23-15

United States Court of Appeals for the Second Circuit

DO NO HARM,
PETITIONER,

v.

PFIZER, INC.,
RESPONDENT.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, NO. 22-CV-7908, HON. JENNIFER L. ROCHON, PRESIDING

BRIEF OF SPEECH FIRST AS *AMICUS CURIAE* SUPPORTING PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Speech First has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*

Speech First is a membership association of students, parents, faculty, alumni, and concerned citizens. Launched in 2018, Speech First is committed to restoring freedom of speech on college campuses through advocacy, education, and litigation. For example, Speech First has challenged speech-chilling policies at the University of Michigan, *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019); University of Texas, *Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020); University of Illinois, *Speech First, Inc. v. Killeen*, 968 F.3d 628 (7th Cir. 2020); University of Central Florida, *Speech First, Inc. v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022); and, Virginia Tech, *Speech First, Inc. v. Sands*, 69 F.4th 184 (4th Cir. 2023). Because Speech First's members include students who require anonymity to protect them from official retribution, it has a vital interest in this case.[1]

[1] No one other than *amicus*, its members, or its counsel authored or contributed money toward this brief.

INTRODUCTION

This case involves the invention of a novel Article III rule that associations cannot have standing to assert their members' injuries unless they divulge their identities. The panel reached this conclusion primarily as a matter of prudence, not constitutional text, history, or precedent. But neither prudence nor our constitutional tradition suggests a new Article III standing limitation on the ability of vulnerable citizens to band together to vindicate their rights. This brief elaborates on two reasons why the Court should grant rehearing en banc.

First, the panel's opinion contradicts precedents of the Tenth and D.C. Circuits, which do not require associations to divulge member identities as a matter of Article III standing. The panel barely contested the point, dismissing the Tenth Circuit's decision as irrelevant because it arose on a motion to dismiss. But Speech First was the plaintiff-appellant in that case, and the procedural posture was identical: both cases involved a preliminary injunction motion made before the district court dismissed on standing grounds. What's more, the Tenth Circuit's decision relied on its precedents refusing to apply the panel's rule even at summary judgment. This circuit conflict requires review.

Second, the panel's rule would harm vulnerable plaintiffs. College students come to Speech First for help vindicating their First Amendment rights against their schools—which could easily retaliate against them—because they know that we will

protect their identities. They, like the Supreme Court's jurisprudence, also recognize that speaking and litigating through an association is often more effective. For students subject to the censorship pressures on college campuses, this is often the only realistic option to protect their rights. The panel's rule would thus harm associations like Speech First and the important work they do to promote the rule of law. The Court should grant rehearing en banc.

ARGUMENT

I. The panel's opinion splits with the D.C. Circuit and a Tenth Circuit precedent that Speech First just won.

The panel held that Article III requires an organizational plaintiff to "identify at least one [member] by name" when its "standing rests on alleged injuries to its members." Op. 19. Beyond lacking a foundation in Article III's text or history, that holding deviates from two other circuits, including the Tenth Circuit in a recent case involving Speech First.

After Oklahoma State University (OSU) "implemented three schoolwide policies that allegedly chilled protected speech, Speech First filed suit in federal court on behalf of its OSU student members." *Speech First, Inc. v. Shrum*, 92 F.4th 947, 948 (10th Cir. 2024). Speech First sought "preliminary and permanent injunctive relief barring the University's enforcement of the Policies." *Speech First, Inc. v. Shrum*, 2023 WL 2905577, at *1 (W.D. Okla. Apr. 10, 2023). After Speech First moved for a preliminary injunction, OSU moved to dismiss, raising "the threshold

issue of [Speech First's] standing to assert the claim on which it [sought] an injunction." *Id.* Addressing both motions simultaneously, the district court granted OSU's motion to dismiss: "Because Plaintiff has failed to name the members on behalf of whom it brings suit, it lacks standing." *Id.* at *3. The court denied Speech First's preliminary injunction motion as moot.

The only question on appeal was whether Speech First could establish Article III standing without revealing the names of its student members. 92 F.4th at 949–50. Answering in the affirmative, the Tenth Circuit started with the "long tradition in the federal courts of plaintiffs bringing suits under an alias." *Id.* at 950. Even under a pseudonym, a plaintiff can present "a justiciable controversy and standing to maintain the action." *Doe v. Bolton*, 410 U.S. 179, 187 (1973) (cleaned up). And pseudonymity does not suggest that the plaintiff is fictitious or that their declarations relevant to standing are false. *Shrum*, 92 F.4th at 950.

The Tenth Circuit found "no reason why the use of a pseudonym by the injured member of the organization filing suit should defeat standing when the injured member alone would have standing to bring the claim as an individual plaintiff under a pseudonym." *Id.* As it explained, "there is longstanding Supreme Court authority supporting standing for organizations whose injured members are not named." *Id.*; *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458–59 (1958) (anonymity of association's members posed no standing hurdle).

The Tenth Circuit also emphasized its prior holdings "that organizational standing is proper even when the qualifying member of the plaintiff organization is anonymous." *Shrum*, 92 F.4th at 951. As it explained, in one decision it "revers[ed] a district court's holding that an organization 'lacks associational standing because none of its individual members have standing'" after concluding that a pseudonymous member "possesses standing." *Id.* (quoting *Am. Humanist Ass'n, Inc. v. Douglas Cnty. Sch. Dist.*, 859 F.3d 1243, 1254 n.4 (10th Cir. 2017)). That decision came at the summary judgment stage, not on the pleadings. *Am. Humanist*, 859 F.3d at 1250.

Even if a plaintiff organization wanted to *name* an injured member to establish standing, there is no requirement to use the member's legal name. *Shrum*, 92 F.4th at 952. Naming only requires "identifying or designating a person or thing and to distinguish that person or thing from others." *Id*. (cleaned up). And even at later stages in the litigation, "the district court could . . . verify the existence and status of the pseudonymous members through in camera review—a process that protects anonymity"—reinforcing that divulging names is not required under Article III. *Id.* at 950 n.4. In short, organizations can both allege and establish standing without naming their injured members. *See id*. at 951.

The panel's opinion here contradicts the Tenth Circuit's reasoning. That opinion would force associations to reveal the name of at least one member with

cognizable injuries. Op. 18–19. The panel found that this "requirement makes sense," making it allegedly "an essential component" of Article III standing. Op. 21–22. The panel found disclosure *necessary* because "it is a demonstration of the sincerity of the member's interest" rather than "a hypothetical legal challenge" by the association. Op. 21–22. So even when it is clear and not speculative, by some other evidence, that one or more members of an association will suffer from a defendant's action, the panel's opinion would require disclosure of members' names.

The panel tried to distinguish the Tenth Circuit's decision in *Shrum* as involving a motion to dismiss, while this case involved a request for a preliminary injunction too. Op. 25 n.7. But as shown above, the same was true in *Shrum*. And the Tenth Circuit precedents relied on by *Shrum* were decided at the summary judgment stage. *Cf. Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011) ("A plaintiff's burden to demonstrate standing increases over the course of litigation."). Because these cases were procedurally analogous, the panel's opinion cannot be squared with the Tenth Circuit's precedents. Rehearing en banc is necessary.

This disagreement is highlighted by the panel's discussion of the Supreme Court's decision in *Summers v. Earth Island Institute*, 55 U.S. 488 (2009). There, the Supreme Court explained that "organizations can assert the standing of their members." *Id.* at 494. The panel agreed that *Summers* did not "squarely address" whether an association must identify its injured members by name to establish

standing. Op. 19. Yet the panel concluded that "a rule requiring an associational plaintiff to name at least one injured member best aligns with *Summers*." Op. 16–17 (cleaned up).

The Tenth Circuit, by contrast, concluded that a naming requirement "was clearly not the intent of the Court" in *Summers*, which "provided no hint, much less an emphatic statement" of such a rule. *Shrum*, 92 F.4th at 949. The Tenth Circuit made clear that context is important. Associational plaintiffs must rely on an actual injured person rather than a "statistical probability that some member would suffer an injury." *Id.* at 952. But *Summers* did not involve pseudonyms, so there was no need for the Supreme Court to "distinguish between legal names and pseudonyms." *Id*. Thus, rather than requiring the actual names of the harmed individuals, standing "can be satisfied by identifying the injured member as "Member 1." *Id*. The decisions of the panel and the Tenth Circuit are irreconcilable.

The panel's decision also breaks with the D.C. Circuit. That court held that a union "adequately demonstrated associational standing because it has shown that at least one of its members is directly regulated by the [challenged] rule and has been injured by it." *Advocs. for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 41 F.4th 586, 592 (D.C. Cir. 2022). The union had submitted a "survey of affected [union] membership," and though the survey did not identify members by name, it provided sufficient evidence to satisfy Article III under *Summers*. *Id.* at

592–94. As the D.C. Circuit explained, "To be sure, we do not know the names of the individuals in the survey, but anonymity is no barrier to standing on this record": "Naming union members adds no essential information bearing on the injury component of standing." *Id.* at 594 (cleaned up). All that mattered was whether the record "evidenc[ed] the concrete injuries that individual members" would suffer—not their names. *Id.* And once again, the D.C. Circuit applied this rule at the final determination of the merits. *See id.*

Thus, rehearing en banc is necessary so that associations do not face uneven barriers to vindicating their rights based on the happenstance of location.

II. The panel's rule will harm vulnerable plaintiffs, like college students.

The panel's opinion threatens to undermine the vindication of important rights. That is because vulnerable plaintiffs have long banded together to assert their legal rights. The panel's opinion makes that common approach much more tenuous by forcing individual plaintiffs to expose their identities before an association can establish standing.

College students typify this type of plaintiff. They reasonably fear speaking out on controversial issues. Once, college campuses served as "marketplace[s] of ideas," where students sought free debate and discussion in the pursuit of truth. *Healy v. James*, 408 U.S. 169, 180 (1972). But the marketplace has turned into an echo chamber, and dissenting students must self-censor or risk personal attacks—or

even disciplinary sanctions—especially when it comes to controversial issues like anti-Semitism and racial discrimination.

A national survey of over 1,500 college students confirms this point, finding that 63% of students agreed that the campus climate prevented some from expressing their views because others might think them offensive. Heterodox Acad., *Understanding Campus Expression Across Higher Ed* 5, 10–11 (Mar. 2023). In another study, more than half of all students worried about damaging their reputation because of someone misunderstanding what they have said or done. S.T. Stevens, *2024 College Free Speech Rankings*, The Foundation for Individual Rights and Expression, https://www.thefire.org/research-learn/2024-college-free-speech-rankings.

These same concerns tend to deter students from suing their schools. The college environment has an "inherent power asymmetry between" the school and students. *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 869 (9th Cir. 2016). Courts properly recognize the realities of this environment by often granting anonymity in cases involving students and schools. *See, e.g.*, *Doe v. Colgate Univ.*, 2016 WL 1448829, at *3 (N.D.N.Y. Apr. 12, 2016) (collecting cases); *Doe v. New York Univ.*, 537 F. Supp. 3d 483, 497 (S.D.N.Y. 2021). Not only do litigating students face the threat of school retaliation, they face opprobrium from future schools and employers.

In large part, all this is why Speech First exists. For instance, consider the rise of university bias response teams, which review (often anonymous) reports from students and faculty members (and sometimes anyone else) of any "expressions against a person or group because of the person's or group's age, color, disability, gender (including pregnancy), gender identity, gender expression, national origin, political affiliation, race, religion, sexual orientation, veteran status, or any other bias protected by law." *Sands*, 69 F.4th at 188. A committee then reviews each complaint and determines whether action is warranted. The committee may act even when the conduct "does not violate the law or university rules" if the committee decides that the complaint "presents an educational opportunity." *Id*. at 189 (cleaned up).

The far-reaching power of bias response teams combined with the typical campus environment has "prompted students to report any and all perceived slights." *Speech First, Inc. v. Sands*, 144 S. Ct. 675, 677 (2024) (Thomas, J., dissenting). For instance, several male students were reported for privately calling a group of women not "athletic." *Id*. at 677. In another school, a student was reported for writing in chalk "Build the Wall." *Id*.

Unsurprisingly, students fear "the risk of being accused of offensive, hostile, negative, or harmful conduct—let alone hate or bias." *Cartwright,* 32 F.4th at 1124 (cleaned up) (finding that bias-related-incidents policy objectively chills student

speech). Through these efforts, bias response teams "subvert free and open inquiry and invite fears of political favoritism." *Fenves*, 979 F.3d at 338.

By suing on behalf of anonymous students in cases like *Shrum*, Speech First has been at the forefront of the pushback against bias response teams and other policies that chill speech. As the ACLU explained, allowing students to "support the association's standing pseudonymously enable[s] them to avoid . . . harms while still seeking to vindicate their rights." Brief for American Civil Liberties Union et al. as *Amici Curiae* 15, *Shrum*, No. 23-6054 (10th Cir. May 30, 2023), https://tinyurl.com/yy9jrecx.

Forcing associations to reveal their members before vindicating legal rights would strip membership organizations like Speech First of the ability to keep their promise and protect students from bias response teams and other First Amendment impositions. "Privacy in group association may be indispensable to the preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP*, 357 U.S. at 462; *see Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.").

Speech First relies on students to join its organization. If Speech First cannot protect its members' identities, students who are (appropriately) fearful of campus

retaliation will be deterred from contacting or joining the organization. All too often, because of the difficulty of an individual bringing suit, they will then have to suffer through the deprivation of their legal rights in silence under the shadow of censorship. Thus, the panel's opinion both discourages the association that the First Amendment recognizes as important and deprives individual plaintiffs of an effective means to seek redress when their rights are violated. The result will be less speech, less association, and more unlawful action.

Respectfully submitted,

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Dated: March 27, 2024

/s Christopher Mills
Christopher Mills

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I, Christopher Mills, an attorney, certify that on this day the foregoing Brief was served electronically on all parties via CM/ECF.

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s/ Christopher Mills
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