23-15

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DO NO HARM,

Plaintiff-Appellant

v.

PFIZER INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of New York
Case No. 1:22-cv-7908

BRIEF OF *AMICI CURIAE* YOUNG AMERICA'S FOUNDATION, MANHATTAN INSTITUTE, AND SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Amici Curiae Young America's Foundation, Manhattan Institute, and Southeastern Legal Foundation state that they have no parent corporation and that they do not issue stock.

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Young America's Foundation (YAF) is a national, nonpartisan, nonprofit organization that ensures young Americans understand 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. YAF engages in dialogue on a variety of issues and hosts prominent conservative speakers on campuses nationwide. YAF, like Plaintiff Do No Harm here, has been subject to government demands that it turn over its membership lists as a condition to filing suit. *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.

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. It has historically sponsored scholarship supporting the rule of law and opposing government overreach, including in the marketplace of ideas.

Southeastern Legal Foundation (SLF) is a national, nonprofit legal organization dedicated to defending liberty and Rebuilding the

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[1] *Amici* 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* and their counsel made a monetary contribution to fund its preparation or submission. All parties consented to the filing of this brief.

American Republic. For nearly 50 years, SLF has advocated in and out of the courtroom to protect our First Amendment rights. Through its 1A Project, SLF educates college students and administrators about the First Amendment and defends the right to engage in open inquiry on our nation's college campuses—the traditional marketplace of ideas.

BACKGROUND

College students and Do No Harm members A and B filed pseudonymous declarations because they "fear[ed] reprisal from other students," "professors," "future employers," and the "public" in retaliation for participating in this litigation J.A.37, 40. Both students attended Ivy League universities, maintained good grades, and held campus leadership positions. J.A.36, 39. They participated in the challenge to Defendant Pfizer's Fellowship because they support Do No Harm's mission of "protect[ing] healthcare from" the "open embrace of racial classifications in medical fellowships and programs." J.A.34, 37, 40. They spoke out on "the controversial issue of affirmative action" and naturally feared reprisal both on and off campus. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 312 (1986) (Marshall, J., dissenting).

Despite the undisputed fear of reprisal, the panel affirmed the district court and forced Do No Harm either to abandon its lawsuit or disclose its nonparty members' identities. *Do No Harm v. Pfizer Inc.*, No. 23-15, 2024 WL 949506, at *1 (2d Cir. Mar. 6, 2024). The majority conceded that no binding precedent "squarely address[ed] the specific issue

here," but—without considering the First Amendment—it proceeded to require nonparties to disclose their names. *Id.* at *8. Judge Wesley rejected the panel's "unfounded 'real name' test," noting that "the majority" never "says" why a member's name has any relevance to the standing inquiry. *Id.* at *14, 17 (Wesley, J., concurring in part and in the judgment).

Amici do not advance any position here on the underlying merits of this case. But they are deeply concerned about the panel's ruling regarding lack of associational standing. That ruling has the potential to stop numerous lawsuits seeking to vindicate constitutional rights where an organization's members require anonymity due to hostility and fear of retaliation by public officials and other students.

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." 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 discuss their beliefs. That self-censorship has distorted marketplaces of ideas both on and off campus into ideological monopolies. But the same studies also show that most students want to dismantle these monopolies.

The history and precedent of the First Amendment's anonymity protection can help bust the government 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 allowed the NAACP to successfully fight racial discrimination.

By conditioning access to federal court on disclosing Do No Harm's members, the panel contravened the First Amendment. The panel's opinion puts litigants to a Hobson's choice: disclose or face dismissal. That rule—as the concurrence recognized—has "no basis." *Do No Harm*, 2024 WL 949506, at *14 (Wesley, J., concurring in the judgment). The First Amendment protects Americans from the harassment, threats, and opprobrium that come from forced disclosure. It requires at least exacting scrutiny of such requirements. But neither the panel nor Pfizer could identify even a *single* reason—let alone a sufficiently important one—how forcing Do No Harm to disclose its members' identities would establish standing. This Court should grant rehearing en banc and hold that establishing associational standing does not require publicly disclosing nonparties' names.

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 dialogue advances the pursuit of truth. *See Healy v. James*, 408 U.S. 169, 180 (1972). Unfortunately, students nationwide realize that a monopoly on ideas has replaced the marketplace. Since 2016, the nonpartisan 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 most recent report 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, growing 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 "non-controversial topics." *Id.* at 15.

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

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 144 essays challenging corruption 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). 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).

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, 15 cabinet members, 20 senators, and 34 congressmen published anonymous political writings. *Id.* In sum, our country's earliest days are marked by a history of anonymous speech.

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. 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 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 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). People may choose anonymity—especially in this digital age—for "fear of economic or official retaliation," "concern about social ostracism," or the desire to preserve as much "privacy as possible." *Id.* 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. Hostile states began demanding that, as a condition for operating within their states, the NAACP turn over its supporters' names. Fear drove many of those supporters to abandon the NAACP despite the good work it was doing. 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.

Because of the grave risks from compelled disclosure, government must satisfy at least exacting scrutiny to justify 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." *Bonta*, 141 S. Ct. 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.* (cleaned up). 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.

III. The panel's refusal to allow the nonparty student-members to proceed anonymously violates the First Amendment.

The anonymous students' understandable reluctance to reveal their identities confirms a troubling national trend. The data reflect that most students believe college campuses stifle free speech. Many students self-censor because they fear the negative reactions of their peers and discipline for perceived "offensive" speech.

Both history and precedent show 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. 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 marketplace of ideas. Similarly, the First Amendment also protects the students' ability to associate anonymously with Do No Harm. Forced associational disclosure subjects members—especially those with minority views—to threats, harassment, and academic and economic repercussions.

The Second Circuit panel did not explain how forced disclosure satisfied exacting scrutiny. To begin, neither the panel nor Pfizer gave *any* reason—let alone a sufficiently important interest—to force disclosure of an association's members to show standing. As Judge Wesley observed, the panel indicated that Members A and B were "ready and able to apply" to the allegedly discriminatory program which shows "why 'naming names' is an empty gesture." *Do No Harm*, 2024 WL 949506, at *17. The members' actual names have no relation to whether they plan to apply to the Fellowship. "Naming … members adds no essential information bearing on the injury component of standing." *Advocs. for Highway & Auto Safety v. FMCSA*, 41 F.4th 586, 594 (D.C. Cir. 2022); *accord Speech First, Inc. v. Shrum*, 92 F.4th 947, 952 (10th Cir. 2024) (rejecting requirement to name names for standing purposes as "novel" and "hitherto unheard-of").

The panel's categorical disclosure requirement also fails any form of narrow tailoring. The rule presents an ultimatum to Do No Harm: 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, or the disclosure of identity information for "attorney's eyes only" in discovery or subject to a protective order. Instead, the panel conditioned entry to federal court on forgoing anonymity and risking the harassment, hostility, and threats endemic to public debate. That, the First Amendment does not allow.

CONCLUSION

College students have stopped voicing their views for fear of official retaliation and unofficial ostracism. That deprives everyone on campus of viewpoints and conversations the First Amendment protects. By conditioning this lawsuit on forced disclosure of Do No Harm's student-members, the panel contravened the First Amendment. To uphold the First Amendment's original meaning and re-open the marketplace of ideas for all, this Court should grant rehearing en banc, reverse the panel, and allow Do No Harm's lawsuit to proceed.

Respectfully submitted this 27th day of March, 2024.

/s/Mathew W. Hoffmann

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(b)(4) because this brief contains 2,600 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: March 27, 2024

/s/ Mathew W. Hoffmann
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CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2024, this brief was filed electronically with the Clerk of Court for the United States Court of Appeals for the Second Circuit through the Court's CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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