The United States Court of Appeals
for the Ninth Circuit

No. 13–16279

NEAL O'BRIEN,
Plaintiff-Appellant,

v.

JOHN WELTY, PAUL M. OLIARO, CAROLYN V. COON, VICTOR M. TORRES, MARIA A. LOPES, LUZ GONZALES, AND MATTHEW JENDIAN, EACH IN THEIR PERSONAL CAPACITIES,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
No. 12-cv-02017-AWI-SAB
The Honorable Anthony W. Ishii, Judge

BRIEF OF THE STUDENT PRESS LAW CENTER AND THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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RULE 26.1 DISCLOSURE STATEMENT

Amicus curiae, the Student Press Law Center, is an IRS 501(c)(3) non-profit corporation incorporated under the laws of the District of Columbia with offices in Arlington, Virginia. The Center does not issue stock and is neither owned by nor is the owner of any other corporate entity, in part or in whole. The corporation is operated by a volunteer Board of Directors.

Amicus curiae, the Foundation for Individual Rights in Education, is an IRS 501(c)(3) nonprofit corporation incorporated under the laws of Massachusetts with offices in Philadelphia. The Foundation does not issue stock and is neither owned by nor is the owner of any other corporate entity, in part or in whole. The corporation is operated by a volunteer Board of Directors.

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INTEREST OF *AMICI CURIAE*[1]

The Student Press Law Center ("SPLC") is a nonprofit organization dedicated to educating high school and college students about the First Amendment and to supporting student freedom from censorship. The Center regularly advocates on behalf of students in court as *amicus curiae* by opposing government actions that restrict students' First Amendment rights. *See*, *e.g.*, *OSU Student Alliance v. Ray*, 699 F.3d 1053 (9th Cir. 2012); *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005); *Owasso Independent School Dist. No. I-001 v. Falvo*, 534 U.S. 426 (2002).

SPLC is concerned that vaguely defined and broadly applied "harassment" and "intimidation" policies undermine student speech rights. SPLC does not endorse plaintiff's views; in particular, to the extent that plaintiff believed that the university faculty or administration should have prevented the publication of a certain poem in a student newspa-

[1] No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that UCLA School of Law paid the expenses involved in filing this brief. Plaintiff has consented to the filing of this brief, but defendants have declined to consent.

per, SPLC would be precisely on the opposite side of that issue from plaintiff. Nonetheless, SPLC believes that it is important to defend the rights of all students, including plaintiff, to speak, to interview, and to videorecord free of vague and overbroad "harassment" policies.

The Foundation for Individual Rights in Education, Inc. ("FIRE"), is a non-profit, tax-exempt educational and civil liberties organization dedicated to promoting and protecting First Amendment rights at our nation's institutions of higher education. FIRE has defended constitutional liberties on behalf of thousands of students and faculty who are challenged by those willing to deny fundamental rights and liberties within institutions of higher education. In the interest of protecting student and faculty rights at our nation's colleges and universities, FIRE has participated as *amicus curiae* in many cases. *See, e.g.*, *Barnes v. Zaccari*, 669 F.3d 1295 (11th Cir. 2012); *Adams v. Trustees of the University of North Carolina–Wilmington*, 640 F.3d 550 (4th Cir. 2011); *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008).

FIRE receives hundreds of complaints each year detailing attempts by college administrators to justify punishing student expression through misinterpretations of existing law and the maintenance of un-

constitutional speech restrictions. FIRE believes that speech codes—university regulations prohibiting expression that would be constitutionally protected in society at large—dramatically abridge freedom on campus. FIRE believes that, for our nation's colleges and universities to best prepare students for success in our modern liberal democracy, the law must remain clearly and vigorously on the side of free speech on campus.

For all of the reasons stated below, SPLC and FIRE believe that this Court must reverse the district court's decision.

SUMMARY OF ARGUMENT

Videorecording is presumptively protected by the First Amendment. To be sure, videorecording, like other protected First Amendment activity, may be subject to more restriction in nonpublic fora and limited public fora than in traditional public fora. If a university implements a policy clearly prohibiting videorecording professors in their offices without their consent, such a policy might be constitutional.

But the 5 Cal. Code Regs. § 41301(b)(7) ban on "interfer[ing] with health and safety" through "harassment" or "intimidation" is not such a policy. The regulation nowhere defines "harassment" or "intimidation."

Indeed, "harassment" has multiple meanings in California law, none of which covers the behavior in this case. "Intimidation" is defined only in one California statute, which likewise does not cover the behavior.

Instead, it appears that the judge used the terms "harassment" and "intimidation" to cover a broader range of behavior than that covered by the legal definitions of the terms—behavior, including otherwise First Amendment protected behavior, that is "intrusive[]," "unsettling," "rude," or "stress"-inducing. While these adjectives might correspond to some lay understandings of "harassment" or "intimidation," they appear nowhere in any legal definitions. Even if they were viewed as part of a newly minted legal definition, they would themselves likely be unconstitutionally vague.

If the university wants to restrict First Amendment protected behavior by students, it has to at least provide clear notice of what it is restricting, even in a nonpublic forum or a limited public forum. The university did not do so here.

ARGUMENT

I. Restrictions on the Videotaping of Public Employees Must Provide Clear Notice to Those Being Restricted, Even as to Behavior in Nonpublic Fora and Limited Public Fora

Videotaping is protected by the First Amendment, especially when it involves citizens monitoring the behavior of public servants. As this Court has recognized, there is a "First Amendment right to gather news" through videorecording. *Fordyce v. City of Seattle*, 55 F.3d 436, 442 (9th Cir. 1995). In the words of *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012),

> The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected . . . .

See also Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011) (likewise recognizing a First Amendment right to videorecord). Indeed, "student journalists increasingly arm themselves with mobile phones for multimedia newsgathering in the field." A. Adam Glenn, *Student Photojournalists Arrested; What Are Their Rights?*, PBS MediaShift, Apr. 30, 2012, http://www.pbs.org/mediashift/2012/04/student-photojournalists-arrested-what-are-their-rights-121/; Caitlin Vogus, *Avoiding Crime*

Scene Confrontations: A Photojournalist's Guide to Recording Police Officers, 32 SPLC REPORT 3:36, Fall 2011, http://www.splc.org/news/report_detail.asp?id=1613&edition=56. And rights to videorecord, like First Amendment rights generally, apply equally to all, including those—such as the plaintiffs in *Fordyce*, *American Civil Liberties Union*, and *Glik*—who are not professional journalists:

> [C]hanges in technology and society have made the lines between private citizen and journalist exceedingly difficult to draw. The proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper. Such developments make clear why the news-gathering protections of the First Amendment cannot turn on professional credentials or status.

Glik, 655 F.3d at 84; *see also* Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459 (2012) (concluding that American law has long treated First Amendment rights as belonging equally to the professional media and to other speakers); SCOTT GANT, WE'RE ALL JOURNALISTS NOW: THE TRANSFORMATION OF THE PRESS AND RESHAPING THE LAW IN THE INTERNET AGE (2007) (defending the wisdom of such equal treatment).

Of course, videorecording, like other First Amendment protected activity, can be subject to greater restrictions in nonpublic fora—"[p]ublic property which is not by tradition or designation a forum for public communication," *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 46 (1983)—and in limited public fora. *See Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 811 (1985) ("The First Amendment does not forbid a viewpoint neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose."). [2] But even in such fora, restrictions on First Amendment activity must be sufficiently clearly defined. *See Board of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (stating that an airport's proposed interpretation of a speech-restricting policy would be unconstitutionally vague, even if an airport were to be treated as a nonpublic forum); *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) (concluding that an airport is indeed a nonpublic forum); *Children of the Rosary v. City of Phoenix*, 154 F.3d 972 (9th Cir. 1998) (applying void-for-vagueness

[2] *Amici* expresses no view here on how the government property on which plaintiff was videorecording should be classified.

analysis in a nonpublic forum); *Miller v. City of Cincinnati*, 622 F.3d 524, 538 (6th Cir. 2010) (holding, in reviewing a preliminary injunction, that plaintiff had shown a likelihood of success on his claim that a restriction on speech in a nonpublic forum was unconstitutionally vague); *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Authority*, 163 F.3d 341, 360 (6th Cir. 1996) (likewise).

Moreover, even if a restriction on videorecording were permissible if limited to certain classes of university property, such a restriction must provide clear notice that it is indeed focused on such places. But section 41301(b)(7) is not limited to nonpublic fora or limited public fora, and indeed applies equally to speech anywhere, including in traditional public fora and on private property off-campus. *Compare, e.g.*, § 41301(b)(7) (not including any geographical limitations) *with* § 41301(b)(3) (expressly applying only to "a University-related activity, or any on-campus activity") *and* § 41301(b)(6) (covering "behavior at a University related activity" as well as, with no geographical limitation, behavior "directed toward a member of the University community").

In this respect, *Cohen v. California*, 403 U.S. 15 (1971), is closely analogous. Cohen was prosecuted under a general ban on "disturb[ing] the peace" through "offensive conduct," *id.* at 16 & n.1, conduct that consisted of wearing a jacket that contained a vulgarity. Cohen's behavior took place at a courthouse, and courthouse authorities might be free to prohibit such vulgarities on courthouse property, on the theory that such property is a nonpublic forum. But the Supreme Court concluded that such a possibility could not justify applying to Cohen a prohibition that contained no such spatial limitation:

> Cohen was tried under a statute applicable throughout the entire State. Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places. No fair reading of the phrase "offensive conduct" can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created.

403 U.S. at 19. Likewise, any attempt to support the discipline in this case "on the ground that the [regulation] seeks to preserve an appropriate[] . . . atmosphere" in faculty offices "must fail." Here too, after all, there is an "absence of any language in the [regulation] that would have put [plaintiff] on notice that certain kinds of otherwise permissible

speech or conduct" (videorecording of a sort that often happens when people confront government officials and ask for their reaction on a controversial issue) "would nevertheless, under [the regulation], not be tolerated in certain places." "No fair reading of the [terms 'harassment' and 'intimidation'] can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created."

II. Section 41301(b)(7) Did Not Give O'Brien Adequate Notice That His Videorecording Was Prohibited

O'Brien, then, can only be punished for violating § 41301(b)(7) if that section gives adequate notice that it prohibits conduct such as O'Brien's. *See Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972) (holding that a rule passes First Amendment muster only if it provides "fair notice to those to whom (it) is directed" (internal quotation marks omitted)). Yet section 41301(b)(7) only bars conduct that "*threatens or endangers the health or safety* of any person within or related to the University community, including physical abuse, threats, *intimidation*, *harassment*, or sexual misconduct." 5 Cal. Code Regs. § 41301(b)(7) (emphasis added). Nothing in these terms gives students notice that videorecording in a faculty member's office—even videorecording after the student has been asked to stop—is prohibited.

A. The Term "Harassment" Does Not Give Clear Notice That It Covers Behavior Such as O'Brien's

"Harassment" is a term with many legal meanings. None of those legal meanings covers the behavior at issue in this case.

In some contexts, "harassment" means behavior that creates a sexually hostile environment—"sexual advances, solicitations, sexual requests, demands for sexual compliance by the plaintiff, or . . . other verbal, visual, or physical conduct of a sexual nature or of a hostile nature based on gender, that were unwelcome and pervasive or severe" within the context of certain relationships. Cal. Civ. Code § 51.9; *see also* Cal. Educ. Code § 212.5 (adopting much the same definition); Cal. Exec. Order No. 1074 (Apr. 6, 2012), http://www.calstate.edu/eo/EO-1074.html, at 2 (likewise). California precedents also recognize a "quid pro quo [sexual] harassment" cause of action, which exists "where a term of employment is conditioned upon submission to unwelcome sexual advances." *Doe v. Capital Cities*, 58 Cal. Rptr. 2d 122, 126 (Ct. App. 1996) (citation omitted).

It is possible that § 41301(b)(7) might be aimed at those instances of hostile environment sexual harassment or quid pro quo sexual harass-

ment that endanger health or safety. But the conduct in this case clearly does not fit within either of these definitions of "harassment."

"Harassment" is also often defined, including in Fresno State University policies, as hostile environment harassment more generally—conduct that is "sufficiently severe or pervasive to . . . create an abusive work environment" based on "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender identity, gender expression, age, or sexual orientation." *Lyle v. Warner Bros. Television Productions*, 132 P.3d 211, 279 (Cal. 2006); Cal. Gov't Code § 12940(j).[3] The Fresno State University policies that deal with "harassment" of faculty members by students appear to define "harassment" precisely this way. Cal. State Univ., Fresno, *Discrimination & Harassment Prevention*, http://www.fresnostate.edu/adminserv/hr/eeo-diversity/discrimination/index.html (Oct. 7, 2013) (prohibiting harassment of faculty generally); Cal. State Univ., Fresno, *Policies and Procedures Ad-*

[3] When it comes to student conduct with respect to other students, the Supreme Court has held that such conduct becomes actionable harassment only when it is severe *and* pervasive. *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 633 (1999).

dressing Discrimination, Harassment, and Retaliation for University Faculty, Staff & Student Assistants, http://www.fresnostate.edu/mapp/III/G/G-25.pdf (Aug. 2012), at 1, 8-9, 13 (noting that students could be disciplined under such policies). Again, the conduct here does not fall within this category, because there was no allegation that the faculty members were approached because of their race, religion, or other protected classification.

"Harassment" is also sometimes defined as "words, conduct, or action (usu. repeated or persistent) that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress in that person and serves no legitimate purpose." *Black's Law Dictionary* (Westlaw version); Cal. Penal Code § 11414 (using a similar definition for the crime of harassment of a child due to the parent's employment); Cal. Code Civ. Proc. § 527.6(b)(3) (using a similar definition for harassment as a basis for getting a restraining order in domestic violence cases). Perhaps this is what the district court had in mind, because O'Brien's behavior may well have been annoying.

Sometimes prohibitions on "harassment" are narrower still: they are limited to speech that is seriously annoying, serves no legitimate pur-

pose, *and* is also threatening. For instance, the ban on stalking, Cal. Penal Code § 646.9, defines "harassment" as a "knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose," but then outlaws such behavior only in situations that involve "a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family." *See also* Cal. Penal Code § 653.2 (using a similar definition, as to the crime of cyberstalking); *People v. Tran*, 54 Cal. Rptr. 2d 650, 652-53 (Ct. App. 1996) (rejecting First Amendment challenge to Cal. Penal Code § 646.9 precisely because the statute is limited to threats). Cal. Civ. Code § 1708.7 takes a similar approach in defining tortious stalking, but requires only that the behavior be reasonably perceived as threatening, not that it be intended to threaten.

But regardless of which of the definitions in the preceding two paragraphs is used, and even if O'Brien's unwanted videorecording could qualify as "seriously" annoying, there is no showing that the videorecording "serve[d] no legitimate purpose." The *means* O'Brien chose for serving his purpose may have been rude, and perhaps such means could

be restricted through a properly drafted rule. But O'Brien's purpose of getting a statement about a political controversy, to use in future criticism that he might publish, was clearly a "legitimate purpose." Indeed, newspapers and broadcasters, both student and professional, routinely engage in such conduct with the same purpose.

The only court opinion addressing the definition of "harassment" in § 41301(b)(7) is *College Republicans v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007), which concluded—following the literal text of the regulation—that the subsection encompassed "only the sub-category of intimidation or harassment that 'threatens or endangers the health or safety of any person.'" *Id.* at 1022. But, first, O'Brien's conduct did not threaten or endanger anyone's health or safety. And, second, the definition offered in *College Republicans* does not give students notice about what the term "harassment" in that definition might mean.

Thus, O'Brien's behavior is not covered by any of the legal definitions of "harassment"—and in any event, the regulation does not inform students about *which* of these definitions would be applicable. It appears, however, that the district court was using a more colloquial definition of harassment. The court apparently viewed the subsection as a means of

preventing behavior that is "intrusive[]," "unsettling," "stress"-inducing, "rude," or "verbally abusive." *O'Brien v. Welty*, 2013 WL 2300920, at *9 (E.D. Cal. May 24, 2013). The mere fact that O'Brien "confronted the faculty members with video recorder running and refused to immediately cease when asked to do so," *id.*, was apparently enough to make the behavior "harassment" in the court's eyes. And that may fit with some lay dictionary definitions of "harassment" —"[t]o trouble or vex by repeated attacks,"[4] "to annoy persistently,"[5] or "to create an unpleasant or hostile situation for[, especially using] uninvited and unwelcome verbal or physical conduct."[6]

Yet all these definitions (even if they apply to O'Brien's videorecording, which was isolated rather than repeated or persistent) turn on whether a person perceives certain conduct to be annoying. And the Supreme Court has made clear that bans defined in terms of whether speech is "annoying" are unconstitutionally vague. "[C]onduct that annoys some people does not annoy others," and the law does not permit

[4] *Oxford English Dictionary* (online ed.), http://oed.com.

[5] *Merriam-Webster Collegiate Dictionary* 567 (11th ed. 2007).

[6] *Id.*

"the enforcement of an ordinance whose violation may entirely depend upon whether or not [the enforcer] is annoyed." *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (striking down on vagueness grounds a ban on "annoying" conduct); *accord Bell v. Keating*, 697 F.3d 445, 458-62 (7th Cir. 2012) (striking down an order-to-disperse ordinance as unconstitutionally vague, partly because, "to the extent that the ordinance criminalizes one's refusal to disperse when proximate to disorderly conduct likely to annoy, it predicates penalty on an inscrutable standard, which is no standard at all").

Likewise, in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), a lawyer had been disciplined for making a pretrial statement to the media defending his client; the state bar had found that the statements violated an ethics rule limiting such public statements to "general" defenses without "elaboration." But such a rule, the Court held, was unconstitutionally vague, "because 'general' and 'elaboration' are both classic terms of degree" that did not provide guidance as to what kind of defense was actually permissible. 501 U.S. 1030, 1048-49 (1991). "The lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated." *Id.*

at 1049. A reasonable person applying the district court's interpretation of the rule in the current case would likewise be unsure about just when speech or videorecording becomes unduly "intrusive[]," "unsettling," "stress"-inducing, "rude," or "verbally abusive."

To summarize, first, a student reading the regulation banning "harassment" has no way of knowing whether a legal or colloquial definitions of "harassment" is being invoked. Second, if the regulation is seen as referring to the legal definition of "harassment," the student has no way of knowing *which* of the legal definitions is being used.

Third, regardless of which legal definition is used, a student contemplating whether he can videorecord a professor in the way that O'Brien was doing would have no way of knowing that the university would read those definitions—which are facially inapplicable to such behavior—as covering that behavior. And, fourth, even if the student intuits that the legal rule is referring to a colloquial rather than a legal definition, that colloquial definition is itself too vague to provide fair notice.

B. The Term "Intimidation" Does Not Give Clear Notice That It Covers Behavior Such as O'Brien's

Only one California statute contains a definition for any form of the word "intimidation": the California Freedom of Access to Clinic and

Church Entrance Act, Cal. Penal Code § 423.1(c). Under § 423.1(c), "intimidate" means "to place in reasonable apprehension of bodily harm to herself or himself or to another." In other legal contexts, "intimidation" is defined even more narrowly, to refer to "unlawful coercion; extortion." *Black's Law Dictionary* (Westlaw version). But O'Brien's behavior did not create a reasonable apprehension of bodily harm, did not unlawfully coerce, and did not extort. A camera is not a weapon; people carrying cameras—even people with political agendas—are usually interested in recording information, not in engaging in a physical attack.

The district court did not seem to use this definition, or even focus on the language of § 41301(b)(7), which is limited to alleged "intimidation" that "threatens or endangers . . . health or safety." Instead, the court appeared to be using a looser definition, which would include conduct that is "unsettling" or "stress"-inducing. *O'Brien*, 2013 WL 2300920, at *9. But people often find speech unsettling or stress-inducing, especially if they sharply disagree with the message, and fall prey to the normal human tendency to think the worst of people with whose viewpoints they differ. That cannot suffice to strip speech of constitutional protection.

Indeed, at some points the district court's opinion suggests that speech is "harassment or intimidation" merely because some people subjectively perceive it to be so. The opinion states that "the Defendants in this case are not burdened to show that Plaintiff's expressive conduct exceeded some objective boundary of intrusiveness before application of sanctions can be applied constitutionally." *Id.* The opinion also states that "the ability of faculty, staff, students or other members of the public to complain of conduct that they find *subjectively* unsettling cannot be impeded by the requirement that a certain objective standard of malice in the complained-of conduct must be demonstrated." *Id.* (emphasis in original). And the opinion adds that "the successful allegation of violation of [§ 41301(b)(7)] in the context of expressive conduct in a non-public forum, requires no more than the demonstration of facts that could plausibly support the subjective experience of harassment or intimidation." *Id.*

Yet punishing students based simply on their listeners' being "*subjectively* unsettl[ed]" or having "the subjective experience of harassment or intimidation" cannot be reconciled with the First Amendment protections given to university student speech. And even if the district court's

later assertion that "Plaintiff's conduct was harassing and/or intimidating because the complaining faculty members stated that it was and because Plaintiff's admitted conduct makes the complaining parties' subjective assessment reasonable," *id.*, adds an objective component to the court's proposed test, the terms "harassment" and "intimidation" remain insufficiently clearly defined.

The Supreme Court has given a definition of what is a constitutionally unprotected threat: speech through which the "speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003); *see also United States v. Bagdarasian*, 652 F.3d 1113, 1117 (9th Cir. 2011) (adopting this definition). A definition of "intimidation" that departs from this "true threats" test, and instead includes any speech or speech-related conduct that is unsettling or stress-inducing, would be unconstitutionally vague and overbroad.

C. The District Court's Reading of the Regulation Produces the Very Problems That the Supreme Court Has Identified as Stemming from Vague Laws

For the reasons given above, interpreting § 41301(b)(7) to cover "unsettling," "stress"-inducing, "intrusive," or "rude" behavior would allow O'Brien to be punished without having been given fair notice that his videorecording could lead to disciplinary action. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (indicating that lack of adequate notice is one problem with vague laws); *Cohen v. San Bernardino Valley College*, 92 F.3d 968, 972 (9th Cir. 1996) (holding a campus harassment policy unconstitutionally vague because it did not provide adequate notice as to the plaintiff's behavior).

Moreover, interpreting the regulation to cover "unsettling," "stress"-inducing, "intrusive," or "rude" behavior would encourage selective enforcement based on a speaker's viewpoint. *Grayned*, 408 U.S. at 108-09 (noting that the risk of such viewpoint discrimination is another problem with vague laws). In public and nonpublic fora alike, viewpoint discrimination is impermissible. *Flint v. Dennison*, 488 F.3d 816, 830 (9th Cir. 2007) (quoting *Perry*, 460 U.S. at 46). Yet, when faced with vague criteria such as "unsettling," "stress"-inducing, "intrusive," or "rude,"

even well-intentioned decisionmakers may unintentionally treat those whose viewpoints they oppose more harshly than those whose viewpoints they support. Someone seen by decisionmakers as campaigning for truth and justice would be given the benefit of the doubt in the application of such vague terms, while someone seen as morally benighted might appear more physically menacing and unsettling. *See Dambrot v. Central Michigan Univ.*, 55 F.3d 1177, 1183-84 (6th Cir. 1995) (striking down a campus speech code on vagueness grounds based on the risk of discriminatory enforcement).

And interpreting the regulation to cover speech or information gathering that is "unsettling," "stress"-inducing, "intrusive," or "rude" would also tend to lead students to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S. at 109 (citation omitted) (indicating that such a chilling effect is one of the harms caused by vague laws). A student concerned about the risk of discipline—and with no way of knowing whether his speech would lead to no discipline, mild discipline, or severe discipline—would be inclined to avoid not only information gathering but

also the expression of viewpoints that some might find as "unsettling," "rude," or productive of "stress."

III. Besides Being Unconstitutionally Vague as Applied to O'Brien, the Regulation Is Unconstitutional on Its Face Unless It Is Narrowly Construed

As the discussion above shows, § 41301(b)(7) does not provide adequate notice that O'Brien's videotaping would be punishable. But beyond this, the section's use of the term "harassment," with no indication of which meaning of "harassment" is being invoked, makes the section unconstitutionally vague on its face. *See Hunt v. City of Los Angeles*, 638 F.3d 703, 711 (9th Cir. 2011) (responding to a facial challenge of an ordinance by striking down the ordinance as unconstitutionally vague).

This vagueness could be cured if a court were to authoritatively interpret § 41301(b)(7) in a way that makes clear what "harassment" it refers to, and makes clear that "intimidation" refers to true threats. For instance, if "harassment" were understood to refer to the conduct outlawed by Cal. Penal Code § 646.9, *see* p. 14—a "knowing and willful course of conduct directed at a specific person" that "seriously alarms, annoys, torments, or terrorizes the person, . . . that serves no legitimate purpose" and that includes "a credible threat with the intent to place

that person in reasonable fear for his or her safety, or the safety of his or her immediate family"—that would make § 41301(b)(7) sufficiently clear. But until such a clarifying construction has been imposed, § 41301(b)(7) would be unconstitutionally vague.

CONCLUSION

Title 5 Cal. Code Regs. § 41301(b)(7) does not provide fair notice that a student's filming a conversation with a professor in a university building constitutes behavior that "threatens or endangers . . . health or safety" through "harassment" or "intimidation." Even if O'Brien's videorecording could have been prohibited by a clearly defined rule, it could not be prohibited by this particular rule. The disciplinary action taken against O'Brien based on his videorecording was thus unconstitutional.

Respectfully Submitted,

s/ Eugene Volokh

Attorney for *Amici Curiae* Student Law Press Center and Foundation for Individual Rights in Education

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,847 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in 14-point New Century Schoolbook.

Dated: Oct. 29, 2013

s/ Eugene Volokh

Attorney for *Amici Curiae* Student Law Press Center and Foundation for Individual Rights in Education

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Appellant's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on Oct. 29, 2013.

All participants in the case are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: Oct. 29, 2013

s/ Eugene Volokh

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