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Student speech case unites right and left in petition for Supreme Court review

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January 9, 2019

Nationwide speech codes ‘contradict the court’s basic First Amendment jurisprudence’

Several organizations and legal clinics filed briefs encouraging the Supreme Court to hear a campus free speech lawsuit after an appeals court upheld a lower court’s dismissal of the suit. The briefs raise concern about the potential for a “chilling effect” on speech stemming from the decision.

The organizations come from across the political spectrum, with politically diverse groups banding together. The ACLU of South Carolina, Cato Institute, DKT Liberty Project and the Reason Foundation all filed one brief together.

On the academic side, the First Amendment clinics at Duke Law School and Arizona State University’s Sandra Day O’Connor College of Law filed a second brief together.

The case involves Ross Abbott, then-president of the University of South Carolina’s College Libertarians, suing the public university after he faced disciplinary investigation for organizing a university-approved pro-free speech demonstration. Some students claimed the free speech “wall,” composed of expression that had been censored at other colleges, contained “racist” and “triggering” conduct.

The charges were eventually dropped, but Abbott sued the school for “vague, overly broad policies” toward speech on campus that chilled protected expression.

In July 2017, a federal judge dismissed the lawsuit, holding that the school’s policies were a “narrow approach to addressing the rights of students on campus: those who participated in the event and those who felt discriminated by it.”

The 4th U.S. Circuit Court of Appeals said the plaintiffs, which also included Young Americans for Liberty, “cannot show a credible threat” that USC will enforce its harassment policy against them for their speech “in the future,” meaning that “they lack standing to pursue their facial attack on the policy.”

They failed to show that USC policy was “likely to deter a person of ordinary firmness from the exercise of First Amendment rights,” the unanimous three-judge panel ruled.

The brief by civil liberties groups takes particular issue with the investigation Abbott faced. It criticizes the “unconstitutional inquisitorial investigations triggered by the exercise of rights that the First Amendment fully protects.”

The brief also states that “while the complainants alleged that the petitioners’ speech was ‘offensive,’ the complainants did not allege any severe harassment that could be punished consistent with the First Amendment.” The university violated the libertarian students’ rights when it required them to accept investigation of their conduct while failing to screen the complainants with as much scrutiny, the brief continues.

It generally condemns the frequency of “sweeping speech codes that contradict the court’s basic First Amendment jurisprudence.”

The First Amendment clinics’ brief also blasts speech codes that “violate students’ rights to free expression by proscribing speech according to overbroad and vague guidelines, and by prohibiting speech that is not objectively offensive,” and claims that the decision to dismiss the suit “places insurmountable hurdles” for speech rights.

“The campus, perhaps more so than any other location, is, and must be, a ‘marketplace of ideas,’” the brief reads. “Students arrive in this marketplace not yet fully formed as consumers or producers of expression. Indeed, it is among the core purposes of a public college or university to ensure that students ‘gain new maturity and understanding’ and learn to become functional members of the body politic.”

The brief acknowledges the need to foster a welcoming and inclusive community on campus. However, administrators have “chosen to err on the side of restricting expression,” and they are incentivized to do so by court decisions like the Fourth Circuit’s dismissal of the lawsuit.

“USC’s policy and the Fourth Circuit’s ruling will undoubtedly chill more speech together than either would on its own,” it concludes. “By not only upholding a substantively unconstitutional speech standard, but also raising the standing requirements for First Amendment plaintiffs, the Fourth Circuit made clear to students that they are stuck with the restrictive speech codes imposed on them.”