

No. 19-50529

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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SPEECH FIRST INCORPORATED

*Plaintiff-Appellant,*

v.

GREGORY L. FENVES, in his official capacity as  
President of the University of Texas at Austin

*Defendant-Appellee.*

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On Appeal from the United States District Court  
For the Western District of Texas, No. 1:18-cv-1078 (Yeakel, J.)

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**BRIEF AMICI CURIAE OF THE GOLDWATER INSTITUTE,  
CATO INSTITUTE, AND TEXAS PUBLIC POLICY FOUNDATION**

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**CERTIFICATE OF INTERESTED PARTIES**

*Speech First, Inc. v. Fenves*, No. 19-50529

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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None of the *amici curiae* on this brief has a parent corporation. No publicly held company owns more than 10% of stock in any of the *amici curiae* organizations.

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## IDENTITY AND INTEREST OF *AMICI CURIAE*<sup>1</sup>

The Goldwater Institute was founded in 1988 as a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government and individual rights through research papers, editorials, policy briefings and forums. Through its Scharf-Norton Center for Constitutional Litigation, the Institute represents clients and participates as *amicus curiae* in cases involving the First Amendment. For instance, the Institute currently represents clients in two First Amendment cases where—as here—the question of ideological harassment is a central issue. *Rio Grande Found. v. City of Santa Fe*, No. 1:17-cv-00768-JCH-CG (D.N.M. filed July 26, 2017); *Colo. Union of Taxpayers Found., et al. v. City of Denver*, No. 2019CA543 (Colo. App. 2019).

The Cato Institute is a nonpartisan public policy research foundation that advances individual liberty, free markets, and limited government. Cato’s Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutionalism that are the foundation of liberty. Toward those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

The Texas Public Policy Foundation is a non-profit, nonpartisan research organization founded in 1989 and dedicated to promoting liberty, personal

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<sup>1</sup> No counsel for any party authored this brief in whole or part, and no person other than *amici*, their members or counsel—and no party or party’s counsel—contributed money intended to fund its preparation or submission.

responsibility, and free enterprise through academically-sound research and outreach. In accordance with its central mission, the Foundation has hosted policy discussions, authored research, presented legislative testimony, and drafted model ordinances to reduce the burden of government on Texans. Through its Center for Innovation in Education, the Foundation authors research specific to campus free speech and higher education.

All parties have consented to the filing of this *amicus* brief.

## **ARGUMENT**

This *amicus* brief intends to address a single issue: How may someone alleging a chilling effect establish an injury-in-fact for purposes of standing in First Amendment cases? This issue has become increasingly relevant as more and more students, and others, self-censor out of fear of being harassed and intimidated for ideological reasons. In this case, members of Appellant Speech First have alleged that they wish to opine about a range of controversial topics, including illegal immigration, affirmative action, the breakdown of the nuclear family, the Second Amendment, and President Trump. ROA 519. However, they allege that they currently refrain from expressing these views because they are afraid that such speech may violate University policies against “verbal harassment,” “incivility,” “rudeness,” and “harassment” online, and “incivility” and “harassment” in University dormitories. ROA 186-89. By violating the University’s speech policies, members of Speech First risk subjecting themselves to the types of constitutional harms discussed in this brief.

The trial court held that this self-censorship must be “objectively reasonable” in order to establish an injury-in-fact for standing purposes. ROA 517. In today’s campus environment, it *is* objectively reasonable for students expressing conservative viewpoints to self-censor when a university adopts policies like those the University of Texas at Austin has adopted here.

Oftentimes, students who oppose conservative viewpoints will express dismay or discomfort whenever their fellow students express conservative or libertarian opinions. *See, e.g.*, Jeffrey M. Jones, *More U.S. College Students Say Campus Climate Deters Speech*, USA Gallup Poll, Mar. 12, 2018;<sup>2</sup> Jerry Zheng, *What Conservative Students Face on Your Campus*, OneClass, Mar. 7, 2019.<sup>3</sup> And, in fact, students who express conservative or libertarian opinions are often formally investigated, suspended, made to issue forced apologies, or experience financial retaliation when they seek to form groups with other students who share their views. These occurrences are so common and widespread that it is perfectly reasonable for members of Speech First to worry that they will be next—particularly under the University’s expansive definitions of what constitutes prohibited speech. Because this self-censorship is objectively reasonable, the trial court should have found that the injury-in-fact requirement was satisfied.

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<sup>2</sup> <https://news.gallup.com/poll/229085/college-students-say-campus-climate-deters-speech.aspx>.

<sup>3</sup> <https://oneclass.com/blog/featured/146680-what-conservative-students-face-on-your-campus.en.html>.

**I. Campus officials regularly target people who have expressed viewpoints similar to those that members of Speech First wish to express.**

Speech First members worry that people who express views similar to theirs are regularly investigated and disciplined under policies similar to the one they object to here. A review of recent cases and media reports shows that fear of being disciplined for expressing conservative viewpoints on campus is well-founded, and would provide an objectively reasonable basis for like-minded students to self-censor. Broadly, these incidents take three primary forms: formal discipline, forced apologies, and defunding of student groups.

**A. Discipline for expressing conservative viewpoints is common.**

Members of Speech First have alleged that they would like to speak about a variety of conservative topics on campus but are self-censoring for fear of being disciplined over their speech. For instance, members allege that they would like to speak about firearm ownership, racial issues, and feminism. ROA 509. As shown below, like-minded students have been disciplined for expressing views on these topics on college campuses in the recent past. It is therefore not unreasonable for members of Speech First to self-censor for fear of incurring similar discipline from the University.

Earlier this year, a student at First Coast Technical College in Florida was suspended for posting a photograph of herself on Facebook that showed her at a gun range receiving firearms instruction. Adrian Mojica, *Florida Mother Says She Was Suspended from College for Posing with a Firearm*, Fox17 Nashville,

June 14, 2019.<sup>4</sup> Even though the activities portrayed in the photo were perfectly legal, and portrayed responsible firearm ownership, the student was confronted by an assistant principal while she was taking an exam. She was suspended soon thereafter, allegedly because the photo, which included the student and her fiancée, included the caption “She’s my Bonnie and I’m her Clyde,” and this allegedly made some students feel fearful.

In 2017, a conservative student at Rollins College was suspended after he objected to a Muslim student’s statement that beheading was the appropriate punishment for homosexuals and adulterers under sharia law (it is unclear whether the Muslim student was endorsing this view).<sup>5</sup> Robby Soave, *Rollins College Allegedly Suspends Conservative After He Challenged Islamic Student Who Threatened Gays*, Reason, March 28, 2017. The suspended student took his concerns about the comments to his professor, saying they were deeply offensive. That professor then reported the conservative student, claiming that the conservative student’s concerns about the Muslim student’s statements made the professor feel unsafe. The conservative student was then called to the dean of safety’s office and informed that he was being suspended. “In my judgment, your actions have constituted a threat of disruption within the operations of the college

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<sup>4</sup> <https://fox17.com/news/nation-world/florida-mother-says-she-was-suspended-from-college-for-posing-with-a-firearm>.

<sup>5</sup> <https://reason.com/2017/03/28/rollins-college-allegedly-suspends-conse/>.

and jeopardize the safety and well-being of members of the College community and yourself,” wrote the dean.

In August 2016, a conservative student at the University of Houston wrote on Facebook “Forget #BlackLivesMatter; More like AllLivesMatter.” Cleve R. Wootson, Jr., *Student Body Vice President Writes a “Forget Black Lives Matter” Post, and a University Erupts*, Wash. Post, Aug. 1, 2016.<sup>6</sup> This post caused an immediate uproar on campus. Other students complained that the author, who was vice president of the Student Government Association, had written something unbecoming of a member of student government. Others called the post hateful and inflammatory. In response to the post, the president of the Student Government Association ultimately moved to suspend the student over the contents of the post.

In 2008, Colorado College disciplined two students over a flyer that mocked feminism and gender studies. Adam Kissel, *Colorado College Punishes Students for “Violent” Satirical Flyer*, Found. for Individual Rights in Educ., Mar. 31, 2008.<sup>7</sup> The flyer was produced in response to a *pro*-feminist flyer that included topics ranging from male castration to feminist pornography. The anti-feminist flyer satirized the first flyer and included topics like the proper use of

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<sup>6</sup> <https://www.washingtonpost.com/news/grade-point/wp/2016/08/01/student-body-vice-president-writes-a-forget-black-lives-matter-post-and-a-university-erupts/>.

<sup>7</sup> <https://www.thefire.org/colorado-college-punishes-students-for-violent-satirical-flyer/>.

chainsaws and female-on-male domestic violence. In other words, it was clearly a provocation created in response to a provocation, as often happens on college campuses—and the sort of “uninhibited, robust, and wide-open” speech that characterizes political argument in a democracy, and which sometimes “include[s] vehement, caustic, and sometimes unpleasantly sharp attacks.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Nevertheless, the students who produced the anti-feminist flyer were charged with “violating the college’s values of respect and integrity” by the college president. Kissel, *supra*. Ultimately, the students had a letter of reprimand put in their student files and were forced to hold a forum to invite opposing views. The students who produced the original flyer, by contrast, were not disciplined.

**B. Forced apologies for expressing conservative viewpoints are common.**

Even when students are not formally disciplined for expressing conservative viewpoints, they are frequently investigated and forced to attend mandatory meetings or to issue forced apologies in order to avoid formal discipline. In the following examples, students were forced to explain themselves, or to apologize for expressing conservative views relating to President Trump and firearm ownership. These are matters that members of Speech First have expressly stated they wish to speak about, and the existence of these examples, among others, makes it objectively reasonable that expressing

those views could lead to consequences similar to those described below under the University's policies.

In 2017, a student at Orange Coast College in California was disciplined for filming a professor who went on a long rant against President Trump and for sharing that video with a conservative student group. Avi Selk and Peter Holley, *A Student Was Punished for Filming Professor's Anti-Trump Rant. Then Came The Backlash*, Wash. Post, Feb. 25, 2017.<sup>8</sup> After the student group complained to school administrators that the rant made conservative students feel unwelcome and fearful that their grades could be harmed as a result of their support for President Trump, the college moved to suspend the student who did the filming. In addition to the semester-long suspension, the student was forced to apologize to the professor and to write an essay about "why you decided to share the video" and the "ensuing damage to Orange Coast College students, faculty and staff." The punishment was rescinded only after vociferous outcry on campus and in the media.

In 2018, a student at Long Island University Post took pictures of himself in a Cabela's sporting-goods store. Erin Dunne, *College Administrators Force Student into Hostile Meeting for Simply Taking Pictures with Unloaded Guns*,

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<sup>8</sup> <https://www.washingtonpost.com/news/grade-point/wp/2017/02/25/an-assault-on-free-speech-school-wont-punish-student-who-filmed-professors-anti-trump-rant/>.

Wash. Examiner, Oct. 10, 2018.<sup>9</sup> In those pictures, which he uploaded to his personal Facebook page, he was posing with various unloaded firearms. He posted other pictures of himself holding unloaded antique firearms while under the supervision of a firearms instructor. Although everything depicted in the pictures was perfectly legal, other students complained about them to the college's administration. Administrators, in turn, summoned the student to a mandatory meeting where "he was berated not only for the Facebook post but also for an essay that he wrote for a class where he cited the Boston Tea Party as a justifiable use of violence against authorities."

**C. Colleges frequently defund and refuse to recognize groups expressing conservative viewpoints.**

A final concern exists among conservative students about whether they will receive recognition and support from their universities when they join together to speak as a group. As shown below, it is increasingly common for universities to refuse to recognize—and therefore fund—student groups that express conservative viewpoints.

In late 2015, *The Koala*, a student newspaper at the University of California San Diego, published a satirical article titled "UCSD Unveils New Dangerous Space on Campus." *The Koala v. Khosla*, No. 17-55380, 2019 WL 3311148, at \*3 (9th Cir. July 24, 2019). "The article satirized the concepts of 'trigger

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<sup>9</sup> <https://www.washingtonexaminer.com/opinion/college-administrators-force-student-into-hostile-meeting-for-simply-taking-pictures-with-unloaded-guns>.

warnings’ and ‘safe places’ on college campuses, employing ethnic and sexist stereotypes and racial epithets.” *Id.* The chancellor of the university denounced the article as “profoundly repugnant, repulsive, attacking[, ] and cruel,” and in response to this statement, the Associated Students organization passed campus legislation that effectively defunded *The Koala*. *Id.*

In March 2017, when the College Republicans at Denver’s Regis University sought to hold a protest against race-based college admissions policies, the University sponsored an official event to denounce them for being “indisputably immoral and malicious,” and an example of “hate speech.” Robby Soave, *Panic Attack: Young Radicals in the Age of Trump* 70 (2019).

Earlier this year, Santa Clara University refused to recognize—or fund—a chapter of Young Americans for Freedom (YAF). Robby Soave, *Santa Clara University Student Government Won’t Recognize YAF, Says Conservative Speakers Make Campus “Unsafe”*, Reason, June 10, 2019.<sup>10</sup> YAF, a widely respected conservative student organization which was founded at the home of William F. Buckley, and whose notable alumni include President Ronald Reagan and Fifth Circuit Court of Appeals Judge Jerry Smith, has been active on American university campuses since 1960. YAF is a 501(c)(3) non-profit that seeks to promote speakers and ideas across the conservative-libertarian ideological spectrum. However, despite its long history of promoting mainstream

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<sup>10</sup> <https://reason.com/2019/06/10/santa-clara-university-yaf-students/>.

conservative viewpoints, Santa Clara University has repeatedly voted not to recognize or fund the local YAF chapter, citing fears of creating an unsafe climate for marginalized students. Also this year, Syracuse University refused to recognize the local YAF chapter. Alex Morey, *Syracuse Denies Recognition of Student Group, Says Conservative Views and Support of U.S. Constitution are “Not Inclusive”*, Found. for Individual Rights in Educ., Feb. 22, 2019.<sup>11</sup> There, the university found that the organization’s past activity was “inflammatory” and that its endorsement of conservative principles was “not inclusive” enough to qualify for recognition and funding.

At Williams College in Massachusetts, the college council rejected an application to create a student group called the Williams Initiative for Israel.<sup>12</sup> The group’s constitution described it as existing to support Israel and pro-Israel members of the campus community, to educate people on issues relating to Israel, and to celebrate Jewish cultural events and holidays. Office of the President of Williams College, *College Council Vote on Williams Initiative for Israel*, May 3, 2019.<sup>13</sup> As the college’s own president observed, transcripts of the vote not to recognize the group “indicate that the decision was made on political grounds.”

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<sup>11</sup> <https://www.thefire.org/syracuse-denies-recognition-of-student-group-says-conservative-views-and-support-of-u-s-constitution-are-not-inclusive/>.

<sup>12</sup> While support for Israel is not an inherently conservative (or liberal) position, it is highly associated today with conservative views.

<sup>13</sup> <https://president.williams.edu/letters-from-the-president/college-council-vote-on-williams-initiative-for-israel/>.

In October 2017, a Catholic student group Love Saxa at Georgetown University was threatened with being labeled a hate group and stripped of university funding for its advocacy for marriage as being between a man and a woman. Caleb Parke, *Georgetown Student Group Targeted as “Hate Group” for Catholic Beliefs, Could be Sanctioned*, Oct. 24, 2017.<sup>14</sup> This occurred as a result of the Love Saxa president publishing an op-ed in the university student newspaper *The Hoya* talking about abstinence before marriage and the group’s definition of marriage.

**II. Given the prevalence of similar incidents around the country, it is objectively reasonable for the members of Speech First to self-censor due to the University’s policies.**

The above are just a few examples that show that conservative students frequently face discipline, suspensions, forced apologies, and defunding for expressing conservative viewpoints on campus. Students opposed to conservative viewpoints frequently use university rules to force administrators to take official action against “offensive” conservative speakers. These types of official actions negatively impact students in obvious ways. At the mild end of the spectrum, forced apologies are a form of public shaming that can lead to students being socially ostracized. In the middle of the spectrum, “official letters” that are placed in a student’s disciplinary file may affect future educational and employment opportunities; and defunding of student groups leads to decreased

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<sup>14</sup> <https://www.foxnews.com/us/georgetown-student-group-targeted-as-hate-group-for-catholic-beliefs-could-be-sanctioned>.

opportunities to engage in constitutionally protected speech on campus. At the extreme end of the spectrum, of course, suspensions can have profound effects on students, as they must be disclosed to all future employers and graduate programs to which a student may apply.

And conservative students do, indeed, feel that their political views expose them to scrutiny and retaliation on campus. Campus newspapers surveying student opinion report that students overwhelmingly perceive conservative views as disfavored and stigmatized. *See, e.g.,* Delaney Vetter, “*They Don’t Let Me Finish My Sentences*”: *Conservative Students Share Their Experiences on a Liberal Campus*, The [University of Portland] Beacon, Apr. 17, 2019<sup>15</sup>; Hannah Cregan Zigler, *We Are The 7%: Conservative Students and Stigmatized Discourse at Haverford*, Haverford [College] Clerk, Nov. 1, 2016.<sup>16</sup> Statistics show that 32 percent of conservative students (as opposed to 8 percent of liberal students) are “very reluctant” to discuss politics in the classroom, and 32 percent of conservative and 30 percent of libertarian students reported being treated badly on campus as a consequence of their political opinions. Sean Stevens, *The Campus Expression Survey: Summary of New Data*, Heterodox Academy, Dec. 20, 2017.<sup>17</sup> Even the University of Chicago’s president, Robert Zimmer, has

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<sup>15</sup> <https://www.upbeacon.com/article/2019/04/conservatives-on-campus>.

<sup>16</sup> <http://haverfordclerk.com/we-are-the-7-conservative-students-and-stigmatized-discourse-at-haverford/>.

<sup>17</sup> <https://heterodoxacademy.org/the-campus-expression-survey-summary-of-new-data/>.

acknowledged that “[f]ree speech is at risk” on the nation’s university campuses, due to the dis-inviting or shouting down of conservative speakers, as well as “[d]emands ... to eliminate readings that might make some students uncomfortable,” and forced apologies “for expressing views that conflict with prevailing perceptions.” Robert J. Zimmer, *Free Speech is the Basis of a True Education*, Wall St. J., Aug. 26, 2016.<sup>18</sup> That college students self-censor is an entirely predictable consequence.

This Court determines whether a chilling-effect claim is objectively reasonable by looking at whether the feared harm would “discourage a person of ordinary firmness from continuing to speak out.” *Keenan v. Tejada*, 290 F.3d 252, 258 (5th Cir. 2002). In *Keenan*, this Court held that people of ordinary firmness *would* be objectively deterred by police detaining them during traffic stops and issuing baseless—but serious—charges of criminal misconduct against them after they made allegations of official misconduct. *Id.* at 260. (*Keenan* was a retaliation case, but the analysis is the same: would the alleged harm prevent a person of ordinary firmness from speaking?) Likewise, in *N. Miss. Commc’ns, Inc. v. Jones*, 951 F.2d 652, 653–54 (5th Cir. 1992), this Court found that a county board’s withholding of advertising spending, in retaliation over a newspaper’s negative treatment of the board’s official actions, could deter a person of ordinary firmness from speaking in the future.

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<sup>18</sup> <https://www.wsj.com/articles/free-speech-is-the-basis-of-a-true-education-1472164801>.

On the other hand, this Court has rejected allegations of objective chilling in cases where the feared retaliation was “too trivial or minor to be actionable as a violation of the First Amendment.” *Keenan*, 290 F.3d at 258. For example, in *Colson v. Grohman*, 174 F.3d 498 (5th Cir. 1999), a member of the Pearland, Texas, city council alleged official retaliation in response to her exercise of her First Amendment rights. As the opinion notes, the history of the case was complex, but the relevant fact was that the council member alleged that other council members were retaliating against her for expressing dissenting views. The alleged retaliation took the form of “(1) reported baseless accusations to the District Attorney’s Office in an effort to have her prosecuted; (2) used these allegations as the basis of a recall petition to drive her out of office; and (3) repeated them once again in a public document designed to discredit her with her constituents.” *Id.* at 506. However, as this Court noted, the case ultimately involved no *formal* action against the council member. She was not even formally reprimanded. Thus, even though what happened to her was serious, it did not rise to the level of a constitutional harm.

The harms that appellant’s members are concerned about here are easily distinguishable. *Colson* involved reputational harms, to be sure, but this Court ultimately found that those were insufficient and differentiated the case from instances involving official action. But as shown in the numerous examples above, conservative students—like the members of Speech First who wish to remain anonymous—do not fear merely social pressure over their views. Instead,

they rightly fear that the University will take official action that will damage their ability to seek future educational opportunities or employment. The feared official actions—which are sanctioned by the University’s rules and policies—are the kind of concrete harms that this Court addressed in *Keenan*. As in *Keenan*, these official actions, in the form of forced apologies, letters in one’s student file, suspensions, and defunding of student groups, are the type of “concrete intimidating tactics [that would] deter[] ordinary persons” from engaging in constitutionally protected speech. *Keenan*, 290 F.3d at 259. Therefore, it was objectively reasonable for members of Speech First to refrain from speaking under the University’s policies.

### **CONCLUSION**

It was objectively reasonable for members of Speech First to self-censor, rather than follow the well-worn path of conservative students who speak out, only to find themselves investigated, forced to apologize, suspended, or defunded simply for exercising their constitutional right to engage in protected speech. And because this self-censorship was objectively reasonable, Speech First successfully plead an injury-in-fact. Accordingly, the decision of the district court should be reversed and remanded.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

This brief complies with Rules 29(a)(5) and 32(a)(7)(B) because it contains 3,483 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)–(6) because it has been prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ Timothy Sandefur

**CERTIFICATE OF SERVICE**

I filed a true and correct copy of this brief with the Clerk of the Court via the CM/ECF system, which will notify all counsel on August 16, 2019.

/s/ Timothy Sandefur