IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
KANSAS CITY-LEAVENWORTH DIVISION

JARED NALLY, ET AL.,	
Plaintiffs,	CIVIL ACTION NO.: 21-2113
v.	
RONALD GRAHAM, ET AL.,	JURY TRIAL DEMANDED
Defendants.	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION ON CLAIMS 4 AND 5

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STATEMENT OF NATURE OF THE MATTER

This is a civil rights action against Haskell Indian Nations University ("Haskell"), a federally operated tribal university, and responsible federal officials for violating Plaintiffs' First and Fifth Amendment rights. Plaintiff Jared Nally is a student at Haskell and the current editor-in-chief of *The Indian Leader*, Haskell's editorially independent student newspaper and the oldest Native American student newspaper in the country. Decl. of Jared Nally in Supp. of Pls.' Mot. for Prelim. Inj. on Claims 4 and 5, May 10, 2021, ¶¶ 3, 5. Plaintiff the Indian Leader Association is an unincorporated association that manages and publishes *The Indian Leader*. *Id.* ¶ 5.

Plaintiffs' lawsuit, filed on March 2, 2021, alleges seven claims and seeks injunctive and declaratory relief, as well as damages. Compl., ECF No. 1. Relevant to this motion, Claims 4 and 5 challenge the constitutionality of Haskell's Campus Expression Policy as both overbroad and vague. Compl., ¶¶ 218–251. Plaintiffs now move under Fed. R. Civ. P. 65(a) and D. Kan. R. 65.1 to preliminarily enjoin Defendants from enforcing the Campus Expression Policy because it causes irreparable injury by continuing to unconstitutionally restrict student expression while this lawsuit is pending. Nally Decl. ¶¶ 23, 29–30.

INTRODUCTION

The Supreme Court of the United States established nearly a half-century ago that First Amendment protections apply with full force on public university campuses, as in the community at large. *Healy v. James*, 408 U.S. 169, 180 (1972).

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (citation omitted). Haskell, a public institution operated and managed by the United States government, is no exception. But Haskell continually violates the First Amendment rights of its students.

Haskell's Campus Expression Policy, which is contained in its Code of Student Conduct, states that students are free to discuss and express all views, "*consistent with Haskell's CIRLE values* and subject only to requirements for the maintenance of order." Nally Decl. Ex. 1, at 12 (emphasis added). The CIRCLE values include, as operative terms, amorphous concepts like "Integrity" and "Respect." Because those terms are vague and subjective, the Campus Expression Policy directly restricts a broad range of student expression that is protected by the First Amendment, and in fact, has been applied to restrict Plaintiffs' protected speech. Last year, former Haskell President Ronald J. Graham directed Jared Nally to cease and desist certain routine journalistic activities, like asking questions of Haskell administrators, under threat of further punishment. In this "Directive," Graham punished Nally for failing to show Haskell officials respect, one of the CIRCLE values, and specifically invoked the Code of Student Conduct. Nally Decl. ¶¶ 11, 14–18; *Id.* Ex. 2. Although this Directive was rescinded after Plaintiffs' counsel intervened, the Campus Expression Policy on which the Directive relied continues to threaten and chill student expression.

This Court must preliminarily enjoin the Campus Expression Policy because Plaintiffs are likely to succeed on the merits of these claims. Courts have routinely struck down overbroad and vague public university speech policies, like Haskell's Campus Expression Policy. *See, e.g.*, *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 250, 252 (3d Cir. 2010) (declaring university speech policies overbroad). Additionally, Plaintiffs readily satisfy the remaining criteria for a preliminary injunction. The deprivation of core constitutional rights, even for a brief period of time, is an irreparable injury, and remedying such deprivations is always in the public interest.

STATEMENT OF FACTS

Haskell's Campus Expression Policy permits only student expression that is consistent with its amorphous CIRCLE values. Defendants have already invoked this policy to punish Nally for his protected expression and newsgathering activities. That punishment prompted Plaintiffs' counsel to notify Defendants that the policy was unconstitutional. When Defendants failed to correct the unconstitutional policy, Plaintiffs filed suit, but the policy remains on the books and continues to chill student expression while this litigation is pending.

I. Haskell's Campus Expression Policy Elevates the CIRCLE Values Over Students' Expressive Rights.

This motion seeks to enjoin the Campus Expression Policy promulgated by Defendants and challenged in Claims 4 and 5 of Plaintiffs' lawsuit. Compl. ¶¶ 218–251.

Haskell is a tribal university founded in 1884 and is now operated by the United States. Nally Decl. ¶ 3. In 2014, Haskell adopted the university's "CIRCLE" values. CIRCLE is an acronym that stands for "Communication, Integrity, Respect, Collaboration, Leadership, and Excellence." Nally Decl. ¶ 8, Ex. 1, at 7–8. Haskell describes conduct consistent with each CIRCLE value. *Id.* For example, and particularly relevant to this case, the value of "Respect" requires students "[t]o honor and promote the diversity of beliefs, rights, responsibilities, cultures, accomplishments of self and others, including our non-human relations." *Id.* Rather than merely serving as statements of Haskell's institutional goals, the CIRCLE values are incorporated into Haskell's Code of Student Conduct and can therefore serve as the basis for student discipline. *Id.* Haskell's Campus Expression Policy, which is contained in the Code of Student Conduct, requires all students to express themselves in accord with the CIRCLE values, including the CIRCLE values' description of "Respect." *Id.* at 12. To this end, policy states: "Discussion and expression of all views is permitted, consistent with Haskell's CIRLE values and subject only to requirements for the maintenance of order." *Id.*

II. Graham Invokes the Campus Expression Policy to Punish Nally.

The instant litigation arose when Haskell invoked the Campus Expression Policy to punish a student journalist. Former President Graham used the Code of Student Conduct and the Campus Expression Policy's requirement that student expression exhibit "Respect" to justify punishing Nally for his newsgathering and reporting on the grounds that it was not sufficiently respectful. Nally Decl. ¶¶ 11, 15, 19, Ex. 2. In the Directive, then-President Graham cautioned: "I will remind you

that you are a student first and foremost on this campus, and your conduct falls under the umbrella of the Student Conduct Code." *Id.* at 2. Graham went on to command Nally to "treat fellow students, University staff, and University officials with appropriate respect. Failure to do so may result in disciplinary action." *Id.* The Directive against Nally was ultimately rescinded, but only after several months and a coalition letter from FIRE, the Native American Journalists Association ("NAJA"), and the Student Press Law Center ("SPLC"). Decl. of Lindsie Rank in Supp. of Pls.' Mot. for Prelim. Inj. on Claims 4 and 5, May 18, 2021, Ex. 1; Nally Decl. ¶¶ 21–22, Ex. 4.

As demonstrated below, because the Campus Expression Policy remains in effect, Plaintiffs' expression is chilled each day because they reasonably fear that Haskell administrators will punish them for failing to adhere to the policy.

III. Haskell Has Failed to Correct Its Unconstitutional Policy Despite Repeated Warnings.

On January 19, 2021, FIRE, NAJA, and the SPLC sent Graham[1] a second letter, calling on Haskell to revise the Campus Expression Policy. Rank Decl. ¶ 6, Ex. 2. The letter expressly called on then-President Graham to revise the Campus Expression Policy to reflect that the university's CIRCLE values do not limit students' First Amendment rights, and to revise the CIRCLE values to make clear that they are merely aspirational and will no longer be invoked to punish students. *Id.* As of the date of the January 19th letter, a current copy of the Code of Student

[1] Jennifer Wiginton, counsel for Defendant the Bureau of Indian Education, was also copied on this letter.

Conduct was not available on Haskell's website, and Haskell populated its Office of Student Rights' webpage with the classic placeholder text "lorem ipsum." Rank Decl. ¶ 4. The letter, therefore, also asked Graham to take steps to increase transparency at Haskell by uploading an updated copy of the Code of Student Conduct to the university's website. Rank Decl. ¶ 6, Ex. 2.

Wiginton replied to FIRE that same day, and wrote that her office was "conducting a review" of Haskell's speech policies identified in the letter. Rank Decl. ¶ 7, Ex. 3. Then, at some point between January 26, 2021, and February 7, 2021—after FIRE pointed out its constitutional infirmity—Defendants uploaded an updated copy of the Code of Student Conduct to Haskell's website. Nally Decl. ¶ 7. The new Code of Student Conduct included an unchanged version of the Campus Expression Policy, which still makes students' expressive rights contingent upon compliance with the CIRCLE values. Nally Decl. Ex. 1, at 12. Defendants never followed up with a substantive response to FIRE concerning the outcome of the review of Haskell's speech policies, the new Code of Student Conduct uploaded to Haskell's website, or the status of the Office of Student Rights' website's "lorem ipsum" text. Rank Decl. ¶ 8.

On March 2, 2021, after Defendants ignored Plaintiffs' and FIRE's concerns for months, Plaintiffs filed this lawsuit. Of the seven alleged claims, two challenge the constitutionality of the Campus Expression Policy as overbroad and vague. Plaintiffs named former President Graham as a defendant because the President of Haskell is responsible for the promulgation, implementation, and enforcement of

the university's Code of Student Conduct.[2] Plaintiffs also named the Bureau of Indian Education, a division of the U.S. Department of the Interior, and its current Director, Tony L. Dearman,[3] as defendants because the Bureau is responsible for Haskell's management and operation.[4]

IV. The Campus Expression Policy Contravenes the Rights and Function of the Student Press.

The Indian Leader has been published since 1897 and has won numerous awards. Nally Decl. ¶ 24. The Indian Leader Association aims to serve the Haskell student body by publishing reporting on issues that impact student academics and campus life. *Id.* ¶ 25. The Association also serves the broader Haskell community by providing information about local news and cultural issues across Indian Country. *Id.* This reporting furthers the Association's mission to "promote the truth and report the facts for the betterment" of the Haskell community and "to promote Native American issues and provide an outlet for those stories to be told." *Id.* ¶ 27.

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[2] *Leadership*, U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN EDUC., https://www.bie.edu/leadership (last visited May 18, 2021); Indian Affairs Manual, pt. 3 Delegations of Authority, ch. 8 Delegations to Deputy Directors, Associate Deputy Directors, and the Assistant Deputy Director, Bureau of Indian Education, U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS (Nov. 5, 2010), https://www.bia.gov/sites/bia.gov/files/assets/public/raca/manual/pdf/3_IAM_8_Delegations_Authority_Deputy_Directors_BIE_508_OIMT.pdf; U.S. Department of the Interior Departmental Manual, pt. 130 Bureau of Indian Affairs, ch. 8 Bureau of Indian Education, U.S. DEP'T OF THE INTERIOR (Aug. 29, 2006), https://www.doi.gov/sites/doi.gov/files/elips/documents/130-dm-8.pdf. As of the date of this motion, Graham no longer holds the office of President of Haskell, but under Federal Rule of Civil Procedure 25(d) his successor Tamarah Pfeiffer is automatically substituted as a defendant with respect to Plaintiffs' official capacity claims.

[3] *Leadership*, U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN EDUC., *supra* note 2.

[4] U.S. DEP'T INTERIOR, BUREAU INDIAN EDUC., https://www.bie.edu/topic-page/bureau-indian-education (last visited Apr. 28, 2021); *Tribally Controlled Schools*, U.S. DEP'T INTERIOR, BUREAU INDIAN EDUC., https://www.bie.edu/topic-page/tribally-controlled-schools (last visited Apr. 28, 2021) ("The BIE directly operates two post secondary institutions: the Haskell Indian Nations University (HINU) in Lawrence, Kansas, and the Southwest Indian Polytechnic Institute (SIPI) in Albuquerque, New Mexico.").

The Indian Leader routinely includes both original journalism and opinion pieces about Haskell's campus and administration. *Id.* ¶ 28.

Plaintiffs are chilled each day in their reporting by the possibility that Defendants will again discipline them under the Campus Expression Policy for their protected expressive activity, as Graham did with the Directive against Nally. *Id.* ¶ 29. The chilling effect engendered by this omnipresent threat has already caused Plaintiffs to refrain from reporting on campus news of interest to their readers and the community, such as Haskell's implementation of new meal plan fees, the Directive itself, and a story involving former President Graham's relationship with the Kansas City Chiefs of the National Football League. *Id.* ¶ 30.

The threat of discipline under the policy harms Plaintiffs' ability to inform the campus community and the broader tribal communities served by Haskell, and their ability to "seek the truth and report the facts for the betterment" of the Haskell community. *Id.* ¶ 27. The Campus Expression Policy chills Plaintiffs' expression as both students and student journalists, causing them to avoid expression that administrators may deem to be disrespectful or lacking "Integrity." *Id.* ¶¶ 23, 29–30. As demonstrated in Plaintiffs' Complaint and as set forth above, this chilling effect is ongoing and will continue as long as the Campus Expression Policy remains enforceable against Haskell students.

STATEMENT OF THE QUESTIONS PRESENTED

Whether Defendants' Campus Expression Policy, which mandates that all student discussion and expression be consistent with amorphous, subjective "CIRCLE" values like "Respect" and "Integrity," can be preliminarily enjoined as:

(1) unconstitutionally overbroad, because it directly restricts student speech and allows for punishment of a substantial amount of protected expression; or

(2) void for vagueness, because it fails to provide students with sufficient notice of what expression will be subject to punishment and invites arbitrary enforcement by granting administrators unbridled discretion?

ARGUMENT

Haskell's Campus Expression Policy is facially unconstitutional because it is overbroad in violation of the First Amendment and because it is vague in violation of the First and Fifth Amendments. Because courts have routinely invalidated similar campus speech policies as unconstitutional on these grounds, Plaintiffs are likely to succeed on the facial challenges in Claims 4 and 5 of their Complaint. Because Plaintiffs can also satisfy the remaining requirements for the issuance of a preliminary injunction, Haskell's Campus Expression Policy should be enjoined pending the resolution of this case.

I. Standard of Review.

To obtain a preliminary injunction under Federal Rule of Civil Procedure 65, Plaintiffs must demonstrate (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm in the absence of a preliminary injunction; (3) that the balance

of equities tips in favor of granting the injunction; and (4) that an injunction would be in the public interest. *Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245, 1252 (10th Cir. 2016) (citing *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008)) (reversing the district court's denial of preliminary injunction because plaintiff was likely to succeed on the merits of its First Amendment claim). When the government is the opposing party, the balance of the equities and the public interest merge into a single inquiry: whether Plaintiffs have a stronger interest in enjoining the regulation than the government has in enforcing it. *See Aposhian v. Barr*, 958 F.3d 969 (10th Cir. 2020) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)) (merging the balance of equities and the public interest elements in evaluating plaintiff's motion to enjoin a federal regulation on Second Amendment grounds).

Plaintiffs meet all of these requirements because: (1) the Campus Expression Policy is unconstitutional under the First and Fifth Amendments; (2) deprivation of these fundamental rights is an irreparable harm that is hard to quantify post-judgment; and (3) Defendants can assert no interest strong enough to outweigh Plaintiffs' interest in the enjoyment of their fundamental rights.

II. Plaintiffs Are Likely to Prevail on the Merits of Their Facial Challenges to the Campus Expression Policy.

Plaintiffs are likely to succeed on the merits of Claims 4 and 5 of their Complaint because Haskell's Campus Expression Policy is, on its face, unconstitutionally overbroad and vague.

A. Haskell's Campus Expression Policy Is Unconstitutionally Overbroad.

The Campus Expression Policy is unconstitutionally overbroad because it directly restricts expression, and courts should be especially willing to invalidate government regulations when they restrict pure speech. Plaintiffs are also likely to succeed on the merits of Claim 4 of their Complaint because the Campus Expression Policy fails the more demanding substantial overbreadth test.

1. The Campus Expression Policy Is a Direct Restriction on Speech.

By its terms, the Campus Expression Policy directly restricts "discussion and expression," not merely conduct with an incidental effect on speech. Nally Decl. ¶ 8, Ex. 1, at 12. Overbreadth scrutiny is at its most exacting when regulations directly burden expression, rather than conduct, because conduct lies "in the shadow of the First Amendment." *See Broadrick v. Oklahoma*, 413 U.S. 601, 614 (1973) (noting that overbreadth scrutiny is less rigid when statutes regulate conduct, as opposed to when statutes regulate merely speech protected by the First Amendment). As the Tenth Circuit has instructed, courts should "be especially willing to invalidate a statute for overbreadth where, as here, the statute regulates 'pure speech.'" *Nat'l Gay Task Force v. Bd. of Educ. of City of Oklahoma City*, 729 F.2d 1270, 1274 (10th Cir. 1984) (citation omitted).

In *National Gay Task Force*, plaintiff challenged an Oklahoma statute that prohibited teachers from advocating, promoting, or encouraging "public or private homosexual activity" under threat of termination. *Id.* The Tenth Circuit ruled that, insofar as the statute prohibited advocacy, promotion, or encouragement, it was

overbroad because it was directed at protected expression. *Id.* The court reasoned that the statute's prohibition "aimed at legal and social change," which are "at the core of First Amendment protections." *Id.*

Like the teachers in *National Gay Task Force*, Plaintiffs regularly engage in expression "aimed at legal and social change" on campus, and have been chilled in that expression by the specter of potential punishment under the Campus Expression Policy. *The Indian Leader* routinely publishes content—including opinion pieces—about Haskell's campus and administration. Nally Decl. ¶ 28. That coverage necessarily involves expression that may be critical of the administration or advocate for change on campus, and is at the core of the First Amendment's protection. *See Nat'l Gay Task Force*, 729 F.2d at 1274; *see also Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 758–59 (1985) (acknowledging that speech on public issues is at the heart of the First Amendment's protection). Newsgathering, whether it is in support of an opinion piece or hard news, is also core expressive activity under the First Amendment's protections of free speech and freedom of the press. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) ("[W]e have recognized that 'without some protection for seeking out the news, freedom of the press could be eviscerated.'") (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)). Plaintiffs—and all Haskell students—are chilled from engaging in such core protected expression because of Defendants' policy.

Because the Campus Expression Policy restricts pure speech and chills student expression at the core of the First Amendment's protection, this Court

should find that Plaintiffs are likely to succeed on the merits of their overbreadth claim.

2. The Campus Expression Policy Reaches a Real and Substantial Amount of Protected Student Speech.

Plaintiffs are also likely to succeed on the merits of Claim 4 because the Campus Expression Policy fails the more exacting substantial overbreadth test applicable to government regulations that restrict both conduct and speech. The Campus Expression Policy restricts a real and substantial amount of student expression protected by the First Amendment—*any* expression or discussion that an administrator subjectively deems to be "disrespectful" or lacking "integrity"—judged in relation to any lawful restriction on student expression.

A regulation violates the First Amendment for overbreadth if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (citation omitted). Even a statute or regulation passed for a legitimate purpose is not insulated from an overbreadth challenge where the "law punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'" *United States v. Brune*, 767 F.3d 1009, 1018 (10th Cir. 2014) (quoting *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003)) (evaluating whether a statute designed to suppress child pornography was nevertheless overbroad).

Courts confronting such overbroad policies in the context of higher education have routinely declared them unconstitutional and enjoined their enforcement.[5] For example, in *College Republicans at San Francisco State University v. Reed*, a federal court considered plaintiffs' overbreadth challenge to several university policies, two of which are particularly relevant here. 523 F. Supp. 2d 1005, 1006–07 (N.D. Cal. 2007). The first challenged policy used language nearly identical to Haskell's Campus Expression Policy and required that student activity be "consistent" with the university's amorphous "goals, principles, and policies." *Id.*

Analyzing this language, the court found that "[t]he full reach and content of the University's 'goals, principles, and policies' is by no means clear," and the use of the term "inconsistent" caused "substantial uncertainty" among students about the scope of the policy. *Id.* The court went on to explain that students "might reasonably feel appreciably less confident that they could predict the kinds of conduct that would be deemed 'inconsistent' with University policies than the kinds of conduct that would 'violate' University policies." *Id.* Accordingly, the court enjoined this policy, concluding that "plaintiffs are likely to prevail on their claim that these

[5] *See, e.g.*, *McCauley v. Univ. of the V.I.*, 618 F.3d at 250, 252 (declaring university speech policies overbroad); *DeJohn v. Temple Univ.*, 537 F.3d 301, 317–18 (3d Cir. 2008) (striking down former sexual-harassment policy on First Amendment grounds and holding that because the policy failed to require that speech in question "objectively" created a hostile environment, it provided "no shelter for core protected speech"); *Smith v. Tarrant Cty. Coll. Dist.*, 694 F. Supp. 2d 610 (N.D. Tex. 2010) (enjoining enforcement of overbroad "cosponsorship" policy); *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (enjoining enforcement of civility policy); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (declaring speech policy overbroad); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of overbroad speech policies); *Booher v. Bd. of Regents*, Civil Action No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998) (finding university sexual harassment policy void for vagueness and overbreadth); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (declaring harassment policy overbroad and unconstitutionally vague); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (finding harassment policy overbroad and unconstitutionally vague).

sweeping mandates and opaque proscriptions offend the First Amendment" and its continued maintenance caused a "real prospect of . . . a substantial chill of First Amendment rights . . . ." *Id.* at 1024. Here, the CIRCLE values do not provide an explanation of their scope, therefore Plaintiffs (and all Haskell students) are similarly uncertain about what expression is "consistent" with those values. Like the policy enjoined in *Reed*, this profound uncertainty causes a substantial chilling effect.

In *Reed*, plaintiffs also challenged a second policy that permitted punishment of students who engaged in conduct that was not "civil." *Id.* The court rejected the university's argument that the policy was merely aspirational, finding that the university had applied the policy to investigate the plaintiffs in *Reed* for months, and, when placed in the context of the student handbook, it was clear that students would read the civility requirement as mandatory. *Id.* at 1016–17. Because the word civility is too "opaque and malleable," the court found that "there is a substantial risk that the civility requirement will inhibit or deter use of the forms and means of communication that . . . will be the most valued and the most effective." *Id.* at 1018–19. Here, the Campus Expression Policy presents a similar threat to student expression. While the CIRCLE values may have theoretically been intended as merely unenforceable institutional goals, they serve as operative terms in the Campus Expression Policy, and thus function as a plain restriction on student expression. The policy is incorporated into the Code of Student Conduct, under which Haskell can punish students for "conduct that occurs before classes begin,

after classes end, on or off campus, during the academic year or during periods between semesters of academic enrollment." Nally Decl. Ex. 1, at 8. Placed in this context, the Campus Expression Policy, like the supposedly aspirational policies in *Reed*, is a mandate that students express themselves consistent with the CIRCLE values or face punishment. That function is also clear from the Directive issued against Nally, in which a Haskell administrator invoked the language of the policy to punish a student for protected expression that allegedly violated the CIRCLE values by being "disrespectful," which — like the civility requirement struck down in *Reed* — is an opaque and malleable term that serves to substantially chill student speech. Nally Decl. ¶ 15.

While it may be laudable to promote respectful discourse, and Haskell is free to promote "Respect" as a general institutional aspiration, the fact that a public university administrator finds student expression to be "disrespectful" is simply not a constitutional basis for student discipline or the threat thereof. Requiring students to adhere to CIRCLE values like "Respect" is overbroad because it permits Defendants to discipline students who speak in a manner that Defendants subjectively view as insufficiently respectful. Discipline on those grounds violates the First Amendment, and interferes with students' rights to criticize public officials and engage in other protected forms of expression. *See, e.g.*, *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973) (expelling public university student for distributing student newspaper violated the First Amendment because "the mere dissemination of ideas—no matter how offensive to good taste—on a state

university campus may not be shut off in the name alone of 'conventions of decency'"); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide open and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.") (citations omitted).

The Haskell Code of Student Conduct states that Haskell has an interest in "promot[ing] healthy decision-making and . . . protect[ing] the rights of all students." Nally Decl. Ex. 1, at 7. But the Campus Expression Policy goes far further than constitutionally permissible in "promot[ing] healthy decision-making," and rather than protecting student rights, it infringes upon them. *Id.* While Haskell could permissibly regulate student expression that is categorically unprotected by the First Amendment—such as obscenity, defamation, incitement, or fighting words, *see Stevens*, 559 U.S. at 468–69—the Campus Expression Policy far exceeds these specific legal bounds by requiring all student expression to be consistent with the CIRCLE values. It therefore restricts expression far beyond its "legitimate sweep." *Id.* at 473.

This Court should find that Plaintiffs are likely to succeed on the merits of Claim 4 of their Complaint, that the Campus Expression Policy is unconstitutionally overbroad.

B. The Campus Expression Policy Is Also Void for Vagueness.

Plaintiffs are also likely to succeed on the merits of Claim 5 of their Complaint because the Campus Expression Policy is unconstitutionally vague. There are two considerations in a vagueness challenge. First, a restriction on speech

violates due process if it is so vague that it does not allow a person of ordinary intelligence to determine what conduct it prohibits. *See Hill v. Colorado*, 530 U.S. 703, 732 (2000). Second, a restriction on speech similarly violates due process if it invites government officials to enforce it in an arbitrary and discriminatory way. *Id.*; *see also Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *West v. Derby Unified Sch. Dist.*, 23 F. Supp. 2d 1223, 1235 (D. Kan. 1998). Vagueness is of special concern in the First Amendment context, because when a vague regulation "abut[s] upon sensitive areas of First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms." *Grayned*, 408 U.S. at 109 (alteration in original) (citation omitted).

1. The Campus Expression Policy Does Not Provide Adequate Notice of What Speech It Prohibits.

The Campus Expression policy is unconstitutionally vague because, by incorporating the amorphous CIRCLE values, it fails to provide students with "fair warning" of what expression is prohibited. *Grayned*, 408 U.S. at 108. While the policy describes each CIRCLE value, those descriptions are amorphous and provide no real notice of what expression is or is not consistent with the values. Nally Decl. Ex. 1, at 7–8. For example, the Code of Student Conduct defines the CIRCLE value of "Respect" as "to honor and promote the diversity of beliefs, rights, responsibilities, cultures, accomplishments of self and others, including non-human relations." *Id.* at 7. But students like Nally could not have reasonably known that, in practice, this generic description prohibits protected activities like standard journalistic practices or speech critical of the university.

When a public institution like Haskell restricts expression, that restriction must be "capable of reasoned application." *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1892 (2018). In *Mansky*, the Supreme Court found that Minnesota's ban on "political" apparel in polling places was unreasonable because the state presented no workable definition of what was political, "[a]nd the word can be expansive." *Id.* at 1888. Even though the Court found that Minnesota had an interest in regulating the messages conveyed inside polling locations "in light of the special purpose of the polling place itself," the ordinance did not pass constitutional muster. *Id.*

The Campus Expression Policy has the same fatal definitional flaw as the statute at issue in *Mansky*. Each of the CIRCLE values is an expansive and ill-defined restriction on student expression. Take as an example again the Code of Student Conduct's definition of "Respect," which is "to honor and promote the diversity of beliefs, rights, responsibilities, cultures, accomplishments of self and others, including non-human relations." Nally Decl. Ex. 1, at 7. Would, for example, a student's advocacy for eating meat in response to public discourse surrounding climate change or animal rights demonstrate disrespect for animals or those who keep a vegan diet, and therefore violate this value and the Campus Expression Policy? Would arguing that Haskell should not require students to wear masks outdoors, in light of recent guidance from health officials on the subject, be failing to "honor and promote" the diversity of beliefs or responsibilities on campus? The description of "Respect" in the policy cannot answer these questions, and therefore provides students with no real notice of what expression is prohibited. Students

have no reliable way to know in advance whether speech will violate the policy because it is "disrespectful" or lacks "integrity." This uncertainty will chill speech and lead students to self-censor in an effort to "steer far wider than the [prohibited] zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S. at 108–09. The First Amendment demands that Haskell provide students with notice of what it prohibits under university policies, and it has failed to meet this obligation by promulgating and enforcing the Campus Expression Policy and the vague and generic CIRCLE values.

2. The Campus Expression Policy Invites Arbitrary Enforcement.

The Campus Expression Policy is also unconstitutionally vague because it invites arbitrary enforcement by giving Haskell administrators unbridled discretion. "A punishment fails to comply with due process if the statute or regulation under which it is obtained . . . is so standardless that it authorizes or encourages seriously discriminatory enforcement." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (citation omitted); *see also Mansky*, 138 S. Ct. at 1891.

The Campus Expression policy allows Haskell administrators unbridled discretion to punish students because the CIRCLE values are so vague they could be employed to punish nearly any student speech. Different students and administrators will naturally come to different conclusions as to whether the same speech is, for example, disrespectful or not based on the amorphous definition included in the Code of Student Conduct. The First Amendment does not permit such a result. *See, e.g.*, *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1184–85 (6th

Cir. 1995) (holding that university policy was vague where it prohibited "offensive" speech since there was no objective way to determine what speech was offensive).

Nally, for example, did not consider his newsgathering or reporting about Haskell's response to the 2020 U.S. Census on behalf of students, an increase in student fees at Haskell, or the death of a beloved Haskell employee to be disrespectful, or otherwise not in accordance with policy. Instead, he considered reporting on these stories as part of his duties as a member the student press. Nally Decl. ¶ 13. But the Campus Expression Policy allows administrators like Graham to target such protected expression by affording them unlimited discretion to enforce the policy arbitrarily based on their own subjective interpretations of terms like "Integrity," "Respect," and "Excellence." Indeed, by issuing the Directive, Graham has already used the amorphous, subjective nature of this unconstitutional policy to punish Nally, and other Haskell administrators could easily do the same.

The Campus Expression Policy poses a significant and ongoing risk to students who face discipline for protected speech based on a purely subjective standard. Its continued maintenance chills the speech of other students, particularly other members of the student press, who reasonably fear that like Nally, they may face threats or punishment for engaging in protected expressive activity. This Court should find that Plaintiffs are likely to succeed on the merits of their claim that the Campus Expression Policy is vague.

III. Plaintiffs Satisfy the Remaining Requirements to Obtain a Preliminary Injunction.

Plaintiffs also satisfy the remaining elements necessary to obtain a preliminary injunction, namely, that they would suffer irreparable harm; that the balance of equities is in their favor; and that an injunction would be in the public interest. *Planned Parenthood Ass'n of Utah*, 828 F.3d at 1252. This Court should also conclude that Plaintiffs are not required to provide security under Federal Rule of Civil Procedure 65(c) because they are engaged in public interest litigation and there is no likelihood of harm to Defendants if they are enjoined from enforcing the Campus Expression Policy.

A. Plaintiffs Will Continue to Be Irreparably Harmed Absent a Preliminary Injunction.

Plaintiffs will be irreparably harmed if the challenged policy is not enjoined while this litigation is pending. Currently, the overbroad and vague Campus Expression Policy chills Plaintiffs' protected expression, both as students and as student journalists. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

The chilling effect of this policy will be difficult to remedy post-judgment. The Tenth Circuit recognizes the irreparable harm caused when members of the general public are prohibited from speaking. *See Verlo v. Martinez*, 820 F.3d 1113, 1127 (10th Cir. 2016) (affirming trial court decision that order prohibiting plaintiffs from distributing pamphlets on public property caused irreparable injury). This is no different for students on a public university campus, who retain their rights under

the First Amendment. *Healy*, 408 U.S. at 180 ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.") And "when an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012) (quoting *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (overruled on other grounds)).

Planned Parenthood Association of Utah v. Herbert is particularly instructive with respect to the constitutional claims at issue here. 828 F.3d 1245 (10th Cir. 2016). In that case, the Tenth Circuit reversed the district court's denial of a preliminary injunction where the state had imposed unconstitutional conditions on plaintiff in response to protected First Amendment activity, finding that plaintiff was likely to succeed on the merits of that claim. *Id.* at 1258–63. The court went on to conclude that in light of the fact that the plaintiff had established a likelihood of success on the merits of its constitutional claim, the plaintiff had also demonstrated a likelihood of irreparable harm because "the likelihood that [the plaintiff] will suffer a violation of its First Amendment rights . . . standing alone, gives rise to an irreparable injury." *Id.* at 1263.

Plaintiff Nally has already been subject to the Campus Expression Policy for his entire tenure at Haskell, including for duration of this litigation, which is a distinct and hard-to-quantify injury. As demonstrated above, the chilling effect of the Campus Expression Policy—and the looming risk of becoming the target of

another Directive—has already stopped Plaintiffs from publishing newsworthy content in *The Indian Leader*. For example, *The Indian Leader* declined to report on Haskell's implementation of new meal plan fees, the Directive against Nally, and a story involving former President Graham's relationship with the Kansas City Chiefs of the National Football League. Nally Decl. ¶ 30.

Because Plaintiffs allege infringement of a constitutional right, this factor weighs in Plaintiffs' favor.

B. The Balance of Equities and the Public Interest Strongly Favor Plaintiffs.

The balance of equities tips strongly in favor of Plaintiffs, as does the public interest. Plaintiffs have a stronger interest in enjoining the Campus Expression Policy than Haskell has in enforcing it. Plaintiffs' interest is significant: the protection of their First Amendment rights. The Defendants have no similar interest; any valid purpose served by the challenged policy can be cured by adopting new, constitutionally acceptable policies that make clear that the CIRCLE values are merely aspirational. Specifically, as FIRE, NAJA, and the SPLC suggested in the January 19, 2021, letter, Haskell could strike the language in the Campus Expression Policy that requires student discussion and expression to be "consistent with Haskell's CIRCLE values." Rank Decl. Ex. 2, at 3 n.8, 4.

The Tenth Circuit has recognized the importance of protecting expressive rights, concluding that "the possibility of [plaintiff]'s First Amendment rights being irreparably harmed outweighs *any* opposing interests asserted by defendants." *Planned Parenthood Ass'n of Utah*, 828 F.3d. at 1265 (emphasis added). With

respect to Planned Parenthood's First Amendment claim, the court also noted that a preliminary injunction was in the public interest, in part because citizens have an interest in ensuring that the government is not violating constitutional rights. *Id.* at 1265–66. As in *Planned Parenthood Ass'n of Utah*, the violation of Plaintiffs' and all Haskell students' constitutional rights, standing alone, is an irreparable injury, and it is in the public interest to enjoin the policy so that injury does not continue while this litigation is pending.

On Plaintiffs' side of the scale are their constitutional rights to free speech and freedom of the press. In contrast, a preliminary injunction would not interfere in any way with Defendants' ability to perform their duties managing and operating Haskell. According to Defendants' materials, the Code of Student Conduct is promulgated "to promote healthy decision-making and promote the rights of all students." Nally Decl. Ex. 1, at 7. This generalized interest does not support the enforcement of a policy, like the Campus Expression Policy, that suppresses protected expression. *Cf. Verlo*, 820 F.3d at 1127 (affirming decision to grant preliminary injunction despite argument about disruption of court proceedings where witnesses identified no concrete threat).

In fact, the Campus Expression Policy would *better* "promote the rights of all students" if it did not cabin student expression to that which is consistent with the CIRCLE values. Any minimal concerns that Defendants may proffer can be addressed by amending the challenged portion of the Code of Student Conduct to comply with the First Amendment. *See, e.g.*, *Bair*, 280 F. Supp. 2d at 373 ("[T]he

issuance of a preliminary injunction leaves [the university] free to enact new regulations that are tailored so as to conform to First Amendment jurisprudence."). When comparing the parties' respective positions, it is clear that the balance of equities favors Plaintiffs.

C. Plaintiffs Should Not Be Required to Provide a Security Payment.

Generally, a party moving for a preliminary injunction is required to provide security in an amount that would be sufficient to compensate a party found to have been wrongfully enjoined. Fed. R. Civ. Pro. 65(c). When the movant is engaged in litigation that is in the public interest, however, the Court "may elect to require no security at all." *Atlanta v. Metro. Atlanta Rapid Transit Auth.*, 636 F.2d 1084, 1094 (5th Cir.1981) (quoting *Corrigan Dispatch Co. v. Casa Guzman*, 569 F.2d 300, 303 (5th Cir. 1978)); *see also Cont'l Oil Co. v. Frontier Refin. Co.*, 338 F.2d 780, 782–83 (10th Cir. 1964) (finding that the district court did not abuse its discretion by entering a preliminary injunction without requiring a surety bond, particularly in "the absence of proof showing a likelihood of harm" to the enjoined party). Plaintiffs' suit is in the public interest, as they sued to vindicate their own rights and to protect the rights of others. Plaintiffs seek to preliminarily enjoin the Campus Expression Policy in an effort to protect both their own expressive and due process rights as well as those of other Haskell students, which is in the public interest. And enjoining the Campus Expression Policy will cause Defendants no harm, as they would suffer no harm in striking a single line of language from their policy to render it compliant with established precedent concerning vague and overbroad

student speech codes. For these reasons, Plaintiffs should not be required to provide a security payment.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' Motion for Preliminary Injunction on Claims 4 and 5.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stephen D. Bonney, hereby certify that on May 19, 2021, a copy of the foregoing motion was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt, and parties may access this filing through the Court's electronic filing system.

/s/ Stephen Douglas Bonney
STEPHEN DOUGLAS BONNEY