No. 23-50633

In the United States Court of Appeals for the Fifth Circuit

SPEECH FIRST, INC.,
Plaintiff-Appellant,

v.

BRIAN MCCALL, in his official capacity as Chancellor of the Texas State University System, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Texas,
No. 1:23-cv-411 (Ezra, J.)

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF APPELLANT AND REVERSAL

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January 23, A.D. 2024

CERTIFICATE OF INTERESTED PERSONS

(1) No. 23-50633, *Speech First, Inc. v. McCall*;

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Cir. R. 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Speech First, Inc.*

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* Speech First has no parent corporation, and no corporation owns 10% or more of its stock.
** Foundation for Moral Law has no parent corporation, and no corporation owns 10% or more of its stock.

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INTEREST OF THE *AMICUS*[1]

Amicus curiae Foundation for Moral Law ("the Foundation") is a 501(c)(3) non-profit, national public interest organization based in Montgomery, Alabama, dedicated to defending religious liberty, freedom of speech and the press, and the strict interpretation of the Constitution as intended by its Framers. The Foundation believes that freedom of speech and freedom of the press are God-given rights, enshrined with religious liberty as a first priority in the Bill of Rights, not only to protect the God-given rights of individual persons, but also to check the power of government.

Believing that protecting the free exchange of ideas (particularly controversial, politically charged ideas) is key to maintaining a free society, the Foundation for Moral Law has filed *amicus* briefs in several cases involving the First Amendment rights of students.

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[1] Pursuant to Fed. R. App. P. 29(a)(2), all parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), *Amicus* certifies that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *Amicus*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

ARGUMENT

When one person's right to speak is suppressed, the entire public discourse is impoverished. For example, take modern college campuses. This case involves a practice that is increasing in popularity in the U.S.: public universities enacting speech codes to minimize speech of certain content that is, in someone's opinion, unsavory. The problem is that our marketplaces of ideas are already suffering. Studies show that universities are less safe places in which to express controversial ideas than ever before. Societal trends like "cancel culture" informally punish and chill contentious speech enough. But now, government-enacted speech codes like Texas State University's discriminatory-harassment policy are worsening the problem and implicating the First Amendment. To restore the protections of the First Amendment to the Framers' original intent, the policy ought to be declared unequivocally unconstitutional.

I. Texas State University's discriminatory-harassment policy should be enjoined because it discriminates based on content and viewpoint and is overly broad, stifling the free exchange of ideas.

The district court below erred by declining to rule on the preliminary injunction motion. This Court's de novo review should find that Appellant's challenge was not moot and that Appellees' egregious violation of the First Amendment warrants an injunction.

In *Shelton v. Tucker*, the Supreme Court said, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[2] Although the Court has recognized that public elementary and high schools may impose some restrictions on free speech when the speech raises a substantial threat of disruption, such as in *Tinker v. Des Moines Independent Community School District*, even in that case, the Court recognized that "[n]either students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[3] And at state universities, free speech considerations are given greater protection by the Constitution.[4]

The Supreme Court has called public universities "peculiarly the marketplace of ideas" and said that there is "no room for the view that First Amendment protections should apply with less force on college campuses than in the community at large."[5]

In *Sweezy v. New Hampshire*, the Court further stated that

> The essentiality of freedom in the community of American *universities* is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where

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[2] 364 U.S. 479, 487 (1960).
[3] 393 U.S. 503, 506 (1969).
[4] *Tilton v. Richardson*, 403 U.S. 672, 685–86 (1971).
[5] *Healy v. James*, 408 U.S. 169, 180 (1972).

> few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die.[6]

This has been forgotten by most institutes of higher learning. The same is true of Justice Jackson's point in *West Virginia State Board of Education v. Barnette*:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[7]

Texas State University's discriminatory-harassment policy at the start of this suit punished "unwelcome" speech of a certain type: speech directed at someone based on their "race, color, national origin, age, sex, religion, disability, veterans' status, sexual orientation, gender identity, or gender expression." This meant that "unwelcome" speech directed at anyone for any other reason (even if it was "sufficiently severe or pervasive so as to interfere" with the recipient's environment and make it "intimidating, offensive, or hostile") was permitted under the policy.

As Appellant's opening brief explains, this makes the policy content- and viewpoint-based, overly broad, and violative of the Supreme Court's standard set forth in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).[8] In other

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[6] 354 U.S. 234, 250 (1957) (emphasis added).
[7] 319 U.S. 624, 642 (1943).
[8] Appellant's Opening Brief at 20-30.

words, Texas State University tried to do exactly what Justice Jackson spoke of—prescribe what shall be orthodox in matters of opinion—by targeting speech on controversial issues implicating religion and policy like identity politics, gender ideology, and the like.

Worse still, Texas State is only a small part of a much larger trend of public universities banning speech based on its "bias," "offensive," or "unwelcome" content. This Court has seen one such policy before, in *Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020). In this Court's *Fenves* opinion, Judge Jones explained that campus speech codes like these have consistently been struck down for being unconstitutionally overbroad and vague.[9]

Why are so many universities picking these particular categories for special protection, and not others (specifically the newest additions: sexual orientation, gender identity, and gender expression)? Politics and social influence are part of the reason. By protecting these so-called oppressed groups in campus speech codes, liberal university administrations can lend legitimacy to these groups and, most significantly, help them silence their critics.

In this respect, campus speech codes are much like "hate speech" laws: unconstitutional under the First Amendment, but attractive to many liberal

[9] *Speech First, Inc. v. Fenves*, 979 F.3d 319, 338–339 n.17 (5th Cir. 2020).

institutions. For now, the United States remains the only bastion of free speech in the West where "hate speech" is not criminalized, and where "bias" and "offensiveness" are not First Amendment factors.[10] Arthur Milikh, writing for the Heritage Foundation, explained the incoherence of "hate speech" laws and their use as a political weapon:

> By ostensibly protecting general categories—race, religion, national origin, or sexuality—Western Europe's laws give the impression that all citizens are protected rather than just favored groups. In practice, however, these laws are enforced selectively: The overwhelming majority of documented cases of hate speech investigations, arrests, prosecutions, and convictions aim to protect so-called marginalized groups. One rarely finds arrests or prosecutions, for example, directed against academics, politicians, and citizens who freely malign Christianity, heterosexuality, and the legacy populations of Western European nations, though these nations' public squares are full of such speech. . . .
>
> [S]peech regarding facts that may call into question a group's self-respect would be viewed as "deplorable" and constitute "hate speech." For instance, speaking of the statistically documented disparities in educational preparedness of affirmative action recipients is not permissible speech. Labeling as "hate speech" factual, provable claims would extend to any number of issues that conflict with the self-respect of the marginalized.[11]

Milikh's point is also true of speech codes on college campuses that target "bias," "offensive," or generally unsavory (e.g. "unwelcome") speech. Studies show that, under these policies, the speech of conservative campus inhabitants is

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[10] Arthur Milikh, *"Hate Speech" and the New Tyranny over the Mind*, THE HERITAGE FOUNDATION, May 19, 2020, https://www.heritage.org/civil-society/report/hate-speech-and-the-new-tyranny-over-the-mind.

[11] *Id.* (footnote omitted).

disproportionately chilled and punished relative to the speech of their left-leaning counterparts. According to the authors of a recent study of over 1,000 students at the University of North Carolina, the challenges to free expression on campus "seem to be more acute for students who identify as conservative."[12] The study found that 40 percent of conservative students had some level of "concern" that other students would file a complaint against them based on something they said in a class that discusses politics, while more than 96 percent of self-identifying liberal students responded that this issue was "irrelevant" or that they were not concerned about others filing a complaint.[13] Another study found that

> [e]ven at the University of Chicago, which was ranked by FIRE as the best institution for free speech in 2020, 75 percent of students identifying as "strong Republicans" report self-censorship because they are afraid of how their peers will respond.[14]

Campus speech codes are targeting conservative speakers and only silencing certain viewpoints. According to a poll taken last year by North Dakota State University of 2,250 undergraduate students from 131 colleges in America, 40 percent of students think a professor should be reported for making the statement,

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[12] Timothy J. Ryan, Jennifer Larson, & Mark McNeilly, *Free Expression and Constructive Dialogue at the University Of North Carolina At Chapel Hill*, March 2, 2020, https://fecdsurveyreport.web.unc.edu/wp-content/uploads/sites/22160/2020/02/UNC-Free-Expression-Report.pdf.

[13] *Id.* at 26.

[14] Noa Faye, *What Conservative Free Speech Advocates are Missing: Self-Censorship on College Campus is a Choice, Not a Requirement*, COLUMBIA POL. REV., Nov. 8, 2020, http://www.cpreview.org/blog/2020/11/what-conservative-free-speech-advocates-are-missing-self-censorship-on-college-campus-is-a-choice-not-a-requirement.

"If you look at the data, there is no evidence of anti-Black bias in police shootings"; 34 percent agree for the statement, "Requiring vaccination for COVID is an assault on individual freedom"; and 27 percent would have a professor reported for stating, "Biological sex is a scientific fact. There are two sexes, male and female."[15] In contrast, only 8 percent of students thought a professor should be reported for saying, "There are a wide variety of sexes. Sex is not binary."[16]

Of course, this difference could be due to the increasing level of general ideological intolerance that researchers have observed among left-leaning students in recent years.[17] But regardless, the anti-expression campus environment that students are perpetuating is also being enforced by university administrations using speech codes, which violates the First Amendment. Thus, anyone who believes in

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[15] John Bitzan, *2023 American College Student Freedom, Progress and Flourishing Survey*, 3, 17–18, https://www.ndsu.edu/fileadmin/challeyinstitute/Research_Briefs/American_College_Student_Freedom_Progress_and_Flourishing_Survey_2023.pdf.

[16] *Id.* at 18.

[17] A 2017 study at Dartmouth College showed that only 39 percent of Democrat students would be comfortable living with someone with different political views from themselves, while 69 percent of Republican students would be comfortable living with a politically diverse roommate. Amanda Zhou & Alexander Agadjanian, *A survey of Dartmouth's political landscape*, Apr. 26, 2017, https://www.thedartmouth.com/article/2017/04/a-survey-of-dartmouths-political-landscape. The 1,000-student survey at the University of North Carolina mentioned above revealed that about 22 percent of liberal students felt UNC would be a better place without conservatives, while only 15 percent of conservatives felt that UNC would be better without liberals. Ryan, et al., *supra* note 12, at 36–37. And roughly 92 percent of conservative students said they would be friends with a liberal, while almost a quarter of the liberals said they would not have a conservative friend. *Id.* at 35–37.

preserving the free exchange of ideas in America, liberal or conservative, ought to be concerned by the state of free speech on campus.

In college, it has become clear to students that certain speech, though protected by the First Amendment, is not safe to express. This is true at Texas State University. Its discriminatory-harassment policy "prescribe[d] what shall be orthodox in politics, nationalism, religion, or other matters of opinion" on campus, and it should be enjoined.

II. Texas State University's voluntary cessation did not moot Speech First's claim.

Last year, this Court decided *Netflix, Inc. v. Babin*, in which the defendant, Babin, argued mootness.[18] In that case, Babin's "proffered reasons for mootness f[e]ll under the category of voluntary cessation," which this Court called "a familiar but 'stringent' exception to the mootness doctrine that we view with a 'critical eye.'"[19] This scrutiny was required because a defendant claiming mootness bears a "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur."[20] Accordingly, this Court required Babin to show that it was "absolutely clear" that the plaintiff's prosecution "could not reasonably be expected to recur in light of his dismissal of the first

[18] 88 F.4th 1080 (5th Cir. 2023).
[19] *Id.* at 1089 (footnotes omitted).
[20] *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000).

indictment and his new non-prosecution policy," in order for it to find mootness.[21] Babin could not make this showing.[22]

This Court has in the past given "some solicitude" to voluntary cessations by governmental officials.[23] However, it noted in *Netflix* that, as Appellant's Opening brief states, this doctrine is "on shaky footing,"[24] for two reasons:

(1) "[T]he solicitude ordinarily afforded to government officials like Babin is premised on a 'presumption of good faith," which "is precisely the presumption being questioned" when it comes to determining whether voluntary cessation establishes mootness;[25] and

(2) In 2022, the Supreme Court decided *West Virginia v. EPA*, 142 S. Ct. 2587, in which it held a government defendant to the "heavy" burden of showing mootness based on its "voluntary conduct," and therefore, Supreme Court precedent may "implicitly overrule" Fifth Circuit precedent granting "some solicitude" to governmental defendants' voluntary cessations.[26]

In fact, based on this, this Court considered overruling the "some solicitude" precedent altogether in *Netflix*. It did not, however, because it found that solicitude

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[21] *Netflix*, 88 F.4th at 1089.
[22] *Id.*
[23] *Id.* at 1089–90.
[24] Appellant's Opening Brief at 32.
[25] *Id.* at 1090.
[26] *Id.* at 1089–90 n.12.

was inapplicable to Babin "for different reasons."[27] It found that even if "some solicitude" were applied to Babin, he still would fail to establish mootness because

> the presumption of good-faith cessation is defeated when, as here, there is no controlling statement of future intention, the change in conduct is suspiciously timed, and the defendant continues to defend the challenged behavior.[28]

So, even applying some solicitude arguendo, this Court did not find mootness based on Babin's voluntary cessation in *Netflix*.

This Court did something similar in *Speech First, Inc. v. Fenves* when faced with a voluntary cessation by the University of Texas at Austin.[29] (Appellees' tactic in this case is clearly popular[30]). In *Fenves*, when the University defendant voluntarily amended the offending campus speech code, this Court refused to extend the "relaxed standard" of "some solicitude" in its mootness analysis.[31] Instead, it held that public universities carry the full "formidable burden" of proving that their voluntary cessation actually moots the plaintiff's claim.[32] Therefore, the voluntary cessation did not moot Speech First's claim in *Fenves*.[33]

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[27] *Id.*
[28] *Id.* at 1089–90 & n.12 (footnotes omitted).
[29] 979 F.3d 319 (5th Cir. 2020).
[30] *See* Appellant's Opening Brief at 32 ("when it comes to free speech, universities have a notoriously bad record of repealing policies when they are sued, only to reinstate them after the litigation ends").
[31] *Fenves*, 979 F.3d at 328.
[32] *Id.*
[33] *Id.*

However, like in *Netflix*, this Court went on to explain that even if "some solicitude" were granted, Speech First's claim would still not be moot. Judge Jones wrote in *Fenves*, "[e]ven applying 'some solicitude'" for the sake of argument, the University of Texas at Austin's voluntary cessation of its speech code did not moot Speech First's claim because it was still not "'absolutely clear' that the University w[ould] not reinstate its original policies."[34] The factors contributing to this finding were: (1) that the University had not issued a controlling statement of future intention; (2) the suspicious timing of the change, and (3) the university's continued defense of the original policy.[35]

All of these exist here: (1) No Texas State University official with authority over its speech codes has offered sworn testimony pledging that it will not reimplement the challenged policy (and it has been established that reimplementation, reversing the amendment, would be quick and easy—a mere ad hoc regulatory action);[36] (2) Texas State University did not amend the challenged policy until it learned that it would lose on Speech First's claim (although the district court had not actually issued a decision like in *Fenves*, it had told Appellees they would lose this challenge and explicitly gave them the opportunity to change the

[34] *Id.*
[35] *Id.* at 328–29.
[36] Appellant's Opening Brief at 33–36.

policy instead);[37] and (3), Texas State University defended the challenged policy up until learning of the district court's position, and continues to defend it.[38]

Thanks to this Court's thorough analysis of these issues thus far, it is clear how it should rule on mootness in this case. Like Fenves and Babin, even if "some solicitude" were applied, Texas State University's amendment of its challenged speech code did not moot Speech First's claim.

This Court could also use this case as an opportunity to reiterate that public universities are not entitled to special solicitude for their voluntary cessations. This would bring Fifth Circuit precedent in line with other federal case law. In general, when it comes to constitutional rights, universities are not entitled to special "deference." For example, last year, in *Students for Fair Admissions, Inc. v. Harvard*, the Supreme Court explained that

> [i]t is true that our cases have recognized a "tradition of giving a degree of deference to a university's academic decisions." *Grutter* [*v. Bollinger*, 539 U.S. 306, 328 (2003)]. But we have been unmistakably clear that any deference must exist "within constitutionally prescribed limits," *ibid.*, and that "deference does not imply abandonment or abdication of judicial review," *Miller–El v. Cockrell*, 537 U. S. 322, 340 (2003).[39]

SFFA v. Harvard involved race-based admissions policies at Harvard and the University of North Carolina. The Court went on:

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[37] Appellant's Opening Brief at 33–34.
[38] *Id.* at 34–35.
[39] No. 20–1199, slip op. at 26 (U.S. Jun. 29, 2023).

> Universities may define their missions as they see fit. The Constitution defines ours. Courts may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review. As this Court has repeatedly reaffirmed, "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Gratz v. Bollinger*, 539 U. S. 244, 270 (2003) (internal quotation marks omitted).[40]

Justice Thomas, concurring with the Court's refusal to grant deference, wrote:

> In fact, it is error for a court to defer to the views of an alleged discriminator while assessing claims of racial discrimination. *See Grutter*, 539 U. S., at 362–364 (opinion of THOMAS, J.); *see also Fisher* [*v. Univ. of Tex.*, 570 U. S. 297, 318–319 (2013)] (THOMAS, J., concurring); *United States v. Virginia*, 518 U. S. 515, 551, n. 19 (1996). . . . We would not offer such deference in any other context. In employment discrimination lawsuits under Title VII of the Civil Rights Act, for example, courts require only a minimal prima facie showing by a complainant before shifting the burden onto the shoulders of the alleged discriminator employer. *See McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 803–805 (1973). And, Congress has passed numerous laws—such as the Civil Rights Act of 1875—under its authority to enforce the Fourteenth Amendment, each designed to counter discrimination and each relying on courts to bring a skeptical eye to alleged discriminators.
>
> This judicial skepticism is vital. History has repeatedly shown that purportedly benign discrimination may be pernicious, and discriminators may go to great lengths to hide and perpetuate their unlawful conduct.[41]

After describing the universities' histories of race-based discrimination, Justice Thomas added, "[o]f course, none of this should matter in any event; courts have an

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[40] *Id.*

[41] *Id.* at 27–28 (Thomas, J., concurring).

independent duty to interpret and uphold the Constitution that no university's claimed interest may override."[42]

Similarly, here, this Court has the responsibility to apply strict scrutiny to Texas State University's content- and viewpoint-based speech code and to demand proof, now that it has claimed mootness, that it will not reinstate that policy. With a policy as clearly unconstitutional as this one, no deference is owed to the University in this Court's mootness analysis.

Since the district court agreed that Texas State University's discriminatory-harassment policy was unconstitutional,[43] it should have granted the injunction, rather than "accept" as "sincere" that the University "does not intend to return to the original policy."[44] This was an "abdication of judicial review,"[45] which this Court should make sure not to repeat.

Like this Court reasoned in *Fenves*, "[i]t is not hard to sustain standing for a pre-enforcement challenge in the highly sensitive area of public regulations governing bedrock political speech."[46] So, even though it had been amended, "the existence of the University's policies . . . suffice[d] to establish that the threat of future enforcement, against those in a class whose speech is arguably restricted, is

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[42] *Id.* at 28 (Thomas, J., concurring).
[43] Appellant's Opening Brief at 20.
[44] *Id.* at 17.
[45] *SFFA*, No. 20–1199, slip op. at 26.
[46] *Fenves*, 979 F.3d at 331, 338.

likely substantial."[47] Consequently, an injunction was necessary in *Fenves*, and is necessary here.

CONCLUSION

This Court has an opportunity with this case to halt the erosion of free speech on campus and restore the marketplace of ideas. The Foundation urges this Court to reverse the district court and enter a preliminary injunction prohibiting Texas State University from employing its former discriminatory-harassment policy.

Respectfully submitted,

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January 23, A.D. 2024

[47] *Id.*

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