No. 19-2807

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Speech First, Inc.,

Plaintiff-Appellant,

v.

Timothy L. Killeen, In His Official Capacity as President of the University of Illinois, et al.,

Defendant-Appellees.

On Appeal from the United States District Court
for the Central District of Illinois, No. 3:19-cv-3142 (Bruce, J.)

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

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November 1, 2019

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CORPORATE DISCLOSURE STATEMENT

Case No. 19-2807,
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Southeastern Legal Foundation (SLF) is a Georgia nonprofit corporation. SLF does not have any parent companies, subsidiaries, or affiliates. SLF does not issue shares to the public.

November 1, 2019 /s/ Kimberly S. Hermann

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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 SLF because it 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

[1] Fed. R. App. P. 29 statement: All parties consented to the filing of this *amicus curiae* brief. No counsel for either party authored this brief in whole or in part. No person or entity other than *Amicus* and its members made a monetary contribution to its preparation or submission.

First's members at the University of Illinois Urbana-Champaign want to engage in: discussions about Israel, immigration, abortion, the right to bear arms, 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—indeed, the University attempts to write this argument off as such—but that is only because the chilling effect of the challenged speech codes is undeniably drastic.

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 Illinois Urbana-Champaign. The University prohibits "bias-motivated" expression, broadly defining "bias" as "prejudice against or hostility toward" anyone based on age, disability or ability status, gender, gender identity, gender expression, national origin, race, religion, spirituality, sexual orientation, socioeconomic class, and so on.[2] A Bias Response

[2] Notably, the University's official definition of bias ends with "etc.," suggesting that even the University cannot define what bias is. *See* RSA07.

Team (BART) is tasked with investigating students who allegedly engage in biased expression. The University claims that BART's investigations cannot lead to punishments because the investigators lack actual authority to discipline students. This is not so. The investigators may report any suspected violation of the Student Code of Conduct to authorities who *can* discipline students. And even if students are not disciplined, the mere appearance of authority amounts to an objective chill on speech. Moreover, University officials can issue "No Contact Directives" against students whenever they conclude such a directive is "warranted." These directives prohibit all forms of communication between a student and a complaining party, and the student never even has the chance to contest the directive.

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 suppresses political speech, students have the ability to protect their freedom of speech by challenging the constitutionality of these stifling policies.

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. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158–61 (2014). 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. Furthermore, the district court ignored the fact that several students have received No Contact Directives, meaning they are completely prohibited from engaging in expressive activities near a complainant with no way to challenge the prohibition. 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. Courts consistently recognize standing in First Amendment pre-enforcement challenges, even when no actual prosecution or conviction has occurred.

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. . . ." *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring). Nowhere is this truer than when a university's policy punishes or threatens speech, causing a person to 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.[3] While that person is no doubt brave and fearless, a majority of students are unwilling to risk 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) (holding that a plaintiff "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief"); *see also Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (finding that although 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 self-censorship is a harm that can be realized even without an actual prosecution. *See Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392–93 (1988) (finding that the plaintiffs had standing to challenge the

[3] 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 v. UFW Nat'l Union*, 442 U.S. 289, 297–98 (1979) (internal quotations omitted).

constitutionality of a criminal statute prohibiting the display of sexually explicit materials even though the plaintiffs were neither charged nor convicted of the crime). All that is needed is a "credible threat of enforcement." *Susan B. Anthony List*, 573 U.S. at 159.

The Supreme Court recognizes a credible threat of enforcement when a plaintiff alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute." *Babbitt*, 442 U.S. at 298 (finding that the plaintiffs could challenge a statute imposing criminal sanctions upon consumers who planned to boycott products through deceptive publicity because the statute was vague and plaintiffs reasonably feared prosecution); *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 15 (2010) (allowing the plaintiffs to challenge a law that criminalized providing material support to terrorist organizations because plaintiffs had provided support in the past and planned to provide support again in the future).

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

The district court's holding that Speech First lacks standing ignores well-settled precedent. It turns respect for the law on its head to require a student to violate the University's speech codes himself, presumably to

be prosecuted or punished, just so he can mount a constitutional challenge. 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.

Just as the plaintiffs in *Am. Booksellers* had standing to challenge a criminal law because complying would be costly, the students here have standing to challenge the University policies because the consequences they face are also costly. *Am. Booksellers Ass'n*, 484 U.S. at 392–93. For example, BART may refer any bias incident to the Office for Student Conflict Resolution (OSCR), the University disciplinary body which can issue official sanctions like suspension or expulsion. RSA010–11. But even BART's less formal investigations can harm students' reputations, friendships, and future careers. And like the statute in *Babbitt*, the University policies are vague and leave students fearing backlash from administrators and peers. *Babbitt*, 442 U.S. at 303. Finally, expression that the University permitted in the past—including support for its former mascot, Chief Illiniwek—may no longer be permitted under the school's bias code. Br. of Pl.-Appellant at 7–8. Thus, students who once

supported the mascot are left wondering if they can still support it, much like the plaintiffs in *Holder* who had standing to challenge a statute that made previously accepted speech impermissible. *Holder*, 561 U.S. at 15.

This Court has held that self-censorship is exactly the type of harm pre-enforcement challenges seek to eliminate. *See Bell v. Keating*, 697 F.3d 445, 451, 453 (7th Cir. 2012) (finding that "[c]hilled speech is, unquestionably, an injury supporting standing" and that a pre-enforcement lawsuit is the appropriate vehicle to challenge a statute that arguably proscribes constitutionally protected conduct); *see also Ctr. for Indiv. Freedom v. Madigan*, 697 F.3d 464, 474 (7th Cir. 2012) (finding that self-censorship is a distinct "harm that can be realized even without an actual prosecution," provided plaintiffs can show a "well-founded fear" of enforcement). The district court accepts the University's claim that BART cannot actually sanction students as proof positive that there can be no objective chill on speech. RSA031–32. But as the Sixth Circuit recently noted in *Speech First, Inc. v. Schlissel*, BART's lack of authority "is not dispositive." 2019 U.S. App. LEXIS 28625 at *10 (6th Cir. Sept. 23, 2019). The mere appearance of authority can objectively chill speech. *Id.* (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68 (1963); *Okwedy*

v. Molinari, 333 F.3d 339, 344 (2d Cir. 2003); *Levin v. Harleston*, 966 F.2d 85, 88–89 (2d Cir. 1992)). And arguing that there is no credible threat of enforcement because the University has not actually disciplined these students "misses the point. The lack of discipline against students could just as well indicate that speech has *already* been chilled." *Id.* at *13 (emphasis added).

Unique standing considerations associated with the First Amendment are even more critical when, as here, the speech codes that a party seeks to challenge suppress political speech. At the University, "bias-motivated incidents" include actions allegedly motivated by prejudice against race, gender identity, sexual orientation, and socioeconomic class. RSA07. In today's world, it is inevitable that political speech is entwined with these topics.

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 decision to deny a preliminary injunction, 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 v. Alabama*, 384 U.S 214, 218–19 (1966)). "'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 v. Louisiana*, 379 U.S. 64, 74–75 (1964). 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; *see also Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976) ("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."); *Citizens United*, 558 U.S. at 349 ("Political speech is indispensable to decisionmaking in democracy[.]").

Although the district court held that the prior restraint argument against the University's ban on political speech was moot because the University has recently changed the policy, the speech codes are still problematic because they *all* reach political speech. RSA027; *see also* Br. of Pl.-Appellant at 7–8. The student plaintiffs fear speaking about politics because they could be—and have been—reported for bias incidents stemming from discussions about race, gender, and the economy. *Id.* Furthermore, the University may issue No Contact Directives for any type of expression, including political speech.[4]

[4] In one instance, a teaching assistant acquired a No Contact Directive against a student after the student reported that the teaching assistant assaulted other students and stole one student's cell phone. Br. of Pl.-Appellant at 15–16. The student could not object to the directive. *Id.* at 15 ("No Contact Directives last indefinitely—i.e., until the student

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." *Citizens United*, 558 U.S. 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 reaffirmed 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 v. Pfister*, 380 U.S. 479, 486 (1965). "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).

graduates—unless the disciplinary officer specifies an end date or otherwise terminates the directive.").

Circuit courts, including this one, 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 Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003) (permitting pre-enforcement challenge of a criminal law regulating the content of election speech even though the plaintiffs were never charged, let alone convicted of the crime); *see also St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 487 (8th Cir. 2006) (permitting pre-enforcement challenge of a campaign finance law even though the plaintiffs did not violate the law); *Vermont Right to Life Comm. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000) (permitting pre-enforcement challenge of civil campaign finance laws even though no prior suit was 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 denial of a preliminary injunction should not be allowed to stand. Here, the mere threat of prosecution, which could ultimately result in expulsion, is tantamount to forced censorship of students who wish to partake in political and public discourse. *See* Br. of

Pl.-Appellant at 19. "[P]olitical 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 are imperative to protecting political speech and ensure 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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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Seventh Circuit Rule 29 because it contains 3125 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Seventh Circuit Rule 32(b) and the type style requirements of Fed. R. App. P. 32(a)(6) and Seventh Circuit Rule 32(c) because it was prepared using Word 2016 and uses a proportionally spaced typeface, Century Schoolbook, in 14-point type for body text and 11-point type for footnotes.

November 1, 2019 /s/ Kimberly S. Hermann

CERTIFICATE OF FILING AND SERVICE

On November 1, 2019, I filed this *Brief of 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.

November 1, 2019 /s/ Kimberly S. Hermann