Case No. 21-12583

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Speech First, Inc.,

Plaintiff – Appellant,

v.

Alexander Cartwright, in his personal capacity and official capacity as President of the University of Central Florida,

Defendant – Appellee.

On Appeal from the United States District Court
for the Middle District of Florida, No. 6:21-cv-313 (Presnell, J.)

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

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Case No. 21-12583,
Speech First, Inc. v. Alexander Cartwright

Pursuant to Federal Rule of Appellate Procedure Rule 26.1 and Eleventh Circuit Rule 26.1, the undersigned counsel of record certifies that the following listed persons and entities as described in 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.

The following is a complete list of trial judge(s), attorneys, persons, associated persons, firms, partnership, or corporations known to amicus that have an interest in the outcome of this particular case or appeal:

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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/ Celia H. O'Leary

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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.

STATEMENT OF THE ISSUES

I. The University of Central Florida prohibits students from engaging in "discriminatory hostile environment harassment." Its policy covers "verbal acts" and "written statements," can be violated by "a single or isolated incident," and goes beyond the Supreme Court's authoritative definition of harassment. Was the district court correct that this policy is likely constitutional because it regulates only unprotected conduct?

II. The University maintains a "bias-response team"—a group of authority figures who solicit reports of "bias," track them, investigate them, ask to meet with the

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no one other than amicus and their counsel wrote any part of this brief or paid for its preparation or submission.

perpetrators, and threaten to refer students for formal discipline. The Fifth and Sixth Circuits held that virtually identical teams objectively chill students' speech. Was the district court correct that the University's team likely does not chill speech?

III. Appellate courts can order the entry of a preliminary injunction when a mere remand would be pointless or harmful. Here, the equitable factors are easy, the district court already explained how it would weigh them, and some of Speech First's members will soon graduate. Should this Court enter a preliminary injunction now?

SUMMARY OF ARGUMENT

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). Our Founding Fathers recognized that different opinions would always accompany liberty. *See* The Federalist No. 10, at 73 (James Madison) (Clinton Rossiter ed., Signet Classics 2003). In "response to the repression of speech and the press that had existed in England" and to curb such tyranny in the future, the Founders established the First Amendment. *Citizens United v. FEC*, 558 U.S. 310, 353 (2010).

The Founders recognized that nowhere are the threats of censorship more dangerous than when a restriction prohibits public discourse on political issues. Therefore, they 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 v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

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 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). It guards against prior restraint or threat of punishment for voicing one's opinions publicly and truthfully. *Meyer v. Grant*, 486 U.S. 414, 421 (1988) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940)). It protects and encourages discussion about political candidates, government structure, and political processes. *Mills*, 384 U.S. at 218–19.

In addition to providing a check on tyranny, freedom of speech and the press ensure the "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) (internal quotation marks omitted)). Speech about public affairs is thus "the essence of self-government" because citizens must be well-informed. *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). They must know "the identities of those who are

elected [that] will inevitably shape the course that we follow as a nation." *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976); *see also Citizens United*, 558 U.S. at 349. For these reasons, public discussion is not merely a right; "[it] is a political duty." *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring).

The freedom to publicly speak on political issues, especially on our country's public college and university campuses, is critical to both a functioning democracy *and* a well-rounded college experience. College students are in the unique position of being surrounded by true diversity: diversity of thought, race, religion, and culture. For many, this is the first—and perhaps only—time they will be exposed to a "marketplace of ideas" that differ from their own. The college experience can have a significant impact on the leaders of tomorrow. And during their four years of college, most students will be first-time voters. College campuses should therefore encourage lively political discussion to develop a well-informed student body and citizenry.

Speech First's members at the University of Central Florida want to engage in discussions about public affairs, including affirmative action, Israel, immigration, abortion, gender identity, and the right to bear arms. But all three students have self-censored their speech out of fear that other students will report them to the University's bias response team ("JKRT") for bias incidents or the Office of Institutional Equity ("OIE") for perceived discriminatory harassment.

It is imperative that if a public college or university suppresses political speech, students have the ability to protect their freedom 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) (finding plaintiffs sufficiently alleged a threat of future enforcement when they showed "an intention to engage in a course of conduct arguably affected with a constitutional interest"). To do otherwise would turn respect for the law on its head and force law-abiding Americans into self-censorship because they would face an unreasonable choice: either break the rules and face the consequences, or keep quiet out of fear of prosecution.

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. 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. . . ." 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.

Under typical standing law, an individual must violate a law and be punished before he can challenge the law's constitutionality.[2] But most students are unwilling to risk their college education and future careers in this way. They would rather not exercise their First Amendment rights at all than risk intense scrutiny from peers and administrators that could result in suspension or expulsion.

Recognizing this Catch-22, courts do not require plaintiffs to expose themselves to prosecution before raising a First Amendment challenge. *See 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

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

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 immediately, 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 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 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 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).

UCF maintains a Discriminatory Harassment Policy that bans "humiliating" conduct. When a student suspects that a peer has engaged in discriminatory conduct, he can report that student to the OIE. And when members of the UCF faculty or staff

suspect such conduct, they *must* report it to the OIE. The OIE then launches into an investigation and can refer students for disciplinary action. Students typically cannot predict what words will offend or humiliate their peers. As a result, the Discriminatory Harassment Policy causes them to self-censor to avoid punishment, sanctions, suspension, or expulsion, because those consequences are not worth the risk of exercising their First Amendment rights.

Similarly, UCF relies on a bias response team—the JKRT—as a "clearinghouse" for alleged bias incidents. Br. of Pl.-Appellant at 12. The University admits on the JKRT website that it is "committed to tracking patterns of bias and other incidents at the University that might prevent the community from thriving." Br. of Pl.-Appellant at 14. The University is also committed to creating a university-wide "response to the handling of these incidents."[3] UCF argues that there is no credible threat of enforcement against the members of Speech First because the JKRT cannot actually punish students for perceived bias. But the University misses the point: it is only a matter of time before its various speech codes and their related enforcement mechanisms come into conflict with the First Amendment.

Let's say fictitious Student D decides to hand out flyers describing abortion procedures to raise awareness for pro-life causes. Another student believes the flyer will have a "negative psychological impact" on the community and reports Student D to

[3] https://jkrt.sdes.ucf.edu/about/.

the JKRT. *See* Br. of Pl.-Appellant at 12 (defining bias incident as "hav[ing] a negative psychological, emotional, or physical impact on an individual, group, and/or community"). JKRT then requests a "voluntary" meeting between the parties, which Student D declines. Because this issue is so important to her, Student D distributes the same flyers on campus the following week. She does so every week for the rest of the semester. The other student continues to find the flyer offensive and continues to report Student D. The JKRT continues to request meetings, and Student D continues to decline those requests.

At some point, UCF will have a decision to make. Does it continue to waste university resources on fruitless efforts to contact Student D? Does it tell the offended student there is nothing it can do, thereby ignoring the perceived injustice? Either the University is committed to "handling" reported bias incidents, or it is not. In this way, speech codes and bias response teams inevitably clash with the First Amendment.

Moreover, it would be short-sighted to assume these students' fears are unfounded. Just last year, as universities struggled to address the COVID pandemic, many created COVID response teams that directly mirrored bias response teams.[4] Students were encouraged to report their peers for any perceived violation of campus COVID guidelines. The COVID response team would then investigate, request a meeting with reported students, and, if necessary, refer the issue to other administrators.

[4] https://www.campusreform.org/?ID=15460.

Just like the bias reporting form and discriminatory harassment complaint form at issue here, COVID reporting forms included open-ended prompts where students could anonymously accuse their peers of anything on any part of campus. *See* Br. of Pl.-Appellant at 13.

UCF need only look in its backyard to find examples of students abusing these reporting forms. At Florida Atlantic University ("FAU"), conservative students set up a table on campus to recruit new members to their organization.[5] They followed every campus guideline. However, when one student lowered his facemask to take a sip of water, a passerby took a photo of him. That same day, FAU notified the students that they were reported for a COVID violation and asked them to meet with the Assistant Director of Student Activities. During the meeting, FAU informed the students that they failed to follow social distancing and mask guidelines. Despite being careful to follow every rule, the students left the meeting feeling uneasy and uncertain—about what the COVID guidelines were, about who reported them and why, and about whether they could return to tabling the following week. Even though the meeting with the university was voluntary, the students were so concerned about being reported again, with or without serious consequences, that they did not resume tabling for months.

[5] https://345h6j74bj93ldnop2phvizr-wpengine.netdna-ssl.com/wp-content/uploads/sites/12/2021/09/20200923-SLF-Follow-Up-Ltr-to-FAU-re.-COVID-Policies.pdf.

And at the University of North Florida ("UNF"), conservative students were reported for violating COVID facemask policies when they walked around campus to engage in speech activities.[6] The students were complying with COVID policies the entire time. In fact, there was no evidence to support the reported violation. Even without the evidence, UNF invited the reported students to attend a "voluntary" meeting to discuss the charges. But whether or not students attended the meeting, UNF had the ultimate authority to issue formal charges against them, thereby subjecting them to official disciplinary hearings. The students did not believe that the "voluntary" meeting with the university was really voluntary, and they feared being reported again if they engaged in future activities.

COVID reporting forms and bias reporting forms have the same end-goal: to make campus "safer." *See* Br. of Pl.-Appellant at 12. But in setting this goal, universities give administrators and other students the unfettered authority to monitor, report, and silence students who are exercising their freedom of speech. UCF attempts to shelter students from uncomfortable topics at the expense of constitutional freedom, forcing students like Student A, Student B, and Student C to self-censor.

[6] https://345h6j74bj93ldnop2phvizr-wpengine.netdna-ssl.com/wp-content/uploads/sites/12/2021/06/3f4d64_1c22683c2bcd43fba851214fcc14c434.pdf.

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

Self-censorship is exactly the type of harm pre-enforcement challenges seek to eliminate. *See Bankshot Billiards, Inc. v. City of Ocala*, 634 F.3d 1340, 1350 (11th Cir. 2011) (listing Supreme Court cases allowing pre-enforcement challenges against laws that impose a chilling effect on speech); *see also Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) (noting an "exception to the usual rules governing standing" when an overly broad statute imposes a chilling effect on the exercise of speech). The district court accepts the University's claim that the JKRT cannot actually sanction students as proof positive that there can be no objective chill on speech. Br. of Pl.-Appellant at 17. But as the Sixth Circuit noted in *Speech First, Inc. v. Schlissel*, JKRT's lack of authority "is not dispositive." 939 F.3d 756, 754 (6th Cir. 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 766 (emphasis added).

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*, 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).

Unique standing considerations associated with the First Amendment are even more critical when, as here, the speech codes that a party seeks to challenge tend to suppress political speech. At the University, both bias and discriminatory harassment include actions allegedly motivated by prejudice against race, gender identity, sexual orientation, and socioeconomic class. Br. of Pl.-Appellant at 9, 11. In today's world, it is inevitable that political speech is woven into these topics.

Circuit courts of appeal 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 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); *see also 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); *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 partial denial of a preliminary injunction should not be allowed to stand. Here, the mere threat of prosecution is tantamount to forced censorship of students who wish to partake in political and public discourse. *See* Br. of Pl.-Appellant at 34. "[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 ensuring 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/ Celia H. O'Leary

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September 15, 2021

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Eleventh Circuit Rule 29 because it contains 3333 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 Eleventh Circuit Rule 32(b) and the type style requirements of Fed. R. App. P. 32(a)(6) and Eleventh Circuit Rule 32(c) because it was prepared using Word 2016 and uses a proportionally spaced typeface, Garamond, in 14-point font.

September 15, 2021 /s/ Celia H. O'Leary

CERTIFICATE OF FILING AND SERVICE

On September 15, 2021, 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.

September 15, 2021 /s/ Celia H. O'Leary