Case No. 19-50529

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Speech First, Incorporated,

Plaintiff-Appellant,

v.

Gregory L. Fenves, In His Official Capacity as President of the University of Texas at Austin,

Defendant-Appellee.

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

BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Case No. 19-50529,
Speech First, Inc. v. Gregory L. Fenves

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

Person or Entity	Connection to Case
Kimberly S. Hermann	Counsel to *amicus*
Southeastern Legal Foundation	*Amicus curiae*

Amicus Southeastern Legal Foundation (SLF) is a Georgia nonprofit corporation. *Amicus* SLF does not have any parent companies, subsidiaries, or affiliates. *Amicus* SLF does not issue shares to the public.

/s/ Kimberly S. Hermann

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Southeastern Legal Foundation is a national nonprofit, public interest law firm and policy center that advocates for constitutional individual liberties, limited government, free speech, and free enterprise in the courts of law and public opinion. This case concerns *Amicus* because SLF has an abiding interest in the protection of our First Amendment freedoms, namely the freedom of speech. This is especially true when a public university suppresses free discussion and debate on public issues that are vital to America's civil and political institutions. SLF is profoundly committed to the protection of American legal heritage, which includes protecting the freedom of speech.

INTRODUCTION AND SUMMARY OF ARGUMENT

The freedom to publicly speak on political issues, especially on our country's public college and university campuses, is critical to a functioning democracy. A primary purpose of the First Amendment is to protect public discourse, which includes the very speech that Speech First's members at the University of Texas at Austin want to engage in:

[1] The parties have consented to this filing. No one other than *Amicus* and its counsel wrote any part of this brief or paid for its preparation or submission.

discussions about Israel, immigration, abortion, the right to bear arms, confirmation proceedings, elections, and the president of our great nation. Rather than protect their students' constitutional right to the free discussion of political affairs, the University uses the full force of its power to issue, implement, and enforce speech codes that make discussion of these topics sanctionable events that could lead to reprimand, suspension, and even expulsion. This may sound dramatic, but that is only because the chilling effect of the challenged speech codes is undeniable.

As adults, it is easy to forget the anxiety and fear that accompanied the excitement of going to college. Reboots are all the rage these days, so let's step back in time for just a minute into our own reboot of those first few weeks of college. You worked hard—you studied, you practiced your sport, instrument, or other extracurricular activity, you served your community through outreach and clubs, you worked that part-time job to earn money for college, you applied to schools, and you got in! Now you are 17 or 18 years old and ready to go off on your own, to learn, to discuss, to challenge yourself. You can't wait to discuss some of the most important issues of the day with your new roommates, classmates, and

professors. College will be the "marketplace of ideas" that you have heard about your whole life. And then you get there and are inundated with rules about things you can't say, topics you can't discuss, and debates you can't have—but those rules are hard to understand. They are vague and cover many different types of speech. How do you know if someone may be offended by something you say or write? How do know if something is considered political or ideological? You don't, so you self-censor because the last thing you want to do is risk punishment, sanction, suspension, or expulsion. You worked too hard to get to college and you have goals and dreams about your future. It just isn't worth the risk.

This is exactly what is happening on college and university campuses across our country, including at the University of Texas at Austin. *Amicus* files this brief to discuss one particular type of speech that the University's speech codes objectively chill: political speech. Nowhere are the threats of censorship more dangerous than when a restriction prohibits public discourse on political issues. "[P]ublic discussion is a political duty." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). The First Amendment has "its fullest and most urgent application precisely to the conduct of campaigns for

political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). Thus, it is imperative that if a public college or university tries to suppress political speech, students have the ability to protect their freedom of speech by challenging the constitutionality of such laws.

The U.S. Supreme Court has consistently held that a plaintiff need not expose himself to prosecution before challenging the constitutionality of a speech-suppressive law. To do otherwise, would turn respect for the law on its head and force law-abiding Americans into self-censorship. Ignoring these principles, the district court has refused to hear Speech First's challenges to the constitutionality of the University's speech codes unless the challengers first subject themselves to punishment that could lead to the end of their college and future careers. The district court's approach abridges the freedom of speech and suppresses open discussion of governmental affairs and debate on public issues, both of which are vital to America's civil and political institutions.

To ensure the University does not violate the Constitution through forced self-censorship, and to prevent it from robbing its students of their freedom to participate in both the political process and the campus

community, this Court should reverse the district court and remand with instructions to grant Speech First a preliminary injunction.

ARGUMENT

I. Refusal to hear Speech First's challenge forces self-censorship and objectively chills speech.

The U.S. Supreme Court has consistently recognized that constitutional challenges based on the First Amendment present unique standing considerations. *See Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988); *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 299-302 (1979); *see also Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) (permitting a pre-enforcement First Amendment challenge, recognizing the "sensitive nature of constitutionally protected expression"). As Justice Brandeis explained in his famous *Whitney v. California* concurrence, "[i]t is therefore always open to Americans to challenge a law abridging free speech and assembly. . . ." 274 U.S. at 377 (Brandeis, J., concurring). Nowhere is this truer than when a university's policy punishes speech and a person must choose between either her college and future career or self-censorship. If that person violates a speech-suppressive law by partaking in the prohibited speech and is punished,

he has standing to challenge the law's constitutionality.[2] While some may characterize that person as brave and fearless, a majority of students are unwilling to face risking their college education and future careers to express their views.

Recognizing this Catch-22, courts do not require plaintiffs to first expose themselves to prosecution to raise a First Amendment challenge. *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (first holding that a plaintiff "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief"); *see Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (finding that while the plaintiff had not been arrested for violating the contested law, he had standing to challenge the law because he claimed that it deterred his constitutional rights). Instead, a person may hold his tongue and challenge the law or policy now, for the harm of

[2] The basic inquiry made to determine whether a party has alleged a case or controversy under Article III of the Constitution, "is whether the conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Babbitt*, 442 U.S. at 297-98 (internal quotations omitted). Thus, where a party is arrested, prosecuted or convicted, the dispute and injury is definite and concrete. *See generally, e.g.*, *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (justiciable First Amendment challenge where plaintiff was charged with violating the Stolen Valor Act); *Mills v. Alabama*, 384 U.S. 214 (1966) (justiciable First Amendment challenge to a state law criminalizing certain campaign speech where plaintiff was charged with violating law); *Garrison v. Louisiana*, 379 U.S. 64 (1964) (justiciable First Amendment challenge to a criminal defamation law where plaintiff was tried and convicted).

self-censorship is a harm that can be realized even without an actual prosecution. *See Am. Booksellers Ass'n*, 484 U.S. 383 (finding that the plaintiffs had standing to challenge the constitutionality of a criminal statute prohibiting the display of sexually explicit materials even though they had neither been charged nor convicted of the crime). All that is needed is a "credible threat of enforcement." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014).

The district court's holding that Speech First lacks standing ignores this well-settled precedent. It turns respect for the law on its head to require a potential challenger to violate the University's speech codes himself presumably to be prosecuted or punished, just so he can mount a constitutional challenge. *See Arizona Right to Life PAC v. Bayless*, 320 F.3d 1002, 1007 (9th Cir. 2003) (finding standing in a pre-enforcement challenge and explaining that to preclude the challenge violates public policy and penalizes the plaintiff for its "commendable respect for the rule of law"). The result of the district court's approach is to rob all University students of any *lawful* ability to challenge the constitutionality of speech-suppressive laws and force them into self-censorship.

II. Refusal to hear Speech First's challenge effectively bans political speech.

Unique standing considerations associated with the First Amendment are even more critical when, such as here, the speech codes that a party seeks to challenge suppress political speech. The district court's refusal to hear Speech First's challenge to the University's speech codes proscribing certain political speech directly contradicts the very agencies our Founding Fathers deliberately selected to keep our society free. Self-censorship results from the district court's dismissal, chilling the very things that the civil and political institutions in our society depend on—free debate and free exchange of ideas—and, from a practical perspective, banning political speech.

When interpreting the First Amendment, "[w]e should seek the original understanding." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 359 (1995) (Thomas, J., concurring). Since 1724, freedom of speech has famously been called the "great Bulwark of liberty[.]" 1 John Trenchard & William Gordon, *Cato's Letters: Essays on Liberty, Civil and Religious* 99 (1724), reprinted in Jeffrey A. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* 25 (Oxford University Press 1988). Upon ratification, the First Amendment "was

understood as a response to the repression of speech and the press that had existed in England." *Citizens United v. FEC*, 558 U.S. 310, 353 (2010). Through the First Amendment, our Founding Fathers sought to ensure complete freedom for "discussing the propriety of public measures and political opinions." Benjamin Franklin's 1789 newspaper essay, reprinted in Smith, at 11. "Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form." *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring).

A major purpose of the First Amendment was to protect public discourse, broadly defined. As the U.S. Supreme Court has acknowledged, "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Brown v. Hartlage*, 456 U.S. 45, 52 (1982) (quoting *Mills*, 384 U.S at 218-19). "'The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.'" *Meyer v. Grant*, 486 U.S.

414, 421 (1988) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940)).

"The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Id*. (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). "For speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison*, 379 U.S. at 74-75. This free discussion necessarily "includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills*, 384 U.S. at 218-19.

"In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). In finding a state law regulating the content of permissible speech during a judicial campaign unconstitutional, the U.S. Supreme Court explained that "[d]ebate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms,

not at the edges." *Republican Party v. White*, 536 U.S. 765, 781 (2002) (quoting *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 222-23 (1989)). In *Citizens United*, the Court took this a step further and reaffirmed the principle that "[p]olitical speech is indispensable to decisionmaking in democracy." 558 U.S. at 349 (quotations omitted).

By refusing to follow well-settled precedent and hear Speech First's constitutional challenge of the University's speech codes prohibiting certain political speech, the district court itself censors political speech. Its approach to standing quashes "an essential mechanism of democracy" and robs the students of their right to "inquire, to hear, to speak, and to use information to reach consensus" which has been found to be a "precondition to enlightened self-government and a necessary means to protect it." *Id.* at 339-40.

III. Reversal and remand is necessary to prevent forced self-censorship and ensure our nation's college students can partake in open political discourse.

The U.S. Supreme Court has re-affirmed these standards time and time again, especially related to First Amendment challenges. *See, e.g.*, *Am. Booksellers Ass'n.*, 484 U.S. at 392-93, *Babbitt*, 442 U.S. at 299-302; *Dombrowski*, 380 U.S. at 486. "First Amendment standards, . . . must

give the benefit of any doubt to protecting rather than stifling speech." *Citizens United*, 558 U.S. at 327 (internal quotations omitted).

Circuit courts have applied these well-settled standards to pre-enforcement challenges of laws that seek to censor political speech and have consistently found such challenges justiciable. *See, e.g.*, *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481 (8th Cir. 2006) (permitting pre-enforcement challenge of a campaign finance law even though the plaintiffs did not violate law); *Majors v. Abell*, 317 F.3d 719 (7th Cir. 2003) (permitting pre-enforcement challenge of criminal law regulating the content of election speech even though the plaintiffs were never charged, let alone convicted of the crime); *Vermont Right to Life Comm. v. Sorrell*, 221 F.3d 376 (2d Cir. 2000) (permitting pre-enforcement challenge of civil campaign finance laws even though no prior suit brought against the plaintiffs). These courts recognize that to find otherwise would be to force self-censorship of political speech—rejecting exactly what the district court has done here.

The district court's dismissal should not be allowed to stand. Here, the threat of prosecution, which could result in expulsion with no right to challenge prior to sanction is tantamount to forced censorship of

students who wish to partake in political and public discourse. "Political speech must prevail against laws that would suppress it, whether by design or inadvertence[.]" *Citizens United*, 558 U.S. at 340. The district court's treatment of standing scares university students who would otherwise partake in political debate into self-censorship. This Court's reversal of the district court and its remand is imperative to protecting political speech and ensures that university students and all Americans will continue to be free to partake in the democratic process.

CONCLUSION

This Court should reverse the district court and remand with instructions to grant Speech First a preliminary injunction.

Respectfully submitted,

s/ Kimberly S. Hermann

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August 16, 2019

CERTIFICATE OF FILING AND SERVICE

On August 16, 2019, I filed this *Brief Amicus Curiae Southeastern Legal Foundation in Support of Plaintiff-Appellant and Reversal* using the CM/ECF System, which will send a Notice of Filing to all counsel of record.

s/ Kimberly S. Hermann

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,396 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using Word 2016 and uses a proportionally spaced typeface, Century Schoolbook, in 14-point type for body text and 12-point type for footnotes.

s/ Kimberly S. Hermann