No. 19-50529

United States Court of Appeals
for the
Fifth Circuit

Speech First, Inc.

Plaintiff-Appellant,

– v. –

Gregory L. Fenves,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION
No. 1:18-cv-01078-LY

BRIEF FOR *AMICUS CURIAE* ALLIANCE DEFENDING FREEDOM IN SUPPORT OF PLAINTIFF-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that, in addition to the persons and entities listed in the appellant's Certified of Interested persons, the following listed persons and entities as described in Fifth Circuit 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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[1] Alliance Defending Freedom has no parent corporation, and no corporation owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE

Alliance Defending Freedom is a nonprofit, public-interest legal organization that protects First Amendment freedoms. Since its founding in 1994, ADF has played a key role in numerous cases before the United States Supreme Court—most recently, in *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018)—as well as in hundreds of other cases in state and federal courts.

SUMMARY OF ARGUMENT

The right to speak anonymously is as engrained in the fabric of our nation as the Constitution itself. Indeed, from the earliest days of the Republic and before, some of our most seminal tracts and formative writings were anonymous. The *Federalist Papers* are not the Madison, Hamilton, and Jay papers. Thomas Paine did not sign *Common Sense*. And any first-year law student can explain that a state may not compel a private organization such as the NAACP to disclose its membership where doing so would expose members to ridicule, harassment, and possibly physical violence. Some speech simply would not happen

without the benefit of anonymity.

Speakers may wish to remain anonymous for any number of reasons. Some may prefer to participate in the marketplace of ideas through their freedom of association, preferring the anonymity that comes from participation in the body politic through a group. Others may feel that their overt involvement may detract from the message. And some, sadly, may fear for their safety and wellbeing. In this era of hyper-communications, in which privacy grows increasingly elusive, the ability of the majority to demand orthodoxy and to police adherence to it through "shaming," "deplatforming," "doxxing," and so forth is ever pernicious.

Now more than ever, a speaker wishing to share provocative or unorthodox views may seek to do so anonymously. And courts have repeatedly recognized the right to anonymity in cases ranging from anonymity of citizen-advocates, to whistleblowers, to dissidents, to civil rights advocates, to secret balloting, to literary authors, and to journalists.

Plaintiff's student members desire to communicate ideas that may be provocative, challenging, and possibly offensive to some (but not to others). They do not necessarily seek to do so anonymously, but they do

seek to do so without the fear of a government-established mechanism that threatens to permit public inquiry into whether their ideas are orthodox or bias. The District Court recognized the students' ability to litigate anonymously through an association. After all, the right to anonymity, for Article III standing purposes or for any reason, is deeply rooted in American history and tradition, and for good cause—anonymity is often a "shield from the tyranny of the majority." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). Yet, the District Court then punished the students' preference by allowing their anonymity to weigh strongly in the balance against Plaintiff's standing. In short, the court punished them for not publicly signing their names to the ideas they seek to share less publicly. That is not the law.

The students' fear of reprisal and retaliation is very real. College campuses should be the ideal place for sharing provocative ideas. But the climate on many campuses now, including the University of Texas, is increasingly hostile to non-conforming speech.

Alliance Defending Freedom seeks to assist this Court in making an informed and principled decision about the students' right to remain anonymous as they vindicate their constitutional rights.

ARGUMENT

The ability to speak anonymously is essential to the freedom of expression itself. Where honest expression of opinion incurs threats or punishment, however, the freedom to speak is degraded. This is especially true where government establishes vague speech codes and erects inquisitorial processes to investigate publicly what opinion is acceptable and what is bias based on its viewpoint.

The history of the United States is replete with examples of brave men and women who challenged prevailing orthodoxies. From the Revolution, to the Alien & Sedition Acts, to Abolition, to the Civil War, to the organized labor movement, to the Red Scare, to the civil rights era, progress was driven by the earnest expression of minority, unpopular, but ultimately successful viewpoints. Yet that expression often came at a tragic cost, and our history is equally replete with examples of threats and violence thrust on those speaking unpopular ideas.

The First Amendment does not require speakers to become martyrs. Small wonder then that from publishing pamphlets in opposition to the English Crown, to the *Federalist Papers*, and down to the modern day, provocative speakers have often sought to remain

anonymous. Anonymity allows the expression of challenging ideas unchilled by the threat of personal risk. And, anonymous speech allows the content of the speech, rather than the character of the speaker, to be the focus of public debate. Both the University and the District Court are offending this time-honored right in a new context—unfairly attacking and punishing the students for their constitutional right to remain anonymous. The University objected to the students' desire to remain anonymous and, while rightly overruling this objection, the District Court found that the students' anonymity contributed to Plaintiff's lack of standing.

Plaintiff here seeks to vindicate its members' ability to speak without the fear of government compulsion or publicity, and to vindicate students' ability to participate in the marketplace of ideas through assembly. Plaintiff challenges chilling speech codes and associated enforcement mechanisms so that its members may themselves speak on campus, sharing potentially provocative ideas, but without a check other than the vigorous exchange of ideas—as a college campus should be. For all the reasons below, Plaintiff should be allowed to press forward with its suit.

A. The right to speak anonymously is deeply embedded in the political and expressive history of the United States.

Anonymous speech has long been a part of social and political discourse. In the 1720s, John Trenchard and Thomas Gordon published a series of 144 essays challenging corruption and immorality in the British political system under the pseudonym "Cato." John Trenchard & Thomas Gordon, *Essays on Liberty, Civil and Religious, and Other Important Subjects*, R. Hamowy ed. (1995). The collected and republished *Cato's Letters* were widely influential in the American Colonies in the 1750s onward. Clinton Rossiter, *Seedtime of the Republic: the Origin of the American Tradition of Political Liberty* (1953). Following in their footsteps, author Thomas Paine and publisher Benjamin Rush marshalled moral and intellectual support for independence anonymously in *Common Sense*, "the most incendiary and popular pamphlet of the entire Revolutionary era." Gordon Wood, THE AMERICAN REVOLUTION: A HISTORY (2002), P. 55.

Their desire for anonymity was understandable. "Before the Revolutionary War," the Supreme Court has observed, "colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-

controlled courts." *Talley v. California*, 362 U.S. 60, 64–65 (1960). Indeed, anonymous pamphlets and leaflets have long been deployed as "weapons in the defense of liberty." *Id.*; *see also* Geoffrey R. Stone, CONSTITUTIONAL LAW 1049–53 (5th ed. 2005) (noting that the framers adopted the First Amendment in part in reaction to England's licensing laws, which were "intended to stifle criticism of the government by requiring authors to identify themselves in their publications").

Subsequent post-revolutionary debate over what form the new government should take was *defined* by its anonymous contributors. Alexander Hamilton, James Madison, and John Jay argued in favor of the federal Constitution under the pseudonym "Publius." *The Anti-Federalist Papers and the Constitutional Convention Debates*, R. Ketcham, 13th ed. (1986). The three men adopted this common *nom de plume* to remove their own individual names and public personages from the debate and instead to present readers with "a comprehensive, single-minded advocacy of the Constitution." *Id.*

The "antifederalist" position was in turn championed by "John DeWitt" (identity unknown), "Centinel" (believed to have been Samuel Bryan and Eleazer Oswald), a different "Cato" (rumored to have been

George Clinton), "Brutus" (believed to have been Robert Yates), and "the Federal Farmer" (believed to have been Melancton Smith). *Id.* 16–20. These anonymous writings focused ensuing discussion on the ideas expounded, not their authors' circumstances.

Motivations for anonymity are not always so high-minded. As Justice Black observed, "[h]istory should teach us then, that in times of high emotional excitement minority parties, and groups which advocate extremely unpopular social or governmental innovations will always be typed as criminal gangs and attempts will always be made to drive them out." *Barenblatt v. United States*, 360 U.S. 109, 150-51 (1959) (Black, J. dissenting). As he illustrated:

> Today we deal with Communists or suspected Communists. In 1920, instead, the New York Assembly suspended duly elected legislators on the ground that, being Socialists, they were disloyal to the country's principles. In the 1830's the Masons were hunted as outlaws and subversives, and abolitionists were considered revolutionaries of the most dangerous kind in both North and South. Earlier still, at the time of the universally unlamented alien and sedition laws, Thomas Jefferson's party was attacked and its members were derisively called 'Jacobins.' Fisher Ames described: the party as a 'French faction' guilty of 'subversion' and 'officered, regimented and formed to subordination.' Its members, he claimed, intended to 'take arms against the laws

as soon as they dare.'

Id.; *accord Gibson v. Fla. Legislative Investigation Comm'n*, 372 U.S. 539, 571 (1963) (Douglas, J. concurring).

In such circumstances, anonymity may be necessary to preserve the ability to speak, if not also to preserve reputation and welfare. Where a would-be speaker remains silent out of a well-founded fear of government-facilitated scrutiny, shaming, or retaliation, the First Amendment has something to say.

Accordingly, the Supreme Court has long recognized the value of anonymous speech in a range of contexts. The ability to remain anonymous undergirds the right to assemble through freedom of association. Or, a speaker may prefer to remain anonymous to allow the debate to focus on ideas rather than speakers' identities. Third, a speaker may wish to remain anonymous out of a well-founded fear of social, political, or physical retribution. In the final analysis, compelled disclosure of speech will necessarily chill, if not quash, that speech, at a cost to the marketplace of ideas.

1. Anonymity protects the freedom to assemble and advocate.

Anonymous speech is not some form of lesser, second-order

expression that may be casually disregarded or suppressed. Rather, the right to speak anonymously is indispensable to the protection of individual liberty and the preservation of political discourse through the right to assemble and to petition the government.

In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), for example, the Court invalidated Alabama's attempt to compel the production of NAACP membership lists pursuant to the state's corporate qualification statute. The Court held unanimously that the compelled disclosure would violate NAACP members' rights to freedom of speech and association. As the Court explained, the legally "compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association" as other improper infringements the Court had struck down in the past. *Id*. at 462. Thus, the NAACP's members had a constitutional right to remain anonymous.

The Court reaffirmed these principles two years later in *Bates v. City of Little Rock*, 361 U.S. 516 (1960), where the government again sought NAACP membership lists. There, the record again demonstrated the negative effects of compelled disclosure, as NAACP members declined to renew their memberships for fear of being publicly associated with the

group. *Id.* at 523–24. In both cases, the Court recognized anonymity as essential to First Amendment rights.

The Court has recognized repeatedly that the "First Amendment prohibits a state from compelling disclosures by a minor party that will subject those persons identified to the reasonable probability of threats, harassment, or reprisals. Such disclosures would infringe the First Amendment rights of the party and its members and supporters." *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 101–02 (1982); *see also DeGregory v. Attorney Gen. of N.H.*, 383 U.S. 825, 828 (1966) (First Amendment bars compelled disclosure of "information relating to [a person's] political associations of an earlier day, the meetings he attended, and the views expressed and ideas advocated at any such gatherings.").

Anonymity allows individuals to associate with likeminded persons, to share ideas of which others might disapprove, and to participate in the marketplace of ideas as a collective. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP*, 357 U.S. at 460. The compelled disclosure of individual

relationships or viewpoints necessarily chills both the association and the related expression.

2. Compelled identification dilutes, distracts from, and obfuscates ideas.

Separately, some speakers may desire anonymity in order to allow their message to be judged on its own merits rather than in reference to the speaker's identity. For any number of reasons, a speaker may discern that their own identity, or that of their organization, would detract from the efficacy of their message. Courts have again been solicitous of such preferences for privacy.

In *Lovell v. City of Griffin*, for instance, a unanimous Supreme Court held "invalid on its face" a city ordinance requiring a person to "first obtain[] written permission from the City Manager" before distributing any written "literature of any kind." 303 U.S. 444, 447, 451 (1938). Refusing to consider the purported interest of the city to maintain "public order" or "littering," the Court found that the "character" of the ordinance "strikes at the very foundation of the freedom of the press by subjecting it to license and censorship." *Id.* at 451.

Likewise, in *Talley*, the Court struck down a Los Angeles City ordinance requiring handbills to include the identity of those who

printed, wrote, compiled, manufactured, and distributed them. 362 U.S. at 60. "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby restrict freedom of expression." *Id*. at 64.

More recently in *McIntyre*, the Court recognized anonymous speech as a core aspect of First Amendment jurisprudence. *McIntyre* concerned an Ohio statute that prohibited the distribution of campaign literature that lacked personally identifying information. Public officials complained to the Ohio Elections Commission after Margaret McIntyre distributed anonymous leaflets opposing an upcoming referendum. The Court invalidated the statute because "having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure of entry." *McIntyre*, 514 U.S. at 342. "Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is . . . protected by the First Amendment." *Id*.

Moreover, *McIntyre* recognized that laws trenching on anonymity are suspect not solely on account of policy concerns favoring speech, but because compelled disclosure "is a direct regulation of the content of [the]

speech." *Id.* at 345; *see also Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 165–66 (2002) ("It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public disclosure a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.").

3. Anonymous speech protects against abuse, harassment, retaliation, and persecution.

Third, and most distressingly, some speakers seek anonymity in the "marketplace of ideas" because they are afraid. *McIntyre*, 514 U.S. at 342 They fear the consequences of associating with an unpopular group; they fear the consequences of endorsing non-conformance; and they fear the "tyranny of the majority." *McIntyre*, 514 U.S. at 357. Indeed, "compelled disclosure, in itself, can seriously infringe on . . . First Amendment" freedoms where an individual seeks to express dissident views. *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (citations omitted). As the Court has recognized, "[t]he decision in favor of anonymity may be motivated by fear of economic [retaliation,] official retaliation, by concern about social ostracism," or the threat of violence. *McIntyre*, 514 U.S. at 341–42. These fears have, sadly, been realized repeatedly.

In *Bates*, the NAACP resisted Alabama's efforts to compel disclosure of its membership lists out of concern for its members' safety. On prior occasions when NAACP members had been involuntarily disclosed, they had been subjected "to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *NAACP*, 357 U.S. at 462. That Alabama had taken no action against the members was irrelevant. As the Court explained,

> [i]n the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action.

Id. at 461. The fact that government-coerced disclosure facilitated private reprisals was sufficient to trigger First Amendment protections. The Court in *Talley* also recognized that the pernicious results of compelled disclosure include persecution, retaliation, and physical coercion. *See also Talley*, 362 U.S. at 64–65.

Even seemingly benign political discourse can give rise to the threat of violence. In *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), an advocacy group challenged Colorado's law requiring petition circulators to wear badges stating their names and other private

information. The evidence demonstrated that such requirements "inhibit[] participation in the petition[] process," because of the threat of "harassment," "recrimination[,] and retaliation" when circulators broach "volatile" political issues with other citizens. *Buckley*, 525 U.S. at 197–98 (citing District Court). Citing *McIntyre*, the Court held that the law improperly curtailed the right to speak anonymously.

Common sense, and a healthy dose of history, make plain that unmasking a speaker involuntarily may result in serious personal costs ranging from public shaming to loss of employment to verbal or physical harassment, to outright violence. To be sure, these reactions may be purely private, in which case they are constrained only by the civil and criminal laws. But sometimes, as in *NAACP* and *Bates*, these reactions are facilitated by government through laws and mechanisms that strip away anonymity and facilitate private retribution. Where "repressive effect[s]" are "brought to bear only after the exercise of governmental power had threatened to force disclosure," the First Amendment lends its protection. *Bates*, 361 U.S. at 524.

4. Compelled disclosure chills speech.

In view of the foregoing, absent anonymous speech, many

individuals would not speak at all. Anonymous speech unquestionably encourages expression from individuals who would otherwise be unwilling to voice their opinion on matters of public discourse. *Talley*, 362 U.S. at 65. History demonstrates as much.

NAACP and *Bates* both illustrate that compelled identification chills speech; government-mandated disclosures discouraged membership and thereby diminished speech promoting racial equality. *NAACP*, 357 U.S. at 463; *Bates,* 361 U.S. at 524. Similarly, in *Buckley*, the badge requirement "very definitely limited the number of people willing to [circulate petitions] and the degree to which those who were willing to work would go out in public." 525 U.S. at 198; *see also Watchtower Bible & Tract Soc'y of N.Y.*, 536 U.S. at 166–67 (identification requirement chilled canvasing for unpopular causes). "Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." *Talley*, 362 U.S. at 64; *see also id.* at 65 ("[I]dentification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance.").

Loss of anonymity spells the loss of myriad voices from public

discourse. Thus, the Court has concluded repeatedly that the societal interest in having unpopular opinions enter the "marketplace of ideas" significantly outweighs any public interest requiring the disclosure of the identity of the speaker. *McIntyre*, 514 U.S. at 342. This "reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Id.* at 346 (quoting *Buckley*, 424 U.S. at 14); *see also Brown*, 459 U.S. at 98 (stating that compelled disclosure can cripple the ability of a minority to operate effectively and thereby reduces "the free circulation of ideas both within and without the political arena"). Even where speech has unpalatable consequences, "our society accords greater weight to the value of free speech than to the dangers of its misuse." *McIntyre*, 514 U.S. at 357. By mitigating the chilling of speech, anonymous speech serves as an indispensable check against the "tyranny of the majority." *Id.* at 357.

B. The District Court unfairly and improperly punished students for their well-founded desire to remain anonymous.

Ignoring the foregoing principles, and disregarding the increasing hostility towards non-conforming speech all too prevalent on college campuses, the University challenged and the District Court dismissively

rejected the students' well-founded desires for anonymity. Plaintiff Speech First seeks to challenge rules and regulations that establish vague codes of speech and conduct that serve as cover for University officials when they enforce those codes against only unpopular viewpoints. Plaintiff's members object to the chilling effect these threats have on their ability to engage in speech publicly, yet the District Court without a hint of irony dismissed Plaintiff's claims for want of standing because its student members failed to ascribe their names publicly to controversial views.

The University, in disregard of decades of jurisprudence protecting the right to litigate anonymously, objected to the "[a]nonymity of Speech First's members," arguing that Ms. Neily "[did] not disclose the identity of the members holding the views and opinions about which" she testified. ROA.459–66. Without irony or shame, the University overlooked its own embrace of "anonymous" accusations that spawn serious investigations by its "bias response team." ROA.316–17, 324–25. The District Court correctly rejected the University's objection. However, the court then ruled that nonetheless the students' anonymity contributed to a lack of standing. *See* ROA.520; 520 n.3.

The District Court held that Speech First had failed to present "a credible threat of enforcement" or show that "its students' self-censorship is objectively reasonable because their fear of punishment is not 'imaginary or wholly speculative.'" ROA.519. The court based these conclusions in large part on the students' anonymity. "Speech First provides no supporting affidavits from Students A, B, or C about any specific statements they wish to make. In fact, the anonymous students are neither identified in the pleadings, nor in any other document submitted to this court." ROA. 520; 520 n.3. In so ruling the court turned First Amendment jurisprudence on its head.

The District Court's conclusion is particularly troubling when considering that the Plaintiff's members are *students* in an *academic* environment. "[T]he precedents of this Court leave no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large." *Healy v. James*, 408 U.S. 169, 180 (1972). Our "Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'" *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385

U.S. 589, 603 (1967). For this reason, the public college campuses are "peculiarly the 'marketplace of ideas.'" *Healy*, 408 U.S. at 180. Thus, not only does "the First Amendment . . . not tolerate laws that cast a pall of orthodoxy over the classroom," *Keyishian*, 385 U.S. at 603, but the Court has been especially cognizant of the unique danger that First Amendment violations pose in the university context, given the "background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995).

Basing Article III standing to challenge an unconstitutionally coercive regime of speech policies on self-disclosure makes a mockery of the First Amendment and will undoubtedly result in students choosing to remain silent. This is anathema to the "tradition of thought and experiment" in a university setting. And not only are the students speaking at a location where their First Amendment freedoms are at their zenith, but their expression constitutes "core political speech," which requires "the broadest protection" under the First Amendment. *McIntyre*, 514 U.S. at 346–47.

As Speech First ably lays out in its brief, the students sought to

discuss widely debated topics on campus ranging from immigration, affirmative action, the Second Amendment, and the "#MeToo" movement to President Trump, Israel, and the confirmation of Justice Kavanaugh. The University's policies and bias response team, however, chilled their political expression. The students also feared for their safety should their names be disclosed. Plaintiff pleaded as much in its complaint:

- Student A "considers herself a Tea party conservative" and "strongly supports Israel, believes in a race-blind society, supports President Trump, is pro-life, and supports the border wall." Cmplt. ¶ 98. Yet the "University's policies are . . . chilling Student A's speech and deterring her from speaking openly about issues that are important to her." *Id.* at 102.
- Student B is a "libertarian" who "strongly supports the Second Amendment" and "has serious concerns that the 'Me Too' movement will erode due process." *Id.* ¶ 108. "Because of . . . credible fears of investigation and punishment, Student B does not forcefully articulate his views" on campus. *Id.* ¶ 111.
- Student C "believes that the breakdown of the nuclear family has had many negative effects on society" and "he believes that Justice

> Kavanaugh was treated unfairly during his confirmation proceedings." *Id.* ¶ 113. He too fears to speak his mind.

These University of Texas students are not alone in their concerns, and their fears are well-founded.

A recent survey by the William F. Buckley, Jr. Program at Yale University found that 54% of students at four-year colleges are intimidated from sharing unpopular views by speech policies similar to the ones at the University of Texas.[2] Another more recent survey by the Knight Foundation concluded that "[s]tudents have become more likely to think the climate on their campus prevents people from speaking their mind because others might take offense."[3]

That speech policies like the ones at the University of Texas chill speech is not incredible or speculative, as the District Court found. And it is not difficult to understand why. These policies are administered by influential administers and academics who have significant control over

[2] McLaughlin & Assoc., *National Undergraduate Study* (Oct. 26, 2015), https://www.dropbox.com/s/sfmpoeytvqc3cl2/NATL%20College%2010-25-15%20Presentation.pdf?dl=0.

[3] Knight Foundation, *Free Expression on Campus: What College Students Think About First Amendment Issues* (Mar. 11, 2018), https://www.knightfoundation.org/reports/free-expression-on-campus-what-college-students-think-about-first-amendment-issues.

the fate of their students who spend large sums of money to attend their institutions of higher education. Moreover, the policies are enforced by a "bias response team" with a structure and procedure that resembles a disciplinary apparatus. These teams comprise university administrators, including police officers and disciplinarians. Once a complaint is lodged—possibly anonymously—alleging "harassment," "incivility," or "rudeness," the Campus Climate Response Team collects reports from witnesses, interviews victims, meets with alleged perpetrators, formally determines whether a bias incident or a disciplinary violation occurred, and refers its conclusions to the appropriate authorities. Speech First Br. at 46. "The resulting message to students is loud and clear: If you commit a 'bias incident,' you are in trouble." *Id*. at 41. These speech policies and "bias response teams" also embolden other students or groups, to the verge of violence, who uncritically conform to conventional ideas on college campuses. *Id*. at 3.

The threat of harassment, retaliation, persecution, and abuse is real when students stray from a prevailing orthodoxy fashionable on college campuses. Indeed, "[a] fifth of undergrads now say it's acceptable to use physical force to silence a speaker who makes 'offensive and

hurtful statements.'"[4] Recent instances of violence are legion.

During the confirmation hearing of Justice Kavanaugh, for instance, members of the Young Conservatives of Texas set up a pro-Kavanaugh table and displayed supportive signs. A large group of students surrounded the Kavanaugh supporters for approximately two hours, hurling expletives and forcibly grabbing them while destroying signs.[5] In February 2019, at University of California at Berkley, a young man holding a sign that read "Hate Crime Hoaxes Hurt Real Victims," a reference to the 2019 Jussie Smollett incident in Chicago, was punched by a man who thought the sign offensive.[6] Months later a University of Missouri-Kansas City student stormed a conservative commentator for delivering a speech titled "Men are Not Women," spraying him with an unknown substance.[7] Around this same time members of a pro-life group called Created Equal were physically assaulted at the University of

[4] Catherine Rampell, *A Chilling Study Shows How Hostile College Students are Toward Free Speech*, WASHINGTON POST (Sep. 18, 2017) (citing John Villasenor, *Views Among College Students Regarding the First Amendment: Results from a New Survey*, BROOKINGS INSTITUTE (Sep. 18, 2017)).
[5] Melanie Torre, *UT Student Rally for Kavanaugh Erupts into Heated Dispute*, CBS AUSTIN (Oct. 2, 2018).
[6] Katie Mettler, *Police Have Arrested the Man They Say Punched a Conservative Activist at UC Berkeley*, WASHINGTON POST (Mar. 1, 2019).
[7] *Student Charged Over Protest at Anti-Transgender Speech*, U.S. NEWS (Apr. 12, 2019).

North Carolina at Chapel Hill for showing signs of babies and aborted fetuses.[8] Likely aware of such violent responses to lawful and calm speech, students in this case wish to remain unknown because they credibly fear similar harms if "the exercise of governmental power . . . threaten[s] to force disclosure" of their names for standing purposes. *Bates*, 361 U.S. at 524.

Speakers and guests on college campuses also face the same type of abuse, chill, and violence as do students who conceive nonconforming ideas. A group of protesters barricaded an event at California State University, Los Angeles to prevent conservative commentator Ben Shapiro from speaking about, of all things, censorship on college campuses.[9] Police escorted Shapiro home at the end of his speech, citing "safety concerns." Protesters at University of California Berkeley gave Shapiro the same greeting, forcing police into full riot gear, as they stood guard during his speech; some protesters even carried "banned weapons" to the event.[10] Also at Berkeley, "the birthplace of the Free Speech

[8] Julie Wilson, *Anti-abortion Group Member at UNC Attacked; 2 Facing Charges*, ABC NEWS (June 4, 2019).
[9] Natalie Johnson, *Campus Protesters Try to Silence Conservative Speaker, Demand College President's Resignation*, DAILY SIGNAL (Feb. 26, 2016).
[10] Madison Park, *Ben Shapiro Spoke at Berkeley as Protesters Gathered Outside*, CNN (Sept. 15, 2017).

Movement," commentator Milo Yiannopoulos encountered protesters who caused "$100,000 worth of damage to the public university when they threw fireworks, rocks and Molotov cocktails," forcing his speech to be canceled.[11] Yiannopoulos faced far worse at DePaul University in Chicago when student protesters stormed the stage and physically assaulted him for his remarks.[12] DePaul University later banned Yiannopoulos for creating a "hostile environment" after he was struck in the face by a student who disagreed with him. At Middlebury College, dozens of students "drowned out" and "charged" Dr. Charles Murray of the American Enterprise Institute and his speaking opponent, a college professor and self-professed Democrat, while they debated.[13] As the professor relayed:

> Someone pulled my hair, while others were shoving me. I feared for my life. Once we got into the car, protesters climbed on it, hitting the windows and rocking the vehicle whenever we stopped to avoid harming them. I am still wearing a neck brace, and spent a week in a dark room to recover from a concussion caused by the whiplash.

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[11] *Id*.
[12] Jessica Chasmar, *Milo Yiannopoulos Banned From DePaul University for Creating "Hostile Environment" During May Speech*, THE WASHINGTON TIMES (July 7, 2016).
[13] Allison Stanger, *Understanding the Angry Mob at Middlebury That Gave Me a Concussion*, THE NY TIMES (Mar. 13, 2017).

Nor was this poor conduct limited to students. "Some professors protested his appearance as well" "without ever having read anything [Dr. Murray] has written."[14]

Faculty members themselves have been openly hostile to opposing viewpoints. A Fresno State University professor censored a student pro-life group on campus by erasing their administration-approved chalked pro-life messages, declaring "[c]ollege campuses are not free speech areas."[15] San Francisco State University investigated its College Republicans group for months after a student complained that the group's anti-terrorism rally violated a university policy that required students to "be civil to one another." *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007). The University of Buffalo charged a pro-life student group $600 in "security fees" for an academic debate about abortion even though a group hosting a debate about the existence of God in the same building at the same time was not charged this fee. *Univ. at Buffalo Students for Life v. Tripathi*, No. 1:13-cv-00685 (W.D.N.Y. 2013) (filed on June 28, 2013 and settled shortly thereafter).

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[14] *Id.*

[15] *Fresno State Professor to Pay $17K and Undergo Training After Censoring Students' Pro-life Messages*, ABC (Nov. 9, 2017).

The threat of actual violence only grows. ANTIFA, a left-wing and militant "anti-fascist[]" group, is increasingly present on college campuses, including at the University of Texas, and this proliferation risks increased violence.[16] In June 2019, ANTIFA threatened to dox, or publicly disclose on the internet, any University of Texas student who joined a conservative club.[17] An account affiliated with ANTIFA tweeted, "Hey #UT23! Do you wanna be famous? If you join YCT [the Young Conservatives Club of Texas] or Turning Point USA, you just might be. Your name and more could end up on an article . . . So be sure to make smart choices at #UTOrientation."[18] Another tweet stated, "The best #LonghornStateofMind is an antifascist one. If you begin to spot the young racists trying to join YCT or TPUSA, send us a tip so we can keep our reports up to date #UT23."[19] The tweets contained links to names, photographs, personal email addresses, phone numbers, and employers of several students at the University of Texas who are involved in YCT

[16] Josh Meyer, *FBI, Homeland Security Warn of More "ANTIFA" Attacks*, POLITICO (Sept. 1, 2017).
[17] Mike Ciandella, *Antifa Student Group Threatens To Dox Any Students At UT Austin Who Join Conservative Clubs*, THE BLAZE (June 26, 2019).
[18] Sinclair Broadcast Group, *Incoming University of Texas Conservative Students Threatened With Getting Doxed*, ABC 3340 (June 28, 2019).
[19] *Id.*

or TPUSA.

A website, run by a student group of ANTIFA called the Autonomous Student Network, details ANTIFA's work at the University of Texas. One page is titled "Research & Destroy" for "articles that are investigative and expose or attack enemies."[20] The page specifically calls for "[i]tems which would enable other people to find targets or better achieve actions [that] are particularly fitting for this category."[21] The "targets" appear to be supporters of traditionally conservative causes. Some posts go so far as to identify the grandparents of targets and display pictures from the grandparents' Facebook accounts.[22]

In January 2019, it was reported that more than 30 University of Texas students had been doxxed on Austin Austonomedia.[23] Since that time, Austin Austonomedia has made an additional 14 posts, either doxxing more individuals or providing more personal information about individuals previously doxxed. Saurabh Sharma, a student serving in a

[20] Austin Autonomedia, Research & Destroy, https://austinautonomedia.noblogs.org/category/rd/ (last visited Aug. 13, 2019).
[21] *Id.*
[22] Austin Autonomedia, *#IdentifyEvropa: Neo-Nazi Student at UT Austin*, https://austinautonomedia.noblogs.org/identifyevropa-ut-clayton-leonard/ (last visited Aug. 13, 2019).
[23] Toni Airaksinen, *More than 30 UT Students Doxxed for Crime of Being Conservative*, PJ MEDIA (Jan. 13, 2019).

doxxed group, lamented that "the fallout has been immense" as the doxxing "has discouraged many from staying involved" in some college groups.[24] Lillian Bonin, who also has been doxxed, shared that she "was completely distraught for a few days and missed a couple days of classes" after the incident.[25] "[T]here are always enough threats that I sometimes find myself insanely paranoid, always checking behind me," she stated.[26]

* * *

In view of the foregoing, Students A, B, and C's desire to exercise their constitutional rights privately is not only reasonable but entirely understandable. Subjected to University-mandated scrutiny, they are likely to be, at a minimum, harassed and stigmatized; more dangerously, they are likely to be doxxed and, quite possibly, physically attacked. These are credible threats. The students have a constitutional right to anonymity for the many reasons explained above: anonymity protects the freedom to assemble and advocate, compelled identification restricts ideas, anonymous speech protects against harassment and violence, and compelled disclosure chills speech.

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[24] *Id.*
[25] *Id.*
[26] *Id.* (alteration in original).

CONCLUSION

For these reasons, Alliance Defending Freedom joins Speech First in urging this Court to reverse the District Court and remand with instructions to grant Speech First a preliminary injunction.

Dated: August 16, 2019

Respectfully submitted,

/S/ Gordon Todd

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6413 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Century Schoolbook font size 14 for main text and Century Schoolbook font size 12 for footnotes.

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