Catholic University Law Review

Volume 64
Issue 4 *Summer 2015*

Article 9

9-22-2015

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Cover Page Footnote
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INJURY-IN-FACT IN CHILLING EFFECT CHALLENGES TO PUBLIC UNIVERSITY SPEECH CODES

Jennifer L. Bruneau[+]

It is shortly after 9/11 and emotions are running high throughout the country.[1] Patriotism abounds, but so does fear and insecurity with the prospect of war looming. Some students at Public University fully support a war effort while others are adamantly opposed to the idea.[2] Both sides, wanting their voices heard on campus, consider organizing rallies in support of their respective causes.[3] Each of the rallies is likely to produce intense emotional reactions from fellow students and, perhaps, even faculty and staff.[4]

Public University, like most institutions of public higher education, has a policy under which students are expected to avoid disrespecting others' personal feelings.[5] The combination of heightened emotions and a vague "personal feelings" policy lead the groups to each decide not to hold their rallies for fear of punishment.[6] This motivation to self-censor because of the school's policy is called a "chilling effect."[7]

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1. The hypothetical that follows is modeled after events that transpired on Yale University's campus following the 9/11 terrorist attacks. GREG LUKIANOFF, UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE 78–80 (2012). *See also* Naomi Massave, *Hate Sign Removed from Durfee Hall*, YALE DAILY NEWS, Oct. 30, 2001, http://yaledailynews.com/blog/2001/10/30/hate-sign-removed-from-durfee-hall/.

2. *See, e.g.*, LUKIANOFF, *supra* note 1, at 78–79. In the aftermath of 9/11, both students and faculty on Yale's campus "were angry and upset about the attacks and wanted the United States to go after the terrorists." *Id.* at 79. However, some students did not favor the "[k]ill em' all" mentality and threatened "campus-wide protests." *Id.*

3. *See, e.g.*, *id.* (discussing how one group of students expressed its thoughts through an anti-peace banner while another group threatened to protest throughout the entire campus).

4. *See, e.g.*, Jo Freeman, *The Changing Styles of Student Protests*, 8 MODERATOR 17 (1969), http://www.jofreeman.com/sixtiesprotest/styles.htm (describing how the University of Chicago dealt with "intense emotional experiences" during and after student protests on campus).

5. *See, e.g.*, *Student Rights and Obligations*, TEX. A&M UNIV. (Aug. 8, 2013), http://policies.tamus.edu/13-02.pdf.

6. *See, e.g.*, LUKIANOFF, *supra* note 1, at 79–81 (discussing two instances on Yale's campus where students received negative reactions to expressing their opinions).

7. *See* Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1648–55 (2013) (providing an overview of the chilling effect).

Broadly, "[a] chilling effect occurs when individuals seeking to engage in activity protected by the [F]irst [A]mendment are deterred from so doing by governmental regulation not specifically directed at that protected activity."[8] In the context of speech restriction policies on campuses, it is explained as self-censorship by those who fear discipline because it appears certain that their speech will be punishable under the policy.[9] Campus speech codes began to spring up on university campuses during the 1980s and continue to operate today.[10] The codes regulate various forms of arguably offensive speech, including speech regarding race, gender, sexual orientation, ideology, views, and political affiliation.[11] Numerous litigants have challenged the chilling effect these policies have on student and faculty speech.[12]

Most schools do not have a policy labeled "speech code"; rather, they exist within codes of conduct, harassment policies, and email policies.[13] For example, University of Oregon's Residence Hall Conduct Policy states, "[a]ny resident's behavior that . . . demonstrates an unwillingness to live in a group setting is prohibited."[14] Speech codes can also be found in policies that create campus

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8. Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685, 693 (1978) (emphasis removed).

9. *See* Kendrick, *supra* note 7, at 1652–55 (explaining how the chilling effect causes speakers to remain silent); LUKIANOFF, *supra* note 1, at 43–45 (providing examples of university regulations on speech).

10. *See* Azhar Majeed, *Defying the Constitution: The Rise, Persistence, and Prevalence of Campus Speech Codes*, 7 GEO. J. L. & PUB. POL'Y 481, 486–88 (2009) (providing a brief history of the rise of speech codes). Various explanations exist for the installation of speech codes on college campuses. *Id.* at 486. Some propose that the codes were designed to ensure a safe campus environment for minorities and that these policies were responsive to racial violence and other forms of intolerance. *Id.* at 486–87. Others claim that the speech codes were a "quick fix" to deflect media attention away from the problem of racial violence. *Id.* at 487. Finally, there are those who claim that university administrators established speech codes to support the broader political correctness movement. *Id.* at 487–88.

11. LUKIANOFF, *supra* note 1, at 38–40, 43–45 (providing a brief overview of the history of speech codes and examples). *Doe v. University of Michigan* was the first case in which a court adjudicated the constitutionality of a public university speech code. 721 F. Supp. 852, 855–56 (E.D. Mich. 1989). At the time the school adopted the challenged anti-discrimination disciplinary policy, the university President acknowledged its First Amendment implications; however, he believed that the negative impact of "speaking or writing discriminatory remarks which seriously offend many individuals beyond the immediate victim" on the "necessary educational climate of a campus" outweighed the potential First Amendment issues. *Id.* at 855.

12. *See* Majeed, *supra* note 10, at 488–94 (providing an overview of existing cases, prior to the Ninth Circuit's overturning of the district court's decision in *Lopez v. Candaele*, 630 F.3d 775 (9th Cir. 2010)).

13. LUKIANOFF, *supra* note 1, at 40–42 (explaining that universities bury speech codes in websites, handbooks, and other materials to disguise speech regulations).

14. *Residence Hall Contract and Community Expectations*, UNIV. OF OR. (2014), https://housing.uoregon.edu/hou-includes/duckweb/14-15/uoh-rhcontract-2014.00.pdf (see Conduct Policy 3(c)). Under this policy, the University charged a female student for shouting from her dormitory window to another female, who was walking by with her boyfriend, "I hit it first," as a joke. *University of Oregon: Student's Four-Word Joke Results in Five Unconstitutional*

"speech zones"[15] and sensitivity or diversity training programs.[16] For example, the University of Delaware once had a mandatory orientation program where students were pressured and sometimes required to agree with the University's ideological positions.[17]

Speech codes are supported by groups such as the Anti-Defamation League (ADL), which advocates narrow codes that target "hate speech" and encourages school administrators to speak out against hateful speakers.[18] On the other hand, organizations such as the Foundation for Individual Rights in Education (FIRE) and the American Civil Liberties Union (ACLU) oppose speech codes on the basis that they violate fundamental rights of free expression.[19] Organizations opposed to speech codes also challenge such codes to preserve universities' unique place in society as a "marketplace of ideas."[20]

Disciplinary Charges, THE FIRE (Aug. 26, 2014), http://www.thefire.org/cases/university-oregon-students-four-word-joke-results-five-unconstitutional-disciplinary-charges/. The Foundation for Individual Rights in Education (FIRE) intervened and the charges were eventually dropped. *Victory: University of Oregon Drops Charges Against Student for Joke*, THE FIRE (Aug. 28 2014), http://www.thefire.org/victory-university-oregon-drops-charges-student-joke/.

15. GREG LUKIANOFF, DAVID FRENCH & HARVEY SILVERGATE, FIRE'S GUIDE TO FREE SPEECH ON CAMPUS 153–54 (2d ed. 2012) [hereinafter LUKIANOFF, FRENCH & SILVERGATE]. For example, Texas Tech University had a "free speech gazebo" which was the only place on campus in which students could hold free speech activities, such as protests, without prior permission. *Id.* at 170. The district court ultimately overturned this policy. Roberts v. Haragon, 346 F. Supp. 2d 853, 872–74 (N.D. Tex. 2004).

16. LUKIANOFF, FRENCH & SILVERGATE, *supra* note 15, at 165–67.

17. *Id.* FIRE intervened and the President subsequently eliminated the program. *University of Delaware: Students Required to Undergo Ideological Reeducation*, THE FIRE (Oct. 30, 2007), http://www.thefire.org/cases/university-of-delaware-students-required-to-undergo-ideological-reeducation/.

18. *See Responding to Bigotry and Intergroup Strife on Campus: Guide for College and University Administrators*, ANTI-DEFAMATION LEAGUE, http://archive.adl.org/campus/guide/free_speech.html (last visited Sept. 4, 2014).

19. *FIRE Mission*, THE FIRE, http://www.thefire.org/about-us/mission/ (last visited Sept. 6, 2014); *Hate Speech on Campus*, ACLU (Dec. 31, 1994), https://www.aclu.org/free-speech/hate-speech-campus.

20. *See* Healy v. James, 408 U.S. 169, 180–81 (1972). *See also* LUKIANOFF, FRENCH & SILVERGATE, *supra* note 15, at 154 ("[A] university can and should ban *true* harassment or threats, but a code that calls itself a 'harassment code' does not thereby magically free itself from its obligations to free speech and academic freedom.").

Speech codes on state university campuses[21] raise significant First Amendment[22] issues because state universities are government entities.[23] As such, challenges to state university speech codes on First Amendment grounds have been successful.[24] However, in cases where the challenged code has not

21. Although speech codes at private universities limit free speech like those at public universities, students and professors cannot make First Amendment claims against them because there is typically no state action in the enactment of the polices. Evan G.S. Siegel, *Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities*, 39 EMORY L.J. 1351, 1381 (1990). In cases that implicate constitutional rights, parties have argued that private universities engage in state action for several reasons. *Id.* at 1382–84. Claims based on the receipt of federal funds and the "public function" of educational institutions have been generally rejected. *Id.* at 1383. In some cases, the courts have found state action when state officials were involved with the institution's administration. *Id.* at 1384. The courts have also found state action when someone has challenged a private institution on the basis of race or sex discrimination, but have not used this as a valid basis to permit a First Amendment claim, despite its purported importance to the country's social fabric. *Id.* at 1384–85. Litigation over private university speech codes will not be discussed here because there is only one known case regarding a private university speech code. Jennifer Ross, *Keeping Free Speech Free in the College Marketplace of Ideas: California Legislation as an Imperfect Solution to Censorship by University Administrators*, 41 U.S.F. L. REV. 727, 743 n.107 (2007). In that case, the court struck down the university's harassment policy on overbreadth grounds under the state's Leonard Law, which allows students of private educational institutions to bring free speech claims. Corry v. Leland Stanford Junior Univ., No. 740309, 41–42 (Cal. Super. Ct. Feb. 27, 1995), http://web.stanford.edu/~evwayne/library/corrym.html. Nearly two decades prior, a similar federal measure, the Collegiate Speech Protection Act, was introduced to the House of Representatives. H.R. 1380, 102d Cong. (1991). *See also* Henry J. Hyde & George M. Fishman, *The Collegiate Speech Protection Act of 1991: A Response to the New Intolerance in the Academy*, 37 WAYNE L. REV. 1469, 1493–94 (1991). The Bill established a cause of action for both public and private college and university students to challenge "any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication protected from governmental restriction by the first article of amendment to the Constitution of the United States." *Id.* at 1493. The House referred the bill to the House Subcommittee on the Constitution and Civil Rights where it appears to have stalled. *Bill Summary & Status: H.R. 1380*, LIBRARY OF CONG., http://thomas.loc.gov/cgi-bin/bdquery/z?d102:H.R.1380:@@@L (last visited Feb. 26, 2015).

22. "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I. Speech codes have been challenged on grounds such as overbreadth, vagueness, or discrimination on the basis of content or viewpoint. *See* Majeed, *supra* note 10, at 494–99 (describing each of these claims).

23. *See* Bernard D. Reams, *Revocation of Academic Degrees by Colleges and Universities*, 14 J.C. & U.L. 283, 293 (1987) ("The activities of a state-owned or state-operated university fall immediately within the state action doctrine, and therefore, must adhere to fourteenth amendment due process requirements."). *See also* Siegel, *supra* note 21, at 1365–66 (summarizing *Doe v. University of Michigan*); *Private Universities*, THE FIRE, http://www.thefire.org/spotlight/public-and-private-universities/ (last visited September 3, 2014) (explaining that private universities are not bound by the Fourteenth Amendment).

24. *See, e.g.*, DeJohn v. Temple Univ., 537 F.3d 301, 320 (3d Cir. 2008) (finding a sexual harassment policy facially overbroad); Roberts v. Haragon, 346 F. Supp. 2d 853, 871–73 (N.D. Tex. 2004) (finding a speech code facially overbroad); Booher v. Bd. of Regents of N. Ky. Univ., No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404, at *26–33 (E.D. Ky. July 21, 1998) (holding that the sexual harassment policy was overbroad and vague); UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis., 774 F. Supp. 1163, 1181 (E.D. Wis. 1991) (striking down a discriminatory

yet been enforced, some courts find that the plaintiff has not met the "injury-in-fact" requirement for Article III standing.[25] The Supreme Court has not ruled on standing requirements in speech code challenges and lower courts are divided.[26] This Comment analyzes this division and provides a proposal for the best resolution of the standing question in this context.

Part I analyzes the Supreme Court's approach to standing standards in pre-enforcement challenges to speech restrictions and to the "special concern of the First Amendment" in education.[27] Part II discusses the various ways that lower courts have ruled on plaintiffs' standing in their pre-enforcement "chilling effect" challenges to public university speech codes. Part III analyzes why these divisions exist among the courts. Part IV argues that the injury-in-fact requirement of Article III standing is satisfied in pre-enforcement challenges to public university speech codes upon an allegation of self-censorship vindicated by a showing that the plaintiffs' speech would arguably be proscribed by the code.

I. STANDING REQUIREMENTS, PRUDENTIAL LIMITATIONS, AND THE SPECIAL TREATMENT OF FIRST AMENDMENT CLAIMS IN EDUCATION

A. General Standing Requirements

Like much of modern jurisprudence, the history and development of standing doctrine is complex. The distinction between public and private rights was central to its early development.[28] Historically, private rights were those held by individuals, such as the rights to life, liberty, and property.[29] In private rights cases, courts based justiciability on whether the plaintiff had asserted the correct form of action.[30] To establish standing, a plaintiff only had to assert the relevant violation of his right; a further showing of actual harm was not required.[31] In

harassment policy that the court found overbroad and vague); Doe v. Univ. of Mich., 721 F. Supp. 852, 866–67 (E.D. Mich. 1989) (invalidating a discriminatory harassment policy for being overbroad and vague). Litigation is just one of many means available to oppose speech codes on college campuses. *See* Majeed, *supra* note 10, at 540–43 (suggesting that public exposure and advocacy as well as efforts to change the cultural norms regarding political correctness are other ways of combating speech codes).

25. *See infra* Part II (providing an overview of the cases in which standing has been an issue). This Comment assumes that once an injury has occurred, causation and redressability are satisfied.

26. *See infra* Part II.

27. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

28. F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 289 (2008).

29. Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 693 (2004). *See also* Hessick, *supra* note 28, at 280–81.

30. *See* Woolhandler & Nelson, *supra* note 29, at 693 (describing this legal standard).

31. Hessick, *supra* note 28, at 280–81 (explaining that no proof of harm was necessary in private legal actions under the common law). *See also* Marbury v. Madison, 5 U.S. 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and

contrast, public rights were those that "belong[ed] to the body politic[,]" such as rights of navigation and highway access.[32] Public rights were thought better defended by the legislature and through criminal law enforcement.[33]

The "power to create new rights and to redefine existing rights"[34] has blurred the distinction between the historically different approaches applied to these two categories of rights. As a result, modern standing doctrine emerged in part to "protect[] legislation from judicial attack," as assertions of constitutional rights were increasingly used to challenge legislative and regulatory expansion.[35] Further, federal courts needed a way to hear claims registered by individuals whose rights were violated by government agency action.[36] To address these changes in the legal system, the Supreme Court eventually adopted the "injury-in-fact" requirement.[37]

Arguably, the Court did not initially intend to apply the injury-in-fact standard to traditional private rights cases.[38] However, with time, the Court applied it to all rights because of concern that permissive court access was facilitating undue judicial interference with state and federal government power.[39] After establishing a single standing measure, the historically more lenient approach to

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not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

32. Woolhandler & Nelson, *supra* note 29, at 693. *But see* Hessick, *supra* note 28, at 290–91 (citing Osborn v. Bank of the U.S., 22 U.S. 738, 819 (1824); Tyler v. Judges of Court of Registration, 179 U.S. 405 (1900)). In *Tyler*, the Court noted that the plaintiff had to "show an interest in the suit personal to himself" when suing on behalf of another person or on behalf of the public. 179 U.S. at 406. Some argue that this is a precursor to modern standing doctrine, but it does not require that the plaintiff establish a harm, only an interest. Hessick, *supra* note 28, at 290–91 nn.90–91.

33. Hessick, *supra* note 28, at 279–80. Public rights are those that should be vindicated through the legislative process, such as "the right . . . to require that the Government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the federal courts a suit . . . ." Fairchild v. Hughes, 258 U.S. 126, 129–30 (1922). *See also* Woolhandler & Nelson, *supra* note 29, at 695–700 (explaining this position).

34. *See* Hessick, *supra* note 28, at 291, 293–94; Woolhandler & Nelson, *supra* note 29, at 694.

35. Hessick, *supra* note 28, at 291. *See, e.g.*, Pierce v. Soc'y of the Sisters of the Holy Name of Jesus and Mary, 268 U.S. 510, 534–36 (1925) (holding that Society of Sisters had standing because a regulation violated its Fourteenth Amendment rights and the threat of enforcement was impacting the viability of its schools).

36. Hessick, *supra* note 28, at 293. *But see* Woolhandler & Nelson, *supra* note 29, at 710 (summarizing the position that exceptions to the "form of action" requirement demonstrate that the doctrine was not static and that the philosophy behind this doctrine protected the separation of powers; therefore, although not explicitly called "standing," the idea existed prior to the twentieth century).

37. Hessick, *supra* note 28, at 293 (citing Data Processing Serv. Org. v. Camp, 397 U.S. 150, 152 (1970)).

38. *Id.* at 295.

39. *Id.* at 296–98.

private claim standing was reintroduced to certain cases through "prudential" standing requirements.[40]

The Court cemented Article III standing[41] requirements in *Lujan v. Defenders of Wildlife*.[42] Summarizing various standing cases, the Court set out the following Article III standing requirements: (1) an injury-in-fact, (2) causation that is "fairly traceable" to the challenged conduct, and (3) redressability of the injury by the remedy sought.[43] Further, the injury must be "(a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical."[44]

The *Lujan* Article III standing standards are constitutional requirements that cannot be overridden by Congressional action.[45] The Supreme Court has proposed that these requirements are essential to the separation of powers because they ensure that the courts do not adjudicate general grievances.[46] Although the rights asserted by Defenders of Wildlife in *Lujan* were public rights, the Court explained that the standing requirements set forth in that case applied to private rights cases as well.[47]

Because of the way standing requirements have evolved, the Court has tailored Article III standing requirements for certain private rights.[48] These

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40. *Id.* at 297. *See also infra* Parts I.B and I.C.

41. "The judicial Power shall extend to all Cases . . . [and] to Controversies . . . ." U.S. CONST. art. III, § 2, cl. 1.

42. 504 U.S. 555, 559–61 (1992).

43. *Id.* 560–61.

44. *Id.* 560 (internal quotations omitted). Several wildlife and environmental conservation organizations sought to enjoin the promulgation of the Secretary of the Interior's interpretation of the reach of the Endangered Species Act because it construed the Act as inapplicable to U.S. projects overseas. *Id.* at 562–63. Defenders of Wildlife argued that it had standing to challenge the claim because it desired to observe endangered species overseas and might not be able to if the environmental regulations did not apply abroad. *Id.* at 558–59. The Court determined that the evidence submitted to support the Defenders of Wildlife's alleged injury was insufficient to satisfy the injury-in-fact requirement. *Id.* at 564–67. None of the plaintiffs had shown specific plans to travel abroad to observe the animals nor their potential interest in studying the animals that may be harmed should the regulation not apply abroad. *Id.* at 564.

45. ERWIN CHEMERINSKY, FEDERAL JURISDICTION, 59–60 (4th ed. 2003). *But see* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885 (1983) ("Personally, I find this bifurcation [between prudential and constitutional standing] unsatisfying—not least because it leaves unexplained the Court's source of authority for simply granting or denying standing . . . . [I believe that] the Court must always hear the case of a litigant who asserts the violation of a legal right.").

46. *See, e.g.*, *Lujan*, 504 U.S. at 576 ("[I]n ignoring the concrete injury requirement . . . , [the courts or Congress] would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those 'Cases' and 'Controversies' that are the business of the courts rather than of the political branches."). *See also* Hessick, *supra* note 28, at 299–300 ("[A]s late as 1980 the Court expressly rejected the formalist notion that standing was based on separation of powers and instead based the requirement on the functional ground that it would improve the quality of litigation . . . .").

47. *Lujan*, 504 U.S. at 578. *See also* Hessick, *supra* note 28, at 299–304 (describing how *Lujan* was subsequently applied to private rights cases).

48. Scalia, *supra* note 45, at 885–86.

constitute prudential standing requirements and include limitations on third-party and taxpayer standing as well as the requirement for the claim to fall within a challenged statute's "zone of interests."[49] In the context of standing in chilling effect challenges to speech codes, the pre-enforcement doctrine and the overbreadth doctrine are two important exceptions to the limitations on third-party standing.[50]

B. Pre-enforcement Standing

Pre-enforcement standing covers cases in which "it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."[51] In *Babbitt v. United Farm Workers National Union*,[52] the Court reviewed the application of this rule in a constitutional challenge to provisions in an Arizona labor statute.[53] United Farm Workers National Union (UFW) alleged that union election procedure statutes, which would result in civil and criminal liability if not followed, violated its free speech and association rights.[54] After the lower court decided that these statutes were unconstitutional, Governor Babbitt appealed on justiciability grounds, arguing that the statutes did not apply to UFW's conduct.[55] Discussing whether a case or controversy existed, the Court stated:

> When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists *a credible threat of prosecution* thereunder, he "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."[56]

The existence of a "credible threat of prosecution" became the standard for establishing injury-in-fact in a pre-enforcement challenge, and subsequent case law established several ways it could be satisfied.[57]

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49. CHEMERINSKY, *supra* note 45, at 60.

50. *See infra* Parts I.B, I.C (describing the pre-enforcement and overbreadth doctrines and their importance in preventing a plaintiff from having to expose him or herself to liability or prove that a personal right was violated in order to establish standing).

51. Steffel v. Thompson, 415 U.S. 452, 459 (1974).

52. 442 U.S. 289 (1979).

53. *Id.* at 292. This case pre-dates the "injury-in fact" requirement established in *Lujan*. *See supra* Part I.A. Nevertheless, it provides insight into the Court's approach to justiciability.

54. Babbitt v. United Farm Workers Nat'l Union, 449 F. Supp. 449, 450–51 (D. Ariz. 1978).

55. *Babbitt*, 442 U.S. at 293, 297.

56. *Id.* at 298 (citing Doe v. Bolton, 410 U.S. 179, 188 (1973) (emphasis added)).

57. *See id.* (applying the "credible threat of enforcement" standard); *see also infra* Part I.B.1–6 (discussing subsequent case law).

1. Previously Engaging in Conduct Arguably Proscribed by the Statute with an Intention to Continue

In *Babbitt*, the Court found that UFW had standing because it previously engaged in the proscribed conduct and intended to do so again in the future.[58] In its 2013 term, the Supreme Court applied this same principle in *Susan B. Anthony List v. Driehaus*.[59] Susan B. Anthony List (SBA), a pro-life advocacy group, challenged the constitutionality of an Ohio statute that prohibited allegedly "false statements" in political campaigns as determined by a state government commission.[60] SBA campaigned against certain members of Congress for supporting the Affordable Care Act (ACA) and, therefore, taxpayer-funded abortion.[61] Candidate Driehaus filed a complaint about these assertions against SBA before the Ohio Elections Commission (OEC), which issued a probable cause finding that SBA violated the statute.[62] In response, SBA filed suit in federal district court, claiming that the statute violated its First and Fourteenth Amendment rights.[63] Driehaus withdrew his claim after he lost the election, but SBA's district court case continued on the amended grounds that SBA intended to make similar statements in future elections.[64]

A unanimous Supreme Court reversed the lower court's determination that SBA had no standing once the election was over.[65] The Court held that SBA "alleged a credible threat of enforcement" because it intended to participate in future election campaigns in a similar manner.[66] The Court also noted that

58. *Babbitt*, 442 U.S. at 301–03. The Court reaffirmed this principle in *Holder v. Humanitarian Law Project*, in which the plaintiffs challenged a federal statute because it "prohibit[ed] them from engaging in certain specified activities" even though they had not been punished under the statute. 561 U.S. 1, 14 (2010). Citing *Babbitt*, the Court found that Humanitarian Law Project had standing because it had engaged in the conduct prohibited under the statute prior to its enactment and intended to continue. *Id.* at 15–16.

59. 134 S. Ct. 2334 (2014).

60. *Id.* at 2338.

61. *Id.* at 2339. Whether the ACA constitutes taxpayer-funded abortion is disputed. *Id.* at 2339 n.2.

62. *Id.* at 2339.

63. *Id.*

64. *Id.* at 2340.

65. *Id.* at 2340–41. The district court concluded that a sufficient injury-in-fact was not present for standing or ripeness. *Id.* at 2340. The Sixth Circuit affirmed with respect to ripeness only. *Id.*

66. *Id.* at 2343. The Court also found that the statute "arguably . . . proscribed" SBA's speech and would continue to do so as long as SBA intended to engage in similar speech. *Id.* at 2344 (citing Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979)). The Court also found that the threat of future enforcement was "substantial" because of the Commission proceedings and the "threat of criminal sanctions" under the statute. *Id.* at 2345–46. In reaching this conclusion, the Court stated, "we need not decide whether that threat [of Commission proceedings] standing alone gives rise to Article III injury . . . [because they are] backed by the additional threat of criminal prosecution." *Id.* at 2346.

SBA's speech "focuses on the broader issue of support for the ACA," not just Driehaus' support for it.[67]

The Coalition Opposed to Additional Spending and Taxes (COAST) also claimed that the Ohio provisions were unconstitutional.[68] Because of the charges pending against SBA, COAST did not distribute literature in opposition to candidates' support for the ACA as it had intended to do.[69] The lower courts dismissed this claim for lack of standing and the Supreme Court reversed.[70] The Court found that COAST had standing because it "ha[d] alleged an intent to engage in the same speech that was the subject of a prior enforcement proceeding . . . [and] ha[d] been the subject of Commission proceedings in the past."[71]

Both *Babbitt* and *Susan B. Anthony List* support the idea that evidence of past conduct proscribed by the statute with an intent to continue such conduct is sufficient to establish injury-in-fact.[72] Further, the credible threat of enforcement standard can be satisfied with evidence of prior enforcement, even if under separate but similar regulations and for different speech.[73]

2. No Evidence of Past Conduct is Required When the Statute Renders the Conduct Futile

Evidence of past conduct is not always required.[74] For example, in *Babbitt*, the Court found that UFW had standing to challenge the statutory election procedures even though UFW had not previously engaged or asserted a subsequent intention to engage in elections.[75] The Court reasoned that UFW had not participated in elections because the statute prevented them from doing so in an efficient way, thereby making the process "futil[e]."[76] Further, "awaiting appellees' participation in an election would not assist [the] resolution of the threshold question [of] whether the election procedures are subject to scrutiny under the First Amendment at all."[77] Therefore, if a plaintiff demonstrates that the challenged regulation renders the desired conduct futile, evidence of past conduct is not required.

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67. *Id.* at 2344 ("Because petitioners' alleged future speech is not directed exclusively at Driehaus, it does not matter whether he 'may run for office again.'").

68. *Id.* at 2340, 2346.

69. *Id.* at 2340.

70. *Id.* 2340–41.

71. *Id.* at 2346 (citing COAST Candidates PAC v. Ohio Elections Comm'n, 543 F. App'x 490 (6th Cir. 2013), *vacated* 134 S. Ct. 2840 (2014), in which COAST was charged under OHIO REV. CODE ANN. § 3517.22(B)(2) for allegedly tweeting false statements about a ballot proposal).

72. *See supra* notes 58–60, 71 and accompanying text.

73. *See supra* note 70 and accompanying text.

74. *See, e.g.*, Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 299–301 (1979).

75. *Id.* at 299.

76. *Id.* at 300.

77. *Id.* at 301.

3. No Evidence of Past Speech is Required When the Statute Renders the Speech Illegal

In *Babbitt*, UFW argued that its speech was chilled by a consumer publicity clause that made "the use of dishonest, untruthful and deceptive publicity" unlawful.[78] Although UFW did not intend to be dishonest, the statute forced them to restrain their publicity efforts because "erroneous statement[s are] inevitable in free debate."[79] On this basis, the Court found the facial threat of prosecution sufficient to satisfy the injury requirement.[80]

Similarly, in *Susan B. Anthony List*, the challenged statute made it illegal to "[p]ost, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not."[81] Driehaus argued that SBA lacked standing "because SBA ha[d] not said it 'plans to lie or recklessly disregard the veracity of its speech.'"[82] Referencing *Babbitt*, the Court stated that, "[n]othing in this Court's decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate that law."[83] From the Court's comments in *Babbitt* and *Susan B. Anthony List*, it can be inferred that misleading statements are a part of everyday discourse.[84]

4. Threat of Enforcement Must Be Directly Tied to Speech

In *Laird v. Tatum*,[85] the Court considered standing in a First Amendment challenge to an Army surveillance program on grounds that it chilled the plaintiffs' speech.[86] In response to violent uprisings in the late 1960s, the Army began to gather intelligence about lawful political organizations in the event that domestic insurrections would require military intervention.[87] Tatum, Secretary of the Central Committee for Conscientious Objectors, and several other political organizations argued that the gathering of the information chilled their speech.[88] The Court determined that Tatum did not have standing because the intelligence gathering effort did not explicitly prohibit speech, a key

78. *Id.* (quoting ARIZ. REV. STAT. ANN. § 23-1385(B)(8) (2014)).

79. *Id.* (quoting New York Times v. Sullivan, 376 U.S. 254, 271 (1964)).

80. *Id.* at 302.

81. Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2338 (2014) (citing OHIO REV. CODE ANN. § 3517.21(B)(10) (West 2013)).

82. *Id.* at 2344.

83. *Id.* at 2345 (citing *Babbitt*, 442 U.S. at 301).

84. *Id.* at 2342–43 (explaining that "erroneous statement is inevitable in free debate") (quoting *Babbitt*, 442 U.S. at 301).

85. 408 U.S. 1 (1972).

86. *Id.* at 3.

87. *Id.* at 3–6.

88. *Id.* at 10.

differentiating factor relative to other pre-enforcement cases.[89] Therefore, when challenging a regulation for its chilling effect on speech, standing under the pre-enforcement doctrine requires that the regulation directly proscribe speech.[90]

5. Government Comments on Enforcement

To disprove a plaintiff's allegation of a threat of enforcement under a challenged statute, the government will sometimes state its intention not to enforce the statute in certain circumstances, as was the case in *United States v. Stevens*.[91] Stevens brought a facial First Amendment challenge to a federal statute that criminalized commercial-use depictions of animal cruelty.[92] In response, the government argued that it would use discretion in enforcing the challenged statute.[93] The Supreme Court rejected this argument, stating that "the First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."[94] Therefore, government statements about the non-enforcement of a regulation do not automatically nullify the credible threat of the enforcement requirement in a pre-enforcement challenge.[95]

6. Reputational Risk is a Sufficient Injury

The Court has also found the potential reputational damage resulting from a negative statutory classification of speech a sufficient injury.[96] In *Meese v. Keene*,[97] an attorney wishing to show films classified as "political propaganda" under the Foreign Agents Registration Act of 1938[98] challenged the Act's

89. *Id.* at 12–14. *Laird* was confirmed in *Clapper v. Amnesty International USA*. 133 S. Ct. 1138, 1152–53 (2013). Amnesty International and several other plaintiffs argued that they were injured by the likelihood that the government would record their speech under the FISA surveillance program at some point. *Id.* at 1145–46. The Court determined that the injury was too speculative to establish standing. *Id.* at 1143.

90. *See Laird*, 408 U.S. at 11–13; *see also supra* Part I.B.1.

91. 559 U.S. 460, 480 (2010).

92. *Id.* at 461–67. Stevens owned a business that profited from the creation and sale of dog-fighting videos. *Id.* at 466. Stevens was convicted of violating the statute and moved to dismiss the charges because the statute was "facially invalid under the First Amendment." *Id.* at 467.

93. *Id.* at 480.

94. *Id.* The Court explained that the mere fact that the government had to qualify its use of the statute indicated its possible unconstitutionality. *Id.* ("[This statement] is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading."). *See also* DeJohn v. Temple Univ., 537 F.3d 301, 309–10 (3d Cir. 2008) (determining that the plaintiff had standing even though the university ceased using the challenged provision during the litigation because the university continued to argue for the constitutionality of its program and did not state whether it would subsequently reinstate the provision).

95. *See, e.g.*, *Stevens*, 559 U.S. at 480.

96. Meese v. Keene, 481 U.S. 465, 473–74 (1987).

97. 481 U.S. 465 (1987).

98. 22 U.S.C. §§ 611–21 (1995).

definition of "political propaganda" on First Amendment grounds.[99] In determining whether the Act injured Keene, the Court found that showing films "classified as 'political propaganda' . . . would substantially harm his chances of reelection and would adversely affect his reputation in the community."[100] Although he could have distributed disclaimers about the content, the Court determined that the reputational risk was a sufficient injury.[101]

C. The First Amendment "Overbreadth" Exception to the Prudential Limitation on Third-Party Standing

One of the prudential limitations on standing is the limitation on third-party standing.[102] However, if a plaintiff has suffered another form of injury, he or she may establish standing based on the violation of a third-party's First Amendment rights even when the relevant government conduct has not violated his or her First Amendment rights personally.[103] This exception to the prudential rule is called the "overbreadth doctrine" and is applied when a plaintiff claims that a law violates the First Amendment because it is overly broad.[104]

The Court has discussed the requirements of the overbreadth doctrine in many cases.[105] In *Broadrick v. Oklahoma*,[106] several civil servants challenged a state statute restricting their political activity.[107] Broadrick acknowledged that the statute properly proscribed his conduct,[108] but argued that it was facially unconstitutional because it was overbroad and vague.[109] The Court acknowledged that in First Amendment overbreadth challenges the plaintiff was not always required to engage in conduct regulated by the statute.[110] Instead, plaintiffs "are permitted to challenge a statute . . . because of a judicial prediction or assumption that the statute's very existence may cause others not before the

99. *Meese*, 481 U.S. at 467–68.

100. *Id.* at 474.

101. *Id.* at 475–76.

102. CHEMERINSKY, *supra* note 45, at 83–84 ("[A] plaintiff can assert only injuries that he or she has suffered; a plaintiff cannot present the claims of third parties who are not part of the lawsuit.").

103. *Id.* at 87.

104. *Id.* at 88 (explaining that this exception arises from the chilling effect that an overbroad law has on protected speech).

105. *See, e.g.*, Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947 (1984); Broadrick v. Oklahoma, 413 U.S. 601 (1973); Dombroski v. Pfister, 380 U.S. 479 (1965).

106. 413 U.S. 601 (1973).

107. *Id.* at 602. Although *Broadrick* is frequently cited for establishing the overbreadth doctrine, the Court found that the plaintiffs did not have standing because the third-party conduct allegedly chilled by the statute was not plainly in the statute's "legitimate sweep." *Id.* at 615–16.

108. *Id.* at 609–10.

109. *Id.* at 606–07.

110. *Id.* at 612.

court to refrain from constitutionally protected speech or expression."[111] In other words, plaintiffs have standing to challenge a statute because of the statute's chilling effect.

The Court reiterated this position in *Secretary of State of Maryland v. Joseph H. Munson Company*.[112] Munson, a company that promoted fundraising events, challenged a statute that restricted the amount of contributions charities could pay to cover solicitation costs.[113] Out of fear of punishment under the statute, a charity refused to enter into a contract with Munson, thereby costing the company business.[114] Although the charity did not provide evidence of its inability to bring its own suit,[115] the Court found that Munson had standing because "challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society—to prevent the statute from chilling the First Amendment rights of other parties not before the court."[116] However, Munson still had to demonstrate an injury under the challenged law, even if not a violation of its First Amendment rights.[117] The Court then considered if this injury would allow Munson to "satisfactorily . . . frame the issues in the case."[118] The Court found Munson's loss of business was an adequate injury and provided sufficient incentive for him to properly argue the case.[119]

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111. *Id.* (summarizing the Court's holding in *Dombroski v. Pfister* that "attacks on overly broad statutes [did not require] that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." 380 U.S. 479, 486 (1965)).

112. 467 U.S. 947, 957 (1984).

113. *Id.* at 950–51.

114. *Id.* at 954.

115. *Id.* at 957. This is unique because one of the third-party standing exceptions is instances in which an injured party is unlikely to be able to sue. CHEMERINSKY, *supra* note 45, at 84.

116. *Munson*, 467 U.S. at 958.

117. *Id.*

118. *Id.* The latter issue is a prudential standing standard demonstrating the Court's concern that if a plaintiff does not have a great enough personal stake in the case, the requisite adversarial positioning and the arguments necessary to make a proper constitutional decision will not exist. *Id.* at 956. *See also* Baker v. Carr, 369 U.S. 186, 204 (1962) (explaining that the prohibition on third-party standing was meant "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions"); CHEMERINSKY, *supra* note 45, at 83 (explaining that the third-party standing limitation is thought to "improve[] the quality of litigation and judicial decision-making").

119. *Munson*, 467 U.S. at 958. The overbreadth doctrine is not without limits. In *Broadrick v. Oklahoma*, the Court emphasized that it should only be employed as a "last resort." 413 U.S. 601, 613 (1973). The Court explained:

> The consequence of our departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression. Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth

D. Standing and Academic Freedom

Largely through a series of Cold War era cases, the Court has given full protection for First Amendment rights in academia. In *Shelton v. Tucker*,[120] teachers and teacher associations challenged the constitutionality of a statute that required all employees of state-supported educational institutions to annually file a list of organizations to which they belonged or contributed.[121] In finding the statute an unconstitutional deprivation of associational rights, the Court stated that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[122]

This concern was also demonstrated in *Healy v. James*,[123] in which the Court held a state college's decision not to officially recognize an organization unconstitutional.[124] The state college refused to recognize the organization partially on the basis that the "organization's philosophy was antithetical to the school's policies."[125] In response, the Court stated that "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."[126]

In *Keyishian v. Board of Regents of the University of New York*,[127] the Court found a requirement that all professors at public schools sign a certificate stating that they were not and had not been a communist unconstitutionally

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has not been invoked when a limiting construction has been or could be placed on the challenged statute.

Id. The Court also noted that the overbreadth exception should be applied more strictly as the arguably unprotected behavior moves from "pure speech" to conduct. *Id.* at 614.

120. 364 U.S. 479 (1960).

121. *Id.* at 482–83.

122. *Id.* at 487. The Court also cited the concurring opinion in *Wieman v. Updegraff*, which stated:

> [I]n view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers.

344 U.S. 183, 195 (1952).

123. 408 U.S. 169 (1972).

124. *Id.* at 183–84.

125. *Id.* at 174–75, 183–84. The organization was the Students for a Democratic Society, which was instrumental in sometimes violent protests on college campuses across the country during the 1960s. *Id.* at 171. The Central Connecticut State College (CCSC) chapter at issue had declared its independence from international movements, but the President was not satisfied that this was true. *Id.* at 172, 174–75. After outlining various errors with the First Amendment claim, the Court remanded the case because the facts were ambiguous enough to leave open the possibility that non-recognition was permissible. *Id.* at 184–85.

126. *Id.* at 180–81 (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

127. 385 U.S. 589 (1967).

overbroad.[128] The University imposed the requirement to ensure compliance with a state statute that required removal of employees who would potentially "utter[] any treasonable or seditious word or words."[129] Keyishian sued after his contract was not renewed when he refused to comply.[130] In its ruling, the Court reiterated the notion of academic freedom expressed in *Shelton* stating, "[academic] freedom is . . . a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[131] The Court also observed that "[t]he danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed."[132] These cases support the extra vigilance required for free speech claims in academia.[133]

II. CIRCUIT COURTS DISAGREE OVER THE THRESHOLD EVIDENCE REQUIRED TO ESTABLISH A "CREDIBLE THREAT OF ENFORCEMENT"

Article III standing requires that the plaintiff allege a concrete injury, but in cases where injury would result only after the plaintiff subjects himself to punishment, injury can be shown through a "credible threat of enforcement."[134] The Supreme Court has tailored the injury-in-fact requirements for "pre-enforcement" challenges wherein the self-censorship provoked by the threat of prosecution is itself an injury that fulfills this prong of the standing requirements.[135] The courts have also tailored these requirements when the proscribed conduct arguably violates an individual's First Amendment rights.[136] And in academic settings, the Court finds First Amendment rights of particular importance.[137]

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128. *Id.* at 592–93.

129. *Id.* at 593.

130. *Id.* at 592. Several other teachers also sued and all sought declaratory and injunctive relief. *Id.*

131. *Id.* at 603. Earlier cases, like *Keyishian*, focused on "a person's liberty to work in his chosen profession free from political scrutiny." Julia H. Margretta, Comment, *Taking Academic Freedom Back to the Future: Refining the "Special Concern of the First Amendment,"* 7 LOY. J. PUB. INT. L 1, 1–2 (2005). However, more recent theories seem to use the notion of academic freedom to ensure that institutions run with minimal outside interference. *Id.* For example, in *Grutter v. Bollinger*, the Court's decision to uphold race-based admissions processes looked at the importance of "[t]he freedom of the university to make its own judgments as to education." 539 U.S. 306, 329 (2003), *superseded by constitutional amendment*, MICH. CONST. art. I, § 26 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978)). One explanation for this difference may be that *Keyishian* was a First Amendment case and *Grutter* was not.

132. *Keyishian*, 385 U.S. at 604.

133. *See supra* notes 122, 125–26, 131–32 and accompanying text.

134. *Supra* Part I.B.

135. *See supra* Part I.B.1–4.

136. *See supra* Part I.C.

137. *See supra* Part I.D.

Nevertheless, the circuit courts are split regarding the application of these standards to standing in chilling effect challenges to public university speech codes.[138] To establish an injury-in-fact, the Fourth and Ninth Circuits require actual enforcement against the plaintiff or a similarly situated person.[139] On the other hand, the Third Circuit has found standing when the plaintiff simply alleges that his intended speech falls within the speech punishable under the challenged code.[140]

A. Standing Requires Concrete Evidence of Enforcement

Doe v. University of Michigan[141] is the first reported case in which a student litigated a challenge to a university speech code.[142] Doe was a graduate student concerned that his discussion of theories asserting biological differences between sexes and races would label him a "sexist" and "racist," therefore, subjecting him to punishment under the school's speech code.[143] As a result, his speech was chilled and he challenged the code as facially overbroad and vague.[144]

Under the pre-enforcement standing doctrine, the court found that Doe was qualified to litigate his claim because he rightly perceived a credible threat of enforcement based on the history of the policy's enactment and past enforcement:[145] the university created the policy in response to certain students' racial remarks that offended other students,[146] the policy's interpretive guide included examples of punishable speech that mirrored the statements Doe intended to make,[147] and the school had enforced the policy against other students for discussing controversial ideas in class.[148] In subsequent cases, the Fourth and Ninth Circuits similarly required that the plaintiff provide specific

138. Challenges to public university speech codes on chilling effect grounds that have actually gone to trial are limited. *See* Majeed, *supra* note 10, at 488–94 (providing an overview of each of the cases). Those in which standing has been an issue are the five discussed *infra* Parts II.A–B, III. However, groups like FIRE continue to support students in challenging speech codes in less formal ways. *See Free Speech*, THE FIRE, http://www.thefire.org/category/cases/free-speech/ (last visited Sept. 20, 2014).

139. *See infra* notes 158–76 and accompanying text.

140. *See infra* notes 186–90 and accompanying text.

141. 721 F. Supp. 852 (E.D. Mich. 1989).

142. Majeed, *supra* note 10, at 488; Doe v. Univ. of Mich., 721 F. Supp. 852, 853–54 (E.D. Mich. 1989).

143. *Doe*, 721 F. Supp at 858. The speech code was in the form of an anti-discrimination disciplinary policy that regulated speech based on location and type, the violation of which could result in sanctions from formal reprimands to expulsion. *Id.* at 856–57.

144. *Id.* at 858.

145. *Id.* at 859–61.

146. *Id.* at 860.

147. *Id.*

148. *Id.* at 860–61.

evidence of enforcement when challenging a public university speech code, essentially requiring an actual threat of punishment.[149]

In *Lopez v. Candaele*,[150] the Ninth Circuit reviewed the district court's ruling that the plaintiff had standing to challenge a college speech code.[151] Lopez was a student at Los Angeles City College (LACC), which adhered to the L.A. Community College District's sexual harassment policy.[152] While giving an informative speech to his Speech 101 class about God's impact on his life, Lopez was halted by the professor when he stated that marriage was to be between a man and a woman.[153] Lopez notified the Dean of Student Affairs about the incident and, upon learning this, the professor threatened Lopez with the possibility of expulsion.[154] The Dean asserted that action was taken against the professor who had not acted in accordance with the school's policies, but no action was taken against Lopez.[155]

Lopez asserted a First Amendment challenge on the grounds that the policy was overbroad and vague.[156] The district court found that Lopez had standing because he was a student at LACC who had censored his speech based on a legitimate fear that he could be punished under the sexual harassment policy.[157] The Ninth Circuit reversed, finding that Lopez had not established an injury because he had not "ma[d]e a clear showing that his intended speech . . . gave rise to a specific and credible threat of adverse action."[158]

To determine whether Lopez established a credible threat of enforcement, the court considered whether he showed a "reasonable likelihood" that the policy would be administered against him, whether he intended to violate the law, and whether the terms or the government's interpretation of the policy rendered it inapplicable to him.[159] The court found that Lopez failed to meet these

149. *See, e.g.*, Lopez v. Candaele, 630 F.3d 775, 789 (9th Cir. 2010) ("Matteson's comment does not indicate that Lopez's speech on marriage or religion would constitute sexual harassment or otherwise violate the sexual harassment policy. Nor does Matteson's comment constitute a threat to initiate proceedings if Lopez made such remarks on marriage or religion."); Rock for Life-UMBC v. Hrabowski, 411 F. App'x 541, 548 (4th Cir. 2010) (noting that "the plaintiffs [did] not allege facts suggesting that [University of Maryland, Baltimore County] officials ever threatened to punish their speech as sexual harassment").

150. 630 F.3d 775 (9th Cir. 2010).

151. *Id.* at 784. The district court found that "Lopez had standing to bring a facial challenge to the policy because it applied to Lopez by virtue of his enrollment at LACC, the policy likely reached the speech in which Lopez wanted to engage, and Lopez has censored himself for fear of discipline under the policy." *Id.*

152. *Id.* at 781.

153. *Id.* at 782–83.

154. *Id.* at 783.

155. *Id.* at 783–84.

156. *Id.* at 784.

157. *Id.*

158. *Id.* at 781.

159. *Id.* at 786.

requirements, giving minimal consideration to his claim of self-censorship.[160] For example, the court stated that "[c]omparing Lopez's past and proposed future speech to the plain language of the District's sexual harassment policy, we do not see . . . how the policy applies to him."[161] In other words, what mattered was the court's perception of chilled speech, rather than Lopez's perception.[162]

The Fourth Circuit resolved a pre-enforcement speech code challenge similarly. In *Rock for Life-UMBC v. Hrabowski*,[163] the court ruled that a pro-life student organization, Rock for Life, did not have standing to bring a facial challenge against the University of Maryland Baltimore County's (UMBC) code of conduct and sexual harassment policies on chilling effect grounds.[164] Rock for Life sought approval to display pro-life posters on campus, but school administrators denied their request to have the display in the University Plaza Center after commenting that "students might feel 'emotionally harassed' by the display."[165] Eventually the administration agreed to allow the display at another location, the Commons Terrace, but subsequently changed the location another two times, including once while Rock for Life was setting up the display.[166] The final location was the much less "trafficked" North Lawn, rather than the Commons Terrace.[167] Further, when the group requested permission to show the display at the Commons Terrace after the first display occurred without issue, the request was denied.[168]

Rock for Life sued on the basis that the facilities use policy, code of conduct, and sexual harassment policy chilled its speech in violation of its right to free expression.[169] The court acknowledged the more lenient pre-enforcement standing requirements in First Amendment cases, but emphasized the need for Rock for Life to provide concrete evidence of an injury-in-fact.[170]

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160. *Id.* at 792. However, the court's conclusion fails to acknowledge the numerous examples of how the school's sexual harassment policy could be broadly interpreted. *See, e.g.*, Answering Brief of Plaintiff-Appellee at 50–55, Lopez v. Candaele, 630 F.3d 775 (9th Cir. 2010) (No. 09-56238) ("Lopez has previously discussed and desires to discuss in the future his Christian views on politics, morality, social issues, religion, and the like. . . . Due to the constant threat of enforcement of the speech code . . . Lopez has modified his behavior and self-censored his speech . . . .").

161. *Lopez*, 630 F.3d at 790.

162. *Id.* at 792 ("[O]ur inquiry into injury-in-fact does not turn on the strength of plaintiffs' concerns about a law, but rather on the credibility of the threat that the challenged law will be enforced against them.").

163. 411 F. App'x 541 (4th Cir. 2010).

164. *Id.* at 549.

165. *Id.* at 543–45.

166. *Id.* at 544–45.

167. *Id.* at 545.

168. *Id.*

169. *Id.* at 545, 549.

170. *Id.* at 548.

In considering whether the sexual harassment policy inflicted a concrete injury on Rock for Life, the court applied the overbreadth exception to third-party standing.[171] Citing *Lopez*, the court noted that it would be sufficient for a plaintiff to show how the policy could be enforced in the future or to provide evidence of a threat to apply or the actual application of the policy against the plaintiff or another "similarly-situated part[y]."[172] The court explained that the injury of "subjective chill requires some specific action on the part of the defendant in order for the litigant to demonstrate an injury-in-fact."[173] The court determined that Rock for Life satisfied neither of these requirements, in part because the University permitted the display, albeit after changing the location several times.[174] Further, despite the UMBC general counsel's concern that the display would "emotionally harass[]" students and the university police's routine investigation of "harassment incidents involving speech,"[175] the court found no evidence of threatened punishment under the sexual harassment policy.[176]

Lopez and *Rock for Life-UMBC* establish the Fourth and Ninth Circuit view that in pre-enforcement claims, the credible threat of enforcement needed to establish injury-in-fact requires actual threatened or enforced punishment.[177]

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171. *Id.* at 547–48.

172. *Id.* at 548.

173. *Id.* at 549 (citing Morrison v. Bd. of Educ., 521 F.3d 602, 609 (6th Cir. 2008)). The University amended the Code of Conduct so that it was not unconstitutionally overbroad or vague, but the plaintiffs retained their suit on the basis that the administration's use of the language contained in the original policy chilled their speech. *Id.*

174. *Id.* at 548–49. "[T]he plaintiffs [cannot] characterize the defendants' decision to move the GAP display to the North Lawn as a non-disciplinary enforcement of the code." *Id*. at 549.

175. Opening Brief of Plaintiff-Appellee at 34–35, Rock for Life-UMBC v. Hrabowski, 411 F. App'x 541 (4th Cir. 2010) (No. 09-1892).

176. *Rock for Life-UMBC*, 411 F. App'x at 548–49. "If the defendants considered the display to be emotional harassment, then it was equally so on either the North Lawn or the Commons Terrace." *Id.* at 549. This statement is questionable because the plaintiffs allege that the Commons Terrace is "highly-trafficked" and the North Lawn is not, demonstrating that the school's intention may have been to restrict the message by reducing the audience. *See* Opening Brief of Plaintiff-Appellee at 5.

177. *See* Lopez v. Candaele, 630 F.3d 775, 786 (9th Cir. 2010); *Rock for Life-UMBC*, 411 F. App'x at 547. At first glance, the *Doe v. University of Michigan* decision seems to indicate that courts in the Sixth Circuit have the same standard as the Fourth and Ninth. 721 F. Supp. 852, 859 (E.D. Mich. 1989). Yet, in *Dambrot v. Central Michigan University*, the Sixth Circuit allowed students to assert an overbreadth challenge to the University's discriminatory harassment policy, even though the university had not applied it against them. 55 F.3d 1177, 1180–82 (6th Cir. 2004). The University charged its basketball coach, Dambrot, with violating the harassment policy for using the word "nigger" in a game locker room session and terminated his employment. *Id.* at 1180–81. Dambrot sued in part alleging that the termination violated his First Amendment rights. *Id.* at 1181. His players also sued claiming the policy was overbroad and vague and infringed upon First Amendment rights. *Id.* Although standing was not at issue, the Sixth Circuit upheld the lower court's decision for the student plaintiffs that the policy was overbroad citing *Broadrick* and *Doe* amongst other cases. *Id.* at 1182–83.

Therefore, in these circuits, a plaintiff's subjective claim of chilled speech is insufficient.[178]

B. Standing Only Requires a Plaintiff's Statement of Intended Speech and How It Could Be Punishable Under the Challenged Code

The Third Circuit has interpreted the injury-in-fact requirement of Article III standing in pre-enforcement challenges less strictly than the Ninth and Fourth Circuits, finding the standing requirements satisfied solely based on the plaintiff's assertion that a speech code had a chilling effect.[179]

In *Bair v. Shippensburg University*,[180] a current student and a former student of Shippensburg University challenged various sections of its code of conduct on overbreadth grounds.[181] They asserted that they were "reluctant" to speak about controversial issues and were members of campus organizations that stood for beliefs potentially punishable under the code.[182] The court interpreted the overbreadth doctrine to permit "facial review and invalidation [of a regulation], even though its application in the case under consideration may be constitutionally unobjectionable . . . 'based on an appreciation that the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the Court.'"[183] The court found the plaintiffs' allegations of chill as a sufficient injury, stating that they "constitute harm that is more than merely speculative . . . [because they] have asserted that both of their past, and Walter Bair's continuing, fears of prosecution . . . have had a chilling effect on their speech."[184] The court required no other evidence.[185]

The Third Circuit affirmed the *Shippensburg* approach in *McCauley v. University of the Virgin Islands*.[186] McCauley, a University of the Virgin Islands (UVI) student who faced harassment charges, challenged several provisions of

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178. *See, e.g.*, *Rock for Life-UMBC*, 411 F. App'x at 549 (finding that "[a]ny subjective fear of disciplinary measures that the plaintiffs might have felt never materialized into an actual, objective harm"); *Lopez*, 630 F.3d at 792 (stating that "our inquiry into injury-in-fact does not turn on the strength of plaintiffs' concerns about a law").

179. *See, e.g.*, McCauley v. Univ. of the V.I., 618 F.3d 232, 238 (3d Cir. 2010); Bair v. Shippensburg Univ., 280 F. Supp. 2d 357 (M.D. Pa. 2003).

180. 280 F. Supp. 2d 357 (M.D. Pa. 2003).

181. *Id.* at 361–63, 367. The Code of Conduct included phrases such as "the expression of one's beliefs should be communicated in a manner that does not provoke, harass, intimidate, or harm another." *Id.* at 363.

182. *Id.* at 365.

183. *Id.* at 364–65 (quoting Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 129 (1992)) (internal quotations omitted).

184. *Id.* at 365. In contrast, the *Doe* court analyzed Doe's standing based purely on the pre-enforcement exception. Doe v. Univ. of Mich., 721 F. Supp. 852, 858–61 (1989).

185. *Bair*, 280 F. Supp. 2d at 365 (holding that "[o]n th[e] basis [of Bair's fear of prosecution], we find that Plaintiffs have standing to challenge the constitutionality of the University Speech Code").

186. 618 F.3d 232, 238 (3d Cir. 2010).

the student code of conduct, including those under which he was not convicted.[187] In the lower court, McCauley claimed that the unenforced policies were overbroad and had a "chilling effect on [his] and other students' right to freely and openly engage in appropriate discussions on theories, beliefs, ideas, and to debate such ideas with persons holding opposing viewpoints."[188] The lower court found that he had standing for these claims because he had been disciplined under other provisions of the code of conduct.[189] The Third Circuit upheld this decision on the basis that the court should "freely grant[] standing to raise overbreadth claims."[190]

Unlike the approach taken in the Ninth and Fourth Circuits, both of which have adopted a different rule for standing and pre-enforcement requirements and rejected the *McCauley* rule, the Third Circuit does not require evidence of threats or actual enforcement of a policy to establish standing.[191] The plaintiff merely needs to provide an example of his or her intended speech and an explanation of why the challenged policy chilled his or her speech.[192]

III. UNDERSTANDING THE CIRCUITS' DIFFERENT APPROACHES TO STANDING

When determining whether a plaintiff has standing for a claim that a speech code violates his free speech rights on chilling effect grounds, the courts incorporate the pre-enforcement and overbreadth doctrines into the injury-in-fact standard.[193]

The pre-enforcement doctrine allows citizens to challenge an unconstitutional government policy without first needing to subject themselves to prosecution by engaging in the proscribed activity.[194] The overbreadth doctrine allows plaintiffs to assert the claims of third-parties when arguing that a law prohibits

187. *Id.* at 236–39. The court considered McCauley's standing under each of the challenged provisions separately. *Id.* An example of one of the provisions McCauley challenged, even though it had not been enforced, is a prohibition on "conduct which . . . compels the victim to seek assistance in dealing with the distress." *Id.* at 239.

188. McCauley v. Univ. of the V.I., No. 2005-188, 2009 WL 2634368, at *4 (D. V.I. Aug. 21, 2009), *rev'd*, 618 F.3d 232 (3d Cir. 2010).

189. *Id.*

190. *McCauley*, 618 F.3d at 238 (citing Amato v. Wilentz, 952 F.2d 742, 753 (3d Cir. 1991)). McCauley also challenged a policy that required students to report misconduct, but the court found no standing because the policy did not prohibit speech, as had the other challenged provisions for which he had standing. *Id.* at 239.

191. *See id*. at 238–39.

192. *See id*.

193. *See supra* Part II (discussing how the circuit courts have incorporated the pre-enforcement and overbreadth doctrines into their determination of whether a plaintiff has shown injury-in-fact).

194. *See, e.g.*, Steffel v. Thompson, 415 U.S. 452, 459 (1974) (holding that there was an actual controversy for standing purposes in a § 1983 action when petitioner was threatened with arrest under state criminal trespass law in order to stop him from handing out pamphlets that protested the Vietnam war).

speech that should be protected by the First Amendment.[195] Unlike the Third Circuit, the Fourth and Ninth Circuits have not found allegations of chilled speech as a sufficient injury-in-fact, even under the pre-enforcement doctrine; therefore, plaintiffs have been unable to satisfy the personal injury requirement of the overbreadth doctrine.[196] One explanation for this difference in treatment is the lack of clarity as to how these doctrines should apply in chilling effect cases.[197]

A. The Circuits' Different Approaches to the Overbreadth Doctrine

To establish an injury-in-fact, plaintiffs must articulate their belief that their intended speech could be punishable under the challenged policy.[198] In *Doe v. University of Michigan*, Doe was able to satisfy this requirement because the University of Michigan created its speech code in direct response to racial incidents on campus and because there was substantial evidence that Doe's speech was the type targeted by the policy.[199]

In *Lopez v. Candaele*, when Lopez argued that his speech was chilled, the court deemed the link between his speech and the policy too "attenuated."[200] The court made this decision despite the policy website's recommendation that when students are "unsure if certain comments or behavior are offensive do not do it, do not say it,"[201] and the professor's threat of expulsion along with students' expressions of offense.[202] Similarly, Rock for Life provided a detailed explanation of how its speech was subject to prohibition under the challenged

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195. *See* CHEMERINSKY, *supra* note 45, at 87–89.

196. Lopez v. Candaele, 630 F.3d 775, 792–93 (9th Cir. 2010) ("Because Lopez fails to establish the necessary injury in fact, he cannot raise the claims of third parties as part of an overbreadth challenge."); Rock for Life-UMBC v. Hrabowski, 411 F. App'x 541, 547–49 (3d Cir. 2010) (applying the *Lopez* court's approach to the plaintiff's injury-in-fact under the overbreadth doctrine and finding the plaintiff did not have standing).

197. This confusion is similar to the confusion over the distinction between public and private rights and Article III standing doctrine broadly. *See, e.g.*, Hessick, *supra* note 28, at 299–306 (describing various inconsistencies in the Court's approach to injury-in-fact arising from misunderstandings over the nature of public and private rights). At one time, plaintiffs were only required to establish an injury-in-fact when claiming the violation of a public right. *See supra* notes 36–38 and accompanying text. Over time, the Supreme Court also applied the injury-in-fact requirement to private rights claims, and in so doing created several nuanced standards that lower courts have to navigate, such as the pre-enforcement and overbreadth doctrines. *See supra* notes 38–39 and accompanying text; *supra* Part II.

198. *See, e.g.*, *Lopez*, 630 F.3d at 789–91 ("[W]e consider both Lopez's stated intent to violate the policy and the likelihood that the District or LACC will enforce the policy against Lopez."); Bair v. Shippensburg Univ. 280 F. Supp. 2d 357, 365 ("Plaintiffs have asserted that both of their past, and Walter Bair's continuing, fears of prosecution pursuant to the Code of Conduct have had a chilling [effect] on their speech. On this basis, we find that Plaintiffs have standing . . . .").

199. Doe v. Univ. of Mich., 721 F. Supp. 852, 854–55, 861 (1989).

200. *Lopez*, 630 F.3d at 789.

201. Answering Brief of Plaintiff-Appellee at 7, Lopez v. Candaele, 630 F.3d 775 (9th Cir. 2010) (No. 09-56238), 2010 WL 4622608, at *7.

202. *Lopez*, 630 F.3d at 783.

policy.[203] However, the *Rock for Life-UMBC* court disregarded this argument because it considered Rock for Life's analysis as insufficient evidence of UMBC's intent to punish them under the policy.[204]

In contrast, the *McCauley* and *Shippensburg* courts did not assess the validity of the plaintiffs' statements. In *McCauley*, the court interpreted *Broadrick* to mean that McCauley could make an overbreadth claim—even though the University had not enforced certain challenged policies against him—because the University disciplined him under other provisions of the policy.[205] Similarly, the *Shippensburg* court found that Bair's prior and continuing fear of punishment "constitute[d] harm that is more than merely speculative," and, therefore, a sufficient injury.[206]

B. The Courts' Different Approaches to Comments by University Administrators Regarding Speech Code Enforcement

In denying that the plaintiffs suffered an injury-in-fact, both the *Lopez* and *Rock for Life-UMBC* courts relied on university administrators' statements about their intention to not enforce the challenged policies against the plaintiffs' speech.[207] The student group in *Rock for Life-UMBC* argued that "[t]he speech codes' mere existence indicates [the college's] intent to enforce them since public institutions do not enact dead-letter policies."[208] However, the court found it determinative that university officials had not charged Rock for Life under the sexual harassment policy when it had previously exhibited its controversial display.[209]

The outcome in *Lopez* and *Rock for Life-UMBC* may have been different if the courts had considered the Supreme Court's decision in *Stevens v. United States*, which was rendered after the *Lopez* oral argument and just a few months

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203. Opening Brief for Plaintiffs-Appellant at 38–41, Rock for Life-UMBC v. Hrabowski, 411 F. App'x 541 (3d Cir. 2010) (No. 09-1982) (explaining that not only did one of the administrators express concern that the displays at issue would impact "emotional safety," the display itself was about abortion, which it argued was clearly linked to the "issues of sex, gender roles, and sexuality" proscribed by the sexual harassment policy).

204. *Rock for Life-UMBC*, 411 F. App'x at 548–49. The court also rejected the argument that UMBC's decision to move the display and express concern that the display's content could illicit a negative emotional reaction from other students was a sufficient credible threat of enforcement. *See supra* note 176 and accompanying text.

205. McCauley v. Univ. of V.I., 618 F.3d 232, 238–39 (3d Cir. 2010). The school enforced certain provisions against McCauley, but not the ones for which standing was questioned. *Id.*

206. Bair v. Shippensburg Univ., 280 F. Supp. 2d 357, 365 (M.D. Pa. 2003).

207. *Supra* notes 155–61, 174–76 and accompanying text. In *McCauley* and *Shippensburg*, comments by the respective universities regarding the enforcement of the challenged policies did not appear in the briefs or opinion, if any were made at all.

208. Opening Brief for Plaintiffs-Appellant at 34, Rock for Life-UMBC v. Hrabowski, 411 F. App'x 541 (4th Cir. 2010) (No. 09-1982).

209. *Rock for Life-UMBC*, 411 F. App'x at 548–49.

before the *Rock for Life-UMBC* argument.[210] In *Stevens*, the Court held that the government's comments regarding the non-enforcement of an allegedly overbroad statute did not invalidate standing to bring a facial First Amendment claim against it.[211] Applying this to *Lopez* and *Rock for Life-UMBC*, the Ninth and Fourth Circuit courts may have made university officials' invocation of a non-enforcement intention less relevant.[212] For example, although the LACC administrators did not intend to punish Lopez under the circumstances in which the professor initially threatened action against him, this did not necessarily preclude him from fear of punishment or actual punishment in the future if he were to engage in similar speech.[213]

IV. STANDING REQUIREMENTS SHOULD BE SATISFIED BY A PLAINTIFF'S STATEMENT DESCRIBING THE INTENDED SPEECH AND HOW IT IS CHILLED BY THE CHALLENGED POLICY

Free speech is an individual right that should be treated as private rights were prior to the creation of modern standing doctrine: a plaintiff should only need to allege an invasion of this legal right to have Article III standing when asserting a First Amendment challenge to a public university speech code on chilling effect grounds.[214] The importance of the right to free speech is somewhat reflected in the nuances available to plaintiffs to establish an injury-in-fact, such as the pre-enforcement and overbreadth doctrines.[215] Under only very narrow

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210. U.S. v. Stevens, 559 U.S. 460 (2010), was decided on April 20, 2010. Oral argument in *Lopez* was on March 3, 2010, while that in *Rock for Life-UMBC* was on September 21, 2010.

211. *See supra* notes 92–95 and accompanying text.

212. This assumes that college or university officials had not amended the challenged provisions to remove the objectionable content. However, even then, courts have found that amendments to challenged statutes are not necessarily determinative to the standing analysis as they can be mere litigation tactics. *See, e.g.*, Am.-Arab Anti-Discrimination Comm. v. Thornburgh, 972 F.2d 501, 508 (9th Cir. 1992).

213. Answering Brief of Plaintiff-Appellee at 11–12, Lopez v. Candaele, 630 F.3d 775, 788 (9th Cir. 2010) (No. 09-56238).

214. *See supra* Part I.A. The Court seems to reject this notion in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992):

> [O]ur generalized-grievance cases have typically involved Government violation of procedures assertedly ordained by the Constitution rather than the Congress. But *there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right*. Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those "Cases" and "Controversies" that are the business of the courts rather than of the political branches.

Id. (emphasis added). However, this statement was made when considering whether the legislative branch can convert the public interest into an individual right via statute, which the Court rejects, so it is unclear whether this statement applies only to public rights or all rights. *Id.* at 576–77.

215. *See supra* Part I.B–C.

circumstances can the government abridge this right.[216] Plaintiffs with chilling effect claims should be able to satisfy the injury-in-fact requirement if they provide an example of their intended speech and how it could be chilled under the speech code.[217]

A. Chilling Effect Claims Fall Within the Nuances of the Credible Threat of Enforcement Standard

In existing pre-enforcement cases, the Supreme Court has not required evidence of enforcement when the statute renders conduct futile or speech illegal.[218] Further, the Court has found an injury-in-fact when a statute may negatively impact the plaintiff's reputation.[219] These rules support the satisfaction of the injury-in-fact requirement in chilling effect cases at public colleges and universities when a plaintiff asserts that a policy has chilled his speech.[220]

In *Babbitt*, the Court did not require UFW to engage in an election in part because the intricacies of the process set out in the challenged statute rendered the election process futile.[221] Similarly, speech codes create processes that discourage speech and could render attempts to discuss controversial ideas on campus futile, as seen in *Rock for Life-UMBC*.[222] For example, the University changed the location of the reserved space twice, including once when Rock for Life was setting up the display in a previously agreed upon location.[223] Further, Rock for Life attempted to negate the potential for violence by suggesting that uniformed officers be present, but no agreement could be reached concerning who would pay for the officers.[224]

In *Susan B. Anthony List*, the Supreme Court suggested that misleading statements are a part of everyday discourse and a plaintiff should not be required to admit his intention to lie in order to have standing.[225] Given people's differences in upbringing, culture, knowledge, and experience, offense is a

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216. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 433 (1963) ("[B]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.").

217. *See, e.g.*, Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 299–300 (1979) (holding appellee's mere reluctance to invoke election procedures because of the potential consequences was enough to support an injury-in-fact for standing purposes).

218. *See supra* Part I.B.2–3.

219. *See supra* Part I.B.6.

220. *See supra* Part I.B.1–6.

221. *Babbitt*, 442 U.S. at 300–01. *See also supra* Part I.B.2.

222. *See* Rock for Life-UMBC v. Hrabowski, 411 F. App'x 541, 544–45 (4th Cir. 2010) (detailing a conflict between a group of college students who wished to set up a pro-abortion display on campus and college officials who enforced a policy because of the controversial nature of the display).

223. *Rock for Life-UMBC*, 411 F. App'x at 544–45.

224. *Id.* at 544.

225. *See supra* notes 81–84 and accompanying text.

natural part of conversation and intellectual discourse.[226] In the same way that a plaintiff should not have to admit an intention to lie, a plaintiff challenging a speech code should not have to admit his intention to offend someone in establishing a chilling effect claim.[227]

Finally, in *Keene*, the Supreme Court found that the challenged statute was likely to negatively impact Keene's reputation, which satisfied the injury-in-fact requirement.[228] The same can be said for students and professors whose speech arguably falls within conduct punishable under a speech code.[229] For example, in *Lopez*, a professor refused to let Lopez finish his speech about God's plan for marriage and threatened to have him expelled from school.[230] Fellow students subsequently submitted letters to the Dean of Academic Affairs stating that they were "deeply offended" by the "hateful propaganda" included in the speech.[231] For the school to foster an environment where students and professors believe they have a right to express their "deep offense" to the Dean of Academic Affairs with an expectation that the offender will be punished demonstrates that speech codes increase the reputational risk of expressing a controversial idea.[232]

B. The Ninth and Fourth Circuits' Interpretation of "Credible Threat of Enforcement" Defeats the Pre-enforcement Doctrine's Purpose

The Ninth and Fourth Circuits' more narrow interpretation of the credible threat of enforcement requirement defeats the purpose of the pre-enforcement doctrine. In *Lopez*, the court partially justified its holding with the fact that Lopez did not claim that anyone had been punished under the challenged policy.[233] In applying *Lopez*, the Fourth Circuit denied Rock for Life's standing by stating that "the plaintiffs do not allege facts suggesting that UMBC officials ever threatened to punish their speech as sexual harassment."[234] Such a threat would presumably require Rock for Life to speak or announce its intention to speak in a way prohibited by the challenged policy prior to suing.[235] This defeats the pre-enforcement doctrine's purpose of authorizing a cause of action for individuals who have self-censored out of fear of government punishment.[236]

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226. *See* Siegel, *supra* note 21, at 1398–99.

227. *See* Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2344–45 (2014).

228. Meese v. Keene, 481 U.S. 465, 476–77 (1987). *See also supra* Part I.B.6.

229. *See infra* notes 230–31 and accompanying text.

230. Lopez v. Candaele, 630 F.3d 775, 782–83 (9th Cir. 2010).

231. *Id.* at 783.

232. *See, e.g.*, *id.* (demonstrating how one student was criticized for his religious views).

233. *Id.* at 791.

234. Rock for Life-UMBC v. Hrabowski, 411 F. App'x 541, 548 (4th Cir. 2010). The court noted, however, that "a history of threatened or actual enforcement" would likely be sufficient. *Id.* (citing *Lopez*, 630 F.3d at 786).

235. *See, e.g.*, *id.* (discussing that plaintiffs did not show a credible threat of enforcement, partially based on the plaintiffs' inability to show that they intended to speak in a manner that would violate the policy).

236. *See* Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 604 (1967).

C. The Ninth Circuit's Misapplication of Laird v. Tatum

In *Lopez*, the Ninth Circuit's application of *Laird v. Tatum* was also incorrect. In finding Lopez's statement of chilled speech inadequate, the court cited *Laird*: "[m]ere 'allegations of a subjective "chill" are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.'"[237] However, in *Laird* the Supreme Court applied that observation to plaintiffs' challenge to an intelligence-gathering operation, not to a policy that penalized certain types of speech, as speech codes do.[238]

Further, in *Laird*, there was no evidence that the plaintiff had been subject to government surveillance,[239] but a student is always subject to the policies of the college or university in which he is enrolled.[240] To this point, the *Laird* Court differentiated the facts before it from other pre-enforcement First Amendment claims by stating that in the other cases "the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging."[241] Therefore, it was improper for the Ninth Circuit to dismiss Lopez's claim based on the pre-enforcement standing requirements set out in *Laird*.

D. Expanding the Overbreadth Doctrine to Any First Amendment Claim

Properly applied, the overbreadth doctrine permits a plaintiff to bring a claim based on the violation of a third-party's First Amendment rights if this violation injures the plaintiff on grounds other than the First Amendment violation implicated in the proxy claim for third parties.[242] Consistent with this doctrine, standing should be granted to public university students or professors

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237. *Lopez*, 630 F.3d at 787 (citing Laird v. Tatum, 408 U.S. 1, 13–14 (1972)).

238. *Laird*, 408 U.S. at 1–2. The challenged practice involved the Army gathering information in situations in which there was a perceived probability that violence would occur. *Id.* at 5–6. Prior to Tatum's suit, the Senate reviewed the Army's program for potential Constitutional violations and the Army narrowed its application, including requiring the destruction of information gathered within sixty days. *Id.* at 7–8. In contrast, the code challenged in *Lopez* prohibited, amongst other things, "*verbal*, visual, or physical conduct . . . ." *Lopez*, 630 F.3d at 781 (emphasis added).

239. *Laird*, 408 U.S. at 13–14 n.7 (explaining that *Tatum* largely failed to establish a connection between the intelligence-gathering program and any alleged chill and to establish that their speech had been chilled).

240. The Third Circuit upheld this principle in *DeJohn v. Temple University*. 537 F.3d 301, 312 (3d Cir. 2008) ("DeJohn continues to have a relationship with Temple University, and as such, continues to be subject to the sexual harassment policy."). Lopez made this argument in his brief. Answering Brief of Plaintiff-Appellee at 52–54, Lopez v. Candaele, 630 F.3d 775 (9th Cir. 2010) (No. 09-56238) ("As a currently enrolled student at the College, Lopez must comply with the speech code on a daily basis."). The district court accepted the proposition but the Ninth Circuit did not consider it. *Lopez*, 630 F.3d at 784.

241. *Laird*, 408 U.S. at 11–12.

242. *See supra* Part I.C (discussing the "overbreadth doctrine," which allows a plaintiff to obtain standing based on the violation of a third-party's First Amendment rights).

challenging a speech code because they will always suffer from the loss of exposure to different viewpoints chilled by the speech code.[243]

Students or professors challenging speech codes could assert a similar argument to the plaintiff in *Munson*, which had standing based on its own, non-First Amendment injury-in-fact.[244] Regardless of whether the university administration enforced the speech code against the plaintiff or whether the speech code chilled the plaintiff's speech, other students likely self-censored themselves.[245] For example, in a 2010 survey by the Association of American Colleges and Universities, only 30.3 percent of the college seniors and 18.8 percent of faculty and staff who responded "strongly agreed that '[i]t is safe to hold unpopular views on campus.'"[246] This injures plaintiffs because they are not exposed to nor allowed to discuss different ideas and perspectives, which is the primary reason that free speech is a constitutionally protected right.[247] If a student or professor can demonstrate a likelihood that speech could be chilled under the challenged speech code, standing should be granted on the assumption that the plaintiff would be injured from the resulting chilled speech.[248]

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243. For example, the injury that the professors and students could assert is the violation of their right to receive information. The Supreme Court recognized this right in *Martin v. City of Struthers*. 319 U.S. 141 (1943). *Martin* held:

> The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature, and necessarily protects the right to receive it.

Id. at 143 (internal citations omitted). *See also* Norman B. Smith, *Constitutional Rights of Students, Their Families, and Teachers in the Public Schools*, 10 CAMPBELL L. REV. 353, 367 (1988) (describing student's rights to receive communications).

244. Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 958 (1984).

245. *See supra* notes 5–9 and accompanying text (discussing the "chilling effect" and its contribution to self-censorship); *see also infra* note 246 and accompanying text (discussing perceived hostility towards unpopular views on campus).

246. LUKIANOFF, *supra* note 1, at 54–55 (citing Eric L. Dey et al, *Engaging Diverse Viewpoints: What is the Campus Client for Perspective-taking?*, AM. ASS'N OF COLLS. & UNIVS. (2010), http://www.aacu.org/sites/default/files/files/core_commitments/engaging_diverse_viewpoints.pdf). *See also* Michicko Kakutani, *Critic's Notebook: Debate? Dissent? Discussion? Oh, Don't Go There!*, N.Y. TIMES (March 23, 2002), http://www.nytimes.com/2002/03/23/books/critic-s-notebook-debate-dissent-discussion-oh-don-t-go-there.html (stating that according to one professor, "[d]ebate has gotten a very bad name in our culture . . . It's become synonymous with some of the most nonintellectual forms of bullying . . . ").

247. *See, e.g.*, Cohen v. California, 503 U.S. 15, 24 (1971). The Court stated:

> The constitutional right to free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity . . . .

Id.

248. *See supra* Part I.B (discussing pre-enforcement standing where a plaintiff need not be subject to arrest or prosecution).

E. Education Deserves Special Treatment

Pre-enforcement standing is more easily attainable in First Amendment claims[249] and the overbreadth doctrine demonstrates the Supreme Court's willingness to relax standing in free speech cases.[250] It is also appropriate to relax standing for First Amendment claims in the educational setting because "[t]he primary function of the university is to discover and disseminate knowledge by means of research and teaching. To fulfill this function a free interchange of ideas is necessary."[251] Both Lopez and McCauley emphasized this contextual consideration in their respective briefs, but neither of their adjudicating courts discussed it in their opinions.[252] This is a mistake and is arguably inconsistent with several cases in which the Supreme Court has emphasized the "special concern of the First Amendment" in the educational context.[253] These include cases in which the Court has considered polices that create a "chilling effect" on campus speech.[254] Courts should authorize standing for students and professors challenging speech codes on chilling effect grounds when they simply state what type of protected speech is proscribed and, therefore, chilled by the challenged policy.

V. CONCLUSION

The First Amendment's protection of free expression is essential, particularly on university campuses.[255] Historically, a plaintiff would have had standing by his mere assertion that his constitutional private right of free expression was violated.[256] The mistaken application of the injury-in-fact requirement to private rights[257] has forced the courts to develop various exceptions to accommodate the nuances of First Amendment rights, such as the pre-enforcement and

249. *See supra* Part I.B.1–6.

250. *See supra* Part I.C.

251. C. VANN WOODWARD, CHAIRMAN'S LETTER TO THE FELLOWS OF THE YALE CORPORATION 5 (1974), http://www.yale.edu/terc/collectiblesandpublications/specialdocuments/Freedom_Expression/freedom1975.pdf.

252. Answering Brief of Plaintiff-Appellee at 12, Lopez v. Candaele, 630 F.3d 775 (9th Cir. 2010) (No. 09-56238). McCauley did not make this argument in his briefs but FIRE filed an amicus brief in the appeal in which it pointed out the importance of preserving speech rights in the college context. Brief *Amicus Curiae* for the Foundation for Individual Rights in Education in Support of Appellant at 5, McCauley v. Univ. of the V.I., 618 F.3d 232 (3d Cir. 2010) (No. 09-3735).

253. *See, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); *see also supra* Part I.C (discussing the importance of free speech in the educational context).

254. *See supra* Part I.D (explaining judicial discussion of the "chilling effect" upon campus speech).

255. *See supra* note 126 and accompanying text (discussing the campus as a "marketplace of ideas").

256. *See supra* note 31 and accompanying text (covering standing by assertion of a violation of a right).

257. *See supra* note 38 and accompanying text.

overbreadth doctrines.[258] In light of these distinctions and the importance of academic freedom, students and professors should be able to establish standing by simply stating how certain arguably protected speech could be chilled under the challenged policy. The rest should be left to the merits.

258. *See supra* notes 30–38 and accompanying text (discussing the argument that the Court did not mean to apply the injury-in-fact standard to private rights cases); *see also supra* Part I.B (explaining pre-enforcement standing) and Part I.C (regarding the overbreadth doctrine).