

No. 26-12085

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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RIHANNA POINTER, ET AL.,  
Plaintiffs-Appellants,

v.

SCOTT PHELPS, ET AL.,  
Defendants-Appellees.

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On Appeal from the United States District Court  
for the Northern District of Alabama  
No. 7:26-cv-00476-EGL

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**BRIEF OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW  
AND NATIONAL WOMEN'S LAW CENTER AS *AMICI CURIAE*  
IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL**

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE  
DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, *amici curiae* Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") and National Women's Law Center ("NWLC") certify that the Certificate of Interested Persons presented by the Plaintiffs-Appellants is complete, subject to the following additions:

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*Amici curiae* Lawyers' Committee for Civil Rights Under Law and National Women's Law Center have no publicly traded parent, subsidiary, or affiliated corporations.

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## INTERESTS OF AMICI<sup>1</sup>

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nonpartisan civil rights organization founded in 1963 by the nation's leading lawyers at the request of President John F. Kennedy to secure equal justice for all through the rule of law by targeting the inequities confronting Black communities and other communities of color. The Lawyers' Committee uses legal advocacy to achieve racial justice and to ensure that Black people and other people of color have the voice, opportunity, and power to make the promises of our democracy real. The Educational Opportunities Project at the Lawyers' Committee has been a national leader in protecting and defending inclusive education and diversity efforts in PK-12 schools, colleges and universities, including by representing intervenor and amici students and presenting oral argument before the Supreme Court in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023).

National Women's Law Center ("NWLC") is a non-profit legal advocacy organization that fights for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to the lives of women and girls, especially women of color, LGBTQI+ people, and low-income women and families.

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<sup>1</sup> Counsel for amici curiae authored this brief. No party's counsel authored this brief in whole or in part, and no party beyond amici contributed any money toward the brief. The parties consented to its filing.

Since its founding in 1972, NWLC has worked to advance educational opportunities, workplace justice, health and reproductive rights, and income security. NWLC has participated in numerous cases to advocate for equal opportunities and greater inclusion in our society including through civil rights legal protections for women, people of color, disabled individuals, and LGBTQI+ individuals.

Amici have a strong interest in ensuring that Black students, students of color, women, LGBTQ+ students and students with intersecting and multiple identities on college campuses are able to express their views in student publications free from government censorship.

### **STATEMENT OF THE ISSUES**

1. Whether the University of Alabama's closure of *Alice* and *Nineteen Fifty-Six*, which eliminated channels for student expression, violated the First Amendment.
2. Whether the district court and university misread legal authority by equating the publications' focus on race- and gender-related experience with exclusion.

### **SUMMARY OF ARGUMENT**

Amici urge reversal of the district court's ruling, which permits the University of Alabama ("UA") to silence student expression, remove platforms dedicated to perspectives most likely to be overlooked, and narrow opportunities for women,

Black students, and others from underrepresented communities to be heard on their own terms. The two student publications that UA shuttered—*Alice* and *Nineteen Fifty-Six*—provided unique viewpoints and opportunities for student expression, dialogue, education, and growth that are unavailable elsewhere in UA’s media ecosystem. Replacing those publications with one that lacks their dedicated perspectives deprives students of those opportunities for expression, and thus, is no replacement at all. UA’s decision to close the publications on the basis of their editorial perspectives is viewpoint discrimination, plain and simple.

Student-operated publications are critical to sustain the marketplace of ideas on university campuses. Closing these publications narrows that marketplace by diminishing the intellectual diversity that is key to maintaining universities’ essential function as bastions for the exchange and testing of new ideas.

Moreover, the district court’s determination that the government speech doctrine covers UA’s actions—and thus shields it from the reach of the First Amendment—is erroneous. Straightforward application of the factors delineated in *Shurtleff v. City of Boston* establishes that *Alice* and *Nineteen Fifty-Six* engaged in private speech protected by the First Amendment. 596 U.S. 243 (2022).

Finally, UA’s decision to eliminate the publications rests on a dangerous premise: that speech about race- and gender-related experiences is equivalent to race- or sex-based exclusion. This does not follow from Title VI of the Civil Rights

Act, *Students for Fair Admissions v. President & Fellows of Harvard College*, 600 U.S. 181 (2023) (hereinafter *SFFA*), federal guidance, or simple logic. Instead, student content that reflects unique editorial perspectives regarding race, gender, and identity enriches education for everyone and strengthens the foundations of our democracy.

## ARGUMENT

### I. UA Closed *Alice* and *Nineteen Fifty-Six* Despite Their Roles as Vital Channels for Expression.

In December 2025, UA closed *Alice* and *Nineteen Fifty-Six* because it believed the current federal administration disfavored the viewpoints these publications expressed. UA advised the student-Plaintiffs it was suspending the magazines based on its interpretation of U.S. Attorney General Pam Bondi’s non-binding memorandum, issued on July 29, 2025 (“Bondi Memo”)<sup>2</sup>, which prohibited “unlawful proxies” for discrimination. R.26-10 p.5; R.26-26 p.3. UA claimed the magazines “target primarily specific groups” and were operated “‘by and for’ students of only one race or sex.” R.26-26 p.3; R.31-1 p.5. But staffing and readership of both publications has always been inclusive and open to all. Shuttering these publications based on their viewpoints conflicts with well-settled First Amendment principles. Moreover, reducing the number of student publications

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<sup>2</sup> Available at <https://www.justice.gov/ag/media/1409486/dl>.

advancing unique perspectives will inevitably shrink the marketplace of ideas by diminishing the intellectual diversity undergirding it.

**A. *Alice* and *Nineteen Fifty-Six* advanced editorial perspectives disfavored by UA.**

It is “axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.” *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 828 (1995); *see also Chiles v. Salazar*, 146 S. Ct. 1010, 1021 (2026). Repeatedly, the Supreme Court has affirmed that state actors cannot pick and choose which voices to silence and which to amplify based on whose viewpoints they prefer. And this Court has agreed. *See, e.g., Pernell v. Fla. Bd. of Governors of State Univ.*, 181 F.4th 1135, 1148 (11th Cir. 2026) (“Viewpoint-based restrictions on speech are widely disfavored,” representing “‘the *greatest* First Amendment sin.’” (emphasis added)).

*Nineteen Fifty-Six* was “focused on Black culture, Black excellence, and Black student experiences.” R.40 p.6. Its submissions showcased the experience of Black and brown communities, discussed and criticized experiences with racism, and explored what acceptance looked like “in light of . . . [attacks] on diversity, equity, and inclusion.”<sup>3</sup> *Alice*—a “publication by and for college women”<sup>4</sup>—

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<sup>3</sup> *Nineteen Fifty-Six*, *Submissions*, <https://1956magazine.ua.edu/submissions/>.

<sup>4</sup> Mission Statement, *Alice Magazine*, Vol 11 Issue 1, at 6. *See also* Mission Statement, *Alice Magazine*, Fall 2025 Issue, Volume 3, at 4, <https://www.yumpu.com/en/document/read/70864100/alice-fall-2025/3>.

featured fashion, beauty, and entertainment pieces, in addition to content addressing “serious issues young women face,” “[b]ecause college women are more than what [they] wear and . . . look like, but also . . . what [they] think.”<sup>5</sup> Pieces often advocated for women, people of color, and LGBTQ+ people, criticizing “the rising tide of discrimination against and subjugation of marginalized people.”<sup>6</sup>

According to UA, the magazines ran afoul of the Bondi Memo because they were operated “‘by and for’ students of only one race or sex,” R.31-1 p.5, and thus were “unlawful proxies” for discrimination. This is flatly untrue, as both were open to all students for contribution and readership. R.33 p.6–7. By suspending them based on their expression of disfavored editorial viewpoints and their focus on race and gender, UA impermissibly “regulat[ed] speech when the specific motivating ideology or the opinion or perspective of the speaker [wa]s the rationale for the restriction.” *Rosenberger*, 515 U.S. at 829.

Distinguishing this case from *Rosenberger*, the district court emphasized one particular provision of UA Media Planning Board’s (“MPB’s”) Charter, which prohibits affiliating with student periodicals with “an espoused ideological . . . or partisan political editorial policy.” R.40 p.31. It is unclear whether the district court

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<sup>5</sup> Mission Statement, Alice Magazine, Vol 11 Issue 1, at 5, <https://www.yumpu.com/en/document/read/70864100/alice-fall-2025/3>.

<sup>6</sup> Alice, Fall 2025 Issue, Issue 5, *Letter from the Editor*, at 6, <https://www.yumpu.com/en/document/read/70864100/alice-fall-2025/5>.

was suggesting that the suspended magazines violated that provision, but, to be clear, there is no tenable argument that *Alice* or *Nineteen Fifty-Six* were “partisan” within the Charter’s meaning. Neither magazine’s description reflects any ideological editorial policy or partisan political identity, and UA permitted both to operate for years without suggesting either ran afoul of the Charter. The only thing that changed between the magazines’ launch and their 2025 suspension was the Bondi Memo.

**B. The loss of *Alice* and *Nineteen Fifty-Six* means far fewer opportunities for Black and women students’ voices to be heard at UA.**

Viewed in light of the ecosystem of UA student publications, shuttering *Alice* and *Nineteen Fifty-Six* means demonstrably fewer opportunities for students to express the viewpoints emphasized in the suspended magazines. The district court rationalized silencing the magazines by stating that “[c]ontent Plaintiffs might have published in *Alice* or *Nineteen Fifty-Six* has already appeared in *The Crimson White*” (“*CW*”) and that any such content would continue to be eligible for publication there in the future. R.40 p.37. According to the court, UA “has simply redirected resources from two narrowly focused magazines to one open to all students—a decision that expands the range of voices the University’s publications will carry.” *Id.*

But the district court’s calculus is fundamentally flawed. *CW* is UA’s official, general-interest student newspaper, structured around news coverage of a wide range

of topics and viewpoints.<sup>7</sup> Its sections include News, Sports, Culture, Opinion, and Multimedia.<sup>8</sup> *CW*'s submission guidelines state that the Opinions section “is an open forum for The University of Alabama and the Tuscaloosa community,” and that “[t]he opinions editor should present a variety of viewpoints on the opinions page.”<sup>9</sup> Submissions on current events by UA students, faculty, and staff are given priority.<sup>10</sup>

While the district court pointed to *CW*'s broad scope as purportedly expanding the range of voices and opportunities to be heard, this is not the case for UA students interested in voicing or reading about the experiences of women and the Black community. These students will have measurably fewer opportunities to voice these particular viewpoints without *Alice* and *Nineteen Fifty-Six*, *CW* notwithstanding. *CW* covers a wide range of topics in the time-bound style of traditional news reporting. By contrast, *Alice* and *Nineteen Fifty-Six* were devoted to sustained narrative and literary work focused on and relevant to women and the Black community at UA. The volume of that loss is significant: between 2020 and 2025, *Alice* published an average of 114 pieces a year, with a high of 361 pieces in 2025. Between 2020 and 2025, *Nineteen Fifty-Six* published an average of 36 pieces a year,

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<sup>7</sup> The Crimson White, *About*, <https://thecrimsonwhite.com/about/>.

<sup>8</sup> *Id.*

<sup>9</sup> *Submit an Opinion*, The Crimson White, <https://thecrimsonwhite.com/submit-an-opinion/>.

<sup>10</sup> *Id.*

with a high of 64 in 2022.<sup>11</sup> The suspension of these publications leaves students with measurably fewer opportunities per year to publish work uplifting their viewpoints. And, whereas *Nineteen Fifty-Six* featured creative writing pieces, poems, and photography essays<sup>12</sup>—a distinct literary form that a general-purpose newspaper’s dispatches alone cannot replicate—*CW* does not.

UA’s remaining publications will do little to amplify the viewpoints expressed in *Alice* and *Nineteen Fifty-Six*. Presently, the complete list of official UA publications includes *CW*, the *Black Warrior Review* (“*BWR*”), *Marr’s Field Journal* (“*MFJ*”), *Southern Historian*, *Bama Life Newsletter*, WVUA-FM, and *Druid*. *BWR* and *MFJ* are literary and arts journals. They accept only creative writing or artwork. *MFJ* is open only to undergraduate students, and *BWR* does not accept any UA-affiliated submissions whatsoever.<sup>13</sup> *Southern History* publishes only “Southern history pieces” written by graduate students in UA’s history department, and appears to have an inactive website<sup>14</sup> and no recent social media posts.<sup>15</sup> *BamaLife* is an email newsletter sharing short-form content on entertainment, local events, and

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<sup>11</sup> NWLC has on file the full list of published pieces from *Alice* and *Nineteen Fifty-Six* between 2020 and 2025.

<sup>12</sup> *Nineteen Fifty-Six*, *Submissions*, <https://1956magazine.ua.edu/submissions/>.

<sup>13</sup> *Black Warrior Review*, <https://bwr.submittable.com/submit>.

<sup>14</sup> <http://www.southernhistorian.ua.edu/>.

<sup>15</sup> Instagram, *Southhistory\_ua*, [https://www.instagram.com/southhistory\\_ua/](https://www.instagram.com/southhistory_ua/); Facebook, *Southern Historian*, <https://www.facebook.com/SouthernHistorian/>.

holidays, run by and distributed to undergraduate students.<sup>16</sup> Its focus on short-form entertainment pieces makes it inappropriate for the serious, longer-form creative writing, think pieces, and artwork *Alice* and *Nineteen Fifty-Six* published. And radio station WVAU-FM's paramount emphasis on music, entertainment, sports, and pop culture is wholly dissimilar from the suspended magazines' focus and scope.

When UA announced *Druid*'s launch in June 2026, UA described it as “a new lifestyle and culture magazine focused on life in Tuscaloosa and beyond” that “examines the art, culture, and social connections of” Tuscaloosa “and the members of its community, state and region.”<sup>17</sup> Replacing *Alice* and *Nineteen Fifty-Six* with a single, general-purpose magazine focused on Tuscaloosa represents a *diminution* of opportunities for students to express the viewpoints those magazines highlighted for the same reasons explained above regarding *CW*. Thus, the district court's conclusion that viewpoints Plaintiffs may have expressed in *Alice* or *Nineteen Fifty-Six* “will remain eligible for publication in the new magazine,” R.40 p.6, is cold comfort and theoretical at best.

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<sup>16</sup> Student Media, *Bama Life*, <https://studentmedia.sl.ua.edu/media-opportunities/#newsletter>.

<sup>17</sup> Student Media, *Student Media Announces New Magazine*, <https://studentmedia.sl.ua.edu/posts/uncategorized/2026/student-media-announces-new-magazine/>.

## II. Suspending *Alice* and *Nineteen Fifty-Six* Undermines the Unique Value of Mission-Specific Student Publications on College Campuses.

The Supreme Court has long recognized the vital role colleges and universities play in the Nation’s civic and intellectual life. As it explained in *Rosenberger*:

The . . . danger . . . to speech from the chilling of individual thought and expression . . . is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.

515 U.S. at 835. The Court has recognized, “[t]he college classroom with its surrounding environs is peculiarly the marketplace of ideas.” *Healy v. James*, 408 U.S. 169, 180–81 (1972) (citation and quotations omitted); *see also Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). But a marketplace of ideas is only as robust as the range of viewpoints it contains. The Court accordingly has struck down “laws that cast a pall of orthodoxy over the classroom” as threats to college and universities’ role as bastions for the exchange and testing of new ideas, noting that the protection of free speech “is nowhere more vital than in . . . American schools.” *Keyishian*, 385 U.S. at 603 (citing *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)). The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas “[rather] than through any kind of authoritative selection.” *Id.* (citation and quotations omitted).

Student-operated publications are critical in sustaining the marketplace of ideas on university campuses.<sup>18</sup> These publications collectively function as a local news agency for the campus, circulating student opinions, reporting, and debate at a time when the broader decline of local news has left fewer outlets to perform that function for the public.<sup>19</sup> The editorial process compels writers and editors to test their arguments with dissenting views, refining ideas through debate rather than declaring them by fiat.<sup>20</sup> The investigative process of journalism provides similar exposure to contrasting viewpoints.<sup>21</sup> And exposure to diverse viewpoints offered by student publications is just as important for student-readers, because it refines their ability to articulate their own viewpoints by deepening their understanding of viewpoints dissimilar to theirs. As the Supreme Court identified, exposure to differing thought is critical to ensure “students . . . remain free to inquire, to gain new maturity and understanding”; without this, the Court warned, “our civilization will stagnate and die.” *Sweezy v. New Hampshire*, 354 U.S. 234, 250–51 (1957).

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<sup>18</sup> *How Campus Media Amplifies the Collective Student Voice*, The Hornet Newspaper Desk (Jan. 5, 2026), <https://thehornetonline.com/campus-media-amplifies-the-collective-student/>.

<sup>19</sup> See Local Journalist Index 2026 (Muck Rack & Rebuild Local News), <https://localjournalistindex.com/> (reporting nation-wide shortage of local journalists, including “shocking lack of coverage of education”). Alabama ranked thirty-fourth in the nation for local journalistic capacity.

<sup>20</sup> Robyn Ilten-Gee & James Francom, *Journalism Education as a Site for Civic Reasoning*, Educ., Citizenship, & Soc. Just. 1, 2–4 (2025).

<sup>21</sup> *Id.* at 8.

But that role depends on who holds the editorial pen. University publications are historically led by “well-off white . . . students.”<sup>22</sup> When a campus paper is run by students of a certain demographic, “coverage tends to mirror the concerns and perspectives of that demographic.”<sup>23</sup> And independent of who sits in the editor’s chair, the editorial process at a general-purpose outlet like *CW* curates content to reflect a broad cross-section of student experiences. This mandate, by definition, narrows the space available for viewpoints specifically devoted to women’s and Black students’ experiences.<sup>24</sup> Indeed, *CW*’s Opinion section is only one of five sections, and even within it, published pieces are organized around discrete, timely submissions responding to current events rather than the sustained exploration of student perspectives or lived experiences that defined the suspended publications.

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<sup>22</sup> Justin Elliott, *The Racial Politics of College Newspapers*, CTR. AM. PROGRESS (Sept. 7, 2007), <https://www.americanprogress.org/article/the-racial-politics-of-college-newspapers/>; Janice Kai Chen, et al., ‘*I Didn’t Feel Wanted by Student Media*’: *Few Black and Latinx Students Are Editors of Top College Newspapers*, Nieman Lab (Sept. 7, 2021), <https://www.niemanlab.org/2021/09/i-didnt-feel-wanted-by-student-media-few-black-and-latinx-students-are-editors-of-top-college-newspapers/> (finding Black students comprised 9.6% of students at 75 colleges with award-winning newspapers in 2020, but only 5.5% of surveyed editors-in-chief were Black).

<sup>23</sup> *Id.*; see also Sid Bedingfield, *From the Counterpublic to the Mainstream: The New Black Press and the Public Sphere*, 24 *Journalism Stud.* 172, 173 (2023) (“For most of the nation’s history, the elite, mainstream press has been the exclusive preserve of white journalists, and at critical moments they have used their status to shape consensus public opinion on race and to marginalize competing arguments in the Black and dissident press.”).

<sup>24</sup> See generally Elliott, *supra* note 22. One such priority set by *CW* is that the “opinions editor should present a variety of viewpoints on the opinions page.” *Crimson White*, *supra* note 9.

The loss of the latter cannot be cured by the availability of *CW* any more than a magazine’s narrative essay is fungible with a newspaper’s dispatch. Student-operated publications dedicated to the editorial viewpoints of historically underrepresented students provide a critical platform for perspectives that might otherwise go unheard.<sup>25</sup> That editorial independence allows these publications to surface stories that mainstream outlets might overlook: incidents of discrimination, gaps in institutional accountability, or simply the everyday experience of belonging to an underrepresented community on campus.

Publications highlighting the perspectives of underrepresented communities are a direct check against the “especially real” danger of viewpoint discrimination “in the University setting” *Rosenberger* warned against. 515 U.S. at 835–36. By fostering belonging and bringing visibility to stories that would otherwise go untold, these publications expand—rather than fragment—the range of viewpoints available to the campus community.<sup>26</sup> A campus marketplace of ideas that systematically

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<sup>25</sup> See Bedingfield, *supra* note 23, at 177 (noting importance of venues that allow marginalized groups to “debate[]” and “disseminate[]” “oppositional interpretations of public life” “without overwhelming interference from the dominant group”).

<sup>26</sup> See Joshua Finnell, *The Enduring Value of Student Newspapers*, JSTOR Daily (Oct. 1, 2025), <https://daily.jstor.org/the-enduring-value-of-student-newspapers/> (describing the historical role of student-run papers as “uncensored alternatives to traditional outlets . . . [that equipped students] to critique mainstream reporting, amplify marginalized voices, and directly challenge dominant narratives”).

excludes these perspectives is not diverse in any meaningful sense; it is simply smaller.

These publications also provide a distinct educational value for the students running them. Participation in student-led journalism develops leadership, reporting, writing, editing, and media-literacy skills through hands-on experience that classroom instruction alone cannot replicate. These skills translate directly into the civic and professional agency students carry beyond campus.<sup>27</sup> For students from underrepresented communities in particular, that experience often means learning that their institution will treat their editorial judgment about their own community's stories as authoritative rather than as something to be revised or overridden. This experience prepares students to solve problems related to systemic inequities, ethical dilemmas, and professional relationships.<sup>28</sup>

Eliminating *Alice* and *Nineteen Fifty-Six* does not just reduce the number of student publications on UA's campus. It removes platforms dedicated to perspectives most likely to be overlooked, narrows the opportunities students from underrepresented communities have to be heard on their own terms, and undermines

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<sup>27</sup> *Id.*

<sup>28</sup> Statement from Steven R. Roberts, J.B. & M.C. Shapiro Professor of Media & Public Affairs, George Washington Univ. Sch. of Media & Pub. Affs. (Aug. 18, 2026) (on file with NWLC).

the robust exchange of ideas that the Court has repeatedly identified as central to both higher education and the First Amendment.

### **III. The Government Speech Doctrine Does Not Shield UA’s Silencing of *Alice* and *Nineteen Fifty-Six* from First Amendment Scrutiny.**

This Court should reject the district court’s application of the “government speech” doctrine to UA’s silencing of *Alice* and *Nineteen Fifty-Six*. This doctrine recognizes that the government, *when it speaks on its own behalf*, “must be able to decide what to say and what not to say.” *Shurtleff v. City of Boston*, 596 U.S. at 243–44; *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009). But the Supreme Court has warned that the government speech doctrine is “susceptible to dangerous misuse,” warranting “great caution” before extending its reach. *Matal v. Tam*, 582 U.S. 218, 234–35 (2017).

#### **A. *Alice* and *Nineteen Fifty-Six* are not UA’s speech.**

The district court sidestepped decades of precedent recognizing that student-run publications like *Alice* and *Nineteen Fifty-Six* are private speech protected from viewpoint-based discrimination by the First Amendment. *Rosenberger*, 515 U.S. at 829, 841 (“[T]he government has not fostered or encouraged any mistaken impression that the student newspapers speak for the University” and “[t]hese principles provide the framework forbidding the State to exercise viewpoint discrimination, even when the limited public forum [a university student-run publication] is one of its own creation.”). In distinguishing between government and

private speech, courts conduct “a holistic inquiry” guided by three factors: “whether the government maintains control over the speech,” “whether the type of speech has traditionally communicated government messages,” and “whether the public would reasonably believe that the government has endorsed the speech.” *McGriff v. City of Miami Beach*, 84 F.4th 1330, 1334 (11th Cir. 2023); *see Shurtleff*, 596 U.S. at 252.

Properly applied, the *Shurtleff* factors weigh strongly against extending the government speech doctrine to *Alice*, *Nineteen Fifty-Six*, or other MPB publications. With respect to the first factor, Defendants concede that UA “never exercised editorial control over [*Alice* or *Nineteen Fifty-Six*] or censored any content while they were in publication.” R.31 p.2. The MPB is “not permitted to engage in censorship, prior restraint, or any other action concerning content which would be a violation of the enterprises’ First Amendment rights, [or] order the publication of specific information.” *Id.* at 4 (quotations omitted). According to its Charter, the MPB promotes “editorial independence” and “ensures that [publications] are responsive to the needs and concerns of the University community,” not the government’s views. R.26-1 p.19. The district court’s focus on UA’s administrative control over the MPB is misplaced; the key question under *Shurtleff* is the degree of government control over the “content and meaning” of the message. 596 U.S. at 245.

As to the second *Shurtleff* factor: MPB publications have not traditionally communicated or been perceived to communicate government messages. To the contrary, student-run publications are traditionally vehicles for students to investigate and editorialize political issues, endorse student-elected leaders, and hold university administrators accountable for problems affecting the campus community. Had student-run publications traditionally communicated the *government's* messages, many of *CW's* pieces, for example, would have never seen the light of day. In 1963, for instance, *CW* published a guest editorial condemning then-Alabama Governor George Wallace's infamous Stand in the Schoolhouse Door.<sup>29</sup> In 1967, it published a guide on how to avoid the draft for the Vietnam War.<sup>30</sup> In 1970, it condemned the U.S. military's campaign into Cambodia.<sup>31</sup> The paper has also called on UA to address campus concerns like sexual assault on campus, and to explain decisions like the termination of the University Dean.<sup>32</sup> It defies reason to characterize student publications like these as UA's own speech.

Nor would the public reasonably believe that the government endorses speech in student-run publications (the third *Shurtleff* factor). In *Rosenberger*, the Supreme

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<sup>29</sup> Rebecca Griesbach & Jessa Reid Bolling, *Through the Years: CW News Headlines, Editorials Shine Light on Campus History*, THE CRIMSON WHITE (Dec. 6, 2019), <https://thecrimsonwhite.com/57108/news/through-the-years-cw-news-headlines-editorials-shine-light-on-campus-history/>.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

Court concluded there was no “plausible fear” that a student publication’s content would be attributed to a university. 515 U.S. at 841–42. This is partly because student-run publications often directly challenge university policies and positions, as discussed above. The public’s response demonstrates this understanding. For example, in 1962, the editor-in-chief of *CW* anonymously published an editorial condemning the integration battle at Ole Miss and urging the school to admit James Meredith, a Black applicant who fought the university’s rejection at the Supreme Court and won. The public did not assume that UA endorsed *CW*’s pro-integration piece. Instead, the United Klans of America burned a cross on the lawn of the *editor*’s residence. Public backlash to the editorial was aimed not at UA, but at the student perceived to be responsible, who needed armed guards to attend class safely.<sup>33</sup>

**B. The district court’s expansion of the government speech doctrine threatens core First Amendment interests.**

Instead of properly applying the *Shurtleff* factors to the two publications in question, the district court invoked precedent from the K-12 context to conclude that the government speech doctrine permits UA to not only completely control professors’ speech inside the classroom (now squarely rejected by *Pernell*, 181 F.

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<sup>33</sup> Dina Weinstein, *50 Years of Integration Began With Jewish Student’s Editorial*, The Forward (Feb. 4, 2013), <https://forward.com/culture/170453/50-years-of-integration-began-with-jewish-students/>.

4th at 1144–45), but also control *student* speech outside the classroom in extracurricular spaces.<sup>34</sup> This is a dangerous extension of an already-rejected premise.

The district court’s interpretation of the government speech doctrine threatens the First Amendment’s quintessential function. Casting student publications as government speech that the government may freely control would prevent student journalists from speaking on political matters “situated at the core of our First Amendment values,” *Texas v. Johnson*, 491 U.S. 397, 411 (1989) (citations omitted), like endorsing candidates for student government or critiquing and holding accountable student or university leaders. It also offends Alabama’s own Free Expression Policy mandating that public postsecondary institutions adopt a policy safeguarding to “the fullest degree possible” intellectual freedom and free expression, including the distribution of student literature, even where it is “unwelcome, disagreeable, or offensive.” Ala. Code § 16-68-3. The district court’s inflated conception of government speech, which swallows even student speech in

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<sup>34</sup> R.40 p.17. The court cited *Walls v. Sanders*, 144 F.4th 995, 1003 (8th Cir. 2025) and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271 (1988) to assert that extracurricular activities are a part of school curriculum, and that the government speech doctrine enables schools to completely control their content. However, both cases apply to K-12 public schools, not universities. See *Student Gov’t Ass’n v. Bd. of Trs.*, 868 F.2d 473, 480 n.6 (1st Cir. 1989) (“*Hazelwood* . . . is not applicable to college newspapers.”); *Kincaid v. Gibson*, 236 F.3d 342, 352 (6th Cir. 2001) (distinguishing the “immature audiences” of K-12 students from university students and refusing to extend *Hazelwood* to the university setting).

extracurricular spaces, cannot be squared with these protections. Nor can it be squared with the Supreme Court’s admonition that the government speech doctrine is “narrow,” and that courts must “exercise great caution before extending [it].” *Matal*, 582 U.S. at 234–35.

#### IV. UA Misreads *SFFA* and Federal Guidance.

Purportedly relying on *SFFA* and the Bondi Memo, UA maintained that it suspended *Alice* and *Nineteen Fifty-Six* to comply with Title VI’s prohibition against discrimination “on the ground of race, color, or national origin.”<sup>35</sup> R.31 p.9 n.1. However, in so doing, UA fundamentally misinterpreted *SFFA* and federal guidance.

##### A. *SFFA* does not prohibit discussing identity-related experiences.

*SFFA* draws a critical line: race may not determine an individual’s treatment, but race-related experience may inform an institution’s understanding of the individual. The Court held that universities’ admission programs may not let race alone affect access to the university. Yet, the Court expressly preserved universities’ ability to consider individuals’ race-related experiences, noting that “nothing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.” *SFFA*, 600 U.S. at 230.

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<sup>35</sup> 42 U.S.C. § 2000d (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

UA apparently assumes *SFFA* establishes a categorical prohibition against institutional support for any expression concerning race or gender. That interpretation cannot be reconciled with *SFFA*'s text, which protects discussions of race to the extent it delineates students' "experiences as an individual." *Id.* at 231. *SFFA* prohibits racial classifications in admissions; it does not hold that universities must refrain from acknowledging race, discussing race, or providing forums in which students may discuss how race has affected their lives. Moreover, neither *SFFA* nor Title VI, which *SFFA* construed, says anything about gender, so in any event this rationale would not apply to *Alice*.

*Alice* and *Nineteen Fifty-Six* did not assign benefits or burdens according to race (or sex). They did not restrict participation to members of particular demographic groups. Both publications were open to all students, maintained nondiscrimination policies, and included editors and contributors who did not share the race or gender around which each publication's subject matter was principally organized. R.33 p.6–7. The publications opened channels for students of all backgrounds to write about, reflect upon, and learn from the histories, cultures, and perspectives of Black people and women. *Alice*'s mission was to create a publication for "everyone and anyone" and ensure "inclusivity extend[ed] far beyond [its] content." *Id.* at 4. Likewise, *Nineteen Fifty-Six* sought to "educate students from all backgrounds on culturally important issues and topics in an effort to produce socially

conscious, ethical, and well-rounded citizens.” *Id.* *Alice and Nineteen Fifty-Six* capture students’ “experiences as . . . individual[s].” *SFFA*, 600 U.S. at 231. Their content concerns challenges students face, issues in their community, and their accomplishments. This is precisely the type of discussion *SFFA* expressly preserves.

Courts confronting similar efforts to expand *SFFA* beyond the admissions context have cautioned against treating the decision as a sweeping command to keep silent on race or dismantle programs focused on identity-related experiences. For example, a federal district court enjoined the Department of Education (ED) from implementing its February 2025 “Dear Colleague Letter,” which purportedly relied on *SFFA* to direct federally funded educational institutions to scrutinize and potentially eliminate race-based preferences, considerations, and diversity, equity, and inclusion programming. *Nat’l Educ. Ass’n v. United States Dep’t of Educ.*, 779 F. Supp. 3d 149, 166 (D.N.H. 2025). The court disagreed that the 2025 Letter properly interpreted Title VI obligations under *SFFA* and emphasized that *SFFA* “did not hold that the Constitution commands color-blindness” in all contexts. *Id.* at 199.

Another federal district court reached a similar conclusion and stayed implementation of the same Dear Colleague Letter. *Am. Federation of Teachers v. Dep’t of Educ.*, 779 F. Supp. 3d 584 (D. Md. 2025). There, the court explicitly held: “[t]he government, at a minimum, misapprehended the scope of Title VI and *SFFA*.” *Id.* at 618. It further observed: “[t]he Letter thus interprets *SFFA* to apply far more

broadly, and to entirely different categories of conduct, than merely preventing the use of race as a factor in ‘zero-sum’ opportunities like admissions, hiring, promotions, or awards.” *Id.* The court concluded that the Executive Branch “is not entitled to misrepresent the law’s boundaries, and must at a minimum acknowledge and consider the relevant legal framework as it is.” *Id.* The *American Federation of Teachers* court’s analysis relied partly on ED’s own Title VI guidance in its February 28, 2025, Frequently Asked Questions (FAQ) document regarding the 2025 Letter. The court recounted that ED’s FAQ expressly recognized that “schools with programs focused on interests in particular cultures, heritages, and areas of the world would not in and of themselves violate Title VI, assuming they are open to all students regardless of race.” *Id.* at 600. Even the government’s own guidance distinguished between exclusionary conduct and activities focused on particular communities, so long as those activities remain open to all. The FAQ acknowledged that “educational, cultural, or historical observances—such as Black History Month, International Holocaust Remembrance Day, or similar events—that celebrate or recognize historical events and contributions, and promote awareness,” remain permissible “so long as they do not engage in racial exclusion or discrimination.” *Id.*

The cases that invalidated race-based programs under *SFFA* are inapposite here, as they involved programs that made race an eligibility requirement for

participation or receipt of a benefit. *See Nuziard v. Minority Bus. Dev. Agency*, 721 F. Supp. 3d 431 (N.D. Tex. 2024) (finding that the Minority Business Development Agency’s use of race and ethnicity presumptions violated the Fifth Amendment); *Ultima Servs. Corp. v. U.S. Dep’t of Agric.*, 683 F. Supp. 3d 745 (E.D. Tenn. 2023) (holding that the Fifth Amendment prohibited the Department of Agriculture and SBA’s use of a rebuttable presumption of economic and social disadvantage for certain minority groups in making preferential contract awards); *see also Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC*, 103 F.4th 765, 769 (11th Cir. 2024) (directing district court to enjoin a grant contest that was “open only to businesses owned by black women”). The concerns animating these cases are not present here. Instead, the publications are more akin to programming intended to “celebrate or recognize historical events and contributions, and promote awareness.” *Am. Federation of Teachers*, 779 F. Supp. 3d at 600. And like the programs described in ED’s own guidance, *Alice* and *Nineteen Fifty-Six* provided venues for students to explore culture, identity, and history while remaining “open to all students regardless of race” (or gender). *Id.*; *see SFFA*, 600 U.S. at 230.

These authorities make clear: *SFFA* does not mandate that educational institutions prohibit any discussion of race or support of identity-related programs, and it mandates nothing whatsoever with respect to gender. Federal courts have spurned UA’s interpretation of *SFFA*, and this Court should reject it.

**B. UA overreads the Bondi Memo.**

UA’s decision to suspend *Alice* and *Nineteen Fifty-Six* also rests on a misreading of the Bondi Memo. Like *SFFA*, the Bondi Memo distinguishes between programs that condition access or benefits on protected characteristics and activities that remain open to all. The relevant distinction is *exclusion*, not expression.

The Bondi Memo targets programs that use protected characteristics as conditions for participation, eligibility, access, or benefits. *See* Bondi Memo at 4. Its examples—“race-exclusive opportunities, . . . internships, mentorships programs,” “BIPOC-only study lounge[s],” “race-based groups . . . for discussion,” and programs with race- or sex-based participation rules—all make protected characteristics gatekeeping conditions. *Id.* at 4, 6–7. Additionally, the Bondi Memo does not indicate an absolute prohibition on sex-conscious measures. It recognizes that certain sex-based distinctions remain lawful when necessary to protect privacy or safety or promote equal opportunity for women. *See id.* at 7. Notably, the Memo neither addresses student publications nor suggests that expression concerning race or gender is exclusionary.

As explained above, *Alice* and *Nineteen Fifty-Six* were open to all; they imposed no protected-class eligibility requirements, quotas, or restrictions on contributors, editors, or readers. Yet, UA treated their identity-focused content as a proxy for exclusionary conduct, conflating what the publications discussed with

whom they permitted to participate. Because *Alice* and *Nineteen Fifty-Six* remained open to all students regardless of race or sex, the Bondi Memo does not support UA's position.

**C. UA's expansion of *SFFA* and the Bondi Memo has no basis in law.**

At root, the district court's and UA's position would significantly expand *SFFA* and the Bondi Memo. Such expansion would treat any race-related objective as constitutionally suspect, even without a racial classification. Yet, nothing in Title VI or the Supreme Court's jurisprudence requires this result.

As a threshold matter, the Bondi Memo—non-binding guidance that lacks the force of law—stands on dubious legal footing. It invokes multiple legal authorities with distinct scopes—including Titles VI and IX, Title VII, and the Equal Protection Clause. The caselaw interpreting these authorities differs, and the Memo does not analyze the differences between them, nor does it suggest that there has been an intervening change in antidiscrimination law such that their historical purpose and function are no longer relevant.<sup>36</sup>

Both the Equal Protection Clause and Title VI were meant to target exclusion from participation by prohibiting denial of benefits or differential treatment on the basis of protected characteristics. See *City of Richmond v. J.A. Croson Co.*, 488 U.S.

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<sup>36</sup> See Thomas Hill, et al., *Attorney General Bondi Issues Guidance to Recipients of Federal Funding 'Regarding Unlawful Discrimination'*, JD Supra (Aug. 5, 2025), available at <https://www.jdsupra.com/legalnews/attorney-general-bondi-issues-guidance-9966209/>.

469, 493 (1989) (plurality opinion); *see also* *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (“A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.”). Neither was designed to prohibit discussion of race, culture, or lived experience. As scholars have recognized, there is a distinction from conventional “means-colorblindness,” which scrutinizes classifications by race, and “ends-colorblindness,” which would make any race-conscious objective suspect even absent a classification. Sonja B. Starr, *The Magnet School Wars and the Future of Colorblindness*, 76 *Stan. L. Rev.* 161, 165, 169, 233–36 (2024). Extending scrutiny to race-conscious purposes alone undermines Title VI and the Equal Protection Clause; It would also needlessly chill race discussions. *Id.* at 246–47 (noting that “embracing ends-colorblindness would be hugely disruptive. . . because policymakers have relied for decades on the idea that they are free to candidly discuss racial inequities, and so countless existing policies would be vulnerable to challenge”); *see also id.* at 266–68.

There are also functional reasons to recognize this distinction. Open-to-all affinity organizations are different from zero-sum admissions preferences. Ivana Wijedasa, *Defending Race-Based Affinity Organizations in Higher Education in a Post-SFFA Society*, 105 *B.U. L. Rev.* 2037 (2025). In the former, identity supplies the organization’s theme rather than a gatekeeping criterion. *See id.* at 2064–67, 2070–73. An affinity group or identity-focused publication does not necessarily

exclude others based on race or sex. The group's name or subject matter does not make identity a gatekeeping criterion. Open-to-all affinity organizations reserve neither membership nor a finite benefit for any racial group, and joining or declining does not change students' access to institutional benefits. *See id.* at 2064–67, 2070–73. Identity merely defines the organization's theme and mission—not who may participate. *Id.* The same is true here: *Alice* and *Nineteen Fifty-Six* allowed students of any race or sex to serve on their editorial boards, contribute to their pages, read their content. *See* R.1 ¶¶ 48, 58–59.

Because *Alice* and *Nineteen Fifty-Six* remained open to all students, discussing race or gender is not equivalent to classifying participants by race or gender. UA's interpretation therefore lacks a principled foundation and should be rejected.

## CONCLUSION

Amici respectfully urge this Court to reverse.

Dated: September 2, 2026

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### **CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5), because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), it contains 6,480 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word in 14-point Times New Roman font, a proportionally spaced typeface.

Dated: September 2, 2026

/s/ Stacey K. Grigsby

### **CERTIFICATE OF SERVICE**

I hereby certify that on September 2, 2026, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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