**No. 23-6054**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

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SPEECH FIRST, INC.,

*Plaintiff-Appellant*

*v.*

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

*Defendant-Appellee.*

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Appeal from the United States District Court
for the Western District of Oklahoma
Case No. 5:23-cv-00029-J

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# BRIEF OF AMICI CURIAE YOUNG AMERICA'S FOUNDATION AND MANHATTAN INSTITUTE IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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## CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and 10th Cir. R. 26.1(A), Amici Curiae Young America's Foundation and Manhattan Institute state that they have no parent corporation and that they do not issue stock.

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## INTEREST OF AMICI CURIAE[1]

Young America's Foundation ("YAF") is a national, non-partisan, nonprofit organization that ensures young Americans understand and are inspired by the ideas of individual freedom, a strong national defense, free enterprise, and traditional values. Young Americans for Freedom is YAF's chapter affiliate on high school and college campuses across the country. To fulfill its mission, YAF engages in dialogue on a variety of issues and hosts prominent conservative speakers on campuses nationwide. Often, these speakers meet resistance from students, faculty, and administrators alike. Rather than engage with and debate YAF's views and speakers, those who disagree commonly turn to name-calling, falsely claiming that YAF promotes "hate speech," "offensive" speech, and "controversial" ideas. Incited by these falsities, students and professors have vandalized YAF's posters, administrators have imposed viewpoint-based security fees, and universities have sought to cancel its events.

The Manhattan Institute ("MI") is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster economic choice and individual responsibility. To that end, it has historically sponsored scholarship supporting the rule of law and

[1] Pursuant to Federal Rule of Appellate Procedure 29(a) *amici curiae* state that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief.

opposing government overreach, including in the marketplace of ideas. Its scholars regularly speak on college and graduate-school campuses, and likewise have faced protest, shutdown, and cancelation. MI also runs the Adam Smith Society, which brings together business-school students and alumni for discussion and debate on how the free market has contributed to human flourishing and opportunity for all.

YAF and MI understand that robust debate on all sides of issues furthers the academic functioning of schools and universities. But it is impossible to have debate of any sort when one side labels everything the other side says as "hateful" or "offensive," then uses those pejoratives to shut down dialogue altogether, stifling dialogue and deterring those who disagree from expressing their true views.

Free speech—not censorship—promotes true understanding and allows all of us to remain faithful to the individual liberties that make our country great. YAF and MI appreciate the importance of the First Amendment's anonymity protections. YAF, like Plaintiff Speech First here, has been subject to government demands that it turn over its membership lists as a condition to filing suit in federal court. *See Young Am.'s Found. v. Gates*, 560 F. Supp. 2d 39, 49 (D.D.C. 2008), *aff'd* 573 F.3d 797 (D.C. Cir. 2009). YAF successfully resisted those unconstitutional efforts, *see id.*, but the similar arguments in this case show that state actors persist in seeking to identify those who reasonably prefer to remain anonymous. MI too has been pressured to reveal its

donors. Given the hostility YAF and MI have faced, the desire of their members and affiliates—and those with similar views—for anonymity is all too understandable. *Amici* thus have a strong interest in the outcome of this case.

## STATEMENT OF THE ISSUE

The First Amendment protects the freedom to speak and associate anonymously. Forced disclosure of identity information must—at the very least—meet exacting scrutiny. The district court, without considering any form of scrutiny, applied a categorical rule requiring Plaintiff Speech First to disclose the identity of its non-party student-members. Does the district court's decision violate the First Amendment?

## BACKGROUND

Oklahoma State University Students A, B, and C all hold views that some label "unpopular, controversial, and in the minority on campus." V. Am. Compl. ¶¶ 53, 68, 85, Doc. 27. For example, all three students believe that abortion is morally wrong. *Id.* ¶¶ 55, 69, 87. And all three students believe that sex is immutable and that men cannot become women and vice versa. *Id.* ¶¶ 57, 72, 86. These students want to engage in "open and robust intellectual debate"—the very premise of the University—with their classmates on these issues. *Id.* ¶¶ 59, 61, 75, 77, 90, 92. The students understand discussions about these and other topics may

become "heated and passionate," but that is exactly how they promote "learn[ing] in a challenging environment." *Id.* ¶¶ 58, 61, 74, 77, 89, 92.

Yet University policies have forced these three students to keep their opinions to themselves. Students A, B, and C credibly fear that expressing their views will violate the University's overly broad harassment and bias-incidents policies. *Id.* ¶ 51. The policies' definitions of "harassment" and "bias incidents" extend to "offensive" or "intimidat[ing]" speech. *Id.* ¶¶ 34, 44–45. The students understand that others on campus may find their speech offensive and report them for "bias incidents" that will then incur University discipline. *Id.* ¶¶ 64–66, 80–82, 95–97. So, they have refrained from voicing their views. *Id.*

To remedy that censorship, Plaintiff Speech First, Inc. filed suit on behalf of its members, Students A, B, and C. *See generally* V. Am. Compl., Doc. 27. Speech First is a "nationwide membership organization of students, alumni, and other concerned citizens . . . dedicated to preserving . . . the freedom of speech guaranteed by the First Amendment." *Id.* ¶ 10. Its student-members used pseudonyms because they are current students at the University and face "reprisal" from University officials, professors, and their fellow students should their identities and views—the expression of which University policies prohibit—become public. *Id.* ¶¶ 52, 67, 84.

The court below dismissed the case. According to it, the non-party students did not have Article III standing to sue because they remained

anonymous. Order 4, Doc. 35. The district court ignored Speech First's verified allegations of the disciplinary and social threats its student-members faced from revealing their identities and held that precedent required it to "name" those members. *Id.* (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 498–99 (2009)). The court acknowledged that its ruling conflicted with "several circuit court decisions" that "question[ed] the requirement of naming members," especially "at the motion to dismiss stage." *Id.* Yet it still imposed a categorical bar on the doors to federal court: organizations must disclose their members or forfeit their right to sue. *See id.*

## SUMMARY OF THE ARGUMENT

College students today fear voicing their views. Studies reveal that most students believe that other students have self-censored because some may find the mere expression of their views "offensive" or even "violent." And college policies—like Oklahoma State University's here—prohibit exactly that type of speech. The data demonstrate that students with views perceived to be in the minority on controversial issues—such as abortion and gender identity—are much more likely not to share their beliefs. That self-censorship has distorted the quintessential marketplace of ideas into a monopoly. But the same studies also show that a majority of students want to dismantle the monopoly. They just need a means to break the self-censorship cycle.

The history and precedent of the First Amendment's anonymity protection can help bust the collegiate speech trust. From colonial times to the present, anonymity has enriched our political debate and protected the freedom of those with dissenting viewpoints to assemble. It enabled Thomas Paine, *The Federalist Papers*, and *The Anti-Federalist Papers* to contribute to our marketplace of ideas and shape our representative government. And it has allowed the NAACP to successfully fight racial discrimination. The Supreme Court has consistently held that the First Amendment protects the freedom to speak and associate anonymously. First Amendment rights need breathing space to survive. But the harassment, threats, and reprisals that accompany forced identity disclosure deter speakers from contributing to the marketplace of ideas.

By conditioning access to federal court on disclosing Speech First's members, the district court contravened the First Amendment. It also foreclosed the ability of those members to restore balance to the campus marketplace of ideas. Students A, B, and C hold views some label controversial. Out of fear from University policies that prohibit "offensive" or "intimidat[ing]" speech and negative reaction from their peers, they have kept both their opinions and identities to themselves.

But the district court ruled that the anonymity of these non-parties deprived Speech First of standing. In categorically dismissing the claims, it applied a Supreme Court case that nowhere discussed the anonymity of non-party members or any First Amendment argument. *See Summers*,

555 U.S. 488. The district court failed to subject its rule to the exacting scrutiny required by Supreme Court precedent—which it could not meet.

The First Amendment protects Americans from the harassment, threats, and opprobrium that come from state-mandated disclosure requirements. This Court should seize this opportunity to reaffirm the Constitution's robust protection against compelled disclosure. To uphold the First Amendment's anonymity protections and assist Speech First's student-members in busting the campus monopoly on ideas, this Court should reverse the court below.

## ARGUMENT

### I. College students of all stripes reasonably fear speaking out on controversial issues.

College campuses have traditionally served as "marketplace[s] of ideas," where free debate and dialogue advance the pursuit of truth. *See Healy v. James*, 408 U.S. 169, 180 (1972). Many of YAF's members, people for whose rights MI advocates, and Students A, B, and C want to contribute to and learn from that marketplace. Unfortunately, students nationwide realize that a monopoly on ideas has replaced the marketplace. Studies reveal that most students believe that others do not voice their opinions because some may find them offensive. In particular, conservative students are much more reluctant to discuss issues some find controversial, while progressive students do not have the same hesitation. Students self-censor because of fears that others may find the

mere expression of their views "offensive" or even "violent" and because university policies target speech for exactly those reasons. Students also expressed the desire to break the monopoly and restore a functioning marketplace.

### A. Students fear the tyranny of prevailing opinion.

Students today see college campuses as echo chambers instead of what they should be—paradigmatic marketplaces of ideas. Since 2016, the non-partisan Knight Foundation has partnered with respected research groups to examine college students' attitudes toward free speech. Knight Found., *College Student Views on Free Expression and Campus Speech 2022*, at 3 (Jan. 2022), https://bit.ly/3OH7bgo. The Foundation published its latest report in 2022 with data collected by Ispos in 2021 from a "nationally representative sample of over 1,000 college students." *Id.* Its report compared that survey to others conducted by Gallup in 2016, 2017, and 2019. *Id.* It concluded that more students today found the "climate" at their colleges "prevents some from saying things others might find offensive" and fewer students felt "comfortable disagreeing in class." *Id.* at 4.

From 2016 to 2021, a steadily increasing share of college students believed that some people self-censored because others might find their views offensive, going from 54% in 2016 to 65% in 2021. *Id.* at 7. The numbers are even starker when broken down along ideological lines. Seventy-one percent of Republican students felt that the campus

environment stifled free speech, as compared to 61% of Democratic students. *Id.* at 20. Less than half (48%) of all students felt comfortable disagreeing with others in class, despite a significant majority believing that colleges should expose students to all types of speech—even what some may consider "offensive or biased." *Id.* at 21–23.

Another national survey of over 1,500 college students in 2022 confirmed the Knight Foundation's results. Heterodox Acad., *Understanding Campus Expression Across Higher Ed: Heterodox Academy's Annual Campus Expression Survey* 10–11 (Mar. 2023), https://bit.ly/3qfOMxi. It found that 63% of students agreed that the campus climate prevented others from expressing their views because some might think them offensive. *Id.* at 5. Unsurprisingly, students were "at least twice as likely to report reluctance to discuss controversial topics" like politics, race, religion, and sexual orientation than "noncontroversial topics." *Id.* at 15. Self-identified Republicans had much greater reluctance to discuss those topics than their Democratic peers. *Id.* at 16–17.

A 2022 survey taken across all campuses in the University of Wisconsin System confirmed these results again. *See* Univ. of Wis. Sys., *UW System Student Views on Freedom of Speech: Summary of Survey Responses* (Feb. 1, 2023), https://bit.ly/3MFAT33. Over two-thirds of Republican students felt not at all or only a little comfortable expressing their views on "transgender issues." *Id.* at 20. Only 26% of Democratic

students had the same hesitation, with a strong plurality (45%) feeling very or extremely comfortable sharing their views. *Id.* Discussing abortion presented a similar picture: 55% of Republican students had little comfort expressing their views, compared to 20% of Democrats. *Id.* at 22. Meanwhile, 56% of Democratic students had no discomfort discussing abortion. *Id.*

### B. Students fear the tyranny of unlawful university censorship.

Students often self-censor over fear of state-sanctioned punishment. A whopping 57% of Wisconsin students at least "somewhat" agreed that merely "expressing views" some "find offensive" could rise to the level of "an act of violence toward vulnerable people." Univ. of Wis. Sys., *supra*, at 24. Approximately 1 in 5 students reported feeling "unsafe" on campus because of people's speech about their "race, ethnicity, religion, gender or sexual orientation—whether or not [the comment] was directed at [the student]." Knight Found., *supra*, at 18. That corresponds to a similar percentage (22%) of students who thought colleges should "protect" the campus community from "offensive or biased" speech—instead of promoting open dialogue. *Id.* at 24. And over a third of students felt "uncomfortable" on campus because of such speech. *Id.* at 18. Stark divides again emerged along partisan lines. Much larger proportions of Democrats reported feeling unsafe (21%) or

uncomfortable (42%) because of speech on campus than Republicans (12% and 23%, respectively). *Id.* at 19.

What effect do such concerns about safety and comfort have on campus speech? Well, 22% of students worried that someone would "file a harassment complaint" with the university if they expressed their views in class. Heterodox Acad., *supra*, at 21. The same percentage feared receiving a lower grade for voicing their opinions. *Id.* Over a quarter of students had concerns that their professors would criticize their views as "offensive" or "wrong." *Id.* And 16% thought the mere expression of their views "would cause others psychological harm." *Id.*

The Wisconsin data presented an even bleaker picture, with 31% of self-censoring students fearful "someone would file a complaint about their views." Univ. of Wis. Sys., *supra*, at 66. Likewise, 41% and 46% had concerns their instructor would dismiss their views as offensive or give them a lower grade, respectively. *Id.*

When university policies teach students that the mere utterance of views can be "violence," students will naturally and reasonably self-censor over fear of discipline. Take the University's policies here. They threaten punishment all the way up to expulsion for "offensive" or "intimidat[ing]" speech. V. Am. Compl. ¶¶ 34, 44–45, Doc. 27. That policy is consistent with how colleges across the country attempt to regulate speech. *E.g.*, *DeJohn v. Temple Univ.*, 537 F.3d 301, 319 (3d Cir. 2008) (affirming injunction against university policy that prohibited speech

that "unreasonably interfere[s] with an individual's work"); *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1114 (11th Cir. 2022) (holding district court abused its discretion in refusing to enjoin university policy that prohibited "verbal acts . . . that may be humiliating"); *Speech First, Inc. v. Khator*, 603 F. Supp. 3d 480, 481 (S.D. Tex. 2022) (enjoining university policy that prohibited speech that "show[ed] hostility or aversion towards an individual or group"). Universities can—and do—use overbroad policies like these to punish for speech some consider offensive. *E.g.*, *Perlot v. Green*, 609 F. Supp. 3d 1106, 1121 (D. Idaho 2022) (enjoining university discipline under harassment policy for speech another student found "offensive").

Because of the rampant self-censorship due to university policies and threats, students generally agree that their campuses should eliminate their speech-suppressive policies. Nearly 60% of students thought colleges should allow exposure to all types of speech even if some find it "offensive or biased." Knight Found., *supra*, at 24. Only one third wanted colleges to implement speech codes to ban "offensive or biased speech" allowed "in other public places." *Id.* at 27. Yet overbroad and content and viewpoint discriminatory policies, like the one here, persist and continue to stifle the marketplace of ideas.

## II. The First Amendment protects both anonymous speech and privacy in association.

From colonial times to the present, anonymous speech and association have shaped the progress of our nation. Anonymity allowed Thomas Paine to publish *Common Sense*, empowered the Federalists and Anti-Federalists to debate freely the form of the country's new government, shielded the right of people to form groups and criticize that government, and enabled the NAACP to fight racial discrimination. Consistent with this rich history, the Supreme Court has time and again held that the First Amendment safeguards anonymous speech and association. That robust anonymity protection means government action that forcibly discloses identities must meet—at a minimum—exacting scrutiny.

### A. The freedom to speak anonymously has deep historical roots.

Anonymous speech laid the foundation for our country's independence. In the 1720s, John Trenchard and Thomas Gordon published a series of 144 essays challenging corruption and immorality in the British political system under the pseudonym "Cato." John Trenchard & Thomas Gordon, *Cato's Letters; or, Essays on Liberty, Civil and Religious, and Other Important Subjects* (4th ed. 1737). *Cato's Letters* were "the most popular, quotable, esteemed source of political ideas in the colonial period." David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MARYLAND L. REV. 429, 445 (1983) (quoting Clinton

Rossiter, *Seedtime of the Republic* 141 (1953)). They inspired James Madison to hail the freedom of the press as the great "bulwark of liberty" against despotism. *Id.* Following in their footsteps, Thomas Paine published an attack on slavery under the name "Humanus"—and, of course, also published *Common Sense* pseudonymously. Erik Ugland, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, 3 DUKE J. CONST. L. & PUB. POL'Y 113, 167 (2008).

Given the threat of prosecution by colonial authorities, the desire for anonymity made sense. "[O]bnoxious press licensing law[s]" worked to reveal the "names of printers, writers and distributors" and thus "lessen the circulation of literature critical of the government." *Talley v. California*, 362 U.S. 60, 64 (1960). "Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English controlled courts." *Id.* at 64–65. As the Supreme Court appreciates, anonymous pamphlets and leaflets have long been deployed as "weapons in the defense of liberty." *Id.* at 62.

Post-Revolution, anonymous speech *defined* the debate over the government for the new nation. Alexander Hamilton, James Madison, and John Jay argued in *The Federalist Papers* in favor of the federal Constitution under the pseudonym "Publius." Jennifer B. Wieland, *Note: Death of Publius: Toward a World Without Anonymous Speech*, 17 J.L. & POLS. 589, 592 (2001). The Anti-Federalists responded under the

fictitious names "Cato," "Centinel," "The Federal Farmer," "Brutus," and "Candidus." *Id.* By one estimate, from 1789 to 1809, no fewer than six presidents, fifteen cabinet members, twenty senators, and thirty-four congressmen published anonymous political writings. *Id.*

### B. The freedom to associate anonymously also has deep historical roots.

The founding generation understood not only the importance of anonymous speech but also that of anonymous assembly. At that time, unlawful assembly laws prevented Englishmen from gathering in streets and parks without official permission. Michael W. McConnell, *Freedom by Association*, FIRST THINGS (Aug. 2012), https://bit.ly/45BoBBp. Colonial governors attempted to use those laws to suppress groups advocating for independence, such as the Sons of Liberty. *Id.* So the group's leaders "met over a period of time, often secretly" to organize their public advocacy. *Id.*

In the new nation, dozens of "Democratic-Republican societies" soon emerged to oppose the Washington administration. Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic*, 82 N.C. L. REV. 1525, 1537 (2004). Federalists criticized these groups because they limited membership to those of a like mind. McConnell, *supra*. The party in power condemned the "nocturnal meetings of individuals, after they have dined, where they shut their doors, pass votes in secret, and admit no

members into their societies, but those of their own choosing." 4 Annals of Cong. 902 (1794). In an address to Congress, President Washington accused these societies of fomenting lawlessness during the Whiskey Rebellion, spurring the Senate to censure them. Chesney, *supra*, at 1560–62.

The censure prompted five days of debate in the House. *Id.* Representative William Branch Giles distinguished between extant laws that could punish illegal conduct, such as treason, and the censure—what he saw as "the very first step made in America to curb public opinion"—which targeted protected speech and would serve only to restrain public debate. *Id.* at 1565 (quoting 4 Annals of Cong. 919). James Madison also warned that the censure would create a "pernicious" precedent that would chill other speech. *Id.* at 1566 (quoting 4 Annals of Cong. 934). Ultimately, the House did not censure the societies, confirming that the First Amendment's protection swept even to anonymous groups. *See Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2390 (2021) (Thomas, J., concurring in part and concurring in the judgment).

### C. The Supreme Court has consistently upheld the freedom to speak and associate anonymously to prevent against retaliation.

Given the historical pedigree of anonymous speech and association, the Supreme Court has unfailingly held that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of

speech protected by the First Amendment." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995); *accord Bonta*, 141 S. Ct. at 2387 (facially invalidating state law requiring nonprofits to disclose identities of major donors); *Talley*, 362 U.S. at 61, 65 (facially invalidating ordinance that required handbills to bear the name of their author); *DeGregory v. Att'y Gen.*, 383 U.S. 825, 828 (1966) (First Amendment bars compelled disclosure of "information relating to [a person's] political associations of an earlier day, the meetings he attended, and the views expressed and ideas advocated at any such gatherings."). People may choose anonymity for "fear of economic or official retaliation," "concern about social ostracism," or the desire to preserve as much "privacy as possible." *McIntyre*, 514 U.S. at 341–42. Regardless of the motivation, "the interest in having anonymous works enter the marketplace of ideas"—what the First Amendment protects—"unquestionably outweighs any public interest in requiring disclosure as a condition of entry." *Id.* at 342.

In a case involving First Amendment "chilling effect in its starkest form," the Court protected the NAACP's membership lists from hostile state officials. *Bonta*, 141 S. Ct. at 2382. In the 1950s, the NAACP was successfully fighting institutionalized racial discrimination. State governments responded with a new weapon: compelled member disclosure. Hostile states began demanding that, as a condition for operating within their states, the NAACP had to turn over its supporters'

names. Government officials understood that many would stop supporting the NAACP if it meant risking reprisal from segregationists. They were right; because of compelled disclosure, the NAACP saw a 50% decline in southern-state memberships between 1955 and 1957. Jack Greenberg, *Crusaders in the Courts* 221 (1994).

The NAACP challenged this blanket-disclosure rule and prevailed. The Supreme Court recognized that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). And "compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as" other government actions that discourage the exercise of constitutionally protected rights. *Id.* at 462. "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses" views over which there are strong disagreements. *Id.*

As *NAACP* demonstrates, governments may use identity and association information to target those with disfavored views, as they've done historically. And when identity information intentionally or accidentally becomes public, it often leads to severe forms of (1) harassment, (2) threats of bodily harm, (3) economic reprisals, and (4) public hostility. *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960).

The digital age has increased the danger. An entire "cottage industry" revolves around leveraging forcibly disclosed identity information to chill free speech and association and "pre-empt citizens' exercise of their First Amendment rights." *Citizens United v. FEC*, 558 U.S. 310, 482 (2010) (Thomas, J., concurring in part and dissenting in part). The risks of forced disclosure "grow with each passing year," especially because "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." *Bonta*, 141 S. Ct. at 2388 (cleaned up).

Those—like many YAF members—who hold views some label controversial have even more reason to preserve anonymity in today's climate. For example, supporters of a California ballot initiative that defined marriage as between one man and one woman "suffered property damage," loss of jobs, and "threats of physical violence or death" when their personal information was revealed. *Citizens United*, 558 U.S. at 481–82 (Thomas, J., concurring in part and dissenting in part). California required donors supporting the initiative to disclose their names, addresses, occupations, and employer's name. *Id.* Opponents of the initiative then compiled this information and created public websites with maps showing the homes and business of supporters, leading to "intimidation tactics." *Id.*

And just two years ago, the Supreme Court facially invalidated a different California law that required nonprofits to disclose their major donors. *See Bonta*, 141 S. Ct. at 2389. One of the petitioners in that case, Thomas More Law Center, defended "religious freedom, free speech, family values, and the sanctity of human life." *Id.* at 2380. It had received "threats, harassing calls, intimidating and obscene emails, and even pornographic letters" because of its views—and its donors could expect the same, were their identities revealed. *Id.* at 2381.

Because of the grave risks from compelled disclosure, government must satisfy at least exacting scrutiny for any such requirements. "[C]ompelled disclosure regimes are no exception" from the bedrock principle that the "government may regulate in the First Amendment area only with narrow specificity." *Id.* at 2384 (cleaned up). "Broad and sweeping state inquiries into" the "protected areas" of anonymous speech and association deter "citizens from exercising rights protected by the Constitution." *Id.* So the government must show—at a minimum—a narrowly tailored and "substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Id.* at 2385; *see also id.* at 2390 (Thomas, J., concurring in part and concurring in the judgment) (compelled disclosure requirements must satisfy strict scrutiny).

## III. The district court's refusal to allow the non-party student-members to proceed anonymously violates the First Amendment.

The anonymous students' understandable reluctance to speak up on campus and reveal their identities due to University reprisals confirms a troubling national trend. The data reflect that most students—and an even larger proportion of those students who hold views similar to those of Students A, B, and C—believe college campuses stifle free speech. *Supra* Section I.A. Many students self-censor because they fear the negative reactions of their peers and discipline for what the University's policy here prohibits: "offensive" speech. *Supra* Part I; V. Am. Compl. ¶¶ 34, 45, Doc. 27.

Both history and precedent confirm that the First Amendment protects the students' right to proceed anonymously. Asserting their views without revealing their identities fits well within the venerable tradition of anonymous writing to evade government sanctions in the colonial period. *Supra* Section II.A. And, just as *The Federalist Papers* and *The Anti-Federalist Papers* debated important ideas anonymously, so, too, does these students' anonymous speech contribute to the University's marketplace of ideas. Similarly, the First Amendment also protects the students' ability to associate anonymously with Speech First. Forced associational disclosure subjects members—especially those with minority views—to threats, harassment, and economic repercussions.

The district court was wrong to rule that *Summers* required dismissal. There, the Court rejected the argument that an "organization's self-description of the activities of its members" could establish standing based on "a statistical probability that some of those members are threatened with concrete injury." *Summers*, 555 U.S. at 497. More specifically, the organization could not establish standing based on a probability "that some (unidentified) members have planned to visit some (unidentified) small parcels affected by the [challenged] procedures and will suffer (unidentified) concrete harm as a result." *Id.* at 497–98. To the contrary, standing requires "specific allegations establishing that at least one identified member had suffered or would suffer harm." *Id.* at 498.

*Summers* had nothing to do with anonymity and the First Amendment. It had everything to do with a failure to plead concrete past and future injuries. In other words, the standing argument rejected in *Summers* relied on the theory "that some members *might* suffer" a violation. *Hancock Cnty. Bd. of Supervisors v. Ruhr*, 487 F. App'x 189, 198 (5th Cir. 2012). But, as the Fifth Circuit put it, "no precedent hold[s] that an association must set forth the name of a particular member in its complaint in order to survive a Rule 12(b)(1) motion to dismiss based on a lack of associational standing." *Id.*; *accord Bldg. & Constr. Trades Council of Buffalo v. Downtown Dev., Inc.*, 448 F.3d 138, 145 (2d Cir. 2006) (Second Circuit not aware of "any" authority "that supports the proposition that an association must 'name names' in a complaint in

order properly to allege injury in fact to its members"). An organization satisfies Article III when it "alleg[es] that some members *were* suffering such a violation." *Hancock*, 487 F. App'x at 198; *see also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) ("[A] plaintiff satisfies the injury-in-fact requirement where he alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." (cleaned up)).

Nor could the government meet its exacting scrutiny burden to justify forced disclosure. To begin, the government does not have a sufficiently important governmental interest in forcing disclosure of an association's members, especially at the pleading stage. The University claims it needs to verify that the student-members are in fact University students. Def.'s Mot. to Dismiss 8, Doc. 29. But "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). And the student-members alleged that they were, in fact, "current student[s]" subject to the challenged policies. V. Am. Compl. ¶¶ 52, 67, 84, Doc. 27.

Any need to assess claims of injury or mootness also pales in comparison to relevant history. That history reveals that the House of Representatives declined even to *censure* groups with anonymous members who stood accused by President Washington of fomenting

rebellion—let alone force those groups to disclose their members. *Cf. Houston Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253, 1262 (2022) (examining this history and concluding that the "threat of a censure *could* raise First Amendment questions" (emphasis added)).

The district court's categorical disclosure requirement here also fails any form of narrow tailoring. The rule presents an ultimatum to Speech First: disclose your members' identities or lose your right to sue. The court failed to consider *any* less burdensome alternatives to achieve any government interest, such as *in camera* disclosure only to the Court and verification against University records. And it did not consider such other alternatives as the disclosure of identity information "attorney's eyes only" in discovery or to a University official without disciplinary authority and subject to protective order. Instead, the district court conditioned entry to federal court on forgoing anonymity and risking the harassment, hostility, and threats endemic to public debate on college campuses. That, the First Amendment does not allow.

## CONCLUSION

College students have stopped voicing their views on campus for fear of both official retaliation and unofficial ostracism. That deprives all of us of the debate and dialogue the First Amendment protects. And it transforms the quintessential marketplace of ideas into a monopoly. Anonymity in speech and association has strong historical and precedential roots and allows the marketplace to flourish even in adverse

circumstances. By conditioning this lawsuit on forced disclosure of Speech First's student-members, the district court contravened the First Amendment. Its decision will only inevitably strengthen the speech monopoly seen on campus today. To uphold the original meaning of the First Amendment and re-open the marketplace of ideas students desire to see on campus, this Court should reverse.

Respectfully submitted this 30th day of May, 2023.

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 5,487 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), as determined by the word counting feature of the software (Microsoft Office 365) used to prepare this brief.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, 14-point Century Schoolbook.

Dated: May 30, 2023

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## CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2023, I electronically filed the above with the Clerk of Court using the CM/ECF system which will send notification of this filing to counsel for all parties.

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