

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-00029-J, Hon. Bernard M. Jones

**BRIEF OF *AMICUS CURIAE* INDEPENDENT WOMEN'S LAW CENTER
SUPPORTING APPELLANT AND REVERSAL**

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GLOSSARY

IWF Independent Women’s Forum

IWLC Independent Women’s Law Center

**IDENTITY, INTEREST, AND AUTHORITY TO FILE
OF THE *AMICUS CURIAE*¹**

On April 6, 2023, former All-American swimmer Riley Gaines traveled to San Francisco State University to speak about her experience racing the trans-identified biological male swimmer Lia Thomas. Although Gaines was scheduled to be on campus for only a portion of the evening, she was, in fact, unable to leave until the wee hours of the next morning, after being assaulted and then held hostage in a classroom for hours by an angry mob that disagreed with her point of view.²

Gaines is a spokeswoman for Independent Women’s Forum (IWF), a nonprofit, nonpartisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic policy issues. IWF promotes access to free markets and the marketplace of ideas and supports policies that expand liberty, encourage personal responsibility, and limit the reach of government. *Amicus*

¹ No counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the brief’s preparation or submission. Counsel for Speech First, Inc. has consented to the filing of this brief, but counsel for defendant Kayse Shrum has refused to consent.

² *Mostly Peaceful: Countering Left-Wing Organized Violence: Hearing Before the Subcomm. on Oversight, Investigations, & Accountability of the H. Comm. on Homeland Sec.*, 118th Cong. (May 16, 2023) (statement of Riley Gaines, Spokeswoman, Independent Women’s Forum), available at https://www.iwf.org/wp-content/uploads/2023/05/IWF_Testimony_Riley_p1.pdf (hereinafter “Gaines Testimony”).

Independent Women’s Law Center (IWLC) supports this mission by advocating—in the courts, in Congress, and before administrative agencies—for freedom of expression, equal opportunity, and individual liberty, especially on matters of particular concern to women. In part because IWF employee Riley Gaines has been harassed and subjected to violence simply for expressing her viewpoints, IWF understands why some organizations might seek to protect the anonymity of their members. IWLC submits this brief to underscore for the Court the violence and harassment that speakers like Gaines have endured and to highlight the dangers posed by the district court’s decision requiring identification of organizations’ members at the outset of litigation.

SUMMARY OF ARGUMENT

It is a sad truth that individuals who are willing to speak out on controversial topics are regularly subject to harassment, vandalism, threats of violence, and actual physical assault. IWF spokeswoman Riley Gaines recently endured a harrowing experience of this sort at the hands of protestors on a college campus, where she was threatened, assaulted, and held hostage in a classroom for hours. Such violence is consistent with the trends documented by recent empirical research, which confirm that a growing population of individuals is willing to resort to physical violence to stop speech with which they disagree.

Given this hostility toward speech, the district court’s decision to require organizations to reveal at the outset of litigation the names of the members on whose behalf they bring suit will put those members in real danger, something the law sensibly does not require at such a preliminary stage. The district court erred in holding to the contrary, and its decision should be reversed.

ARGUMENT

I. Individuals Today Are Not Free to Take Positions on Controversial Issues Without Risk of Sanction, Harassment, and Even Violence.

As the Supreme Court has recognized, the First Amendment plays an important role “in affording the public access to discussion, debate, and the dissemination of information and ideas.” *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (footnote omitted). “[D]emocracy stands on a stronger footing when courts protect First Amendment interests.” *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 519 (1981). Today, however, many individuals approve of disrupting and harassing speakers with whom they disagree, creating an environment in which it can be dangerous to take a public stand on controversial topics or even belong to a group that does.

1. Although hostility to speech is evident across the country, one arena in which First Amendment rights are under particular attack is our nation’s college campuses. Ideally, “[t]he college classroom with its surrounding environs is peculiarly the marketplace of ideas.” *Healy v. James*, 408 U.S. 169, 180 (1972)

(internal quotation marks omitted). In practice, however, modern campus culture is one in which speakers are routinely harassed and students with dissenting opinions are afraid to speak out—for good reason. In fact, a 2022 survey of almost 45,000 undergraduate students commissioned by the Foundation for Individual Rights in Education found that an alarming 20% of students approve of “violence to stop a campus speech” under certain circumstances.³

In one particularly frightening recent incident, IWF spokeswoman Riley Gaines was assaulted by protestors who oppose her efforts to limit women’s sports to biological females.⁴ Gaines testified before Congress that she “began to fear for [her] safety” when she “could hear chanting in the hallway outside the room” in

³ Found. for Individual Rts. and Expression & Coll. Pulse, *2022-2023 College Free Speech Rankings: What Is the State of Free Speech on America’s College Campuses?*, at 62 (2022), <https://reports.collegepulse.com/college-free-speech-rankings-2022> (1% believe the use of violence is “always” acceptable, 4% believe it is “sometimes acceptable” and 15% believe it is “rarely acceptable”). To make matters worse, the number of students who support the use of disruptive and violent tactics has increased over time. *Compare id. with* Found. for Individual Rts. in Educ. et al., *2020 College Free Speech Rankings* (2020), <https://www.thefire.org/research/publications/student-surveys/2020-college-free-speech-rankings/2020-college-free-speech-rankings-view-rankings/>.

⁴ Natasha Chen & Cheri Mossburg, *Former College Swimmer Says She Was Assaulted at an Event Opposing the Inclusion of Trans Women in Women’s Sports*, CNN (Apr. 8, 2023), <https://www.cnn.com/2023/04/07/us/former-ncaa-swimmer-riley-gaines-assault-san-francisco-state-university/index.html>.

which she was speaking and “sensed the situation outside might be growing confrontational.”⁵ She recalled:

As I ended my presentation, protestors in the room opened the locked doors and a chaotic flood of shouting, angry, protestors forced their way in. The crowd rushed at me, some with fists raised, most shouting, anger contorting many faces around me. Then the lights in the room began flicking on and off in strobe-like fashion and then they went off. The room was filled with the glare of a hundred cell phone flashlights, some being shined in my face. I realized I was at the mercy of the crowd, and I was assaulted. . . . I truly feared for my life.⁶

After being grabbed by a woman who claimed to be with campus police but bore no indicia of officer status, Gaines was ushered out of the speech room and “held hostage in a classroom while a mob of protestors demanded money in exchange for [her] release”⁷ and a school reporter “doxx[ed] [her] information and location on twitter in hopes more protestors would show up.”⁸ Finally, “around midnight, [police] officers formed a diamond around [Gaines] and pushed through the mob to get outside,” where Gaines had to run to a waiting car to avoid additional students chasing them.⁹

⁵ Gaines Testimony, *supra* note 2, at 2.

⁶ *Id.* at 2–3.

⁷ Claudine McCarthy, *Riley Gaines and Attorney Discuss Impact of Trans Athletes on Women’s Teams*, 20 Coll. Athletics & L. 1, 7 (2023) (statement of Riley Gaines).

⁸ Gaines Testimony, *supra* note 2, at 3.

⁹ *Id.*

Sadly, Gaines’s experience is not unique. When students in the American Enterprise Club at Middlebury College invited Dr. Charles Murray to discuss the struggles of the white working class with faculty member Allison Stanger, objecting students shouted Murray down until he and Stanger attempted to move to a different location.¹⁰ At that point, the protestors, “some of whom were wearing masks,” began pushing Murray and Stanger, grabbed Stanger’s hair, and twisted her neck, sending her to the hospital, where she was given a neck brace.¹¹ As one self-described liberal writer warned after the event: what happened to Professor Alison Stanger “should serve as . . . a warning of things to come.”¹²

There are, of course, many more examples of objectors harassing individuals who have expressed certain opinions, engaging in vandalism and physical threats—even threats against the family members of a professor who spoke out against ideological imbalance on campus.¹³ Both research and experience, therefore, make

¹⁰ Peter Beinart, *A Violent Attack on Free Speech at Middlebury*, *The Atlantic* (Mar. 6, 2017), <https://www.theatlantic.com/politics/archive/2017/03/middlebury-free-speech-violence/518667/>.

¹¹ *Id.*

¹² *Id.*

¹³ Ethan Cai, *Prof Says He Received Threats After Calling Out Campus Bias*, *Tenn. Star* (Aug. 10, 2019), <https://tennesseestar.com/uncategorized/prof-says-he-received-threats-after-calling-out-campus-bias/admin/2019/08/10/> (after Sarah Lawrence College professor Samuel Abrams wrote a *New York Times* opinion piece that pointed out the ideological imbalance on college campuses, students vandalized

clear that the decision to take a public stance on a question of public concern can be a dangerous choice on a college campus.

2. Nor is viewpoint harassment limited to educational institutions. In 2008, the organization Accountable America “compiled data from campaign finance disclosure reports to send letters to nearly 10,000 conservative donors, threatening publication of their names” and “‘digging through their lives’ if they continued their financial support of conservative candidates and causes.”¹⁴ In addition, “stories and videos abound” of people “losing jobs, being harassed and threatened by internet mobs or live demonstrators, having their cars and property damaged, being screamed at in restaurants, and sometimes being physically attacked” for supporting Proposition 8, the California initiative that would have barred the state from recognizing same-sex marriages.¹⁵ One man was reportedly punched in the face for his support of the measure and required 16 stitches; others described having hot

his office door, and he received “numerous threats” to his safety and the safety of his family); Scott Jaschik, *Vandalism Follows Professor’s Critique on Ideology*, Inside Higher Ed (Nov. 4, 2018), <https://www.insidehighered.com/quicktakes/2018/11/05/vandalism-follows-professors-critique-ideology>.

¹⁴ Bradley A. Smith, *Americans for Prosperity Foundation v. Bonta: A First Amendment for the Sensitive in Cato Supreme Court Review*, 2020-2021, at 63 (2021) (quoting Michael Luo, *Group Plans Campaign against G.O.P. Donors*, N.Y. Times (Aug. 8, 2008)), available at <https://tinyurl.com/mrxaauhr>.

¹⁵ *Id.* at 63–64.

liquid thrown at them or being thrown to the ground and kicked.¹⁶ Multiple people, including the mayor of Fresno, received death threats.¹⁷

3. The U.S. Supreme Court has acknowledged the very real dangers faced not only by speakers but by individuals who support or join groups that weigh in on controversial issues. *See Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2388–89 (2021). In *Bonta*, the Court held that California cannot require non-profit organizations to turn over donor lists to the state because doing so could expose donors to harassment, intimidation, and retaliation. *Id.*

“Such risks,” the Supreme Court cautioned, “are heightened in the 21st century and seem to grow with each passing year, as anyone with access to a computer [can] compile a wealth of information about anyone else, including such sensitive details as a person’s home address or the school attended by his children.” *Id.* at 2388 (cleaned up). It is therefore no wonder that many organizations and their members prefer that their membership remain anonymous. “The deterrent effect feared by these organizations”—that individuals will cease to join or otherwise support associations if their identities can be made known—“is real and pervasive,” and shared by organizations that “span the ideological spectrum.” *Id.*

¹⁶ *See* Thomas Messner, *No. 2328, The Price of Prop 8*, at 910, Heritage Found. (Oct. 22 2009), <https://www.heritage.org/marriage-and-family/report/the-price-prop-8>.

¹⁷ *Id.* (citations omitted).

II. A Plaintiff Organization Need Not Identify Affected Members by Name to Survive a Motion to Dismiss.

That deterrent effect is no less real in a case like this, where the district court held that plaintiff Speech First was required to disclose the names of its affected members at the very outset of the litigation to survive defendant Shrum's motion to dismiss. Such mandated disclosure would put those individual members at risk even before a court has had the chance to determine whether the pleadings state a claim upon which relief can be granted.

That is not what the law requires. On the contrary, on a motion to dismiss, a court must "accept as true all well-pleaded factual allegations in the complaint and view them in the light most favorable to the [plaintiff]." *SEC v. Shields*, 744 F.3d 633, 640 (10th Cir. 2014). With respect to standing, in particular, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [the Court] presum[es] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (citation and quotation marks omitted).

Other courts have thus correctly held that an association is not required to "name names" in a complaint in order properly to allege injury in fact to its members." *Bldg. & Constr. Trades Council of Buffalo, N.Y. & Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138, 145 (2d Cir. 2006); *see, e.g., Nat'l Council of La Raza v.*

Cegavske, 800 F.3d 1032, 1041 (9th Cir. 2015). The district court should have reached the same conclusion in this case. Whether a member of Speech First has suffered an injury in fact depends “not on his or her name” but “on the facts of his or her existence” and enrollment in the defendant’s University. *N.Y. v. U.S. Dep’t of Com.*, 351 F. Supp. 3d 502, 606 n.48 (S.D.N.Y. 2019), *aff’d in part, rev’d in part and remanded sub nom. Dep’t of Com. v. N.Y.*, 139 S. Ct. 2551 (2019).

Speech First’s First Amended Verified Complaint plainly establishes both. It specifically alleges that “Speech First has members who attend Oklahoma State University, including Students A, B, and C,” and that those members’ “protected speech is chilled by the[] three policies” being challenged in the litigation. First Am. Verified Compl. ¶¶ 6, 11, *Speech First, Inc. v. Shrum*, No. 5:23-cv-00029-J, 2023 WL 2905577 (W.D. Okla. Apr. 10, 2023), ECF No. 27. The Amended Complaint further details that “Speech First member, Student A, is a Sophomore at the University” and “wants to speak directly to her classmates about” controversial topics, but “does not fully express herself or talk about certain issues because she knows that students, faculty, or others will likely report her to University officials” under the challenged policies. *Id.* ¶¶ 54–68; *see id.* ¶¶ 69–100 (establishing similar facts about “Student B” and “Student C,” each of whom “is a Junior at the University”).

Those allegations, which must be presumed true at this stage of the litigation, *Shields*, 744 F.3d at 640, are sufficient to establish that members of Speech First are students at the University and have suffered an injury in fact due to the challenged policies. Nothing more is required, and to hold otherwise would be to subject the members of plaintiff organizations to very real and unnecessary dangers that can and should be avoided. The district court erred in holding to the contrary.

CONCLUSION

The district court's decision should be reversed.

Dated: May 30, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rules of Appellate Procedure 32(g)(1) and 29(a)(5), I certify that this brief:

(i) complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 2,460 words, including footnotes and excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and 10th Circuit Rule 32(B), as determined by the word counting feature of Microsoft Word; and

(ii) 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)(6) and 10th Circuit Rule 32(A) because it has been prepared using Microsoft Office Professional 2016, set in Times New Roman 14-point font.

Dated: May 30, 2023

/s/ Kathryn E. Tarbert
Kathryn E. Tarbert

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing brief:

- (1) all required privacy redactions have been made per 10th Cir. R. 25.5;
- (2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;
- (3) the digital submissions have been scanned for viruses with the most recent version of Microsoft Defender, a commercial virus scanning program, and according to the program are free of viruses.

Dated: May 30, 2023

/s/ Kathryn E. Tarbert
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