NO. 23-6054

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SPEECH FIRST, INC.,

Plaintiff-Appellant,

v.

KAYSE SHRUM, in her individual capacity and official capacity as President of Oklahoma State University, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Oklahoma
Case No. CIV-23-29-J
The Honorable Bernard M. Jones, presiding

BRIEF OF AMICUS CURIAE CATHOLICVOTE.ORG EDUCATION FUND IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus curiae is an independent, not-for-profit 501(c)(3) corporation under the law of Michigan; it has no parent corporation, and no publicly held company owns 10% or more of its stock.

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CatholicVote.org Education Fund ("CVEF") is a nonpartisan voter education program devoted to serving our country by supporting educational activities that promote an authentic understanding of ordered liberty and the common good. Given its educational mission, CVEF is deeply concerned about the First Amendment issues implicated by *Speech First, Inc. v. Shrum* (No. 23-6054). If organizations are required to disclose the legal names of their members even when the statements in their complaints would subject the members to discipline under a governmental policy, freedom of speech is threatened. This is particularly true on college campuses where "there is a possibility that, rather than risk punishment for conduct in challenging the [speech restriction]," students "will refrain from engaging further in protected activity." *Sec'y of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947. 956 (1984). As a result, CVEF comes forward to support the right of all students to participate fully in ongoing discussions regarding important local and national issues even when—or perhaps especially when—those issues are controversial. *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973) ("The mere dissemination of ideas—no matter how offensive to good taste—on a

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(3), *amicus* has filed a motion for leave to file this amicus brief because the Appellees-Defendants refused their consent. Pursuant to Rule 29(a)(4)(E), *amicus* states that no counsel for a party authored this brief in whole or in part and that no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

state university campus may not be shut off in the name alone of 'conventions of decency.' ").

I. Argument

The Supreme Court has long-recognized the "common ground that … organizations can assert the standing of their members." *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009). To satisfy the "case or controversy" requirement of Article III, an organization must establish that "(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." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). To satisfy *Hunt*'s first prong, an association "*must allege* that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (emphasis added). In the present case, Speech First did just that, alleging "that at least one of its members has suffered an injury in fact." *Speech First, Inc. v. Shrum*, 2023 WL 2905577 at *2 (W.D. Okla. 2023); *Summers*, 555 U.S. at 498 (confirming that the Court has "required plaintiff-organizations to make specific allegations establishing that at least one identified member had suffered or would suffer

harm"). Specifically, Speech First alleged that three members—Students A, B, and C—suffered an injury to their First Amendment speech rights as a result of the harassment, computer use, and bias incident policies at Oklahoma State University (the "University"). Verified Compl. at ¶¶ 3-5, 11.

Disregarding *Warth*, the District Court concluded Speech First lacked standing to bring suit on behalf of its student-members because "associational standing requires that a plaintiff identify—by name—at least one member with standing." *Speech First*, 2023 WL 2905577 at *2. In support of this novel requirement, which is not found in *Hunt* or *Warth*, the District Court invoked one sentence in *Summers*: "This requirement of naming 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." 555 U.S. at 498-99. Because Speech First "failed to name the members on behalf of whom it brings suit, it lacks standing to press the claims asserted here." *Speech First*, 2023 WL 2905577 at *3.

There are at least two problems with the district court's analysis. First, the district court misinterprets *Summers*, taking the critical sentence out of its proper context. In *Summers*, the majority rejected the dissent's "hitherto unheard-of test for organizational standing"—that "accepting the organization's self-description of the activities of its members, there is a statistical probability that some of those

members are threatened with concrete harm." *Id*. at 497. Instead of alleging that one or more specific members suffered a particular, concrete injury, Earth Island relied on the probability that "some (unidentified) members have planned to visit some (unidentified) small parcels affected by the Forest Service's procedures and will suffer (unidentified) harms as a result." *Id*. at 498. This was sufficient for the dissent, which would have found standing whenever it is "probable" that *some* unknown and unidentified member is likely to suffer *some* type of harm. The majority disagreed, explaining that such speculation and uncertainty "would make a mockery of our prior cases, which have required plaintiff-organizations to make specific allegations establishing that at least one identified member had suffered or would suffer harm." *Id*.

Speech First does not rely on probabilities or likelihoods; rather, it alleges that particular individuals—Students A, B, and C—are members of its organization and have been harmed by the University's speech-restrictive policies. These allegations are sufficient to establish standing under *Warth*, *Hunt*, and *Summers*. Furthermore, even if standing requires more than identifying and describing the particular injured students (which it does not), *Alabama Legislative Black Caucus v. Alabama* recognizes, at a minimum, that Speech First should be afforded an opportunity to bolster its allegations that one or more of its members have been injured. 575 U.S. 254, 270 (2015) ("*ALBC*").

Second, the District Court ignores the important reason why Speech First did not name the particular student-members whom the University's policies have injured. The statements in the Verified Complaint establishing First Amendment harm are assertions that would subject the Students to possible discipline under the policies if made on or off campus—which is why the Students have not articulated these views previously. Naming the Students would both subject them to the punishment they are seeking to avoid and chill speech at the University and other college campuses across the Tenth Circuit.

A. To establish associational standing, an organization must allege that there is at least one member who has been or will be injured, not identify that person by his or her legal name.

This case implicates only the first prong for associational standing. To meet this requirement, Speech First "*must allege* that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action." *Warth*, 422 U.S. at 511 (emphasis added). Contrary to the District Court's suggestion, *Summers* does not change this well-established condition; rather, *Summers* simply confirms that statistical probabilities are insufficient to prove standing unless the probability is 100 percent: "The 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." *Summers*, 555 U.S. at 498-99. The critical point for organizational

standing is that at least one member has suffered or will suffer an injury-in-fact. *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015) ("The *Summers* Court refused to find standing based only on speculation that unidentified members would be injured by a proposed action of the National Forest Service."). Article III requires that a particular member has an injury-in-fact, not that the individual member be named. *See*, *e.g.*, *Roe v. Wade*, 410 U.S. 113, 124 (1973), overruled on other grounds by *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022) (finding standing "[d]espite the use of the pseudonym" because "no suggestion is made that Roe is a fictitious person"). Drawing on *NAACP v. Alabama*, 357 U.S. 449 (1958) ("*NAACP*"), *Summers* sets out a straightforward argument: if (1) all members of an organization have been injured by the government action, and (2) the organization has at least one member, then (3) there is at least one member who has been injured. In such circumstances, the Court is assured that one or more members have standing. The NAACP did not have to "name" specific individuals because it was clear that some (read as "at least one") member had been injured.

What *Summers* did not do was hold that an organization must always provide the names of injured members when fewer than all of the members have been harmed; instead, it concluded only that statistical probabilities do not satisfy *Hunt*'s first prong. *Cegavske*, 800 F.3d at 1041 (rejecting the view "that *Summers*

… stands for the proposition that an injured member of an organization must always be specifically identified in order to establish Article III standing for the organization"); *American Coll. of Emergency Physicians v. Blue Cross and Blue Shield of Georgia*, 833 Fed. Appx. 235, 240 (11th Cir. 2020) (finding standing, even though specific members were not named, where "ACEP and MAG identified a whole category of its members who are harmed and will be harmed by Defendants' new policy: all members whose patients are insured by Defendants"); *Disability Rights Wis., Inc. v. Walworth County Bd. of Supervisors*, 522 F.3d 796, 802 (7th Cir. 2008) (holding that "[t]he first *Hunt* factor … still allows for the member on whose behalf the suit is filed to remain unnamed by the organization"); *Doe v. Stincer*, 175 F.3d 879, 882 (11th Cir. 1999) ("Nor must the association name the members on whose behalf suit is brought.").

Speech First's Verified Complaint identifies three members, all of whom are students at the University and have had their First Amendment rights violated by the University's harassment and bias policies. Speech First does *not* allege that it is likely—given the size of its organization and membership—that some unidentified member might be injured at some point. Rather, Speech First identifies each injured member by a pseudonym (*e.g.*, "Student A") and a description (*e.g.*, "a Sophomore at the University" holding a series of particular views). Verified Compl. at ¶¶ 58-68. In this way, Speech First singles out three

student-members at the University who have been harmed. Accordingly, *Summers*'s reflections on statistical probabilities are not controlling.

What governs is Article III's demand that at least one member suffer an injury-in-fact:

> "Standing," we have said, "is not 'an ingenious academic exercise in the conceivable' … [but] requires … a factual showing of perceptible harm." In part because of the difficulty verifying the facts upon which such probabilistic standing depends, the Court has required plaintiffs claiming an organizational standing to identify members who have suffered the requisite harm.

Summers, 555 U.S. at 499 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 566 (1992)). As *NAACP* demonstrates, though, a court can know that there is at least one member who has been injured without also knowing the legal name of that member:

> Where it is relatively clear, rather than merely speculative, that one or more members have been or will be adversely affected by a defendant's action, and where the defendant need not know the identity of a particular member to understand and respond to an organization's claim of injury, we see no purpose to be served by requiring an organization to identify by name the member or members injured.

Cegavske, 800 F.3d at 1041; *Hancock County Bd. of Supervisors v. Ruhr*, 487 Fed. Appx. 189, 198 (5th Cir. 2012) ("[T]he NAACP branches were not merely alleging that some members *might* suffer a 'one person, one vote' violation. The NAACP branches were alleging that some members *were* suffering such a violation. By

alleging that some of its members were voters from overpopulated and under-represented districts, the NAACP branches adequately alleged that some of its members were suffering a concrete, particularized injury."). What confers standing is not the name of a member but the fact that at least one member was harmed. *Sierra Club v. Morton*, 405 U.S. 727, 735 n.8 (1972) (indicating that allegations in an amicus curiae brief—to the effect that "the Sierra Club has conducted regular camping trips into the Mineral King area, and that various members of the Club have used and continue to use the area for recreational purposes"—would have been sufficient if "contained in the pleadings" or "brought to the attention of the Court of Appeals").

The contrast with cases where the Supreme Court found standing lacking is stark. In *Morton*, "[t]he Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents." *Id*. at 735. Similarly, in *Summers*, Earth Island did not allege that the Forest Service regulations injured a specific person. Earth Island made only a general claim that "it is probable … that some (unidentified) members have planned to visit some (unidentified) small parcels affected by the Forest Service's procedures and will

suffer (unidentified) concrete harm as a result." 555 U.S. at 497-98. Alleging "it is *likely* that there is an x" who is a member and who may be injured at some point does not establish organizational standing. *Summers*, 555 U.S. at 498 ("[O]ur prior cases … have required plaintiff-organizations to make specific allegations establishing that at least one identified member had suffered or would suffer harm."); *Georgia Republican Party v. SEC*, 888 F.3d 1198, 1204 (11th Cir. 2018) (concluding that standing was lacking because, among other things, "Mr. Pipkin's affidavit does not aver that at least one of the Georgia Party's members is certain to be injured by Rule 2030").

Although organizations frequently do name their injured members (*e.g.*, *Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 181 (2000)), naming is not necessary to establish associational standing. *Hunt*'s three prongs work together to ensure that Article III is satisfied even when the names of injured members are not used. Prong one guarantees that at least one of an organization's "members … [is] suffering immediate or threatened injury as a result of the challenged action." *Hunt*, 432 U.S. at 342. This condition makes sure that a particular individual is identified who has been (or will be) harmed. Prong two "is complementary to the first, for its demand that an association plaintiff be organized for a purpose germane to the subject of its member's claims raises an assurance that the association's litigators will themselves have a stake in the resolution of the

dispute, and thus be in a position to serve as the defendant's natural adversary." *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 555-56 (1996). The association must be named, but not every named organization can bring suit. The germaneness requirement guarantees that the organization has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends." *Baker v. Carr*, 369 U.S. 186, 204 (1962). And the third prong makes certain that the named association can litigate the case without the participation of the individual members. *Hunt*, 432 U.S. at 343 ("[N]either the claim asserted nor the relief requested require[d] the participation of individual members in the lawsuit."). The organization brings suit on behalf of particular members who are injured but who do not need to participate in the lawsuit given the nature of the claim and the relief sought. But if the individual members are not required, then neither are their names—only the assurance that one or more of them have been harmed.

This is such a case. Neither the First Amendment speech claims "nor the request for declaratory and injunctive relief requires individualized proof" such that "both are … properly resolved in a group context." *Id*. at 344; *United Food*, 517 U.S. at 546 (confirming that individual participation of an organization's members is "not normally necessary" when dealing with prospective or injunctive

relief); *Florida State Conference of NAACP v. Browning*, 522 F.3d 1153, 1160 (11th Cir. 2008) (same). Given that this action can be litigated without the participation of Speech First's student-members, Speech First's uncontested allegations—that there are three specific students harmed by the University policies—are enough. Their names are not necessary to establish associational standing. *Religious Sisters of Mercy v. Azar*, 513 F. Supp.3d 1113, 1137 (D.N.D. 2021) (finding organizational standing where the individual members were not named but the group's "verified second amended complaint confirms that its membership includes Catholic hospitals and other healthcare entities 'that receive Medicaid and Medicare payments and participate in HHS-funded programs' "); *Bldg. and Constr. Trades Council of Buffalo v. Downtown Dev., Inc.*, 448 F.3d 138, 145 (2d Cir. 2006) ("[T]he defendants cite to no authority—nor are we aware of any—that supports the proposition that an association must 'name names' in a complaint in order properly to allege injury in fact to its members.") (citations omitted).

Finally, even if this Court determines that organizational standing is uncertain, Speech First should be given the opportunity to "provide additional information" related to the standing of its student-members. *ALBC*, 575 U.S. at 271 (explaining that "elementary principles of procedural fairness required that the District Court, rather than acting *sua sponte*, give the Conference an opportunity to

provide evidence of member residence");[2] *Warth*, 422 U.S. at 501-02 ("At the same time, it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. If, *after this opportunity*, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed.") (emphasis added); *Cegavske*, 800 F.3d at 1042 (quoting *ALBC*, 575 U.S. at 270) ("The Supreme Court has recently confirmed … that a membership organization should have the opportunity to provide evidence that bolsters its claim of associational standing when the organization reasonably believes, 'in the absence of a state challenge or a court request for more detailed information,' that 'it need not provide additional information such as a specific membership list.' ").

[2] *ALBC* reintroduces probabilistic reasoning into the standing analysis, holding that general statements about the scope of the organization, its purpose, and its having "members in almost every county in Alabama," "support[ed] an inference that the organization has members in all of the State's majority-minority districts, other things being equal, which is sufficient to meet the Conference's burden of establishing standing." *Id*. at 270. The Court did not require the Alabama Legislative Black Caucus to name specific members, relying instead on a "common sense inference." *Id*. Because Speech First has standing under *Hunt* and *Summers*, it necessarily has standing under *ALBC* if this Court should decide to apply that more lenient standard.

B. Preserving the anonymity of Speech First's student-members is necessary to prevent their being subject to punishment under the University's policies and to avoid chilling speech on college campuses within the Tenth Circuit.

The District Court's reliance on *Summers* is also misplaced because *Summers* says nothing about an organization's right to bring suit on behalf of members who have good reasons to proceed anonymously. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority."). While anonymity may not be important in many cases (*e.g.*, individuals who visit and enjoy the beauty and splendor of our National Parks), it is critical to those who confront the threat of retaliation or discrimination for challenging government policies that violate First Amendment speech rights. *See Femedeer v. Haun*, 227 F.3d 1244, 1246 (10th Cir. 2000) (recognizing the need for anonymity outside the organizational standing context "where the injury litigated against would be incurred as a result of the disclosure") (cleaned up). Members of the NAACP had such concerns in *NAACP v. Alabama*. Compelled disclosure of the NAACP's membership list would have eviscerated its members' right to associate anonymously. As the Court explained, the traditional and limited role of the Courts was "not disrespected where constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an

appropriate representative before the Court." 357 U.S. at 459; *NAACP v. Button*, 371 U.S. 415, 431 (1963) ("[T]he litigation [the NAACP] assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society.").

Requiring Speech First to provide the names of its student-members presents a similar threat to free expression, albeit in a much different context. Students A, B, and C do not confront retaliation simply for being members of Speech First; instead, they face possible punishment for making the statements detailed in the Verified Complaint. If (as alleged) such statements would subject the Students to discipline under the University's policies if made on or off campus, then providing their names in connection with the Verified Complaint also would expose them to punishment. This, in turn, may cause many students to forego challenging unconstitutional policies, severely limiting their ability to vindicate their speech rights. Adapting what the Supreme Court said in *NAACP* to the present case, "compelled disclosure of [the names of Speech First's student-members] is likely to affect adversely the ability of [Speech First] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from [Speech First] and dissuade others

from" challenging speech restrictive policies "because of … the consequences of this exposure." 357 U.S. at 463.

The need for anonymity, therefore, is apparent in this case. First Speech alleged that three of its members "are suffering concrete injuries as a direct result of the University's unconstitutional policies and actions." Verified Compl. at ¶ 53. Each member is a student at the University and is prohibited from engaging in otherwise protected speech. Consider Student A, the first member Speech First identifies in the Verified Complaint. Speech First does not simply allege that Student A is Student A, which is simply an instance of the law of identity. Such an identity statement expresses a logical truth and, therefore, appears to be—and is—trivial, being known *a priori* and being true regardless of how the world is organized. Instead, Speech First alleges that Student A "is a sophomore at the University," who "is politically conservative and holds views that are unpopular, controversial, and in the minority on campus," such as "oppos[ition] to affirmative action," "that abortion is wrong and that women should not be allowed to kill innocent babies," disapproval of "illegal immigration," and "that sex is inherent and immutable." Verified Compl. at ¶¶ 54-59. This statement—that Student A is a sophomore at the University and holds these and other controversial views—is not trivial, being known only *a posteriori* and being dependent upon the world's being a certain, specific way. This latter statement has cognitive value; it conveys new

information and, in the process, identifies a particular student at the University who has been (and will continue to be) injured by the University's speech-restrictive policies.

Student A also has a legal name, say 'Jane Smith,' and knowing that name would provide additional information about the same, previously identified person. This phenomenon is not new. In antiquity, sky gazers did not know that the evening star, Hesperus, just was the morning star, Phosphorus. Thus, while "Hesperus is Hesperus" expressed a trivial identity, "Hesperus is Phosphorus" conveyed new information. That Hesperus and Phosphorus both referred to the same planet, Venus, provided additional information even though all three terms identified the same enduring object.[3] But neither the legal name of Student A nor the planetary name 'Venus' is necessary to identify the particular person or object described. Hesperus is Phosphorus whether or not one knows that both names also refer to Venus. Student A is the sophomore holding the particular views described in the Verified Complaint whether or not one knows that 'Jane Smith' refers to the same person.

[3] Thankfully, organizational standing under Article III does not require federal courts to resolve Gottlob Frege's identity puzzle. The central point for standing purposes is that the identification of particular members who have been injured can be accomplished without using a member's legal name. This is especially important where, as here, the use of a student's name would subject the student to the injury that she is trying to avoid—punishment for the exercise of her First Amendment speech rights.

The problem in *Summers* was that Earth Island could not put forward any meaningful identity statement. It could not even muster the claim that a particular member, say D, had suffered a specific injury. There was only a likelihood that some unidentified member might be injured at some point in the future. But saying that "the unknown member who might be injured sometime is the unknown member who might be injured sometime" does not identify a particular individual. Adapting Earth Island's position to the sky-gazing context, instead of referencing the evening star (Hesperus) or the morning star (Phosphorus), Earth Island merely asserts that, among the billions of stars in the universe, it is likely that a star is sometimes visible in certain parts of the sky from certain locations at night and in the morning. Earth Island does not know this to be true, but believes it likely, so its "self-description" should be sufficient. The majority properly rejected this type of "statistical probability" analysis, which was "unheard-of" in the organizational standing context, because it failed to identify any specific member who was injured. *Summers*, 555 U.S. at 497.

Granted, the celestial context is different. Venus, an inanimate planet, is not worried about being identified as the same object as Hesperus and Phosphorus. After all, there is no threat that Venus will be demoted from the planetary ranks like poor Pluto. But as noted, there is good reason for withholding the legal names of Students A, B, and C—the cognitive value conveyed by naming each student

just is the information that would expose these student-members to discipline. The Students have refrained from making the statements set forth in the Verified Complaint because those statements may constitute harassment or bias under the University's policies. If the statements must be attributed to them by name, then the Students are forced into doing what they were filing suit to avoid—making statements that could subject them to discipline and possibly expulsion. Verified Compl. at ¶ 41. The District Court's opinion, therefore, puts Speech First's student-members in a Catch-22—remain silent and lose their First Amendment rights, or challenge the University's policies (using their legal names) and be subject to discipline for making the statements in the Verified Complaint. To establish the requisite injury, the Students must detail what the University's policies preclude them from saying, but in providing those statements and their legal names, the Students now subject themselves to disciplinary action for engaging in (what the University deems to be) harassing and/or biased expression.

Given the breadth of the policies, most (if not all) of the speech they want to make is prohibited. Under the harassment policy, students can be disciplined for engaging in speech that the University determines is "intimidat[ing]" or constitutes "verbal abuse." Verified Compl. at ¶ 3. These terms are left undefined, providing students no guidance as to what speech is verboten and, consequently, chilling an even wider array of expression. In addition, the Code of Conduct precludes

students from "[a]ttempting to or encouraging others to commit acts prohibited by the Code" or even displaying "[a]pathy or acquiescence in the presence of prohibited conduct." *Id*. at ¶ 38. If found guilty of harassment or verbal abuse, students are subject to disciplinary action "rang[ing] from a verbal warning to suspension or expulsion." *Id*. at ¶ 41. The University's bias-incidents policy also threatens First Amendment principles. Bias incidents are defined as "actions committed against or directed toward a person … that are motivated, in whole or in part, by a bias against a person or group of persons who possess common characteristics." *Id*. at ¶ 5. Bias, in turn, is defined as "a disproportionate weight in favor of or against an idea or thing, usually in a way that is close-minded, prejudicial, or unfair." *Id*. Biased conduct includes pure speech, such as a "Comment in Class" or a "Comment in Writing." *Id*. at ¶ 49. Bias incidents can occur on campus or off, and "[s]tudents accused of 'bias incidents' can be referred for formal disciplinary proceedings." *Id*. at ¶¶ 5, 52.

Students A, B, and C want to express views on a variety of controversial and important topics that challenge the established orthodoxy at the University, including opposition to affirmative action, abortion, illegal immigration, transgenderism, and gender identity. *Id*. at ¶¶ 56-62; *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its

substance is the right to differ as to things that touch the heart of the existing order."). Under the University's speech restrictive policies, such statements (*e.g.*, "that sex is inherent and immutable and that there is no such thing as a 'gender spectrum,' " Verified Compl. at ¶ 59, or that "the Black Lives Matter organization has had a corrosive impact on race relations in America," *id.* at ¶ 75, or that " 'open borders' policies are destructive and dangerous," *id.* at ¶ 90) could be viewed as "intimidating" or a form of "verbal abuse" or "bullying," especially if made during multiple conversations or discussions. *Id.* at ¶¶ 38, 97. The University also might determine that such statements constitute a "bias incident," being "directed toward a person" and "motivated, in whole or in part, by a bias [*i.e.*, a disproportionate weight in favor of or against an idea or thing, usually in a way that is close-minded, prejudicial, or unfair] against a person or groups of persons who possess common characteristics." *Id.* at 48. Oftentimes, views that conflict with the established orthodoxy are characterized as "close-minded," "prejudicial," or "unfair." Recently, this has been true for expression defending traditional marriage, arguing against abortion, or contending that only biological females should be allowed to compete in women's sports—all views that the Students want to express.

Consequently, students at the University who hold minority or dissident views must choose between and among three unconstitutional options: either

(1) remain silent and forego speaking on important and controversial topics confronting our Nation, (2) engage in such expression and risk disciplinary action, or (3) sue using their legal names to vindicate their First Amendment rights and confront the same threat of disciplinary action. Each of these options undermines "the usual rule that governmental bodies may not prescribe the form or content of individual expression." *Cohen v. California*, 403 U.S. 15, 24 (1971); *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) ("[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."; *Turner Broad. Sys., Inc v. FCC*, 512 U.S. 622, 641 (1994) (affirming that "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence"); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) ("[I]f it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."). In addition, the University's policies "may deter or 'chill' constitutionally protected expression," resulting in "[m]any persons, rather than undertak[ing] the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, … choos[ing] simply to abstain from protected speech, harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

The chilling effect on First Amendment speech activity at the University is unsurprising given the undefined terms contained in the policy (*e.g.*, harassment, verbal abuse, intimidation, and bias), the extension of the policies to off campus expression, the uncertainty surrounding which speech is "close-minded, prejudicial, or unfair," the possibility of being punished for displaying "[a]pathy or acquiescence in the presence of prohibited conduct," and the recent examples of hostile reactions by administrators and professors to unpopular speech at Stanford, Ohio Northern, and Hunter College. *See* Stuart Kyle Duncan, "My Struggle Session at Stanford Law School," *Wall Street Journal* (March 17, 2023) (available at https://www.wsj.com/articles/struggle-session-at-stanford-law-school-federalist-society-kyle-duncan-circuit-court-judge-steinbach-4f8da19e?mod=article_inline); Scott Gerber, "DEI Brings Kafka to My Law School," *Wall Street Journal* (May 9, 2023) (available at https://www.wsj.com/articles/dei-brings-kafka-to-my-law-school-ohio-tenure-collegiality-viewpoint-discipline-102d62b8?mod=article_inline); Reuven Fenton, et al., "Shellyne Rodriguez, NYC college professor who threatened Post reporter with machete is fired as her lawsuit against NYPD emerges, *New York Post* (May 23, 2023) (describing Professor's actions after a reporter requested an interview regarding the Professor's "flipping out on pro-life students at Hunter College") (available at https://nypost.com/2023/05/23/nyc-

college-professor-shellyne-rodriguez-who-threatened-post-reporter-with-machete-is-fired/).

Forcing organizations to name their student-members will further limit the robust exchange of ideas on campus. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (noting the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"). At state-run colleges and universities, the government directly influences all aspects of a student's life—from housing and meals to curriculum requirements and student conduct codes. Rather than challenge school officials (who may be asked to assist a student during her academic career), a student may determine that the safer route is to remain silent, further stifling the marketplace of ideas that is so important on college campuses. *Healy v. James*, 408 U.S. 169, 180-81 (1972) ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.").

Yet First Amendment safeguards are supposed to apply with full force on university campuses: "the precedents of this Court leave no room for the view that … First Amendment protections should apply with less force on college campuses than in the community at large." *Id*. at 180. In fact, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American

schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). As the Supreme Court has explained, "[t]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.' " *Papish*, 410 U.S. at 670; *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995) (explaining that "the point of all speech protection is … to shield just those choices of content that in someone's eyes are misguided, or even hurtful"). The First Amendment safeguards the free flow of ideas on university campuses to promote broader societal benefits:

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us…. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, (rather) than through any kind of authoritarian selection."

Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967) (citation omitted); *Sweezy v. N.H. ex rel. Wyman*, 354 U.S. 234, 250 (1957) ("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.").

The problem is that, because "[t]hese [First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society[,] [t]he threat of sanctions may deter their exercise almost as potently as the actual application of

sanctions." *Button*, 371 U.S. at 433. Confronted with speech restrictions and the threat of disciplinary action for merely acquiescing in another's speech, many students "will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Hicks*, 539 U.S. at 119 (citation omitted); *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1124 (11th Cir. 2022) (concluding that "the average college-aged student would be intimidated—and thereby chilled from exercising her free-speech rights—by subjection to [Central Florida's] bias-related-incidents policy"). In such situations, "the censor's determination may in practice be final." *Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

II. Conclusion

Organizational standing helps to protect constitutional rights, such as freedom of speech, that cannot "be effectively vindicated except through an appropriate representative before the Court." *NAACP*, 357 U.S. at 459. If a student-member must be identified by her legal name, "there is a possibility that, rather than risk punishment for conduct in challenging the [speech restriction]," a student in the Tenth Circuit "will refrain from engaging further in protected activity. Society as a whole then would be the loser. Thus, when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute

challenged." *Joseph H. Munson Co.*, 467 U.S. at 956. Consequently, this Court should reverse the District Court and hold that an organization bringing suit on behalf of its members is not required to name names where, as here, the association has established that at least one member has been injured.

Respectfully submitted,

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Dated: May 30, 2023

CERTIFICATE OF COMPLIANCE

1. This amicus brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because, excluding the parts exempted by Fed. R. App. P. 32(f), the brief contains 6,342 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(b) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point New Century Schoolbook font.

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CERTIFICATE OF DIGITAL SUBMISSION

I certify that (1) all required privacy redactions have been made from this brief per 10th Cir. R. 25.5; (2) this ECF submission is an exact copy of the hard copies that will be submitted to the Court; and (3) this brief has been scanned for viruses by Vipre Endpoint Security Anti-Virus, last updated on May 29, 2023, and, according to the program, is free of viruses.

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CERTIFICATE OF SERVICE

I certify that on May 30, 2023, I caused the foregoing to be filed through this Court's CM/ECF system, which will serve a notice of electronic filing on all registered users, including counsel for the parties.

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