No. 23-6054

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SPEECH FIRST, INC.,
Plaintiff-Appellant,

v.

KAYSE SHRUM, in her official capacity
as President of Oklahoma State University,
Defendant-Appellee.

On Appeal from the United States District Court for the Western District of Oklahoma, No. 5:23-cv-29 (Jones, J.)

OPENING BRIEF OF PLAINTIFF-APPELLANT SPEECH FIRST, INC.

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Dated: May 23, 2023

ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Per Rule 16.1, Speech First represents that it has no parent corporation or corporation that owns 10% or more of its stock. No publicly traded company or corporation has an interest in the outcome of this case or appeal.

Dated: May 23, 2023

/s/ Cameron T. Norris
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

PRIOR OR RELATED APPEALS

None.

JURISDICTIONAL STATEMENT

The district court had jurisdiction because Speech First alleged that the University is violating the First and Fourteenth Amendments. 28 U.S.C. §1331. This Court has jurisdiction because Speech First appeals from a final order dismissing its entire case. §1291. The district court entered that order on April 10, 2023, and Speech First timely appealed the next day. App. Vol. 3 at 631-37.

STATEMENT OF THE ISSUE

Does an association fail to allege Article III standing when its complaint identifies specific members with standing, but uses pseudonyms instead of legal names?

STATEMENT OF THE CASE

Speech First is a membership association committed to free speech on college campuses. On behalf of its members, it has challenged unconstitutional policies at nine universities. In each case, Speech First referred to its members with pseudonyms. In no case did a court suggest that the students' anonymity defeated Speech First's standing. Until now.

I. Speech First successfully sues universities, on behalf of its anonymous members, for free-speech violations.

Plaintiff, Speech First, is a nationwide membership organization of students, alumni, and others that is dedicated to preserving human and civil rights secured by law,

including the freedom of speech. App. Vol. 1 at 160 ¶2. Speech First protects the rights of students at colleges and universities through litigation and other lawful means. *Id.* It has filed free-speech litigation against nine universities, including Texas State, Houston, Virginia Tech, Central Florida, Iowa State, Illinois, Texas, and Michigan. *See Court Battles*, Speech First, perma.cc/F2WA-U3JA (archived May 23, 2023). In each case, Speech First sued on behalf of students who attend the university in question. And in each case, it protected those students' privacy by referring to them with pseudonyms ("Student A," "Student B," and so on).

Many of Speech First's suits challenge what are known as "bias response teams." Living up to their Orwellian name, these teams encourage students to monitor each other's speech and to report incidents of "bias" to the university. "Bias" is defined incredibly broadly and covers wide swaths of protected speech. *See* App. Vol. 2 at 340-41. After receiving reports of a bias incident, the team can log the incident, investigate it, meet with the relevant parties, attempt to reeducate the "offender," and recommend formal or informal discipline. Bias-response teams are usually staffed not by students or professors, but by university administrators, disciplinarians, and even police officers—a literal "speech police." App. Vol. 2 at 237, 248. Though universities say this process is entirely voluntary, they know that students do not see it that way. According to the watchdog group FIRE, bias-response teams "effectively establish a surveillance state on campus where students … must guard their every utterance for fear of being reported to and investigated by the administration." App. Vol. 2 at 257. Speech First

has argued in court that these teams objectively chill students' speech, creating a 3-1 circuit split. *Compare Speech First, Inc. v. Fenves*, 979 F.3d 319, 330-38 (5th Cir. 2020); *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 763-67 (6th Cir. 2019); *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1119-24 (11th Cir. 2022) (yes they do), *with Speech First, Inc. v. Killeen*, 968 F.3d 628, 639-44 (7th Cir. 2020) (no they don't). Speech First has another case raising this issue currently pending in the Fourth Circuit. *Speech First, Inc. v. Sands*, No. 21-2061 (4th Cir.).

Speech First also sues universities when they adopt overbroad regulations of "discriminatory harassment." As then-Judge Alito once explained, there is no First Amendment exception for "harassing" or "discriminatory" speech. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 210 (3d Cir. 2001); *see Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (plurality). Universities can regulate discriminatory harassment only when it rises to the level of unprotected conduct. The Supreme Court explained how schools should draw this line in *Davis v. Monroe County Board of Education*, where it defined actionable harassment as behavior "so severe, pervasive, and objectively offensive that it denies" someone "equal access to education." 526 U.S. 629, 652 (1999). But many universities define harassment more broadly than *Davis*, thus sweeping in protected speech. *See* App. Vol. 2 at 418-19; Vol. 3 at 458-506. Speech First has won preliminary injunctions against two such policies. *Compare* App. Vol. 3 at 548 (UCF policy), 577 (Houston policy), *with Cartwright*, Doc. 59, No. 6:21-cv-313 (M.D. Fla. July 12, 2022) (enjoining UCF), *and Speech First, Inc. v. Khator*, 603 F. Supp. 3d 480, 481-82 (S.D. Tex. 2022) (enjoining

Houston). And it eliminated another via settlement after winning its appeal in the Fifth Circuit. *Compare* App. Vol. 3 at 514 (Texas policy)*, with Fenves*, Doc. 39, No. 1:18-cv-1078 (W.D. Tex. Dec. 22, 2020) (Texas settlement).

Speech First also challenges universities' attempts to regulate their students' speech online. The internet generally, and the campus specifically, are traditional public forums for students. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017); *Am. Future Sys., Inc. v. Penn. State Univ.*, 752 F.2d 854, 864 (3d Cir. 1984). Yet public universities often restrict what students can email or post online in ways that a State could never do for other citizens. *E.g.*, App. Vol. 2 at 301 (discussing Oklahoma State's practice of blocking students from using the names of political candidates on social media). Speech First has obtained preliminary injunctions against computer policies that, for example, banned "harassing or hate messages," *Speech First, Inc. v. Cartwright*, 2021 WL 3399829, at *7 (M.D. Fla. July 29), and demanded "respect of ... the rights of others to be free of intimidation, harassment, and unwarranted annoyance," *Sands*, 2021 WL 4315459, at *18-21 .

II. Speech First sues Oklahoma State.

Speech First filed this suit against Oklahoma State in January 2023. Like its other cases, Speech First challenged the University's bias-response team, harassment policy, and computer policy. FIRE has reviewed these policies at Oklahoma State and given them all a "yellow light." App. Vol. 3 at 448-57. "At public institutions, yellow light policies are unconstitutional." App. Vol. 3 at 439. Speech First challenged these policies

under the First and Fourteenth Amendments. And like its other cases, Speech First challenged them on behalf of its anonymous members who attend the University.

The University's bias-response team is called the Bias Incident Response Team (BIRT, for short). The BIRT administers the University's policy on "bias incidents." The University defines bias incidents as "actions committed against or directed toward a person or property that are motivated, in whole or in part, by a bias against a person or group of persons who possess common characteristics." App. Vol. 2 at 324. These actions include pure speech. Students can be reported for, among other things, a "Comment in Class," a "Comment in Writing," "Incorrect name or pronoun usage," or an "Offensive Picture or Image." App. Vol. 2 at 331-32. Bias incidents can occur on or off campus, including on social media. App. Vol. 2 at 330-31. And bias-incident complaints are submitted online via a "Bias Incident Report" form. App. Vol. 2 at 327-33. The University "urges anyone who has experienced or witnessed a bias incident to report it" and lets them do so anonymously. App. Vol. 2 at 225, 228, 324, 328. The "majority" of bias-incident reports to date have involved "perceived offensive speech." App. Vol. 1 at 121 ¶18, 33 ¶49.

The BIRT solicits, receives, reviews, and responds to bias-incident reports. App. Vol. 2 at 324-25. After receiving a complaint, the BIRT "will contact the reporting person" and "offer a meeting to discuss the incident in detail to explore a plan for resolution." App. Vol. 2 at 325. That plan can include the BIRT "reach[ing] out to the person alleged to have engaged in the perceived biased behavior"—a meeting where the

accused student "describes the communication at issue and their intent" to the BIRT. App. Vol. 1 at 121 ¶20. The BIRT's goal is to achieve an "informal resolution" of the complaint, such as "training and educational opportunities" for the bias offender. App. Vol. 2 at 319. But "where disciplinary or corrective action is a possibility," the BIRT warns that bias-incident complaints will be "referred to … Student Conduct." *Id.* The BIRT also keeps records of bias allegations and its response so the University can "assess the campus climate on an ongoing basis." *Id.*

The University also has a vague and overbroad harassment policy. Under the header "Social Justice," the University defines "harassment" as "verbal abuse, threats, intimidation, harassment, coercion, bullying, or other conduct" that "threatens or endangers the mental or physical health/safety of any person or causes reasonable apprehension of such harm" that is "persistent, severe, or pervasive and is subjectively offensive to the complainant and objectively offensive to a reasonable person." App. Vol. 1 at 196. This definition of harassment is partially circular, as it includes the term "harassment" itself. And it violates *Davis* in at least two ways. It covers "severe *or* pervasive" harassment, meaning it reaches an isolated incident that the University deems sufficiently "severe." *Id.* (emphasis added). But *Davis* used the word "and" so its definition did not cover isolated incidents. *See* 526 U.S. at 652-53. The University's policy also bans "harassment" that "threatens or endangers the mental … health/safety of any person" or that "causes reasonable apprehension of such harm." App. Vol. 1 at 196. But *Davis* made clear that prohibitable harassment must turn on whether the harassment

"denies" someone's "access" to education. *See* 526 U.S. at 652. These deviations from *Davis* must be intentional, since the University's other harassment policies track *Davis* verbatim. *See* App. Vol. 2 at 370 (Title IX policy), 358 (Board of Regents policy).

The University has a computer policy, too, that even it cannot defend. Its "Appropriate Use Policy" bans students from using the University's technology resources "for transmitting political campaigning" messages. App. Vol. 2 at 280. That content-based restriction on core protected speech is flatly unconstitutional. The University admits that this policy, as applied to students, "would likely run afoul of the First Amendment" but says it's working to revise it. PI Opp. (D.Ct. Doc. 25) at 13-14. That was four months ago. As of today, the policy has not changed. *Appropriate Use Policy* §4.04(B), Okla. State Univ., perma.cc/3DW6-KLXJ (captured May 23, 2023). If it is changed later, Speech First reserves the right to argue that the University's voluntary cessation does not moot this claim. *See Fenves*, 979 F.3d at 327-29; *Schlissel*, 939 F.3d at 767-70.

Speech First challenges these policies on behalf of its members, three of whom it named in the complaint: "Student A," "Student B," and "Student C." Though it used pseudonyms instead of legal names, the complaint alleges detailed information about each member. The complaint is verified by Speech First's executive director and is backed up by a declaration from her, anonymous declarations from the students, and numerous exhibits. *See* App. Vol. 1 at 50, 160-783.

Students A-C currently attend the University. App. Vol. 1 at 23 ¶11. Student A is female, while Students B-C are male. App. Vol. 1 at 34 ¶52, 37 ¶67, 40 ¶84. Student

A is a sophomore. App. Vol. 1 at 34 ¶52. Students B-C are juniors. App. Vol. 1 at 37 ¶67, 40 ¶84. All three have "views that are unpopular, controversial, and in the minority on campus." App. Vol. 1 at 34 ¶53, 37 ¶68, 40 ¶85. For example, Student A believes that "affirmative action" is "immoral" and "just old-fashioned racism"; the University shouldn't "subsidize in-state tuition benefits for illegal aliens"; and "there is no such thing as a gender spectrum." App. Vol. 1 at 34-35 ¶¶54-57. Student B believes that "marriage is only between a man and a woman" and "it is wrong for two men to use a 'surrogate'"; "biological sex is immutable" and no one should have to "affirm that a biological male is actually a female, or vice versa"; and "the Black Lives Matter organization has had a corrosive impact on race relations in America." App. Vol. 1 at 37-38 ¶¶69-73. And Student C believes that "human beings are created male or female and … a person cannot 'transition'"; "'undocumented immigrants'" should be called "'illegal immigrants'" because they "have no right to be here"; and "abortions should be illegal in all circumstances." App. Vol. 1 at 40-41 ¶¶86-88.

Students A-C want to "[e]ngage in open and robust intellectual debate with [their] fellow students about these topics in the classroom, in other areas of campus, online, and in the City of Stillwater." App. Vol. 1 at 35 ¶59, 38 ¶75, 41 ¶90. When someone else voices contrary views, Students A-C "want to point out the flaws in their arguments and convince them to change their minds." App. Vol. 1 at 35 ¶60, 38 ¶76, 41 ¶91. Students A-C want to "speak directly to [their] classmates about these topics" and "talk frequently and repeatedly on these issues." App. Vol. 1 at 35 ¶61, 38 ¶77, 41 ¶92. But

the challenged policies make them "reluctant to openly express [their] opinions or have these conversations in the broader University community." App. Vol. 1 at 36 ¶63, 39 ¶79, 41-42 ¶94. Students A-C "do not fully express [themselves] in certain circumstances or talk about certain issues because [they] believe that sharing [their] beliefs will be considered 'harassment'" or a "'bias-related incident.'" App. Vol. 1 at 42 ¶95, 36 ¶64, ¶67, 39 ¶80, ¶82. And Students B-C would like to "send politically-oriented emails—including campaign-related emails—to [their] fellow students from [their] university email address," but cannot under the computer policy. App. Vol. 1 at 40 ¶83, 42 ¶98.

Both Speech First and Students A-C have good reasons for wanting to keep their real names out of the case-opening documents, before any protective order or other protections are in place. Students A-C are "current student[s] at the University and, if [their] participation in this litigation becomes public, [they] fear reprisal from the University, [their] professors, [their] fellow students, and others." App. Vol. 1 at 34 ¶52, 37 ¶67, 40 ¶84. Attaching their names to their controversial views effectively makes them *speak*, risking reports to the BIRT and the other consequences they are trying to avoid. Even if those policies were enjoined, it is one thing to speak your mind freely on campus on your own terms. It is another thing to sue your university—the institution that houses you, feeds you, gives you grades, and controls your future—in a high-profile case involving a national group like Speech First. Students who have taken a high-profile stand for the causes Students A-C want to champion have been insulted by their

professors, threatened, doxxed, assaulted, and removed from student groups. App. Vol. 1 at 162 ¶¶13-17; Vol. 3 at 615-18.

Speech First's executive director, whose very presence on campus risks "hostile, damaging protests," has documented these risks. App. Vol. 1 at 164 ¶20; *see also* Knapp, *Cherise Trump Visit Creates Controversy, Leads to Meeting of Student Organizations*, The Oswegonian (Mar. 30, 2023), perma.cc/4S4X-FAZ5. She knows from speaking to her members and countless students across the country that, if the law required young adults with deeply unpopular views to reveal their names to the world, few would join organizations like Speech First and vindicate their constitutional rights in court. App. Vol. 1 at 161-62 ¶¶10-12.

III. The district court dismisses Speech First's complaint for lack of Article III standing because its members are anonymous.

On the same day it filed its complaint, Speech First moved for a preliminary injunction. App. Vol. 1 at 15. The University opposed and filed a separate motion to dismiss under Rule 12(b)(1). App. Vol. 1 at 18. After Speech First amended as of right, the University refiled its motion to dismiss and filed a new motion to strike certain allegations from the amended complaint. *Id.*

In its motion to dismiss, the University argued that Speech First lacked standing. It mostly claimed that the challenged policies do not objectively chill students' speech. *See* App. Vol. 1 at 68-80. It said the harassment policy does not cover what Speech First's members want to say and promised that the University would never enforce it

unconstitutionally. App. Vol. 1 at 70-75. And while it acknowledged that the members' speech could be reported to the BIRT, the University claimed that the BIRT does not objectively chill speech because it has no formal disciplinary authority. App. Vol. 1 at 75-80. Speech First has litigated these arguments many times. *E.g.*, *Cartwright*, 32 F.4th at 1119-24 (rejecting all of them); *Fenves*, 979 F.3d at 330-38 (same); *Schlissel*, 939 F.3d at 763-67 (same); *Killeen*, 968 F.3d at 639-44 (accepting one of them).

But the University also made an argument that other universities haven't: It claimed that, because the complaint does not divulge the legal names of Students A-C, Speech First lacks Article III standing under *Summers v. Earth Island Institute*, 555 U.S. 488 (2009). Recognizing that *Summers* didn't involve an association that used pseudonyms, the University cited other cases where *named plaintiffs* tried to sue under pseudonyms without permission. *See* App. Vol. 1 at 65-67 (citing cases applying Federal Rule of Civil Procedure 10(a)). The University's ultimate position, then, was that Speech First could use pseudonyms, but only if it got the district court's permission first. *See* App. Vol. 1 at 68. (Though Speech First disagreed, it alternatively asked the district court for that permission. *See* App. Vol. 1 at 158.) The University said it needed the students' "true identities … to ensure they are ***actually*** OSU students throughout the pendency of this lawsuit." App. Vol. 1 at 65. It did not explain why it needed their true identities to respond to the standing allegations in Speech First's complaint—allegations that were thoroughly responded to in the rest of its motion to dismiss.

The district court granted the University's motion to dismiss based solely on *Summers*. The court stressed the word "naming" in *Summers*, which it read to mean that associations must use members' *real* names. App. Vol. 3 at 633-34. The court admitted that "several circuit court decisions" reject this reading of *Summers*, "even more so … at the motion to dismiss stage." App. Vol. 3 at 634. But those cases are merely "persuasive," the court explained, and the Tenth Circuit has been "silen[t]." *Id.* The court's opinion is short on analysis: Other than observing that *Summers* used the word "naming," the court noted, in a footnote, that it was "not entirely convinced" the pleading stage should be treated differently from later stages of the litigation. App. Vol. 3 at 634 n.5. The court thus dismissed Speech First's complaint without prejudice for lack of Article III standing. App. Vol. 3 at 635-36. It did not rule on Speech First's alternative request for permission to use pseudonyms. And it denied the other motions as moot. App. Vol. 3 at 631, 635.

Speech First timely appealed. App. Vol. 3 at 637.

SUMMARY OF ARGUMENT

Associational standing is a "three-part test": The association has standing if "'(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Doe v. Stincer*, 175 F.3d 879, 882 (11th Cir. 1999) (quoting *Hunt v. Wash.*

State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977)). There is no fourth part; "[t]hese are the sole requirements." *Id.* And associations can satisfy it without divulging the legal names of their members in their complaint. They do so all the time.

I. *Summers* does not ban associations from referring to their members with pseudonyms. It couldn't, since that case didn't involve an association that referred to its members with pseudonyms. Associations can violate *Summers* if they fail to identify a *specific* member with standing—if they refer to their membership generally or make speculative predictions about possible members. But Speech First identified three specific members, and it pleaded every fact needed to prove their current standing. The district court did not explain why swapping the words "Student A" for that student's legal name would have made a difference under Article III. No appellate precedent or logical argument suggests it would. And it wouldn't, as virtually every court to consider the question has said.

II. The law does place limits on pseudonyms, but those limits do not come from Article III. Even *named plaintiffs* can sue under pseudonyms if they get permission from the court—proving that pseudonymity cannot be a question of Article III jurisdiction. But Speech First's members are not named plaintiffs or otherwise parties to this case. While the University might be able to get their identities in discovery, its entitlement to that information is not clear, and it hasn't even asked for discovery yet. Speech First might have to submit that information later *in camera* or under seal, and the public will

have a presumptive right to access it. But that presumption can be overcome, and the public's right of access has not attached yet because no sealed materials have been filed.

III. At the very least, *Summers* was not a reason to dismiss Speech First's complaint at the pleading stage. That decision was an appeal from final judgment, and it stressed the differences between alleging standing in a complaint and proving standing on the merits. Most courts hold that even *Summers*' actual holding—that associations must identify a specific member with standing—does not apply at the pleading stage. Even more so here, where Speech First *did* identify specific members with standing and included detailed allegations about them in its complaint.

This Court should reverse the district court's judgment and remand for further proceedings on the remaining issues and motions.

ARGUMENT

"This Court reviews a dismissal for lack of standing 'de novo, applying the same standard used by the district court.'" *Petrella v. Brownback*, 697 F.3d 1285, 1292 (10th Cir. 2012). It should reverse here. Speech First complied with *Summers* by identifying specific members with standing. It used pseudonyms, but that fact has nothing to do with Article III. And even if Speech First had violated *Summers*, dismissal was improper because *Summers*' reasoning does not apply at the pleading stage.

I. Speech First's use of pseudonyms did not violate *Summers*, a case involving no pseudonyms.

To support its conclusion that Article III categorically bars associations from using pseudonyms, the district court relied exclusively on *Summers*—a case that involved no pseudonyms. Even if *Summers* applied at the pleading stage, the district court misread what it requires. *Summers* requires specificity, not legal names, and Speech First identified specific members here. The district court's misreading has been rejected by many other courts. And no circuit has embraced it.

A. *Summers* requires associations to identify specific members with standing, not divulge their legal names.

In *Summers*, associations tried to challenge federal regulations that affected the national forests. Federal law required large forest projects to go through a lengthy approval process, but the regulations exempted certain projects. 555 U.S. at 490, 493. That exemption, the associations argued, prevented their members from commenting during the approval process, causing worse projects to be approved and harming their aesthetic and recreational interests in the forests. *Id.* at 494.

The associations failed to prove standing. Their theory was "'difficult'" to prove, the Supreme Court noted, because the members were not themselves "'the object of'" the regulations. *Id.* at 493. To prove standing, the associations needed to identify a member who had concrete plans to visit a specific area; that area needed to be subject to a specific project; that project needed to be covered by the challenged regulations; and those regulations needed to deprive that member of his right to comment. *Id.* at

494. The associations didn't make that showing. They identified a specific project, but the controversy over that project was moot because the parties had settled. *Id.* at 494-95, 497. The associations identified a specific member, but the only projects he specified affected places that he had no concrete plans to visit. *Id.* at 496, 500. And the associations tried to submit new affidavits on appeal, but the Supreme Court rejected them as untimely. *Id.* at 495 n.*, 500.

All that remained was the dissent's theory of standing. Though the case had proceeded past trial, the dissent pointed to the associations' "pleadings," where they alleged that they had "'thousands of members in California' who 'use and enjoy the Sequoia National Forest.'" *Id.* at 497; *see id.* at 502 (Breyer, J., dissenting). Given the sheer number of people represented, the dissent deemed it "probable" that the regulations would injure at least one of the associations' members. *Id.* at 497 (majority).

The Court rejected this theory on both form and substance. On form, the Court faulted the dissent for relying on the associations' "self-descriptions of their membership" in their pleadings, instead of "verifying the facts" through "individual affidavits" or some other "'factual showing.'" *Id.* at 499. On substance, the Court deemed the dissent's theory of "probabilistic standing" too "speculati[ve]" to prove standing. *Id.* The Court's "prior cases" required associations to make "specific allegations" that an "identified" member "would" suffer harm, not "statistical probabilities" that such a member likely exists. *Id.* at 498. The caselaw required associations to "identify members who have suffered the requisite harm." *Id.* at 499. And "[t]his requirement of naming the

affected members has never been dispensed with in light of statistical probabilities." *Id.* at 498-99 (citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 235 (1990)). The associations could not generate standing by predicting that "some (unidentified) members have plan[s] to visit some (unidentified) small parcels affected by the [regulations] and will suffer (unidentified) concrete harm as a result." *Id.* at 497-98.

Speech First's complaint complies with *Summers*, even if the Court's discussion of identifying specific members applied at the pleading stage. Speech First "did not offer only unsubstantiated generalizations about the [challenged policies'] effect on its membership." *Advocs. for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 41 F.4th 586, 594 (D.C. Cir. 2022) (distinguishing *Summers*). Nor did its complaint "merely alleg[e] that some members *might*" have standing; it "alleg[ed] that some members *were* suffering." *Hancock Cnty. Bd. of Sup'rs v. Ruhr*, 487 F. App'x 189, 198 (5th Cir. 2012) (distinguishing *Summers*). It "'identified'" three members and gave "particular facts … going to how [each policy] allegedly injures them." *Humane Soc'y of the U.S. v. USDA*, 2021 WL 1593243, at *6 (C.D. Cal. Mar. 26) (distinguishing *Summers*). It named those members ("Student A," "Student B," "Student C"). And for each member, it provided their year at the University, their sex, what speech they would like to engage in, why the challenged policies chill that speech, and even why they prefer anonymity. App. Vol. 1 at 34-42 ¶¶51-98. "There are no remaining uncertainties as to the effect of the [challenged policies] on [Speech First's] members." *FAIR v. Rumsfeld*, 291 F. Supp. 2d 269, 288 (D.N.J. 2003). Indeed, "it is not clear how a more specific identification could be

accomplished at this stage" except by adding their legal names, "a step that associational standing does not require." *Marszalek v. Kelly*, 2021 WL 2350913, at *4 (N.D. Ill. June 9) (distinguishing *Summers*).

The district court thought that *Summers* banned the use of pseudonyms because the opinion used the words "name" and "naming" once, but the Supreme Court has warned courts—recently and repeatedly—not to read its opinions that way: "'The language of an opinion is not always to be parsed as though we were dealing with language of a statute. Instead, we emphasize, our opinions dispose of discrete cases and controversies and they must be read with a careful eye to context." *Nat'l Pork Producers Council v. Ross*, 2023 WL 3356528, at *9 (U.S. May 11) (cleaned up). "[W]hen it comes to" *Summers*, "the language" that the district court highlighted "appeared in a particular context and did particular work." *Id.* "What matters in [*Summers*] is not a one-line description, but a pages-long analysis" surrounding it. *Borden v. United States*, 141 S. Ct. 1817, 1833 n.9 (2021) (plurality). In the relevant analysis, *Summers* was faulting the associations for not proving that a *specific* member was injured; it used "name" as a synonym for "identify." *See* 555 U.S. at 498-99. And members can of course be identified without using their legal names. *See Advocs. for Highway & Auto Safety*, 41 F.4th at 594; *New York v. U.S. Dep't of Com.* (*Census Case*), 351 F. Supp. 3d 502, 606 n.48 (S.D.N.Y.), *aff'd in part, rev'd in part and remanded*, 139 S. Ct. 2551 (2019); *Humane Soc'y*, 2021 WL 1593243, at *5; *FAIR*, 291 F. Supp. 2d at 289.

Summers could not be precedent on the use of pseudonyms because the associations in *Summers* did not use them. Though *Summers* discusses a "naming requirement," pseudonyms *are* names. *See Name*, Black's Law Dictionary (11th ed. 2019) ("word or phrase identifying … a person … and distinguishing that person … from others"); *Pseudonym*, Black's Law Dictionary ("A fictitious name or identity"). And the Court's reasoning would have been entirely different if the associations had submitted an affidavit saying that "Member A" had concrete plans to visit a specific area of the forest that a covered project would soon affect. Again, it would be "contrary to all traditions of our jurisprudence to consider the law on this point conclusively resolved by broad language in cases where the issue was not presented or even envisioned." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385-86 n.5 (1992); *accord Armour & Co. v. Wantock*, 323 U.S. 126, 132-33 (1944) ("[W]ords of our opinions are to be read in the light of the facts of the case under discussion…. General expressions transposed to other facts are often misleading."); *Brown v. Davenport*, 142 S. Ct. 1510, 1528 (2022) ("We neither expect nor hope that our successors will comb these pages for stray comments and stretch them beyond their context" to arguments that the decision "had no reason to pass on").

B. Many cases have rejected the argument that *Summers* regulates the use of pseudonyms.

When associations use pseudonyms, most litigants understand that *Summers* has nothing to say about it. But some have tried to argue that *Summers* bans this practice. When they do, courts uniformly reject the argument. Consider the following examples.

1. The D.C. Circuit recently held that, when an association identifies "specific" members, the members' "anonymity is no barrier to standing." *Highway Safety*, 41 F.4th at 593-94. The association there identified "specific, individual" members who were harmed by the challenged rule, but it did not reveal "the names of the individuals." *Id.* Applying the summary-judgment standard, *id.* at 592, the D.C. Circuit found associational standing. *Summers* did not apply because the association "did not offer only unsubstantiated generalizations about … its membership"; it "identif[ied] specific members" with standing. *Id.* at 593-94. Though it did not divulge their "names," the D.C. Circuit held that "'[n]aming … members adds no essential information bearing on'" standing. *Id.* at 594. Here, then, this Court could not affirm the district court without creating a circuit split.

2. Courts reached a similar result just a few years before *Summers*. In *FAIR v. Rumsfeld*, an association of law schools who didn't want to host military recruiters (because of don't ask, don't tell) sued the Defense Department. 291 F. Supp. 2d 269, 274-75 (D.N.J. 2003). The association's members were secret "to allay members' fears of retaliatory efforts on behalf of the government and private actors if the law schools were to participate … in a legal challenge." *Id.* at 286. While the district court was familiar with the cases "requiring plaintiff associations to 'identify' or 'name' members," it refused to overread those cases as requiring an association to "take the next step and *publicly* name" them. *Id.* at 289, 287 (emphasis added). It held that FAIR had standing at the pleading stage, despite its anonymous members. *Id.* at 287. Both the Third Circuit

and the Supreme Court affirmed. *See* 390 F.3d 219, 228 n.7 (3d Cir. 2004) (independently finding standing); 547 U.S. 47, 52 n.2 (2006) (agreeing that "FAIR ha[d] standing"). Nothing in *Summers* suggests that the Court thought it was overruling cases like *FAIR*.

3. A more recent decision drives the point home. In the litigation over the repeal of DACA, the NAACP sued on behalf of its anonymous members: DACA beneficiaries whose legal names were withheld from the government. *NAACP v. Trump*, 298 F. Supp. 3d 209, 225 & n.10 (D.D.C. 2018). Though the government complained about the NAACP's use of pseudonyms, the district court rejected that "'tenuous'" reading of *Summers*. *Id.* It ruled that the NAACP had associational standing at summary judgment, *id.* at 225-26 & n.10, and the Supreme Court affirmed without questioning standing, *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 (2020).

4. And, of course, Speech First has kept its members anonymous in every case it's ever filed. Yet two courts upheld Speech First's standing at the preliminary-injunction stage. *Schlissel*, 939 F.3d at 763-67; *Fenves*, 979 F.3d at 330-38. And another three also granted Speech First a preliminary injunction. *Cartwright*, 32 F.4th at 1129; *Khator*, 603 F. Supp. 3d at 482; *Sands*, 2021 WL 4315459, at *24. Even in the one case that Speech First lost on appeal, the Seventh Circuit did not fault it for keeping its members anonymous; it told Speech First that it *should have* supported its preliminary-injunction motion with anonymous "Doe affidavits" from its members. *Killeen*, 968 F.3d at 643;

accord id. at 650 (Brennan, J., concurring in part and dissenting in part) (faulting Speech First for not "fil[ing] anonymous affidavits" from its members).

The University can't brush these cases off as "drive-by" rulings. The University of Texas formally objected to the "anonymity of Speech First's members," but its objection was overruled. *Compare* Objections to Decl. (Doc. 22) at 3-5, 7-8, *Speech First, Inc. v. Fenves*, No. 1:18-cv-1078 (W.D. Tex. Jan. 28, 2019)*, with Speech First, Inc. v. Fenves*, 384 F. Supp. 3d 732, 743 (W.D. Tex. 2019) ("Defendant['s] … Objection to the Declaration … is **OVERRULED**."). And in Speech First's pending appeal against Virginia Tech, the Fourth Circuit admitted three declarations from Speech First's members, over the university's objection that the members were anonymous. *Compare* Opp. to Mot. to Suppl. (CA4 Doc. 69) at 8, *Speech First, Inc. v. Sands*, No. 21-2061 (4th Cir. Oct. 24, 2022) (objecting to "the New Students' anonymity")*, with* Order Granting Mot. to Suppl. (CA4 Doc. 76) (Jan. 10, 2023). To be sure, no other university has argued that Speech First *lacks Article III standing* because it used pseudonyms. But it's unlikely that scores of talented lawyers missed such an obvious winning issue (or that several courts shirked their independent duty to raise this jurisdictional issue sua sponte). It's more likely that the issue doesn't exist.

5. Contra the district court, this Court has not been "silen[t]" on associations using pseudonyms. App. Vol. 3 at 626. It allowed an association to sue on behalf of an anonymous member in *Roe No. 2 v. Ogden*, 253 F.3d 1225 (10th Cir. 2001). A case with strikingly similar facts, *Roe* involved a chapter of the ACLU suing on behalf of its

anonymous member: a law student known only as "John Roe #2." *Id.* at 1227-28. The ACLU moved for a preliminary injunction, but the district court dismissed its complaint for lack of jurisdiction. *Id.* at 1228. This Court reversed. It held that "John Roe #2 has standing" and that, "[b]ecause John Roe #2 is a member of the [ACLU]," the association had standing to sue on his behalf. *Id.* at 1230. But if the district court were right here, then this Court must have been wrong in *Roe No. 2*.

C. No circuit has held that an association lacks standing because it referred to its members with pseudonyms.

No appellate case holds that an association loses Article III standing if it refers to its members with pseudonyms. The district court and the University cited several appellate cases, but none involved an association that used pseudonyms. Those cases all applied *Summers*' actual holding: They found no standing because the associations identified no *specific* member with standing.

Start with the district court's cases. *See* App. Vol. 3 at 626 n.4 (citing *Am. Coll. of Emergency Physicians v. Blue Cross & Blue Shield of Ga.*, 833 F. App'x 235 (11th Cir. 2020); *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583 (8th Cir. 2022); *Tenn. Republican Party v. SEC*, 863 F.3d 507 (6th Cir. 2017)).

- In *Emergency Physicians*, the Eleventh Circuit *rejected* the district court's rule and reiterated that associations "need not name names to establish standing." 833 F. App'x at 240 n.8 (cleaned up).
- In *Religious Sisters*, the association did not use pseudonyms; it stated generically that "'its membership includes … entities'" that receive federal funds. 55 F.4th at 601; *see* 2d Am. Compl. (Doc. 97) ¶¶55-56, No. 3:16-cv-386 (D.N.D. Nov. 23, 2020). The Eighth Circuit faulted the

association for failing to identify a "'*specific*'" member with standing. *Religious Sisters*, 55 F.4th at 601.

- And in *Tennessee Republican Party*, the associations "fail[ed] to identify any members," except four people who weren't injured. 863 F.3d at 521. No specific members with standing were identified with pseudonyms. *See* Pet'rs App'x (CA6 Doc. 39) at 312-13, No. 16-3360 (6th Cir. Nov. 16, 2016).

The University's other cases follow the same pattern. *See* App. Vol. 3 at 613-15 (citing, additionally, *Ga. Republican Party v. SEC*, 888 F.3d 1198 (11th Cir. 2018); *Draper v. Healey*, 827 F.3d 1 (1st Cir. 2016); *Assoc. Gen. Contractors of Am., San Diego Chapter, Inc. v. Cal. Dep't of Transp.* (*AGC*), 713 F.3d 1187 (9th Cir. 2013); *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175 (4th Cir. 2013)).

- In *Georgia Republican Party*, the association referred to its "members" generally; it "failed to allege that a specific member w[ould] be injured by the rule." 888 F.3d at 1203.
- In *Draper*, the association "did not identify any member" with standing; it asserted only that "many of its members asked it" to sue. 827 F.3d at 3.
- In *AGC*, the association's lone declaration did not name "any specific members" and was largely "struck from the record." 713 F.3d at 1195.
- And in *Southern Walk*, the association "failed to identify a single *specific* member" with standing; it made no "specific mention of any individual member's injury." 713 F.3d at 184-85.

Again, all these cases involved associations that failed to identify a *specific* member with standing; none involved an association that identified a specific member but refused to divulge that member's real name.

The only contrary authority that Speech First knows about is *Do No Harm v. Pfizer*, 2022 WL 17740157 (S.D.N.Y.), *appeal pending*, No. 23-15 (2d Cir.). While the

University relied heavily on that decision below, this Court should not. The decision is currently on appeal and will likely be reversed. It ignores the Second Circuit's binding precedent on this point. *See Bldg. & Const. Trades Council of Buffalo v. Downtown Dev., Inc.*, 448 F.3d 138, 144-45 (2d Cir. 2006). It openly conflicts with two decisions from its own court and several decisions from other courts. *See Do No Harm*, 2022 WL 17740157, at *9 n.5, *8 & n.3. And it does not grapple with any of the arguments above, likely because it sua sponte dismissed without giving the plaintiff notice or an opportunity to respond. *See* Appellant's Br., 2023 WL 2536426 (2d Cir. Mar. 10). That sua sponte dismissal decreases the "reliability of the order" and will be "'by itself, grounds for reversal.'" *Snider v. Melindez*, 199 F.3d 108, 113 (2d Cir. 1999).

II. Pseudonymity is regulated by other rules, not Article III.

That *Summers* doesn't address pseudonyms is unsurprising, since pseudonymity has nothing to do with Article III. The University all but conceded that point below. It insisted that Speech First *could* use pseudonyms if it got "the court's permission." App. Vol. 1 at 61-62, 65, 68. But no judge can permit a lack of Article III standing. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). A rule that is subject to judicial exceptions is, by definition, not jurisdictional. *Santos-Zacaria v. Garland*, 2023 WL 3356525, at *4 (U.S. May 11).

The truth is that anonymity "in no way detracts" from the "components of what constitutes an Article III case or controversy." *B.R. v. F.C.S.B.*, 17 F.4th 485, 494 (4th Cir. 2021). If no case or controversy existed unless everyone used their real names, then

plaintiffs shouldn't be able to sue under pseudonyms either—yet that practice is "common." *Id.* at 495 (citing, as famous examples, *Roe v. Wade* and *Doe v. Bolton*). The Federal Rules, moreover, require litigants to anonymize the names of minors. Fed. R. Civ. P. 5.2(a); *see also* Fed. R. Civ. P. 17(d) (no need to refer to public officers "by name"). Yet minors and their parents can sue (and have associations sue for them) without using their legal names. *E.g.*, *P.M. v. Evans-Brant Cent. Sch. Dist.*, 2008 WL 4379490, at *2-4 (W.D.N.Y. Sept. 22); *Douglas Cnty. Sch. Dist. RE-1 v. Douglas Cnty. Dep't of Pub. Health*, 2021 WL 5106284, at *1 (D. Colo. Oct. 21). All these practices are allowed because "the use, vel non, of pseudonyms in pleading is immaterial to the case or controversy inquiry." *B.R.*, 17 F.4th at 495.

"[T]o hold that Article III requires an organization" to use its members' legal names "would be in tension with one of the fundamental purposes of the associational standing doctrine—namely, protecting individuals who might prefer to remain anonymous." *Census Case*, 351 F. Supp. 3d at 606 n.48. Far from making individual members the stars of the show, a premise of associational standing is that the litigation will *not* "requir[e] the participation of individual members." *Hunt*, 432 U.S. at 343. The doctrine recognizes the advantages of letting members "band together" and litigate "'under a name and form'" that is "'collective'" in nature. *UAW v. Brock*, 477 U.S. 274, 290 (1986). If the district court were right that associations lack standing unless they unmask members in the complaint, then associations should have lacked standing to represent anonymous immigrants, *NAACP*, 298 F. Supp. 3d at 225 & n.10; people with sensitive

medical conditions, *Disability Rts. N.J., Inc. v. Velez*, 2011 WL 2976849, at *11 & n.10, *14 (D.N.J. July 20); sexual minorities, *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 890, 892 (C.D. Cal. 2010), *vacated due to subsequent mootness*, 658 F.3d 1162 (9th Cir. 2011); regulated entities suing their regulator, *FAIR*, 291 F. Supp. 2d at 287; or students, *Members of Same v. Rumsfeld*, 321 F. Supp. 2d 388, 395-96 (D. Conn. 2004). The district court's rule would render associational standing a dead letter for vulnerable members.

Although Article III does not police pseudonymity, the law does police it in other ways. Pseudonymity is constrained by the rules governing case captions, discovery, and the public's right to access court documents. But the district court did not find that Speech First violated any of those rules. Nor could it have.

A. Rule 10(a)

The University cited a few cases that involved pseudonyms below, but those cases all involved Rule 10(a)—not Article III. *See* App. Vol. 1 at 65-68 (citing *U.S. ex rel. Little v. Triumph Gear Sys., Inc.*, 870 F.3d 1242 (10th Cir. 2017); *NCBA v. Gibbs*, 886 F.2d 1240 (10th Cir. 1989); *W.N.J. v. Yocom*, 257 F.3d 1171 (10th Cir. 2001)). Rule 10(a) requires plaintiffs to "name all the parties" in the "title of the complaint." Fed. R. Civ. P. 10(a). Rule 17(a) adds that "[a]n action must be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a). The purpose of these rules is to promote the public's "access to legal proceedings" and to help courts "apply legal principles of res judicata and collateral estoppel." *Femedeer v. Haun*, 227 F.3d 1244, 1246 (10th Cir. 2000).

Courts thus read them to bar plaintiffs from suing under pseudonyms unless they first get permission from the court. *Gibbs*, 886 F.2d at 1245. If a plaintiff uses a pseudonym in the caption without first getting permission, the district court "lack[s] jurisdiction" over that plaintiff, according to this Court. *Id.* But the court lacks jurisdiction not because those plaintiffs lack Article III standing, but because "a case has not been commenced with respect to them." *Id.* The cases applying Rule 10(a) do not even use the words "standing," "case or controversy," or "Article III."

No one thinks Speech First violated Rule 10(a) here. The University did not argue Rule 10(a). The district court did not invoke Rule 10(a). And Speech First's complaint was docketed successfully (like the complaints in all its other cases). Speech First complied with Rule 10(a) because its caption "names all the parties": Speech First, Inc. and Kayse Shrum. App. Vol. 1 at 21. An association's members are "not ... parties to the litigation." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 459 (1959). They cannot be served party discovery, *Univ. of Tex. at Austin v. Vratil*, 96 F.3d 1337, 1339-40 (10th Cir. 1996), recover fees, *Nail v. Martinez*, 391 F.3d 678, 684 (5th Cir. 2004), or do anything else that parties do. They are "third parties" who are not subject to the naming requirement that applies to plaintiffs and defendants. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 2023 WL 3126414, at *6 n.4 (D. Mass. Apr. 27). If Speech First had listed them in the "title of the complaint," it would have *violated* Rule 10(a) precisely because an association's members are not "parties." Fed. R. Civ. P. 10(a).

Gibbs illustrates the distinction between parties (who are subject to Rule 10(a)) and nonparty members (who are not). In that case, an association tried to put all its "members" in the caption as co-plaintiffs, without identifying who they were. 866 F.2d at 1244. This Court dismissed these "unnamed plaintiffs" under Rule 10(a). *Id.* at 1245. But the association itself was also a plaintiff. So this Court let it proceed "as an associational entity" on behalf of those same unnamed members. *Id.* Speech First can do the same on behalf of Students A-C.

B. Discovery

The discovery rules sometimes require associations to divulge the identities of their members. Under those rules, defendants can generally get any information that is "nonprivileged," "relevant," and "proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). If a defendant could meet that standard, then it could request an association's members in discovery.

If the University had tried to unmask Speech First's members in discovery, Speech First could have raised several objections. A request for anything more than their legal names wouldn't be proportional. *See, e.g.*, *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty.*, 50 F. Supp. 2d 443, 446 (D. Md. 1999); *Sw. Ctr. for Bio. Diversity v. Clark*, 90 F. Supp. 2d 1300, 1309 (D.N.M. 1999); *NRDC v. Mineta*, 2005 WL 1075355, at *5 (S.D.N.Y. May 3). And their legal names are protected by the First Amendment associational privilege. *See AFPF v. Bonta*, 141 S. Ct. 2373, 2382 (2021); *Patterson*, 357 U.S. at 460-63; *Grandbouche v. Clancy*, 825 F.2d 1463, 1465-67 (10th Cir. 1987). Disclosing their

names and their support for this litigation would chill protected speech and association. *See* App. Vol. 1 at 34 ¶52, 37 ¶67, 40 ¶84, 161-65 ¶¶10-21; *Beinin v. Ctr. for Study of Popular Culture*, 2007 WL 1795693, at *3 (N.D. Cal. June 20). The University thus would need a "'compelling governmental interest'" and to use the "'least restrictive means.'" *Perry v. Schwarzenegger*, 591 F.3d 1147, 1161 (9th Cir. 2010). Outright disclosure would fail that test, given the availability of "less intrusive alternatives." *Bonta*, 141 S. Ct. at 2386. For example, Speech First could disclose the members' identities to the court *in camera*. Or it could disclose them to a single University employee (who can access the University's records but lacks disciplinary authority) under a protective order.

But that dispute is not yet live. This case is still at the pleading stage. The University has served no discovery. Nor could it have, since the parties have not had their Rule 26(f) conference and no discovery plan has been proposed or adopted. *See* W.D. Okla. LCvR16.1. As recently explained by a three-judge district court (two of whom are now circuit judges), the question "whether [an association] must disclose its members" is "a discovery dispute" for later. *S.C. State Conf. of NAACP v. Alexander*, 2022 WL 453533, at *3 (D.S.C. Feb. 14) (Heytens, Gergel & Childs, JJ.). It "can and should be handled using the ordinary mechanisms for resolving such disputes," not on a motion to dismiss the complaint. *Id.*

And this dispute might never arise. One advantage of handling it via discovery is that the district court can "take steps to ensure that individual [member] privacy remains safeguarded." *Id.* Once discovery begins, Speech First could disclose its members'

names and enrollment status to the district court *in camera*, if necessary. Other reasonable measures are possible, too, since the University surely shares Speech First's concern with protecting these students. *Cf.* App. Vol. 1 at 67 (seemingly agreeing that the members' names could "be kept under seal"). The University complies with FERPA every day. And it would be ironic for the University to protest the anonymity of these students when it allows *other* students to anonymously report each other's "biased" speech to the BIRT. App. Vol. 1 at 32 ¶47; Vol. 2 at 325. But whether and how Speech First discloses its members' identities is a question for later. For now, what matters is that Speech First "alleged all it must to survive a motion to dismiss." *S.C. NAACP*, 2022 WL 453533, at *3.

C. Right of access

If this case proceeded and Speech First filed something in court that disclosed its members' identities, then that document would be "covered by a common law right of access." *United States v. McVeigh*, 119 F.3d 806, 811 (10th Cir. 1997). "The public enjoys a common law right of access to judicial records," but "the right is not absolute." *Parker v. United Airlines, Inc.*, 49 F.4th 1331, 1343 (10th Cir. 2022). Courts can seal or redact documents "if competing interests outweigh the public's interest." *Id.* That decision "ultimately involve[s] a balancing test," the application of which is "reviewed for abuse of discretion." *McVeigh*, 119 F.3d at 811-12.

But this issue, too, is not yet presented. The district court did not invoke the right of access, apply the balancing test, or exercise any discretion. Nor did anybody

"rais[e] a public right of access argument" below. *United States v. Walker*, 761 F. App'x 822, 838 (10th Cir. 2019). "As such, the argument is forfeited." *Id.*; *accord United States v. Bacon*, 950 F.3d 1286, 1292 (10th Cir. 2020). The argument was not raised because it would obviously fail. The right of access does not attach to documents until "the court *receives* them." *Courthouse News Serv. v. New Mexico Admin. Off. of Cts.*, 53 F.4th 1245, 1262 (10th Cir. 2022). But here, Speech First has filed no document revealing its members' legal names. There is no document to unseal or unredact; the public can see everything that has been filed to date.

Even if Speech First later files a document containing its members' legal name under seal, it could defeat any right-of-access argument. The public interest in these names is vanishingly small. As the court that presided over the affirmative-action case against Harvard recently explained, an association's members are not "plaintiffs"; their role in the case is limited to "determining standing." *SFFA*, 2023 WL 3126414, at *6 n.4. The need to protect their "rights," including their interest in "privacy," thus "outweighs any right to access." *Id.* Those rights are substantial here, as Speech First explained in its complaint, its opposition to the motion to dismiss, and a declaration from its executive director. *See* App. Vol. 1 at 34 ¶52, 37 ¶67, 40 ¶84; 157-58, 161-65. And those rights are grounded in the First Amendment, as explained above—a competing constitutional interest that defeats the public's interest.

Even the University seemed to agree below that the members' real names could "be kept under seal." App. Vol. 1 at 67. And this Court routinely allows just that. *E.g.*,

Producers of Renewables United for Integrity Truth & Transparency v. EPA, 2022 WL 538185, at *5 n.3 (10th Cir. Feb. 23) (nonprecedential order) ("At the request of [the trade association], we keep the association's membership list confidential, and refer to the relevant company only as Member throughout this order."); *Elevate Fed. Credit Union v. Elevations Credit Union*, 2023 WL 3330119, at *17 (10th Cir. May 10) (granting motion to seal an exhibit that revealed a credit union's "membership"). Regardless, sealing and unsealing records has nothing to do with the issue here: whether Speech First's complaint should have been dismissed for lack of Article III standing.

III. In all events, *Summers* does not apply at the pleading stage.

No matter what *Summers* requires, that case was an appeal from final judgment. Most courts hold that its reasoning does not apply at the pleading stage, and the district court gave no good reason to split from those authorities. Because under any reading of *Summers* the district court's dismissal was premature, this Court could reverse on that ground alone.

1. *Summers* was an appeal from final judgment, "*after the trial*." 555 U.S. at 500. The district court had received pretrial briefing, held a bench trial, and entered final judgment. *See Earth Island Inst. v. Pengilly*, Docs. 66, 76-78, No. 1:03-cv-6386 (E.D. Cal.). When the Court discussed "identifying" and "naming" members, the "*Summers* majority was objecting to the dissent accepting as true allegations of harm made in the complaint but unsupported by declarations." *Marszalek*, 2021 WL 2350913, at *4. The Court faulted the associations for not submitting timely "'affidavits'" that contained "'specific

facts'" proving their members' standing. 555 U.S. at 497-500 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 563, 566 (1992)). It stressed the need to "verif[y] the facts" underlying standing at this stage. *Id.* at 499. And it quoted directly from *Lujan*, a case that famously explained how the plaintiff's burden to show standing increases throughout "the successive stages of the litigation." 504 U.S. at 561.

But as *Lujan* also explains, a plaintiff's burden is lower "[a]t the pleading stage." *Id.* To quote this Court, a plaintiff's "burden in establishing standing" at the motion-to-dismiss stage is "lightened considerably." *Petrella*, 697 F.3d at 1292. Applying *Summers* under this lighter standard would not only "stretch" its reasoning "beyond [its] context." *Davenport*, 142 S. Ct. at 1528. It would violate at least three basic rules of pleading.

First, "[a]t the pleading stage," plaintiffs can plead standing with "general factual allegations," since courts must "presume" that "general allegations embrace those specific facts that are necessary." *Lujan*, 504 U.S. at 561 (cleaned up). This Court agrees, even after *Summers*. *E.g.*, *S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1156, 1152 (10th Cir. 2013) (faulting the district court for demanding specific allegations of standing and reiterating that only "general factual allegations [are] needed at the pleading stage"). Based on this pleading principle, it cannot be true that "an association must 'name names' in a complaint." *Bldg. & Const.*, 448 F.3d at 145. *Summers* discusses "identifying" and "naming" members as following from the principle that standing must be proved with "specific allegations" and "'specific facts'"—specificity that's simply not required at the pleading stage. 555 U.S. at 498 (quoting *Lujan*, 504 U.S. at 563, in turn quoting

the summary-judgment rules); *see Erickson v. Pardus*, 551 U.S. 89, 93 (2007) ("Specific facts are not necessary" in complaints, even after *Twombly*).

Second, "[w]hen evaluating a plaintiff's standing at the stage of a motion to dismiss," courts must "'accept as true all material allegations of the complaint'" and "'construe the complaint'" and any "'affidavits'" in "'the light most favorable to the [plaintiff].'" *S. Utah*, 707 F.3d at 1152. So when the University says it needs the members' legal names "to ensure they are ***actually*** OSU students," App. Vol. 1 at 65, that argument does not register. Speech First *alleged* that Students A-C are students at the University. App. Vol. 1 at 23 ¶11, 34-42 ¶¶51-98. The district court had to accept that factual allegation as true. *S.C. NAACP*, 2022 WL 453533, at *3; *B.R.*, 17 F.4th at 495; *Bldg. & Const.*, 448 F.3d at 145; *Humane Soc'y*, 2021 WL 1593243, at *6. (And Speech First's lawyers, of course, have ethical duties to tell the truth in their pleadings. *B.R.*, 17 F.4th at 495 (citing Fed. R. Civ. P. 11(c)).) *Summers*' concern with "verifying the facts" simply does not apply at this stage. 555 U.S. at 499; *see Predator Int'l, Inc. v. Gamo Outdoor USA, Inc.*, 793 F.3d 1177, 1184 (10th Cir. 2015) ("at the outset of a case it is enough to *allege* the facts … establishing standing"); *Smith v. United States*, 561 F.3d 1090, 1104 (10th Cir. 2009) (explaining that "factual allegations" need not be "plausible"; "they are assumed to be true").

Third, to stave off dismissal, a complaint "need only give the defendant fair notice." *Erickson*, 551 U.S. at 93 (cleaned up). The federal pleading standard is "still fundamentally one of notice pleading intended 'to ensure that a defendant is placed on

notice … sufficient to prepare an appropriate defense.'" *Sylvia v. Wisler*, 875 F.3d 1307, 1326 (10th Cir. 2017). And this liberal standard evaluates pleadings based on "'substance'" rather than "'form'" or "'labels.'" *Dodson Int'l Parts, Inc. v. Williams Int'l Co. LLC*, 12 F.4th 1212, 1229 (10th Cir. 2021); *accord Vallario v. Vandehey*, 554 F.3d 1259, 1269 n.7 (10th Cir. 2009) ("notice pleading … emphasizes function over form"). When an association "can point to at least one specific person" with standing, the argument that it did not "provide a name" is "a technicality." *Ind. Prot. & Advoc. Servs. Comm'n v. Ind. Fam. & Soc. Servs. Admin.*, 2022 WL 4468327, at *3 (S.D. Ind. Sept. 26). "The individual's nam[e] adds nothing to the standing analysis at this stage." *Humane Soc'y*, 2021 WL 1593243, at *6. A defendant "need not know the identity of a particular member to understand and respond to an organization's claim of injury." *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015); *accord Census Case*, 351 F. Supp. 3d at 606 n.48. In fact, the University *did* respond to Speech First's theory of standing in its motion to dismiss, thoroughly. "[A]s demonstrated by [its] thorough memoranda, [it was] able to fully and substantively contest [Speech First's] standing despite not knowing the [members'] names." *Humane Soc'y*, 2021 WL 1593243, at *6.

2. These observations explain why five circuits have held that *Summers*' reasoning does not apply at the pleading stage. The Second and Seventh Circuits said so before *Summers*. *See Bldg. & Const.*, 448 F.3d at 145 (rejecting "the proposition that an association must 'name names' in a complaint"); *Disability Rts. Wis., Inc. v. Walworth Cnty. Bd. of Supervisors*, 522 F.3d 796, 802 (7th Cir. 2008) ("the member on whose behalf the suit is

filed [can] remain unnamed"). The Eleventh Circuit has maintained that position after *Summers*. *See Emergency Physicians*, 833 F. App'x at 241 n.8 ("requiring specific names at the motion to dismiss stage is inappropriate"); *Stincer*, 175 F.3d at 882 (denying that an association must "name the members on whose behalf suit is brought"). The Ninth Circuit has likewise explained why that *Summers* should not apply at the pleading stage. *See La Raza*, 800 F.3d at 1041. And while a panel of the Seventh Circuit has questioned that distinction, *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 2 F.4th 1002, 1011 (7th Cir. 2021), it remains the law there too, *e.g.*, *Marszalek*, 2021 WL 2350913, at *4. The Fifth Circuit accurately summarized the state of the law three years after *Summers*: In 2012, it was "aware of no precedent holding that an association must set forth the name of a particular member in its complaint." *Hancock Cnty.*, 487 F. App'x at 198.

The district court did not address these decisions, except to say they're out-of-circuit. App. Vol. 3 at 634. In a footnote, it said it was skeptical that the pleading stage should be treated differently because standing turns on "'the facts as they existed at the time the complaint was filed.'" App. Vol. 3 at 634 n.4. But that reasoning does not hold up. The question is not *when* Speech First needed to have standing. The question is *how* Speech First needed to show its standing. The "manner and degree" of that showing changes throughout "the successive stages of the litigation." *Lujan*, 504 U.S. at 561. Everything that Speech First said about Students A-C—their enrollment, intentions, beliefs, and fears—"was real" at the time the complaint was filed. *B.R.*, 17 F.4th at 493. And it will remain real at that time, even if Speech First does not disclose their legal

names until later in the case. *S.C. NAACP*, 2022 WL 453533, at *3; *Humane Soc'y*, 2021 WL 1593243, at *6.

The University has little authority to the contrary. Most of its cases apply *Summers* under the summary-judgment standard. *See Religious Sisters*, 55 F.4th at 598; *Assoc. Gen. Contractors of Am.*, 713 F.3d at 1194; *Ga. Republican Party*, 888 F.3d at 1201; *Tenn. Republican Party*, 863 F.3d at 517. While the Fourth Circuit has applied *Summers* under the motion-to-dismiss standard, it never grappled with the different procedural posture (perhaps because the appellant never pressed it). *See S. Walk*, 713 F.3d at 184. The First Circuit did grapple with the argument and still applied *Summers* at the pleading stage, relying on circuit precedent that imposes a "'heightened'" pleading standard for standing. *Draper*, 827 F.3d at 3 (quoting *United States v. AVX Corp.*, 962 F.2d 108, 115 (1st Cir. 1992)). But this circuit has no such rule. And respectfully, the First Circuit's rule is wrong. "The Supreme Court has not imposed special burdens at the pleading stage with respect to jurisdictional issues." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 730 F.3d 1234, 1236 (10th Cir. 2013) (en banc) (Hartz, J., joined by Kelly, Tymkovich & Phillips, JJ., dissenting). It holds standing to "the same" pleading standard as everything else, not a heightened one. *Lujan*, 504 U.S. at 561. And it has warned courts not to create heightened pleading standards that aren't spelled out in the Federal Rules. *Jones v. Bock*, 549 U.S. 199, 212-13 (2007).

To be clear, when these precedents say that *Summers* does or does not apply at the pleading stage, they are debating whether to apply *Summers*' actual holding: that

associations must identify a specific member with standing. In other words, the circuits that don't apply *Summers* at the pleading stage allow associations to point to their membership generally, without identifying any specific member in the complaint. *E.g.*, *Bldg. & Const.*, 448 F.3d at 143 (complaint referred to "many of its members"); *La Raza*, 800 F.3d at 1037 (complaint referred to "members" collectively). But this case is much easier: Speech First *did* identify three specific members in its complaint and provided every relevant detail about them but their legal names. Speech First's members are also "'the object of the government action'" they challenge. *Summers*, 555 U.S. at 493 (quoting *Lujan*, 504 U.S. at 562). They are students challenging university policies that regulate students. So unlike the members in *Summers*, their standing should have been "little question." *Lujan*, 504 U.S. at 561. Speech First alleged more than enough to show standing at the pleading stage here.

3. The University might deny that this case is even at the pleading stage, either because the University raised a "factual" challenge to Speech First's standing or because Speech First sought a preliminary injunction. But the University would be wrong. And regardless, Speech First showed standing under the preliminary-injunction standard too.

The district court did not resolve a factual challenge to Speech First's standing. While a facial attack "'assumes the allegations in the complaint are true and argues they fail to establish jurisdiction,'" a factual attack "'goes beyond the allegations in the complaint and adduces evidence to contest jurisdiction.'" *Laufer v. Looper*, 22 F.4th 871, 875 (10th Cir. 2022). The district court did the former. It simply looked at the complaint

and deemed it insufficient for not unmasking Students A-C. It adduced no evidence and made no factual findings.

Nor did the University raise a factual challenge on this point. Though it introduced outside evidence, *see* App. Vol. 1 at 84-126, none of that evidence pertained to its *Summers* argument. *See Const. Party of Penn. v. Aichele*, 757 F.3d 347, 358 (3d Cir. 2014) (arguments not supported by external evidence cannot be factual attacks because "[a] factual attack requires a factual dispute"); *Little v. Tex. Atty. Gen.*, 2015 WL 5613321, at *2 n.5 (N.D. Tex. Sept. 24) (similar), *aff'd*, 655 F. App'x 1027 (5th Cir. 2016). Speech First thus could stand on the "uncontroverted factual allegations" in its complaint. *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583-84 (Fed. Cir. 1993); *accord S.C. NAACP*, 2022 WL 453533, at *3 ("Absent contrary evidence, a plausible allegation suffices."); *Barnett v. Okeechobee Hosp.*, 283 F.3d 1232, 1238 (11th Cir. 2002) (similar). That Speech First used pseudonyms is not even "evidence that [it] *lacks* the alleged members"; it "merely suggest[s it] has reservations about revealing those member names." *S.C. NAACP*, 2022 WL 453533, at *3.

This case did not reach the preliminary-injunction stage either. The district court considered the University's motion to dismiss first, as the University had urged, and denied the preliminary-injunction motion as moot without reaching its merits. App. Vol. 3 at 631, 635; Vol. 1 at 58. Because the University has "not yet filed an answer" and "no discovery ha[s] occurred," this case is still at "the pleadings stage," even though Speech First "contemporaneously" sought a "preliminary injunction." *Food & Water*

Watch, Inc. v. Vilsack, 808 F.3d 905, 913 (D.C. Cir. 2015). That motion did not fast-forward this case to another stage. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *H-FERA v. Griffin*, 958 F.2d 24, 26 (2d Cir. 1992). True, Speech First shouldn't have gotten a preliminary injunction if it could not meet the preliminary-injunction standard, including by showing it likely has standing. *Food & Water Watch*, 808 F.3d at 913. But an inability to show likely standing "requires denial of the motion for preliminary injunction, not dismissal of the case." *Id.* Total dismissal was erroneous unless Speech First failed to allege standing "under the motion-to-dismiss standard." *Id.*

But even under the preliminary-injunction standard, Speech First's submission was more than adequate. Rather than rest on mere allegations in an unverified complaint, it came forward with evidence of its standing—including a declaration from its executive director, three anonymous declarations from Students A-C, and a verified complaint (which counts as a declaration at this stage, *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1146 (10th Cir. 2013) (en banc)). These declarations are what's "typically used to establish standing." *Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 134 (D.C. Cir. 2006); *e.g.*, *N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 697 n.13 (10th Cir. 2009). The district court would have "no reason to doubt the truthfulness of these declarations." *Marszalek*, 2021 WL 2350913, at *4. And their undisputed representations should be accepted as true. *Sec. Indus. & Fin. Markets Ass'n v. CFTC*, 67 F. Supp. 3d 373, 402 n.13 (D.D.C. 2014).

Contra the University, the students' anonymous declarations do not violate 28 U.S.C. §1746. *See* App. Vol. 1 at 81. Even if the University were right, Speech First made the same allegations in its verified complaint and a declaration from its executive director—both sworn, neither anonymous. *See* App. Vol. 1 at 34-42 ¶¶52-98. Those declarations are based on the director's personal knowledge and are sufficient proof on their own. *Marszalek*, 2021 WL 2350913, at *4; *McCloud v. McClinton Energy Grp.*, 2015 WL 737024, at *4 n.5 (W.D. Tex. Feb. 20). Regardless, the University is not right: "28 U.S.C. §1746 … does not prohibit the use of … pseudonyms" if "the actual person can be identified." *Springer v. IRS*, 1997 WL 732526, at *5 (E.D. Cal. Sept. 12). Students A-C can be identified—and thus held accountable—by Speech First's director and from the declarations' identifying details. *McGehee v. Neb. Dep't of Corr. Servs.*, 2019 WL 1227928, at *2 (D. Neb. Mar. 15), *vacated for subsequent mootness*, 987 F.3d 785 (8th Cir. 2021).

The district court could have granted Speech First a preliminary injunction on this record, as several other courts have done. What it could not do was dismiss the complaint, as no other court has done (at least not without getting reversed). The University raised several challenges to Speech First's standing in its motion to dismiss, some of which present debatable issues that have split the circuits. Its insistence that Article III requires associations to immediately divulge their members' legal names, for no discernible purpose, is not one of them.

CONCLUSION

This Court should reverse the district court's judgment and remand for further proceedings.

Respectfully submitted,

Dated: May 23, 2023

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STATEMENT WITH RESPECT TO ORAL ARGUMENT

Speech First requests oral argument. According to the district court, associations cannot refer to their members with pseudonyms, else their complaints will be dismissed for lack of standing. The district court conceded that its decision departs from "several circuit court decisions." App. Vol. 3 at 634. And its rule would have devastating consequences for associations who sue to vindicate the rights of students, children, immigrants, the disabled, and more. It should not be affirmed without full deliberation.

CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7) because it contains 11,571 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font (and 16-point Helvetica Neue for headers).

Dated: May 23, 2023 *s/ Cameron T. Norris*

CERTIFICATE OF DIGITAL SUBMISSION

With respect to this brief, all required privacy redactions have been made; the hard copies submitted to the clerk are exact copies of the ECF submission; the digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, Microsoft Word 2016, and according to the program is free of viruses.

Dated: May 23, 2023 *s/ Cameron T. Norris*

CERTIFICATE OF SERVICE

I filed this brief with the Court via ECF, which will email everyone requiring notice.

Dated: May 23, 2023 *s/ Cameron T. Norris*

ATTACHMENT

1. Order (D.Ct. Doc. 35; App. Vol. 3 at 631-35)

2. Judgment (D.Ct. Doc. 36; App. Vol. 3 at 636)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

SPEECH FIRST, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CIV-23-29-J
	)	
KAYSE SHRUM, in her official capacity as President of Oklahoma State University,	)	
	)	
	)	
Defendant.	)	

ORDER

Plaintiff Speech First, Inc. (Plaintiff) brings this action against Defendant Kayse Shrum (Defendant), in her official capacity as president of Oklahoma State University (the University), alleging that several of the University's speech-related policies run afoul of the Constitution. *See* (Am. Compl.) [Doc. No. 27].[1] This matter is presently before the Court on Plaintiff's motion for a preliminary injunction [Doc. No. 3], Defendant's motion to dismiss Plaintiff's amended complaint on grounds that it lacks standing (Def.'s Mot. to Dismiss) [Doc. No. 29],[2] and Defendant's motion to strike Plaintiff's amended complaint [Doc. No. 30]. The motions are fully briefed.[3]

[1] Plaintiff filed its original complaint on January 10, 2023. [Doc. No. 1]. It later stipulated to the dismissal of all claims except those asserted against Defendant in her official capacity, and an amended complaint was filed thereafter.

[2] Defendant previously filed motions to dismiss Plaintiff's original complaint on similar grounds. *See* [Doc. Nos. 21, 24].

[3] All page citations refer to the Court's CM/ECF pagination.

I. Background

Plaintiff is a member organization dedicated to protecting students' free speech rights. It takes issue with three University policies (the Policies) encompassing speech conduct and brings suit on behalf of three of its members—anonymously identified as "Student A," "Student B," and "Student C." In essence, Plaintiff maintains that the Policies impose a chilling effect on the members' First Amendment rights, doing so in a manner that is impermissibly overbroad, vague, and content discriminatory. Plaintiff seeks only prospective relief. Specifically, it seeks (1) declaratory relief as to the constitutionality of the Policies; and (2) preliminary and permanent injunctive relief barring the University's enforcement of the Policies.

Defendant moves to dismiss Plaintiff's amended complaint for lack of standing. Because the motion to dismiss raises the threshold issue of Plaintiff's standing to assert the claims on which it seeks an injunction, the Court first addresses that issue before moving to the motion for a preliminary injunction. *See Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1087 (10th Cir. 2006) ("[W]e cannot reach the merits based on 'hypothetical standing,' any more than we can exercise hypothetical subject matter jurisdiction.").

II. Standard

Those seeking to invoke the jurisdiction of federal courts must satisfy the case or controversy requirement imposed by Article III of the Constitution. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). "The case or controversy limitation requires that a plaintiff have standing." *United States v. Colo. Sup. Ct.*, 87 F.3d 1161, 1164 (10th Cir. 1996).

In satisfying Article III's standing requirement, "a plaintiff must demonstrate that (1) he or she has suffered an injury in fact; (2) there is a causal connection between the injury and the

conduct complained of; and (3) it is likely that the injury will be redressed by a favorable decision." *Ward v. Utah*, 321 F.3d 1263, 1266 (10th Cir. 2003) (internal quotation marks omitted).

Where, as here, the plaintiff is an association advancing the interests of its members, the showing is more specific. "An association has standing to bring suit on behalf of its members when [1] its members would otherwise have standing to sue in their own right, [2] the interests at stake are germane to the organization's purpose, and [3] neither the claim requested nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 169 (2000). Thus, an organization must demonstrate, among other things, that at least one of its members has suffered an injury in fact. *Ward*, 321 F.3d at 1266. An injury in fact is "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (quoting *Lujan*, 504 U.S. at 560).

III. Anonymous Members

The Court must first address Plaintiff's reliance on anonymous members, a defect which Defendant claims defeats Plaintiff's standing. Def.'s Mot. to Dismiss at 9 ("[Plaintiff's] anonymous Student references in the Amended Complaint and Anonymous Declarations cannot support associational standing.").[4] The Court agrees.

In support of the position that associational standing requires that a plaintiff identify—by name—at least one member with standing, Defendant points the Court to *Summers v. Earth Island Institute*, 555 U.S. 488 (2009). There, in challenging several regulatory projects, a group of

[4] Courts have routinely addressed the failure to name members in review of associational standing. *See, e.g.*, *Am. Coll. of Emergency Physicians v. Blue Cross & Blue Shield of Ga.*, 833 F. App'x 235, 240 n.8 (11th Cir. 2020); *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 602 (8th Cir. 2022); *Tenn. Republican Party v. SEC*, 863 F.3d 507, 520 (6th Cir. 2017).

environmentalist organizations claimed associational standing on behalf of their unidentified members. *Id.* at 490–91. However, despite recognizing the "common ground that . . . organizations can assert standing of their members," *id.* at 494, the Supreme Court denounced the organizations' failure to identify by name, as to particular projects, members with standing. *Id.* at 498–99. The *Summers* Court made clear: "Th[e] requirement of *naming* the affected members has never been dispensed with in light of statistical probabilities, but only where *all* the members of the organization are affected by the challenged activity." *Id.* (first emphasis added); *see also FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 235 (1990) (noting that an affidavit provided by the city to establish standing would be insufficient because it did not name the individuals who were harmed by the challenged license-revocation program).

In responding, Plaintiff points this Court to several circuit court decisions favorable to its position that actually naming members is not required by *Summers*. *See* [Doc. No. 32] at 24–25 n.3. These cases question the requirement of naming members for purposes of associational standing, even more so its application at the motion to dismiss stage. But regardless of the persuasive force of opinions from outside this circuit, this Court is in no way bound by their conclusions. *Dennis v. Charnes*, 805 F.2d 339, 340 (10th Cir. 1984). And given the Tenth Circuit's silence on the issue, this Court is inclined to take the *Summers* Court at its word.[5]

Because Plaintiff has failed to name the members on behalf of whom it brings suit, it lacks standing to press the claims asserted here. Thus, the Court lacks jurisdiction to consider them, and Plaintiff's case must be dismissed without prejudice. *Brereton v. Bountiful City Corp.*, 434 F.3d

[5] The Court is also not entirely convinced that a distinction is warranted between naming members at the various stages of litigation, given *Summers*' "requirement of *naming* the affected members," *Summers*, 555 U.S. at 498 (emphasis added), and the fact that "[s]tanding must be analyzed from the facts as they existed at the time the complaint was filed." *Tandy v. City of Wichita*, 380 F.3d 1277, 1284 (10th Cir. 2004).

1213, 1218 (10th Cir. 2006) ("[D]ismissals for lack of jurisdiction [are] without prejudice because the court, having determined that it lacks jurisdiction over the action, is incapable of reaching a disposition on the merits of the underlying claims." (emphasis omitted)).

IV. Conclusion

Accordingly, Defendant's motion to dismiss Plaintiff's amended complaint on standing grounds [Doc. No. 29] is GRANTED. Defendant's motion to dismiss in her individual capacity [Doc. No. 21], Defendant's motion to dismiss Plaintiff's original complaint on standing grounds [Doc. No. 24], and Defendant's motion to strike Plaintiff's amended complaint [Doc. No. 30] are DENIED as moot. Plaintiff's motion for a preliminary injunction [Doc. No. 3] is also DENIED as moot. A separate judgment will issue.

IT IS SO ORDERED this 10th day of April, 2023.

BERNARD M. JONES
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

SPEECH FIRST, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CIV-23-29-J
	)	
KAYSE SHRUM, in her official capacity as President of Oklahoma State University,	)	
	)	
	)	
Defendant.	)	

JUDGMENT

Pursuant to the Order filed this same date, Judgment is entered in Defendant's favor.

IT IS SO ORDERED this 10th day of April, 2023.

BERNARD M. JONES
UNITED STATES DISTRICT JUDGE