
No. 19-50529

IN THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

SPEECH FIRST, INCORPORATED,

Plaintiff - Appellant,

v.

GREGORY L. FENVES,

In His Official Capacity as President
of the University of Texas at Austin,

Defendant - Appellee.

On Appeal from the United States District Court
for the Western District of Texas
Honorable Lee Yeakel, Judge

**BRIEF *AMICUS CURIAE* OF PACIFIC LEGAL FOUNDATION
IN SUPPORT OF SPEECH FIRST, INCORPORATED
SUPPORTING REVERSAL**

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DISCLOSURE STATEMENT

No. 19-50529

Speech First, Inc.,

v.

Fenves

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

No. 19-50529

Speech First, Inc.,

v.

Fenves

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that no persons or entities other than those in the parties' briefs have an interest in the outcome of this case.

- Pacific Legal Foundation, *Amicus Curiae*

/s/ Timothy R. Snowball

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IDENTITY AND INTEREST OF *AMICUS CURIAE*¹

Pursuant to Federal Rule of Appellate Procedure 29(a), Pacific Legal Foundation (PLF) files this *amicus curiae* brief in support of Appellant Speech First, Inc. (Speech First).

PLF was founded in 1973 to advance the principles of individual rights and limited government, representing the views of thousands of supporters nationwide. PLF has long litigated on behalf of the freedom of speech, including *Smith v. Novato Unified School District*, 150 Cal. App. 4th 1439 (2007) (representing high school student in challenge to district’s punishment based on student’s opinion editorial published in the student newspaper); *Matal v. Tam*, 137 S. Ct. 1744 (2017) (*amicus*); *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018) (representing voters in challenge to vague political speech ban); *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019) (*amicus*). PLF believes its perspective and expertise in First Amendment litigation will aid this Court in the consideration of the issues presented in the case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The First Amendment to the United States Constitution provides, in relevant part, that “Congress shall make no law . . . abridging the freedom of speech”

¹ Pursuant to Federal Rule of Appellate Procedure 29, all parties to this appeal have consented to the filing of this *amicus curiae* brief, no party’s counsel authored this brief in whole or in part, no party or party’s counsel contributed money intended to fund preparation or submission of the brief, and no person—other than the *amicus curiae*, its members, or its counsel—contributed money intended to fund preparation or submission of the brief.

U.S. Const. amend. I. “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). This protection is particularly important in the context of higher education, because the free exchange of ideas is “a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.” *See Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

The protections of the First Amendment apply to all government sponsored or organized institutions, including public colleges and universities. *See generally Barnette*, 319 U.S. at 624; *Healy v. James*, 408 U.S. 169, 180 (1972). While this does not mean that administrators are powerless to affect the civility of their campuses, *see Bethel School District v. Fraser*, 478 U.S. 675, 680 (1986), public university students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969).

Nonetheless, in recent years onerous speech policies that penalize supposedly controversial speech, including the University of Texas-Austin (UT) regulations challenged in this litigation, have become more common. Speech policies like these

that go beyond time, place, and manner limits on decorum threaten to imperil the free expression of students and eviscerate the protections of the First Amendment.

Examples of these kinds of regulations include speech codes, trigger warnings, so-called free speech zones, bias response teams, vague bans on “hate speech,” and the dis-invitation of controversial speakers. *See generally* Nina Burleigh, *The Battle Against ‘Hate Speech’ on College Campuses Gives Rise to a Generation That Hates Speech*, Newsweek (May 26, 2016).² A 2018 report by the Foundation for Individual Rights in Education found that nine out of ten American colleges now “clearly and substantially” restrict the protected free speech rights of students. *Report: 9 in 10 American colleges restrict free speech*, Foundation for Individual Rights in Education (Dec. 11, 2018).³

These speech restrictions take a toll, chilling students’ protected speech over fear of causing offense, and contributing to an animus toward the free exchange of ideas. *See New Survey, Majority of college students self-censor, support disinvitations, don’t know hate speech is protected by First Amendment*, Foundation for Individual Rights in Education (Oct. 11, 2017).⁴ As a result, universities are gaining notoriety as hotbeds of outrage, rather than as havens for discussion and

² <https://www.newsweek.com/2016/06/03/college-campus-free-speech-thought-police-463536.html>

³ <https://www.thefire.org/report-9-in-10-american-colleges-restrict-free-speech/>

⁴ <https://www.thefire.org/new-survey-majority-of-college-students-self-censor-support-disinvitations-dont-know-hate-speech-is-protected-by-first-amendment/>

critical inquiry. See Jonathan Butcher, *Will Free Speech Survive on College Campuses?*, The Heritage Foundation (Oct. 30, 2018).⁵

In the face of these threats, Speech First was formed to give students a way to fight back against policies that cast an intolerable “pall of orthodoxy over the classroom.” *Keyishian*, 385 U.S. at 603. Believing that “free and open discourse is an essential component of a comprehensive education,” the goal of Speech First is to support students in their fight for their First Amendment rights. See About Us, Speech First.⁶ This lawsuit against the speech policies of UT is in pursuit of that goal. Speech First brought the case on behalf of three of its members who are UT students (Members). They have, like so many of their peers across the United States, *supra* n.4, felt the chill of their university’s restrictive speech policies. In the midst of hundreds of ideologically motivated investigations on their campus, they are forced to choose between their education and the robust exchange of ideas with their peers.

The Members intend to discuss constitutionally protected topics proscribed by the vague and overbroad university policies that they challenge. This constitutes a credible threat of enforcement. See *Zimmerman v. City of Austin, Tex.*, 881 F.3d 378, 391 (5th Cir. 2018). Therefore, their speech is chilled and they suffer a cognizable

⁵ <https://www.heritage.org/education/commentary/will-free-speech-survive-college-campuses>

⁶ <https://speechfirst.org/about/>

injury sufficient to establish Article III standing. Additionally, the broader implications of campus speech codes demonstrate the seriousness of the underlying injury to the Members. UT's speech policies are constitutionally offensive, damaging to the university experience, and unnecessary. The Members have Article III standing, and thus Speech First has standing. *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). The lower court's decision to the contrary should be reversed.⁷

ARGUMENT

The Members have shown that the speech restrictions they challenge have prevented them from discussing topics protected by the First Amendment, which is causing them a direct injury. Additionally, campus speech policies like those promulgated by UT encourage and enable a culture of campus outrage, do damage to the foundations of the university experience, and are unnecessary given the myriad alternative policies available that effectively balance First Amendment requirements and fostering a culture of inclusiveness. The Members have standing.

⁷ This court examines standing issues *de novo*. See *N.A.A.C.P. v. City of Kyle*, 626 F.3d 233, 236 (5th Cir. 2010).

I.
**THE MEMBERS ARE SUFFERING A COGNIZABLE
INJURY AND HAVE ARTICLE III STANDING**

The Members in this case belong to Speech First, which brought First Amendment claims on their behalf based on a theory of associational standing. *Speech First, Inc. v. Fenves*, 384 F. Supp. 3d 732, 739 (W.D. Tex. 2019). The district court’s analysis of the Members’ alleged First Amendment injury was the sole basis for its decision. *Id.* at 741–742. It did not address the additional requirements for associational standing. *Id.*; *Hunt*, 432 U.S. at 343 (A membership organization has associational standing when: “(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.”).

In order to show a credible threat of enforcement that chills speech sufficient to establish a cognizable injury, the Members must show that they intend to engage in speech about constitutionally protected topics proscribed by the challenged University policies. *See Zimmerman*, 881 F.3d at 391.⁸ The district court found that the affidavit filed by Speech First’s president on behalf of the Members was insufficiently particular to support its allegations, because it “offer[ed] no more than

⁸ Political speech “occupies the highest rung of the hierarchy of First Amendment values,” *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotation marks omitted), and the topics the Members intend to discuss are patently political.

generalized declarations of broad categories of speech in which” the Members wish to engage. *Fenves*, 384 F. Supp. 3d at 742. But the pertinent analysis is not whether the topics the Members intend to discuss are specific enough, but whether UT’s policies are so vague and overbroad that the Members’ speech is unconstitutionally chilled.⁹ It is.

Laws or regulations are unconstitutionally vague when individuals “of common intelligence must necessarily guess at [their] meaning.” *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926). In the First Amendment context, a vague law can have the effect of unconstitutionally chilling otherwise protected expression. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

Such is the case here. For example, verbal harassment is defined by UT in its Institutional Rules (the Rules) as “hostile or offensive speech, oral, written, or symbolic” that “is not necessary to the expression” of any idea related to “argument[s] for or against the substance of any political, religious, philosophical, ideological, or academic idea” *Fenves*, 384 F. Supp. 3d at 736. Neither the Rules nor any other UT document further defines what speech is “necessary” to the

⁹ In First Amendment pre-enforcement challenges such as this one, “chilling a plaintiff’s speech is a constitutional harm adequate to satisfy the injury-in-fact requirement.” *Houston Chronicle Publ’g Co. v. City of League City*, 488 F.3d 613, 618 (5th Cir. 2007); *see Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 543 (5th Cir. 2008) (“The City’s admitted enforcement strategy is to use a complaint-driven scheme [I]njuries resulting from a criminal prosecution for violating the [the challenged law], which Plaintiffs contend is unconstitutionally vague, and from being liable for its penalties . . . were real and immediate threats.”).

expression of an idea, nor provides guidance to students on how to make this determination for themselves. Although the Rules concede that some ideas might be offensive without constituting “verbal harassment,” the Rules then muddy the waters further by declaring that the written definition of verbal harassment “does not exhaust the category of speech that is unnecessary and inappropriate to vigorous debate in a diverse community of educated people.” *Id.* The only guidance the Members and other UT students are given about how to identify “verbal harassment” are amorphous “community norms.” *Id.*

Should Student A express her intended support for Israel during a class discussion by questioning the motivations or tactics of groups that oppose the Israeli state? *See id.* at 741. Are her opinions about Hamas “necessary” to expressing religious, political, or ideological support for Israel? It is unknowable what the “community norms” might be, or how Student A might anticipate the community reaction. So Student A remains silent.

Student B intends to discuss the Second Amendment, e.g., with a classmate in the student commons during lunch. *See id.* Is this speech hostile or offensive if the other student is upset by a recent school shooting? Is the way Student B articulates an anti-gun-control argument “necessary” to the expression of a political or ideological idea? It is again clear that the topic engenders “hostil[ity]” and

“offens[e],” but it is again unclear what speech is “necessary” to the discussion and what speech crosses the line into “harassment.” So Student B remains silent.

Or what of Student C’s intention to express support for Justice Kavanaugh by questioning the allegations against him? *See id.* Is Student C free to express these ideas? Are they “inappropriate” in a diverse community, or does questioning an alleged victim violate so-called “community norms”? We cannot know based on UT’s “hopelessly vague” speech policies, *see Joseph Burstyn, Inc.*, 343 U.S. at 520 (Frankfurter, J., concurring), and neither can the Members or other UT students. So Student C remains silent.

Relatedly, laws or regulations are unconstitutionally overbroad under the First Amendment when the regulation of unprotected speech sweeps so broadly that it also encompasses protected speech. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 397 (1992) (White, J., concurring). UT’s policies are also unconstitutional under this standard. The Acceptable Use Policy (the Use Policy) governs all university computer devices, applications, email addresses, and Internet access, and requires students to “be civil” and not send “rude” correspondence. *Fenves*, 384 F. Supp. 3d at 737. Students subject to the Use Policy are admonished to be “polite and courteous,” without further guidance. *Id.* But if Student A advocates for a race-blind society in an email to a classmate, it is still protected speech whether that classmate perceives it as uncivil or rude based on their subjective values. Nonetheless,

Student A would still be vulnerable to being officially reported as biased to the Campus Climate Response Team (CCRT).

The Residence Hall Manual (the Manual) warns students against “[u]ncivil behaviors” that interfere with the “health” or “individuality” of other persons. *Id.* at 3. So if Student C, who lives in residential housing, *id.*, expresses constitutionally protected views about the Second Amendment on campus, where concealed handguns are generally allowed,¹⁰ UT’s Manual invites his dorm mates to report the comments as having interfered with the “health” or “individuality” of a fellow resident who feels strongly in favor of gun control. UT’s speech policies paint with so broad a brush that they allow listeners to subjectively define “health” and “individuality” and then to decide which speech is protected and which is prohibited based on the listeners’ subjective assessments. *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (“Listeners’ reaction to speech is not a content-neutral basis for regulation.”).

UT does not dispute that the speech of the Members is entitled to the protection of the First Amendment. *Fenves*, 384 F. Supp. 3d at n.2. In fact, the challenged speech policies in this case contain several general endorsements of First Amendment values. *See, e.g., id.* at 737 (quoting the Use Policy as stating that UT “place[s] great value on freedom of thought and expression.”). But UT cannot have

¹⁰ *See* Tex. Gov’t Code § 411.2031 (“Campus Carry Law”).

it both ways. It cannot simultaneously shield its actions from constitutional review by general allusions to the First Amendment, while couching its prohibitions in such “unmoored” and vague and broad terms that students cannot clearly “draw a reasonable line” between what speech is prohibited and what is allowed. *Minnesota Voters Alliance*, 138 S. Ct. at 1888. While UT certainly has authority to police the time, place, and manner of speech, its speech policies apply so broadly that the Members are “‘afraid to voice their views out of fear that their speech’ may violate University policies.” *Fenves*, 384 F. Supp. 3d at 742 (quoting affidavit filed in support of Appellant’s lawsuit).

Any students’ speech at UT, whether in class, on campus, in an assignment, in the privacy of a dorm room, or even using a university-provided email account or computer, is subject to UT’s vague and overbroad speech code policies. Students like the Members lack any clear delineations by which to police their own expression so as not to upset their peers’ subjective preferences and open themselves to official sanction and further action by the CCRT. The Members have sufficiently pled their intention to discuss protected but regulated political topics at UT. By regulating the Members’ intended protected speech through vague and overbroad prohibitions, the Members suffer a credible threat of enforcement sufficient to establish Article III standing.

II. SPEECH CHILLING POLICIES UNNECESSARILY HARM STUDENTS' UNIVERSITY EXPERIENCE

Campus policies that encourage students to police each other's speech by providing official mechanisms to report their peers also encourage and perpetuate a culture of outrage at perceived slights based on subjective preferences. In such a climate, it becomes increasingly likely that students like the Members will face accusations of bias for engaging in controversial, but protected, speech. As a result, the symbiotic relationship between free inquiry, intellectual development, and civic engagement that defines the university experience is damaged. *See, e.g.,* Michael Rectenwald, *Here's what happened when I challenged the PC campus culture at NYU*, Washington Post (Nov. 3, 2016).¹¹ Given the availability of alternate speech policies that account for the free speech protections of the First Amendment, restrictive speech codes like UT's are simply unnecessary.

A. Restrictive Campus Speech Codes Exacerbate Restrictive Campus Culture

Restrictive university speech codes and bias response teams like those at UT encourage and enable campus cultures of offense. It is one thing for students to have opinions on what should or should not be protected speech; it is another to have official university policies lend credibility and support to subjective speech-stifling

¹¹ https://www.washingtonpost.com/posteverything/wp/2016/11/03/campus-pc-culture-is-so-rampant-that-nyu-is-paying-to-silence-me/?noredirect=on&utm_term=.7421fd9433d1

preferences. For example, many recent college students erroneously consider certain political topics “hate speech” beyond the protections of the First Amendment. Catherine Rampell, *A chilling study shows how hostile college students are toward free speech*, *The Washington Post* (Sept. 18, 2017).¹² Worse, many consider “hate speech” equal to using actual physical violence. *See generally* Jonathan Haidt and Greg Lukianoff, *Why It's a Bad Idea to Tell Students Words Are Violence*, *The Atlantic* (July 18, 2017).¹³ Such speech is not deemed to be violent because it is an actual threat of violence (not protected by the First Amendment), but because it is perceived as attacking the identity of members of certain groups. *See generally* German Lopez, *The battle over identity politics, explained*, *Vox* (Aug. 17, 2017) (discussing recent identity politics controversies).¹⁴

Those subscribing to this view posit that hearing certain words can be so psychologically upsetting that they cause actual physical harm. These “violent” statements can even take the form of “micro-aggressions,” which are unintended prejudicial statements attacking an individual’s subjective “lived experience.” Anne Godlasky, *What are microaggressions?*, *USA Today* (Nov. 11, 2016)¹⁵; Jessica

¹² https://www.washingtonpost.com/opinions/a-chilling-study-shows-how-hostile-college-students-are-toward-free-speech/2017/09/18/cbb1a234-9ca8-11e7-9083-fbdfdf6804c2_story.html?noredirect=on&utm_term=.2bc391db8a8b

¹³ <https://www.theatlantic.com/education/archive/2017/07/why-its-a-bad-idea-to-tell-students-words-are-violence/533970/>

¹⁴ <https://www.vox.com/identities/2016/12/2/13718770/identity-politics>

¹⁵ <https://www.usatoday.com/story/news/nation/2016/11/11/microaggressions-psychological-impact/93645528/>

Batheia, *Damage control not enough to fix discrimination*, The Daily Texan (Apr. 4, 2017) (“We are surrounded by people who insist on their liberal politics, as if those proved cultural competence, yet fill our lives with one microaggression after another.”).¹⁶ Common examples of supposed microaggressions include, “Where are you from?,” “Everyone can succeed in this society, if they work hard enough,” and “I believe the most qualified person should get the job.” See generally Derald Wing Sue, et al., *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, American Psychologist.¹⁷ According to these students, allowing free speech threatens students’ “safety.” See London Gibson, *A war of words: Here’s why free speech advocates are scrutinizing University of Texas policies*, The Daily Texan (Mar. 31, 2019) (“I saw a girl on the ground crying by their table because she was so triggered on her way to class . . . I don’t think free speech should have to come at the cost of safety.”).¹⁸

This view of speech-as-violence has also been used to justify outright violence in response to a campus speaker saying “offensive and hurtful” things. See Rampell, *A chilling study shows how hostile college students are toward free speech*, *supra* n.12 (showing one-fifth of college students support violence in response to offensive

¹⁶ <https://www.dailytexanonline.com/2017/04/04/damage-control-not-enough-to-fix-discrimination>

¹⁷ <https://world-trust.org/wp-content/uploads/2011/05/7-Racial-Microaggressions-in-Everyday-Life.pdf>

¹⁸ <http://www.dailytexanonline.com/2019/03/31/a-war-of-words-heres-why-free-speech-advocates-are-scrutinizing-the-university-of-texas>

speech). Some professors are even alleged to support the use of violence against speakers whose ideas they find repugnant. *See, e.g.,* Derek Hawkins, *A Dartmouth antifa expert was disavowed by his college president for ‘supporting violent protest,’ angering many faculty*, *The Washington Post* (Aug. 29, 2017).¹⁹ These beliefs take on an even more concrete and troubling dimension when considering how common the use of violence on college campuses has actually become.

Examples of these ideas being put into action abound. At the University of California at Berkeley in 2017, the home of the “Free Speech Movement” of the 1960s, agitators “toppled light poles, started fires and hurled objects at officers” in an attempt to prevent a controversial speaker from delivering remarks. Michael McLaughlin, *Milo Yiannopoulos Speech At Berkeley Canceled Amid Violent Protests*, *The Huffington Post* (Feb. 1, 2017).²⁰ At Middlebury College, a professor suffered whiplash and a concussion when she was attacked while fleeing a campus event where she had planned to interview a controversial speaker. Allison Stanger, *Understanding the Angry Mob at Middlebury That Gave Me a Concussion*, *The New York Times* (Mar. 13, 2017).²¹ At Evergreen State College, a professor who self-

¹⁹ https://www.washingtonpost.com/news/morning-mix/wp/2017/08/28/a-dartmouth-antifa-expert-was-disavowed-by-his-college-president-for-supporting-violent-protest-angering-many-faculty/?utm_term=.254c8af842b2

²⁰ https://www.huffpost.com/entry/milo-yiannopoulos-speech-at-berkeley-canceled-amid-violent-protests_n_58911132e4b02772c4ea10d0

²¹ https://www.nytimes.com/2017/03/13/opinion/understanding-the-angry-mob-that-gave-me-a-concussion.html?_r=0&login=email&auth=login-email

identifies as “deeply progressive,” was confronted by a mob outside his classroom and denounced as a white supremacist for opposing a “Day of Absence” in which white people were asked to leave campus. Bret Weinstein, *The Campus Mob Came for Me—and You, Professor, Could Be Next*, Wall Street Journal (May 30, 2017).²²

In addition to outright violence, UT students who express views like those held by the Members in this case also risk being “doxed.” Doxxing consists of publishing private information about an individual online—such as their social security number, their address, telephone number, email address, social media profile names, place of employment, details of relatives, partners and children, etc., with a malicious intent to harm them. Stephen Cooper, *What is doxxing (with examples) and how do you avoid it*, Comparitech (Mar. 28, 2019).²³ While doxxing has existed since the 1990s, in recent years it has become a tool used against those perceived to stray from the social orthodoxy.

Just this year at UT, the Autonomous Student Network threatened members of the incoming freshman class with doxxing if they joined conservative student organizations. Jon Street, *Incoming Texas freshmen threatened with doxxing if they join conservative campus groups*, Campus Reform.²⁴ In a particularly disturbing

²² <https://www.wsj.com/articles/the-campus-mob-came-for-meand-you-professor-could-be-next-1496187482>

²³ <https://www.comparitech.com/blog/vpn-privacy/what-is-doxxing-how-to-avoid/>

²⁴ <https://www.campusreform.org/?ID=13363>

incident, a Marquette University professor doxed a graduate student instructor because of her advocacy for gay rights. Damon McCoy, *When Studying Doxing Gets You Doxed*, The Huffington Post (May 1, 2018).²⁵

Faced with such tension, one could be tempted to think campus administrators are justified in restricting offensive speech in order to encourage social peace and quiet. But “we are not descended from fearful men—not from men who feared to write, to speak, to associate and to defend causes that were, for the moment, unpopular.” Edward R. Murrow, *See It Now*, CBS (Mar. 9, 1954).²⁶ Much as administrators may wish to avoid the inconveniences inherent in living in a free society, *see* Thomas Jefferson, Letter to Archibald Stuart (1799),²⁷ the price of maintaining campus social peace cannot require sacrificing one of our most sacred liberties. The potential for reprisals by students against students for subjective “bias” is real and directly fueled by official campus speech codes.

Not only are university administrators prohibited from enacting a heckler’s veto by the clear requirements of the First Amendment, *Forsyth Cty.*, 505 U.S. at 134, but campus rules and institutions should drive student culture, not the other way around. *See, e.g.*, Peter Kaufman, *The Sociology of College Students’ Identity Formation*, *New Directions for Higher Education*, 35–42 (2014) (“College is not just

²⁵ https://www.huffpost.com/entry/opinion-mccoy-doxing-study_n_5ae75ec7e4b02baed1bd06cc

²⁶ <https://www.youtube.com/watch?v=OtCGlqA2rrk>

²⁷ <https://founders.archives.gov/documents/Jefferson/01-31-02-0094>

an arena for intellectual development . . . it is a site in which students construct a sense of self that situates them in a particular social location with a set of corresponding social roles.”).²⁸ Universities historically have been concerned with providing students with basic civic values that would enable them to become effective democratic citizens, *see generally* Margaret Stimmann Branson, *The Role of Civic Education*, Center for Civic Education (Sept. 1998),²⁹ not with protecting students’ feelings from the discomfort of engaging with uncomfortable ideas.

By promulgating vague and overbroad campus speech policies, UT and other campus administrators provide an official means to police fellow students’ protected speech that enables and encourages a culture of campus outrage for even minor or unintended slights. UT’s speech codes and CCRT allow unofficial social norms to become weaponized, which may encourage further social restrictions in a self-perpetuating loop that limits the speech rights of students like the Members. *See generally* Tom R. Burns with Nora Machado, *Social Rule System Theory: Universal Interaction Grammars* (Dec. 30, 2013) (discussing the interaction between institutional rules and resulting social behaviors).³⁰ Students who equate speech with violence undoubtedly take very seriously their duty to report “bias incidents.”

²⁸ <https://bloggingarguments.files.wordpress.com/2014/08/the-sociology-of-college-students-identity-formation.pdf>

²⁹ http://www.civiced.org/papers/articles_role.html

³⁰ https://www.researchgate.net/publication/259591669_SOCIAL_RULE_SYSTEM_THEORY_Universal_Interaction_Grammars

Students are encouraged to actively look for reasons to report their class or dorm mates, leading to “an atmosphere of suspicion and distrust.” *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

Instead of taking the opportunity to teach students about their civic responsibility, administrators appear more concerned with confirming students’ subjective assessments of which speech should or should not be protected. This can lead to harmful reprisals that go beyond the very real threat of official sanction, including outright violence and doxxing. Conforming UT’s speech policies to the requirements of the First Amendment will not only address the direct injuries the Members are suffering in this case, but also positively affect campus culture.

B. Chilling Students’ Speech Negatively Impacts Academic and Civic Participation

Policies like UT’s speech codes not only poison campus culture and increase the likelihood that students like the Members will face reprisals, but also damage the Members and other students’ ability to fully participate in their own university educations. While individuals pursue a college degree for myriad reasons, including professional marketability, at its core higher education is still focused on developing critical thinking skills. Critical thinking in turn depends on the ability to openly discuss, critique, and analyze important, and sometimes controversial, viewpoints and topics. *See Keyishian*, 385 U.S. at 603 (“The classroom is peculiarly the ‘marketplace of ideas.’”). According to former University of Chicago president

Robert Maynard Hutchins, “[f]reedom of inquiry, freedom of discussion, and freedom of teaching—without these a university cannot exist.” Tom Lindsay, *Opponents of Campus Free-Speech Laws Forgot the History of the Civil Rights Movement*, *Forbes* (Oct. 26, 2018) (quoting Hutchins).³¹ See also *Sweezy*, 354 U.S. at 250 (“[S]tudents must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding . . .”).

The symbiotic relationship between free inquiry and intellectual development has long been recognized by some of western civilization’s most influential thinkers. Plato’s early Socratic dialogues exemplify the ancient origins of free speech and inquiry. In *Apology*, Plato’s Socrates relates that “the greatest good of man is daily to converse about virtue, and all that concerning which you hear me examining myself and others, and that the life which is unexamined is not worth living.” *Plato’s Apology of Socrates*, Plato, San Jose State University.³² Hundreds of years later, John Stuart Mill wrote that “there ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it may be considered.” John Stuart Mill, *On Liberty*, Constitution Society (1860).³³ For Mill, this individual liberty of expression is essential to understanding truth for

³¹ <https://www.forbes.com/sites/tomlindsay/2018/10/26/opponents-of-campus-free-speech-laws-forgot-the-history-of-the-civil-rights-movement/#4c7efald3b16>

³² <http://www.sjsu.edu/people/james.lindahl/courses/Phil70A/s3/apology.pdf>

³³ <https://www.constitution.org/jsm/liberty.htm>

“those who dissent from the opinion, still more than those who hold it.” *Id.* John Milton described this robust exchange of ideas as “a free and open encounter” where “[truth] and Falshood grapple.” John Milton, *Areopagitica: A Speech of Mr. John Milton for the Liberty of Unlicenc’d Printing To the Parlament of England* (1644).³⁴

Besides its absolute necessity to intellectual development, the ability of college students to speak freely also has implications for important issues of public policy. *See, e.g., 20 of the Most Important College Protests and Social Movements, Best Degree Programs.*³⁵ Throughout American history, university students have played a vital role in speaking out and bringing attention to some of the most pressing issues of the day. Examples include advancing the cause of civil rights for African Americans in the 1950s and 60s, equal treatment for women, and opposition to the war in Vietnam. *See, e.g., Lindsay, Opponents of Campus Free-Speech Laws Forgot the History of the Civil Rights Movement, supra* n.32. This dynamic continues to this day. *See, e.g., Anemona Hartocollis, New Wave of Student Activism Presses Colleges on Sexual Assault, The New York Times* (June 8, 2019).³⁶

These examples show that college students’ speech has both a profound impact on society, and can play a vital role in our democracy. *See Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“Those who won

³⁴ https://www.dartmouth.edu/~milton/reading_room/areopagitica/text.html

³⁵ <https://www.bestdegreeprograms.org/features/college-protests-social-movements>

³⁶ <https://www.nytimes.com/2019/06/08/us/college-protests-dobetter.html>

our independence believed that . . . public discussion is a political duty.”). Conforming UT’s speech policies to the requirements of the First Amendment will not only address the direct injuries the Members are suffering in this case and positively affect campus culture, but allow the Members and other UT students to fully participate and get the most out of their own educations.

III. AVAILABILITY OF ALTERNATIVE CAMPUS SPEECH MODELS

Speech-chilling policies like those at UT are even more injurious (and tragic) considering the wide variety of policy prescriptions available to UT administrators that both encourage inclusivity while balancing First Amendment rights. Many universities, public and private, successfully walk this line. UT should do the same.

For example, at Arizona State University harassment is defined as “unwelcome behavior, based on a protected status, which is sufficiently severe or pervasive as to create an intimidating, hostile, or offensive environment for academic pursuits, employment, or participation in university-sponsored programs or activities.” Academic Affairs Manual, Arizona State University (Sept. 29, 2017) (in policy PDF).³⁷ That policy is consistent with the Supreme Court’s only on-point decision regarding harassment in education, which defines harassment in elementary schools as behavior “so severe, pervasive, and objectively offensive, and that so

³⁷ <https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2016/01/03112702/Arizona-State-University1.pdf>

undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Davis v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999). Compare this standard for an "unwelcome behavior, based on a protected status," with UT's prohibition on speech "not necessary to the expression" of any idea, that merely "interferes with or diminishes" the listener's university experience based on amorphous "community norms." One is concrete and specific, the other is vague and overbroad.

Similar to Arizona State, George Mason University prohibits behavior that is concretely "hostile, threatening, or intimidating [] that by its very nature would be interpreted by a reasonable person to threaten or endanger the health, safety or well-being of another." Code of Student Conduct: Acts of Misconduct, George Mason University (Apr. 15, 2019).³⁸ UT's Use Policy, on the other hand, actively requires students to "be civil" and not send "rude" correspondence, as well as being "polite and courteous," without further detail or resort to even a reasonableness standard. It is one thing to prohibit clearly defined and overtly disruptive behavior, it is another to require students to conform to an ill-defined affirmative standard of community courtesy.

³⁸ <https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2013/10/15123818/hostile.pdf>

Some universities go even further in successfully protecting the free speech rights of students. Dozens of institutions have adopted the “Chicago Statement,” a free speech policy statement produced by the University of Chicago’s Committee on Freedom of Expression in 2015 “articulating the University’s overarching commitment to free, robust, and uninhibited debate and deliberation among all members of the University’s community.”³⁹ For example, Purdue University has adopted the Chicago Statement, as reflected in that school’s commitment “to free and open inquiry in all matters, [which] guarantees all members of the University community the broadest possible latitude to speak, write, listen, challenge, and learn.” Statement of Commitment to Freedom of Expression, Purdue University (May 2, 2019).⁴⁰ At Purdue, “civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be” to students or faculty. *Id.* Although the UT System Student Advisory Council endorsed the Chicago Statement, the system’s Faculty Advisory Council raised concerns and UT has taken no formal action. Kyle R. Cotton, *UT system considers free speech policy to further protect on-campus expression*, The Shorthorn (Mar. 7, 2019).⁴¹ Instead, UT continues to threaten campus-hall residents

³⁹ <https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf>

⁴⁰ <https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2002/11/02105114/Commitment-to-Freedom-of-Expression-Office-of-Marketing-and-Media-Purdue-University.pdf>

⁴¹ http://www.theshorthorn.com/news/ut-system-considers-free-speech-policy-to-further-protect-on/article_901768d4-413a-11e9-a71a-77128e95cc29.html

that “[u]ncivil behaviors” interfering with the subjective “health” or “individuality” of other students are strictly prohibited, and will be punished accordingly.

But there is no contradiction between making universities a safe place for all individuals, while also allowing those individuals free and open expression without fear of official or unofficial reprisal. Instead, UT’s policies encourage community members to anonymously report each other based on the merest possibility of mental or emotional discomfort. This system is conducive to neither the exercise of protected speech nor an effective education.

CONCLUSION

The Members intend to discuss controversial, but constitutionally protected, topics that are encompassed within UT’s vague and overbroad speech policies. The Members are thus faced with the choice of expressing themselves freely, or suffering the consequences of a credible threat of enforcement. This is not an idle threat. The policies challenged in this case have created official mechanisms for students to report their peers; these policies encourage and perpetuate a culture of outrage that threatens to not only expose the Members to official sanctions, but also strangle the free and open inquiry that has—until now—defined the university experience. Yet UT’s speech policies are not just unconstitutional and corrosive, they are unnecessary. Numerous universities across the country have embraced free

expression as their guiding principle—while still protecting students from threats and harassment.

The Members have standing to redress the injuries they are currently suffering because of UT’s speech policies, and thus Speech First has standing.

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I hereby certify that on August 16, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

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