INSTITUTE FOR FREE SPEECH

A Progress Report to Supporters of the Institute for Free Speech

January 2023 – December 2023

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Mission

The Institute for Free Speech, through strategic litigation, communication, activism, training, research, and education, works to promote and defend the political rights to free speech, press, assembly, and petition guaranteed by the First Amendment.

Vision

Free speech. It's fundamental to American democracy. The First Amendment to the Constitution says we have the right to freely speak, associate, assemble, publish, and petition the government. Government and society can't be improved without free speech. Equally important, our free political speech rights help protect every citizen from abuse of governmental power. Free speech can mean the difference between liberty and tyranny.

Today, our free speech rights are under assault. Some politicians seek to stifle dissent, quash opposition, and expand their power. They do this by passing laws that aim to suppress and limit speech about government and candidates, threaten our privacy if we speak or join groups, and impose heavy burdens on organizing. To further their agendas, some organizations want powerful politicians to decide what speech is acceptable and what is not. Others want the government to decide how much can be spent on speech or organizing groups. Such limits make it difficult or impossible for those with differing views to make their voices heard. And if we cannot speak, others cannot hear our ideas, consider them, and act. The result is a democracy that is less vibrant, less dynamic, and less free.

The Institute for Free Speech exists to protect and defend the First Amendment's speech freedoms. We believe that differing opinions and new, challenging ideas make for a more robust democracy. We believe free speech makes it possible to improve our country and our lives. We believe free speech makes those in power more accountable to the people. We believe government should never decide who can speak and who can't—or how much speech is "too much."

We put those beliefs into practice by championing free speech for all: those less powerful, those who think differently, those with ideas that may be unpopular at the moment, and those who believe there may be a better way forward. Every day, we go to work and dedicate ourselves to protecting and defending every American's ability to exercise their First Amendment right to free political speech.

The nonpartisan **Institute for Free Speech** defends the First Amendment on many fronts. We go to court to help clients protect their rights and set new precedents. We work with government officials to craft laws that expand free speech and adhere to the Constitution. We produce research that helps us build a strong case for speech rights. We communicate with and educate the public, legislators, organizations, and the media to enable every American to understand the importance of the First Amendment's speech freedoms. Our many successes in

these areas have helped expand free political speech protections for individuals and organizations.

Free speech for all. That is our vision, our goal, our quest. If you believe in that vision as well, we ask for your support and assistance. Please join us in enhancing and defending free speech rights.

Scope of this Report

This report covers activities related to the use of funds from January 2023 through December 2023 to protect and advance free political speech and donor privacy.

The Work Ahead

The breadth of our activities reflects the wide range of our work to promote and defend free speech at the federal, state, and local levels.

In an era of extreme partisanship, all sides in the non-profit space can at least agree on one thing: without privacy protections, many donors will contribute less—or stop contributing altogether. After all, many donors do not want to risk harassment and threats at the hands of hostile media and extreme activists.

Fortunately, in October 2023, the Institute for Free Speech won what we believe to be the first federal circuit court ruling striking a campaign finance disclosure law using the *Americans for Prosperity Foundation (AFPF)* Supreme Court precedent that requires "narrow tailoring" under "exacting scrutiny" analysis.

In ***Wyoming Gun Owners v. Buchanan****,* the U.S. Court of Appeals for the Tenth Circuit ruled that Wyoming's electioneering-communications disclosure regime was unconstitutional. The opinion creates a new binding precedent in a federal circuit that includes six mountain and midwestern states. It can also be used as persuasive authority in other courts.

More well-litigated challenges to campaign finance and lobbying laws are needed to build on the 2021 *AFPF* precedent. The Institute for Free Speech is uniquely positioned to fully realize the potential effect of this important decision on campaign finance and lobbying laws by building new precedents at the federal appellate level.

Our competitive advantage over any other pro-free speech organization is our expertise in political speech, especially campaign finance and lobbying laws. We won the landmark *SpeechNow v FEC* case that created the Super PAC. We litigate more cases in this arena than any other organization and have the strongest record. At the end of 2023, we were litigating six campaign finance or donor privacy cases.

Besides the ever-present threats to donor privacy from campaign finance and lobbying laws that inhibit political speech rights, a dangerous, new culture of censorship and compelled speech has become increasingly tolerated, if not encouraged—most pervasively, in our educational institutions.

As Thomas Jefferson wrote, "Wherever the people are well informed, they can be trusted with their own government; that whenever things get so far wrong as to attract their notice, they may be relied on to set them to rights." The Founding Fathers believed the key to a virtuous society required an educated public. Creating informed citizens capable of inquiry and critical thinking was a part of the vision of our democratic republic from the beginning.

The people will not become well-informed if schools prioritize indoctrination over education, if speakers face censorship when attempting to point out this problem and advocate for change, and if administrators compel teachers or students to express one favored viewpoint. This trend is leading to a tangible erosion of academic freedom and intellectual diversity at schools and on campuses nationwide.

Rather than promoting critical thinking and open dialogue, educational institutions increasingly promote ideologies and narratives that align with their agendas. This approach undermines the purpose of education, which should be to foster independent thought and the pursuit of knowledge. Students who learn at institutions that practice censorship are a long-term threat to our unique American culture that upholds free speech as essential to our way of life. Today's students will be tomorrow's legislators and judges.

The Institute for Free Speech is confronting this threat through litigation at four critical junctures, each used by censors to suppress speech. One is censorship at K-12 school board meetings. The other three consist of threats to professors' careers who express dissenting views on "diversity, equity, and inclusion" (DEI), direct censorship of dissenting opinions on DEI, and regulations and university policies on hiring and promotion based on allegiance to DEI ideology.

Strategic Litigation

In 2023, our attorneys won a complete victory in three cases and won initial favorable rulings in two other ongoing cases. In one other closed case, the lawsuit helped trigger a speedy repeal of the unconstitutional law. During 2023, we filed seven new lawsuits and six amicus briefs in a variety of important cases.

These complete and final victories (cases closed) are:

- ***Wyoming Gun Owners v. Buchanan*** **(disclosure and vague campaign finance law)**

  In October, the Tenth Circuit held that Wyoming's electioneering-communications disclosure regime is unconstitutional. We believe it is the first time an appellate court has interpreted the U.S. Supreme Court's opinion in *Americans for Prosperity Foundation v. Bonta* in a campaign finance case.

  The case stemmed from Wyoming Gun Owners (WyGO) making multiple communications to its members and the public about candidates' policy views for the 2020 election. Although these communications did not directly support the election or defeat of any candidate, the Wyoming Secretary of State's Office investigated WyGO's political speech after receiving a complaint from a frequent opponent of the group's policy views. Then-Deputy Secretary of State Karen Wheeler assessed a $500 fine against WyGO.

  The Tenth Circuit upheld the district court's ruling that Wyoming's disclosure requirements were not narrowly tailored and failed to provide sufficient guidance on which donors must be disclosed, making the law unconstitutional.

  As the court determined, Wyoming's mandate to disclose donations "relating to" electioneering communications lacked narrow tailoring and was vague. According to the court: "To comply with the First Amendment, a disclosure regime must offer appropriate and precise guidance, defining how actors—sophisticated or otherwise—should structure internal accounting mechanisms."

  The vague Wyoming law is a prime example of how such laws can harm political speech. The complaint filed under the law came from a frequent opponent of the group's policy views, allowing the complainant to weaponize the law against political adversaries. Even if speakers prevail against state investigations, the process punishes them for speaking, draining them of time and resources.

- ***Hetherington v. Madden*** **(Florida school board candidate speech ban)**

  Florida prohibits nonpartisan candidates from telling voters their partisan affiliation. Our client, Kells Hetherington, ran for the Escambia County School Board in 2022. The last time he ran for school board, the Florida Elections Commission (FEC) fined him for saying he was a "lifelong Republican."

  Party membership is one of the most valuable pieces of information a candidate can provide to the voting public. States should not prohibit candidates from sharing truthful information about their political party affiliation. We asked a federal court to strike down this provision as unconstitutional.

  On November 8, 2022, the judge granted our motions for summary judgment and a permanent injunction against the law, noting that the ban on campaigning "based on

party affiliation to maintain a nonpartisan election is effectively 'to burn the house to roast a pig.'"

In April 2023, the FEC agreed to end the litigation.

- ***Mama Bears of Forsyth County v. Forsyth County Schools*** **(Georgia school board censorship)**

  Mama Bears, a group started by Forsyth County School (FCS) moms, spoke at their local school board meeting to voice concerns about school library books they thought were pornographic. Two of the group's leaders, our clients Alison Hair and Cindy Martin, used their time to read aloud from some of those books.

  The school board chair censored them, saying the language was inappropriate and profane—ironically making their point. Alison was banned permanently from speaking unless she agreed to limit her First Amendment rights.

  On November 16, 2022, a federal judge ruled that key portions of the Forsyth County School Board public comment policy were unconstitutional and barred their enforcement. He also ordered the district to end its ban on Alison Hair from speaking at board meetings.

  On January 31, 2023, the judge issued an order that "permanently enjoins the District … from enforcing the respectfulness requirement, the restriction on personally addressing Board members, including the Superintendent, or any restriction on profane, uncivil or abusive remarks contained in the FCS' current public participation policy or any substantially comparable provision in a future FCS policy."

The lawsuit that helped trigger the repeal of an unconstitutional law, and now also closed, is:

- ***Libby v. Schneider*** **(contribution limits)**

  Our attorneys represented Maine State Rep. Laurel Libby and a coalition of would-be donors challenging a recent Maine law that set low contribution limits for political action committees (PACs) led by legislators.

  Yet the law exempted so-called "caucus" PACs from the contribution limits. Caucus PACs are organizations that function like leadership PACs but are run by the four most powerful Maine legislators: the Speaker of the House, the President of the Senate, and the minority leaders in each chamber.

  After we filed the lawsuit in May 2023, the legislature and governor swiftly repealed the law.

Ongoing Cases with significant updates

- ***The Buckeye Institute v. Internal Revenue Service*** **(donor disclosure)**

  We represent The Buckeye Institute, an Ohio-based think tank, in a lawsuit challenging a decades-old tax law that forces the IRS to demand that nonprofit charities hand over the private information of their largest donors every year. The lawsuit says the law violates the First Amendment, and the requirement chills free speech and association.

  The IRS admits that it does not need these donor records and issued a rule in 2020 to stop collecting the same from tax-exempt groups that are not classified as section 501(c)(3) nonprofit charities. The agency also noted in the rulemaking that collecting this sensitive personal data on Form 990 Schedule B "poses a risk of inadvertent disclosure" of private, non-public information. Even though the IRS has stated in related contexts that it would prefer not to collect this information from charities, federal law still requires it.

  The lawsuit notes that Buckeye's work "would be significantly damaged" if it can't maintain the confidentiality of its donor relationships, as Buckeye's supporters "risk retribution from some who oppose its mission." The recent leak to ProPublica of "a vast trove of Internal Revenue Service data on the tax returns of thousands" of individual taxpayers and other IRS leaks understandably give financial supporters of certain charities, including Buckeye, justified pause.

  The U.S. Supreme Court has already struck down a similar disclosure mandate in the landmark 2021 case of *Americans for Prosperity Foundation v. Bonta (AFPF)* because the government must consider "the potential for First Amendment harms before requiring that organizations reveal sensitive information about their members and supporters."

  In November 2023, the judge denied the government's motions for summary judgment and dismissal. The judge agreed with our arguments that the appropriate standard is exacting scrutiny under *AFPF* and ordered a trial to resolve disputed facts in the case. The exacting scrutiny standard boosts our client's chances of winning. If you'd like more information on the significance of this ruling, please read our blog post.

- ***No on E v. Chiu*** **(burdensome ad disclaimers)**

  Want to advertise to San Francisco voters? Before starting your message, the city could force you to spend over 30 seconds reciting donor information that's already publicly available.

  "A 32-second disclaimer is not a disclaimer at all. It's a whole new ad that makes it impossible to communicate our message with voters," said Todd David, Founder and Treasurer of the San Francisco No on E Committee.

  Groups must recite a long disclaimer naming their donors—and their donors' donors—at the start of audio and video ads. It's hard to think of a more boring way to start a message.

These requirements make it impossible for groups to communicate effectively with San Francisco voters. Speakers' messages are shoved to the side in favor of redundant donor information of questionable value.

Rather than inform voters, the disclaimer misleads voters by naming as "secondary donors" individuals who have not directly contributed to or supported the speaker's message in any way. Viewers will be led to believe these "secondary donors" helped create the ad or support the group running the ad. Yet, in many cases, those individuals will not even know about the ad their name appears on until it airs.

Joining No on E and David in the lawsuit against San Francisco City Attorney David Chiu is the Edwin M. Lee Asian Pacific Democratic Club PAC, sponsored by Neighbors for a Better San Francisco Advocacy (Ed Lee Dems).

We drew a hostile panel on appeal and lost in March. We filed for en banc review, which was denied in October 2023 over two dissents, each signed by nine judges. As Judge Daniel Collins noted in his dissent from denial, "This circuit now affords more robust constitutional protection to ads hawking sugary beverages than to core political speech about ballot initiatives. That defies both controlling precedent and common sense."

After the dissents were published, a prominent election law professor who is hostile to free political speech wrote that the case is "one that the Supreme Court could well agree to hear and overturn."

In early 2023, we will file for U.S. Supreme Court review of the ruling.

New Cases (listed in reverse chronological order)

- ***Moms for Liberty – Yolo County, CA v. Lopez*** **(California public library censorship)**

  Censoring Americans from voicing their opinions in public facilities is a clear violation of their First Amendment rights – but that didn't stop Yolo County Public Library staff from shutting down an event organized by the local chapter of Moms for Liberty.

  The case stems from a "Forum on Fair and Safe Sports for Girls" event organized by our clients, Moms for Liberty, in August to discuss the issue of biological males competing in female sports. However, Library Regional Manager Scott Love invited disruptive protesters to the event and then shut down the forum almost immediately after it began, even though the plaintiffs paid to reserve the space.

  Love did so on the grounds that event participants were "misgendering," and informed speakers that referring to "transgender females" as "males" or stating that "men" are participating in women's sports would cause him to shut down the event. After participants continued using his disfavored terms and persisted in discussing their view

that men are, in fact, competing in women's sports, Love made good on his threat to shut down the forum.

In addition to ending the August event after just a few minutes, Yolo County librarians have actively organized opposition to the plaintiffs' events, directed protestors to attend meetings, failed to stop repeated disruptions, and contacted law enforcement to urge action against the speakers to make it difficult for the plaintiffs to use library meeting rooms.

The lawsuit seeks injunctions against continued enforcement of the library's unconstitutional policies and practices, both generally and against the plaintiff organizations and individuals.

- ***Institute for Free Speech v. J.R. Johnson, et al.*** **(ban on pro bono litigation)**

  The U.S. Supreme Court has long recognized that the First Amendment allows pro bono lawyers to associate with clients to litigate civil rights claims against the government. It shouldn't matter whether free legal services happen to be offered by a nonprofit corporation.

  Unfortunately, the Texas Ethics Commission (TEC) disagrees.

  So, we've filed a federal lawsuit against the TEC's commissioners and executive director in August over the TEC's ban on pro bono legal services for candidates and political committees. This ban stops organizations like the Institute for Free Speech from advocating for the civil rights of such clients, imposing stiff civil and criminal penalties for violations.

  Texas law prohibits corporations—including nonprofits like ours—from making "in-kind contributions" to candidates and political committees. The TEC recently interpreted this ban to extend to pro bono litigation services, even when such services only aim to challenge the constitutionality of state laws.

  The lawsuit argues that the TEC's interpretation violates our First Amendment rights to free speech and association by representing clients in court. Texas essentially bars the courthouse doors to groups like ours, preventing challenges to unconstitutional laws. In addition, federal law guarantees a remedy for civil rights violations. But this state-imposed rule interferes with that federal law.

- ***Johnson v. Watkin*** **(Bakersfield College and California Community Colleges, forced allegiance to an ideology)**

  The Wall Street Journal covered this lawsuit in a lead editorial in July 2023.

The California Community Colleges Board of Governors recently issued a pervasive set of guidelines that force faculty to embrace an "anti-racist" ideology, violating fundamental First Amendment rights.

Participation in the state's all-encompassing political program is now required "to teach, work, or lead within California's community colleges." The state explicitly demands that "faculty members shall employ teaching, learning, and professional practices that reflect DEIA [diversity, equity, inclusion, accessibility] and anti-racist principles." And so-called "equity-centered practices" must be incorporated "into teaching and learning, grading, annual evaluations, and faculty review/tenure processes."

Professor Johnson is a full-time Professor of History at Bakersfield College (BC). He is also the Faculty Lead for the Renegade Institute for Liberty ("RIFL"), a group of BC faculty members who value genuine academic freedom, free speech, and critical thinking. RIFL, which uses the "Renegade" nickname of BC's athletic teams, aims to promote and preserve freedom of thought and intellectual literacy through the open discourse of diverse political ideas.

Unfortunately for Professor Johnson and his colleagues, the BC administration treats independent thought as a punishable offense. The Kern Community College District ("KCCD"), which operates BC, views the expression of disfavored viewpoints as grounds for termination and has weaponized a broad "civility" requirement against dissenting voices. And BC has made clear that it expects the faculty to adhere to its "anti-racism" ideology.

The college district's Board of Trustees exemplified this toxic, anti-speech atmosphere, with one of them even saying publicly of those who speak out, "They're in that five percent that we have to continue to cull. Got them in my livestock operation, and that's why we put a rope on some of them and take them to the slaughterhouse."

Professor Johnson conflicted with BC's political preferences when he questioned a colleague's anti-American views on RIFL's Facebook page. The exchange led to an administrative complaint for "harassment" and "bullying" that necessitated the resolution of 29 allegations. After a five-month ordeal that required Professor Johnson to retain legal counsel, the administration finally cleared him, but with a warning that it would continue to investigate alleged misconduct.

BC administrators have sent an unmistakable message: anyone who dares commit wrongthink against the state-approved ideology—or who challenges other faculty who promote it—can have their careers sidetracked or ruined.

That's what happened to Professor Johnson's RIFL Faculty Lead predecessor, Professor Matthew Garrett. The administration terminated Garrett after he spoke out publicly against BC's preferred views, including writing an op-ed published in the local newspaper, appearing on a radio show, giving media interviews, and posting online comments. The administration even cited Professor Garrett's defense of the term "Cultural

Marxism," deeming it "hate speech." Among Garrett's offenses was his failure to censor RIFL's Facebook posts—posts made by Professor Johnson.

The lawsuit asks that administrators be enjoined from investigating or disciplining Professor Johnson for offering his viewpoints and seeks to prevent officials from demanding that faculty advance and teach the state's official DEIA ideology. The lawsuit also challenges the constitutionality of these new statewide guidelines to help protect the rights of Johnson and other faculty members across California from these new requirements. The rule affects all 116 California community colleges serving 1.9 million students.

In November 2023, Magistrate Judge Christopher D. Baker issued a Report and Recommendation (R&R) supporting Professor Johnson's lawsuit, in which, he noted that "California's goal of promoting [DEIA] in public universities does not give it the authority to invalidate protected expressions of speech."

The R&R found that it is likely that Professor Johnson has standing to pursue such a suit, is harmed by the policies and practices in question, and that an injunction is an appropriate remedy for the state's unconstitutional suppression and punishment of Professor Johnson.

The judge recommended blocking California Community Colleges Chancellor Sonya Christian and Kern Community College District trustees from enforcing mandatory (DEIA) policies against Johnson when he speaks as a private citizen or through his teaching and scholarship. This strong recommendation is now before the district court judge for review and a final decision.

- ***Moms for Liberty – Wilson County, TN v. Wilson County Board of Education*** **(Tennessee school board censorship)**

  When Robin Lemons decided to speak to the Wilson County School Board last fall about how school officials ignored and mishandled an allegation of sexual misconduct involving her fourth-grade daughter, she worried the school board might censor her. She was right.

  As soon as she started criticizing the school director during the October 3, 2022, meeting, Board Chairman Jamie Farough told Lemons to "stop talking." Farough cut her off because she had not announced her home address to the crowd—a disregarded rule the school board had not enforced against any other speaker over the previous year. Lemons complied with the request, but now is a plaintiff in a federal lawsuit filed in March against the Wilson County Board of Education for violating her First Amendment rights. The Wilson County chapter of Moms for Liberty and its chair, Amanda Dunagan-Price, join her as plaintiffs in the case.

  The moms challenge three policies that violate the First Amendment, including the board's requirement that speakers publicly announce their home addresses before speaking. This rule—which the board selectively enforced against Lemons—exposes

speakers, their homes, and their families to potential harassment or reprisals if their speech is unpopular.

The moms also challenge the board's policy against "abusive" comments and a requirement that individuals obtain approval to speak by first persuading a board member that their presentation is in "the public interest." These policies allow the board to censor speakers if they criticize officials too harshly. They also make speaking at board meetings "a difficult and intimidating process—one that prevents the board's sharpest critics from speaking freely," reads the complaint.

- ***Pollak v. Wilson*** **(Wyoming school board censorship)**

  After Harry Pollak heard his local superintendent defend controversial policies at the school board's public meeting, Pollak signed up to speak during the next meeting. When his turn came, Pollak explained that he intended to address the superintendent's previous statements. But the board chair cut him off.

  The chair claimed that the board's rule against discussing "personnel matters" prohibited Pollak from mentioning the superintendent for any reason at all. That rule ordinarily requires individuals to discuss confidential personnel issues in private. But when Pollak started speaking, the chair used it to stop him from criticizing the superintendent's public statements. She ordered Pollak to stop speaking and asked for a recess. The board then called the police to escort Pollak out of the building.

  In March, Pollak sued the school board for violating his constitutional rights. The First Amendment prohibits government agencies from shielding public officials from criticism during meetings open for public comment. Pollak challenges the school board's use of its personnel rule to do just that.

  While there may be a justification for a school board to prevent citizens from discussing personnel matters in public meetings, the board here deploys this rule to distort debate about important policy issues. It weaponizes the rule to prohibit individuals from criticizing the officials who enacted those policies.

  Pollak also challenges another speaking policy that prohibits "gossip" and "abusive or vulgar language." Several federal courts have held that these kinds of speech restrictions discriminate against speakers based on their viewpoints and thus violate the First Amendment.

  Pollak's lawsuit asks the court to declare that the school board's policies violate the First Amendment and permanently enjoin the board from enforcing those policies. We took over this case, which resulted in an unfavorable Tenth Circuit precedent on a preliminary injunction request under the previous counsel. We hope that we can eventually obtain a more favorable result with our amended complaint and full briefing.

- ***Lowery v. Mills*** **(University of Texas, career threats for dissent)**

  We represent a finance professor who is suing officials at the University of Texas at Austin (UT) who threatened to punish him for criticizing the university by threatening his job, reducing his pay, and removing his affiliation with UT's Salem Center.

  In a complaint filed in February in the Austin federal court, Dr. Richard Lowery, an Associate Professor of Finance at the McCombs School of Business at UT-Austin, said the officials at the state's flagship university violated his constitutional right to criticize government officials. The lawsuit also claims the UT administration harmed his right to academic freedom.

  Professor Lowery is well known for his vigorous commentary on university affairs. His articles have appeared widely, including in *The Hill,* the *Texas Tribune,* the *Houston Chronicle*, and *The College Fix*. He questioned the UT administration's approaches to critical race theory, affirmative action, academic freedom, competence-based performance measures, and the future of capitalism.

  One key target of Prof. Lowery's critiques was the UT administration's use of DEI requirements to filter out competent academics who dissent from the DEI ideology.

  Our lawyers wrote in the complaint that UT's administration "responded with a campaign to silence Lowery."

  The campaign started by pressuring Carlos Carvalho, another professor of business at the UT McCombs School who is also the Executive Director of the Salem Center for Public Policy. This academic institute is part of the McCombs School. Lowery reports to Carvalho as an Associate Director and a Senior Scholar at the Salem Center.

  In the summer of 2022, Sheridan Titman, one of the senior UT officials named in the lawsuit, told Carvalho, "We need to do something about Richard." According to the lawsuit, "he added that [UT] President [Jay] Hartzell and Dean [Lillian] Mills were upset about Lowery's political advocacy." Titman wanted to know if 'we can ask him to tone it down?'"

  Carvalho understood this as a threat by Titman, directed at Lowery, but at first refused to convey it. Carvalho explained to Titman that the First Amendment protected Prof. Lowery's right to expression.

  Despite this, the administrators ratcheted up the pressure on Carvalho and Lowery. When Carvalho again resisted calls to discipline Lowery over his speech. Dean Mills, the lead defendant in the lawsuit, threatened to remove Carvalho from his Executive Director post. "I don't need to remind you that you serve at my pleasure," she said.

  These were among the UT administration's threats to Lowery's "job, pay, institute affiliation, research opportunities, [and] academic freedom."

Some in the administration even "allowed, or at least did not retract, a UT employee's request that police surveil Lowery's speech, because he might contact politicians or other influential people."

"Fearing further retribution, Lowery began self-censoring." He locked his Twitter account, which hid it from the public. He also "stopped using Twitter entirely and has curtailed his public speech critical of the UT administration."

The UT administration also "feared the possibility of elected officials scrutinizing their behavior." As one employee wrote, when urging campus police to surveil his now-protected tweets, "We are more worried about the people he reaches than him. Some of his supporters are authors, podcasters, and politicians." Lowery's tweets often tagged the Texas Governor and Lt. Governor, which added to the UT administration's concerns.

Besides chilling Lowery's speech, UT's actions "effectively removed an important part of his job duties by restricting" his academic freedom as a UT professor.

The lawsuit asks the court to:

- bar UT officials from threatening or acting on the threats made to Lowery for his protected speech;
- declare that the "threats against Lowery amounted to unconstitutional state action designed to chill Lowery's protected speech and retaliate against him;"
- and award costs and attorney's fees as provided by federal law/

Amicus Briefs

- ***United States v. Sittenfeld***

In December 2023, we filed a brief in the U.S. Court of Appeals for the Sixth Circuit supporting the appeal by former Cincinnati City Councilman Alexander "P.G." Sittenfeld, who was convicted in 2022 on federal corruption charges related to interactions with campaign donors. The brief urges the court to reverse the conviction on First Amendment grounds.

The Institute argues that Sittenfeld's convictions violate Supreme Court precedent on First Amendment protections for political speech and association, noting that his interactions with donors amounted to typical political conduct and protected speech.

The district court acknowledged that the prosecution lacked unambiguous evidence that Sittenfeld explicitly traded donations for official action, as required by the Supreme Court's McCormick standard. The Institute's amicus brief contends that allowing courts to infer an improper motive in the face of such uncertainty chills protected speech. It asks the Sixth Circuit to overturn Sittenfeld's convictions to vindicate First Amendment freedoms.

- ***Gonzalez v. Trevino***

  In December, we filed another amicus brief urging the Supreme Court to overturn a Fifth Circuit ruling that makes it nearly impossible for citizens to hold police accountable for retaliatory arrests aimed at silencing criticism.

  Police arrested Sylvia Gonzalez, a 72-year-old grandmother and city councilwoman in Kleberg County, Texas, after she had spearheaded a petition criticizing the city manager's performance. The charge: tampering with government records, because Gonzalez had briefly and inadvertently included the petition in her binder at a city council meeting before returning it.

  Ms. Gonzalez sued the police for a retaliatory arrest stemming from her constitutionally protected speech, but the U.S. Court of Appeals for the Fifth Circuit imposed stringent requirements that prevented her from even receiving a trial for her claims. The Fifth Circuit's expansive view of a recent Supreme Court opinion, *Nieves v. Bartlett* (2019), creates special barriers for plaintiffs in virtually any retaliatory arrest case.

  In the brief, we argue that the U.S. Court of Appeals for the Fifth Circuit took Nieves too far in foreclosing retaliation claims where free speech is concerned, ignoring the Supreme Court's carefully crafted limits on Nieves. Officials should not have unchecked discretion to use minor infractions to punish or chill dissent. The Institute proposes a balanced framework that would hold officials accountable for proven retaliation while avoiding baseless lawsuits.

- ***Campaign Legal Center v. 45Committee, Inc.***

  In September, we filed an amicus brief in the U.S. Court of Appeals for the District of Columbia in *Campaign Legal Center v. 45Committee, Inc.*, urging the court to affirm the dismissal of a lawsuit against an advocacy organization—a lawsuit that could harm political speech.

  The case stemmed from a Federal Election Commission (FEC) complaint filed by the Campaign Legal Center (CLC) against 45Committee, a nonprofit organization. In its amicus brief, the Institute argues that the district court's dismissal should be upheld because an enforcement vote constitutes definitive action by the FEC, precluding a private enforcement suit. The brief explains that Congress structured the FEC to prevent partisan enforcement, crafting the law so that it must obtain bipartisan agreement before launching investigations.

  Allowing private lawsuits following tie votes, as CLC urges, would eviscerate those protections. A partisan bloc of commissioners could effectively deputize private litigants to serve as enforcers against political opponents. Such an outcome would chill crucial First Amendment political speech.

- ***Brooke Henderson, et al. v. School District of Springfield R-12, et al.***

  Government policy is the product of politics. Accordingly, government employees will often be called upon to implement or follow directives with which they disagree. It does not, however, follow that the government may seek to politically indoctrinate its employees or require that they subvert legal norms.

  In May, we filed an amicus brief in the U.S. Court of Appeals for the Eighth Circuit that argues a government's demand that employees pledge loyalty to a political ideology would ordinarily violate the First Amendment.

  That defendant's ideology extols unlawful racial discrimination, and that plaintiffs cannot lawfully implement it without exposing themselves to personal liability, underscores the First Amendment violation's severity. And when the inevitable First Amendment lawsuits contesting such indoctrination reach the courts, judges cannot punish the plaintiffs for objecting.

- ***McBreairty v. Miller***

  The right to criticize public officials and government employees lies at the heart of the First Amendment. Yet, for Hampden parent Shawn McBreairty, such criticism prompted the local school board to silence him.

  That's why the Institute for Free Speech filed an amicus brief urging the First Circuit Court of Appeals to reverse a federal district court ruling and declare unconstitutional the Regional School Unit 22 (RSU 22) policy prohibiting speakers at board meetings from criticizing school personnel.

  In the brief, the Institute argues that the RSU 22 policy violates the First Amendment by discriminating against particular viewpoints and unreasonably restricting public debate. The Institute filed the brief in support of McBreairty, a parent who was removed from an RSU 22 board meeting after attempting to criticize school officials by name.

- ***Frese v. Formella***

  Many Americans may be surprised to learn that laws punishing libel as a criminal offense still exist, even though such laws contradict fundamental First Amendment principles.

  Frese v. Formella seeks to rectify that error. The case concerns Robert Frese, a New Hampshire citizen who posted negative online comments about a law enforcement officer. Those comments led to charges against Frese under New Hampshire's criminal libel law. Frese's case asks the Supreme Court to declare criminal libel laws unconstitutional on First Amendment grounds.

  The Institute for Free Speech has filed an amicus brief supporting Frese's position. As the brief explains, the law of criminal libel raises fears of prosecution for merely speaking,

and the threat of prosecution may cause speakers to self-censor. Moreover, prosecutions, even if ultimately dismissed or overturned on appeal, can cause long-lasting injuries to the speaker.

The brief also notes that the supposed longstanding common-law pedigree of criminal libel is grounded in error, reflecting a mistaken view of legal history dating back to the Star Chamber—a view that, in any event, was flatly rejected by early Americans via the public backlash to the Alien and Sedition Acts.

Criminal libel laws still exist in 25 states, and the hostility of these laws to the First Amendment is clear. These laws function as seditious libel and give public officials a tool with which to punish people who criticize them.

The brief details the critical, relevant history surrounding such laws while also demonstrating the unconstitutional dangers that criminal libel laws present.

Work Outside the Courtroom

Defending Free Speech from Legislation and Regulation

The Institute tracks bills in Congress and state legislatures as well as initiatives in regulatory agencies and analyzes proposals that would harm First Amendment rights. Our experts are often invited to testify before Congress and state legislatures. No other group has supplied more invited congressional testimony in 2023 on political speech.

Additionally, no other group files more comments from a free-speech perspective on matters considered by the Federal Election Commission (FEC), which writes rules on and enforces federal campaign finance laws.

Among the comments filed in 2023 were:

- A 14-page comment in response to the U.S. House Ways and Means Committee's request for information on "Understanding and Examining the Political Activities of Tax Exempt Organizations under Section 501 of the Internal Revenue Code."

We were invited to testify at several legislative hearings this year:

- Chairman Bradley Smith testified on May 11 before the U.S. House of Representatives Committee on House Administration hearing on the "American Confidence in Elections: Protecting Political Speech."
- Chairman Bradley Smith testified on February 16 before the Kansas House of Representatives Committee on Elections on constitutional infirmities in the state's campaign finance laws.
- The Kansas Legislature's 2023 Special Committee on Governmental Ethics Reform, Campaign Finance Law held a hearing on October 6 with testimony from Bradley

Smith and the Institute's president, David Keating. After our 30-minute presentation, committee members asked questions for about an hour.

2023 Anti-SLAPP 50-State Report Card

In November, we released the 2023 edition of our scorecard of Anti-SLAPP laws by state, including an interactive webpage providing detailed information on each state. SLAPP is an acronym for "strategic lawsuit against public participation." A *Forbes* columnist hailed the first scorecard, published in 2022, as an "excellent and definitive analysis of Anti-SLAPP statutes nationwide."

Anti-SLAPP statutes address a structural problem within American law: people can use meritless lawsuits to censor or punish speech they dislike. We expect the scorecards will highlight the need for more and better Anti-SLAPP laws nationwide.

Indeed, since we published the first scorecard in 2022, six states have upgraded their laws. For the first time in the nation's history, over 50% of the population now resides in a jurisdiction with a robust anti-SLAPP law, meaning a grade of "B" or better in our report.

New Staff and Promotions

A Deeper Litigation Team

This year, we've added four new attorneys to our capable legal team, three of whom have over eight years of experience.

Charles "Chip" Miller, Senior Attorney

Chip served as Ohio's Deputy Attorney General, where he directed major litigation. Before joining the state AG's office as General Counsel, he served as a judge for the First Appellate District of Ohio and was a visiting judge on the Supreme Court of Ohio. Before entering public service, Chip spent over ten years at Keating, Muething & Klekamp, PLL as a litigation partner arguing cases before the Sixth Circuit and the Supreme Court of Ohio. He is a Boston University College of Law graduate and clerked for Justice Maureen O'Connor at the Supreme Court of Ohio.

Brett Nolan, Senior Attorney

Brett served as the Principal Deputy Solicitor General of Kentucky, where he represented the Commonwealth in various high-stakes litigation at every level of state and federal court. In that role, Brett led a successful challenge against the U.S. Department of Treasury over the constitutionality of a federal law limiting the ability of states to modify their tax codes, and he helped secure a U.S. Supreme Court victory that upheld a state's constitutional right to defend its interests in federal court.

Before that, Brett served as the Deputy General Counsel to the former Governor of Kentucky, where he advised the governor and other executive branch officials on legal and policy issues and represented them in litigation. Brett clerked for Judge John Nalbandian of the Sixth Circuit and Judge Karen K. Caldwell of the U.S. District Court for the Eastern District of Kentucky.

Brett attended the University of Chicago Law School, where he served as an editor of *The University of Chicago Law Review* and graduated with High Honors, Order of the Coif.

Courtney Corbello, Attorney

Courtney is a former member of the US Army, where she served as a Cryptological Linguist specializing in Mandarin. After serving our nation, Courtney attended UCLA Law School, where she was a member and Vice President of the UCLA Moot Court Team. She was the sole recipient in her graduating class of the Order of the Barristers Statue for being the top oral advocate among her peers.

Courtney began her law career as a briefing attorney to Judge David Newell on the Texas Court of Criminal Appeals, the state's highest appellate court for criminal matters. Following this clerkship, she accepted a position at the Texas Attorney General's Office. Through her six years with the Texas AG's Office, Courtney obtained extensive trial and appellate experience in state and federal courts and won key precedents.

Nathan Ristuccia, Attorney

Nathan began his legal career as a clerk for the Hon. Victor J. Wolski, Judge of the United States Court of Federal Claims. Before entering law, Nathan worked as a historian at the University of Chicago. He is the author of more than a dozen scholarly articles and an award-winning book: *Christianization and Commonwealth in Early Medieval Europe: A Ritual Interpretation* (Oxford University Press, 2018).

Nathan graduated *summa cum laude* from Georgetown University Law Center, where he was an Articles Editor for the *Georgetown Law Journal* and a Bradley Fellow at the Georgetown Center for the Constitution. He received the Francis E. Lucey, S.J. Award, presented annually to the student with the highest academic achievement in the graduating class. Nathan earned his Ph.D. and M.M.S. from the University of Notre Dame and his B.A. from Princeton University.

Expanded Communications Team

We've also bolstered the capacity of our communications function, hiring Tom Garrett as our Chief Communications Officer, promoting Tiffany Donnelly to Deputy Communications Director, and hiring Sarah Fisher as a new Associate Director of Communications. Before joining the Institute, Tom most recently served as the Director of Communications for the bipartisan nonprofit Council for a Strong America. There, Tom led many successful communications campaigns related to a wide range of policy issues.

Originally an attorney by trade, Tom has been a professional writer since college. During his career in communications, Tom has authored pieces that have appeared in hundreds of publications across the United States. Tom earned a B.A. in politics from Washington & Lee University and a J.D. from the University of Richmond School of Law.

Four-Star Charity

Institute for Free Speech Again Awarded Charity Navigator's Top Rating

The Institute for Free Speech was again awarded a 4-star rating, the highest possible, by Charity Navigator for "demonstrating strong financial health and commitment to accountability and transparency."

Charity Navigator first rated the Institute for Free Speech in 2015; we received a 4-star rating every year since.

Charity Navigator's coveted 4-star rating indicates that the Institute for Free Speech exceeds industry standards in pursuing our mission in a financially efficient way. We received our highest point total ever for FY 2022, receiving 100 out of a possible 100 points.