RECORD NO. 20-1509

In The
United States Court of Appeals
For The Fourth Circuit

TODD KASHDAN, f/k/a John Doe,
Plaintiff – Appellant,

v.

GEORGE MASON UNIVERSITY; RECTOR AND BOARD OF VISITORS OF GEORGE MASON UNIVERSITY; JENNIFER RENEE HAMMAT, in her official and individual capacity; JULIAN ROBERT WILLIAMS, in his official and individual capacity; KEITH DAVID RENSHAW, in his official and individual capacity; ANN LOUISE ARDIS, in her official and individual capacity; SZUYUNG DAVID DWU, in his official and individual capacity,
Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, counsel for *amicus* certifies that (1) *amicus* does not have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in *amicus*.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISION

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

The Foundation for Individual Rights in Education ("FIRE") is a nonpartisan, nonprofit organization dedicated to promoting and protecting civil liberties at our nation's institutions of higher education. Since 1999, FIRE has defended student and faculty rights at campuses nationwide. FIRE believes that to best prepare students for success in our democracy, the law must remain unequivocally on the side of robust free speech and academic freedom rights on campus. FIRE coordinates and engages in targeted litigation and regularly files briefs as *amicus curiae* to ensure that student and faculty First Amendment and academic freedom rights are protected at public colleges and universities.

SUMMARY OF ARGUMENT

The vital role of First Amendment rights on public college campuses has been recognized by the Supreme Court in holdings spanning six decades. Here, the lower court's decision ignored the First Amendment's binding limits on public universities' ability to censor the content of faculty speech. Graduate students are adults, with no more right to expect protection from disagreeable thoughts and

[1] All parties have consented to undersigned *amicus*' request to file a brief. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

words than any other adult in the campus community. Notwithstanding the university's reasoning, accepted by the district court below, nothing in Title IX requires colleges to protect graduate students from faculty speech they find simply offensive. To the contrary: Not only does Title IX not require such insulation, the First Amendment prohibits public universities from seeking to accomplish that objective by sanctioning professors for speech students find objectionable.

Nonetheless, campus censorship of faculty continues, as college administrators prioritize student complaints of subjective offense over faculty rights. The decision below is at odds with the First Amendment and its vital protection of academic freedom, and unmoored from the stringent legal standards required to find a hostile educational environment. Here, the university disciplined a tenured professor under the guise that he had committed "sexual and gender-based harassment." The university made this finding in the absence of any allegation that any student was targeted on the basis of her membership in a protected class, or that the educational environment was objectively hostile to students on the basis of protected class status. Compounding the harm of the university's error, the lower court applied the wrong standard in its analysis of the professor's curricular speech. If left unchecked, the district court's opinion would grant public universities broad discretion to censor and punish faculty based solely on the content of their speech.

We urge the Court to consider the fundamental purpose of higher education and the impact of its ruling on the free speech rights of faculty. If the district court's decision stands, public college administrators will have unfettered discretion to police faculty speech simply by invoking a subjective standard of offense. To ensure that the intellectual marketplace of ideas remains vibrant and that administrative efforts at censorship fail, the Court should reaffirm the necessity of broad First Amendment protections for the exercise of academic freedom by reversing the decision below.

ARGUMENT

I. The First Amendment is the Foundation of Academic Freedom at Public Universities, and this Court's *Adams* Decision Fully Protects Curriculum-Related Speech.

Our jurisprudence has long recognized that the First Amendment's free speech guarantee is central to the academic freedom that undergirds public colleges and universities. "'[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" *Healy v. James*, 408 U.S. 169, 180 (1972). Free speech is of critical importance to America's public universities because it is the lifeblood of academic freedom. *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008). "The university atmosphere of speculation, experimentation, and creation is essential to the quality of higher education." *McCauley v. Univ. of V.I.*, 618 F.3d 232, 243 (3d Cir. 2010). "Our

public universities require great latitude in expression and inquiry to flourish[.]" *Id*. at 243. Universities are intended to be "great bazaars of ideas where the heavy hand of regulation has little place." *Kim v. Coppin State Coll.*, 662 F.2d 1055, 1064 (4th Cir. 1981).

Nearly a decade ago, this Court affirmed the First Amendment's centrality to academic discourse, holding that public university professors have the clearly established right to "speak as a citizen on matters of public concern" when addressing subject matter "within their respective fields," regardless of whether that speech occurs in a formal university setting. *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 564, 566 (2011). The *Adams* decision affirmed the First Amendment's protection for the free exchange of ideas at public universities, as noted by the Supreme Court in *Garcetti v. Ceballos*. In *Adams*, this Court recognized that "professors will engage in writing, public appearances, and service," addressing a panoply of issues of public concern, such as "academic freedom, civil rights, campus culture, sex, feminism, abortion, homosexuality, religion, and morality." *Adams*, 640 F.3d at 564–65 (citing *Garcetti*, 547 U.S. 410, 425 (majority opinion) and 438 (Souter, J., dissenting) (2006)). Following this Court's lead, the U.S. Court of Appeals for the Ninth Circuit adopted the same rule in *Demers v. Austin*, holding that "academic employee speech [by public university instructors] . . . is protected by the First Amendment" where the speech addresses

"matters of public concern" that is not outweighed by a government employer's interest in efficiently providing the public service at issue. 746 F.3d 402, 412 (2014) (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 146 (1983)).

In this case, the district court (despite a passing reference to *Adams*, *see* JA 960–61) failed to recognize and apply *Adams*' holding to Professor Kashdan's Complaint. *See* JA 959–61. The court below held that because Professor Kashdan's statements regarding sex "were made either during and in relation to a class he taught in his capacity as a GMU professor, or in relation to and in conjunction with such a class or related research that he conducts on the same capacity," Kashdan's "speech is unprotected because it occurred in his capacity as a state employee." JA 960. Continuing in that vein, the district court opined that because Kashdan's "speech is curricular," it "is therefore not a matter of public concern." *Id.* at 960–61.

This is exactly wrong. "To suggest that the First Amendment, as a matter of law, is never implicated when a professor speaks in class, is fantastic." *Scallet v. Rosenbaum*, 911 F. Supp. 999, 1013–14 (W.D. Va. 1996), *aff'd* 106 F.3d 391 (4th Cir. 1997). Indeed, *Adams* and *Demers* require that a public university instructor's speech be subject to *Pickering-Connick* balancing. *Adams*, 640 F.3d at 563 (concluding that "using the *Pickering-Connick* analysis as opposed to *Garcetti* is

equally — if not more — valid in the public university setting"); *Demers*, 746 F.3d at 412 (9th Cir. 2014) ("We hold that academic employee speech not covered by *Garcetti* is protected under the First Amendment, using the analysis established in *Pickering*."). *Adams* makes plain that "scholarship and teaching" within a professor's "respective field"— as contrasted with "a public university faculty member's assigned duties includ[ing] a specific role in declaring or administering university policy" — requires *Pickering-Connick* balancing. This analysis "permits a nuanced consideration of the range of issues that arise in the unique genre of academia." *Adams*, 640 F.3d at 563–64. Where a professor's speech concerns substantive content, a public university may not characterize it as "administrative" in order to remove it from the broad rubric of "public concern." *Demers*, 746 F.3d at 415 (professor's proposals for what subjects should be taught and by whom received First Amendment protection, as opposed to purely administrative concerns such as teaching credit allocations, dress codes, and cafeteria choices).

The four graduate students complained about Professor Kashdan's speech in his areas of academic expertise: human sexuality and abnormal human behavior. The topics and substantiative commentary at issue were germane to the classes, conferences, and research to which Professor Kashdan and these graduate students were committed. A professor is free to use the terminology, examples, and prompts he deems suited to the topic of public concern at hand, so long as those

methods are reasonably related to the pedagogical endeavor. *Hodge v. Antelope Valley Cmty. College Dist.*, 2014 U.S. Dist. LEXIS 199656 at *15–25 (C.D. Cal. Feb. 14, 2104) (*citing*, *e.g.*, *Hardy v. Jefferson Cmty. College*, 260 F.3d 671, 678–80 (6th Cir. 2001)) (finding that a public university professor's in-class use of profanity involved matters of "overwhelming public concern" because it related to the "subject matter of his lecture on the power and effect of language," as well as "race, gender, and power conflicts in our society").

Graduate students — even more so than college students — are not a captive audience. "Unlike a public elementary or high school setting, where students are required by law to attend school and, as such, listen to a teacher's speech, the same does not apply here. In this case, [a professor's] students are not only adults, but they are not required by law to take [his] courses or to listen to his speech—they choose to do so, on their own free will." *Hodge*, 2014 U.S. Dist. LEXIS 199656 at *36. In none of the venues where GMU asserts these graduate students were offended were they forced to attend or participate. There was no element of compulsion.

The district court's reliance on *Boring v. Buncombe County Board of Education* is thus inapposite. JA 961 (citing 136 F.3d 364, 368 (4th Cir. 1998)). *Boring* concerned a public school district's right to control the curriculum provided to *children* by public school teachers in a public high school. 136 F.3d at 368–69

(relying on *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988) (same), and *Kirkland v. Northside Ind. Sch. Dist.*, 890 F.2d 794, 800–02 (5th Cir. 1989) (same)). Cases governing the grade school milieu rely on rationales having little applicability to the college environment. Public grade schools serve to "inculcate the habits and manners of civility" in the children in their care. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986). By contrast, the adults who teach and study at a university occupy "one of the vital centers for the Nation's intellectual life." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 836 (1995).

In light of that foundational distinction, "the teachings of ... *Hazelwood* … and other decisions involving speech in public elementary and high schools cannot be taken as gospel in cases involving public universities." *McCauley*, 618 F.3d at 247. To the extent the lower court's decision here was influenced by court decisions limiting the speech rights of children, or of adults interacting with children, that reliance is misplaced. "The college classroom with its surrounding environs is peculiarly the marketplace of ideas," *Healy*, 408 U.S. at 180, and "the First Amendment guarantees wide freedom in matters of adult discourse[.]" *Fraser*, 478 U.S. at 682. There is no rational basis for treating adult college students as children.

II. Nothing in Title IX's Prohibition of Hostile Educational Environments Precludes Professorial Speech on the Ground that Students May Not Like the Message.

As GMU did to Professor Kashdan, colleges often seek to curtail faculty speech on the ground that students have been upset or offended by what they hear, thereby opening the institution up to liability for permitting the existence of a hostile educational environment. However, federal civil rights laws prohibiting hostile environments apply only to discrimination based on the employee or student's membership in a protected class, such as sex. *See, e.g., Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) ("Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at 'discrimination . . . because of . . . sex.'"). Moreover, in the education context, sexual harassment must be "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999).

No one argues, as the district court here suggested rhetorically, that being a professor of "sexual taboos . . . confer[s] carte blanche and render[s] all speech protected." JA 961. Title IX's standard precludes those forms of conduct that deny students their full participation in higher education. Stalking, for instance, is not protected by the First Amendment and may give rise to Title IX liability.

See, e.g., Doe v. Valencia College, 903 F.3d 1220, 1227–32 (11th Cir. 2018). Conditioning student advancement upon sexual submission is similarly unlawful. *See, e.g., Alexander v. Yale*, 459 F. Supp. 1, 4 (D. Conn. 1977), *aff'd* 631 F.2d 178 (2d Cir. 1980). Other speech that is unmoored from a pedagogical purpose, such as pervasive speech designed to intimidate, humiliate, and degrade students on the basis of their gender, is also actionable. *See, e.g., Jennings v. Univ. of N.C.*, 482 F.3d 686, 696–700 (4th Cir. 2007).

But these are the exceptions that prove the rule, and courts must be careful to "ensure that Title IX does not become a 'general civility code.'" *Id*. at 696. "[I]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable." *DeJohn*, 537 F.3d at 314 (internal citations and quotations omitted). A public university need not — indeed, must not — violate the First Amendment in attempting to address sexual harassment. *See, e.g.*, *id*. at 320 (striking down university sexual harassment policy for overbreadth). "In the context of school anti-discrimination policies, 'harassing' or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections." *Id*. at 314 (internal citations omitted). "[O]verbroad harassment policies can suppress or even chill core protected speech, and are susceptible to selective application amounting

to content-based or viewpoint discrimination[.]" *Id*. A public university has "a substantial interest in maintaining an educational environment free of discrimination," but it likewise "has many constitutionally permissible means to protect female . . . . students," and it must "accomplish[] its goals in some fashion other than silencing speech on the basis of its viewpoint." *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 393 (4th Cir. 1993).

Public universities like GMU have no writ to insulate their students from offense by censoring constitutionally protected expression on campus. *McCauley*, 618 F.3d at 242–52; *Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703 (9th Cir. 2010); *DeJohn*, 537 F.3d at 313–20; *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1182–85 (6th Cir. 1995); *Iota Xi*, 993 F.2d 386. GMU did not allege that Professor Kashdan treated any students differently because of their sex or engaged in coercive conduct toward them. Instead, GMU relied on nothing more than student claims to have been offended by the speech he chose to use while teaching or interacting with graduate students. But "crude or vulgar language alone does not rise to the level of a Title IX violation . . . . [T]he mere use of an offensive or gendered term does not in itself rise to the level of discrimination on the basis of sex." *Chisholm v. St. Mary's Sch. Dist. Bd. of Ed.*, 947 F.3d 342, 350 (6th Cir. 2020) (holding that a coach's use of the term "pussy" was not a Title IX violation) (citing *Oncale*, 523 U.S. at 81 ("[The plaintiff] must always prove that

the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted *discrimina[tion]* . . . because of . . . sex.")) (emphasis in original).

III. Faculty Free Speech Rights Are Under Threat Nationwide.

Professor Kashdan's case is, regrettably, not an isolated circumstance. The curbing of faculty academic freedom to prevent subjective offense is becoming depressingly familiar across the landscape of American higher education. To take but a few recent examples:

In June 2020, UCLA faculty member W. Ajax Peris was referred to the Office of Equity, Diversity and Inclusion, as well as the Discrimination Prevention Office, by his department chair and college after a student tweeted disgust and a demand for Peris' termination in response to Peris' having read to his class Martin Luther King's "Letter from a Birmingham Jail" and having shown a graphic documentary on the history of lynching, both of which contained the word "nigger."[2]

In May 2017, two law students complaints about a test question involving an upset customer of a Brazilian waxing establishment resulted in Howard

[2] Letter from Adam Steinbaugh, Director, Individual Rights Def, Program, Found. for Indiv. Rights in Educ., to Charles F. Robinson, General Counsel, Univ. of Cal., July 2, 2020, *available at* https://www.thefire.org/fire-letter-to-the-university-of-california-los-angeles-july-2-2020.

University's holding law professor Reginald Robinson responsible for sexual harassment. After a 504-day investigation, administrators required Robinson to undergo mandatory sensitivity training, prior administrative review of future test questions, and classroom observation. He also received a stern warning that any further "violations" of the university's Title IX policies could result in his termination.[3]

In March 2016, Marquette University suspended tenured political science professor John McAdams without pay for nine months for using his personal blog to criticize a graduate student instructor who told an undergraduate student that it was inappropriate to express opposition to same-sex marriage in her class.[4]

In November 2015, University of Kansas communications professor Andrea Quenette held an in-class discussion about a forum held the previous day addressing racial and cultural issues affecting the campus. Afterwards, eight graduate students — some of whom were not even in Quenette's class — filed complaints against Quenette arguing that her comments (in particular, her noting of

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[3] *See* Press Release, Found. for Individual Rights in Educ., "Ouch! Brazilian Wax Test Question Nets Howard University Professor a 504-day Title IX Investigation, Sanctions," July 6, 2017, *available at* https://www.thefire.org/a-sticky-situation-at-howard-university-brazilian-wax-test-question-nets-professor-a-504-day-title-ix-investigation-sanctions.

[4] Diana Sroka Rickert, *The Marquette Professor Who Dared to Speak Out*, CHI. TRIB., Apr. 11, 2016. http://www.chicagotribune.com/news/opinion/commentary/ct-mcadams-marquette-speech-campus-perspec-0413-jm-20160411-story.html.

academic performance issues among black students) during the discussion were "unacceptably offensive" and violated KU's Racial & Ethnic Harassment Policy. Quenette was subsequently placed on paid leave, pending the outcome of a university investigation.[5]

In May 2015, Marywood University investigated political science Professor Tom Jackson, required him to meet with the dean, and suggested taking other vague "measures" against him for his "sexist comments," likely centering around a class discussion of the public political perception of Hillary Clinton as "bitch Hillary."[6]

In December 2014, Harvard Law Professor Jeannie Suk Gersen wrote that "[a]bout a dozen new teachers of criminal law at multiple institutions have told me that they are not including rape law in their courses, arguing that it's not worth the risk of complaints of discomfort by students."[7]

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[5] Letter from Peter Bonilla, Dir., Individual Rights Def. Program, Found. for Individual Rights in Educ., to Bernadette Gray-Little, Chancellor, Univ. of Kan., Feb. 3, 2016, *available at* https://www.thefire.org/fire-letter-to-university-of-kansas.

[6] *See* Press Release, Found. for Individual Rights in Educ., "After Investigating Professor for 'Sexist Comments,' Marywood University Links Title IX With University 'Values.'" Oct. 28, 2015, *available at* https://www.thefire.org/after-investigating-professor-for-sexist-comments-marywood-university-links-title-ix-with-university-values.

[7] Jeannie Suk Gerson, *The Trouble With Teaching Rape Law*, NEW YORKER, Dec. 15, 2014, *available at* https://www.newyorker.com/news/news-desk/trouble-teaching-rape-law.

In the fall of 2014, Rowan College at Gloucester County terminated sociology professor Dawn Tawwater after students complained about her use of "indecent language" and screening of a music video in the classroom as part of a lecture on postmodern theory. She was terminated after refusing to sign a "last chance agreement" requiring her to publicly apologize to her classes and to refrain from using "indecent language" in the future.[8]

In November 2013, after a graduate teaching assistant expressed concern to University of Colorado administrators that undergraduate teaching assistants might feel uncomfortable about participating in role-playing exercises in sociology professor Patty Adler's "Deviance in US Society" class, administrators sought to terminate her. The popular class, which she had taught for more than twenty years, featured subjects relevant to course material involving the global sex trade. (Class performances featured animated character types, such as an "Eastern European 'slave whore,' a pimp, a 'bar whore,' and a high-end escort.") Professor Adler's dean offered her a buyout for early retirement, indicating that if she did not accept the offer, she could incur penalties up to and including forfeiture of her retirement benefits, because her pedagogical approach entailed too much risk in a "post-

[8] Letter from Peter Bonilla, Dir., Individual Rights Def. Program, Found. for Individual Rights in Educ., to Frederick Keating, President, Rowan Coll. at Gloucester County, Oct. 29, 2014, *available at* https://www.thefire.org/fire-letter-to-rowan-college-at-gloucester-county-october-29-2014.

Sandusky" climate; alternatively, she could return to the classroom, but no longer teach the course. Only after an outcry from faculty, students, and advocacy groups did the University drop the matter, without apology, as if it had never happened.[9]

The list could go on. These censorship pressures continue across the academy today. But these pressures run counter to higher education's purpose:

> The presumption that students need to be protected rather than challenged in a classroom is at once infantilizing and anti-intellectual. It makes comfort a higher priority than intellectual engagement and . . . it singles out politically controversial topics like sex, race, class, capitalism, and colonialism for attention. Indeed, if such topics . . . are likely to be marginalized if not avoided altogether by faculty who fear complaints for offending or discomforting some of their students. . . . In this way the demand for trigger warnings creates a repressive, "chilly climate" for critical thinking in the classroom.

American Assoc. of Univ. Professors ("AAUP"), Report of Committee A on Academic Freedom and Tenure on Trigger Warnings, Aug. 2014 ("AAUP Report").[10]

This Court has recognized "that policies that formally or informally suppress protected expression at public universities raise serious First Amendment concerns" and acknowledged that it must be "attentive to the dangers of stretching

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[9] Boulder Faculty Assembly Ad Hoc Committee, Report of the Boulder Faculty Assembly (BFA) Ad Hoc Committee to Investigate the Patricia Adler Case, May 1, 2014, *available at* http://www.colorado.edu/bfa/sites/default/files/attachedfiles/ReportBFAAdlerFinalReport05.2014.pdf.

[10] *Available at* https://www.aaup.org/report/trigger-warnings.

[discrimination and harassment] policies beyond their purpose to stifle debate, enforce dogma, or punish dissent." *Abbott v. Pastides*, 900 F.3d 160, 179 (4th Cir. 2018). Those dangers are present in the case at hand. Amicus FIRE requests that the Court remind public universities that the First Amendment protects academic freedom, that Title IX may not be contorted to achieve pedagogical repression, and that higher education requires vigorous debate and discussion.

CONCLUSION

The Court should not countenance GMU's use of Title IX to discipline a professor's exercise of his First Amendment rights, and the decision below should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Dated: August 19, 2020

/s/ Earl N. "Trey" Mayfield, III
Counsel for Amicus Curiae

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 19th day of August, 2020, I caused this Brief of *Amicus Curiae* to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

/s/ Earl N. "Trey" Mayfield, III
Counsel for Amicus Curiae