on *Cooksey v. Futrell*, 721 F.3d 226 (4th Cir. 2013), but that case only illustrates how far short they fall in

their effort to show a "non-speculative and objectively reasonable chilling effect" sufficient to make out a First Amendment injury. *Id.* at 236. In *Cooksey*, we did indeed find that a state regulatory board had chilled the plaintiff's speech, taking actions that would be "likely to deter a person of ordinary firmness from the exercise of First Amendment rights." *Id.* at 236 (internal quotation marks omitted). But in that case, the board: informed the plaintiff that the speech on his website was "under investigation"; then "instructed" him to make changes to that speech and to refrain from making particular statements; and then, when he did so, told him that it would continue to monitor his speech to ensure that it remained in compliance with regulatory requirements. *Id.* at 231–32. Had this case played out differently – had the University informed Abbott that it had determined that an investigation of the Free Speech Event *was* warranted; and then instructed him *not* to display swastikas or "wetback" signs or other controversial material at future events; and then warned him that it would scrutinize future events to ensure that they conformed to STAF 6.24 – then, we agree, a student of "ordinary firmness" might well be deterred from engaging in similar speech activities. Instead, of course, after hearing from Abbott, the University did the opposite, telling the plaintiffs that it had decided against opening an investigation or taking any further action in connection with *171 the Free Speech Event. Under those circumstances, we do not believe that students of "ordinary firmness" would be deterred from sponsoring

similar events.

[6]Whether the plaintiffs experienced a speech restriction in the form of a chilling effect before that process ran its course – that is, during the time after the November 24 letter informing Abbott of the complaints but before the December 23 letter announcing that no investigation would be conducted – is a more difficult question. The district court concluded that the plaintiffs' speech *was* chilled during that initial period, reasoning that "a student of 'ordinary firmness' may have self-censored his future speech while awaiting notice from Wells on the status of the official student complaints." *See Abbott*, 263 F.Supp.3d at 577.

Like the district court, we do not doubt that a college student reasonably might be alarmed and thus deterred by an official letter from a University authority referring to an attached "Notice of Charge" (even if no such notice actually is attached), raising the prospect of an investigation and ultimate recommendation to the University Provost and President, directing his attendance at a meeting, and prohibiting him from discussing the matter with others. *See id.* But our case law suggests that to recover damages, as plaintiffs seek here, it is not enough to establish that a reasonable person *could* have engaged in self-censorship as a result of the University defendant's actions. Instead, the plaintiffs must show that the defendants actually caused the

asserted First Amendment harm – here, by alleging that STAF 6.24 deterred some specific intended act of expression protected by the First Amendment. *See Reyes*, 300 F.3d at 455 n.8 (rejecting claim for damages based on past chill because plaintiff failed to allege that challenged city ordinance deterred him from engaging in any specific intended expression). But as the University defendants point out (and plaintiffs do not dispute), neither the College Libertarians nor Young Americans for Liberty has identified any speech event they had planned or wished to sponsor during the brief time period in question – perhaps because, as the plaintiffs explain, the weeks between November 24 (the initial letter to Abbott) and December 23 (the final letter to Abbott) overlap with the Thanksgiving holiday, final exams, and the start of winter vacation. Accordingly, it does not appear that the plaintiffs can establish a past "chill" sufficient to sustain their damages claim for the pre-December 23 period any more than they can for the period after December 23.[5]

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[5]Nor, we note, can the plaintiffs premise their damages claim on some other alleged constitutional deprivation – a possibility we left open in *Reyes*. Here, as in *Reyes*, the plaintiffs make no specific allegation that officials acted in bad faith, or that Abbott was deprived of due process protections. *See Reyes v. City of Lynchburg*, 300 F.3d 449, 455–57 & n.8 (4th Cir. 2002). And to the extent the plaintiffs may have sought other forms of relief on their as-applied challenge before the district court, *see Abbott*, 263 F.Supp.3d at 573 (describing relief sought by plaintiffs on all claims), they were addressed neither by the district court nor by the plaintiffs in their brief before this court, and so we need not

B.

[7]Even if we were to assume, however, that the University's preliminary inquiry into complaints about the Free Speech Event amounted to a cognizable restriction on the plaintiffs' speech for some brief period of time, there would remain the question whether that restriction violated *172 the First Amendment. And here again, we agree with the district court: Any such restriction survives review under the First Amendment. *See Abbott*, 263 F.Supp.3d at 577–78.

[8]We emphasize that this question, as framed by the parties, is a narrow one. The parties agree, as did the district court, that to the extent the University's procedure for handling student complaints led to reasonable self-censorship by the plaintiffs, it is subject to strict scrutiny under the First Amendment, and can survive review only if it is "necessary to serve a compelling state interest and ... narrowly drawn to achieve that end." *See id.* at 577; *see also, e.g.*, *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987).[6] And

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consider them here. *See Belk, Inc. v. Meyer Corp., U.S.*, 679 F.3d 146, 153 nn.4, 6 (4th Cir. 2012) (holding that claims not addressed in brief on appeal are waived).

[6]Strict scrutiny, of course, applies only to content-based policies that regulate speech "because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, ––– U.S. ––––, 135

neither party disputes that the University has a compelling interest in maintaining a school environment free from illegal discrimination and harassment. *See Abbott*, 263 F.Supp.3d at 577 (citing *Sigma Chi Fraternity*, 993 F.2d at 393). The only issue the parties contest, and the only issue we have cause to consider, is whether the University's inquiry into student complaints arising from the Free Speech Event was narrowly tailored to that end.

The gist of the plaintiffs' claim is that the University's response was neither "necessary" nor "narrowly drawn" to serve the identified state interest, because it would have been possible to handle student complaints about the Free Speech Event without burdening or involving the plaintiffs at all. First, the plaintiffs argue, the University could and should have "employ[ed] some means of weeding out" complaints

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S.Ct. 2218, 2227, 192 L.Ed.2d 236 (2015). Applying that standard to all governmental efforts to address complaints that are based on some form of expressive activity – analyzing, for instance, whether a police officer has used narrowly tailored means in responding to a complaint that a picketer is trespassing on private property – might have implications that extend well beyond this appeal. *Cf. Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 546, 83 S.Ct. 889, 9 L.Ed.2d 929 (1963) (holding that "an investigation which intrudes into the area of constitutionally protected rights of speech" is valid so long as (Continued) there is a "substantial relation" between the information sought and a compelling state interest). Again, we emphasize that given the posture of this case, we have no need to decide the issue.

that are frivolous or insubstantial "on their face." Appellants' Br. at 42 (quoting *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 474–75 (6th Cir. 2016)). Of course, the University *did* employ "some means" of screening student complaints: a brief and decidedly non-adversarial meeting with Abbott, followed by a decision to take no further action. And as a practical matter, it simply is not the case that the complaints here could be deemed frivolous "on their face." Students objected not only to the visual displays at the Free Speech Event, but also to allegedly harassing behavior and speech – "sexist and racist statements" – at the scene. J.A. 72. Neither the University's prior approval of the Free Speech Event nor anything in the complaints themselves would have allowed the University to dismiss those allegations on their face. As Director of Campus Life McMahon, who approved and defended the Free Speech Event, explained, "As I am not there [at the Event] I can't provide context and [tell] if [the] group is doing what their event said it would." J.A. 156.

The plaintiffs insist that even if there was an "angry exchange" during which student sponsors of the Free Speech Event used "racial or sexual terms," it still would be clear that STAF 6.24 had not ***173** been violated, obviating any need for further inquiry. Appellants' Reply Br. at 23 n.21. But the facts matter in a situation like that, and we do not agree that school officials confronted with harassment allegations are required to resolve them in the abstract. Nor does

the First Amendment require that they assume no actionable harassment or discrimination without first seeking relevant information. As this court has made clear, universities have obligations not only to protect their students' free expression, but also to protect their students. *See S.B. ex rel. A.L. v. Bd. of Educ. of Harford Cty.*, 819 F.3d 69, 76–77 (4th Cir. 2016) ("[A] school may ... be held liable under Title IX ... for what is effectively an official decision by the school not to remedy student-on-student harassment.") (internal quotation marks and alterations omitted).

The Sixth Circuit's decision in *Susan B. Anthony List*, on which the plaintiffs chiefly rely for their "screening process" claim, is not to the contrary. There, the court held that a state law criminalizing false statements about political candidates violated the First Amendment, in part because a candidate in the middle of a campaign could be subjected to a "full adjudicatory hearing" – a public and adversarial probable cause hearing that might appear to voters as an official sanction – based only on a facially meritless complaint by an opposing candidate, timed to achieve "maximum disruption." 814 F.3d at 474–75. We do not think that Wells's single and decidedly non-adversarial meeting with Abbott can be compared to the full adjudicatory process at issue in *Susan B. Anthony List*. Nor, as we have explained, was it possible to dismiss the complaints here as frivolous on their face. *Cf. id.* (hypothesizing complaint that could be dismissed on its face because it objected only to protected statement

of opinion).

The plaintiffs have a second, fallback argument: Even if some further inquiry into the complaints was justified, they contend, the University defendants violated the First Amendment because they used the wrong form of inquiry – or, more specifically, because they made inquiries of the wrong person. According to the plaintiffs, University officials were required to speak first with the complaining students, or perhaps with witnesses as part of an "independent investigation," and only then, if indicated, contact Abbott to hear his side of the story. Appellants' Br. at 43–45. But allowing a student accused of a campus infraction an early chance to respond generally is considered a feature of due process, not a bug. *See Goss v. Lopez*, 419 U.S. 565, 581, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975) (holding that students are entitled under the Due Process Clause to an opportunity to present their version of events before being suspended). Nor is it obvious that the single and confidential meeting Abbott attended with Wells was any more "restrictive" or burdensome than the independent investigation he suggests in its stead, which would have had University officials out in the community searching for fact witnesses to the verbal harassment alleged in the complaints, with attendant risks to the reputations of Abbott and his fellow event sponsors. And, of course, there are obvious practical difficulties in focusing an inquiry on the complainant as opposed to the alleged perpetrator when, as here, at

least some of the complaints are anonymous. Indeed, STAF 6.24 specifically contemplates this problem, making it standard procedure to interview alleged offenders in cases involving anonymous complaints.

It bears repeating that the University here did not seek to advance its end of maintaining a campus environment free of illegal discrimination and harassment through the kinds of broad steps that most ***174** commonly lead to First Amendment litigation. As the district court observed, it did nothing to interfere with the plaintiffs' Free Speech Event, featuring the display of a swastika and a "wetback" sign, and it did nothing to sanction that speech after the fact. *Abbott*, 263 F.Supp.3d at 578; *cf., e.g.*, *Sigma Chi Fraternity*, 993 F.2d at 393 (sustaining First Amendment challenge to sanctions on fraternity "ugly woman contest"). Instead, in the face of student complaints, University officials met with Abbott so that he could give his account of the facts – "the who, what, when, whys, and hows," J.A. 158 – and then credited that account in its entirety, declining to conduct an investigation or take any further action. Under the circumstances, we agree with the district court that this minimally burdensome process was narrowly tailored to the relevant state interest and so survives strict scrutiny. *See Abbott*, 263 F.Supp.3d at 578.[7]

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[7]In addition to their main objection to the way in which the University conducted its inquiry – that the University involved them at all – the plaintiffs also fault the University for, *inter alia*,

C.

[9]For the reasons laid out above, we agree with the district court that the plaintiffs have failed as a matter of law to establish that the University defendants violated their First Amendment rights in connection with the inquiry into the Free Speech Event. *Abbott*, 263 F.Supp.3d at 578. We note, however, that even if this were not the case, the defendants would be entitled to summary judgment on qualified immunity grounds.

[10] [11]As the district court explained, government officials like the University defendants are "protected under the doctrine of qualified immunity from 'liability for civil damages insofar as their conduct does not

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not expediting its process to avoid a two-week waiting period between the meeting and Wells's second letter; including in its initial letter to Abbott instructions not to contact the named complainant or discuss the matter with others on campus; and not "joining in the University of Chicago's Principles of Free Expression." Appellants' Br. at 45–46. At the outset, we note that the question under strict scrutiny is whether the complaint procedures utilized by the University are narrowly drawn to advance the *state* interest, not the *plaintiffs'* interests. And to the extent the University's process imposes certain incidental burdens – for instance, short waiting periods or directions to respect the privacy of complainants – that is not enough to render it insufficiently tailored to the state interest. Strict scrutiny requires procedures that are "narrowly tailored, not ... perfectly tailored." *Williams-Yulee v. Florida Bar*, ––– U.S. ––––, 135 S.Ct. 1656, 1671, 191 L.Ed.2d 570 (2015) (internal quotation marks omitted).

violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Id.* at 575 (quoting *Pearson*, 555 U.S. at 231, 129 S.Ct. 808). Unless "existing precedent" has "placed the statutory or constitutional question beyond debate," the defendants may not be held liable. *Reichle v. Howards*, 566 U.S. 658, 664, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012). And even assuming, *arguendo*, that it were possible to find that the University's response to student complaints arising out of the Free Speech Event transgressed some First Amendment limit, the plaintiffs are unable to identify any precedent – and we have found none – that would put that result "beyond debate."

As we and other courts have recognized, First Amendment parameters may be especially difficult to discern in the school context. *See Morgan v. Swanson*, 755 F.3d 757, 760 (5th Cir. 2014) (observing that "educators are rarely denied immunity from liability arising out of First-Amendment disputes"); *see also Doninger v. Niehoff*, 642 F.3d 334, 351 (2d Cir. 2011) ***175** (school officials entitled to qualified immunity for disciplining student based on off-campus speech); *Mellen v. Bunting*, 327 F.3d 355, 376 (4th Cir. 2003) (college official entitled to qualified immunity for holding "supper prayer" that violated Establishment Clause). And as we have noted, the plaintiffs' claim for damages relief in connection with a speech event that the University approved and for which they were never sanctioned presents some especially novel questions.

At a minimum, the University defendants were not on clear notice that their response to student complaints regarding the Free Speech Event violated the First Amendment, and for that reason alone they are entitled to qualified immunity.

III.

We turn now to the plaintiffs' facial challenge to STAF 6.24. In addition to damages for the University's past response to the Free Speech Event, the plaintiffs also sought an injunction against future enforcement of STAF 6.24, arguing that the University's policy is on its face unconstitutionally broad and impermissibly vague. The use of undefined terms like "objectionable epithets" and "demeaning depictions" as examples of conduct that may amount to harassment, the plaintiffs contend, would allow the University to punish multiple forms of protected First Amendment expression. Nor, according to the plaintiffs, is the policy saved by the caveat that it will apply only to conduct "sufficiently severe, pervasive *or* persistent" to deprive its targets of full and equal access to educational benefits, J.A. 91 (emphasis added), because the Court in *Davis*, in discussing the circumstances under which schools may be held liable for student-on-student harassment, referred to conduct that is so "severe, pervasive, *and* objectively offensive" that it bars equal access, *see* 526 U.S. at 651, 119 S.Ct. 1661 (emphasis added). The University defendants, for their part, vigorously defend STAF 6.24 as modeled on the essence of the

Davis standard as we have described it in our own case law, *see Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) (en banc) (holding that plaintiff establishes Title IX claim by showing harassment that is "sufficiently severe or pervasive to create a hostile (or abusive) environment"), and further narrowed by express exceptions for speech in "academic" contexts, J.A. 91, or otherwise protected under the First Amendment.

The district court did not reach the merits of this dispute, finding instead that the plaintiffs lacked standing to pursue prospective injunctive relief because they could establish no ongoing or future injury. We review that finding de novo, *Kenny v. Wilson*, 885 F.3d 280, 287 (4th Cir. 2018), and affirm.[8]

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[8]Although the district court clearly resolved the plaintiffs' facial challenge on standing grounds, *see Abbott*, 263 F.Supp.3d at 580, its only announced disposition was the grant of summary judgment to the University defendants, *see* J.A. 596. Ordinarily, of course, a lack of subject-matter jurisdiction will lead to dismissal under Rule 12(b)(1), rather than summary judgment under Rule 56(c), which suggests a decision on the merits. *See Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995); 5B Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 & n.33 (3d ed. 2018) (collecting cases). Here, it seems clear from the context that the district court intended to enter summary judgment only as to the claims over which it retained jurisdiction, having dispensed already with the facial challenge on standing grounds. And the parties, for their part, have offered no indication on appeal that they disagree. Accordingly, we treat the district court's entry of summary

***176 [12] [13]**As the district court explained, a plaintiff seeking prospective injunctive relief "may not rely on prior harm" to establish Article III standing. *Abbott*, 263 F.Supp.3d at 578. "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects." *Id.* (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495–96, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)). Because the plaintiffs are pursuing prospective injunctive relief in connection with their facial challenge to STAF 6.24, they may not rest on the University's past conduct, but must instead "establish an ongoing or future injury in fact." *Kenny*, 885 F.3d at 287.

We have recognized two ways in which litigants may establish the requisite ongoing injury when seeking to enjoin government policies alleged to violate the First Amendment. *See id.* at 288; *Cooksey*, 721 F.3d at 235–38. First, they may show that they intend to engage in conduct at least arguably protected by the First Amendment but also proscribed by the policy they wish to challenge, and that there is a "credible

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judgment for defendants on the facial challenge as a dismissal under Rule 12(b)(1) for want of jurisdiction, and affirm on that basis. *Cf. Mexiport, Inc. v. Frontier Commc'ns Servs., Inc.*, 253 F.3d 573, 574 n.2 (11th Cir. 2001) ("Because we are not bound by the label placed on the district court's disposition of the case, we [may] treat the district court's summary judgment ruling as a dismissal [under Rule 12(b)(1)].").

threat" that the policy will be enforced against them when they do so. *Kenny*, 885 F.3d at 288; *see Susan B. Anthony List v. Driehaus*, ––– U.S. ––––, 134 S.Ct. 2334, 2342–45, 189 L.Ed.2d 246 (2014). Second, they may refrain from exposing themselves to sanctions under the policy, instead making a "sufficient showing of 'self-censorship' " – establishing, that is, a "chilling effect" on their free expression that is "objectively reasonable." *Cooksey*, 721 F.3d at 235–36 (quoting *Benham*, 635 F.3d at 135). Either way, a credible threat of enforcement is critical; without one, a putative plaintiff can establish neither a realistic threat of legal sanction if he engages in the speech in question, nor an objectively good reason for refraining from speaking and "self-censoring" instead. *See Rock for Life-UMBC*, 594 F.Supp.2d at 606; *Ramirez v. Sanchez Ramos*, 438 F.3d 92, 98 (1st Cir. 2006).

A.

The most obvious way to demonstrate a credible threat of enforcement in the future, of course, is an enforcement action in the past. *See, e.g.*, *Susan B. Anthony List*, 134 S.Ct. at 2345 ("history of past enforcement" is "good evidence" of a genuine threat of enforcement); *O'Shea*, 414 U.S. at 496, 94 S.Ct. 669 ("[P]ast wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury."). Our recent decision in *Kenny v. Wilson* is a good example. There, a group of South Carolina students sought to challenge two state laws criminalizing school

disturbances and disorderly conduct, seeking an injunction against the laws' enforcement on vagueness grounds. We held that several of the students could show a "credible threat of future enforcement" of the laws against them – primarily because they had previously been arrested and criminally charged under the very same statutes. 885 F.3d at 288–89; *see also Doe v. Univ. of Mich.*, 721 F.Supp. 852, 861 (E.D. Mich. 1989) (holding that students sufficiently alleged credible threat of enforcement of campus speech policy against them where university previously had enforced policy against classroom comments).

[14]The plaintiffs here, by contrast, can point to no evidence of prior sanctions under STAF 6.24 – against them or anyone else – for the type of speech in which *177 they wish to engage. Instead, they argue that the University's inquiry into the Free Speech Event establishes the necessary "credible threat" of enforcement, making it reasonable to expect that they will be sanctioned under STAF 6.24 if they sponsor similar events in the future. Like the district court, we must disagree.

As we have explained already, once Abbott attended his meeting with Wells regarding the Free Speech Event and then received written notice that neither investigation nor sanction was forthcoming, a student of "ordinary firmness" no longer could have reason to fear discipline under STAF 6.24 for similar activity. *See Abbott*, 263 F.Supp.3d at 577 & n.4. For much the

same reason, the plaintiffs cannot establish a "credible threat" that the University would employ STAF 6.24 to sanction, say, their Marijuana Legalization Rally. It is true, as the plaintiffs argue, that Wells's letter announcing that no action would be taken in response to the Free Speech Event did not go on to specify that no action would be taken in response to similar events in the future. But it is up to the plaintiffs to show some objective reason to believe the University would change its position, and this they have not done. As the district court explained, University officials, after concluding their inquiry into the Free Speech Event, did nothing to threaten the plaintiffs with future discipline under STAF 6.24. *Id.* at 580; *cf. Cooksey*, 721 F.3d at 237 (finding objectively reasonable self-censorship in light of "explicit warning" from state "that it will continue to monitor the plaintiff's speech in the future"). And the fact that the University inquired into and then dismissed student complaints arising from the Event – including complaints of verbal harassment at the scene – does not by itself translate into a credible threat that the University would sanction the plaintiffs for engaging in protected speech in the future simply because others found it offensive. *Cf. Ramirez*, 438 F.3d at 99 ("It is simply too much of a stretch to posit that the government's decision to prosecute a Riot Act charge" arising from a protest march also "indicates a willingness to prosecute entirely peaceful First Amendment expression.").

For their claim to the contrary, the plaintiffs rely primarily on *Doe v. University of Michigan*, in which a district court found a credible threat that a campus harassment policy would be enforced against a student's intended classroom speech, conferring standing to seek an injunction. 721 F.Supp. at 858–61. In that case, the court relied on a combination of "legislative history" making plain the university's intent to bar any expression that "many individuals" would find "offensive," official university guidance suggesting that precisely the ideas the student wished to discuss – specifically, differences between the sexes – would be sanctionable if aired in a classroom, and a past record of enforcement of the policy against classroom comments. *Id.* at 859–61. Here, by contrast, on the plaintiffs' own account, the University has made manifest its intent to *allow* speech even when it might or does cause offense, first approving the display of a swastika on campus (though recognizing that it might be a "bit uncomfortable," J.A. 151), and then deciding against disciplinary action in response to student complaints of "offensive symbols" and "offensive signs," J.A. 67, 72. Moreover, as the district court pointed out, the record in this case is devoid of any evidence that there has "been frequent actual or threatened use of STAF 6.24 to silence the types of speech" in which the plaintiffs wish to engage, and STAF 6.24 specifically "clarifies that the policy does not regulate academic speech." *Abbott*, 263 F.Supp.3d at 580. There are significant differences, in ***178** short, between this case and *Doe*, and overlooking them here

would do a disservice to the good-faith efforts of university officials to mind the details, crafting harassment policies so that they protect the "open exchange of ideas," J.A. 90.[9]

B.

[15]Again, the plaintiffs have a fallback argument.

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[9]We have recognized a "presumption" of a credible threat of enforcement with respect to "non-moribund" statutes that "facially restrict[ ] expressive activity by the class to which the plaintiff belongs." *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999) (internal quotation marks omitted). The plaintiffs do not rely on that presumption here, and we agree that it does not apply. There is no question that the plaintiffs belong to the "class" governed by STAF 6.24. But unlike in *Bartlett*, where the policy "appear[ed] by its terms to apply" to the plaintiffs' anticipated speech and contained no "rule exempting" their intended "issue advocacy," *id.* at 710–11, STAF 6.24 is on its face limited to conduct "sufficiently severe, pervasive or persistent" to deprive its targets of equal educational opportunity, and contains multiple statements exempting the kind of academic speech in which the plaintiffs intend to engage. *See, e.g.*, J.A. 91 ("Harassment does not include the use of materials by students or discussions involving students ... for academic purposes appropriate to the academic context."); J.A. 90 ("Nothing in this policy is intended to impede the exercise of those rights protected under the First Amendment of the U.S. Constitution."). Whether or not STAF 6.24 would survive a facial challenge based primarily on the alleged vagueness of its terms – a question we lack jurisdiction to decide – we think these provisos are enough to bring it outside the "presumption" of enforcement discussed in cases like *Bartlett*.

Even if they do not face a credible threat of actual discipline or sanctions under STAF 6.24, they contend, there still is a credible threat of another meeting like the one Abbott was required to attend with Wells. In other words, if they engage in speech events similar to the Free Speech Event, and those events again draw student complaints, then they have reason to expect more meetings with University officials – and those meetings, the plaintiffs claim, are their own form of threatened punishment, sufficiently "chilling" to generate reasonable self-censorship and thus confer standing for their facial challenge. We disagree.

We may accept, at least for purposes of argument, the plaintiffs' premise: that there are some forms of "pre-enforcement" investigation that are so onerous that they become the functional equivalent of "enforcement" for standing purposes. The Supreme Court addressed this question without quite deciding it in *Susan B. Anthony List*, considering whether certain advocacy organizations had standing to seek an injunction on First Amendment grounds against a state law (discussed above) that criminalized false statements made against political candidates. In finding a "credible threat of enforcement" sufficient to confer standing, the Court recognized that the state's administrative process for investigating complaints itself imposed a "substantial" burden virtually indistinguishable from a sanction:

> [T]he practical effect of the [state]

> scheme is to permit a private complainant to gain a campaign advantage without ever having to prove the falsity of a statement. Complainants may time their submissions to achieve maximum disruption of their political opponents .... [T]he target of a false statement complaint may be forced to divert significant time and resources to hire legal counsel and respond to discovery requests in the crucial days leading up to an election. And where, as here, a Commission panel issues a preelection probable-cause finding, such a determination itself may be viewed by the electorate as a sanction by the State.

***179** 134 S.Ct. at 2346 (citations, alterations, and internal quotation marks omitted). But there was no need, the Court held, to decide whether the threat of administrative proceedings alone was tantamount to a threat of "enforcement" for standing purposes, because in that case, there also existed a realistic threat of criminal prosecution. *Id.*

[16]What is clear, however, is that a threatened administrative inquiry will not be treated as an ongoing First Amendment injury sufficient to confer standing unless the administrative process itself imposes some significant burden, independent of any ultimate sanction. *See id.* (describing burdens imposed

by administrative process as of "particular concern" because of their potential to influence election results regardless of outcome); *Rock for Life-UMBC*, 594 F.Supp.2d at 608 (collecting cases). A "significantly intrusive" FBI field investigation into a plaintiff's political beliefs and personal life, for instance, has been deemed sufficiently onerous that it reasonably could generate a "chilling effect" for standing purposes, *Clark v. Library of Congress*, 750 F.2d 89, 92–95 (D.C. Cir. 1984), as has an "extraordinarily intrusive and chilling" investigation by a federal agency, lasting for eight months, into certain plaintiffs' protected speech and beliefs, *White v. Lee*, 227 F.3d 1214, 1228, 1237–38, 1242 (9th Cir. 2000).

The single, non-intrusive meeting that plaintiffs rely on here, followed two weeks later by an announcement that no further action would be taken, does not fall within this category. Even an objectively reasonable "threat" that the plaintiffs might someday have to meet briefly with a University official in a non-adversarial format, to provide their own version of events in response to student complaints, cannot be characterized as the equivalent of a credible threat of "enforcement" or as the kind of "extraordinarily intrusive" process that might make self-censorship an objectively reasonable response. And because the plaintiffs can point to no reason to think they will be subjected to some different and more onerous process not yet experienced or threatened, their claim to injury by way of threatened "process" is purely speculative

and thus insufficient to establish standing. *See Benham*, 635 F.3d at 135 ("Subjective or speculative accounts of ... a chilling effect ... are not sufficient. Any chilling effect must be objectively reasonable.") (alterations and internal quotation marks omitted).[10]

IV.

Freedom of speech needs "breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). And "vigilant protection" of First Amendment rights is "nowhere more vital" than at public universities, which are "peculiarly the 'marketplace of ideas.' " *Healy*, 408 U.S. at 180, 92 S.Ct. 2338 (quoting *180 *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967)). For those reasons, we have recognized that

[10]In addition, we note a mismatch between the plaintiffs' facial challenge to STAF 6.24, limited to certain substantive provisions of that policy, and a theory of standing that rests on a threatened meeting or other administrative process, governed by a different section of STAF 6.24 devoted to complaint procedures. Though we give "broad latitude" to facial challenges in the First Amendment context, a plaintiff still "must establish that he has standing to challenge *each* provision of [a policy] by showing that he was injured by application of *those provisions*." *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 429–30 (4th Cir. 2007) (emphases added). Even if the threat of a meeting under STAF 6.24's complaint procedures could rise to the level of a cognizable First Amendment injury-in-fact, it would not automatically "provide [the plaintiffs] a passport to explore the constitutionality" of the rest of STAF 6.24's provisions. *Id.* at 429.

policies that formally or informally suppress protected expression at public universities raise serious First Amendment concerns. *See Sigma Chi Fraternity*, 993 F.2d at 393. And while we are mindful of universities' obligations to address serious discrimination and harassment against their students, we also are attentive to the dangers of stretching policies beyond their purpose to stifle debate, enforce dogma, or punish dissent.

Here, however, we have a University that approved and encouraged a speech event intended to be controversial, with the knowledge that it would cause "[d]iscomfort." J.A. 156. And in the face of student complaints, the University made no effort to sanction that speech after the fact. The plaintiffs suggest that a ruling against them will make it impossible for any student to mount a successful challenge to an overly broad campus harassment policy, but we must disagree. Our decision today is limited to the facts before us, and the courthouse door remains open to the claims of students who experience cognizable restrictions on their right to free expression.

AFFIRMED

APPENDIX B

United States District Court
D. South Carolina
Columbia Division

Ross ABBOTT, College Libertarians at the University of South Carolina, and Young Americans for Liberty at the University of South Carolina,
Plaintiffs,

v.

Harris PASTIDES, Dennis Pruitt, Bobby Gist, and Carl Wells,
Defendants.

Civil Action No.: 3:16–cv–538–MBS

Signed 07/11/2017

Attorneys and Law Firms

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ORDER AND OPINION

Margaret B. Seymour, Senior United States District Judge

Plaintiffs Ross Abbott ("Abbott"), College Libertarians at the University of South Carolina ("Libertarians"), and Young Americans for Liberty at the University of South Carolina ("YAL")(together "Plaintiffs") bring this civil rights action pursuant 42 U.S.C. § 1983 against Defendants Harris Pastides, Dennis Pruitt, Bobby Gist ("Gist"), and Carl Wells ("Wells") (together "Defendants"), alleging that Defendants violated their rights under the First Amendment. This matter comes before the court on Defendants' two motions for summary judgment and Plaintiffs' cross-motion for partial summary judgment.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs planned a Free Speech Event at the University of South Carolina ("USC") to draw attention to threats to free expression on college campuses. ECF No. 1 at 5. Plaintiffs planned "to create visual displays and handouts depicting censorship controversies that have occurred at USC and other universities throughout the country." *Id.* Prior to the

event, Abbott met with Director of Campus Life and the Russell House University Union, Kim McMahon. *Id.* Abbott provided Ms. McMahon a synopsis of the planned event, including details describing the types of visuals that Plaintiffs intended to display. *Id.* at 6. Abbott subsequently obtained the proper space and facilities reservation to hold the event in front of the Russell House Union Building, a building located within USC's "free speech zone." *Id.*[1]

The Free Speech Event took place on November 23, 2015, as planned. Plaintiffs "displayed posters and hand-outs referencing censorship incidents at other universities." *Id.* at 6. Some of the incidents highlighted included an incident where a student was threatened punishment because of distributing copies of the United States Constitution on Constitution Day outside of a university's designated areas for free speech, and an incident where a university's policies failed to recognize a pro-choice group as a student organization. *Id.* at 6–7. Further, the word "wet back" and a picture of a swastika were among the visual displays. *Id.* Contextual background for all of the incidents displayed were provided by Plaintiffs.

During the event, members of the campus community

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[1]Under STAF 3.17, USC designates areas on campus available for solicitation activities. Plaintiffs "Free Speech Event" fell under the definition of "non-commercial solicitation" for purposes of a space and facilities reservation.

called USC officials to complain about the displays. These complaints were forwarded to Ms. McMahon by email. ECF No. 27–3 at 2. One particular email from the Director of the Office of Multicultural Student Affairs stated, "I am getting calls from everyone from faculty to the Columbia Jewish Federation concerning the swastika on Greene [S]treet." *Id.* Ms. McMahon responded to the email noting, "This is free speech and they are in a free speech area and if they are being respectful and trying to help learn and create dialogue then I am not sure how to help those that are uncomfortable about it." *Id.* Ms. McMahon responded again in a subsequent email wherein she continued to describe the purpose of the event, writing, "Discomfort is not surprising but they are hosting a free speech education event with a variety of situations that have been cited as examples of violation of free speech on other campuses. As I am not there I can't provide context and if group is doing what their event said it would." ECF No. 27–4 at 2.

On November 24, 2015, Wells, Assistant Director of the Office of Equal Opportunity Programs ("EOP"), sent a letter to Abbott stating that three students filed Formal Complaints of Discrimination. ECF No. 1–14 at 2. One student complained of Plaintiffs' behavior at the event, including, "engaging rudely with USC students, saying sexist and racist statements." ECF No. 1–14 at 8. In reference to Plaintiffs' display of a swastika at the event, another student complained that a friend "was violently triggered by seeing the

symbol, and now feels unsafe on campus." *Id.* at 11.

The letter sent to Abbott indicated that a "Notice of Charge" and copies of the official student complaints were enclosed. ***570** *Id.*[2] Abbott was instructed to contact the EOP office within five days to "arrange an appointment to fully discuss the charges as alleged." *Id.* Abbott was directed not to contact any of the complainants, and not to discuss the issue with other members of the campus community. *Id.* The letter further provided:

> With respect to a complaint that is filed with this office we shall as a matter of policy attempt to resolve the complaint through mutually agreeable mediation. Should we be unable to mediate a complaint we shall move to investigate the complaint and we shall upon completion of our investigation, issue to all parties a copy of our findings and recommendations which we shall make to the Provost and President of the University.

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[2]Defendants argue that the letter sent to Abbott was a not a formal "Notice of Charge." Instead, Defendants state that the inclusion of language that instructed that a "Notice of Charge" was attached was a scrivener's error as no "Notice of Charge" was attached, and no official investigation had commenced.

Id.

On November 24, 2015, Abbott called Wells to discuss the letter. ECF No. 1 at 10. Abbott states that during his conversation with Wells, "Mr. Wells confirmed that an investigation into the complaints would comply with University policy EOP 1.01, which details Equal Opportunity Complaint procedures." ECF No. 57–1 at 5.

On December 8, 2015, Wells met with Abbott, who was joined by Michael Kriete ("Kriete"), the President of YAL. ECF No. 1 at 13. The meeting lasted forty-five minutes and was recorded by Abbott. *Id.* At the beginning of the meeting, Abbott provided Wells with a letter setting forth his defense to the Free Speech Event. ECF No. 27–5 at 7. The letter also listed actions USC "would need to take to prevent its policies from chilling the exercise of constitutionally protected speech." ECF No. 1 at 14. Abbott explained the purpose of the free speech event and expressed his concerns with the meeting. ECF No. 27–5. Wells confirmed that the meeting was a pre-complaint/pre-investigation remedy to obtain more information concerning the details of the event in response to the student complaints. ECF No. 27–5 at 3.

On December 23, 2015, Wells sent a letter to Abbott notifying Abbott that the EOP Office "will not move any further in regard to this matter. The Office of Equal Opportunity Programs has found no cause for

investigating this matter." ECF No. 27–6 at 2. On February 23, 2016, Plaintiffs brought the underlying action. ECF No. 1. First, Plaintiffs raise an "as-applied" challenge, asserting that when Defendants required Abbott to attend a meeting to address student complaints, Defendants unconstitutionally applied USC policies to Plaintiffs in a way that chilled Plaintiffs' speech. Next, Plaintiffs allege USC's "policies and actions create a hostile atmosphere for free expression on campus, chilling the speech of other registered student organizations, as well as students, who are not before the court." ECF No. 1 at 17.

Plaintiffs challenge USC's Student Non–Discrimination and Non–Harassment Policy, STAF 6.24; and the *Carolinian Creed* as unconstitutional, claiming that the terms of both are broad and undefined and "vest University officials with unbridled discretion in their ability to review and restrict student speech." *Id.* at 21. Plaintiffs argue that the types of speech prohibited in STAF 6.24–"'unwelcome' and 'inappropriate' speech, including 'objectionable epithets, demeaning depictions,' 'unwelcome and inappropriate letters, telephone calls, electronic mail, or other communication,' 'repeated inappropriate ***571** personal comments,' speech that employs 'sexual innuendos and other sexually suggestive or provocative behavior,' and even 'suggestive or insulting gestures or sounds' "—is unconstitutionally vague. *Id.*

STAF 6.24's definitions of "harassment" and "sexual harassment" state, in pertinent part:

> Harassment is a specific type of illegal discrimination. It includes conduct (oral, written, graphic, or physical) which is directed against any student or group of students because of or based upon one or more of the characteristics articulated in Section II above, that is sufficiently severe, pervasive, or persistent so as to interfere with or limit the ability of an individual or group to participate in or benefit from the programs, services, and activities provided by the University.
>
> Such harmful conduct may include, but is not limited to, objectionable epithets, demeaning depictions or treatment, and threatened or actual abuse or harm. Harassment does not include the use of materials by students or discussions involving students related to any characteristic articulated in Section II for academic purposes appropriate to the academic context.

ECF No. 1–16 at 3.

> Sexual harassment is a specific type of discrimination which is defined as

unwelcome conduct of a sexual nature that is sufficiently severe or pervasive that it adversely affects a student's or student group's ability to participate in or benefit from the programs and services provided by the University. Examples of conduct that may constitute sexual harassment in violation of this policy include, but are not limited to, the following types of unwelcome and harmful behavior:

a. Physical Conduct

i. Unnecessary or unwanted touching, patting, massaging, etc.

ii. Impeding or blocking movements

iii. Acts of sexual violence

iv. Other unwanted conduct of a physical nature

b. Non–Verbal Conduct

i. Suggestive or insulting gestures or sounds

c. Verbal conduct

i. Direct propositions of a sexual nature

ii. Sexual innuendos and other sexually suggestive or provocative behavior

iii. Repeated, unwanted requests for dates

iv. Repeated inappropriate personal comments

v. Unwelcome and inappropriate letters, telephone calls, electronic mail, or other communication or gifts

vi. Requests for sexual favors

Sexual harassment may occur between members of the same or opposite sex. Sexual harassment directed at any student or other member of the University community, regardless of his or her sexual orientation, is a violation of this policy.

Sexual harassment does not refer to occasional, nonsexual compliments, nonsexual touching, or other nonsexual

conduct.

Id. at 3–4.

The *Carolinian Creed*, which encourages students to adhere to the following ideals, provides:

> A. I will practice personal and academic integrity.
>
> A commitment to this ideal is inconsistent with cheating in classes, in games, or in sports. It should eliminate the practice of plagiarism or borrowing another student's homework, lying, deceit, excuse making, and infidelity or disloyalty in personal relationships.
>
> B. I will respect the dignity of all persons.
>
> A commitment to this ideal is inconsistent with behaviors which compromise or demean the dignity of individuals or groups, including hazing, most forms of intimidating, taunting, teasing, baiting, ridiculing, insulting, harassing, and discrimination.
>
> C. I will respect the rights and property of others.

A commitment to this ideal is inconsistent with all forms of theft, vandalism, arson, misappropriation, malicious damage to, and desecration or destruction of property. Respect for other's personal rights is inconsistent with any behavior which violates their right to move about freely, express themselves in a civil manner, and to enjoy privacy.

D. I will discourage bigotry, striving to learn from differences in people, ideas, and opinions.

A commitment to this ideal pledges affirmative support for equal rights and opportunities for all students regardless of their age, sex, race, religion, disability, ethnic heritage, socioeconomic status, political, social or other affiliation or disaffiliation, or affectional preference.

E. I will demonstrate concern for others, their feelings, and their need for conditions which support their work and development.

A commitment to this ideal is a pledge to be compassionate, civil, and considerate, to avoid behaviors which are insensitive,

> inhospitable, or incident which unjustly or arbitrarily inhibit another's ability to feel safe or welcomed in their pursuit of appropriate goals.
>
> > F. Allegiance to these ideals obligates each student to refrain from and discourage behaviors which threaten the freedom and respect all USC community members deserve.
>
> This last clause reminds community members that they are not obliged to avoid these behaviors, but that they also have an affirmative obligation to confront and challenge, respond to or report the behaviors whenever or wherever they are encountered.

ECF No. 1–17.

Last, Plaintiffs challenge STAF 3.17 and STAF 3.25, contending that both policies have allowed Defendants to promulgate and enforce a *de facto* "Free Speech Zone" policy "that prohibits free expression on all but a tiny fraction of the University of South Carolina's campus." *Id.* at 22. Specifically, Plaintiffs argue that "Sections II.A and II.H.2 of STAF 3.17 limit expressive 'solicitation activities' ... to a few small 'designated' areas and locations, and prohibit it in the residence

halls." ECF No. 49–1 at 59. Section II. A. reads:

Solicitation is defined as contact for the purpose of:

> 1. Soliciting funds or sales or demonstrations that may result in sales;
>
> 2. Distributing advertising or other materials;
>
> 3. Compiling data for surveys, programs, or other purposes;
>
> 4. Recruitment of members or support for an organizations or cause;
>
> 5. Providing educational information sessions (exclusive of formal University ***573** of South Carolina academic classes).

ECF No. 1–19 at 2.

Section II.H.1 further details that organizations or students seeking to use space for events "must complete a USC Facility Reservation and Event Registration Form to the Russell House University Union event services coordinator." ECF No. 1–19 at 4. Plaintiffs challenge both STAF 3.17's advance registration and fee requirement. *Id.* Finally, Plaintiffs challenge STAF 3.25, as it "imposes a two-week registration requirement for any outdoor event held on

campus." ECF No. 1 at 17.

Plaintiffs seek:

> A. A declaratory judgment stating that Defendants' Student Non–Discrimination and Non–Harassment Policy, facially and as-applied to Plaintiffs, is unconstitutional facially and as-applied, and that they violated Plaintiffs' rights as guaranteed under the First and Fourteenth Amendments to the United States Constitution;
>
> B. A permanent injunction restraining enforcement of Defendants' unconstitutional Student Non–Discrimination and Non–Harassment Policy and its underlying enforcement practices;
>
> C. An injunction requiring the Defendants to remove any notation of the complaints against Plaintiffs' Free Speech Event from University records;
>
> D. A declaratory judgment that Defendants' review of Plaintiffs' expressive activity violated their First and Fourteenth Amendment rights;

> E. Monetary damages in an amount to be determined by the Court to compensate Plaintiffs for the impact of a deprivation of fundamental rights;
>
> F. Plaintiffs' reasonable costs and expenses of this action, including attorney's fees, in accordance with 42 U.S.C. § 1988, and other applicable law; and
>
> G. All other further relief to which Plaintiffs may be entitled.

ECF No. 1 at 26–27.

On October 3, 2016, Gist and Wells moved for summary judgment based on qualified immunity as well as the absence of any claim for damages against them. ECF No. 27 at 1. On October 25, 2016, all Defendants filed a second motion for summary judgment on the remaining issues. ECF No. 36. In that motion, Defendants assert that they "are entitled to dismissal because some of the University policies challenged by Plaintiffs in this action have been amended to eliminate any conceivable issue about the policies' constitutionally, and because any remaining policies, i.e., those which have not been amended, are not unconstitutional." ECF No. 36–1 at 1.

On November 14, 2016, Plaintiffs filed a response in

opposition to Defendants' motions for summary judgment and a cross-motion for partial summary judgment. ECF No. 48 and 49.[3] First, Plaintiffs contend that there remain factual disputes concerning Gist's involvement in the matter, making summary judgment as to Gist premature. ECF No. 49 at 1. Plaintiffs contend, however, that summary judgment should be granted in their favor as it relates ***574** to Wells. Plaintiffs assert that Wells' investigation burdened Plaintiffs' First Amendment rights in five specific ways: (1) "Wells' letter initiated an investigative process under USC policies that favored the complainant and placed the burden firmly on the speaker"; (2) "initiating an investigation under USC's policies threatened to impose significant penalties on Plaintiffs for their speech, as the complainants demanded"; (3) "USC's process for reviewing complaints does not employ adequate substantive standards or the least restrictive means of addressing allegations of harassment, and the application of those policies to Plaintiffs had a significant chilling effect"; (4) "USC's investigation did more than just chill speech because Wells' letter also had the immediate effect of imposing a 'gag order' on Plaintiffs"; and (5)

[3]Plaintiffs filed ECF No. 48 and 49 separately for docket clarity; however, the motions are identical. For purposes of this order, the Court will cite to ECF No. 49 when referring to Plaintiffs' response in opposition to Defendants' motion for summary judgment and Plaintiffs' cross-motion for partial summary judgment.

"Defendants' claim that there can be no chilling effect here because USC terminated the investigation is false." ECF No. 49–1 at 33–42.

Defendants responded in opposition to Plaintiffs' motion for partial summary judgment by arguing that (1) Plaintiffs lack standing to assert facial challenges to USC policies; (2) STAF 6.24 is constitutional; (3) the *Carolinian Creed* has always been a non-enforceable, aspirational document, and does not affect Plaintiffs' rights in any way; and (4) Plaintiffs' challenge to STAF 3.17 and STAF 3.25 is moot because Defendants have revised both policies. ECF No. 55.

On December 21, 2016, Plaintiffs filed a reply to Defendants' opposition. In summation, Plaintiffs argue the court should grant Plaintiffs' motion for partial summary judgment on their as-applied challenge because: (1) the First Amendment bars intrusive investigations and threats of sanction; and (2) USC's investigation violated Plaintiffs' First Amendment rights. Plaintiffs assert the court should grant Plaintiffs' cross-motion for partial summary judgment on their facial challenge to STAF 6.24 because: (1) Plaintiffs' standing to challenge a policy applied to them is obvious; (2) Defendants have no substantive response to STAF 6.24's constitutional deficiencies; and (3) Plaintiffs' challenge to STAF 3.17 and STAF 3.25 has not been mooted by amendments to the policies. ECF No. 57. Additionally, Plaintiffs attached the affidavits of Abbott and Kriete describing how

their speech was chilled by Defendants' actions. ECF No. 57–1, 57–2.

On January 19, 2017, the court held a hearing on Defendants' motions for summary judgment and Plaintiffs' cross-motion for partial summary judgment. ECF No. 58.

II. LEGAL STANDARD

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed R. Civ. P. 56(a). A fact is "material" if proof of its existence or non-existence would affect the disposition of the case under the applicable law. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248–49, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine question of material fact exists where, after reviewing the record as a whole, the court finds that a reasonable jury could return a verdict for the nonmoving party. *Newport News Holdings Corp. v. Virtual City Vision*, 650 F.3d 423, 434 (4th Cir. 2011).

III. ANALYSIS

[1] [2]Plaintiffs who allege violations pursuant to § 1983 must establish: "(1) the deprivation of a right secured by the Constitution or a federal statute; (2) by a person; (3) acting under color of state law." *Jenkins v. Medford*, 119 F.3d 1156, 1159–60 (4th Cir. 1997).

State officials sued ***575** in their individual capacities are "persons" within the meaning of § 1983. *Hafer v. Melo*, 502 U.S. 21, 31, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991).

A. Plaintiffs' As–Applied Challenge (Count One)

Count One of Plaintiffs' complaint alleges that "by investigating Plaintiff Ross Abbott's involvement in Plaintiffs' Free Speech Event, Defendants have explicitly and implicitly chilled Plaintiffs' free expression as well as that of all USC students." ECF No. 1 at 19. Gist and Wells seek summary judgment and dismissal as to Count One pursuant to qualified immunity. ECF No. 27.

[3] [4]Government officials are protected under the doctrine of qualified immunity from "liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009)(citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). In such cases, the court is faced with determining the " 'objective legal reasonableness' of the action, accessed in the light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

1. Clearly established right

[5] [6]Pure speech is protected under the First Amendment of the Constitution, and such protection extends to school campuses. *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). Further, "entertainment as well as political and ideological speech, is protected ... within the First Amendment guarantee." *Iota XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 389 (4th Cir. 1993)(internal citations omitted).

[7] [8]Universities are not immune from "the sweep of the First Amendment." *Healy v. James*, 408 U.S. 169, 180, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972). Indeed, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506, 89 S.Ct. 733. While courts have recognized the need for affirming the authority of school officials to proscribe and control conduct, courts have not determined that First Amendment protections "should apply with less force on college campuses than in the community at large." *Healy*, 408 U.S. at 181, 92 S.Ct. 2338. "In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Tinker*, 393 U.S. at 511, 89 S.Ct. 733.

Here, Plaintiffs' rights to freedom of expression and

speech are clearly established. Therefore, the court must decide if Plaintiffs' rights were violated when Defendants held a meeting with Plaintiffs to further discuss student complaints regarding Plaintiffs' Free Speech Event.

2. Violation of clearly established right

While all students on University campuses have First Amendment rights to free speech, such rights are not absolute. Indeed, the Supreme Court has "held repeatedly that a content-based regulation of protected expression survives judicial scrutiny if it is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Sigma Chi Fraternity,* 993 F.2d at 394 (Murnaghan, J., concurring) (quoting ***576** *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105, 118, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991)). The Supreme Court has "recognized that regulation of speech based on its content is not only permissible but, in limited circumstances, justified." *Id.* Such areas of justification would occur if speech was determined to infringe upon other students' rights to be free from discrimination, as universities have "a substantial interest in maintaining an educational environment free of discrimination and racism...." *Id.* at 393. "Under certain circumstances racial and ethnic epithets, slurs, and insults might fall within this description and could constitutionally be prohibited by the University." *Doe v. University of Michigan*, 721 F.Supp. 852, 862 (1989).

[9] [10]In cases where it is alleged that government action violated a plaintiff's First Amendment rights, the plaintiff may show an injury by establishing self-censorship. *See Cooksey v. Futrell*, 721 F.3d 226 (4th Cir. 2013). Self-censorship occurs when a claimant "is chilled from exercising her right to free expression." *Benham v. City of Charlotte,* 635 F.3d 129, 135 (4th Cir. 2011)(internal quotations and citations omitted). Allegations of "subjective chill" are not sufficient. *Laird v. Tatum*, 408 U.S. 1, 13, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972). Still, claimants need not show that they completely ceased activity to prove an injury. *Benham*, 635 F.3d at 135. Indeed, "[c]onduct that tends to chill the exercise of constitutional rights might not itself deprive such rights, and a plaintiff need not actually be deprived of her First Amendment rights" in order to establish a valid claim. *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005). "Government action will be sufficiently chilling when it is likely to deter a person of ordinary firmness from the exercise of First Amendment rights." *Benham*, 635 F.3d at 135 (internal quotations and citations omitted).

[11]Plaintiffs argue that other students of "ordinary firmness" would experience a chilling effect after receiving a letter from a member of USC's administration referencing a "Notice of Charge" and requiring the student to attend a meeting to discuss formal student complaints. Plaintiffs claim that between receiving the letter from Wells on November

24, 2015, until the filing of the underlying action on February 23, 2016, the College Libertarians "avoided putting on any public events at USC." ECF No. 57–1 at 6. Abbott states that, "as College Libertarians events often focus on controversial public policy and free speech issues, holding an event such as the kick-off (or anything similar to the prior Free Speech Event) was impeded by the real possibility that if a member of the University community complained again, I or other members of the College Libertarians group would again face possible discipline, or in the least, be called in by Mr. Wells or another administrator to justify our actions." *Id.* Abbott also details that Plaintiffs had planned to cancel their Marijuana Legalization Rally but felt that they could host the event only after filing the underlying suit. *Id.* at 7.

Kriete shared similar sentiments, stating that between the time Abbott received the letter from Wells and Plaintiffs filed the underlying lawsuit, "YAL was hesitant to put on any public events at USC. On February 17, 2016, we decided to go ahead and have a pro capitalism event on campus. We knew that the lawsuit was about to filed at this time. However we were worried that students might find this event offensive and could result in our group and us as individuals being punished by the University for offending students. Although we went ahead, we were hesitant to ***577** engage with students who disagreed with our event out of fear they would complain to the University and we would be further punished." ECF

No. 57–2 at 4.

A student who receives a letter indicating that a "Notice of Charge" is attached and prohibiting him from discussing the letter with others, could feel he or she was subject to discipline. The student reasonably could believe that the "Notice of Charge" inadvertently was not enclosed. For purposes of summary judgment, the court finds that Plaintiffs' speech was chilled in that a student of "ordinary firmness" may have self-censored his or her future speech while awaiting notice from Wells on the status of the official student complaints.[4] The question becomes, then, whether USC's investigation of the student complaints was necessary to serve a compelling state interest and is narrowly drawn to achieve that end.

USC was required under Title VI of the Civil Rights Act of 1964 and mandates from the United States Department of Education to ensure that no students had been unlawfully discriminated against as a result

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[4]Even if Abbott believed before attending the meeting that he was in danger of disciplinary action, those fears should have been assuaged after he attended the meeting, which was held fifteen days later. Throughout the meeting, Wells clarified that there were no charges against Abbott, and that the meeting was being held to obtain Abbott's response to the student complaints. Finally, USC declined to pursue an investigation of the event after confirming with Plaintiffs that the event had been held as Plaintiffs represented it would be. ECF No. 27–6.

of the Free Speech Event.[5] To do so, USC had an obligation to employ a method of balancing both students' rights to freedom of speech and rights to be free from discrimination.

In *Sigma Chi Fraternity*, the plaintiff fraternity held an event called the "ugly woman contest" where members dressed up as caricatures of different women. *Id.* at 387. One such member was painted black attempting to imitate an African–American. *Id.* at 388. The event garnered numerous campus community complaints and protests to university officials. *Id.* After the event, the University engaged in several meetings with the complainants and the fraternity. *Id.* The University decided to sanction the fraternity by suspending it from all activities for the rest of the spring semester. *Id.* The University also imposed "a two-year prohibition on all social activities except pre-approved pledging events and pre-approved philanthropic events with the educational purpose

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[5]Pursuant to EOP 1.01, The Executive Assistant to the President for Equal Opportunity Programs is tasked with implementing "equal opportunity and affirmative action in education and employment for all persons regardless of race, color, religion, gender, national origin, age, disability, sexual orientation, genetics or veteran status." ECF No. 1–15 at 2. To pursue this goal, the Executive Assistant to the President for Equal Opportunity Programs has a responsibility to investigate complaints under EOP 1.01 "to insure compliance with applicable federal and state statutes relating to non-discrimination in employment and education." *Id.*

directly related to gender discrimination and cultural diversity." *Id.*

The Fourth Circuit determined that the University in *Sigma Chi Fraternity* violated the students' First Amendment rights to Free Speech. The Fourth Circuit emphasized that " 'the manner of [the University's] action cannot consist of selective limitations upon speech.' " *Sigma Chi Fraternity*, 993 F.2d at 393 (*R.A.V. v. City of St. Paul*, 505 U.S. 377, 392, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992)). The Fourth Circuit observed:

> The University certainly has a substantial interest in maintaining an educational ***578** environment free of discrimination and racism, and in providing gender-neutral education. Yet it seems equally apparent that it has available numerous alternatives to imposing punishment on students based on viewpoints they express. We agree wholeheartedly that it is the University officials' responsibility, even their obligation, to achieve the goals they have set. On the other hand, a public university has many constitutionally permissible means to protect female and minority students.... The University should have accomplished its goals in some fashion other than silencing speech

on the basis of its viewpoint.

Id.

In this case, unlike the University in *Sigma Chi Fraternity*, USC knew of the content of the Free Speech Event, approved the event, and ultimately determined that the event was an acceptable exercise of Plaintiffs' First Amendment rights. USC never attempted to silence Plaintiffs' speech, sanction Plaintiffs for their speech, or prevent students from engaging in similar speech in the future. Instead, Defendants chose a narrow approach to addressing the rights of all students on campus: those who participated in the event and those who felt discriminated by it.

The court concludes that, as a matter of law, the inquiry by Wells was a narrowly drawn solution that was necessary to serve USC's compelling interest in protecting students' rights to be free from discrimination based on race, gender, religion, or other attributes.

B. Facial Challenges to USC Policies (Counts Two, Three, and Four)

1. STAF 6.24

[12]Plaintiffs argue that the court should enjoin USC's Non–Discrimination and Non–Harassment Policy

(STAF 6.24) as unconstitutional because it is vague, overly broad, restricts speech using "amorphous and undefined terms," and fails to implement the required constitutional standard. ECF No. 49–1 at 36–45. Defendants counter Plaintiffs' assertion, claiming that Plaintiffs lack standing to bring a claim against the policy, and even if they do have standing, the policy is constitutional. ECF No. 26.

a. Standing.

[13] [14]A plaintiff seeking injunctive relief may not rely on prior harm. "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects." *O'Shea v. Littleton*, 414 U.S. 488, 495–96, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974). Standing to seek injunctive relief does not exist absent a "showing of any real or immediate threat that the plaintiff will be wronged again," or, in other words, a "likelihood of substantial and immediate irreparable injury." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). A "speculative ... claim of future injury" does not establish standing to seek equitable relief. *Id.*

[15] [16] [17]When a case presents a constitutional challenge under the First Amendment, rigid standing requirements are relaxed. *Cooksey*, 721 F.3d at 235. "A regulation that burdens speech creates a justiciable injury if on its face it restricts expressive activity by

the class to which the plaintiff belongs, or if its presence otherwise tends to chill the plaintiff's exercise of First Amendment rights." *Rock for Life–UMBC v. Hrabowski*, 411 Fed.Appx. 541, 547 (4th Cir. 2010). For standing purposes, the plaintiff must show that the regulation presents a credible threat of enforcement against the party bringing ***579** suit that is not "imaginary or wholly speculative." *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 302, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979). Plaintiffs may bring a pre-enforcement suit when they can establish that they intend to engage in conduct that is proscribed by a statute, and that there exists some credible threat of enforcement thereunder. *See Susan B. Anthony List v. Driehaus*, ––– U.S. ––––, 134 S.Ct. 2334, 2342, 189 L.Ed.2d 246 (2014).

i. Intent to Violate the Challenged Law

[18]The court must determine if Plaintiffs have shown, concretely, that they intend to violate the challenged law. *Lopez v. Candaele*, 630 F.3d 775, 786 (9th Cir. 2010). "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." *Id.* (internal quotations omitted). The allegations must be specific enough so that the court need not speculate on the types of speech or political activity in which the claimants intend to engage. *Id.*

Plaintiffs' Free Speech Event focused on speech used for an academic discourse on First Amendment rights, which is speech not covered by the sexual harassment and discrimination policy. Examples of events that Plaintiffs intend to host include Marijuana Legalization Rallies, educational political ideology quizzes, a "Carolina Clash" to debate between College Republicans and College Democrats, a kickoff event, or "anything similar to the prior Free Speech Event." ECF No. 57–1 at 6–7. As stated above, Plaintiffs should be satisfied following the meeting with Wells that "anything similar to the prior free speech event" does not constitute speech regulated by the harassment policy. Plaintiffs have failed to show that they intend to violate STAF 6.24.

ii. Credible Threat of Enforcement

[19]To demonstrate a credible threat of enforcement, a plaintiff can establish several factors: "(1) past enforcement against plaintiff; (2) official threats of enforcement made specifically against plaintiff; and (3) frequency of enforcement against similarly situated persons." *Boston Correll v. Herring*, 212 F.Supp.3d 584, 601 (E.D. Va. 2016). Further, some courts have found that plaintiffs have standing to facially challenge University policies based on pre-enforcement claims. For example, the plaintiff in *Doe v. University of Michigan* was a psychology graduate student who brought a suit against the University of Michigan, alleging that its harassment policy chilled his speech

and that he could potentially be sanctioned under its overbroad terms. 721 F.Supp. 852, 858 (E.D. Mich. 1989). The policy at issue stated that students could be subject to discipline for "any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap, or Vietnam-era veteran status…." *Id.* at 856. The student brought the suit because he believed his studies, which focused on biological bases of individual difference in personality traits and mental abilities, could be deemed "sexist" or "racist." *Id.* at 858.

The *Doe* court noted that, "[W]ere the court to look only at the plain language of the Policy, it might have to agree with the University that Doe could not have realistically alleged a genuine and credible threat of enforcement." *Id.* at 859. The court in *Doe* took an additional step and looked at the intent of the policy through reference to the policy's "legislative history, the Guide, and experiences gleaned *580 from enforcement." *Id.* at 859. The record indicated that "the drafters of the policy intended that speech need only be offensive to be sanctionable." *Id.* Further, the record provided evidence of several instances where the administration used the policy to regulate academic speech. *Id.* at 861. Taking the complete record into account, the *Doe* court determined there was a realistic and credible threat that Doe's speech could be sanctioned. *Id.* at 860. The court in *Doe*

invalidated the policy because it "was simply impossible to discern any limitation on its scope or any conceptual distinction between protected and unprotected conduct." *Id.* at 867.

The within litigation is distinguishable from *Doe* and similar cases. In the court's view, the present case is more analogous to *Rock for Life*, where the plaintiffs sought to facially challenge the University of Maryland, Baltimore County's ("UMBC") sexual harassment policy as chilling their speech when they were not allowed to host an event on the campus space of their choice. The Fourth Circuit found that the UMBC officials never threatened to punish the plaintiffs' speech as sexual harassment, and that UMBC "never undertook a 'concrete act' to investigate or sanction the plaintiffs for violation of the code of conduct." 411 Fed.Appx. at 549. The Fourth Circuit concluded that the plaintiffs were unable to demonstrate a credible threat of enforcement, and, as a result, the plaintiffs did not have standing to assert their claim. *Id.*

In this case, Abbott states in his affidavit, "Mr. Wells' December 23 letter did not clarify for me whether the University's policies on harassment and discrimination as set forth in STAF 6.24 and other rules could be used—as they were in response to the Free Speech Event—to impose enforcement and possible disciplinary measure on students like myself or members of College Libertarians and YAL who

engaged in otherwise constitutionally-protected expression." ECF No. 57–1 at 6. However, Plaintiffs did not present any evidence that there has been frequent actual or threatened use of STAF 6.24 to silence the types of speech in which Plaintiffs were engaging.

STAF 6.24 defines harassment as it pertains to sexual harassment, clarifies that the policy does not regulate academic speech, sets forth clear examples of how the policy is violated, and the proper procedures for enforcement. The language of STAF 6.24 makes it clear that the policy would not be applied to the speech in which Plaintiffs or similarly situated students intend to participate. There is no support in the record to establish that there is a credible threat of enforcement of STAF 6.24 against Plaintiffs or similarly situated students. The court concludes that Plaintiffs lack standing to challenge STAF 6.24 as facially unconstitutional.

2. *STAF 3.17 and 3.25 and the Carolinian Creed*

[20]Plaintiffs raise facial challenges to USC policies STAF 3.17 and 3.25. ECF No. 49–1. Unlike STAF 6.24, the Facilities and Solicitation policies, STAF 3.17 and STAF 3.25, were applied to Plaintiffs, as both policies regulated campus events. The *Carolinian Creed* applied to all students. Plaintiffs have standing to contest the constitutionality of these policies.

[21]Following the commencement of this case, Defendants revised STAF 3.17 and STAF 3.25 to cure any deficiencies raised by Plaintiffs' complaint. ECF No. 36–8, 36–10. Plaintiffs do not claim that the policies are unconstitutional in their amended state. Instead, Plaintiffs assert that "Defendants face a 'heavy burden' of establishing the challenged policies will not *581 be reinstated (or continued to be enforced despite 'official' amendment)." *Id.* at 57.

> As a general rule, "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." But jurisdiction, properly acquired, may abate if the case becomes moot because (1) it can be said with assurance that "there is no reasonable expectation ..." that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying question of fact and law.

Los Angeles County v. Davis, 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979)(internal citations

omitted).

[22] [23]A challenge to a facilities policy indicating that the University has too much control over student-planned events is a challenge premised on overbreadth. *Rock for Life–UMBC*, 411 Fed.Appx. at 550 (4th Cir. 2010). “When a facially overbroad regulation is subsequently narrowed within constitutional boundaries, the inherent threat of content-based discrimination becomes null.” *Id.* Further, “statutory changes that discontinue a challenged practice are ‘usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed.’” *Valero v. Terrestrial Corp. v. Paige*, 211 F.3d 112, 116 (4th Cir. 2000)(internal citation omitted).

In its original form, STAF 3.17 made no distinction between what types of speech required a solicitation fee. ECF No. 36–7 at 5. After revisions, STAF 3.17 states that non-commercial solicitation activities, like those participated in by Plaintiffs, are not subject to a fee. ECF No. 36–8 at 5. “Non-commercial solicitation” was not defined in the original policy, making it unclear what types of speech required fees. The revised policy eliminates any vagueness and defines such non-commercial solicitation as “any distribution by students individually or as members of student organizations of leaflets, brochures or other written material, or oral speech by them to a passerby, conducted without intent to obtain commercial or

private pecuniary gain." ECF No. 36–8 at 2. STAF 3.25 was changed to lessen the amount of time required to host an outdoor event from two weeks advance notice to three day advance notice, and only in cases where the event would use amplified sound and host over 150 people. ECF No. 36–10 at 3. The *Carolinian Creed* was an unenforceable statement of ideals that USC repealed and removed from USC's policies. ECF No. 46. The court finds that changes made to the policies "eradicate the effects" of the alleged violations.

With respect to reinstatement, injunctive relief is appropriate unless the court can determine, with a degree of certainty, that USC would not reinstate the prior versions of STAF 3.17 and 3.25 and the *Carolinian Creed. See DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008). Defendants have submitted an affidavit from Dennis Pruitt, Vice President for Student Affairs, Vice Provost and Dean of Students at USC, that details the repeal of the *Carolinian Creed* and revisions to STAF 3.17 and 3.25. ECF No. 55–1. Pruitt avers that "USC does not intend to reverse any of these changes at any time in the future ... The existence of the present lawsuit simply pointed up the need for these relatively minor changes in order to obviate any possible First Amendment concerns. There is nothing about them that would cause USC to have any interest in reinstating ***582** them once the present lawsuit it over." ECF No. 55–1 at 3–4.

The court concludes that USC voluntarily ceased the

allegedly illegal conduct and the allegations have become moot. The court declines to issue injunctive relief against any future revision to the policies.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment (ECF No. 27) and Defendants' second motion for summary judgment (ECF No. 36) are hereby **GRANTED**. Plaintiffs' cross-motion for summary judgment (ECF No. 49) is **DENIED**, and the case is **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

APPENDIX C

FILED: September 18, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1853
(3:16-cv-00538-MBS)

ROSS ABBOTT; COLLEGE LIBERTARIANS AT THE UNIVERSITY OF SOUTH CAROLINA; YOUNG AMERICANS FOR LIBERTY AT THE UNIVERSITY OF SOUTH CAROLINA

Plaintiffs - Appellants

v.

HARRIS PASTIDES; DENNIS PRUITT; BOBBY GIST; CARL R. WELLS

Defendants - Appellees

STUDENTS FOR LIFE OF AMERICA; ACLU OF SOUTH CAROLINA; DKT LIBERTY PROJECT; INDIVIDUAL RIGHTS FOUNDATION; NATIONAL COALITION AGAINST CENSORSHIP; REASON FOUNDATION; STUDENT PRESS LAW CENTER

Amici Supporting Appellants

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX D

Compl. Ex. P

NUMBER:	STAF 6.24 (NEW)
SECTION:	Student Affairs and Academic Support
SUBJECT:	Student Non-Discrimination and Non-Harassment Policy
DATE:	April 9, 2013

Policy for:	Columbia Campus
Procedure for:	Columbia Campus
Authorized by:	Dennis A. Pruitt
Issued by:	Office of Student Conduct

USC recognizes the human dignity of each member of the University community and believes that each member has a responsibility to promote respect and dignity for others so that all students are free to pursue their goals in an open environment, able to participate in the free exchange of ideas, and able to share equally in the benefits of the University's education opportunities. To achieve this end, the University believes it should foster an academic, social, and living environment that is free from discrimination and harassment on the basis of race, color, national origin, religion, sex, gender, age, disability, sexual orientation, genetics, veteran status,

or any other category protected by law[1].

The University is also committed to the principles of academic freedom and believes that a learning environment where the open exchange of ideas is encouraged is integral to the mission of the University. The University vigorously embraces students' rights to the legitimate freedom of expression, speech, and association. Nothing in this policy is intended to impede the exercise of those rights protected under the First Amendment of the U.S. Constitution. The University recognizes that the conduct prohibited in this policy extends to behavior and speech that is not constitutionally protected and which limits or denies the rights of students to participate or benefit in the educational program.

The standard mandated by this policy represents the bare minimum of acceptable behavior. The University's commitment to civility, mutual respect, and tolerance should cause the members of the University community to adhere to an even higher standard of behavior in these matters—not because we are required to do so, but because conscience dictates it.

I. Policy

It is the policy of the University of South Carolina that

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[1]This policy recognizes federally protected categories of student characteristics as well as those characteristics protected as a matter of USC policy.

all students should be able to learn and live in an educational and campus environment that is free from discrimination and harassment on the basis of race, color, national origin, religion, sex, gender, age, disability, sexual orientation, genetics, veteran status, or any other category protected by law, in all programs, activities, and services of the University.

A. Scope

This policy applies to the conduct of students in all aspects of academic, residential, athletic, and social activities, operations, and programs at the University.[2] Any student or student organization that violates this policy shall be subject to disciplinary action up to and including suspension and expulsion from the University. Violations of this policy are considered to be a conduct offense under the USC Student Code of Conduct.

B. Definitions of Prohibited Conduct

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[2]The University has adopted the following specific policies and procedures pertaining to discrimination and harassment that apply to the conduct of other members of the University community, including employees, faculty, and third-party vendors:

University Policy EOP 1.00 Equal Opportunity and Affirmative Action
University Policy EOP 1.01 Equal Opportunity Complaint Processing Procedures
University Policy EOP 1.02 Sexual Harassment
University Policy EOP 1.03 Discriminatory Harassment
University Policy EOP 1.04 Non-Discrimination Policy.

1. Discrimination

Discrimination is the unfair or unequal treatment of an individual or a group based upon race, color, national origin, religion, sex, gender, age, disability, sexual orientation, genetics, veteran status, or any other category protected by law, that interferes with or limits the ability of an individual or group to participate in or benefit from the services, activities, or privileges provided by the University.

2. Harassment

Harassment is a specific type of illegal discrimination. It includes conduct (oral, written, graphic, or physical) which is directed against any student or group of students because of or based upon one or more of the characteristics articulated in Section II above, that is sufficiently severe, pervasive, or persistent so as to interfere with or limit the ability of an individual or group to participate in or benefit from the programs, services, and activities provided by the University. Such harmful conduct may include, but is not limited to, objectionable epithets, demeaning depictions or treatment, and threatened or actual abuse or harm. Harassment does not include the use of materials by students or discussions involving students related to any characteristic articulated in Section II for academic purposes

appropriate to the academic context.

3. Sexual Harassment

Sexual harassment is also included in this policy[3]. Sexual harassment is a specific type of discrimination which is defined as unwelcome conduct of a sexual nature that is sufficiently severe or pervasive that it adversely affects a student's or student group's ability to participate in or benefit from the programs and services provided by the University. Examples of conduct that may constitute sexual harassment in violation of this policy include, but are not limited to, the following types of unwelcome and harmful behavior:

a. Physical Conduct

I. Unnecessary or unwanted touching, patting, massaging, etc.
ii. Impeding or blocking movements
iii. Acts of sexual violence
iv. Other unwanted conduct of a physical nature

b. Non-Verbal Conduct

I. Suggestive or insulting gestures or sounds

[3]The University's sexual harassment policy may also be found at EOP 1.02 Sexual Harassment.

c. Verbal Conduct

I. Direct propositions of a sexual nature
ii. Sexual innuendos and other sexually suggestive or provocative behavior
iii. Repeated, unwanted requests for dates
iv. Repeated inappropriate personal comments
v. Unwelcome and inappropriate letters, telephone calls, electronic mail, or other communication or gifts
vi. Requests for sexual favors

Sexual harassment may occur between members of the same or opposite sex. Sexual harassment directed at any student or other member of the University community, regardless of his or her sexual orientation, is a violation of this policy.

Sexual harassment does not refer to occasional, nonsexual compliments, nonsexual touching, or other nonsexual conduct.

II. Procedures

A. Complaint Procedures

1. Any student may file a complaint with the Office of Equal Opportunity Programs (EOP) against another student, student organization, faculty, staff, or other member of the University community who is believed to have violated this policy or otherwise engaged in discriminatory or harassing behavior.

2. The Office of Equal Opportunity Programs (EOP) serves as the lead office for the receipt and investigation of all complaints of discrimination and harassment involving members of the University community, including complaints involving students and student organizations. Any student who believes he or she has been subjected to discrimination or harassment, or who has knowledge of or has witnessed discriminatory or harassing actions, should contact the EOP Office. The EOP Office can be contacted in person at 1600 Hampton Street (Suite 805), by email at wellscr@mailbox.sc.edu, or by telephone at (803) 777-9560. In the alternative, a student can complete the on-line complaint form found at http://www.sc.edu/eop/students.html. Students who feel their safety is threatened should immediately contact Campus Security at (803) 777-4215 or (803) 777- 8400.

3. In the event a student has a complaint after hours, or on weekends or holidays, the student

can inform an available University official[4] if the student believes immediate action is necessary. All University officials who are informed of a complaint by a student, who become aware of a complaint by other means, or who witness an act of discrimination and/or harassment involving students, are required to report this information to the EOP Office. If the complaint is such that the official believes it can be resolved by the official, with the consent of the students involved, and, if available, advice from the EOP Office, the official can attempt to resolve it. In all situations, however, whether the complaint is resolved or not, the official must report, in writing to the EOP Office by the next business day, the complaint, the names and contact information of the parties involved, and the resolution, if any, in order that the EOP Office can follow-up with the student to begin the resolution process or to ensure that the complaint was satisfactorily resolved and that no further investigation is needed.

4. The EOP Office will designate one staff member to handle student complaints and work with Student Affairs to ensure that the complaint is fairly and expeditiously

[4]For the purposes of this policy, University officials include Student Affairs staff, Housing staff, resident mentors, athletic coaches and directors, student organization advisors, Greek Life officials, faculty advisors, faculty deans, and security staff.

investigated and if necessary, that appropriate sanctions are assessed.

5. In the event of an anonymous or victimless complaint, the EOP Office will investigate such complaints to the extent possible. The EOP will interview any witnesses to the acts and, if alleged offenders are identified, the alleged offenders. The EOP Office will then issue a report of findings to the Office of Student Affairs. The EOP Office and the Office of Student Affairs may use such incidents as an opportunity to inform and educate the University community.

6. Once a report of discrimination or harassment is received by the EOP Office, unless the complaint is anonymous, the EOP Office will contact the student who has made the complaint ("complainant") to discuss confidentially the specifics of the complaint and provide guidance and information regarding the resolution process. If the complaint has been resolved, the EOP Office will ensure that the complainant is satisfied with the resolution and determine whether further investigation is warranted.

7. Complainants will be asked to provide the following information: a description of the alleged acts, the date(s) the alleged acts occurred, the names, if known, of the individual(s) or group(s) allegedly engaging in

discriminatory or harassing acts, and the names of witnesses, if any. If the complainant wishes his or her name not be disclosed, the EOP Office will explain that such a confidentiality request may limit the ability of the University to respond but that the EOP Office will take all reasonable steps to investigate consistent with the complainant's request as long as doing so does not prevent the EOP Office from responding effectively to the complaint or prevents the EOP Office from stopping potential discrimination or harassment of others. In all situations, the EOP Office will take every effort, to the extent allowed by law, to protect the privacy of the persons involved. The number of persons with knowledge of the complaint shall be kept to a minimum and only those persons with a need to know will be notified of the complaint.

Following this initial meeting, the student may choose not to pursue the complaint, request informal resolution by the EOP Office, or proceed with a formal complaint with the EOP Office.

8. If the EOP Office determines the complaint is one that can be resolved informally, the EOP Office will explain the informal resolution process to the complainant and if the complainant agrees, the EOP Office will proceed with informal resolution. Some complaints are not appropriate for informal resolution, such as

sexual assault complaints or complaints that involve violence or a threat of violence. In the event a complainant withdraws his or her complaint before resolution is accomplished, the EOP Office will continue to investigate the complaint to the extent possible to determine what occurred and then recommend, if appropriate, steps to remedy the situation.

9. In certain circumstances, the University may impose emergency action upon a student or student organization when there is reason to believe, based upon available evidence, that the student or student organization poses an immediate threat to the safety, health, or welfare of persons, property, or to the orderly operation of the University. Such emergency action can include, but is not limited to, suspension, limitation of privileges, or housing relocation or removal. Emergency action is interim in nature pending the outcome of conduct procedures. Emergency actions and procedures are fully described on the Office of Student Conduct website at http://www.housing.sc.edu/osc/cp.html. In cases involving potential criminal conduct, the EOP Office will determine whether appropriate law enforcement authorities should be notified.

B. Resolution Procedures

1. Informal Resolution

The informal resolution process is intended to be flexible so as to enable the EOP Office to address a complaint in the most effective and expeditious manner possible. Informal resolutions are accomplished with the consent of the complainant and assistance of other offices or administrators on campus in the area relevant to the complaint. The complainant, after receiving explanation of the informal resolution process, will be asked to sign a form consenting to informal resolution.

Informal resolution may be achieved by: (a) action taken by the complainant, when appropriate, to address the matter directly with the alleged offender; (b) action to negotiate a resolution undertaken by the EOP Office; or (c) mediation undertaken by the EOP Office. The complainant, at his or her discretion, may end the informal process and begin the formal resolution process at any time. Although the process focuses on conciliation, not sanctions, disciplinary action, including an oral or written warning may be issued if agreed upon by all parties. In all cases in which informal resolution is achieved, the EOP Office will make a written report of the resolution to file with the copy of the complaint. In the event an oral or written warning is issued to an alleged offender, if the alleged offender is an employee, a copy of the warning is sent to employee's supervisor. In the case of a student or student organization, a copy of the warning is sent to the Office of Student

Conduct. If the complaint is not settled by informal resolution, the EOP Office will proceed to formal resolution.

2. Formal Resolution

In a formal resolution process, the EOP Office will provide a copy of the complaint to the alleged offender within five (5) days either personally or by certified mail. The alleged offender ("respondent") will have ten (10) days in which to respond in writing to the complaint. A copy of the respondent's response will be provided to the complainant.

The EOP Office will assign the complaint to an investigator. Upon receiving the respondent's response, the EOP investigator may attempt to negotiate a resolution which is agreeable to both parties. If no negotiated resolution is achieved, or if a negotiated resolution is not feasible, the investigator will initiate a formal investigation of the complaint.

a. Complaint Investigation

The investigator will interview the complainant, the respondent, witnesses identified by the parties, and anyone else whom the investigator believes may have knowledge of the facts regarding the complaint. The investigator may conduct independent research regarding the facts

of the complaint. Investigations are normally completed within 15 working days but if warranted by circumstances, this time may be increased at the discretion of the investigator.

b. Complaint Findings

Based on the information obtained during the investigation, the EOP Office will issue a report of its findings to the complainant and respondent. There are two categories of findings: (1) no reasonable cause to believe illegal discrimination or harassment occurred, or (2) reasonable cause to believe a violation has occurred.

i. In the event the EOP Office finds there is no reasonable cause to believe that illegal discrimination or harassment occurred, the complaint will be dismissed and the complainant will be advised that if he or she is dissatisfied with the decision, a complaint can be filed with the Office of Civil Rights of the United States Department of Education or the Civil Rights Division of the United States Department of Justice. In situations where the alleged acts do not rise to the level of illegal discrimination or

harassment, the EOP Office, if it believes the situation is appropriate, may inform the University community of the occurrence(s) in order to educate the community about issues presented by the behavior and reaffirm the University's commitment to equal opportunity.

ii. In the event the EOP Office finds that there is reasonable cause that a student or student organization engaged in illegal discrimination or harassment, the EOP Office will issue a report of findings, along with recommendation as to appropriate sanctions to the Director of the Office of Student Conduct. If the student is also an employee of the University, and the conduct involves the student's capacity as a University employee, the report must also be forwarded to the student respondent's immediate administrative official.[5] The report of findings will include a statement of the complaint, a chronology of the

[5]If the respondent is a University staff member or faculty member, the report of findings will be issued to the respondent's immediate administrative supervisor and the appropriate Vice President.

investigation, the information discovered, witness summaries, a list of documents pertinent to the investigation, the findings of the EOP Office, and any recommended sanctions the EOP Office believes are warranted.

c. Student Hearing Procedures

I. The Office of Student Conduct (OSC) will then send written notification to the accused student or student organization representative indicating the nature of the complaint. The student or student organization representative will be given the opportunity to meet with the OSC to discuss the allegations. Failure of the student or student organization representative to meet with the OSC could result in disciplinary action being imposed based on the available evidence. If the student or student organization representative disagrees with the finding of the EOP Office or the recommended disciplinary action, the student or student organization representative is offered several options to resolve the charges, including an informal administrative hearing, a formal administrative

hearing, a University conduct hearing[6], or mediation. At any such hearing, the EOP investigator will present the report of findings. The procedures for these hearings are fully described on the Office of Student Conduct website at http://www.housing.sc.edu/osc/cp.html.

ii. Decisions resulting from administrative hearings or a University conduct hearing may be appealed by a student or a student organization to the Vice President for Student Affairs in the following limited situations: (1) there was a procedural error committed in hearing the case which significantly prejudiced the findings; or (2) new evidence, which could not have been available at the time of the hearing and which is material to the outcome of the case, becomes available. The procedure for appeal is fully described on the Office of Student Conduct website at http://www.housing.sc.edu/osc/cp.html.

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[6]Jurisdiction over violations of this policy by Greek organizations or members of Greek organizations will be with the OSC, not the Greek Life Office.

d. Student Sanctions

I. The EOP Office and the OSC may recommend sanctions to the appropriate hearing tribunal. Disciplinary action for student or student organization violations of this policy may include a variety of sanctions. The severity of the sanctions are determined by several factors, including but not limited to: whether there was physical harm or threat of physical harm to others; whether there was violence or the threat of violence; whether there was damage to University or student property; whether the respondent had engaged in similar conduct in the past; whether the proposed sanction will provide education and training to deter future violations; whether the proposed sanction will make the victim whole; and whether the proposed sanction will increase the University community's awareness of student discrimination and harassment.

ii. Sanctions for individual student violations may include the following: expulsion, suspension, conduct probation, conditions/restrictions on University privileges, written

warning, fines and restitution, housing sanctions, required attendance at educational or community service events, and any other sanctions deemed appropriate by the EOP Office and OSC.

iii. Sanctions for student organization violations may include the following: permanent revocation of organizational registration, suspension of rights and privileges for a specified period of time, conduct probation, conditions/restrictions, written warning, fines and restitution, required attendance at education or community service events, and any other sanctions deemed appropriate by the EOP Office and the OSC.

e. Record Keeping

While a complaint is being investigated, all evidence regarding the complaint must be maintained in the confidential files of the official handling the complaint and should be transferred to EOP Office once the complaint is resolved where all records regarding the complaint will be kept in confidential files within the EOP Office. These records will include the complaint, interview notes, witness

statements, correspondence, investigation summaries and reports, and documentation of remedial actions. Access to these records shall be on a need to know basis only. These records will be maintained for a minimum of five years.

C. Non-Retaliation

It is a violation of this policy for any person to retaliate, intimidate or take reprisals against a person who has filed a complaint, testified, assisted or participated in any manner in the investigation or resolution of a complaint of discrimination or harassment. Appropriate disciplinary actions shall be taken against any person who has been found to have violated this policy.

D. Other

1. Reporting and Monitoring

The EOP Office will provide an annual report to the President of the University summarizing the discrimination and harassment complaints and the resolution (informal and formal) of such complaints. The University will also conduct a survey of students every three years to gage students' knowledge of this policy and complaint procedures. The results of these surveys will be used to improve the procedures and policies of the EOP Office and the Office of Student

Affairs.

2. Dissemination and Training

The EOP Office, in conjunction with the Office of Student Affairs, is responsible for ensuring that all students at the University are aware of their right to be free from discrimination and harassment. To achieve this goal, all new students will be informed of this policy and their rights and obligations under it during orientation. Information describing the policy is readily available on various University websites, including the student handbook, with links to the policy, and the online complaint form. Posters and brochures describing this policy can be found at various sites on campus where students congregate such as residence halls, Student Life offices, academic buildings, student organization offices, eating halls, Greek housing, etc.

Training will be provided to students and student organizations in order that students know and understand their rights and obligations under the policy, to whom to report violations, and the procedures for investigations and hearings. Training will also be provided to faculty and staff members who interact with students in order that these individuals understand their responsibility to report any incidents of discrimination or harassment report to or observed by them.

III. Related Policies

University Policy EOP 1.00 Equal Opportunity and Affirmative Action
University Policy EOP 1.01 Equal Opportunity Complaint Processing Procedures
University Policy EOP 1.02 Sexual Harassment
University Policy EOP 1.03 Discriminatory Harassment
University Policy EOP 1.04 Non-Discrimination Policy
University Policy STAF 6.00 Disability Discrimination

Compl. Ex. O

NUMBER:	EOP 1.01
SECTION:	Equal Opportunity Programs
SUBJECT:	Equal Opportunity Complaint Processing Procedures
DATE:	January 1, 1995
REVISED:	October 6, 2014

Policy for:	All Campuses
Procedure for:	All Campuses
Authorized by:	Bobby D. Gist
Issued by:	Equal Opportunity Programs

I. Policy

The Office of Equal Opportunity Programs was established by the President of the University to provide equal opportunity and affirmative action in education and employment for all persons regardless of race, color, religion, sex, gender, national origin, age, disability, sexual orientation, genetics or veteran status. The President appoints the Executive Assistant to the President for Equal Opportunity Programs to implement these functions. The Executive Assistant to the President is responsible for the overall operation of the office, and this individual is responsible for planning, developing, administering and evaluating the University's equal opportunity/affirmative action policies and practices to insure compliance with

applicable federal and state statutes relating to non-discrimination in employment and education.

II. Procedure

A. Pre-Complaint Review (Who May File)

1. An individual (i.e., person, student, faculty, staff member or applicant) may file a complaint or seek information about illegal discrimination at the University of South Carolina based on race, color, religion, sex, gender, national origin, age, disability, sexual orientation, genetics or veteran status through the Office of Equal Opportunity Programs (hereinafter referred to as EOP office). Inquiries may be made by telephone, in person, in writing or by e-mail.

2. The purpose of pre-complaint review is to provide an individual an opportunity to discuss confidentially the specifics of his/her complaint and to receive guidance and information on the administrative procedures followed by the Office of Equal Opportunity Programs should a complaint be filed.

3. It is not necessary for an individual to reveal his or her identity in seeking information about filing a possible discrimination complaint.

4. As a general rule, no formal administrative action will be taken on anonymous complaints of discrimination. However, the designated EOP

official receiving the anonymous complaint may, depending on the seriousness of the incident described, bring the anonymous charge to the attention of the Legal Department, the department head and possibly the alleged offender.

5. An individual, faculty, staff member or student who is made aware of an incident of illegal discrimination should refer the person(s) to the Office of Equal Opportunity Programs for assistance immediately.

6. After receiving information or pre-complaint counseling from the EOP office, an individual may:

a. choose not to pursue a complaint; or

b. decide to take action directly with the alleged offender/respondent by verbally or in writing requesting the individual to cease the discriminatory behavior; or

c. report the matter to the alleged offender's/respondent's supervisor or department head asking that steps be taken to ensure that the offending behavior ceases; or

d. ask a designated university official or EOP officer to pursue informal resolution of the matter; or

e. proceed with a formal complaint of discrimination through the Office of Equal Opportunity Programs.

7. If the identity of a complainant is known and if the Office of Equal Opportunity Programs has not been involved in the resolution of a problem, the EOP office should make follow-up contact within a reasonable period of time to ascertain whether the matter has been resolved and proceed to close its file if all parties agree to the resolution.

B. Informal Resolution Process

1. Informal complaint resolution focuses on conciliation, not sanctions; however, disciplinary action including an oral or written warning may be issued if warranted. The aim of informal resolution is to ensure that the discriminatory behavior ceases and that the matter is resolved promptly at the lowest possible level to effect conciliation. The alleged offender may be asked, politely but firmly, to cease the offensive behavior. He or she may be told of the identity of the complainant at this stage. Investigation is optional, since the emphasis is not on establishing guilt or innocence, but on stopping the alleged discrimination.

Informal complaint resolution may be achieved by any of the following steps:

a. action taken by the complainant to address the matter directly with the alleged offender; or

b. action to negotiate a resolution taken by the alleged offender's supervisor or department head, after consultation with the Office of Equal Opportunity Programs upon the request of the complainant; or

c. mediation undertaken by the Office of Equal Opportunity Programs.

2. If mediated, the Office of Equal Opportunity Programs, the supervisor or department head, as applicable, is required to prepare a memorandum for the record indicating the complaint, the action taken and the resolution achieved. This memorandum will be filed in the Office of Equal Opportunity Programs permanent files.

3. The Office of Equal Opportunity Programs shall decide whether a complaint warrants an attempt at informal resolution. In some cases, a formal investigation may be appropriate and must be pursued to protect all parties to the complaint.

C. Formal Procedure

1. Filing a Formal Complaint of

Discrimination

To initiate a formal complaint an individual (person, student, faculty, staff member, or applicant) is required to submit a written statement to the Office of Equal Opportunity Programs. The complaint is then submitted to the EOP official designated to receive the complaint. The EOP office shall be the principal investigator of all illegal complaints of alleged discrimination.

In order to file a complaint, the complainant must be able to:

a. state a cause of action based upon one's membership in a protected class: race, color, religion, sex, gender, national origin, age, disability, sexual orientation, genetics or veteran status and the complaint must be;

b. timely, the date of the alleged violation(s) must have occurred within the past 180 days, and the complainant must be able to identify, with specificity, the dates of the alleged offense(s), and the complaint must be;

c. reduced to writing and signed before a notary public or EOP official, and;

d. must indicate some harm that the

complainant has suffered, is suffering, or will suffer as a result of their protected class membership status, and;

e. specify the relief the complainant is seeking as a result of the complaint.

2. Acknowledging Receipt of Formal Complaint of Discrimination

After receipt of a discrimination complaint form, the EOP designated investigator shall meet with the complainant as soon as possible, generally no later than five work days after receiving the complaint. The purpose of this meeting is to review the complaint and clarify issues which may be unclear to the complainant or to the EOP Investigator. The complainant will be asked to identify witnesses to the incident(s) or other possible victims of discrimination by the same alleged offender, steps taken to resolve the matter, and the outcome being sought through this process. The complainant will be advised that notice of the charge of discrimination and a copy of the complaint will be provided to the alleged offender.

3. Notice of Charge/Service of Complaint of Discrimination

The Notice of Charge will contain the name of the complainant, the specific allegations made

(date, places and nature of the discrimination) and a copy of the complaint. The Notice of Charge is processed as follows:

a. The Notice of Charge along with a copy of the complaint will be provided to the alleged offender or his/her representative by the EOP Investigator, or other designated university official, in a timely manner, normally within one week of receipt of the formal complaint. The Notice of Charge and copy of complaint will be served either personally or by certified mail.

b. The alleged offender shall answer the charge(s) in writing within ten (10) University work days of receiving the Notice of Charge. The time limit to provide a written response may be extended with the approval of the designated official handling the complaint. If the alleged offender fails to respond, notice of such failure to respond will be provided to the dean/department head of the alleged offender and the investigation will proceed. The alleged offender may be compelled by the University to respond to a charge of discrimination, to the extent permitted by or consistent with federal and state law.

c. A copy or summation of the response to the Notice of Charge will be provided to the complainant by the designated EOP official.

4. Negotiated Resolution of Complaint of Discrimination

After reviewing the response to the charge, the EOP designated official may attempt a negotiated resolution of the complaint which is agreeable to both parties. The proceedings may be terminated by the designated official upon receipt of a written resolution of the complaint acceptable to both parties. In those instances, a formal negotiated settlement agreement will be developed and signed by all parties.

5. Investigating Formal Complaints of Discrimination

The process of formal investigation includes the following:

a. An investigator of record will be assigned by the Executive Assistant to the President for Equal Opportunity Programs or the Executive Assistant may elect to process the matter.

b. The investigator will interview separately the complainant, alleged offender, and witnesses identified by

each party.

c. The investigator may meet with the complainant and alleged offender together if, in his/her judgment, such a meeting could foster a resolution to the problem and the complainant and alleged offender agree to such a meeting.

d. Normally the investigation should be completed within 15 University work days of receipt of the formal complaint; however, if warranted by the circumstances of the complaint, this time may be increased at the discretion of the investigator.

e. Based upon the information obtained during the investigation, the investigator or the Executive Assistant to the President shall issue a report of the findings and make appropriate recommendations to the Executive Assistant to the President for Equal Opportunity Programs. The investigator, as appropriate, may consult the Vice President for Human Resources, the Vice President for Student Affairs, the Executive Vice President for Academic Affairs and Provost and the Legal Department regarding the appropriate recommendation of disciplinary action to be taken.

The report of findings and recommendations shall include a statement of the complaint, a chronology of the investigation (who was interviewed and by whom), the information discovered, a list of documents pertinent to the investigation, the conclusions reached, the investigators' recommendations, the investigator's name and date of the report.

If disciplinary action is recommended, the report shall be presented, as appropriate, to the President, Executive Vice President for Academic Affairs and Provost, Vice President for Human Resources, Vice President for Student Affairs, Chancellor, Dean, Department Chair or Director by the Executive Assistant to the President for Equal Opportunity Programs. The EOP designated official will then notify the complainant and the alleged offender, in writing, of the findings of the investigation within five University work days after the conclusion of the formal investigation. This notice will not include the recommendations. The investigative record shall be maintained by the Office of Equal Opportunity Programs.

6. Findings

There are two categories of findings: (1) no reasonable cause to believe discrimination occurred, or (2) reasonable cause to believe a violation has occurred.

a. If no reasonable cause is found, the charge is dismissed. The complainant is advised that if he or she is dissatisfied with the decision, a Presidential Review may be requested, or a complaint may be filed with Federal or State agencies which enforce compliance with laws prohibiting illegal discrimination. [Request for a Presidential Review must be submitted in writing to the President within five University work days of receipt of the notice of findings. A Presidential Review does not guarantee an audience with the President, only review of the record.]

b. If a reasonable cause violation is found, appropriate disciplinary action shall be taken, where appropriate, by the President, Executive Vice President for Academic Affairs and Provost, Vice President for Human Resources, Vice President for Student Affairs, Chancellor, Dean, Department Chair or Director, who must notify the charged party, in writing, of the action to be taken, the reasons for the action and avenues of appeal. The nature of the discipline to be

imposed on the offender/charged party shall not be communicated to the complainant, but the complainant may be informed whether the offender will be disciplined. The charged party may appeal the findings by requesting a Presidential Review. If the disciplinary action taken is grievable, it may be grieved through appropriate channels; however, a copy of the reasonable cause violation will be made a part of the University's defense.

7. Sanctions/Disciplinary Action

Persons found to be in violation of the University's anti-discrimination policy will be subjected to disciplinary action which may include, but not limited to, oral or written warnings, suspension, transfer, demotion or dismissal and request for revocation of tenure procedures in cases involving tenured members of the faculty.

8. If the complainant can demonstrate that he/she has suffered a loss as a consequence of illegal discrimination, a remedy may be recommended. The objective is to restore the complainant to his/her status before suffering the consequences of the discrimination. A remedy may consist of a reassignment, transfer, letter of apology, or other appropriate action. A remedy is not subject to appeal through the

Presidential Review process.

D. Presidential Review/Appeal

A request for a Presidential Review shall be made in writing to the President by either party to the complaint within five University work days after receiving notification of the findings at the conclusion of the formal investigation.

1. Composition of Review Panel

a. Within five University work days after receipt of a request for a Presidential Review/Appeal, the President or the President's designee will appoint an impartial Review Panel of three individuals who will conduct a closed review of the record and provide recommendations to the President.

b. No Review Panel member will be appointed from the college or department of either the complainant or the alleged offender.

c. The Chairperson of the Review Panel will be appointed by the President or the President's designee.

2. Consideration of the Complaint by the Review Panel

a. The President's Review Panel shall conduct a review of the record as soon as possible, normally within seven University work days of the appointment of the Panel. The EOP office will be required to present the rationale for its recommendations /findings.

b. Both parties may be present during the presentation of the case to the Review Panel by the EOP office. Questioning of witnesses is at the discretion of the Review Panel and shall be conducted solely by members of the Panel.

c. Each party shall have the right to provide additional evidence in writing relevant to the complaint.

d. Each party to a complaint may be accompanied to the review by an advisor or legal counsel. The parties shall notify the chairperson of the Review Panel at least five (5) University work days in advance of the Presidential Review hearing if he or she will be assisted by an advisor or counsel.

e. The Chairperson of the Review Panel shall be authorized to request additional files, records, and documents relevant to the complaint, including the report of the findings and recommendations of the

EOP investigator.

f. The Review Panel shall report its findings and recommendations to the President in a timely manner, normally within five University work days of the conclusion of its review.

g. The President or the President's designee shall issue a decision on the matter including appropriate sanctions, and will notify the parties of his or her decision as soon as possible after the receipt of the Review Panel's findings.

h. There is no further internal appeal under these procedures available to the complainant. The charged party may appeal disciplinary action through the student grievance procedure, the employee grievance procedure or faculty grievance procedure, as applicable, provided the disciplinary action is subject to appeal through one of these processes. Complainants may also have the right to file a complaint with the S.C. Human Affairs Commission, the U.S. Office of Civil Rights, the U.S. Department of Education, the U.S. Office of Federal Contract Compliance, or the U.S. Equal Employment Opportunity Commission, as appropriate.

I. Every effort shall be made to conclude the Presidential Review process within thirty University work days after appointment of the Presidential Review Panel.

E. Related Procedures

1. Suspension or Withdrawal of Complaints of Discrimination

a. The University may suspend its investigative proceedings at any stage if the designated EOP official receives a written resolution of the complaint agreed to by both parties.

b. A complaint, or any part thereof, may be withdrawn at any time upon receipt of a written request from the complainant that the complaint be withdrawn. The charged party will be notified of the withdrawal of the complaint. Such withdrawal shall be without prejudice to the rights of the complainant to refile the complaint at a later date, so long as the matter is timely (within 180 days of the date of the alleged violation).

c. If the complainant files an external complaint with a State or Federal enforcement agency or an action in State or Federal Court during the EOP office

review/investigation, the EOP office shall immediately cease to process the complaint internally and defer to the State or Federal Agency/Court all rights to process the complaint.

2. Dismissal of Complaints of Discrimination

a. A complaint may be dismissed if the designated official investigating the complaint determines that the complaint is without merit, or the accusations/charges are false.

b. A complaint may be dismissed if the designated official in the EOP office determines that the complainant has not cooperated and the action or actions of the complainant impairs or compromises the EOP office's ability to conduct an objective investigation. In such instances, where applicable, the EOP office will cease its' investigation, remove itself and refer the complainant to the appropriate federal/state administrative agencies that are empowered to conduct investigations/resolution of illegal/prohibited discrimination.

c. Willful false accusations by complainants or abuse of the EOP process may result in actions and sanctions, to include

reprimand, suspension, demotion, or dismissal.

3. Appealing a Sanction

As a result of an investigation in which reasonable cause is found to believe a discriminatory violation has occurred, disciplinary action may be taken against the charged party. If the disciplinary action is a demotion, dismissal, or suspension, it may be grievable by staff employees under the University Grievance Procedure administered by the Division of Human Resources. Faculty should consult the Faculty Manual for appropriate grievance procedures. Students may appeal disciplinary actions to the Judicial Appeal Board. Information on the Judicial Appeal Board is contained in The Carolina Community: Student Policy Manual.

F. Record Keeping

1. While a complaint is being investigated all documentary evidence regarding the complaint must be maintained in the confidential files of the officials handling the complaint.

2. After final resolution of the complaint within the university system, all records regarding the complaint must be transferred to the confidential files of the EOP office.

3. Access to these confidential records shall be on a need to know basis only. Persons who may have access include: the President of the University, Executive Vice President for Academic Affairs and Provost, Chancellor or Dean of the campus, the Legal Department, the members of the President's Review Panel, the Vice President for Human Resources and/or Campus Personnel Director, Campus Affirmative Action Coordinator, the Vice President for Student Affairs or equivalent campus student affairs official, and any other designated official appointed by the President.

G. Confidentiality

1. Every effort shall be made, to the extent possible, to protect the privacy of the persons involved in the complaint.

2. The following steps should be taken to help assure confidentiality:

a. The number of persons with knowledge of the complaint shall be kept to a minimum. Only persons with a need to know shall be notified of the complaint.

b. The EOP office shall exercise discretion in the setting of dates and locations of interviews, and the placing of, and responding to, telephone calls related to the complaint.

c. The EOP office will interview, in person, individuals named as witnesses by parties to the complaint. Solicitation of comments from others, unless there is reason to believe they have relevant, first-hand knowledge about the complaint, will be avoided.

d. Correspondence concerning the complaint shall be issued in sealed envelopes and marked "Confidential to the Personal Attention of the Addressee."

H. Exceptions

In exceptional circumstances, depending on the nature of the alleged offense, it may be necessary for the President, upon the advice of the Vice President of Human Resources, the Vice President for Student Affairs and the General Counsel, to suspend/remove an alleged offender prior to beginning a formal investigation of a complaint. Reinstatement or further disciplinary action may be appropriate based upon the findings. The disciplinary action may be appealed as outlined in Section E.3 above.

I. Non-Retaliation

It shall be deemed a violation of the University of South Carolina's policies and procedures for any person to retaliate intimidate or take reprisals against a person who has filed a complaint, testified, assisted or participated in any manner in the

investigation/resolution of a complaint of illegal discrimination as filed with the Office of Equal Opportunity Programs. Appropriate sanctions/disciplinary actions shall be taken against any person who has been found to have violated this policy.

III. Reason for Revision

Policy updated to ensure compliance with State and Federal laws.

Compl. Ex. A

MU POLICE

To: MU POLICE
Reporting Hateful and/or Hurtful Speech

To continue to ensure that the University of Missouri campus remains safe, the MU Police Department (MUPD) is asking individuals who witness incidents of hateful and/or hurtful speech or actions to:

- Call the police *immediately* at 573-882-7201. (If you are in an emergency situation, dial 911.)

- Give the communications operator a summary of the incident, including location.

- Provide a detailed description of the individual(s) involved.

- Provide a license plate and vehicle description (if appropriate).

- If possible and if it can be done safely, take a photo of the individual(s) with your cell phone.

Delays, including posting information to social media, can often reduce the chances of identifying the responsible parties. While cases of hateful and hurtful speech are not crimes, if the individual(s) identified are students, MU's Office of Student Conduct can take

disciplinary action.

This e-mail has been generated in accordance with the MU Mass E-Mail Policy:
http://doit.missouri.edu/e-mail/mass/

University of Missouri

On November 10, the University of Missouri Police Department issued a campus-wide email asking "individuals who witness incidents of hateful and/or hurtful speech" to take a series of actions in response. These actions include calling the police "immediately" and providing "detailed description[s]" and photographs of the actors in question. The statement further added, "While cases of hateful and hurtful speech are not crimes, if the individual(s) identified are students, MU's Office of Student Conduct can take disciplinary action." FIRE sent Mizzou a letter on November 11 reminding the university that the majority of speech considered subjectively "hateful" or "hurtful" is protected by the First Amendment. FIRE has asked Mizzou to clarify that it will not discipline students on these unconstitutionally broad and vague grounds.

Compl. Ex. B

Modesto Junior College (MJC)

On September 17, 2013, three Modesto Junior College (MJC) students distributed copies of the U.S. Constitution in front of the student center, in observance of Constitution Day. Roughly 10 minutes after they began, the students were approached by a campus police officer who informed them that students were prohibited from distributing materials without prior permission. When MJC student Robert Van Tuinen protested that such a restriction violated his right to free speech, the officer ignored his claims and directed him to the Student Development Office. There, Van Tuinen was told by MJC clerical staffer Christine Serrano that the school's "time, place, and manner" policies required students to register events five days in advance and that all events must be held

inside a small "free speech area." Because the area was in use that day, Van Tuinen was not only told he would have to register his event, but that he might have to wait days—or even weeks—to hold it. FIRE wrote to MJC President Jill Stearns on September 19, 2013, pointing out that MJC's actions were blatantly unconstitutional and calling on the school to immediately rescind its policies. When MJC did not do so, FIRE worked with Van Tuinen and the law firm of Davis Wright Tremaine to coordinate a lawsuit that was filed in federal court on October 10, 2013. The lawsuit was settled six months later after MJC revised its policies to allow free expression in the open areas of campus and paid Van Tuinen $50,000 for legal expenses and to compensate him for the violation of his First Amendment rights.

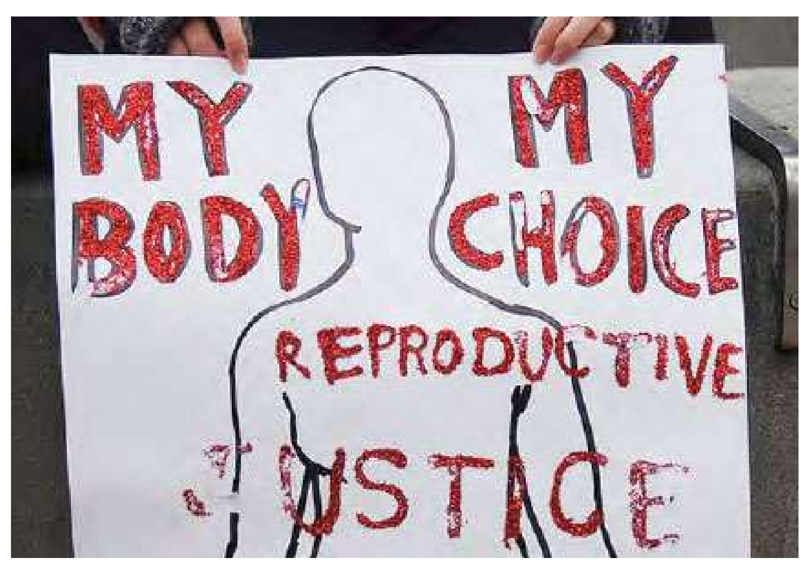
Compl. Ex. C

Chicago State University

Two professors have sued Chicago State University (CSU) as part of FIRE's Stand Up for Speech Litigation Project for attempting to censor their blog, CSU Faculty Voice, which is highly critical of CSU's administration. CSU's attempts to silence the two professors have been heavy-handed and contrived and include disciplinary charges for "cyber-bullying" based on a two-minute face-to- face conversation. That's not all, however: Two students filed a lawsuit against CSU alleging that the university shut down the independent student newspaper, invalidated their election to the student government, and ultimately

expelled one of them, all as part of a campaign to stop them from drawing attention to corruption within the administration. CSU's former legal counsel received a $3-million award when he sued after CSU fired him for reporting misconduct by senior university officials. CSU president (and defendant) Wayne Watson recently announced that he will retire in 2016. Perhaps this signals that the period of rule by censorship and fear at CSU is coming to an end. In the meantime, however, CSU richly deserves its spot among the worst threats to campus free speech.

Compl. Ex. D



Georgetown University

Georgetown University has been on FIRE's radar for years. Since 2010, the university has refused to recognize the student group H*yas for Choice, contending that its mission conflicts with that of the university. Written policy, however, states that "all members of the Georgetown University academic community ... enjoy the right to freedom of speech and expression," including the "right to express points of view on the widest range of public and private concerns." Matters only got worse in 2014. That January, H*yas for Choice was forced to relocate from where it had been tabling outside a campus event to a location off campus. Even though Vice President for

Student Affairs Todd Olson conceded at the time that this shouldn't have happened, it took until May for Georgetown to make revisions and clarifications to its speech policies, and even then students were only allowed to express themselves in certain designated areas of campus. Georgetown cemented its place on this list in September, when university police instructed H*yas for Choice that it could not table in precisely the location it was instructed to move to in January.

Compl. Ex. E

George Washington University (GWU)

On March 16, the student placed a small, bronze, Indian swastika on a bulletin board at GWU's International House residence hall. He intended to educate his friends and co-residents about the symbol's origins, which he learned about during a spring break trip to India. The student had learned on his trip that although the swastika was appropriated by Nazi Germany, it has an ancient history in many cultures as a symbol of good luck and success.

After a fellow student reported the swastika to the GWU police department, the university quickly

suspended the student and evicted him from university housing, pending the outcome of five disciplinary charges. The university also referred the incident to the District of Columbia police for investigation as a potential "hate crime."

"GWU may not ignore thousands of years of history and effectively forbid all uses of the swastika because it was used by Nazi Germany," said FIRE Program Officer and attorney Ari Cohn. "It's ironic that the charges against the student illustrate the very point he was trying to make in the first place—that context is important and there's much to be learned about the history of the swastika."

"GWU must honor its explicit promises of freedom of expression," said Cohn. "These charges contradict those promises and do great harm to the robust, open debate from which a university derives intellectual vitality. The university must end its senseless disregard of context, drop all charges, and make good on its word."

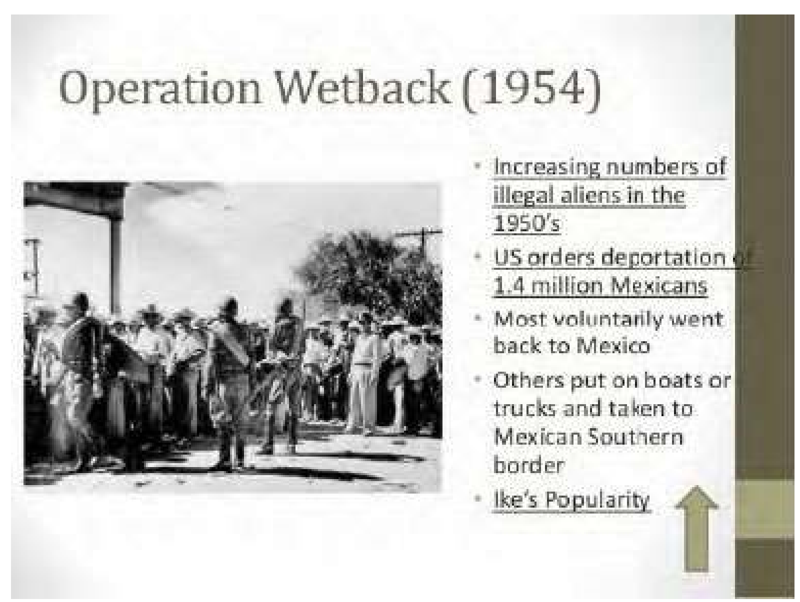
Compl. Ex. F

California State University, Fullerton

It's hard to imagine a more bewildering and petty example of censorship than that which California State University, Fullerton (CSUF) demonstrated last year in dispensing with the rights of the Alpha Delta Pi (ADPi) sorority. On the basis of a "Taco Tuesday"-themed recruitment event at which many ADPi members wore sombreros and other Mexican garb, CSUF declared the sorority guilty of, among other absurd offenses, "[w]illful, material, and substantial disruption" of university activities and "[d]isorderly, lewd, indecent, or obscene conduct." Adding further insult to its utterly meritless case, CSUF also coerced the sorority into complying with numerous sanctions, including that it "coordinate a mandatory workshop on cultural competencies and

diversity." What CSU Fullerton really could have used, however, is a mandatory workshop on the fundamentals of the First Amendment for its administrators.

Compl. Ex. G



Brandeis University

Brandeis University declared a professor guilty of racial harassment and placed a monitor in his classes after he criticized the use of the word "wetbacks" in his Latin American Politics course. Professor Donald Hindley, a nearly 50-year veteran of teaching, was neither granted a formal hearing by Brandeis nor provided with the substance of the accusations against him in writing before a verdict was reached. Determined not to be branded as a racial harasser simply for using a word in the process of explaining it, Hindley appealed the decision. Provost Marty Krauss pointedly ignored various responsibilities to consult

with the Faculty Senate and Krauss' assertion of arbitrary administrative power angered the Faculty Senate, which has refused to peacefully surrender its bargained-for rights and led to a total meltdown of faculty-administration relations. Hindley has also alleged that he was targeted for his political views including his pro-Palestinian advocacy. The unwillingness of the administration to reach a resolution in this case has led FIRE to place Brandeis University on its Red Alert list as one of the worst of the worst abusers of liberty on campus.

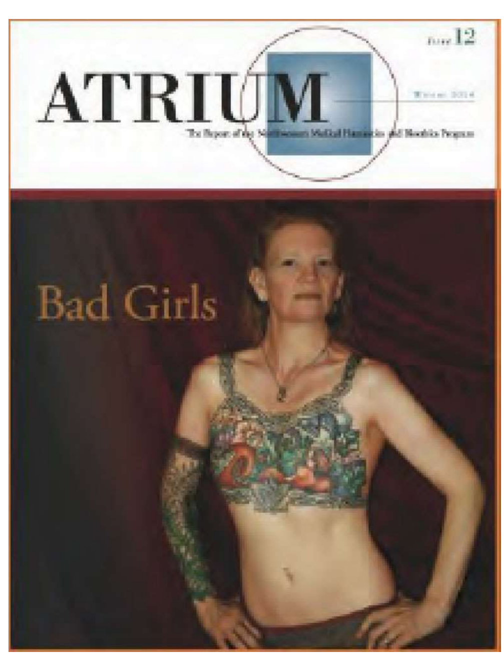
Compl. Ex. H

University of Illinois at Urbana-Champaign

Late last summer, the University of Illinois at Urbana-Champaign (UIUC) sparked an intense, nationwide debate over civility and professors' right to free speech when it rescinded its job offer to Steven Salaita, who had left a tenured faculty position at Virginia Tech to join UIUC's American Indian Studies program. The university revoked Salaita's offer over controversial anti- Israel statements made from his personal Twitter account. After the decision was made public, UIUC Chancellor Phyllis Wise emailed the UIUC community and explained that Salaita was not hired because UIUC would not tolerate "personal and disrespectful words or actions that demean and abuse

either viewpoints themselves or those who express them." FIRE and other free speech advocates denounced UIUC's treatment of Salaita, but the UIUC Board of Trustees refused to reconsider its decision. Salaita has since filed a federal lawsuit against the school's Board of Trustees.

Compl. Ex. I



Northwestern University

Digital issues of a magazine published annually by one of Northwestern's medical school programs were taken down after running an essay called "Head Nurses," that described a nurse performing oral sex on a patient in 1978.

Atrium is a publication of the Feinberg School of Medicine's (FSM's) Medical Humanities and Bioethics Program (MHB), and features content from authors at institutions around the country. The theme of the

Winter 2014 issue was "Bad Girls," and included an essay by Syracuse University professor William Peace about his rehabilitation experience after being paralyzed at age 18, and his fear that he would be unable to have sex ever again.

The article describes how in his rehabilitation ward, a few nurses were referred to as "head nurses" because they were known to occasionally provide oral sex to certain patients late at night. Peace described his own experience of being provided oral sex by a nurse with whom he had a good relationship, a consensual act that for him brought relief at the realization that he had not lost his ability to function sexually. Peace credited the nurse, with whom he developed a lifelong friendship, with playing a significant role in his psychological recovery.

Compl. Ex. J

Background and Context

On November 9, 2014, you chose to post on the Internet a story prompted by a secretly-taped conversation between a student and a graduate student instructor. While you left the undergraduate student's name out of your post, and later insisted that his anonymity be protected, you posted without permission the graduate student instructor's name, Ms. Cheryl Abbate.

In addition, you gave an account of what happened in a class you did not attend and was not taped describing Ms. Abbate as "airily" making a statement about "gay rights." You further purported to describe how the student's concerns were ignored by University officials in the College of Arts & Sciences and the Department of Philosophy.

You posted this story on the Internet (1) without speaking with Ms. Abbate or getting her permission to use her name; (2) without contacting the Chair of Ms. Abbate's Department (who had met twice with the undergraduate student) to get her perspective or express your concerns; (3) without contacting anyone in the College of Arts & Sciences to get their perspective or express your concerns; (4) without contacting anyone in the Office of the Provost to raise concerns that you believed had been ignored at the Department or College level; (5) without describing

what had happened in the very next class following the one you wrote about – when Ms. Abbate discussed and addressed the student's objection (without identifying him); and (6) without even reporting fully or accurately what the student had disclosed to (and concealed from) others in the University about these events.

Marquette University

Marquette University's chilling campaign to revoke the tenure of political science professor John McAdams due to writings on his private blog ensures its place on this year's list. McAdams criticized a graduate instructor for what he viewed as her inappropriate suppression of certain viewpoints for in-class discussion (one student's opposition to same-sex marriage in particular), and the instructor came in for heavy criticism. Marquette then suspended McAdams without due process and abruptly cancelled his classes for the next semester. It also publicly insinuated that McAdams violated its harassment policy and was a safety threat to the campus, despite a complete lack of proof for either charge. Marquette's disregard of due process and its incredible denial that its campaign against McAdams's tenure implicates free speech or academic freedom in any way should frighten anyone concerned about faculty rights. Indeed, if the university succeeds in removing McAdams, free speech and academic freedom will lose whatever meaning they had at Marquette.

Compl. Ex. M

We Support Free Speech at Carolina

We, the undersigned members of the Carolina community, pledge to all Carolinians, present and future, that we support and will defend your freedom of thought, conscience, inquiry, speech, expression, and communication. It is our moral obligation to defend the basic rights of all to free speech and expression, whether we support those views or not.

We therefore oppose all attempts by Carolina faculty and administrators to silence, suppress, or "prosecute criminally" thought and speech deemed vulgar, controversial, unpopular, insensitive, offensive, inappropriate, subversive, or blasphemous. We regard any effort by the University to censor and punish thought and speech as especially disgraceful.

All students everywhere have a right to think, learn, and speak in an environment free of faculty or administrative threats, intimidation, harassment, coercion, and indoctrination.

Know this: Carolinians are legally entitled to the full protection of the First Amendment. Any denial of this right is illegal, unconstitutional, and a betrayal of Carolina's commitment to providing its students with a marketplace of ideas.

In the name of genuine tolerance and diversity, let

there be no thought crimes or thought police at the University of South Carolina. Our campus must be a refuge for free thought and speech, which includes ideas that we do not like or that make us feel uncomfortable. That's what a true university is and does.

Let all Carolinians unite to fight error and prejudice with rational arguments, critical investigation, and unfettered debate, which requires upholding the principle of free speech uncompromisingly.

We therefore pledge that we shall work tirelessly to fight censorship and to keep alive the spirit of open-minded inquiry at the University of South Carolina.

Compl. Ex. N

**UNIVERSITY OF
SOUTH CAROLINA**

Equal Opportunity Programs

November 24, 2015

Ross Abbott
Sent electronically to abbottr2@email.sc.edu

RE: Formal Complaint of [redacted]
Complaint Number: 20150091

Dear Mr. Abbott.

Enclosed is a copy of the Notice of Charge of in this matter, in addition to a copy of the official Complaint of Discrimination filed by the above-cited complainant, [redacted]

Please contact this office within the next five (5) working days. by December 1, 2015, to arrange an appointment to fully discuss the charges as alleged. With respect to a complaint that is filed with this office we shall as a matter of policy attempt to resolve the complaint through mutually agreeable mediation. Should we be unable to mediate a complaint we shall move to investigate the complaint and we shall upon the completion of our investigation, issue to all parties a copy of our finding and recommendations which shall

make to the Provost and President of the University.

Please be advised that you are not to contact [redacted] regarding this matter while it is under investigation. Please also refrain from discussing this complaint with any member of the faculty, staff or student body.

Should you need any additional information at this time please contact me at 803-777-9560.

Sincerely,

/s/

Carl R. Wells
Asst. Dir. EOP

CC: Henry White, University Lawyer

UNIVERSITY OF
SOUTH CAROLINA

Bias Report
Submitted on November 23, 2015 at 10:18:26 pm EST
Last modified November 24, 2015 at 12:21:42 pm EST

Type:	Student
Urgency:	Witness
Incident Date:	2015-11-23
Incident Time:	2:00 pm
Incident Location:	Russell House Greene St. in front of Russell House

Reported by

Name:	[redacted]
Title:	
Email:	[redacted]
Phone:	[redacted]
Address:	[redacted]

Involved Parties

Ross Abbott	[redacted]	abbottr2@email.sc.edu Off Campus
[redacted]		Off Campus

Questions

* Reasons for the Report
Check all that apply:
Hostile Environment, Racial Discrimination

* Description/Narrative
Please provide the facts of the incident in as much detail as possible. Describe what happened in chronological order using specific, concise, objective language (who, what, where, when, why and how).

The College Libertarians hung several offensive signs at their event on Greene St today. One poster depicted a swastika, another had the word "Wetback" on it and described what the slur meant. Another sign was a dry erase board which asked "reasons USC wifi blows," referencing the incident last year where a girl wrote a racist message on a dry erase board. The other signs mocked the concept of a "safe space" by saying that these spaces, which serve to give minority students space, deprived them of their free speech. These students seem to want to use university resources and space to post offensive symbols and racial slurs.

* Optional Questions
How did the bias incident affect you?
This is especially annoying to student organizers who go out of our way at our events to make sure that we limit cursing and sexual innuendo in order to make our events more palatable to members of administration. As an LGBTQ student on campus, the swastika is a reminder of the murders of 11 million people, many of which were LGBTQ. I had a Jewish student approach me after arguing with the people

putting on the event and she was clearly very upset from their refusal to listen to what she said. I don't believe that USC wants to cultivate an environment where swastikas and racist slurs are welcomed on Greene St. I'd also like to note that several tour groups passed by while this was happening.

* Other than completing this form, is there any other action that you took?
Gathered attention to the issue via social media.

* What do you think is the appropriate action for the Office of Diversity and Inclusion or the Office of Equal Opportunity Programs to take? (Please note that the action that the office takes is not solely up to the complainant. There may be instances when we are required to take the issue further than the complainant might prefer.)
At the very least, there needs to be a conversation with the leadership of the College Libertarians to address this incident and make sure it won't happen again. I believe that the students violated their representation of USC and should lose access to University funding for future events.

* Have you reported the incident to another University of South Carolina office?
No

* Type of incident (check all that apply)
Written Slur/ Graffiti, Hate Symbol

* Specify (Other type of incident)

Swastika and "wetback" were written.

* Harm the Complainant experienced as a result of the incident?
Many students were visibly upset. Some are still messaging that they cannot calm down and that they can't believe that this is happening at our university. Many students are shocked.

* Type relief and corrective actions the Complainant is seeking?
I'm fine. I would just like to see that student organizations are not welcomed to hold racist symbols and slurs in front of the university.

Attachments

fullpicture.jpg
safespace.jpg
swastika.jpg

Pending JR #00000372
Submitted from 71.68.146.231 and routed to Carl R. Wells (Asst. Dir. EOP)
Modified by Carl R. Wells on November 24, 2015 at 12:21:42 pm EST from 129.252.66.91

UNIVERSITY OF
SOUTH CAROLINA

Bias Report
Submitted on November 23, 2015 at 10:20:16 pm EST

Type:	Student
Urgency:	Witness
Incident Date:	2015-11-23
Incident Time:	2:30 pm
Incident Location:	Russell House Greene Street center left location

Reported by

Name:
Title:
Email:
Phone:
Address:

Involved Parties

Questions

Reasons for the Report
Check all that apply:
Color Discrimination, Gender Discrimination, Hostile Environment, Racial Discrimination, Religious Discrimination

Description/Narrative

Please provide the facts of the incident in as much detail as possible. Describe what happened in chronological order using specific, concise, objective language (who, what, where, when, why and how).

The college libertarians/young Americans for Liberty on campus staged a tabling event that I witnessed at 1:13pm, where they had multiple offensive signs up on Greene street, one with the definition of a "wetback", one with a swastika, another with offensive information about Israel/Palestine, and one that even had a white board available for USC students to write their own opinions on why "USC wifi sucks", referencing the spring white board incident. This was extremely in inappropriate, and very triggering to students on campus. It showed tours of campus how bigoted our student body can be. After witnessing it at 1:13pm, I notified Russell house, who said they would move the tabling event to the free speech zone outside of the Greene street gates. However, at 3:14pm when I left campus, they were still in front of Russell house, with swastikas, and engaging rudely with USC students, saying sexist and racist statements.

Optional Questions

How did the bias incident affect you?

Other than completing this form, is there any other action that you took?

Notifying Russell House and the director of OMSA.

What do you think is the appropriate action for the Office of Diversity and Inclusion or the Office of Equal

Opportunity Programs to take? (Please note that the action that the office takes is not solely up to the complainant. There may be instances when we are required to take the issue further than the complainant might prefer.)
Advise student organizations to abide by the free speech zones when they desire to engage in hate speech, do not allow symbols that could incite a riot to be present on Greene street, and do not subject other students & prospective students to seeing inflammatory posters and offensive imagery when they are simply trying to enjoy Greene street.

Have you reported the incident to another University of South Carolina office?
No

Type of incident (check all that apply)
Verbal Harassment, Written Slur / Graffiti, Hate Symbol

Specify (Other type of incident)
Posters, verbal comments

Harm the Complainant experienced as a result of the incident?
Triggering

Type relief and corrective actions the Complainant is seeking?
Don't allow this to happen again.

Attachments

image.jpeg

Pending IR #00000373
Submitted from 162.200.233.22 and routed to Carl R.
Wells (Asst. Dir. EOP)

UNIVERSITY OF
SOUTH CAROLINA

Bias Report
Submitted on November 24, 2015 at 12:22:50 am EST

Type:	Other
Urgency:	Third-party (received report)

Incident Date:	2015-11-23
Incident Time:	
Incident Location:	Other

Reported by

Name:
Title:
Email:
Phone:
Address:

Involved Parties

Questions

Reasons for the Report
Check all that apply:
Hostile Environment, Religious Discrimination

Description/Narrative
Please provide the facts of the incident in as much

detail as possible. Describe what happened in chronological order using specific, concise, objective language (who, what, where, when, why and how).
A flag with a Nazi symbol was displayed on campus, and the offenders refused to remove it, citing "free speech" as their reason.

Optional Questions
How did the bias incident affect you?
It's disgusting to think that such a well-known hate symbol is flown on a campus with Jewish students.

Other than completing this form, is there any other action that you took?
No.

What do you think is the appropriate action for the Office of Diversity and Inclusion or the Office of Equal Opportunity Programs to take? (Please note that the action that the office takes is not solely up to the complainant. There may be instances when we are required to take the issue further than the complainant might prefer.)
Issue an apology for letting the symbol appear and punish the offenders accordingly.

Have you reported the incident to another University of South Carolina office?
No

Type of incident (check all that apply)
Hate Symbol

Specify (Other type of incident)
Nazi symbol displayed on campus without being removed.

Harm the Complainant experienced as a result of the incident?
A Jewish friend was violently triggered by seeing the symbol, and now feels unsafe on campus.

Type relief and corrective actions the Complainant is seeking?
For this to be acknowledged as a hate crime against USC's Jewish population, for an apology to be issued, and for this incident to be avoided in future.

Compl. Ex. R

December 8, 2015

Re: Complaint No. 20150091

Dear Mr. Wells and the Office of Equal Opportunity Programs,

I am bringing you this letter in response to the Notice of Charge you sent me on November 24. The Notice says your office received an "official Complaint of Discrimination" about a Free Speech Event that I lead for the College Libertarians in conjunction with the Young Americans for Liberty. As the Notice explains, the purpose of our meeting today is to see if it is possible to "resolve the complaint through mutually agreeable mediation." If that is not possible, your Notice states that you will "move to investigate the complaint" and at the conclusion of your investigation issue a copy of your findings and recommendations to the Provost and the President of the University.

I write this letter to avoid any confusion during or after our meeting and because EOP 1.01 Section II(C)3(b) appears to require me to do so. I have done nothing more than offer discussion and education on the topic of free speech and open discussion at universities across the country (and abroad), a subject that has been in the news and should be especially important to other members of the student body. I

have done nothing wrong, and as such I will not agree to a mediated resolution or other type of "plea bargain" of any complaints about my constitutionally protected speech. The University of South Carolina's policy on Student Non-Discrimination and Non-Harassment (STAF 3.24) states that the University "is committed to the principles of academic freedom and believes that a learning environment where the open exchange of ideas is encouraged is integral to the mission of the University." It further states that the University's policy is not intended to impede the exercise of rights protected by the First Amendment, and that conduct prohibited by the non-harassment policy includes only "speech that is not constitutionally protected and which limits or denied the rights of students to participate or benefit in the educational program."

Because our event involved the public discussion of ideas, there is nothing for us to "mediate." Indeed, the very idea that I or any other student would be subjected to an investigation because I expressed an idea that some considered offensive is at odds with University Policy, the Carolinian Creed (which requires that all Carolinians respect the rights of others, including free speech), and most importantly the Constitution of the United States.

The entire point of our event was to educate the university community about the importance of free speech on college campuses in light of recent protests against freedom of expression at the University of Missouri, Yale, Amherst College, and Claremont McKenna, among others. As I informed the Director of

Student Life, Kim McMahon, in planning the event, our display included versions of symbols and speeches that have been censored in the past that we wanted to use to start a conversation about student speech on campus. I knew that the event had the potential to be controversial which is why I wanted to provide the full context and specific details about what we would be displaying to the university before submitting the space request. After I informed Director of our plans, she told me there is "no controversy in educating [the] campus about what is happening in the world" and that the event presented students with an opportunity "to learn and grow (and even be a bit uncomfortable), not further any intolerance, censorship or acts of incivility."

The event took place as authorized. And while it did stimulate spirited discussion (and in a couple of instances strong disagreements) that was exactly point, just as it is the purpose of the First Amendment. We also invited students to sign a petition supporting free speech at Carolina, which stated in part:

> We, the undersigned members of the Carolina community, pledge to all Carolinians, present and future, that we support and will defend your freedom of thought, conscience, inquiry, speech, expression, and communication. It is our moral obligation to defend the basic rights of all to free speech and expression, whether we support those views or not.

A complete copy of the petition is attached to this letter. We had more than twenty students sign the petition during our event, while many other members of the community (including faculty and staff) expressed the desire to do so but feared retaliation from the University.

Those fears were apparently well founded, as you have now informed me through the Notice of Charge that I must answer complaints and that I face possible sanctions because of our University approved Free Speech event. As I understand University policies and our previous phone conversation, these sanctions may include expulsion, suspension, conduct probation, conditions or restrictions on University privileges, a written warning, fines and restitution, required attendance at educational or community service events, or "any other sanctions deemed appropriate by the EOP Office and OSC [Office of Student Conduct]." So far as I know, no complaints were filed against Young Americans for Liberty or the College Libertarians because of our Free Speech event. But if complaints were to be filed, I understand the organizations could also face a range of sanctions up to permanent revocation of organizational registration.

To me it is unthinkable that a citizen of the United States or a student at this University should have to answer to a government office or be subjected to an investigation because of the exercise of their First Amendment rights. And the threat of sanctions makes it even worse. Accordingly, I ask that your office immediately dismiss all complaints that were

submitted in response to our Free Speech Event and remove any notation of them from my student records.

It is essential that this matter be resolved immediately. Every day this matter is left open, subject to investigations, reports, and sanctions, is a day that the exercise of constitutionally-protected rights is threatened. If there is a bright side, it is that this situation may provide an opportunity for a teachable moment. It is my understanding that in situations where the "alleged acts do not rise to the level of illegal discrimination or harassment, the EOP Office may… inform the University community of the occurrence(s) in order to educate the community about issues presented by the behavior and reaffirm the University's commitment to equal opportunity."

I believe that this instance provides an opportunity to educate the community about the University's commitment to the equal opportunity of freedom of expression and to the First Amendment. Accordingly, to provide the necessary education, and to remove the ongoing threat to the exercise of First Amendment rights, the following conditions must be met:

1. Your office should send a letter terminating this proceeding and make a written commitment that no further actions will be taken, and no sanctions imposed, on me, the College Libertarians, the Young Americans for Liberty, or any of our members, because of our Free Speech Event. Further, any notations about this

instance made in the records, kept by the EOP or any other University department, of the above stated parties should be removed.

2. Your office should clarify in writing how the University policies are to be interpreted and applied in the future so as not to conflict with students' First Amendment rights. At a minimum, this means that the University will not find that illegal discrimination or harassment has occurred unless the behavior in question is severe, pervasive, and objectively offensive, as is currently established by law. This clarification should be made publically available to avoid future confusion about the policy from faculty, staff, and students.

3. The University should join the University of Chicago in adopting a binding commitment to principles of free expression. Among other things, the Chicago statement provides: "Debate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed." It affirms that "it is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive." A copy of the Chicago Principles, adopted in 2014 and joined by a number of other schools since then, is attached.

I look forward to your response. As I said before, it is vital to me and to the general atmosphere of free speech on our campus that the continuing cloud over the exercise of my First Amendment rights be lifted as soon as possible. If I have not been notified in writing by January 1, 2016 that the University has agreed to terminate this proceeding and to clarify its policies as described above I will have no choice but to pursue other potential remedies.

Sincerely,

Ross Abbott