No. 17-50641

United States Court of Appeals for the Fifth Circuit

JENNIFER LYNN GLASS; LISA MOORE; MIA CARTER,

Plaintiffs-Appellants,

– v. –

KEN PAXTON, in his official capacity as Attorney General of Texas; GREGORY L. FENVES, in his official capacity as President, University of Texas at Austin; and PAUL L. FOSTER, R. STEVEN HICKS, JEFFREY D. HILDEBRAND, ERNEST ALISEDA, DAVID J. BECK, ALEX M. CRANBERG, WALLACE L. HALL, JR., BRENDA PEJOVICH, AND SARA MARTINEZ TUCKER, in their official capacities as members of the University of Texas Board of Regents,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION
NO. 1:16CV945-LY
THE HONORABLE LEE YEAKEL

BRIEF OF AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE, AND BRADY CENTER TO PREVENT GUN VIOLENCE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Plaintiffs have set forth the interested parties in this case at pages i-ii of their opening brief. Pursuant to Fifth Circuit Rule 29.2, which requires "a supplemental statement of interested parties, if necessary to fully disclose all those with an interest in the *amicus* brief," undersigned counsel of record certifies that, in addition to those persons listed in the parties' statements, the following listed persons have an interest in this *amici curiae* brief. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

i) American Association of University Professors ("AAUP"), *amicus curiae* in this case;

ii) Brady Center to Prevent Gun Violence, *amicus curiae* in this case;

iii) Giffords Law Center to Prevent Gun Violence, *amicus curiae* in this case;

iv) Attorneys for *amici curiae:* Risa Lieberwitz, Aaron Nisenson, Nancy Long (AAUP); Mariel Goetz (Brady Center to Prevent Gun Violence); J. Adam Skaggs (Giffords Law Center to Prevent Gun Violence); Charles C. Lifland, Cynthia A. Merrill (O'Melveny & Myers LLP).

/s/ Cynthia A. Merrill
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STATEMENT OF AUTHORITY TO FILE

All parties have consented to filing of this brief, as required by Federal Rules of Appellate Procedure 29(a)(2) and 29(a)(4)(D). In accordance with Rule 29(a)(4)(E), *Amici* aver that: (i) no party's counsel authored this brief in whole or in part; (ii) no party or party's counsel contributed money intended to fund preparation or submission of the brief; and (iii) no person—other than the *amici curiae*, their members, or their counsel—contributed money intended to fund preparation or submission of the brief.

IDENTITY AND INTEREST OF *AMICI CURIAE*

The American Association of University Professors ("AAUP"), founded in 1915, is a nonprofit organization of over 40,000 faculty, librarians, graduate students, and academic professionals, many of whom are public sector employees. Its mission is to advance academic freedom and shared governance; define values and standards for higher education; promote the economic security of all engaged in higher education teaching and research; help the higher education community organize to make our goals a reality; and ensure higher education's contribution to the common good. The AAUP's policies have been recognized by the Supreme Court and are widely respected in American colleges and universities. The AAUP regularly submits *amicus* briefs in cases implicating AAUP policies or raising legal issues important to higher education or faculty members.

For more than 40 years, **the Brady Center to Prevent Gun Violence** has been dedicated to reducing gun violence through education, research, and legal advocacy. A national, nonpartisan, nonprofit organization, the Brady Center fights in courts nationwide on behalf of victims of gun violence, against dangerous gun polices and law, and in support of effective gun laws and Americans' right to live and enjoy all constitutional liberties. The Brady Center has filed numerous briefs *amicus curiae* in cases involving laws and policies that affect gun violence, and has successfully litigated cases to protect First Amendment and other constitutional freedoms when gun-related legislation or policies threaten those rights.

Giffords Law Center to Prevent Gun Violence is a national nonprofit organization with nearly 25 years of experience supporting laws, policies, and programs proven to save lives from gun violence. The organization was founded by members of the California legal community in 1993 after a mass shooting at a downtown San Francisco law firm. Today, Giffords Law Center provides comprehensive legal expertise in support of effective gun safety laws and has participated as *amicus* in dozens of state and federal cases implicating gun policy and constitutional rights across the nation.

INTRODUCTION AND SUMMARY OF ARGUMENT

As the Supreme Court observed sixty years ago, "[i]t is the business of the University to provide that atmosphere which is most conducive to speculation, experiment and creation."[1] And it is the obligation and right of individual faculty to make pedagogical choices that foster such an environment. In 2016, the University of Texas at Austin ("the University") abrogated that right. In response to a newly enacted Texas statute,[2] it adopted a policy[3] preventing individual faculty members from excluding concealed handguns from their classes. Together, the Law and Policy sharply reversed Texas's longstanding practice of keeping guns out of university classrooms—sites of vigorous debate, dispute and contestation.

The decision whether to permit or exclude handguns in a given classroom is, at bottom, a decision about educational policy and pedagogical strategy. It predictably affects not only the choice of course materials, but how a professor can and should interact with her students—how far she should press a student or a class to wrestle with unsettling ideas, how trenchantly and forthrightly she can evaluate student work. Permitting handguns in the classroom also affects the extent to

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[1] *Sweezy v. New Hampshire,* 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quotation marks and citation omitted).

[2] Senate Bill 11, 84th Leg., R.S., ch. 438, 2015 Tex. Gen. Laws 438 (2015) (hereafter "Senate Bill 11" or the "Law"); *see also* Tex. Gov't Code § 411.2031.

[3] University of Texas at Austin, Campus Concealed Carry, Handbook of Operating Procedures 8-1060 (hereafter "Campus Carry Policy" or "Policy"), ROA.297.

which faculty can or should prompt students to challenge each other. The Law and Policy thus implicate concerns at the very core of academic freedom: They compel faculty to alter their pedagogical choices, deprive them of the decision to exclude guns from their classrooms, and censor their protected speech.

Confronted with these consequences, University Professors Jennifer Lynn Glass, Lisa Moore, and Mia Carter (collectively, "Plaintiffs") challenged the Law and Policy on First Amendment and other grounds—only to have their claims dismissed when the District Court concluded that they failed to allege a cognizable injury sufficient to confer constitutional standing. (ROA.1300-03.) The court found that Plaintiffs did not "point to a specific harm they have suffered or will suffer as a result of the law and policy," but relied on a "subjective belief" about the likelihood of future harm and offered "no concrete evidence to substantiate their fears." (ROA.1302-03.) In short, the court read Plaintiffs' Amended Complaint as simply asserting a looming threat of gun violence. The holding betrays a fundamental misunderstanding of the First Amendment rights at issue in this case and a misapplication of the standards for deciding a motion brought under Federal Rule of Civil Procedure 12(b)(1).

Plaintiffs do not allege that the Law and Policy as a whole are unconstitutional or argue that the University overall must be a gun-free zone. Rather, Plaintiffs contend that to the extent the Law and Policy require them to

permit concealed handguns in their classes, they suffer an invasion of their First Amendment right to academic freedom, a cognizable injury.[4] That invasion occurs for at least three reasons. First, the Law and Policy impermissibly chill Plaintiffs' academic rights by compelling them either to revise their considered teaching methods in light of a fundamentally altered educational environment, *or* to violate the Policy by excluding guns from their classrooms and risk discipline or loss of their positions. Self-censorship, undertaken to avoid a regulatory violation, confers standing to bring an anticipatory challenge to an unconstitutional law. Second, in forcing Plaintiffs to permit handguns in their classrooms, the Law and Policy wrest from Plaintiffs the right to make choices about classroom management according to their best educational judgment. Third, by expressly forbidding Plaintiffs from even discouraging students from bringing guns to class, the University overtly censors Plaintiffs' classroom discussion of public issues. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976).

Plaintiffs' core contention—that admitting handguns into classrooms alters the educational environment—cannot reasonably be dismissed as "subjective fear" insufficient to confer standing, as the District Court did below. Plaintiffs'

[4] *See* Amended Complaint, ROA.1123-35, 1129-30, ¶¶ 36-38, 50.

allegations articulate a widespread belief among educators that the presence of guns interferes with pedagogy, a belief confirmed by social science research demonstrating that the very presence of guns can propel discomfort into overt aggression, even if no one threatens an actual shooting. The District Court faulted Plaintiffs for not producing "concrete evidence to substantiate their fears." (ROA.1303.) In ruling on a motion brought under Rule 12(b)(1), however, a court must "'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 889 (1990)). Nevertheless, to aid the Court's understanding of Plaintiffs' alleged injuries, *amici* identify "concrete evidence" demonstrating that Plaintiffs' concerns amount to far more than "subjective" beliefs.

Because Plaintiffs have adequately established their standing, *amici* respectfully request that this Court reverse the judgment below.

BACKGROUND

Senate Bill 11 permitted, for the first time, those holding licenses for the concealed carry of handguns[5] to bring their guns to class. The statute expressly permits license holders to carry concealed handguns on university campuses and in university buildings, and bars public institutions from adopting any rule or

[5] *See* Tex. Gov't Code § 411.171 *et seq.*

regulation to the contrary. *Id.* § 411.2031(b), (c), (e); *see also* Tex. Penal Code 46.035(f)(3). University presidents are charged with developing policies for individual campuses, but may not establish "provisions that generally prohibit or have the effect of generally prohibiting license holders from carrying concealed handguns on the campus of the institution." *Id.* § 411.2031(d-1).

Following passage of the Law, University of Texas at Austin President Gregory L. Fenves convened a Campus Carry Policy Working Group to gather information and recommend a campus wide policy.[6] The Working Group's Final Report acknowledged that the "most consistent view" expressed by faculty and many students was fear of the impact concealed weapons would have in the classroom. (ROA.235.) It admitted that "[*e*]*very member of the Working Group—including those who are gun owners and license holders—thinks it would be best if guns were not allowed in classrooms*." (ROA.250 (emphasis added).) Nevertheless, it did not recommend such an exclusion, believing it had no choice but to permit handguns in classrooms because excluding them would have the effect of generally prohibiting concealed carry on campus, in violation of Section 411.2031(d-1). (ROA.251.) The Working Group did not indicate whether it considered the less restrictive option of permitting *individual* faculty to decide to

[6] *See* Campus Carry Policy Working Group Final Report (December 2015) ("Working Group Report"), ROA.225.

exclude guns from their own classrooms. After President Fenves and the University of Texas Board of Regents approved the Policy, it went into effect on August 1, 2016. (ROA.295, 308.)

With the exception of formal disciplinary hearings,[7] the Policy requires faculty to teach and advise students in the presence of handguns if students wish to carry them. While faculty with individual offices may prohibit guns in those offices, they must give "oral notice" of the prohibition and make "reasonable arrangements" to meet license holders elsewhere if they desire. (ROA.272, § VII.C.1.) In a July 14, 2016 email to faculty, UT-Austin Executive Vice President and Provost Maurie McInnis stated that, as part of the new Policy, faculty "cannot use syllabi to discourage the concealed carry of handguns." (ROA.308.) Faculty who violate the Policy may be subject to University discipline.[8] (ROA.246.)

ARGUMENT

I. LEGAL STANDARDS

This Court reviews dismissal of claims for lack of standing *de novo.* *Friends of St. Frances Xavier Cabrini Church v. Fed. Emergency Mgmt. Agency*, 658 F.3d 460, 466 (5th Cir. 2011). To establish constitutional standing, a plaintiff

[7] *See* ROA.272, § VII.C.2.

[8] The Policy, the Working Group Report, President Fenves' transmittal letter to the Chancellor, the McInnis email, and Plaintiffs' declarations are incorporated in the Amended Complaint by reference. (ROA.1127, ¶ 42.)

must allege (1) an injury in fact—that is, the invasion of a legally protected interest that is "concrete and particularized" as well as "actual or imminent"; (2) a causal connection between the injury and the challenged conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan,* 504 U.S. at 561.

On a motion to dismiss, a court must accept factual allegations as true, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and construe affidavits "in the light most favorable" to the plaintiff. *D&F Afonso Realty Trust v. Garvey,* 216 F.3d 1191, 1194 (D.C. Cir. 2000); *Initiative & Referendum Institute v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006) (en banc).

II. THE FIRST AMENDMENT ENCOMPASSES A RIGHT TO ACADEMIC FREEDOM.

The Supreme Court recognized academic freedom as a protected right over half a century ago, observing that "[t]he essentiality of freedom in the community of American universities is almost self-evident. … To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

The academic freedom invoked by the Court extends to classroom teaching as well as research. "The classroom is peculiarly the 'marketplace of ideas,'" and for that reason, academic freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *see also Clark v. Holmes,*

474 F.2d 928, 931 (7th Cir. 1972) ("[I]t is now clear that academic freedom, the preservation of the classroom as a 'marketplace of ideas,' is one of the safeguarded rights."). Academic freedom serves most crucially to protect the "robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Keyishian*, 385 at 603 (quoting *United States v. Assoc. Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)). The University environment plays a vital role in fostering such critical inquiry:

> Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them.

Wieman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurtor, J., concurring).

Academic freedom encompasses not only a professor's own classroom expression, but her choice of course material and pedagogical strategies. *See Kingsville Ind. Sch. Dist. v. Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980) (high school teacher's use of controversial role-playing to teach history of Reconstruction protected by First Amendment); *East Hartford Educ. Assoc. v. Bd. of Educ.*, 562 F.2d 838, 843 (2d Cir. 1977) (recognizing "[f]reedom to teach in the

manner of one's choice" as a "universally recognized" form of academic freedom).[9]

III. THE LAW AND POLICY CHILL PLAINTIFFS' FIRST AMENDMENT RIGHT TO ACADEMIC FREEDOM BY FORCING THEM TO CENSOR THEIR PEDAGOGICAL STRATEGIES.

The Law and Policy confront Plaintiffs with a stark choice: They must either revise their preferred course materials and pedagogical strategies in response to an altered academic environment or violate the policy by requiring gun-free classrooms and risk University discipline. The chilling of academic freedom and self-censorship prompted by such a choice constitute a cognizable injury.

As *amicus* AAUP has long affirmed, "[c]ontroversy is at the heart of the free academic inquiry."[10] Subjects on the cutting edge of research, or at the center of political and cultural debates, may unsettle students and generate heated classroom discussion. Faculty challenge students' deep-seated convictions as a means of

[9] Relying on decisions from other Circuits, Defendants argued below that the right to academic freedom belongs only to institutions, not to individual faculty. This claim ignores *Sweezy*'s finding of "an invasion of [individual] petitioner's liberties in the areas of academic freedom and political expression." 354 U.S. at 250. And it ignores this Court's decision in *Kingsville Independent School District* that a teacher's classroom discussion is protected discourse. 611 F.2d at 1113. While *Kingsville* did not articulate its holding in terms of "academic freedom," it relied in part on *Minarcini v. Strongsville City School Dist*rict, 541 F.2d 577 (6th Cir. 1976), which stated that a teacher's classroom speech would receive First Amendment academic freedom protection. *Id.* at 582.

[10] AAUP, 1940 Statement of Principles on Academic Principles and Tenure, with 1970 Interpretive Comments, https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure ; *see also Rodriguez v. Maricopa County Cmty. College Dist.,* 605 F.3d 703,708 (9th Cir. 2010) ("Intellectual advancement has traditionally progressed through discord and dissent ….).

leading them into new intellectual territory. And in the vigorous give-and-take of classroom discussion, students challenge each other.

Plaintiffs' declarations confirm that their pedagogy elicits and requires intellectual risk. For instance, as a sociologist and demographer, Professor Glass teaches about welfare tax policies, gender stratification, abortion, racism in health care, and LGBT assisted reproduction—subjects that elicit "strong emotional reactions" and "extreme views" from students. (ROA.135, ¶ 15.) Her syllabus invites active exchange of opinions—indeed, her grading standards require such activities. (ROA.137, ¶ 21.) Classroom discussions have in the past grown "heated," requiring Professor Glass's "constant supervision to ensure that discourse remains civil." (ROA.135, ¶ 15.) Professor Carter explains that her teaching "involves argumentation and critique, rational and impassioned debate, rigorous analysis, and sometimes challenging and uncomfortable processes of intellectual discovery"—activities she regards as "fundamental to effective pedagogy." (ROA.145, ¶ 14.)

But while academic debate thrives on differences of opinion, Plaintiffs allege (and social science confirms) that the presence of guns—even if not flourished or discharged—can significantly alter the dynamics of provocative exchanges. Such an alteration in the classroom environment necessarily impacts

faculty's decisions about course objectives and pedagogical strategy. A large body of evidence confirms that Plaintiffs' apprehensions are anything but "subjective."

A. Self-Censorship to Avoid a Regulatory Violation Is an Injury in Fact.

Self-censorship undertaken to avoid violating a regulation or statute constitutes a cognizable First Amendment injury. *See Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988) (finding standing where alleged injury was self-censorship); *Hous. Chronicle Publ'g Co. v. City of League City*, 488 F.3d 613, 618 (5th Cir. 2007) ("[C]hilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement."). Admittedly, such injuries are "inchoate"—precisely *because* conduct has been chilled—but they are nevertheless real. *Walker*, 450 F.3d at 1088. Where the need for protective self-censorship arises, plaintiffs are not required to violate the law and suffer enforcement before commencing an anticipatory challenge. *Justice v. Hosemann,* 771 F.3d 285, 291 (5th Cir. 2014). If a plaintiff can show she is "seriously interested in disobeying" the challenged law or regulation and the defendants are "seriously intent on enforcing" it, the case presents a viable case or controversy under Article III. *See Hosemann,* 771 F.3d at 291; *Hous. Chronicle Publ'g Co.*, 488 F.3d at 619.

Governmental action may chill First Amendment rights even where, as here, it does not facially restrict speech or expression. *Laird v. Tatum,* 408 U.S. 1, 12-13 (1972) (governmental action is "subject to constitutional challenge even though it

has only an indirect effect on the exercise of First Amendment rights"); *see also NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 461-63 (1958) (finding mandatory production of membership lists unconstitutional impingement on freedom of association). Nor does standing require a risk of criminal prosecution or civil liability, where other effects create chill. *See Walker,* 450 F.3d at 1095-96. In *Walker,* for example, the court found that organizations had standing to challenge a Utah statute requiring wildlife initiatives to obtain approval of two-thirds rather a than simple majority of voters, where the organizations had previously participated in wildlife initiative campaigns but were deterred from doing so in Utah by the super-majority requirement. *Id.* at 1087-92. What matters in such cases is that "the challenged exercise of governmental power [is] regulatory, proscriptive, or compulsory in nature, and the complainant [is] either presently or prospectively subject to the regulations, proscriptions, or compulsions that he [is] challenging." *Laird,* 408 U.S. at 11.

Plaintiffs' allegations readily satisfy these requirements. Contrary to the District Court's assumptions (ROA.1301), the Law and Policy unquestionably regulate Plaintiffs' actions, barring them from prohibiting handguns in their classrooms. Regardless of whether individual students in their courses *do* in fact carry hidden guns, Plaintiffs must teach in an environment in which faculty and students are aware that others *may* be doing so. Each of the Plaintiffs declares that

she would exclude guns from her classroom if permitted, but anticipates disciplinary or other adverse consequences were she to do so.[11]

Plaintiffs also allege that the potential presence of guns will necessarily compel different pedagogical choices—amounting to self-censorship. Professor Moore claims: "[T]o properly teach my classes, especially the controversial ones, I must be free from fear from students with guns and so must my students." (ROA.141, ¶ 11.) Professor Carter concurs that the possible presence of guns "impedes [her] ability to create a daring, intellectually active, mutually supportive, and engaged community of thinkers." (ROA.145, ¶ 14.) And Professor Glass claims she will have to "radically revise" her course requirements if students can bring guns to class. (ROA.137, ¶ 21.) By inhibiting Plaintiffs' ability to cultivate their classrooms as marketplaces of challenging ideas, the Law and Policy infringe their First Amendment rights, an alleged injury that far exceeds the "identifiable trifle" that the Supreme Court has held sufficient for Article III standing. *See United States v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 690 n.14 (1973).

B. Plaintiffs Allege an Objectively Reasonable Chill.

The District Court discounted Plaintiffs' alleged injuries as nothing more than "subjective" fear—speculative harms contingent on uncertain third-party

[11] ROA.134, ¶¶ 9, 12; ROA.140, ¶¶ 8, 9; ROA.143, 145, ¶¶ 9, 16.

actions and unsubstantiated by "concrete evidence." (ROA.1302-03.) This both misunderstands the First Amendment academic rights asserted by Plaintiffs and misapplies the law governing motions to dismiss. Plaintiffs' allegations do not turn on *possible* governmental action as did the allegations of "subjective chill" that the Supreme Court rejected as a basis for standing in *Laird* and *Clapper v. Amnesty International USA*. *See* 408 U.S. at 13-14; 568 U.S. 398, 410-14 (2013). And the law does not require Plaintiffs to produce "concrete evidence" to withstand a motion to dismiss; rather, the court must presume that the complaint's "'general allegations embrace those specific facts … necessary to support the claim.'" *Lujan,* 504 U.S. at 561 (quoting *Nat'l Wildlife Fed.*, 497 U.S. at 889). In fact, as detailed below, abundant evidence demonstrates that Plaintiffs' allegations about the chilling effect of guns on classroom dynamics are "objectively reasonable"—as Plaintiffs could have shown had the lower court permitted their claims to proceed.

1. Plaintiffs' Allegations Are Distinguishable from Those in *Laird* and *Clapper*.

In *Laird,* the plaintiffs challenged the Army's alleged surveillance of civilian political activity. *Laird,* 408 U.S. at 2. As the Court described it, the alleged "chilling effect" arose "merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in

future take some *other* and additional action detrimental to that individual." *Id.* at 11 (emphasis in original). The plaintiffs failed to clarify "the precise connection between the mere existence of the challenged system and their own alleged chill," as the harm appeared to depend on the future and uncertain actions of others. *Id.* at 12-13. The *Clapper* plaintiffs challenged a provision of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1881a, and alleged injury based on the likelihood that their communications would be intercepted under Section 1881a at some indeterminate future time. 568 U.S. at 401, 410. Noting the "highly attenuated chain of possibilities" that would have to take place for the alleged harm to occur, the Court concluded that the asserted injury was not "certainly impending," but merely "speculative"—and thus insufficient to confer standing. *Id.* at 410-14.

The circumstances here are nothing like those in *Laird* and *Clapper*. Unlike the possible injuries alleged in those cases, the injury to Plaintiffs' First Amendment rights was "certainly impending" at the time they filed their initial complaint, when Plaintiffs were scheduled to begin a new semester. The alleged chill does *not* depend on uncertain third-party actions, such as a student brandishing or firing a handgun, as the District Court erroneously assumed. (ROA.1302.) While the risk of such developments certainly exists, it need not occur to produce the injury at issue here: chill arising from a necessary

accommodation to the potential presence of firearms in the classroom and students' knowledge of that potential.

Nor are such chilling effects "subjective." To be cognizable as an injury, a "'chilling' effect . . . must be objectively reasonable." *Zanders v. Swanson*, 573 F.3d 591, 593-94 (8th Cir. 2009); *see also Walker*, 450 F.3d at 1088 (chilling is cognizable injury if it "arise[s] from an objectively justified fear of real consequences") (quotation marks and citation omitted); *Benham v. City of Charlotte*, 635 F.3d 129, 135 (4th Cir. 2011) ("Government action will be sufficiently chilling when it is likely to deter a person of ordinary firmness from the exercise of First Amendment rights." (citation and quotation marks omitted)).[12] The relevant question, then, is whether alterations in course materials and/or teaching methodologies, instigated by the possibility of handguns in the class, are objectively reasonable—that is, whether a "person of ordinary firmness" would be deterred from teaching volatile topics when guns are added to the mix.

2. Educators Nationwide Share Plaintiffs' Concerns, Which Are Validated by Social Science Research—

Educators at the University and across the nation share Plaintiffs' belief that the presence of firearms mandates less pedagogically sound strategies. The

[12] *See also Friends of the Earth, Inc. v. Laidlaw Environmental Servs.*, 528 U.S. 167, 180-85 (2000) (where it was undisputed that defendant discharged excess pollutants, plaintiffs' fear of using the affected waterways was "entirely reasonable" and standing existed).

Working Group's Final Report explained that faculty (and many students) expressed a "deep-seated fear that the knowledge that one or more students might be carrying a concealed weapon would have a substantial chilling effect on class discussion." (ROA.227.) In transmitting the proposed Policy to the Chancellor, President Fenves reported that the Faculty Council had passed a resolution calling for exclusion of guns from classrooms, and that all large private institutions in Texas had exercised the statutory option to prohibit concealed guns on their campuses. (ROA.295.)

Some faculty expressed their opposition to the Law and Policy by cutting ties with the University.[13] Job applicants have declined University employment and prospective students and invited speakers have stayed away, citing the potential of guns on campus—powerfully rebutting any notion that Plaintiffs' concerns are merely "subjective."[14]

Indeed, Plaintiffs' concerns echo those expressed in a 2015 survey of faculty

[13] *See, e.g.,* Martinez, Michael & Melvin, Don, *Texas dean quits, partly over state's new campus gun law,* CNN (Feb. 26, 2016), http://www.cnn.com/2016/02/26/us/texas-professor-quits-gun-law/index.html; Edwards, Harry, *A Letter To The University Of Texas About Campus Concealed Carry*, HuffPost (Aug. 25, 2016), https://www.huffingtonpost.com/entry/a-letter-to-the-university-of-texas-about-campus-concealed-carry_us_57bf596ce4b04193420e57e6.

[14] *See* Dearman, Eleanor & Selby, Gardner, *Professor:"Concrete examples" of teachers, students spurning University of Texas due to gun law*, Politifact Texas, (Aug. 26, 2016), http://bit.ly/2bngLPG; *see also* GunFreeUT, *The Impact of Campus Carry: Recruitment, Retention, Reputation Damage,* http://gunfreeut.org/resources/impact-of-campus-carry/.

and staff at seven Kansas public universities.[15] Of 10,866 respondents, seventy percent reported that they "discuss material that challenges views and deeply held beliefs in ways that others may find uncomfortable." (Survey 2.) The same percentage believed that guns on campus would negatively impact their teaching and sixty-six percent said that permitting guns in the classroom would "limit[ ] their academic freedom to teach the material and engage with students in the way that optimizes learning." *(*Survey 2.) Sixty percent said they would "need to change how they teach their course if guns are allowed in the classroom." (Survey 2.)

University faculty across the country overwhelmingly share these beliefs. In 2015, *amicus* AAUP joined the American Federation of Teachers, the Association of American Colleges and Universities, and the Association of Governing Boards of Universities and Colleges in a Joint Statement Opposing Campus Carry laws because "a rigorous academic exchange of ideas may be chilled by the presence of weapons. Students and faculty members will not be comfortable discussing controversial subjects if they think there might be a gun in the room."[16] In the

[15] Fort Hayes State University Docking Institute of Public Affairs, Kansas Board of Regents Council of Faculty Senate Presidents Campus Employees' Weapons Survey, 4 (January 2016) ("Survey"), https://www.fhsu.edu/uploadedFiles/executive/docking/Regents%20FacultyStaff%20Gun%20Survey%202015%20(2).pdf.

[16] AAUP, Joint Statement Opposing "Campus Carry" Laws (Nov. 12, 2015), https://www.aaup.org/file/CampusCarry.pdf; *see also* Statement from the American Association

twenty-two states which permit colleges and universities to set their own policies about guns on campus, almost every school has elected not to permit them, and over a dozen additional states and the District of Columbia restrict guns on campus by statute.[17]

Educators' apprehensions are verified by social science research. Studies dating back to 1967 have demonstrated the "weapons effect": the tendency of provoked individuals to behave aggressively when in the presence of actual guns, pictures of guns, and even words referring to weapons.[18] This research suggests that carrying a concealed weapon can increase aggressive behavior by the person carrying.[19] But it also demonstrates that words or pictures of guns exert a priming effect on individuals—*even if they themselves are not carrying guns*—triggering

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of State Colleges and Universities on Texas Senate Bill 11 (June 2, 2015), http://www.aascu.org/MAP/PSSNRDetails.aspx?id=13455.

[17] Everytown for Gun Safety, *Guns on Campus* (listing state statutes and university handbooks and regulations), https://everytownresearch.org/guns-on-campus/#foot_note_3.

[18] *See* Berkowitz, Leonard & LePage, Anthony, *Weapons as Aggression-Eliciting Stimuli,* 7.2 J. of Personality and Social Psych., 202 (1967) (increased application of electric shocks by provoked men in the presence of a gun not belonging to the participants), http://dx.doi.org/10.1037/h0025008; Benjamin, Arlin James, Jr. & Bushman, Brad J., *The Weapons Effect,* 19 Current Opinion in Psychology, 93, 96 (2018) (reviewing research), http://www.sciencedirect.com/science/article/pii/S2352250X17300969?via%3Dihub.

[19] *See, e.g.,* Hemenway, David, et al., *Is an Armed Society a Polite Society? Guns and Road Rage*, 38 Accident Analysis & Prevention 687 (2006) (drivers with concealed firearms more prone to engage in aggressive driving behaviors than those without) http://www.sciencedirect.com/science/article/pii/S0001457505002162.

the accessibility of aggressive concepts.[20] As a recent review summed up: "[T]here is a growing body of research showing that weapons increase aggressive thoughts and hostile appraisals, which helps explain why weapons also increase aggressive behavior."[21] In other words, the "mere presence of weapons" magnifies both aggressive cognition and aggressive conduct—particularly in stressful situations. And this heightened aggression afflicts both those who carry weapons and those who perceive their mere presence.

College students may be particularly susceptible to cued aggression. As a recent report from the Johns Hopkins Bloomberg School of Public Health explains:

> Compared with adults and younger children, adolescent decision-makers … are more sensitive to stress, both psychologically and biophysiologically. … [T]ypical developmental processes in adolescence are associated with more risk-taking, and poorer self-control in the transition to adulthood. Guns may be called on in the very situations in which adolescents are most developmentally vulnerable: in the context of high emotional arousal, situations that require rapid, complex social information processing, those that involve reinforcing or establishing peer relationships (i.e., showing off), or in conditions of perceived threat.[22]

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[20] *See, e.g.,* Anderson, Craig A., et al., *Does the Gun Pull the Trigger? Automatic Priming Effects of Weapons Pictures and Weapon Names*, 9 Psychol. Sci. 308 (1998), http://dx.doi.org/10.1111/1467-9280.00061.

[21] Benjamin, Arlin James, Jr. & Bushman, Brad J., *The Weapons Effect,* 19 Current Opinion in Psychology 93, 96 (2017), http://www.sciencedirect.com/science/article/pii/S2352250X17300969?via%3Dihub.

[22] Webster, Daniel W., et al., *Firearms on Campuses: Research Evidence and Policy Implications* 18-19 (2016) (citations omitted), http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/_pdfs/GunsOnCampus.pdf.

Vigorous collegiate debate and intellectual risk taking can create a charged atmosphere in which guns, or the suspected presence of guns, may power aggression. Even if no violence or actual threat of violence occurs, heightened verbal aggression may sour academic discourse, inhibit students, and impede learning. Plaintiffs' alleged chill does not turn on a belief that, as the Attorney General flamboyantly put it in the court below, "adults who have been licensed to carry handguns could attack them at any moment if they say anything potentially controversial in class." (ROA.969.) Rather, as experienced and highly competent teachers, they recognize that their pedagogy must anticipate and accommodate an altered dynamic: by reducing or eliminating controversial topics, dropping requirements that students engage in vigorous debate, holding back in response to students' fears. Such a chill of Plaintiffs' academic freedom amounts to a cognizable injury in fact caused by the challenged Law and Policy.

IV. THE LAW AND POLICY INFRINGE PLAINTIFFS' FIRST AMENDMENT RIGHTS BECAUSE THEY DO NOT PERMIT INDIVIDUAL FACULTY TO EXCLUDE GUNS FROM THEIR CLASSROOMS.

The Law and Policy violate Plaintiffs' First Amendment academic freedom for a second reason: They improperly wrest from individual faculty the right to determine that guns cannot reasonably be permitted in their individual classrooms. As discussed above, that question is inextricable from an individual professor's course objectives and pedagogical strategy. (*See supra* pp. 15, 19-21.) In

considering factors such as whether course topics will arouse heated dispute and the pedagogical importance of challenging the status quo, a faculty member should be able to decide that students should not be permitted to bring guns to class.

The Policy acknowledges that guns pose singular risks in certain sites, such as laboratories storing "extremely dangerous chemicals," but does not specify the precise facilities. (ROA.273, § VII.F.) Just as chemists best determine which chemicals are combustible, individual faculty must be able to decide that the ideas in their courses are particularly volatile, warranting the exclusion of guns.

Academic freedom encompasses, among other things, the "freedom to teach," *East Hartford Education Assoc.*, 562 F.2d at 843, and "the freedom of individual teachers to not suffer interference by the administrators of the university." *Rubin v. Ikenberry*, 933 F. Supp. 1425, 1433 (C.D. Ill. 1996) (citations omitted). As *amicus* AAUP explains, the "freedom to teach" includes "the right of the faculty to select the materials, determine the approach to the subject, make the assignments, and assess student academic performance."[23] Because, as University of Texas and Kansas faculty concur, guns in the classroom may preclude use of certain materials, distort classroom dynamics, and affect academic performance, the right to teach necessarily includes the right to determine that guns cannot be included in the mix. By denying faculty the ability

[23] AAUP, *Freedom to Teach,* AAUP Policy Documents and Reports, 28 (11th ed. 2015).

to make this context-specific decision, the Policy improperly subjects Plaintiffs' teaching to administrative interference. And it denies them the constitutionally protected academic freedom to cultivate an atmosphere "conducive to speculation, experiment and creation." *Sweezy,* 354 U.S. at 263 (Frankfurter, J., concurring) (quotation marks and citation omitted). This abridgement of academic freedom is direct and neither speculative nor uncertain.

V. THE UNIVERSITY'S PROHIBITION ON DISCOURAGING GUNS IN THE CLASSROOM VIOLATES PLAINTIFFS' SPEECH RIGHTS.

The Policy additionally infringes Plaintiffs' First Amendment rights by directly censoring their classroom speech. After the Policy was approved, Executive Vice President and Provost Maurie McInnis emailed University faculty that they "may not impose a ban on concealed handguns in their classrooms, and *they cannot use syllabi to discourage the concealed carry of handguns*." (ROA.308.) This directive amounts to a governmental content-based prior restraint on speech in violation of the First Amendment. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828-29 (1995).

Plaintiffs' status as employees cannot justify such censorship. Public employees retain their right to address matters of "public concern" where the employee's interest in speaking outweighs the employer's interest in ensuring the "efficiency" of its services. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 568-74 (1968) (public school teacher may protest school board's allocation of resources

between academics and athletics); *Connick v. Myers*, 461 U.S. 138, 142 (1983). This right receives heightened protection in the university where academic freedom applies because, as a safeguard of democracy, such freedom is itself a matter of public concern. Thus while the Supreme Court has held that public-employee communications made "pursuant to their official duties" lack constitutional protection, it expressly reserved the question of whether the holding applies to scholarship or teaching, recognizing that classroom speech may implicate constitutional interests "not fully accounted for by [the] Court's customary employee-speech jurisprudence." *Garcetti v .Ceballos,* 547 U.S. 410, 421, 425 (2006).

Addressing this question, the Ninth Circuit held that "*Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor." *Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014). *See also Lee v. York County Sch. Div*., 484 F.3d 687, 695 n.11 (4th Cir. 2007) (declining to apply *Garcetti* in determining whether high school teacher's bulletin board postings constituted protected speech).[24] As these courts recognize, withholding

[24] *See also Adams v. Trs. of the Univ. of N. Carolina-Wilmington*, 640 F.3d 550, 562-64 (4th Cir. 2011) (declining to apply *Garcetti* where professor's speech, directed to national and international audiences, concerned scholarship and teaching); *cf. Renken v. Gregory*, 541 F.3d 769, 773-75 (7th Cir. 2008) (applying *Garcetti* to faculty member administering grant).

First Amendment protection from classroom speech would eviscerate the longstanding doctrine of academic freedom.

While no particular syllabus was before the court below, a statement discouraging guns in the classroom would pass the test laid down in *Pickering* and *Connick* for First Amendment protection. Whether a public employee's speech addresses a "public concern"—the test's first element—is determined from the content, form and context of a given statement. *Connick,* 461 U.S. at 147-48. There can be no doubt that the issue of bringing guns to class is one of intense public scrutiny and importance. *See Kennedy v. Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359, 372 (5th Cir. 2000) (employee speech "made against the backdrop of public debate" may relate to a public concern even if made privately). The context and form of a university course syllabus—which may be distributed to hundreds of students or posted online—affords it a broad scope, while even employee speech delivered privately has been found to implicate matters of public concern. *See Kennedy,* 224 F.3d at 374.

The balance of interests also favors First Amendment protection for a syllabus statement discouraging guns. Plaintiffs possess legitimate interests in deterring students from bringing guns to class because, as discussed above, the presence of guns in the classroom academic objectives. By discouraging guns, Plaintiffs would *encourage* an atmosphere in which vibrant intellectual debate and

contention could flourish. Plaintiffs' interests flow not from personal concerns but from goals intrinsic to the academic mission.

The University, by contrast, has no articulated interest in squelching Plaintiffs' speech. Neither the Working Group in their Final Report nor President Fenves, in submitting the proposed Policy to the Chancellor, identified any value in preventing faculty from excluding guns from their classrooms. Indeed, the Working Group unanimously concluded "it would be best if guns were not allowed in classrooms," but believed that broadly mandating such a policy would violate Section 411.2031(d-1). (ROA.251.) But syllabi statements by individual faculty *discouraging* guns in classrooms would not amount to a prohibition—particularly when faculty would have no means of enforcing such a ban. And such individual statements would no more interfere with the University's administration of the Policy than do the various exceptions to the right to carry guns carved out in the Policy itself—including faculty's right to exclude guns from individual offices. *See Pickering,* 391 U.S. at 573 (where teacher's comments did not interfere with teaching or the school's operation, the administration's interest in limiting teacher's speech on public matter was no greater than its interest in limiting contributions by the general public).

Because the McInnis directive burdens conduct protected by the First Amendment, Plaintiffs need not violate the regulation and suffer the consequences

to gain standing. *See Hosemann*, 771 F.3d at 291. They need only show—as they have here—that they possesses a serious interest in disobeying the Law and Policy and the government possesses a serious interest in enforcement. *See Hosemann*, 771 F.3d at 291; *Hous. Chronicle Publ'g Co.*, 488 F.3d at 619.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to reverse the judgment below and remand for further proceedings.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE UNDER RULES 29(a) and 32(a)

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 6494 words, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type.

Dated: November 20, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2017, I electronically filed the foregoing *amicus curiae* brief with the Clerk for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the CM/ECF system.

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