Student Protests and the Return of Blacklisting

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INTRODUCTION

Soon after the end of World War Two, the Cold War began, and fear of Communist infiltration in government and the entertainment industry became a focus for politicians and the media. The federal government's loyalty program, which included the establishment of a quasi-official government blacklist,[1] was quickly followed by blacklisting by private employers, including the Hollywood studios in particular. After the 1947 Congressional hearings involving the "Hollywood 10," the net cast by government inquiries and the concomitant blacklisting by private industry and the government widened greatly. In the late 1940s and into the 1950s, if you were a Communist Party member, or if you refused to answer questions from a congressional committee on your affiliations, you became unemployable in government or in the movie industry. Former Communist Party members, "fellow travelers"[2] and even unaffiliated political liberals and progressives were soon targeted beyond Hollywood and Washington, D.C. Academics, union members, and others were swept up, many losing their jobs after being blacklisted as a result of association with Communist Party members or a refusal to answer questions by government investigators. Free expression was stultified in what became one of the most repressive periods in American history. As Professor Geoffrey Stone describes: "From 1946 to 1954, there was a steady erosion in the support of civil liberties among those individuals and institutions we rely upon most to preserve and protect the freedom of expression – the press, intellectuals, liberal politicians, lawyers, courts, and educators" and "[b]y the mid-1950s, a decade of political repression had created a pervasive sense of apprehension among Americans that they could suffer serious consequences if they openly expressed their opinions."[3]

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[1] *See* Part II. A. below.

[2] The term "fellow traveler" became ubiquitous in this time period and later historical accounts. One former Communist Party member, testifying before Congress, stated that the term "fellow traveler" was generally understood to mean someone who, although not a Communist Party member, was "not unsympathetic to your being a Communist." ROBERT VAUGHN, ONLY VICTIMS: A STUDY OF SHOW BUSINESS BLACKLISTING 194 (Limelight ed. 1996).

[3] GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME, FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 419 (2004). *See* Part II below.

What started as a specific and targeted undertaking – identifying Communist Party members in the U.S. government – had metastasized into a broad hunt for political dissidents and their associates. By the mid-1950s, state and local governments had joined the pursuit, and innumerable employers and institutions were inquiring into individuals' memberships and affiliations. Naming names and identifying those affiliated with or members of suspect groups became commonplace. Indeed, the stigma attached to being identified as a member of a questionable group had become such an effective weapon that the practice later spread in Southern states opposed to integration, as they sought to identify and target individual members of civil rights groups.[4]

The Supreme Court, after Chief Justice Warren's appointment and the replacement of other Justices in the mid-1950s, responded (haltingly at first) and, in a series of decisions through the 1960s and later, placed limits on many of the government's repressive efforts.[5]

Blacklisting of political dissenters now appears to be making a comeback. Student protesters are the new target. Responding to pro-Palestinian protests at Columbia University in the Spring of 2024, a group of 13 federal judges (the "Judges") announced in a letter dated May 6, 2024 (the "Judges' Letter"), that they will not hire as law clerks "anyone who joins the Columbia University community – whether as undergraduates or law students – beginning with the entering class of 2024," regardless of any individual student's participation (or lack of participation) in any protest.[6] The Judges' Letter further indicates that the Judges intend not to hire any disruptive protesters (regardless of affiliation).[7]

In parallel with the Judges' action, the U.S. House of Representatives Committee on Education and the Workforce (the "House Education

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[4] *See* Part III below.

[5] *See id.*

[6] Letter from Judge James C. Ho, et al., to Minouche Shafik, President, Columbia Univ. (May 6, 2024), https://www.cnn.com/.element/interactive/2024/05/letter-to-Shafik-from-Judges.pdf (Minouche Shafik was the President of Columbia University at the time the letter was sent. The letter included a cc to Gillian Lester, the Dean of Columbia Law School, and was signed by Judge Ho of the United States Court of Appeals for the Fifth Circuit; Judge Elizabeth L. Branch of the United States Court of Appeals for the Eleventh Circuit; Judge Matthew H. Solomson of the United States Court of Federal Claims; Judges Alan Albright and David Counts, both of the United States District Court for the Western District of Texas; Judges James W. Hendrix, Matthew Kacsmaryk and Brantley Starr, all of the United States District Court for the Northern District of Texas; Judge Jeremy Kernodle of the United States District Court for the Eastern District of Texas; Judge Tilman E. Self, III, of the United States District Court for the Middle District of Georgia; Judge Drew B. Tipton of the United States District Court for the Southern District of Texas; Judge Daniel M. Traynor of the United States District Court for the District of North Dakota; and Judge Stephen Alexander Vaden of the United States Court of International Trade).

[7] *See infra* Part I (the judges' actions as announced in the Judges' Letter are referenced below as the "Judges' Blacklist" or the "Judges' hiring ban." The Judges' Letter follows earlier announcements by one of its lead signatories, Judge James Ho, that as a result of disruptive protests at Yale Law School and Stanford Law School he would not hire any law students who had attended those schools. Judge Elizabeth Branch joined Judge Ho in blacklisting law students from Yale and Stanford); *see also* Andrew Goudsward, *Conservative Judges Extend Clerk Boycott to Stanford After Disrupted Speech*, REUTERS (Apr. 3, 2023, 3:20 PM), https://www.reuters.com/legal/government/conservative-judges-extend-clerk-boycott-stanford-after-disrupted-speech-2023-04-03/.

Committee"), held a series of hearings and issued reports in 2023 and 2024 condemning student protests. A number of members of the House Education Committee were critical of those protests, and in its reports the committee referred to protesters as "woke mobs" and called for the executive branch "to enforce the laws and ensure colleges and universities restore order."[8] The executive branch, with the inauguration of a new administration in January 2025, subsequently also expressed its antipathy to student protesters, targeting universities for their handling of pro-Palestinian campus protests while detaining and seeking to deport non-citizen protesters.[9]

Separately, a law firm – Sullivan & Cromwell – adopted a policy under which a law student's "participation in a protest – on campus or off – could be a disqualifying factor" precluding employment at the firm (the "Law Firm Blacklist").[10] The report of the Law Firm Blacklist followed upon the Judges' Blacklist and the House Education Committee hearings.[11] Under the

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[8] *See Transcript: What Harvard, MIT and Penn presidents said at antisemitism hearing*, ROLL CALL (Dec. 13, 2023, 1:39 PM), https://rollcall.com/2023/12/13/transcript-what-harvard-mit-and-penn-presidents-said-at-antisemitism-hearing/ (reporting various committee members' criticism of the universities' responses to student protests); Press Release, H.R. Comm. on Education and the Workforce, (reporting various committee members' criticism of the universities' responses to student protests); Press Release, H.R. Comm. on Education and the Workforce, @EdWorkforce Unveils Alarming Report on Free Speech in Secondary Education (Sept. 21, 2023), https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=409591; H.R. COMM. ON EDUCATION AND THE WORKFORCE, 118TH CONG., REP. ON FREEDOM OF SPEECH AND ITS PROTECTION ON COLLEGE CAMPUSES 13, Sept. 21, 2023, https://edworkforce.house.gov/uploadedfiles/free_speech_committee_report_final.pdf The Republican staff of the House Committee issued a subsequent report in October 2024. *See* Comm. on Educ. and the Work Force, U.S. House of Representatives, Antisemitism on College Campuses Exposed, at 121 (2024) (Sept. 21, 2023), https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=409591; H.R. COMM. ON EDUCATION AND THE WORKFORCE, 118TH CONG., REP. ON FREEDOM OF SPEECH AND ITS PROTECTION ON COLLEGE CAMPUSES 13, Sept. 21, 2023, https://edworkforce.house.gov/uploadedfiles/free_speech_committee_report_final.pdf ; *See* also Comm. on Educ. and the Work Force, U.S. House of Representatives, Antisemitism on College Campuses Exposed, at 121 (2024) (the Republican staff of the House Committee issued a subsequent report in October 2024).

[9] *See, e.g.*, Katherine Rosman, *Legal Experts Question Trump's Authority to Cancel Columbia's Funding*, N.Y. TIMES (Mar. 17, 2025), https://www.nytimes.com/2025/03/17/nyregion/columbia-trum-p-administration-funding-fight.html?smid=nytcore-ios-share&referrringSource=articleShare; Kate Selig, *The Trump Administration Revoked 800 Student Visas. Here Is What To Know*, N.Y. TIMES (Mar. 27, 2025, updated Apr. 11, 2025), https://www.nytimes.com/2025/03/27/us/students-trump-ice-detention.html?smid=nytcore-ios-share&referringSource=articleShare.

[10] *See* Emily Flitter, *A Wall Street Law Firm Wants to Define Consequences of Israel Protests*, N.Y. TIMES (July 8, 2024, updated July 11, 2024), https://www.nytimes.com/2024/07/08/business-/sullivan-cromwell-israel-protests.html?smid=nytcore-ios-share&referringSource=articleshare (reporting on Sullivan & Cromwell's policy on student protesters and noting that a number of other prominent New York law firms have "privately said they are adopting similar" policies regarding the hiring of student protesters).

[11] The Law Firm Blacklist was preceded by an earlier communication by a group of New York law firms (including Sullivan & Cromwell) with law school deans condemning law student participation in pro-Palestinian protests and urging the deans to address the situation at their law schools. *See, e.g.*, Dan Roe, *Big Law Firms Call on Top Law Schools to Condemn Anti-Israel Protests, Harassment*, LAW.COM (Nov. 2, 2023, 8:00 AM), https://www.law.com/americanlawyer/2023/11/02/big-law-firms-call-on-top-law-schools-to-condemn-anti-israel-protests-harassment-405-131250/. Prominent alumni at a number of universities also joined in the attacks on pro-Palestinian protesters, in some cases urging that private employers blacklist undergraduates who participated in protests. *See, e.g.*, Pamela Paul, *And Now, a Real-World Lesson for Student Activists*, N.Y. TIMES (May 30, 2024), https://www.ny-

law firm policy, a job candidate's presence at a protest or involvement in a pro-Palestinian student group will be scrutinized, and participation in a protest or involvement in a group reportedly may be sufficient to preclude employment.[12]

These actions by the Judges and the law firm are fairly denominated as blacklisting. These employers are not merely exercising their discretion in screening applicants as part of the hiring process. Rather, these measures are intended to deter the hiring of students associated with pro-Palestinian protests regardless of an individual candidate's merit. In the case of the law firm, pro-Palestinian protesters and members of pro-Palestinian groups are targeted, and in the case of the Judges, all students who have attended a certain school (in addition to protesters) are barred. These actions, based on political association, are akin to the executive branch's action in the 1940s in establishing the Attorney General's List of Subversive Organizations ("AGLOSO"), the quasi-official government blacklist of the McCarthy era used to identify organizations (such as the Communist Party) as subversive and disloyal.[13] Under AGLOSO, a listed group was unilaterally deemed by the Attorney General to be "guilty" (i.e., Communist or otherwise subversive), and that determination was used as evidence against government employees in loyalty hearings.[14] AGLOSO not only led to private-industry blacklisting and loss of employment for individuals affiliated with organizations on that list, it broadly chilled associational and speech rights throughout that era.[15] Like AGLOSO and similar organizational blacklists, the demarcations by the Judges and the law firm taint all affiliated with the identified groups.

The Judges' Blacklist and the Law Firm Blacklist, in tandem with the House Education Committee hearings, also appear to have had a speech-chilling effect similar to that of AGLOSO. Although the impact of a blacklist is not subject to objective quantifiable measurement, it is notable that the number of pro-Palestinian campus protests, which proliferated across the country in the Spring of 2024, reportedly declined 64 percent in

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times.com/2024/05/30/opinion/college-activism-israel-gaza.html?smid=nytcore-ios-share&referring-Source=articleShare (describing employer reactions to pro-Palestinian protests and noting that one prominent employer requested "that Harvard release the names of students [who were members of student organizations involved in one protest event] 'so as to insure that none of us inadvertently hire any of their members.'").

[12] *See* Flitter, *supra* note 10. Although the law firm hiring ban reportedly leaves open the prospect of hiring pro-Palestinian protesters and group members, it clearly taints all associated with those protests and groups, presenting them with the prospect of lost opportunity, and is undoubtedly intended to chill speech and protest activity.

[13] *See* discussion *infra* notes 63-77 and accompanying text.

[14] *See, e.g.,* Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 143 (1951) (Black, J., concurring) ("Without notice or hearing and under color of the President's Executive Order 9835, the Attorney General found petitioners guilty of harboring treasonable opinions and designs, officially branded them as Communists, and promulgated his findings and conclusions for particular use as evidence against government employees suspected of disloyalty.").

[15] *See* Part II below.

the Fall of 2024, from 3,220 to 1,151.[16] New restrictive protest policies enacted by universities undoubtedly were a significant factor (perhaps the most significant factor) in that drop, as were the arrests and suspensions of many protesters as a result of the Spring 2024 protests.[17] In addition to those factors, however, the widespread publicity accompanying the blacklists and government hearings likely brought them to the attention of students and had an impact. This chilling effect highlights why the blacklists raise a more serious First Amendment concern beyond a refusal to hire an individual protester. Unlike an individual hiring decision, the announcement of a blacklist ban chills potential speech and expressive conduct, such as the political protest activity targeted here, before it happens.[18]

Peaceful political protest and freedom of association are ideas at the core of the First Amendment,[19] and blacklisting efforts targeting student protesters raise significant issues under that amendment. The Judges' Letter explicitly states that the hiring ban is based on Columbia University's "viewpoints" and the students' protest activity, and requires that those viewpoints change and that protest activity cease in order for the university to avoid the Judges' ire.[20] This threat of coercion of the university runs squarely into the Supreme Court's admonition in NRA v. Vullo,[21] that "[g]overnment officials cannot attempt to coerce private parties in order to

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[16] Johanna Alonso, *Massive Decline in Protests From Spring to Fall 2024*, INSIDE HIGHER ED (Dec. 19, 2024), https://www.insidehighered.com/news/students/free-speech/2024/12/19/2000-fewer-pro-palestinian-protests-fall-spring-2024 (reporting data from the Crowd Counting Consortium, a project run by Harvard University's John F. Kennedy School of Government and the University of Connecticut that collects data on protests). (reporting data from the Crowd Counting Consortium, a project run by Harvard University's John F. Kennedy School of Government and the University of Connecticut that collects data on protests).

[17] *Id.* Columbia University and other colleges and universities adopted new, more restrictive protest policies in the wake of the Judges' announcement and the House Education Committee hearings. Those more restrictive policies were prompted at least in part by those government actions. *See, e.g.*, *AAUP Condemns Wave of Administrative Policies Intended to Crack Down on Peaceful Campus Protest*, AM. ASS'N OF UNIV. PROFESSORS (Aug. 14, 2024), https://www.aaup.org/news/aaup-condemns-wave-administrative-policies-intended-crack-down-peaceful-campus-protest ("The recent proliferation of these new restrictive policies seems to be an attempt to appease politicians who are calling for university administrators to use a heavy hand against faculty and student protesters."). ("The recent proliferation of these new restrictive policies seems to be an attempt to appease politicians who are calling for university administrators to use a heavy hand against faculty and student protesters.").

[18] *See infra* Part V. B.

[19] *See, e.g.*, Counterman v. Colorado, 600 U.S. 66, 81 (2023) ("dissenting political speech [is] at the First Amendment's core"); Ams. for Prosperity Found. v. Banta, 594 U.S. 595 (2021) ("Protected association . . . 'is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority'") (quoting Roberts v. United States Jaycees, 468 U.S. 609, 622 [1984]); Charles F. Walker, *Free Speech and Disruptive Campus Protests*, 88 ALB. L. REV. (forthcoming) (discussing the role of protest and dissent in First Amendment jurisprudence); Dawn C. Nunziato, *First Amendment Protections for "Good Trouble,"* 72 EMORY L. J. 1187, 1191–1214 (2023) (discussing how the "Civil Rights Era [protest] cases forged fundamental First Amendment doctrines")(the pro-Palestinian campus protests have been largely peaceful and fit squarely within the tradition of non-violent civil rights protests in the United States); *See* Erica Chenoweth, Soha Hamman, Jeremy Pressman, & Jay Ulfelder, *Protests in the United States on Palestine and Israel, 2023-2024*, SOC. MOVEMENT STUD. (2024) (collecting, reviewing, and analyzing data, and concluding that "this pro-Palestinian movement has not been violent. That is true of both the national protest wave in general and of the student encampments in spring 2024 in particular").

[20] Judges' Letter, *supra* note 6, at 1–2.

[21] NRA v. Vullo, 602 U.S. 176 (2024).

punish or suppress views the government disfavors."[22] Of course, the Judges, like the rest of us, can voice their views freely and criticize particular beliefs and viewpoints. "What [they] cannot do, however, is use the power of the State to punish or suppress disfavored expression."[23] Yet that is exactly what the Judges are doing here. As the Chief Judge of the United States Court of Appeals for the Eighth Circuit stated in reviewing a complaint against one of the Judges for participation in the hiring ban, the "judges seek through the allocation of publicly-funded employment opportunities (or other allocation of public funds) to influence the behavior of private institutions on matters of public concern."[24] This type of coercive pressure by government officials targeting speech based on viewpoint is wholly antithetical to the First Amendment.[25]

In addition to the improper coercion of the university, the Judges' blacklisting of students based on their protest activity, their affiliation with protesters, and even their affiliation with an institution where disruptive protests have occurred, directly implicates those students' freedom of speech and association.[26] The Supreme Court has explicitly held that the First Amendment prevents the government from "conditioning hiring decisions on political belief and association . . . unless the government has a vital interest in doing so."[27] Similarly, the Court has held that government employment generally may not be denied based on an applicant's constitutionally protected speech.[28] Of course, the Court has also recognized that certain government positions are sensitive, with a heightened need for trust and confidence, which may outweigh these other interests.[29] The job of a judicial law clerk is arguably such a position, as clerks often work in

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[22] *Id.* at 180.

[23] *Id.* at 188 (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 830 (1995)). *See* Genevieve Lakier, *Enforcing the First Amendment in an Era of Jawboning*, 93 U. Chi. L. Rev. (forthcoming 2026) (manuscript at 24–25)) [hereinafter Lakier, *Enforcing the First Amendment*] (stating that the *Vullo* decision reaffirms "that the First Amendment rule against schemes of informal censorship is a prophylactic, or what we might also describe as a categorical, rule that prohibits all efforts by government actors to coerce the private suppression of speech or to force private parties to disassociate from disfavored speakers.").

[24] In re Complaint of John Doe, No. 08-24-90036, 2025 at 4 (Jud. Council 8th Cir., 2025) (Colloton, C.J.) (dismissing ethics complaint while noting that there is "a substantial question whether judges cross an important line when they go beyond expressing their personal views in an effort to persuade and begin using their power as government officials to pressure private institutions to conform to the judges' preferences.").

[25] *See* Part IV below.

[26] *See* Part V below.

[27] Rutan v. Republican Party of Ill., 497 U.S. 62, 78 (1990) (citing Torcaso v. Watkins, 367 U.S. 488, 496 (1961)).

[28] *See, e.g.*, Perry v. Sindermann, 408 U.S. 593, 597 (1972) (government may not deny public employment "to a person on a basis that infringes his constitutionally-protected interests – especially, his interest in freedom of speech."); *see also* U.S. v. Nat'l Treasury Emps. Union, 513 U.S. 454, 465 (1995) (government employees "have not relinquished 'the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest.'") (quoting Pickering v. Bd. of Ed., 391 U.S. 563, 568 (1968)).

[29] *See, e.g.*, Rankin v. McPherson, 483 U.S. 378, 388 (1987) ("in assessing the government's interest, a relevant consideration is whether the speech "has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary") (citing *Pickering*, 391 U.S. at 570-73).

close confidence with the judge, providing counsel and advice on difficult issues, all of which is appropriate for consideration in an individual hiring decision. However, as discussed below, the announcement of an across-the-board ban on public employment as a law clerk while condemning a large cohort of potential applicants for their political speech and activity, as well as their associations with others, including their attendance at a particular institution of higher education, clearly runs contrary to the First Amendment and is fairly subject to condemnation.[30]

Blacklisting of student protesters by a private law firm is also subject to criticism in this regard. Although law firms are not state actors and therefore not subject to First Amendment constraints, there are numerous state laws that bear on free speech, and employee speech and political activity in particular.[31] New York's Labor Law, for example – relevant here in light of Sullivan & Cromwell's New York City headquarters – prohibits a private employer's refusal to hire an applicant based on the applicant's "political activities outside of working hours" or the applicant's "recreational activities."[32] The protections afforded by that statute are intended to protect New York employees' freedoms of speech and association, and arguably apply to a refusal to hire an applicant based on political protest activity.[33] Even if the New York Labor Law does not govern here, the law firm's policy is subject to condemnation insofar as it follows upon and furthers government efforts to condemn protester speech and expressive conduct.[34] Acting in concert with government officials as they condemn speech and expressive conduct has no place within the legal profession, especially in light of the profession's role in preserving the processes and protecting the values, including free speech values, that underlie our constitutional democracy.

Blacklisting in the McCarthy era was condemned for good reason: it not only chilled First Amendment activity such as speech and political association, but it had a corrosive effect on democracy, undermining core constitutional values. Lawyers – the "foot soldiers of our Constitution"[35] – should not be abetting this activity. As one commentator has stated: "In constitutional democracies that define democratic values (e.g., representative government) and assign at least partial responsibility for

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[30] *See* Part V below.

[31] *See, e.g.,* Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2331-2342 (2021) [hereinafter Lakier, *Non-First Amendment Law of Freedom of Speech*] (discussing worker speech protection laws); Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295 (2012) [hereinafter Volokh, *Private Employees' Speech*] (cataloguing state laws protecting employee speech and political activity).

[32] N.Y. LAB. LAW § 201-d(2)(a), (c) (McKinney 2023). *See Sullivan & Cromwell – About Us – Overview*, https://www.sullcrom.com/About/about-us (noting law firm is headquartered in New York City) (noting law firm is headquartered in New York City).

[33] *See* Part VI below.

[34] *See id.*

[35] RENNARD STRICKLAND & FRANK T. READ, THE LAWYER MYTH: A DEFENSE OF THE AMERICAN LEGAL PROFESSION 13 (2008).

protecting those values to the courts, the rule of law becomes increasingly significant for the democracy. As the experts in legal process, lawyers arguably have a special role to play in preserving that process."[36] Piggybacking on government condemnation of protesters, and blacklisting applicants on the basis of their political activity, expression, and associations, is a position ill-fitted to those who hold a central place as defenders of constitutional rights.

Part I of this Article provides a description of both the Judges' Blacklist and the Law Firm Blacklist and the reactions to those blacklists. Part II then provides some context for the practice of blacklisting with a brief overview of how blacklists and loyalty programs operated in the McCarthy era, and the Supreme Court's complicity in the abuses of that era. Part III addresses how the Supreme Court subsequently (albeit slowly and with some hesitation) led the country out of the McCarthy era with decisions overturning that era's precedent in some cases and, even when not explicitly overruling past cases, breaking new ground (or returning to pre-McCarthy-era ground) in opinions protecting the freedom of speech and association. Part IV sets out the argument that the Judges' ban on hiring from Columbia University is a form of informal government censorship that violates the First Amendment. Part V discusses the concerns raised by the Judges' Blacklist under the Court's post-McCarthy era cases addressing First Amendment protections for government employees, with a focus on the hiring context. Part VI addresses the free speech issues, including state law prohibitions, implicated by the Law Firm Blacklist. The Article concludes that the Judges' hiring ban is at variance with First Amendment precedent, and that the law firm's policy is similarly deficient insofar as it violates New York state law and broader free speech standards.

I. THE BLACKLISTS

In May 2024 the Judges announced their ban on hiring as law clerks anyone who has attended Columbia University.[37] The Judges stated that the action was prompted by their view that "Columbia University has become ground zero for the explosion of student disruptions, anti-semitism, and hatred for diverse viewpoints on campuses across the Nation."[38] The Judges' Letter continues:

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[36] Fred C. Zacharias, *True Confessions About the Role of Lawyers in a Democracy*, 77 FORDHAM L. REV. 1591, 1608-09 (2009); *see also* MODEL RULES OF PRO. CONDUCT, PMBL. (AM. BAR ASS'N 1983) ("A lawyer, as a member of the legal profession, is . . . a public citizen having a special responsibility for the quality of justice.").

[37] Judges' Letter, *supra* note 6. Judge Ho subsequently reaffirmed the ban. *See* James Taranto, Opinion, *The Weekend Interview with James C. Ho: The Case of District Judges vs. Trump*, WALL ST. J., May 10–11, 2025, at A11 (discussing the Judges' Letter and Judge Ho's statement that, if Congress and the executive branch "want to get involved in this, absolutely [they should]. I would cheer that on.").

[38] Judges' Letter, *supra* note 6.

> Disruptors have threatened violence, committed assaults, and destroyed property. As judges who hire law clerks every year to serve in the federal judiciary, we have lost confidence in Columbia as an institution of higher education. Columbia has instead become an incubator of bigotry. As a result, Columbia has disqualified itself from educating the future leaders of our country.
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> By favoring certain viewpoints over others based on their popularity and acceptance in certain circles, Columbia has failed as a legitimate, never mind elite, institution of higher education.
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> Recent events demonstrate that ideological homogeneity throughout the entire institution of Columbia has destroyed its ability to train future leaders of a pluralistic and intellectually diverse country.[39]

The letter states that "[s]ignificant and dramatic change in the composition of its faculty and administration is required to restore confidence in Columbia" and concludes that "absent extraordinary change, we will not hire anyone who joins the Columbia University community – whether as undergraduates or law students – beginning with the entering class of 2024."[40] The letter also states that Columbia should identify students who participate in disruptive protests so that employers are not "forced to assume the risk that anyone they hire from Columbia may be one of these disruptive and hateful students."[41]

This effort followed on the earlier announcement by Judge James Ho (who, as noted above, is a lead signatory to the Judges' Letter) that he would not hire students who had attended either Yale Law School or Stanford Law School as a result of disruptive student protests at those schools. Judge Ho announced in September 2022 that he "will no longer hire law clerks from Yale Law School" because of the disruptive student protest of an outside

[39] *Id.*
[40] *Id.*
[41] *Id.*

speaker at the school and the school administration's response.[42] In April 2023, Judge Ho stated that he "will not hire any student who chooses to attend Stanford Law School in the future" as a result of a disruptive student protest of a federal judge during a speaking event, and the school administration's response.[43] In his announcement of the Stanford Law School blacklist, Judge Ho stated that "at a minimum, law schools should identify disruptive students, so that future employers will know who they're hiring."[44]

The Judges' Blacklist has elicited a number of reactions.[45] The New York City Bar Association issued a "Statement of Concern Regarding Improper Use of Judicial Offices in Relation to Law Clerk Hiring and Refusal to Hire" (the "NYC Bar Statement"), in which it stated that "the [Judges'] Letter improperly penalizes Columbia University's students and intervenes in a highly politicized public controversy brandishing the institutional heft of federal judicial offices."[46] The NYC Bar Statement expresses concern that the Judges' Letter was issued "in an effort to pressure Columbia to more harshly punish student protesters and police the ideological composition of its faculty – goals that implicate the free speech rights of members of the Columbia community and of the university itself," and states that "the [Judges'] Letter's blunderbuss warning to entering undergraduates and law students, none of whom was, to our knowledge, accused of illegal conduct at Columbia or anywhere else, seems intended to deter *all* students from attending that university under pain of forfeiting opportunities for future clerkships with a significant number of federal judges."[47]

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[42] James C. Ho, *Agreeing to Disagree: Restoring America by Resisting Cancel Culture*, 27 TEX. REV. L. & POL. 1, 5-6, 17 (2022).

[43] James C. Ho, *Judge James Ho's Remarks Announcing a Hiring Boycott from Stanford Law School*, FED. SOC'Y: FREEDOM OF THOUGHT PROJECT (Apr. 27, 2023), https://www.freedomofthought.fedsoc.org/judge-james-hos-remarks-announcing-a-hiring-boycott-from-stanford-law-school/.

[44] *Id.* As noted above, Judge Branch joined Judge Ho in these announcements.

[45] In addressing the reactions to raucous student protests at law schools over the past few years, Professor Thomas Healy referenced Judge Ho's initial blacklist of Yale Law students, stating: "I will have little to say about the conservative backlash (to student protests) in this essay. When conservatives such as Judge Ho respond to 'cancel culture' by engaging in the very same behavior they condemn – in effect indiscriminately 'canceling' an entire student body – it is hard to take them seriously." Thomas Healy, *The Kids Are Alright*, 51 HOFSTRA L. REV. 439, 441 (2023) (noting that the judge by his comments has made it clear that he seeks "passivity and acquiescence" from student protesters and not debate). The additional blacklist undertaken by the Judges, together with the Law Firm Blacklist and related congressional and executive branch actions, however, would indicate that these efforts are not waning and do warrant attention.

[46] Press Release New York City Bar Association, Statement of Concern Regarding Improper Use of Judicial Offices in Relation to Law Clerk Hiring and Refusal to Hire (June 17, 2024), https://www.nycbar.org/press-releases/statement-of-concern-regarding-improper-use-of-judicial-offices-in-relation-to-law-clerk-hiring-and-refusal-to-hire/.

[47] *Id.* (emphasis in original). (Separately, the non-profit organization Citizens for Responsibility & Ethics in Washington ("CREW") filed a complaint with the Judicial Conference of the United States regarding the Judges' Letter, as well as Judge Ho's earlier blacklisting of students from Yale Law School and Stanford Law School, stating that the blacklists violate the Code of Conduct for United States Judges.) *See* Letter from Noah Bookbinder, Citizens For Resp. & Ethics in Washington, to The Hon.

A number of academics have also responded to the Judges' Blacklist. Professor Vikram Amar of the University of California at Davis School of Law said that the policy described in the Judges' Letter "imposes guilt by association" and that "at a minimum, it's not well thought through on the part of the judges."[48] Dean Erwin Chemerinsky of the University of California at Berkeley School of Law stated: "I find it outrageous the judges would punish students for the choices of their university presidents or administrators. Students should be considered on their merits, not what administrators or faculty or peers have done."[49] Professor Eugene Volokh of the Hoover Institution and UCLA School of Law echoed Professor Chemerinsky's comments, stating that Columbia students "shouldn't be held responsible for what Columbia does, and they shouldn't be retaliated against as a means of trying to pressure Columbia to change."[50] Professor Volokh added that his concern was related to the "familiar principle" of "rejecting guilt by association. We may refuse to hire people [who] do various bad things, but we shouldn't refuse to hire people who are friends with those people, or who belong to the same groups as those people."[51] Stanford Professor Orin Kerr's comments regarding Judge Ho's earlier boycott of Yale Law School students in response to their disruptive protests are also applicable here:

> [Judge Ho] is trying to use his position as a government official, and the accompanying power to direct taxpayer dollars to employ staff, in a way that maximizes his personal agenda outside of his government work . . . . I think this 'boycott' crosses an important line. It's the line between judges expressing their personal views in an effort to persuade (which is fine), and judges harnessing their power as government

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Robert J. Conrad, Jr., Dir., Admin. Off. of the U.S. Courts and Sec'y, Judi. Conf. of the U.S. (June 5, 2024), https://www.citizensforethics.org/wp-content/uploads/2024/06/Judicial-Hiring-Boycott-Letter.pdf. The Judges' Blacklist has also resulted in recusal motions and complaints addressed to the individual judges who signed the letter. *See, e.g.*, Nate Raymond, *U.S. Judge Boycotting Columbia Law Clerks Won't Recuse From Protest Case*, REUTERS (Sept. 13, 2024, at 3:24 PM), https://www.reuters.com/legal/government/us-judge-boycotting-columbia-law-clerks-asked-recuse-protest-case-2024-09-13/ (reporting on recusal motion against Judge Traynor in the District of North Dakota and a complaint against eight judges presented to the Fifth Circuit)

[48] Jack Needham, *Judges' boycott of Columbia students is 'guilt by association,'* DAILY J. (May 9, 2024), https://www.dailyjournal.com/articles/378704-judges-boycott-of-columbia-students-is-guilt-by-association. Professor Amar added: "For them to say that they're not going to consider anyone from this school is basically to punish hundreds, if not thousands, of students for the actions of administrators." *Id*.

[49] *Id.*

[50] Eugene Volokh, *Columbia, the Boycotting Judges, Neutrals, and Secondary Boycotts*, REASON (May 7, 2024, 8:01 AM), https://reason.com/volokh/2024/05/07/columbia-the-boycotting-judges-neutrals-and-secondary-boycotts/.

[51] *Id.*

> officials to create pressure on private institutions to further their personal agendas (which is not fine, in my view).[52]

In contrast to the Judges' Blacklist, the Law Firm Blacklist does not involve a blanket ban on students from particular schools. Rather, it targets student involvement in protests and their association with pro-Palestinian organizations: "The firm is scrutinizing students' behavior with the help of a background check company, looking at their involvement with pro-Palestinian groups, scouring social media and reviewing news reports and footage from protests."[53] The firm is reportedly focused on antisemitic language, and under its policy "[c]andidates could face scrutiny even if they weren't using problematic language but were involved with a protest where others did."[54] The firm's position is reportedly that "protesters should be responsible for the behavior of those around them . . . or else they [are] embracing a 'mob mentality.'"[55] Accordingly, "applicants will have to "list student groups they have joined" and "[p]articipation at a protest or involvement in a group that Sullivan & Cromwell finds objectionable will prompt questioning. Applicants will have to explain their role, including what they did to stop other protesters from making offensive or harassing statements."[56]

The law firm's policy has received support.[57] It has also been criticized. Professor Roderick Ferguson stated that "[d]isqualifying people based on what someone else nearby may have been doing seems to characterize all protesters as having a single mind-set" and that condemning an individual for membership in or participation in a group "can mimic racist thinking, sexist thinking, homophobic thinking, that one instance becomes a character of all."[58] One legal commentator has noted that aspects of the policy are reminiscent "of Sen. Joseph McCarthy during the Red Scare."[59] Other commentators have asked what "due process safeguards" will attach to the law firm's review of applicants, stating that "[s]ilencing, chilling, or

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[52] Orin Kerr, *Boycotting Law Schools in Clerk Hiring As a Way to Influence Law School Culture*, REASON (Sept. 29, 2022, 10:53 PM), https://reason.com/volokh/2022/09/29/boycotting-law-schools-in-clerk-hiring-as-a-way-to-influence-law-school-culture/.

[53] Flitter, *supra* note 10. The firm is reportedly "looking for explicit instances of antisemitism as well as statements and slogans it has deemed to be 'triggering' to Jews." *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] The chairman of another large New York City law firm stated, "What's happening here is really just the implementation of basic work force decency standards." *Id.*

[58] Emily Flitter, *A Wall Street Law Firm Wants to Define Consequences of Israel Protests*, N.Y. TIMES (July 11, 2024), https://www.nytimes.com/2024/07/08/business/sullivan-cromwell-israel-protests.html?smid=nytcore-ios-share&referringSource=articleshare

[59] Vivia Chen, *Sullivan & Cromwell's New Hiring Policy Is Polarizing and Worrisome*, SUBSTACK: VIVIA CHEN (May 23, 2024), https://viviachen.substack.com/p/sullivan-and-cromwells-new-hiring.

deterring speech that offends no civil or criminal prohibition subtracts from our democratic dispensation and the health of civil society."[60]

Context for understanding these blacklisting efforts and their effects can be found in similar efforts by the government and private actors in the post-World War II hunt for Communist Party members and other "subversives" in the United States during the Cold War, discussed below.

II. THE MCCARTHY ERA

A. The Loyalty Program and McCarthy-Era Blacklisting

The protection of free speech and association arguably reached its 20th century nadir with the McCarthy era.[61] That period is perhaps best described as a time when – from a First Amendment point of view – government overreached, creating a profoundly oppressive social and political environment. Fear of Communism, which rose quickly after the Second World War and the demise of relations with the Soviet Union, became a central focus of numerous politicians and organizations soon after the end of the war.[62] Responding to political pressures, President Truman issued Executive Order 9835 (the "Executive Order") in March 1947 establishing a loyalty program for all current and prospective federal executive branch employees (the "Loyalty Program").[63] Under the Executive Order, an individual was deemed ineligible for federal employment if there were "reasonable grounds" for belief that he or she is "disloyal to the U.S. Government."[64] Every present and prospective executive branch employee was subject to an extensive loyalty investigation under the order.[65] Professor Stone states that "[i]t was [the Loyalty Program], more than any other single action, that laid the foundation for the anti-Communist hysteria that gripped the nation over the next decade."[66]

The term "disloyal" was not defined in the Executive Order; rather, that order listed types of activities by employees or applicants to be considered in assessing loyalty, including, among other things, espionage; treason; sedition; advocacy of illegal overthrow of the government; or, most

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[60] Letter from Bruce Fein, Ralph Nader, & Lou Fisher to Joseph C. Shenker, Sullivan & Cromwell LLP, N.Y. TIMES (July 30, 2024), https://www.nytimes.com/interactive/2024/07/30/business/sullivan-letter.html?smid=nytcore-ios-share&referringSource=articleShare.

[61] The political environment and the Supreme Court's decisions in First Amendment cases during and following World War I closely rival the McCarthy era in this regard. *See* ROBERT JUSTIN GOLDSTEIN, POLITICAL REPRESSION IN MODERN AMERICA: FROM 1870 TO 1976 382– 83 (2001) [Hereinafter GOLDSTEIN, POLITICAL REPRESSION] (noting the similarity of factors that "dampened dissent" in the 1917-1920 period and the McCarthy era, including the risk of being tried for sedition or "simply being accused of being a 'subversive.'").

[62] STONE, *supra* note 3, at 323-25. In addition to the federal government, organizations at the forefront of anti-Communist efforts included the U.S. Chamber of Commerce and the Catholic Church. *Id*. at 325.

[63] Exec. Order No. 9835, 12 C.F.R. 59 (Mar. 25, 1947).

[64] *Id.* at 1938; *see* GOLDSTEIN, POLITICAL REPRESSION, *supra* note 61, at 299-300.

[65] STONE, *supra* note 3, at 326.

[66] STONE, *supra* note 3, at 327; *see also* GOLDSTEIN, POLITICAL REPRESSION, *supra* note 61, at 300.

significantly, "[m]embership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist or subversive . . . ."[67] This last criteria, which called for consideration of an employee or applicant's membership in an organization or group "designated by the Attorney General" led to the creation and establishment by the Department of Justice of what became known as the "Attorney General's List," – a list of "subversive organizations" which became a quasi-official blacklist.[68] Dozens of organizations were initially listed, with over 250 listed within a few years thereafter.[69] Although there was no public disclosure of the criteria for listing, for a number of years organizations that found themselves on the Attorney General's List had no right to a hearing or judicial review, and thus no right to contest being labeled "subversive."[70]

The consequences of being included on the Attorney General's List were profound:

> The effect of being listed was clearly to seriously hinder or destroy the organizations involved. Membership and contributions usually dried up, the Treasury Department revoked the tax exempt status of at least sixteen organizations that were listed, meeting places suddenly became difficult to find, and the list was soon incorporated into state and local loyalty programs and became the basis for private blacklisting.[71]

Although the Attorney General's List was promulgated for the purpose of providing administrative guidance for the Loyalty Program, it was soon reportedly used by the administration for political ends.[72] Thus, when the Connecticut State Youth Conference demonstrated against the United States

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[67] Exec. Order No. 9835, *supra* note 63.

[68] ROBERT JUSTIN GOLDSTEIN, AMERICAN BLACKLIST: THE ATT'Y GEN.'S LIST OF SUBVERSIVE ORG. 63 (2008) [hereinafter GOLDSTEIN, AMERICAN BLACKLIST] ("AGLOSO [the Attorney General's List of Subversive Organizations] . . . quickly became a massively publicized, quasi-official blacklist.").

[69] DAVID CAUTE, THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER 169 n. 18 (1978).

[70] STONE, *supra* note 3, at 344. Although the Supreme Court subsequently held, in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951), that the Attorney General's procedures were arbitrary and unlawful, the DOJ did not issue regulations allowing a challenge of designation until 1953, and did not grant a hearing until 1955. *See* CAUTE, *supra* note 69, at 170; GOLDSTEIN, AMERICAN BLACKLIST, supra note 68, at 181, 216-23.

[71] GOLDSTEIN, POLITICAL REPRESSION, *supra* note 61, at 310.

[72] *See* GOLDSTEIN, AMERICAN BLACKLIST, *supra* note 68, at 63 ("AGLOSO . . . was utilized in an almost unlimited variety of punitive fashions by governments and private groups across the nation."); CAUTE, *supra* note 57, at 169 ("From the outset, the list was used to intimidate and morally outlaw the Left, to pillory and ostracize critics of the Truman administration, and to deter potential critics.").

intervention in Greece in 1947, it was placed on the Attorney General's List.[73] Other non-profit organizations that opposed administration policy were similarly listed.[74] Being identified as a current or former member of a group on the Attorney General's list also had significant consequences for individuals, including loss of employment.[75] As a result, "because the criteria for listing were vague and undisclosed, and because new groups were constantly being added to the list, citizens had to be wary about joining *any* organization. The only 'safe' course was not to join anything."[76] As Professor Robert Goldstein stated, "the greatest effect of the Attorney General's list was not on the organizations listed . . . but on the general climate of political dissent. The loyalty program directly affected only federal employees, but the Attorney General's list affected all Americans who belonged to or contemplated belonging to or in any way associating with organizations."[77]

The Loyalty Program was itself a perversion of due process. The hearings before agency loyalty review boards have been said to be akin to a "medieval inquisition," with questions about "sympathetic association" with members of subversive organizations; actions and associations of family members; and possession or knowledge of books, films and musical records.[78] That process was described by Judge Henry White Edgerton of the United States Court of Appeals for the District of Columbia Circuit in the case of Dorothy Bailey.[79] Bailey had been denied reinstatement to her position as a training officer based on allegations that she was or had been a member of the Communist Party and other organizations on the Attorney General's list. Bailey's challenge to that determination was rebuffed by the D.C. Circuit and ultimately by the Supreme Court, which split 4-4, leaving the Court of Appeals decision in place.[80] Judge Edgerton's dissenting opinion in the D.C. Circuit lays out the facts of the case:

> The Federal Bureau of Investigation had reported that informants believed to be reliable had made general statements purporting to connect [Bailey] with the Communist Party. These reports were not disclosed to [Bailey] and have not been

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[73] CAUTE, *supra* note 69, at 169-70.
[74] *Id.*
[75] *See, e.g.*, GOLDSTEIN, AMERICAN BLACKLIST, *supra* note 68, at 85 (" . . . allegations of AGLOSO ties were published in private publications that became the informal 'bibles' of the notorious 'blacklist' of the broadcast and movie industries . . . [and as a result] artists, writers, announcers, and directors . . . were effectively 'being deprived of their opportunity to make a living' because once 'listed' they became 'controversial . . .'").
[76] STONE, *supra* note 3, at 344 (emphasis in original).
[77] GOLDSTEIN, POLITICAL REPRESSION, *supra* note 61, at 310.
[78] *Id.* at 300, 302– 05; *see also* CAUTE, *supra* note 69, at 279-86.
[79] Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd without op*., 341 U.S. 918 (1951).
[80] *Id.* Justice Clark, who served as Attorney General when the Loyalty Program was implemented, recused himself from the decision, resulting in the 4-4 vote affirming the decision below.

> disclosed to the court. The informants were not identified to [Bailey] or even to the [Loyalty Review] Board. Their statements were admittedly not made under oath. [Bailey] denied under oath any membership in and any relationship or sympathy with the Communist Party, any activities connected with it or with communism, and any affiliation with any organization that advocated overthrow of the government of the United States. She asserted her loyalty to the government of the United States. She admitted attending one Communist meeting in 1932 in connection with a seminar study of the platforms of the various parties while she was a student at Bryn Mawr.[81]

Despite these facts, the court rejected Bailey's statutory and constitutional challenges, holding that she had no right to a hearing or further process, and that the decision as to loyalty is one left solely to the executive branch: "[T]he President, absent congressional restriction, may remove from government service any person of whose loyalty he is not completely convinced."[82] As to her First Amendment challenge to the denial of reinstatement based on her alleged political beliefs, the Court stated, "[S]o far as the Constitution is concerned there is no prohibition against the dismissal of government employees because of their political beliefs, activities or affiliations . . . [T]he First Amendment guarantees free speech and assembly, but it does not guarantee Government employ."[83]

The executive branch's establishment and implementation of the Loyalty Program ran in parallel with Congressional investigations. Congressional investigations, however, unlike the administration's Loyalty Program, were not limited to federal employees, and the U.S. House of Representatives Un-American Activities Committee ("HUAC") began its now-familiar investigation of Communists in the motion picture industry in

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[81] *Id.* at 66. Bailey also admitted she had been a member of the American League for Peace and Democracy, an organization on the Attorney General's list. *Id*. at 50.

[82] *Id.* at 65.

[83] *Id.* at 59. Although there was precedent at that time for the view that public employees had no right to object to unconstitutional conditions of employment, *see infra* note 132, Judge Edgerton noted in his dissent that the Court's decision contravened principles espoused in prior Supreme Court precedent, stating: "Appellant's dismissal attributes guilt by association, and thereby denies both freedom of assembly guaranteed by the First Amendment and the due process of law guaranteed by the Fifth." *Id*. at 74 (citing Schneiderman v. United States, 320 U.S. 118, 136 (1943) ("under our traditions beliefs are personal and not a matter of mere association, and . . . men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles.")).

1947.[84] HUAC soon alleged that "scores of screen writers who are Communists" had infiltrated the Hollywood studios and injected Communist propaganda into the movies.[85] HUAC famously subpoenaed eleven writers, actors, and directors who were "suspected of poisoning America's film industry," posing the same question to each: "Are you now or have you ever been a member of the Communist Party?"[86] Ten of the eleven witnesses – soon known as the "Hollywood 10" – refused to answer, and were cited by the Committee for contempt of Congress.[87] Promptly after the 1947 HUAC hearings, and prior to litigation of the contempt citations, the Hollywood studios blacklisted the Hollywood 10, refusing to employ any of them "until such time as he is acquitted or has purged himself of contempt and declares under oath that he is not a Communist."[88] Those ten witnesses had each invoked the First Amendment in refusing to answer the Committee's questions.[89]

The courts rejected that defense to the HUAC contempt citation, and the Supreme Court denied certiorari.[90] Each of the Hollywood 10 were sentenced to prison[91] and, upon their release in 1951, all but one remained blacklisted and unemployable.[92]

Once the Hollywood studios, and the producers that controlled them, decided to blacklist the Hollywood 10, opposition to HUAC in the film

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[84] STONE, *supra* note 3, at 359-60. In its initial incarnation in 1938 as a Special Committee, HUAC had investigated "Communist collaboration," prompting the passage of the Alien Registration Act of 1940 (better known as the "Smith Act," after the name of its sponsor, Rep. Howard W. Smith of Virginia). LAURA WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE 299 (2016). The Smith Act, a broadly-worded anti-sedition act that proscribes, among other things, knowingly or willfully teaching or advocating (or distributing any written material that teaches or advises) the overthrow of any government in the United States by force or violence, was the basis for the prosecution in Dennis v. United States, 341 U.S. 494, 496 (1951), discussed below. *See infra* notes 136-141 and accompanying text.

[85] STONE, *supra* note 3, at 360.

[86] *Id.* at 363.

[87] GOLDSTEIN, POLITICAL REPRESSION, *supra* note 61, at 307. The German playwright Bertolt Brecht was the sole witness who answered, denying that he was or had ever been a member of the Communist Party. STONE, *supra* note 3, at 363. The other 10 witnesses, Hollywood writers and directors, refused to answer the committee's questions about membership in the Communist Party on First Amendment grounds. *Id*.

[88] LARRY CEPLAIR & STEVEN ENGLUND, THE INQUISITION IN HOLLYWOOD: POLITICS IN THE FILM COMMUNITY 1930-60 328-31, 455 (2003) (quoting the Association of Motion Picture Producers' Waldorf Statement (Dec. 3, 1947)).

[89] STONE, *supra* note 3, at 363-64.

[90] Lawson v. United States, 176 F.2d 49, 52-53 (D.C. Cir. 1949) (affirming convictions for refusal to answer HUAC's questions on Communist Party membership and rejecting First Amendment defense), *cert. denied*, 338 U.S. 934 (1950). At the time of the congressional hearings in 1947, the witnesses' legal strategy was focused on litigating the First Amendment issue to the Supreme Court, where it was anticipated there would be five votes for the First Amendment defense. *See* CEPLAIR AND ENGLUND, *supra* note 88, at 264. The composition of the Court changed before *Lawson* reached the high court, however (*see* discussion *infra* notes 122-124 and accompanying text), and the challenge to HUAC ended in the D.C. Circuit with the Supreme Court's denial of certiorari.

[91] CEPLAIR & ENGLUND, *supra* note 88, at 355-56.

[92] *Id.* at 359. One member of the Hollywood 10, Edward Dmytryk, escaped blacklisting by "recant[ing] his political past" and reappearing before HUAC to answer questions and name "former comrades." *Id*. at 357-59.

industry collapsed.[93] "An anti-blacklist organization proved impossible to form in an industry town where the bosses were doing the blacklisting and the unions and guilds were ducking for political and economic cover."[94] HUAC soon gained steam, bolstered by developments both domestic (including the trial of Eugene Dennis and other Communist Party members in 1949 and the conviction of former State Department official and alleged Communist Party member Alger Hiss for perjury in 1950) and foreign (including the fall of the Chinese Nationalist Government in 1949 and the start of the Korean War in 1950).[95] The anti-communist fervor in Congress was also advanced by the rise to prominence of Senator Joseph McCarthy in 1950.[96] McCarthy had been elected to the Senate from Wisconsin in 1946 and thereafter established his name by falsely asserting that he had the names of "card-carrying Communists" in the State Department.[97] Although many Senators saw he was a fraud, McCarthy drew support from the majority of his Republican colleagues and by 1953 had become the chair of the Senate Permanent Subcommittee on Investigations.[98] From there, McCarthy ran hearings similar to HUAC's, attacking government agencies for allegedly harboring Communist infiltrators.[99] His charges were largely baseless; McCarthy "slandered witnesses and ridiculed, debased, and humiliated dozens of innocent individuals, many of whom had to litigate for years to regain their positions. Some never recovered their reputations."[100]

These congressional investigations and hearings did not lead to legislation or criminal referrals (other than for contempt in the case of those who refused to answer questions); their goal was "exposure and ruination of individuals."[101] HUAC held "more than 100 days of public hearings at which more than three hundred witnesses would testify" in 1951 and 1952.[102] Hollywood remained the target, although by this time the witnesses were primarily former Communist Party members or so-called "fellow travelers."[103] The Committee's focus was on "naming names;" many ex-Communists complied and identified former colleagues in order to save their

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[93] *Id.* at 289-92.
[94] *Id.* at 289.
[95] *See, e.g.*, GOLDSTEIN, POLITICAL REPRESSION, *supra* note 61, at 316, 320, 368. Dennis's subsequent conviction was upheld by the Supreme Court in U.S. v. Dennis, 341 U.S. 494 (1951), discussed below. *See infra* notes 135-140 and accompanying text.
[96] GOLDSTEIN, POLITICAL REPRESSION, *supra* note 61, at 320– 21.
[97] ROBERT M. LICHTMAN, THE SUPREME COURT AND MCCARTHY-ERA REPRESSION, 18 (2015).
[98] STONE, *supra* note 3, at 375-76, 382.
[99] *Id.* at 382-90.
[100] *Id.* at 384.
[101] GOLDSTEIN, POLITICAL REPRESSION, *supra* note 61, at 345. *See* Barenblatt v. United States, 360 U.S. 109, 153 (1959) (Black, J., dissenting) ("[T]he chief aim, purpose and practice of the House Un-American Activities Committee, as disclosed by its many reports, is to try witnesses and punish them because they are or have been communists or because they refuse to admit or deny communist affiliations. The punishment imposed is generally punishment by humiliation and public shame.").
[102] WALTER GOODMAN, THE COMMITTEE: THE EXTRAORDINARY CAREER OF THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES, at 298 (1968).
[103] *Id.* at 298-301.

careers.[104] Others remained defiant, and refused to testify on the grounds of the Fifth Amendment, resulting invariably in blacklisting and the attendant consequences.[105] Although HUAC's hearings failed to show Communist dominion of the film industry, over the following years "some 250 writers, directors, and actors were blacklisted in Hollywood," in many cases ruining lives and careers.[106] The Hollywood blacklisting was facilitated by private groups such as the American Legion and a firm operating under the name "American Business Consultants", which compiled lists of people who, although not Communists, had "dallied with liberal politics or causes."[107] Professor Ellen Schrecker succinctly captures the essence of this aspect of McCarthyism:

> [I]t helps to view McCarthyism as a process rather than a movement. It took place in two stages. First the objectionable groups and individuals were identified – during a committee hearing, for example, or an FBI investigation; then, they were punished, usually by being fired. The bifurcated nature of this process diffused responsibility and made it easier for each participant to dissociate his or her action from the larger whole. Rarely did any single institution handle both stages of McCarthyism. In most cases it was a government agency which identified the culprits and a private employer which fired them . . . By the time the investigative furor that characterized the first stage of McCarthyism abated in the late fifties, thousands of people had lost their jobs. And thousands more, whether realistically

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[104] CAUTE, *supra* note 69, at 501.
[105] Although witnesses frequently invoked both the First and Fifth Amendments in declining to answer questions about Communist Party membership, the Supreme Court continued to rebuff the First Amendment defense, while upholding reliance on the Fifth Amendment. *See* Emspak v. United States, 349 U.S. 190, 195 (1955) (affirming use of the Fifth Amendment privilege against self-incrimination where witness stated he was invoking "primarily the First Amendment, supplemented by the Fifth;" the Court stated that "[i]f it is true that in these times a stigma may somehow result from a witness' reliance on the Self-Incrimination Clause, a committee should be all the more ready to recognize a veiled claim of the privilege. Otherwise, the great right which the Clause was intended to secure might be effectively frustrated by private pressures."); Quinn v. United States, 349 U.S. 155, 163 (1955) (Reliance on the First Amendment "does not preclude . . . reliance on the Fifth Amendment as well.").
[106] STONE, *supra* note 3, at 365; *see also* GOLDSTEIN, POLITICAL REPRESSION, *supra* note 61, at 345.
[107] CEPLAIR & ENGLUND, *supra* note 88, at 387-88.

> or not, feared similar reprisals and curtailed their political activities.[108]

Blacklisting became pervasive, not just in Hollywood, but in academia, among unions, and throughout the country.[109] For example, HUAC had come to focus on colleges and universities in its search for Communists during the 1953-54 congressional term.[110] Most institutions of higher education cooperated in those investigations, and the Association of American Universities (the "AAU") went so far as to say that Communist Party membership "extinguishes the right to a university position" and that exercising the constitutional right of invoking the Fifth Amendment "places upon a professor a heavy burden of proof of his fitness to hold a teaching position and lays upon his university an obligation to re-examine his qualification for membership in its society."[111] As a result, hundreds of faculty members were dismissed or forced to resign based on their affiliations or because they invoked the Fifth Amendment when questioned.[112] Once a faculty member lost his or her position as a result of the inquiries, blacklisting kept them out of the profession. As Professor Schrecker describes:

> Almost every academic who lost a job as a result of a congressional investigation had trouble finding a new one. A blacklist was in place, a blacklist at least as comprehensive and far less well known than the one in the entertainment industry. It operated to deny academic employment to almost every teacher who refused to cooperate with an anti-Communist investigation and to an unknown number of other controversial individuals as well . . . .

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[108] ELLEN W. SCHRECKER, NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES, at 9 (Oxford University Press, 1986). Professor Genevieve Lakier has made the same point in discussing how efforts at repression of pro-Palestinian protests on campus are reminiscent of the McCarthy era. Knight First Amendment Institute, *'War & Speech' Episode 1 Transcript: How Repressive Is This Moment, Really?* April 3, 2024), https://knightcolumbia.org/documents/79mb6nc1za (citing the "harnessing of both public and private power and their complex intermingling" in both eras, and noting that "it was . . . the government providing the instigation and then the private institutions providing the firepower that I think made the McCarthy era [very] powerful.")

[109] GOLDSTEIN, POLITICAL REPRESSION, *supra* note 61, at 360– 69. Unions were specifically targeted in the Taft-Hartley Act, which in effect precluded Communist Party members from serving as union officers. *See* Am. Commc'ns Ass'n v. Douds, 339 U.S. 382 (1950), discussed *infra* at notes 124-29 and accompanying text.

[110] GOODMAN, *supra* note 102, at 325-32.

[111] GOLDSTEIN, POLITICAL REPRESSION, *supra* note 61, at 362– 63. The AAU "represented the heads of thirty-seven of the most prestigious American colleges." *Id*. at 363. The American Association of University Professors (the "AAUP") opposed the AAU position. *See* GOODMAN, *supra* note 102, at 327-28.

[112] CAUTE, *supra* note 69, at 406, 416.

> [D]uring the height of McCarthyism, in the middle and late fifties, no academic who was dismissed as the result of a public refusal to cooperate with an investigating committee was able to find a regular teaching position at an academically respectable American college or university.[113]

The effect was intimidation and fear. As Robert M. Hutchins, the President of the University of Chicago, stated at the time, "[t]he question is not how many teachers have been fired, but how many think they might be, and for what reasons . . . . The entire teaching profession of the U.S. is now intimidated."[114] College students were also impacted: "Deans at several institutions reported that students had become frightened to voice liberal views, or to become identified with peace or free speech, because such views had 'become associated with Communism.' Any criticism of the nation was likely to be decried as unpatriotic."[115]

Thus, the academic blacklists had the same effect as the Hollywood blacklists: they silenced dissent and suppressed political criticism. The blacklists were, in essence, "an institutionalized, politicized mechanism for imposing censorship and weakening dissent in Cold War America."[116] And the blacklists were effective. Professor Goldstein notes that by the mid-1950s "most voices of dissent had long been shackled . . . . opposition to American cold war foreign policies was practically unheard of, and suggestions of radical alternatives to the existing political and economic structure in America were almost equally rare."[117]

As Professor Stone has pointed out, although there were legitimate concerns about espionage and unlawful foreign influence in this time period, "a democracy is about means as well as ends," and the witch hunts engaged in by McCarthy and others "violated the fundamental norms and the essential values of the American constitutional system."[118] The proper way to address the dangers of espionage and sabotage, he adds, is to "focus precisely on the criminal conduct and to use appropriate *law enforcement* tools to identify, punish and deter dangerous lawbreakers," and not to "stifle open debate or to foster a climate of fear and timidity."[119] Congress's pursuit of guilt by association, and the resulting blacklisting, however, did exactly that, smothering debate and creating an environment of anxiety and concern.

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[113] SCHRECKER, *supra* note 108, at 265-66.
[114] CAUTE, *supra* note 69, at 429 (quoting President Hutchins).
[115] STONE, *supra* note 3, at 422.
[116] CEPLAIR & ENGLUND, *supra* note 88, at xi.
[117] GOLDSTEIN, POLITICAL REPRESSION, *supra* note 61, at 406.
[118] STONE, *supra* note 3, at 393.
[119] *Id.* at 374 (emphasis in original).

B. The Courts' Complicity in McCarthyism

Although the Supreme Court had issued a number of decisions in the 1930s and 1940s that were protective of First Amendment rights,[120] that soon changed with the onset of the Cold War. One driver of the change was the appointment of new justices to the Court. Fred Vinson replaced Harlan Fiske Stone as Chief Justice in 1946. Three years later, two of the Court's "most zealous defenders of civil liberties," Justices Frank Murphy and Wiley Rutledge, both passed away, replaced by conservative stalwarts Tom C. Clark and Sherman Minton.[121] The appointments of Justices Clark and Minton had a profound effect on the Court, creating a "new five-justice conservative majority. . . in 'Communist' cases – one that would prevail for the remainder of the Vinson court's tenure."[122] That five-member voting bloc of the Court – Chief Justice Vinson, together with Justices Clark, Minton, Harold Burton and Stanley Reed – "largely acquiesced in government action" in those cases, and "did not resist the era's repressive practices."[123]

In American Communications Ass'n v. Douds,[124] the reconstituted Court faced an early test in the war on Communism. In a plurality opinion authored by Chief Justice Vinson, the Court upheld a provision of the Taft-Hartley Act that required each union officer to sign an affidavit stating in part that "he is not a member of the Communist party or affiliated with such party" and "does not believe in . . . the overthrow of the United States Government by force or by any illegal or unconstitutional methods."[125] The statute was aimed at preventing political strikes by unions, that is, strikes led by Communists or others aiming to disrupt the economy.[126] The law was challenged on the ground that it infringed the First Amendment rights of

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[120] *See, e.g.*, Stromberg v. California, 283 U.S. 359, 369-70 (1931) (reversing conviction for display of red flag as a symbol of "opposition to organized government."); Near v. Minnesota, 283 U.S. 697, 722-23 (1931) (reversing prior restraint on antisemitic newspaper report accusing public officials of corruption); De Jonge v. Oregon, 299 U.S. 353, 362, 365 (1937) (reversing state court syndicalism conviction for assisting in the conduct of a public meeting "under the auspices of the Communist Party."); W. Va. State Board of Education v. Barnette, 319 U.S. 624, 633 (1943) (affirming injunction against enforcement of a state regulation requiring students to salute and pledge allegiance to the flag).

[121] LICHTMAN, *supra* note 97, at 24-25.

[122] *Id.* at 25. As to the other Justices, Lichtman states that Justices Hugo Black and William Douglas "would continue to cast liberal votes, but now they were often isolated. The votes of the remaining Justices, Felix Frankfurter and Robert H. Jackson, were difficult to predict." *Id. See also* MARJORIE HEINS, PRIESTS OF OUR DEMOCRACY: THE SUPREME COURT, ACADEMIC FREEDOM, AND THE ANTI-COMMUNIST PURGE 103 (2013) (noting that the "lamentable performance" of the Vinson Court after the addition of Justices Minton and Clark "made a wreck of the First Amendment jurisprudence that the Court had built under its previous chiefs, Evan Hughes and Harlan Fiske Stone.").

[123] LICHTMAN, *supra* note 97, at 29-30.

[124] *Douds*, 339 U.S. at 415, 445. Chief Justice Vinson's opinion was joined by Justices Reed and Burton. Justices Frankfurter and Jackson dissented in part and concurred in part, and Justice Black dissented. Justices Douglas, Minton and Clark did not participate.

[125] *Id.* at 385-86. Absent the oath, unions could not avail themselves of federal labor-law remedies. *Id*. Thus, the statute effectively precluded Communist Party members from holding union office.

[126] *Id.* at 388-89; *see* Heins, *supra* note 122, at 107 ("Congress thought communists would organize strikes not just to achieve better pay and working conditions but to disrupt the economy sufficiently to prepare for revolution.").

union officers "to hold what political views they choose and to associate with what political groups they will . . ."[127] Chief Justice Vinson's opinion rejected that challenge, stating that the statute's "manifest purpose was to bring within the terms of the statute only those persons whose beliefs strongly indicate a will to engage in political strikes and other forms of direct action when, as officers, they direct union activity" and he therefore construed the applicable clause to apply only to "persons and organizations who believe in violent overthrow of the Government as it presently exists under the Constitution as an objective, not merely a prophecy."[128] The *Douds* opinion thus provided a legal and conceptual foundation for the dubious principle of guilt by association and the resulting blacklisting in the following years.[129]

Subsequently, in Adler v. Board of Education,[130] public school teachers brought a declaratory judgment action pursuant to the First and Fourteenth Amendments seeking to enjoin a New York state statute – the Feinberg Law – that, among other things, prohibited state employment of anyone who advocates, advises or teaches the overthrow of the government by unlawful means, or becomes a member of a group that advocates, advises or teaches such overthrow.[131] In an opinion authored by Justice Minton, the Court held that the statute did not violate the First Amendment, stating that the teachers "may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and association and go elsewhere."[132] The statute also allowed the State Board of Regents to list those organizations in which membership would constitute prima facie evidence of disqualification from employment. The Court held that such a list was not a due process violation, as "[d]isqualification follows . . . as a reasonable presumption."[133] In his dissent, Justice Douglas summarized the failings of this scheme:

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[127] *Douds*, 339 U.S. at 389.

[128] *Id.* at 407. Justice Black, dissenting, made short shrift of that rationale, citing the Court's earlier First Amendment precedent and stating that "penalties should be imposed only for a person's own conduct, not for his beliefs or the conduct of others with whom he may associate. Guilt should not be imputed solely from association or affiliation with political parties or any other organization, however much we abhor the ideas they advocate." *Id*. at 452 (citing Schneiderman v. United States, 320 U.S. 118, 136-39 (1943) and De Jonge v. Oregon, 299 U.S. 353, 365 (1937)).

[129] *See* HEINS, *supra* note 122, at 107 ("This first major Supreme Court encounter [in *Douds*] with the test oaths, blacklisting, and guilt by association that came to define the Red hunt of the 1950s was . . . cited ceaselessly in the years to come as signaling the Court's approval of nearly any anti-subversive measure.").

[130] 342 U.S. 485 (1952).

[131] *Id.* at 487-89.

[132] *Id.* at 492. The decision in *Adler* reflected the courts' long-held view – later rejected by the Warren Court – that a public employee had no right to object to conditions placed upon the terms of employment – including those which restricted the exercise of constitutional rights. Connick v. Myers, 461 U.S. 138, 143 (1983) (discussing the demise of this view and citing the "classic formulation of this position" as espoused by Justice Holmes in McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220 (1892) (Holmes, J.) ("A policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."). *See* Part V. A. below.

[133] *Adler*, 342 U.S. at 495.

> The present law proceeds on a principle repugnant to our society – guilt by association. A teacher is disqualified because of her membership in an organization found to be 'subversive.' The finding as to the 'subversive' character of the organization is made in a proceeding as to which the teacher is not a party and in which it is not clear that she may even be heard. To be sure, she may have a hearing when charges of disloyalty are leveled against her. But in that hearing the finding as to the 'subversive' character of the organization apparently may not be reopened in order to allow her to show the truth of the matter. The irrebuttable charge that the organization is 'subversive' therefore hangs as an ominous cloud over her own hearing. The mere fact of membership in the organization raises a prima facie case of her own guilt. She may, it is said, show her own innocence. But innocence in this case turns on knowledge, and when the witch hunt is on, one who must lean on ignorance leans on a feeble reed.[134]

In the most significant decision of the era, *Dennis v. United States*,[135] the Court (in another plurality decision authored by Chief Justice Vinson) upheld the conviction of Eugene Dennis and 11 other members of the national board of the Communist Party for conspiring to teach and advocate the overthrow of the U.S. government by force and violence.[136] Chief Justice

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[134] *Id.* at 508-09. Justice Black joined in Justice Douglas's dissent. Justice Frankfurter dissented separately on standing and ripeness grounds; In its subsequent decision in Wieman v. Updegraff, 344 U.S. 183, 190-91 (1952), the Court struck down Oklahoma's state loyalty oath where membership in a designated organization created a "conclusive" presumption of disloyalty, stating: "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process." In striking down the oath on due process grounds, the Court did not reach the First Amendment issue and in doing so did little more than reassert the "feeble reed" of a defense of ignorance referenced in Justice Douglas's dissent in Adler.

[135] Dennis v. United States, 341 U.S. 494 (1951).

[136] *Id.* at 516-17. Chief Justice Vinson's plurality opinion was joined by Justices Minton, Burton and Reed. Justices Frankfurter and Jackson concurred, and Justices Black and Douglas dissented. The prosecution was brought under the Smith Act, which among other things made it unlawful for any person to "knowingly or willfully advocate, abet, advise or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence." *Id*. at 496.

Vinson abandoned Justice Holmes's clear and present danger test[137] (which required imminent danger to allow government restriction of speech) and adopted Judge Learned Hand's modification of Holmes's test (proposed in Judge Hand's opinion for the Second Circuit in the decision below), under which the notion of a "present" or imminent danger was replaced by a balancing test. That balancing test required the Court to "ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[138] By allowing Dennis's conviction for conspiring to teach and advocate political ideas, and abandoning the concepts of clear and present danger or imminent threat, Chief Justice Vinson's opinion, together with the earlier opinions in *Douds* and *Bailey*, markedly diminished First Amendment protections for speech and association and "deeply compromised free speech" at the height of the McCarthy era.[139] Moreover, "[t]he biggest impact was not on the already floundering [Communist Party]; it was on the many thousands of individuals who were subject to loyalty programs, to blacklisting, and to legislative inquisitions."[140]

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[137] Schenck v. United States, 249 U.S. 47, 52 (1919) (Holmes, J.) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."); *see also* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., joined by Holmes, J., concurring) (No danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.).

[138] *Dennis*, 341 U.S. at 510. In their dissents, Justices Black and Douglas took exception to the other Justices' abandonment of Holmes's clear and present danger test. Justice Douglas (who, unlike the other justices, had reviewed the trial record) concluded that the prosecution was based on the defendants' teaching Marxist-Leninist doctrine from books that "lawfully remain on library shelves," and that there was "no evidence whatsoever that the acts charged viz., the teaching of the Soviet theory of revolution with the hopes that it will be realized, have created any clear and present danger to the nation." *Id*. at 583, 587. *See* LICHTMAN, *supra* note 84, at 45. Professor Harry Kalven, Jr., points out that among other failings, the Court's decision in *Dennis*, although involving a prosecution for defendants' speech, nowhere discusses "specific messages" conveyed. HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 194 (Jamie Kalven ed., 1988). In addition, although involving a "conspiracy to advocate," the Court did not address "the constitutional limits of conspiracy doctrine applied to speech." *Id*. at 193. Professor Kalven states that "the combined effect of the majority's uncritical acceptance of the conspiracy framework and its reformulation of the clear and present danger test is to enlarge the censor's domain so that it once again includes general advocacy of violent overthrow." *Id*. at 210. Although never explicitly overruled, this criticism was addressed, and resolved, in the Court's decision in Brandenburg v. Ohio, 395 U.S. 444 (1969). *See* Part III below.

[139] Heins, *supra* note 122, at 116.

[140] *Id.* The Court issued another decision that same year, Feiner v. New York, 340 U.S. 315 (1951), in which it upheld the conviction of a speaker for disorderly conduct where violence and fights erupted as a result of his speech. The Court, per Chief Justice Vinson, held that the conviction presented no constitutional violation because the police acted to preserve order and protect the general welfare. *Id.* at 319. In his dissent, Justice Douglas noted that Feiner's speech did not involve incitement or the use of fighting words, but only "an unsympathetic audience and the threat of one man [in the audience] to haul the speaker from the stage." *Id*. at 331. In Justice Douglas's view, Feiner's speech was protected and his arrest and conviction violated the First Amendment. *Id*. Like the Court's decision in Dennis, the Feiner decision was widely criticized and, although not explicitly overruled, has fallen into disfavor and has been repeatedly distinguished in analogous cases. *See, e.g.*, Frederick Schauer, *Costs and Challenges of the Hostile Audience*, 94 NOTRE DAME L. REV. 1671, 1680 (2019) ("the Supreme Court appears to have eviscerated *Feiner* of whatever authority it may once have had.") (citing cases).

III. THE SUPREME COURT AND THE END OF THE MCCARTHY ERA: RENEWED PROTECTION FOR THE FREEDOMS OF ASSOCIATION AND SPEECH

After the Supreme Court's decision in *Dennis*, between the years 1953 and 1957, the composition of the Court changed yet again and, led by a new Chief Justice, the Warren Court opened a new era in civil rights jurisprudence.[141] Of particular note, the Court issued a series of significant decisions on Monday, June 17, 1957, a date subsequently demarcated as "Red Monday" by FBI Director J. Edgar Hoover.[142] In one of those decisions, Watkins v. United States,[143] the Court reviewed the conviction of John Watkins, who had been called before HUAC where he refused to answer questions about individuals whom he believed were no longer members of the Communist Party. (Watkins had provided other information to the committee, including the identity of current Communist Party members.) His refusal rested on the grounds that the questions were not relevant to the work of the committee. In upholding that challenge and ordering the indictment for contempt to be dismissed, the Court spoke expansively on the potential for abuse inherent in public investigations:

> The mere summary of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference. And when those forced revelations concern matters that are unorthodox, unpopular, or even hateful to the general public, the reaction in the life of the witness may be disastrous . . . . Nor does the witness alone suffer the consequences. Those who are identified by

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[141] Chief Justice Warren replaced Chief Justice Vinson in March 1954. Thereafter, Justice Harlan replaced Justice Jackson in March 1955; Justice Brennan replaced Justice Reed with a recess appointment in October 1956 and confirmation to the bench in March 1957; and Justice Whittaker replaced Justice Minton also in March 1957. *See* Supreme Court Historical Society, *Justices and the Court*, https://supremecourthistory.org.

[142] Elizabeth J. Elias, *Red Monday and Its Aftermath: The Supreme Court's Flip-Flop Over Communism in the Late 1950s*, 43 HOFSTRA L. REV. 207, 210 (2014). The four decisions issued by the Court on that date were the three decisions discussed immediately below – Watkins, Yates, and Sweezy – and Service v. Dulles, 354 U.S. 363 (1957) (setting aside State Department's discharge of foreign service officer on loyalty grounds where State Department failed to follow its regulations in connection with the discharge). Earlier that month, the Court had issued a decision in Jencks v. United States, 353 U.S. 657 (1957), in which a union leader had been convicted of filing a false Taft-Hartley affidavit. The Court ruled that the lower court had violated Jencks's due process rights by not requiring the government to disclose reports by FBI informants who testified at trial. *Id*. at 667, 672. The decision "had major implications for the use of secret evidence in political cases," and became a point of contention, especially among members of Congress. Heins, *supra* note 122, at 178.

[143] Watkins v. United States, 354 U.S. 178 (1957). Chief Justice Warren delivered the opinion of the Court. Justice Frankfurter concurred and Justice Clark dissented. Justices Burton and Whittaker did not participate.

> witnesses and thereby placed in the same glare of publicity are equally subject to public stigma, scorn and obloquy.[144]

The Court went on to note that government investigations such as HUAC's inevitably create a chilling effect and an environment conducive to private backlash, stating that beyond the immediate impact on witnesses and those they identify "there is the more subtle and immeasurable effect upon those who tend to adhere to the most orthodox and uncontroversial views and associations in order to avoid a similar fate at some future time. That this impact is partly the result of non-governmental activity by private persons cannot relieve the investigators of their responsibility for initiating the reaction."[145]

Thus, despite the narrow holding of Watkins (reversing a contempt citation on the grounds that the committee had not set forth the relevancy of its questions to the committee's legislative purpose), the Court made clear that it found HUAC's broad and intrusive inquiries, and the resulting reputational harm and blacklisting incurred by many, to be significantly troubling.[146]

In *Dennis* and other decisions of the McCarthy era, the Court had upheld the suppression of dissenting speech that resulted from executive branch overreach and congressional hearings. The Court took an important step to abjure those precedents in *Yates v. United States*,[147] also decided on Red Monday. There, the Court overturned the conviction of Oleta Yates and others for conspiracy to violate the Smith Act on facts essentially indistinguishable from *Dennis*. While not overruling *Dennis*, Justice Harlan's opinion held that advocacy of *action* (rather than advocacy as an "abstract principle") is required for a conspiracy conviction under the Smith Act.[148] The Warren Court subsequently issued a number of decisions specifically addressing speech and associational rights.

A. Renewed Protection for the Freedom of Association

As discussed above, one of HUAC's signature features was its pursuit of guilt by association; the committee was almost singularly focused on exposure of individuals' associations with subversive groups. Senator McCarthy also adopted this tack, as did southern segregationists. Professor Seth Kreimer explains: "The sanctions at the command of Senator McCarthy, his precursors, and his imitators, lay primarily in the ability to

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[144] *Id.* at 197-98.
[145] *Id.* at 197-198. In Sweezy v. New Hampshire, 354 U.S. 234 (1957), also decided on June 17, 1957, the Court again reversed a contempt citation, this time in connection with a state legislative inquiry. In that case, a college professor was questioned about his class lectures; the Court found the inquiry to be a due process violation. *Id.*
[146] GOLDSTEIN, POLITICAL REPRESSION, *supra* note 61, at 404.
[147] Yates v. United States, 354 U.S. 298 (1957).
[148] *Id.* at 318.

obtain and publish information, with the expectation that private parties would respond. So well recognized was this dynamic at the time that massive resistance in the American South consciously adopted similar tactics in the effort to eviscerate civil rights initiatives."[149] The Warren Court addressed this form of abuse, clarifying the First Amendment's protection of the freedom of association, in *NAACP v. Alabama ex rel. Patterson*.[150] In that case, the state of Alabama sought the NAACP's membership list as a condition of doing business in the state. The NAACP argued that its members' First Amendment right of freedom of association permitted it to withhold the membership list. The Supreme Court agreed, recognizing the "vital relationship between the freedom to associate and privacy in one's associations."[151] The Court held that requiring disclosure would be akin to mandating that members wear identifying armbands and would act as a "substantial restraint upon the exercise by [NAACP] members of their right to freedom of association."[152] Disclosure would expose members to "economic reprisal, loss of employment, threat of physical coercion and other manifestations of public hostility."[153] The Court noted that it is no answer that these consequences flow from private reprisal rather than directly from government action: "The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold."[154]

In *Scales v. United States*,[155] and *Noto v. United States*,[156] the Court addressed prosecutions for membership in subversive organizations under

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[149] Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 45-46 (2006); *see also* KALVEN, *supra* note 138, at 259 (noting that Southern states sought to compel disclosure of NAACP membership lists in order to "hobble" the civil rights movement).

[150] 357 U.S. 449 (1958). Following the decision in that case, the Court appeared to retreat from its speech-protective position in the Red Monday cases. In Barenblatt v. United States, 360 U.S. 109 (1959) and Uphaus v. Wyman, 360 U.S. 72 (1959), the Court affirmed the convictions of individuals suspected of having connections to the Communist Party for their refusal on First Amendment grounds to answer questions or produce information to government investigators. *Barenblatt*, 360 U.S. at 114-16 (refusal to answer questions); *Uphaus*, 360 U.S. at 74-75 (refusal to produce names). *See* HEINS, *supra* note 122, at 183 ("the political reaction to the Court's 1957 decisions culminating in "Red Monday" contributed to the Court's retrenchment in Barenblatt and Uphaus."); Elias, *supra* note 142, at 209, 220-26 (discussing possible reasons for the Court's decisions in those cases). The Court subsequently issued a number of decisions reaffirming the right of free speech and association, as discussed below.

[151] *NAACP*, 357 U.S. at 462.

[152] *Id.*

[153] *Id.*

[154] *Id.* at 463. The Court's analysis and decision calls into question the exhortation by the Judges in their letter to Columbia University's President that the school "identify students who engage in [disruptive protest] so that future employers can avoid hiring them." Judges' Letter, *supra* note 6. The Judges' statement echoes the action of the state of Alabama in seeking the names of NAACP members in order to hinder protesters in the exercise of their freedom of association.

[155] 367 U.S. 203 (1961).

[156] 367 U.S. 290 (1961).

the Smith Act.[157] In *Scales*, while affirming the conviction below, the Court held that membership in an organization that engages in illegal conduct is not sufficient for individual liability; rather, the individual must be an "active" member "having also a guilty knowledge and intent."[158] In *Noto*, the Court reversed the conviction below because of a lack of evidence of "illegal Party advocacy," stating that "the mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force or violence, is not the same as preparing a group for violent action and steeling it to such action."[159] Professor David Cole has noted that the *Scales* decision "effectively ended prosecutions for Communist Party membership under the Smith Act."[160]

Although the term "association" is not found in the text of the First Amendment, as a result of these early Warren Court decisions, the right of association is now firmly ensconced in Supreme Court jurisprudence. In the seminal case of *NAACP v. Alabama*, discussed above, the Court emphasized that "freedom to engage in association for the advancement of beliefs and ideas" is a protected free speech right.[161] The Roberts Court reaffirmed these principles in its decision in *Americans for Prosperity Foundation v. Bonta*.[162] Justice Roberts there stated that "[p]rotected association furthers 'a wide variety of political, social, economic, religious, and cultural ends' and 'is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.'"[163] Elaborating on the importance of the right of association, the Court has elsewhere stated that an "individual's freedom to speak and to petition the Government for the redress of grievances could not be vigorously protected unless a correlative freedom to engage in group effort for those ends were not also guaranteed."[164] These principles hold regardless of whether the group with which one associates pursues illegal aims; a "law which applies

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[157] Subsequent to *Yates,* which had scuttled the government's ability to prosecute conspiracy under the Smith Act, the government turned to the membership clause of the Act, which made it "a felony if a person 'becomes or is a member' of a 'society, group or assembly of persons who teach advocate or encourage' violent overthrow of the government 'knowing the purposes thereof.'" LICHTMAN, *supra* note 97, at 150.

[158] *Scales*, 367 U.S. at 228. The Court held that the prosecution had met its burden in showing that the defendant, Junius Irving Scales, was an active member of the Communist Party and had engaged in "illegal Party advocacy." *Id.* at 251.

[159] *Noto*, 367 U.S. at 297-99.

[160] David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 8 (2003).

[161] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958).

[162] 594 U.S. 595 (2021)(holding that a California state requirement that non-profit organizations identify their donors violates the First Amendment right to freedom of association).

[163] *Id.* at 606 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984)).

[164] Roberts, 468 U.S. at 622. In his opinion for the Court in Roberts, Justice Brennan distinguished the "two distinct senses" in which the Court has referenced the "constitutionally protected 'freedom of association.'" *Id*. at 618. In one sense there is the freedom of intimate association, referring to security against intrusion by the state into personal liberties. In the other sense there is the freedom of expressive association – the right to associate for the purpose of engaging in First Amendment protected activities, including speech, assembly and the exercise of religion. *Id*. at 618-19. It is this latter aspect of the freedom of association which is addressed here.

to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of 'guilt by association' which has no place here."[165]

B. Renewed Protection for the Freedom of Speech

In addition to its decisions on freedom of association, the Warren Court issued a number of significant free speech decisions.[166] The blacklisting of the McCarthy era had showcased not only the government's formal, regulatory power over speech, but its informal power exercised through congressional investigations and use of the bully pulpit to shame and criticize. The Warren Court took note, and addressed government overreach in the form of informal, indirect regulation of speech.[167] One such case in which the Court found the improper exercise of the government's informal power was Bantam Books v. Sullivan.[168] There, a state agency, the Rhode Island Commission to Encourage Morality in Youth (the "Commission"), sent notices to a book distributor listing certain books and magazines as "objectionable for sale, distribution or display to youths under 18 years of age;" advising the distributor of "the Commission's duty to recommend to the Attorney General prosecution of purveyors of obscenity;" and stating that the lists of objectionable books were being sent to local police.[169] The notices would solicit or thank the distributor in advance for his cooperation, and a police officer would usually visit the distributor after the notice was sent to see what action had been taken.[170] The distributor accordingly stopped distribution of the listed books.[171] The publishers of the books sued, alleging that the Commission's actions "amount to a scheme of governmental censorship devoid of the constitutionally required safeguards for state regulation of obscenity" in violation of the First and Fourteenth

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[165] Elfbrandt v. Russell, 384 U.S. 11, 19 (1966); *see also* Keyishian v. Bd. of Regents of the State of New York, 385 U.S. 589, 606 (1967) (striking down New York state's Feinberg Law (barring public employment on the basis of membership in "subversive" organizations) and holding that guilt by association is not an appropriate legal rule, as a legal violation requires "a specific intent to further the unlawful aims of an organization."); Healy v. James, 408 U.S. 169, 186 (1972) (guilt by association "is an impermissible basis upon which to deny First Amendment rights.").

[166] An overview of the Warren Court's First Amendment decisions can be found in Kalven, *supra* note 138; s*ee also* Nunziato, *supra* note 19, at 1191-1211; Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 940-1016 (2008).

[167] Many of the Court's decisions during Chief Justice Warren's tenure invoke, in the words of Professors Evelyn Douek and Genevieve Lakier, a "judicial responsibility to encourage, not merely protect, a healthy democratic public sphere." Evelyn Douek & Genevieve Lakier, *Lochner.com?*, 138 HARV. L. REV. 100, 110 (2024). It was this view, that "freedom of speech was a positive and social right, not just a negative and individual one," that led the Court "to show great concern . . . with the threat government actions posed to First Amendment interests, not only when they directly restricted speech but also when they indirectly deterred it." *Id*. at 111.

[168] 372 U.S. 58 (1963).

[169] *Id.* at 58. The Court noted that "the books listed in the notices included several that were not obscene within this Court's definition of the term." *Id.* at 64.

[170] *Id.* at 62-63.

[171] *Id.* at 63.

Amendments.[172] The Court agreed, holding that although the Commission had no power to "apply formal legal sanctions," its use of "informal sanctions," including "the threat of invoking legal sanctions, and other means of coercion, persuasion and intimidation . . . amply demonstrates that the Commission deliberately set about to achieve suppression of publications deemed 'objectionable' and succeeded in its aim."[173] The Court added: "It would be naïve to credit the State's assertion that these blacklists are in the nature of mere legal advice, when they plainly serve as instruments of regulation independent of the laws against obscenity."[174]

The primary fault in the system used by the Commission in the *Bantam Books* case was its lack of due process, as it allowed the government to suppress speech without the legal protections found in the criminal sanctions process.[175] In a criminal investigation, "[c]riminal sanctions may be applied only after a determination of obscenity in a criminal trial hedged about with the procedural safeguards of the criminal process. The Commission's practice is in striking contrast, in that it provides no safeguards whatever against the suppression of nonobscene, and therefore constitutionally protected matter."[176] The Court concluded that the Commission's "conduct as disclosed by this record shows plainly that they went far beyond advising the distributors of their legal rights and liabilities. Their operation was a scheme of state censorship effectuated by extralegal sanctions; they acted as an agency not to advise but to suppress."[177] As discussed below, the Court's decision in *Bantam Books* (together with the more recent decision in NRA v. Vullo[178]) bears directly on the Judges' coercive threats to Columbia University banning anyone who has attended the university from employment with the Judges unless and until the university changes its "viewpoints."[179]

One year after *Bantam Books*, the Court issued its landmark decision in New York Times Co. v. Sullivan.[180] There, the Court reversed a defamation judgment in favor of government officials against the newspaper, holding that the First Amendment requires a finding that the defendant acted with the knowledge of the falsity of the alleged libelous statements or reckless disregard for the truth in the case of statements regarding the official conduct of a public official.[181] The Court in that opinion recognized the importance

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[172] *Id.* at 64.
[173] Bantam Books v. Sullivan, 372 U.S. 58, 67 (1963).
[174] *Id.* at 68-69 (citing Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (holding that the lack of a hearing in connection with listing in the Attorney General's List of Subversive Organizations (AGLOSO) was unconstitutional; *see* discussion *supra* notes 67-70 and accompanying text)).
[175] *See* Lakier, *Enforcing the First Amendment*, *supra* note 23, at 18 ("The Court recognized . . . that the Commission took advantage of the institutional context in which it operated to create a system of speech regulation that operated largely outside the courts.").
[176] *Bantam Books*, 372 U.S. at 70.
[177] *Id.* at 72.
[178] 602 U.S. 175 (2024) (*see* discussion *infra* notes 187-205 and accompanying text).
[179] Judges' Letter, *supra* note 6, at 2; *see* Part IV below.
[180] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
[181] *Id.* at 279-80.

of allowing criticism of the government, stating that "debate on public issues should be uninhibited, robust and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[182] In another significant decision of the era, the Court put to rest the confusion caused by the reformulated clear and present danger test put forth in Dennis v. United States,[183] holding in Brandenburg v. Ohio that "the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[184] The Court's free speech views expressed in these cases served as the basis for a number of the Court's subsequent First Amendment decisions, discussed below.

IV. THE JUDGES' BLACKLIST AND *VULLO*

The Judges' Letter claims that Columbia University is rife with disruptive protesters, that the school favors certain "viewpoints," and has demonstrated "ideological homogeneity throughout the entire institution."[185] As a result, the Judges assert that they will not hire anyone who has attended the school going forward, absent "extraordinary change" by the university.[186] On its face, the Judges' Letter constitutes a threat of coercion against the school "to achieve the suppression of disfavored speech" in violation of the First Amendment under NRA v. Vullo and Bantam Books, Inc. v. Sullivan.[187]

In *Vullo*, the NRA sued Maria Vullo, the Superintendent of the New York State Department of Financial Services ("DFS"), alleging that she "pressured regulated entities to help her stifle the NRA's pro-gun advocacy by threatening enforcement actions against those entities that refused to disassociate from the NRA and other gun-promotion advocacy groups."[188] The NRA's complaint alleged that in 2017 Vullo had opened an investigation of affinity insurance policies offered by the NRA through state-licensed insurance companies, which are regulated by DFS. After the mass shooting at Marjorie Stoneman Douglas High School in Florida in February 2018, Vullo pressured New York-licensed insurance companies to stop doing business with the NRA.[189] Her efforts included indicating to one insurance company that she would not enforce "technical regulatory infractions" against them if they stopped providing affinity insurance for the NRA, and publicly warning New York state-licensed banks and insurance companies to "review any relationships they have with the NRA," to "continue

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[182] *Id.* at 270.
[183] Dennis v. United States 341 U.S. 494 (1951). *See* discussion *supra* notes 136-141 and accompanying text.
[184] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
[185] Judges' Letter, *supra* note 6, at 1-2; *see* Part I above.
[186] *Id.*
[187] NRA v. Vullo, 602 U.S. 175, 180 (2024) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 67 (1963)).
[188] *Id.* at 180-81.
[189] *Id.* at 183.

evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA," and to "take prompt actions to manag[e] these risks."[190] Vullo also issued a joint press release with the governor in which she urged "all insurance companies and banks doing business in New York" to join those "that have already discontinued their arrangements with the NRA."[191] As a result of these and other actions, a number of insurance companies allegedly stopped doing business with the NRA.[192]

The Court held that Vullo's actions, as alleged in the complaint, stated a First Amendment violation based on its claim that she "wield[ed] her power . . . to threaten enforcement actions against DFS-regulated entities in order to punish or suppress the NRA's gun-promotion advocacy."[193] The Court in *Vullo* thereby reaffirmed its earlier holding in *Bantam Books* that informal censorship in the form of coercive threats by government agents intended to suppress speech violate the First Amendment. In both *Vullo* and *Bantam Books*, the government targeted third-parties in order to suppress the speech it found offensive. In *Vullo*, the Superintendent threatened the insurers in order to quash the NRA's speech,[194] and in *Bantam Books*, the Rhode Island Commission targeted book distributors in its effort to suppress the publishers' speech.[195]

The Judges through their hiring ban have engaged in the very activity condemned by the Court in *Vullo* and *Bantam Books* by threatening Columbia University with the loss of valuable government employment opportunities for its students unless the school changes its viewpoints and ideology and eliminates disruptive pro-Palestinian protester speech on its campus. As the Court in *Vullo* pointed out, this strategy can be particularly nefarious and effective, as "intermediaries will often be less invested in the speaker's message and thus less likely to risk the regulator's ire."[196] As a result, those intermediaries "often just acquiesce to government demands rather than challenge them."[197] Here, the university is presumably less invested than the pro-Palestinian protesters in the protesters' message, and at the same time the school clearly has an interest in avoiding the Judges' wrath, in particular with regard to the anticipated negative effect on enrollment and reputation.

The Judges' lack of any direct regulatory authority over the university has no bearing on the constitutionality of their action. The threat of coercion need not involve regulatory sanctions; the prospect of less direct retaliation is sufficient. As one court has stated, "[a] public official defendant who

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[190] *Id.* at 176, 183-84.
[191] *Id.* at 176.
[192] *Id.* at 176.
[193] NRA v. Vullo, 602 U.S. 175, 194 (2024).
[194] *Id.* at 191.
[195] *Bantam Books,* 372 U.S. at 67.
[196] *Vullo*, 602 U.S. at 198.
[197] Douek and Lakier, *supra* note 167, at 147.

threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights regardless of whether the threatened punishment comes in the form of the use (or, misuse) of the defendant's direct regulatory or decision-making authority over the plaintiff, or in some less-direct form."[198] The Judges' coercive threat to stop hiring anyone who has attended the university is clear and impactful even if not an exercise of regulatory authority per se.

One possible response may be that the Judges' Letter explicitly states that their animus is directed at Columbia students who have engaged in "violence or terrorism," i.e., nonexpressive activity and actions unprotected by the First Amendment. Under *Vullo*, however, the question is the intent of the government official.[199] Here, the Judges' coercive threats are expressly intended to cause the university to stop "favoring certain viewpoints" and to alter its practices in order to stifle protester's speech. It is for that reason that the Judges' Blacklist violates the First Amendment.[200]

The Judges may also argue that the blacklist is an expression of personal views and is not intended as an official act, and that "officials who [speak] in their personal capacity and [do] not threaten the exercise of state power simply [cannot] be found to have acted in violation of the First Amendment, even if they acted with the intent to suppress speech and were successful in that aim."[201] That argument does not appear sufficient here, however, as the Judges "go beyond expressing their personal views in an effort to persuade and . . . us[e] their power as government officials to pressure private institutions to conform to the judges' preferences" and "seek through the allocation of publicly-funded employment opportunities (or other allocation of public funds) to influence the behavior of private institutions on matters of public concern."[202]

Nor do the *Vullo* and *Bantam Books* decisions improperly infringe on government officials' ability to speak out *qua* government officials

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[198] Okwedy v. Molinari, 333 F.3d 339, 343-44 (2d Cir. 2003) (holding that city borough official's threat to billboard company over which he had no direct regulatory authority could constitute First Amendment violation).

[199] *Vullo,* 602 U.S. at 196-97 (argument that government official targeted "'nonexpressive activity'. . . does not change the allegations that her actions were aimed at punishing or suppressing speech.").

[200] *Id.* at 196. By the same measure, the potential illegality of some protesters' actions does not affect the analysis. As the Court stated in *Vullo*, "the contention that the NRA and the insurers violated New York law does not excuse *Vullo* from allegedly employing coercive threats to stifle gun-promotion advocacy." *Id*. Similarly, "*Bantam Books* held that the commission violated the First Amendment by invoking legal sanctions to suppress disfavored publications, some of which may or may not contain protected speech (*i.e.*, no obscene material)." *Id*.

[201] Genevieve Lakier, *Enforcing the First Amendment, supra* note 23, at 24-25 (discussing lower courts' pre-*Vullo* interpretations of *Bantam Books* and citing Hammerhead Enters.,Inc*. v. Brezenoff,* 707 F.2d 33, 39 (2d Cir. 1983) (requiring intimation of "some form of punishment or adverse regulatory action" or "official pronouncements" for First Amendment claim)).

[202] *In re Complaint of John Doe*, JCP No. 08-24-90036, at 4 (Jud. Council 8th Cir. Apr. 8, 2025) (Colloton, C.J.) (dismissing ethics complaint); *see also* Kerr, *supra* note 52 (opining that Judge Ho's earlier boycott of Yale Law School students "crosses an important line . . . between judges expressing their personal views in an effort to persuade (which is fine), and judges harnessing their power as government officials to create pressure on private institutions to further their personal agendas (which is not fine, in my view)").

"condemning views with which they disagree."[203] Rather, those decisions prohibit government officials from making coercive threats "to punish or suppress speech," whether directly or "through private intermediaries."[204] That is,

> [r]ather than prohibiting government criticism or advice to private speech intermediaries per se, [those cases] prohibit[] only criticism or advice that helps create what Justice Brennan described in *Bantam Books* as an 'informal system of regulation, beyond the reach of the laws' . . . In practice, this means that government officials must do or say something to indicate to the target of their campaigning that sanctions, or the withdrawal of benefits that they could otherwise receive, will be predicated on the private party's compliance with the [government official's] wishes.[205]

Under this clear standard, the Judges' Blacklist, which vows the loss of clerkship opportunities to anyone who has attended the university absent a change in the university's viewpoints and an end to disruptive protests, is plainly at odds with the First Amendment. As discussed below, that blacklist is also at variance with the Supreme Court's public employment cases, which prohibit discrimination in hiring based on speech or association.

V. THE JUDGES' BLACKLIST AND THE PUBLIC EMPLOYMENT CASES

Beginning in the 1960s, the Warren Court began to grapple with the First Amendment rights of government employees. As Professor Lakier describes, "[o]nly after both the federal and state governments began to aggressively purge Communists and fellow travelers from public

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[203] Nat'l Rifle Ass'n of Am. v. Vullo, 602 U.S. 175, 198 (2024).

[204] *Id. See also Jenner & Block LLP v. U.S. Dep't of Just.*, 2025 WL 1482021, *15 (D.D.C. May 23, 2025) (Bates, J.) (finding that executive order against law firm constituted "coercion against a third party to achieve the suppression of disfavored speech.")(citing *Vullo*, 602 U.S. at 180), *appeal docketed*, No. 25-5265 (D.C. Cir. July 22, 2025); *Perkins Coie LLP v. U.S.* Dep't of Just., 2025 WL 1276857, *3 (D.D.C. May 2, 2025) (Howell, J.) ("the Constitution . . . requires that the government respond to dissenting or unpopular speech or ideas with 'tolerance, not coercion.'") (quoting 303 Creative LLC v. Elenis, 600 U.S. 570, 603 (2023)), *appeal docketed*, No. 25-5241 (D.C. Cir. July 2, 2025); *Wilmer Cutler Pickering Hale & Dorr LLP v. Exec. Off. of the President,* 2025 WL 1502329, *15 (D.D.C. May 27, 2025) (Leon, J.) ("'[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion of perspective of the speaker is the rationale for the restriction'") (quoting *Rosenberger v. Rector and Visitors of Univ. of Va*., 515 U.S. 819, 829 (1995)), *appeal docketed*, No. 25-5277 (July 28, 2025).

[205] Lakier, Enforcing the First Amendment, *supra* note 23, at 52.

employment during the [McCarthy era] did the Court recognize that granting government officials virtually unrestricted power to hire, fire, or discipline whomever it wanted might threaten the democratic and egalitarian values that the First Amendment protects."[206] The Supreme Court addressed these concerns in two lines of cases, one protecting the right to association, and the other addressing freedom of speech. The Judges' Blacklist raises concerns under both. That blacklist impacts associational rights insofar as it targets potential law clerk applicants based on their attendance at a certain university where disruptive protests have occurred (or association with such protests),[207] and it impacts speech rights insofar as it indicates an intent to blacklist students more broadly based on their participation in disruptive protests.[208]

A. The Judges' Blacklist and Freedom of Association

The Judge's Blacklist runs up directly against the cases condemning guilt by association in the public employment context. In Rutan v. Republican Party of Illinois,[209] the Supreme Court brought to bear its precedent governing the freedom of association in a public employment hiring case, stating that "[t]he First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and associate."[210] The Court reiterated the principle that "loss of a job opportunity for failure to compromise one's convictions states a constitutional claim"[211] and held that "conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so."[212]

The burden on a government employer to show a vital interest justifying a condition of employment based on political association is a high one.[213] The Warren Court's public employment cases involving teachers who were asked to sign loyalty oaths or to provide information relating to their associations demonstrates this high bar. In Shelton v. Tucker,[214]

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[206] Lakier, The Non-Frst Amendment Law of Freedom of Speech, *supra* note 31, at 2332.
[207] *See* Judges' Letter, *supra* note 6 ("blacklisting all Columbia University students").
[208] *See* Judges' Letter, *supra* note 6 ("Universities should also identify students who engage in [disruptive protests] so that future employers can avoid hiring them.").
[209] 497 U.S. 62 (1990).
[210] *Id.* at 76.
[211] *Id.* (citing *Torcaso v. Watkins,* 367 U.S. 488, 496 (1961) (holding that state of Maryland could not refuse license to notary public on the ground that he refused to declare his belief in God, as the oath "unconstitutionally invades the appellant's freedom of belief and religion.")).
[212] *Id.* at 78.
[213] *See* Elrod v. Burns, 427 U.S. 347, 363 (1976) (stating that if a condition of employment is to be based on belief or association, "it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights."); *Branti v. Finkel*, 445 U.S. 507, 515-16 (1980) (government can demonstrate an "overriding interest" of "vital importance" to deny employment on the basis of belief or association).
[214] 364 U.S. 479 (1960).

Arkansas required public school teachers to file annually an affidavit listing every organization to which they belonged in the preceding five years.[215] In assessing this requirement, the Court recognized that "there can be no doubt of the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools . . . 'A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the State has a vital concern.'"[216] That "vital concern," however, was not sufficient to sustain Arkansas' broad inquiry in which it asked teachers to disclose all associational ties, many of which had no relevance to the teacher's "occupational competence or fitness."[217] The Court held that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[218] Subsequently, in Keyishian v. Bd. of Regents,[219] the Court addressed the loyalty oath and restrictions on association imposed on public school teachers by New York's Feinberg Law – the same statute the Court had addressed 15 years earlier in *Adler*.[220] The Court held the law constitutionally deficient because it cut into the right of association without requiring any showing that an individual's association posed any threat, stating that "mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion" from public employment.[221]

The Court has affirmed these principles in other contexts relevant here. Thus, in Baird v. State Bar of Arizona,[222] denial of admission to the bar based on a law graduate's beliefs and political associations was struck down.[223] There, the applicant, Sara Baird, had completed all requirements for bar admission, including listing on a questionnaire all organizations with which she had been affiliated since the age of 16.[224] She declined to answer the question whether "she had ever been a member of the Communist Party or any organization 'that advocates overthrow of the United States Government by force or violence.'"[225] The Arizona Supreme Court upheld the state bar committee's denial of Baird's admission to the bar based on that omission.

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[215] *Id.* at 480.
[216] *Id.* at 485 (quoting *Adler v. Bd. of Educ.,* 342 U.S. 485, 493 (1952)).
[217] *Id.* at 488.
[218] *Id.*
[219] 385 U.S. 589 (1967).
[220] Keyishian v. Bd. of Regents, 385 U.S. 589, 595 (1967). The Court in *Keyishian* stated that "to the extent that *Adler* sustained the provision of the Feinberg Law constituting membership in an organization advocating forceful overthrow of government a ground for disqualification, pertinent constitutional doctrines have since rejected the premises upon which that conclusion rested. *Adler* is therefore not dispositive of the constitutional issues we must decide in this case."
[221] *Id.* at 606. The Court also found the law unconstitutionally vague. *Id.* at 604.
[222] 401 U.S. 1, 9 (1971) (Stewart, J., concurring in the judgment) ("[M]ere membership in an organization can never, by itself, be sufficient ground for a State's imposition of civil disabilities or criminal punishment.").
[223] *Id.* at 8.
[224] *Id.* at 4.
[225] *Id.* at 4-5.

The Supreme Court reversed, with Justice Black stating that Baird had supplied the committee "the information relevant to her fitness to practice law" and that the query on her associations improperly probed into her views and beliefs.[226] Justice Black concluded: "the First Amendment's protection of association prohibits a state from excluding a person from a profession or punishing him solely because he is a member of a particular organization or because he holds certain beliefs."[227] The Court similarly held, in Healy v. James,[228] that association with disruptive protest activity is not a basis to exclude a political group from a college campus. In that case, Central Connecticut State College sought to deny official recognition to the local chapter of the Students for a Democratic Society (the "SDS"). The Court stated that denial would abridge the students' right of association, and that the fact that other SDS chapters "had been associated with disruptive and violent campus activity" was not a sufficient reason for the school to deny official recognition to the local chapter.[229]

These same principles apply in the case of the Judges' Blacklist. A student's association with a school where disruptive protests have occurred, or his or her peaceful participation in such protests, cannot fairly serve as a blanket basis to preclude an applicant consistent with the First Amendment. The Judges' Blacklist casts too wide a net, eliminating any prospect of employment with these judges for any applicant who has attended Columbia University or who has peacefully participated in a protest regardless of other considerations.[230] Although all judges have a not insubstantial interest in hiring clerks who accord with the judge's views, the Judges' Blacklist bars a large swath of students without regard to whether any particular applicant would in any way be incompatible with the position.[231] Moreover, and perhaps most tellingly, since the Judges have stated that their goals are to pressure the university to punish protesters severely and to change the composition of the school's faculty and administration,[232] their blacklist facially lacks any relationship to the merits of applicants, and is plainly nothing more than punishment of innocent individuals as a means to coerce

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[226] *Id.* at 7.
[227] *Baird,* 401 U.S. at 6 (citing *United States v. Robel*, 389 U.S. 258, 259–60, 266 (1967) (striking down federal statute that prohibited members of Communist organizations from working in defense facilities); *Keyishian*, 385 U.S. at 607).
[228] 408 U.S. 169, 172 (1972).
[229] *Id.* at 181, 185.
[230] In this regard, as noted above, the Judges' Blacklist is akin to the McCarthy-era Attorney General's List of Subversive Organizations – AGLOSO – a blacklist that served as a basis to bar anyone associated with the listed organization. *See* discussion *supra* notes 13-18 and accompanying text.
[231] In Branti v. Finkel, 445 U.S. 507, 517 (1980), the Court stated that "if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency." The Judges' blanket ban offers no basis to conclude that the "private political beliefs" of any particular blacklisted student "would interfere with the discharge of his public duties."
[232] *See* Judges' Letter, *supra* note 6 (calling for "[s]erious consequences for students and faculty who have participated in campus disruptions" at Columbia University and stating that "significant and dramatic change in the composition of its faculty and administration is required to restore confidence in Columbia.").

the university. In this respect, the Judges' Blacklist is simply wrongheaded, proceeding "on a principle repugnant to our society – guilt by association."[233]

B. The Judges' Blacklist and Freedom of Speech

Insofar as the Judges' Blacklist targets protesters for their expressive conduct or speech in connection with disruptive protests, it also runs afoul of precedent governing "the interplay between free speech rights and government employment."[234] The seminal case in this area is Pickering v. Board of Education.[235] There, the Court held that the termination of a high school teacher, Marvin L. Pickering, for writing a newspaper editorial critical of the school board's spending violated the teacher's First Amendment rights.[236] The Court reached that result through a two-step analysis, under which an initial assessment must be made as to whether the employee's speech addresses matters of public concern.[237] Once the employee is determined to have been speaking on a matter of public concern, the value of the speech must be balanced against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[238] Where the employee is commenting on matters of public concern, and that speech does not interfere with the operation of the workplace, the government's interest in limiting that speech is no greater than it would be in the case of any member of the general public.[239] The Court thereby held that Pickering's editorial, criticizing school funding decisions, addressed matters of legitimate public concern and that, as the speech did not impede the school's operations, the school's interest did not outweigh Pickering's interest in "speak[ing] out freely on such questions without fear of retaliatory dismissal."[240]

The Court subsequently clarified the nature of employee speech that warrants protection in Connick v. Myers,[241] where it held that not all matters related to the operation of a government office are "matters of public concern," and that employee speech relating to "matters only of personal

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[233] Adler v. Bd. of Educ., 342 U.S. 485, 508–09 (1952) (Douglas, J., dissenting).
[234] Kennedy v. Bremerton School District, 597 U.S. 507, 527 (2022) (citing *Pickering v. Bd. of Educ.* 391 U.S. 563 (1968) and Garcetti v. Ceballos, 547 U.S. 410 (2006)).
[235] 391 U.S. at 563.
[236] *Id.* at 565–67
[237] *Id.* at 568.
[238] *Id.* Thus, with regard to speech restrictions, "the government as employer . . . has far broader powers than the government as sovereign." *Waters v. Churchill*, 511 U.S. 661, 671-72 (1994).
[239] *Pickering*, 391 U.S.at 573.
[240] *Id.* at 571.
[241] 461 U.S. 138 (1983). In *Connick*, Sheila Myers, an assistant district attorney ("ADA") for New Orleans, was informed she would be transferred to another section in the office. Unhappy with that decision, Myers disseminated a questionnaire to other ADAs in the office to bolster her case against the transfer. As a result of that action, the District Attorney, Harry Connick, fired Myers for insubordination. *Id.* at 140-42. Although the questionnaire included one question as to whether ADAs "ever feel pressured to work in political campaigns on behalf of office-supported candidates," the Court held that the questionnaire was not protected speech as it was "most accurately characterized as an employee grievance concerning internal office policy." *Id.* at 149, 154.

interest" such as an employment grievance are not protected by the First Amendment.[242] In Garcetti v. Ceballos,[243] the Court held that a public employee is speaking as a government employee and not "as a citizen on a matter of public concern" when the employee is "making a statement pursuant to their official duties."[244] Accordingly, "[o]fficial communications" made within the scope of employment do not enjoy First Amendment protection.[245] These three cases, *Pickering*, *Connick* and *Garcetti*, provide the basic framework for speech-based First Amendment public employment cases today.[246]

Under *Pickering* and its progeny, speech involves matters of public concern "when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest, that is, a subject of general interest and of value and concern to the public."[247] Public protests plainly fall into the category of speech and expressive conduct addressing matters of social concern.

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[242] *Id.* at 147.

[243] 547 U.S. 410 (2006). In that case, Richard Ceballos, a deputy district attorney for the Los Angeles County District Attorney's Office claimed that employment actions taken against him constituted retaliation for a memorandum he had written in the course of his work. Ceballos alleged the memorandum recited "government misconduct" and therefore was a matter of public concern. The Court held that because the memorandum was written pursuant to Ceballos's "official duties," he was not speaking as a citizen for First Amendment purposes, and that therefore "the Constitution does not insulate [his] communication[] from employer discipline." *Id.* at 421.

[244] *Id.* at 422.

[245] *Id.* at 423.

[246] *See, e.g.*, Kennedy v. Bremerton School District, 597 U.S. 507, 509 (2022) (setting out "*Pickering-Garcetti* framework" for resolving public employee speech claims.); Lane v. Franks, 573 U.S. 228, 241-42 (2014) (applying *Connick* in determining if speech involves a matter of public concern). As can be seen from the above discussion, under the Pickering line of cases, a more extensive analysis is required where a public employee asserts a free speech claim, in contrast to a freedom of association claim. In *O'Hare Truck Service, Inc. v. City of Northlake* (1996), the Supreme Court explained its different approaches to speech and association in the public employment context, stating: "Our cases call for a different, though related, inquiry where a government employer takes adverse action on account of an employee or service provider's right of free speech. There, we apply the balancing test from *Pickering* . . . . *Elrod* and *Branti* involved instances where the raw test of political affiliation sufficed to show a constitutional violation, without the necessity of an inquiry more detailed than asking whether the requirement was appropriate for the employment in question. There is an advantage in so confining the inquiry where political affiliation alone is concerned, for one's beliefs and allegiances ought not to be subject to probing or testing by the government." O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712, 719 (1996).

[247] *Lane v. Franks*, 573 U.S. at 241 (internal quotations omitted) (quoting *Snyder v. Phelps*, 562 U.S. 443, 453 (2011)). This principle holds true even where the employee's speech is offensive and controversial. In *Rankin v. McPherson* (1987), for example, the Court held that the workplace remark "if they go for him again, I hope they get him" made by Ardith McPherson, a clerical employee at a sheriff's office in reference to the 1981 assassination attempt on President Reagan, was speech "on a matter of public concern." Rankin v. McPherson, 483 U.S. 378, 380, 386 (1987). The Court noted that the "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Id.* at 387 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)("debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."). McPherson was a clerk who did not interact with the public. In balancing her interest in making her statement against the state's interest in maintaining an effective workplace, the Court noted that there was no evidence in the record of the remark causing disturbance, and that her employer discharged her based solely on the content of her statement and not based on any workplace concern. *Id.* at 384, 390.

Thus, in Noble v. Cincinnati & Hamilton County Library,[248] Eric Noble, a public library security guard, posted on Facebook regarding the Black Lives Matter ("BLM") protests.[249] His post was soon taken down, but his employer nevertheless deemed it offensive and fired him. Noble's First Amendment retaliation claim was dismissed by the District Court on summary judgment.[250] The Sixth Circuit reversed, holding, among other things, that Noble's speech addressing those protests was "on a matter of public concern," and that the "insensitive manner" of his speech did not affect the analysis of that issue.[251] So too here, campus pro-Palestinian protests, which in broad terms concern issues of U.S. foreign policy and the treatment of civilians in wartime (and which, in the view of some, have at times included insensitive or offensive speech), unquestionably involve protected speech on a subject "of value and concern to the public."[252]

The public employee speech cases have long been applied in the hiring context. As the Court stated in Perry v. Sinderman,[253] a case challenging a university's failure to re-hire a non-tenured employee:

> [E]ven though a person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally-protected interests – especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to

[248] 112 F.4th 373 (6th Cir. 2024).
[249] Noble's post contained a meme with a "highly offensive message" critical of the BLM movement. *Id*. at 378-79.
[250] Noble v. Public Library of Cincinnati and Hamilton County, No. 1:20-CV-594, 2023 WL 11897165 (S.D. Ohio, Sept. 26, 2023), *rev'd*, 112 F.4th 373 (6th Cir. 2024). The District Court found that the post "caused documented disharmony with his coworkers and had a detrimental impact on his working relationships, and risked harm to the Library's standing and trust among members of the community." *Id*. at *3.
[251] *Id.* at 381-82 (citing Rankin, 483 U.S. at 387). The court also held that there was no evidence that Noble "took his politics to work or that his views on the BLM protests or any other political matter ever interfered with how he performed his job." *Id*. at 382.
[252] *Lane*, 573 U.S. at 241. The fact that the protests, while peaceful, were in some cases also disruptive does not diminish the applicability of the First Amendment to protected speech and expressive conduct by protest participants. *See, e.g.*, Walker, *supra* note 19, at 14-46 (discussing the centrality of disruptive protest and dissent to the development of First Amendment law); Nunziato, *supra* note 19, at 1191-1214 (discussing Civil Rights Era cases and growth of First Amendment doctrine).
[253] 408 U.S. 593 (1972).

> 'produce a result which (it) could not command directly' . . . Such interference with constitutional rights is impermissible.[254]

The Court noted that although it had applied this principle in various contexts, "most often, we have applied this general principle to denials of public employment."[255] Thus, numerous Circuit Courts have applied *Pickering* in the hiring context.[256] As the D.C. Circuit stated in one such case, "[m]erely because an employer is *hiring* rather than *firing* . . . does not justify unconstitutional action."[257]

Significantly, the Judges' Blacklist, unlike the individual employment decisions involved in the cases discussed above, is a broad statement of intent addressed to all applicants, future applicants, and other individuals who may consider application in the future. In this regard, the Judges' Blacklist is not dissimilar from the regulation addressed by the Supreme Court in United States v. National Treasury Employees Union ("NTEU").[258] There, the Court struck down a broad rule that barred federal executive branch employees from accepting payment for a speech or article on any topic.[259] The Court stated that the government's policy prevented employees from speaking as "citizen[s]" on "matters of public concern" because the speeches and articles "were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their government employment."[260] Noting that the ban was "a wholesale deterrent to a broad category of expression by a massive number of potential speakers," the Court stated that "[t]he widespread impact of the honoraria ban . . . gives rise to far more serious concerns than could any single supervisory decision."[261] The Court added: "unlike an adverse decision taken in response to actual speech, this ban chills potential speech before it happens."[262] The Court stated:

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[254] *Id.* at 597 (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).
[255] *Id.* (citations omitted).
[256] *See, e.g.*, Heim v. Daniel, 81 F.4th 212, 221 (2d Cir. 2023) (applying "the employer/employee interest-balancing framework first set forth in Pickering" to employee's First Amendment challenge to hiring decision); Anderson v. Valdez, 845 F.3d 580, 599 (5th Cir. 2018) (upholding law clerk applicant's First Amendment claim against state court judge under Pickering); Bonds v. Milwaukee County, 207 F.3d 969, 973 (7th Cir. 2000), *cert. denied*, 531 U.S. 944 (2000) (applying *Pickering* balancing test to decision not to hire prospective employee because of his speech); Worrell v. Henry, 219 F.3d 1197, 1201 (10th Cir. 2000), *cert. denied*, 533 U.S. 916 (2001) (applying *Pickering* to employer's withdrawal of employment offer based on applicant's speech activity); Shahar v. Bowers, 114 F.3d 1097, 1101(11th Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1049 (1998) (employer withdrawal of job offer).
[257] Hubbard v. EPA, 949 F.2d 453, 460 (D.C. Cir. 1992), *aff'd on other grounds en banc*, 982 F.2d 531 (D.C. Cir. 1992) (emphasis in original).
[258] 513 U.S. 454 (1995).
[259] *Id.* at 457.
[260] *Id.* at 466.
[261] *Id.* at 467-68.
[262] *Id.* at 468.

> For these reasons, the Government's burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action. The Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government.[263]

Accordingly, the Court held that because "the vast majority of the speech at issue in this case does not involve the subject matter of Government employment and takes place outside the workplace, the Government is unable to justify [the ban] on the grounds of immediate workplace disruption asserted in *Pickering* and the cases that followed it."[264]

The *NTEU* case bears directly on the propriety of the Judges' Blacklist. Like the honoraria rule in that case, the Judges' Blacklist is a broad prohibition barring prospective law clerks from speaking at or attending pro-Palestinian protests. Like the publications and speaking events prohibited by the honoraria ban, those protests take place outside the workplace and involve content largely unrelated to the prospective clerks' employment. Most significantly, the Judges' Blacklist chills potential First Amendment activity before it happens. To justify a broad hiring ban based on First Amendment-protected activity, the Judges would have to show that the interests of all of the affected potential future employees in their political expression are outweighed by the impact of the future employees' expression on the "actual operation" of the government.[265] The *NTEU* decision leaves little room for argument that the Judges' hiring ban could surmount that burden.

The D.C. Circuit's opinion in Guffey v. Mauskopf[266] is also instructive on this score. There, the Administrative Office of the United States Courts (the "AO"), which provides support services to the federal courts, revised its code of conduct to "prohibit partisan political expression."[267] AO employees sued to enjoin the code so as to allow them to engage in partisan political

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[263] *Id.* (citing *Pickering*, 391 U.S. at 571).
[264] 513 U.S. 454, 470 (1995). The Supreme Court has subsequently noted that the "*Pickering* framework" was designed to address an individual adverse employment decision, while the *NTEU* decision addresses speech-restrictive government action with "widespread impact." Janus v. Am. Fed'n Of State, Cnty., and Mun. Emps.loyee, Council 31, 585 U.S. 878, 907 (2018). In this latter situation, the government carries a heavier burden, "and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights . . . . The end product of those adjustments is a test that more closely resembles exacting scrutiny than the traditional *Pickering* analysis." *Id.*
[265] *Id.* at 468 (citing *Pickering*, 391 U.S. at 571).
[266] Guffey v. Mauskopf, 45 F.4th 442 (D.C. Cir. 2022).
[267] *Id.* at 445.

expression outside the office. The D.C. Circuit affirmed the District Court's grant of injunctive relief in relevant part, holding that under *NTEU* the employees' right to speak outweighed the impact on government operations.[268] The Court rejected AO's arguments that the employees' political expression "could undermine the public perception of the Judiciary as an impartial adjudicative body" and that it may impact the trust between judges and the employees.[269] The court stated this latter argument "conflicts with 'the powerful and realistic presumption that the federal workforce consists of dedicated and honorable civil servants.'"[270]

The Supreme Court has stated in its public employee speech cases that in assessing the government's interest, a relevant consideration is whether the speech "has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary."[271] Thus, prospective employees for "sensitive government positions" requiring a "heightened need for trust and confidence" – where the government employer's interest may outweigh the candidate's speech interest – may not enjoy the protections generally afforded by the public employment cases.[272] This precedent addressing sensitive government positions leaves room for an argument that the unique nature of a judicial clerkship, where a lawyer frequently serves as a close confidential advisor to the judge, outweighs an individual applicant's otherwise protected speech interests.[273] That authority, however, bears solely on individual hiring decisions. A sweeping hiring ban, precluding consideration of all who have engaged in expressive conduct or speech in connection with disruptive protests, is not within the scope of the precedent governing applicants for sensitive positions. That

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[268] *Id.* at 446, 452.
[269] *Id.* at 447.
[270] *Id.* at 450 (quoting *NTEU*, 513 U.S. at 476). The court noted that AO employees, unlike law clerks, do not "make recommendations about the outcomes of individual cases." *Id.* at 445. The distinctive nature of the law clerk role is discussed below.
[271] Rankin v. McPherson, 483 U.S. 378, 388 (1987) (citing Pickering v. Bd. of Educ., 391 U.S. 563, 570-73 (1968)); *see also* Damiano v. Grants Pass Sch. Dist. No 7, 140 F.4th 1117, 1139 (9th Cir. 2025) ("[T]he expressive activities of a highly placed supervisory, confidential, policymaking, or advisory employee will be more disruptive to the operation of the workplace than similar activity by a low level employee.") (quoting Faghri v. Univ. of Conn., 621 F.3d. 92, 98 (2d Cir. 2010)).
[272] Bonds v. Milwaukee County, 207 F.3d 969, 977 (7th Cir. 2000), *cert. denied*, 531 U.S. 944 (2000); *see also* Bauer v. Sampson, 261 F.3d 775, 785 (9th Cir. 2001) (workplace interests may outweigh applicant's speech interest where employer-employee relationship will involve "frequent contact which require[s] trust and respect in order to be successful"); Hagan v. Quinn, 867 F.3d 816, 826 (7th Cir. 2017) (employer interest trumps employee right where "the government employer's need for political allegiance from its policymaking employee [sufficiently] outweighs the employee's freedom of expression").
[273] *See also, e.g.*, FEDERAL JUDICIAL CENTER, LAW CLERK HANDBOOK: A HANDBOOK FOR LAW CLERKS TO FEDERAL JUDGES 5,7 (4th ed. 2020), https://www.fjc.gov/sites/default/files/materials/43/Law_Clerk_Handbook_Fourth_Edition.pdf (noting "the close association between judges and law clerks" and the paramount importance of confidentiality and loyalty in that relationship); Guercio v. Brody, 911 F.2d 1179, 1186 (6th Cir. 1990) (referencing the importance of "inter-chamber harmony, cooperation, and collegiality between judges and court personnel"), *cert. denied*, 500 U.S. 904 (1991); GUIDE TO JUDICIARY POLICY, VOL. 2A, CH. 3, *Code of Conduct for Judicial Employees* (2024), https://www.uscourts.gov/sites/default/files/guide-vol02a-ch03-2.pdf (restricting outside activities, including political activities, of law clerks).

caselaw and other guidance, which provides a narrow exception in hiring and employment where government interests outweigh employee speech rights, does not address, much less bless, a practice of subjecting a large cohort of prospective applicants to the "stigma, scorn and obloquy"[274] of a government blacklist, and such a hiring ban cannot be justified under *Pickering*, *NTEU*, and the other public employment cases.

VI. THE LAW FIRM BLACKLIST, NEW YORK LABOR LAW AND FREE SPEECH VALUES

The blacklisting by private employers in the McCarthy era made it clear that private as well as public employees can suffer as a result of reactions to government repression. Although the First Amendment does not directly regulate the relationship of private employers and their employees, broader free speech principles arguably do impact these relations, and call for protection of employees, and applicants for employment, engaging in political speech and association. As Professor Eugene Volokh has noted, free speech is a valuable tool for democratic self-government and, as with governmental restrictions, the threat of private employer restrictions can "interfere with such self-government."[275] The *Restatement of Employment Law* explicitly recognizes this concept in proposing common-law free speech protections for private employees, stating: "There is a public interest in employees' personal autonomy because it is critical to engagement in civil life. Employees must be free to express their own ideas and concerns in order for the public sphere to flourish."[276]

New York's Labor Law appears to follow the spirit, if not the letter, of the *Restatement*.[277] That law makes it unlawful for employers to refuse to hire, fire, or otherwise discriminate against employees because of their "political activities outside of working hours" or their "legal recreational

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[274] Watkins v. United States, 354 U.S. 178, 197-98 (1957).

[275] Eugene Volokh, *Should the Law Limit Private-Employer-Imposed Speech Restrictions?*, 2 J. FREE SPEECH L. 269, 273-74 (2022) [hereinafter Volokh, *Speech Restrictions*] (discussing, inter alia, arguments for protecting private employee speech on the grounds of democratic self-government, the search for truth, and self-expression and autonomy).

[276] RESTATEMENT OF EMPLOYMENT LAW §7.08 Rep. Notes (cited in Volokh, *Speech Restrictions*, *supra* note 275, at 272). The Restatement concludes that "employers should be liable for firing an employee for 'adhering to political, moral, ethical, religious or other personal beliefs or expressing such beliefs outside of the locations, hours, and responsibilities of employment in a manner that does not refer to or otherwise involve the employer or its business,' unless the employer 'can prove that it had a reasonable and good faith belief that the employee's exercise of an autonomy interest interfered with the employer's legitimate business interests, including its orderly operations and reputation in the marketplace.'" Volokh, *Speech Restrictions*, *supra* note 275 at 272 (quoting RESTATEMENT OF EMPLOYMENT LAW §7.08(a)(2)).

[277] As noted above, New York's Labor Law bears on the Law Firm Blacklist, as New York City is the location of Sullivan & Cromwell's headquarters. *See* note 33 *supra*. Other states have laws similar to New York's. Professor Lakier describes state laws (including New York's) that protect "private-sector workers' freedom of speech and association against employment sanctions, threats and coercion." Lakier, *Non-First Amendment Law of Free Speech*, *supra* note 31, at 2339-41. Although those laws vary greatly in their coverage, and are not found in every state, they do provide private employees and applicants for employment some measure of speech protection. *Id*.

activities."[278] The statute defines "political activities" as "(i) running for public office, (ii) campaigning for a candidate for public office, or (iii) participating in fund-raising activities for the benefit of a candidate, political party or political advocacy group[.]"[279] The statute defines "recreational activities" as including "any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material[.]"[280] The statute also contains a safe-harbor provision for employers, allowing an employer to take adverse action if the employee's speech "creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest[.]"[281]

Although the New York statute defines "political activities" fairly narrowly in terms of electoral-related functions, the existing caselaw takes a broader view of the scope of the statute. The New York Appellate Division has issued decisions in which it has allowed claims to proceed alleging termination as a result of a discussion "outside of the workplace in which [the plaintiff's] political affiliations became an issue"[282] and as a result of the political activity of attending the funeral of the victim of a hate crime.[283] Those decisions, while providing no analysis, are consistent with the legislative history found in the statement of the bill's sponsor: "we have long since passed the days of company towns, where the company told you when to work, where to live and what to buy in their stores. This bill would insure that employers do not tell us how to think and play on our own time."[284] As Professor Lakier has noted, this provision of New York law can be viewed as "an attempt to prevent employers from using the economic power that the employment relationship gave them to render workers subordinate to them in some important, democratically troubling way."[285]

Under this authority, there is a sound argument that the Law Firm Blacklist violates the New York Labor Law. That law prohibits private firms from refusing to hire applicants based on their political activity. The cases decided under the New York Labor Law indicate that the political activities

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[278] N.Y. LAB. LAW § 201-d(2)(a), (c) (McKinney 2023).
[279] *Id.* at § 201-d(1)(a).
[280] *Id.* at § 201-d(1)(b).
[281] *Id.* at § 201-d(3)(a).
[282] Cavanaugh v. Doherty, 243 A.D. 2d 92, 100 (N.Y. App. Div. 1998).
[283] El-Amine v. Avon Products, Inc., 293 A.D. 2d 283 (N.Y. App. Div. 2002). *See* Jonathan Sabin, *Employer Regulation of Employee Political Conduct In and Outside of the Office*, N.Y. L. J. (May 21, 2024),https://www.law.com/newyorklawjournal/2024/05/21/employer-regulation-of-employee-political-conduct-in-and-outside-of-the-office/; Joseph Pace, *Can Private Employees Be Fired for Out-of-Office Political Speech*, 95 N.Y. STATE BAR J. 28 (Mar. 28, 2023), https://nysba.org/can-private-employees-be-fired-for-out-of-office-political-speech/.
[284] Alyce H. Rogers, *Employer Regulation of Romantic Relationships: The Unsettled Law of New York State*, 13 TOURO L. REV. 687, 690 (1997) (quoting Sen. James J. Lack Mem., Ch. 776, N.Y.S. LEGIS. ANN. (1992)).
[285] Lakier, *Non-First Amendment Law of Free Speech*, *supra* note 31, at 2341.

protected by the law should be construed broadly to include political activity generally and political affiliations.[286] Those cases (while moving beyond the statutory language) not only find support in the legislative history of the New York Labor Law,[287] but more broadly they are also consistent with much of the non-First Amendment law of free speech. There are "numerous local, state, and federal laws that protect the freedom of workers to speak as they wish, and to associate with whom they wish, against the economic coercion of their employers."[288] Those laws and court decisions have come about because "legislators have come to believe just as courts have, that allowing employers unimpeded freedom to use their economic power to constrain their employees' speech threatens the vitality of the marketplace of ideas and undermines the political, and perhaps also social, equality that is a crucial precondition of democracy."[289] The caselaw construing the New York Labor Law, the legislative history, and the breadth of state law support for protecting employee speech, together provide a basis for a reading that blacklisting of law firm applicants based on their protest activity contravenes New York law.

In addition to the argument to be made for the statutory violation, the timing of the Law Firm Blacklist also raises concerns. That blacklist was announced in mid-2024 in the wake of House Education Committee hearings and the Judges' Blacklist.[290] Thus, the Law Firm Blacklist was issued at a time when members of two branches of the federal government had denounced activity by student protesters – activity that consisted of largely peaceful political speech and association.[291] The Law Firm Blacklist was thereby implemented in the same way as a key tactic of the McCarthy era: by following government criticism with a private blacklist.[292]

One possible response to a claim that the New York Labor Law (or another state's law) prohibits a blacklist of or refusal to hire an applicant

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[286] Cavanaugh, 243 A.D. 2d at 100; El-Amine, 293 A.D. 2d at 283.
[287] Rogers, *supra* note 284, at 690.
[288] Lakier, *Non-First Amendment Law of Freedom of Speech*, *supra* note 31, at 2331. Thus, a number of states have legislation that protects private employee speech or political activity from employer retaliation. Some states have enacted laws broadly protecting the expressive autonomy of private-sector employees. For example, Connecticut has a statute barring employment discrimination based on any "exercise . . . of rights guaranteed by the First Amendment." CONN. GEN. STAT. ANN. § 31-51q (West 2020). That statute has been interpreted to apply to private employers the same rules governing public employers under the First Amendment (although the statute may not apply to hiring decisions). *See* Neron v. Amedisys Holding, LLC, No. 3:22-cv-469 (OAW), 2024 WL 1072578, at *9 (D. Conn. Mar. 12, 2024); Cotto v. United Techs. Corp., 738 A.2d 623, 627 (Conn. 1999). California has a statute prohibiting employers from retaliating against employees for engaging in "political activities" that has been interpreted broadly to include participation in protest movements such as the gay rights movement. *See* Hamilton v. Juul Labs, Inc., No. 20-cv-03710-EMC, 2021 WL 275485, at *8, *13 (N.D. Cal. Jan. 27, 2021); Gay Law Students Ass'n v. Pac. Tel. & Tel. Co., 595 P.2d 592, 610 (Cal. 1979). Other states have similar statutes and regulations limiting regulation of speech in the private sector. *See* Volokh, *Private Employees' Speech*, *supra* note 31, at 302-334; Lakier, *Non-First Amendment Law of Free Speech*, *supra* note 31, at 2331-2342.
[289] Lakier, *Non-First Amendment Law of Free Speech*, *supra* note 31, at 2342.
[290] *See* discussion *supra* notes 6-12 and accompanying text
[291] *See* discussion *supra* note 19 and accompanying text.
[292] *See* discussion *supra* notes 108, 144-45 and accompanying text.

based on the applicant's political activity is that a juridical entity such as a law firm has a First Amendment right of association pursuant to which it has the right not to hire anyone whose political views it rejects.[293] That is, a law firm may assert that it has a right to blacklist and the concomitant right not to hire those with whom it disagrees, so as not to convey the message (or be perceived as conveying the message) of those they blacklist.[294] The cases recognizing a First Amendment right of association, however, have involved expressive associations[295] -- and a law firm is a commercial business association, not an expressive association. In the case of a business such as a law firm, "there is only minimal constitutional protection of the freedom of commercial association."[296] In Justice O'Connor's words in her "influential concurrence" in Roberts v. United States Jaycees, "[t]he Constitution does not guarantee a right to choose employees . . . without restraint from the State . . . . [G]overnmental regulation of the commercial recruitment of new . . . employees is valid if rationally related to the government's ends."[297] Referencing the Court's decision in Hishon v. King & Spalding, which upheld a female law firm associate's claim of discrimination in the denial of promotion to partnership, Justice O'Connor stated: "As a commercial enterprise, the law firm could claim no First Amendment immunity from employment discrimination laws, and that result would not have been altered by a showing that the firm engaged even in a substantial amount of activity entitled to First Amendment

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[293] *See, e.g.*, MARTIN H. REDISH, THE LOGIC OF PERSECUTION 12 (2005) (arguing that blacklists based on ideological grounds (*e.g.*, blacklists of Communist Party members) are an "exercise of the . . . First Amendment right of non-association . . .").

[294] In Professor Redish's words, "the right of nonassociation that is grounded in the constitutional guarantee of free expression is properly viewed as an outgrowth of the well-established First Amendment precept that one may not be compelled to utter views which he deems offensive." *Id*. at 13 (citing Wooley v. Maynard, 430 U.S. 705, 715 (1977) (upholding the right of an objector to tape over the motto "Live Free or Die" on his New Hampshire license plate).

[295] The leading case on this issue is Boy Scouts of America v. Dale, 530 U.S. 640 (2000). There, the Boy Scouts expelled James Dale, "an avowed homosexual and gay rights activist" as an assistant scoutmaster – a Scout leader – based on the Boy Scouts expressed view that homosexuality is immoral. Dale challenged that action under New Jersey's public accommodations law, which prohibited the Boy Scouts from discriminating against Dale based on his sexual orientation. The Court, after determining that "the Boy Scouts is an expressive association and that the forced inclusion of Dale would significantly affect its expression," held that application of New Jersey's public accommodations law "runs afoul of the Scouts' freedom of expressive association." *Id*. at 656. Dale's inclusion, according to the Court, would "send a message, both to the youth members and to world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id*. at 653.

[296] Roberts v. U.S. Jaycees, 468 U.S. 609, 634 (1984) (Connor, J., concurring in part and concurring in the judgment). Although a commercial entity may be an "expressive association," entitled to greater constitutional protection, an "ordinary commercial law practice is not" such an association. *Id*. at 636. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 600 (2023) ("the First Amendment extends to all persons engaged in expressive conduct, including those who seek profit (such as speechwriters, artists and web designers)."); Volokh, *Speech Restrictions*, *supra* note 276, at 277, 280-82 ("Some have argued that employers have a constitutional right to refuse to associate with people whose political beliefs they reject. But the Court has never extended the right that far.").

[297] *Roberts*, 468 U.S. at 634-635; *see* Elizabeth Sepper, *The Return of Boy Scouts of America v. Dale*, 68 ST. LOUIS UNIV. L. J. 803, 812 (2024) ("Justice O'Connor's influential concurrence in *Roberts* had drawn a line between predominantly expressive associations and commercial enterprises.").

protection."[298] Similarly here, a law firm should not be able to claim the First Amendment right of association as a shield against New York's Labor Law protections.

A law firm might also assert the related argument that the New York Labor Law prohibition on discriminating against political protesters is a form of compelled speech, improperly requiring the firm to hire attorneys who voice a message disavowed by the firm. A similar argument was before the Court in Rumsfeld v. Forum for Academic and Institutional Rights, Inc. ("FAIR").[299] There, an association of law schools – FAIR – sought to preclude the military from recruiting on their campuses because of the military's discrimination based on sexual orientation. Congress responded by passing the Solomon Amendment, under which institutions of higher education that denied military recruiters access equal to that provided to other recruiters would lose certain federal funding.[300] FAIR sought an injunction against enforcement of the Solomon Amendment, arguing that the application of the statute to the law schools violated their First Amendment rights.[301] FAIR argued that requiring the law schools to host military recruiters was a form of compelled speech, whereby the government was "forc[ing] one speaker [the law schools] to host or accommodate another speaker's [the recruiter's] message."[302] FAIR said the military recruiters' presence on campus would be seen as an endorsement by the schools of the recruiters' speech and should not be allowed, as it would interfere with the law schools' messaging.[303] The Court rejected this argument, holding that there is "little likelihood" that the recruiters' views would be mistaken for the views of the law schools and there is nothing in the federal statute that restricts what the law schools can say about military policy.[304] Similarly, law firm applicants (or interns or summer associates) participating in political protests outside of the office are not likely to be understood as speaking on behalf of the firm. At any rate, the firm can disavow that speech

[298] *Roberts*, 468 U.S. at 637 (citing Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) (reversing dismissal of Title VII complaint alleging that law firm discriminated against female associate in denying her admission to partnership and stating: "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protection.")); *see* Volokh, *Speech Restrictions, supra* note 275, at 278-79.

[299] Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006) (Roberts, C.J., delivering the opinion of the Court).

[300] *Id.* at 51.

[301] *Id.* at 63.

[302] *Id. See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) (holding that under the First Amendment a state law cannot require a parade to include a group whose message the parade's organizer does not wish to send).

[303] *Rumsfeld*, 547 U.S. at 63.

[304] *Id.* at 65. The Court noted in this regard that the law schools' recruiting services are "not inherently expressive" as required by *Hurley*. *Rumsfeld*, 547 U.S. at 64. As discussed above, law firms similarly are not expressive associations.

or activity, either generally or in any given instance.[305] The out-of-office speech and political activities of applicants and untenured interns or summer associates is just that – extracurricular activity undertaken by adults on their own time. These future employees (or temporary employees) are not slated for entry as policy-making managers (at least in the vast majority of cases), and there is little basis for arguing that an employee-protective statute, such as New York's Labor Law, infringes in this situation on the firm's free speech rights.[306]

Another argument is that the refusal to hire blacklisted applicants could itself be viewed as symbolic expression of a law firm's position, constituting "expressive conduct" that falls under the First Amendment.[307] This argument, too, was addressed and rejected in *Rumsfeld v. FAIR.* The argument failed there, as it does here, because it is not the conduct that is expressive, it is the speech that accompanies it. Under the Court's symbolic speech cases, the conduct must be "inherently expressive" to warrant First Amendment protection. Burning the American flag, for example, is expressive conduct that has been held to warrant First Amendment protection.[308] By contrast, in *Rumsfeld v. FAIR*, "[t]he expressive component of [the] law school's actions is not created by the conduct itself but by the speech that accompanies it."[309] Similarly in the case of a law firm denying employment to an applicant based on participation in a protest, it is the refusal to hire that would trigger the New York Labor Law, and not the speech related to that decision.

Although the First Amendment likely does not provide a private law firm a defense against enforcement of the New York Labor Law, the applicability of that law in the case of potential employees who have engaged in political protest remains untested and unclear. The cases construing that statute, which have allowed its application in contexts beyond the electoral-related actions identified in the statutory language without providing any analysis, may not carry the day in the face of a strong

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[305] *See* Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 260 (2013) ("when an employee speaks about political issues on her own time, her speech is not likely to be understood as expressing her employer's views (at least where she was neither hired specifically as a spokesperson or lobbyist nor occupies such a senior position in the company as to be understood as speaking for it at all times) . . . In any event, the employer can always disavow the employee's off-work speech – whether through a general disclaimer of responsibility for anything an employee says outside the workplace or in response to a specific act of speech that the employer, customers or coworkers find particularly offensive.").

[306] FAIR also argued that requiring the law schools to accept the recruiters amounted to compelled speech insofar as "the recruiting assistance provided by the schools often includes elements of speech" (*e.g.*, in the form of scheduling emails and other communications). *Id*. at 61. The Court stated that such speech, however, does not trigger First Amendment scrutiny as it is "plainly incidental" to the regulation of conduct. The Court provided a clarifying example: "the fact that [a law prohibiting discrimination on the basis of race] will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Id*.

[307] *See* United States v. O'Brien, 391 U.S. 367, 376 (1968) (recognizing that expressive conduct may be entitled to First Amendment protection).

[308] Texas v. Johnson, 491 U.S. 397 (1989).

[309] *Rumsfeld*, 547 U.S. at 66.

litigation challenge. A law firm also, like a federal judge, necessarily reviews applicants for suitability, compatibility and trustworthiness. Indeed, Justice Stewart, dissenting in *Branti v. Finkel*, characterized the District Attorney's office in that case as "a firm of lawyers in the public sector" and stated, "I can think of few occupational relationships more instinct with the necessity of mutual confidence and trust than that kind of professional association."[310] Nevertheless, just as with the Judges' Blacklist, screening applicants is one thing; the announcement of a blacklist of all students who engage in political protest activity or who affiliate with particular political groups is quite another.[311] As Professor Michael Schmidt has stated, the practice of blacklisting is "corrosive to American democracy and to a free speech culture on which the First Amendment depends."[312] The law firm's action is particularly egregious given its timing, directly on the heels of government action condemning these same protesters. Such a blacklist is fundamentally wrong and, in light of the role of members of the legal profession in the defense and protection of constitutional rights,[313] a decidedly unsound undertaking.

CONCLUSION

Peaceful political protest and freedom of association are at the heart of the First Amendment. The Judges' hiring ban on disruptive protesters as well as all those who have attended Columbia University – using their power as government officials to coerce the school to change its viewpoints and suppress student speech and protest – is plainly at variance with First Amendment precedent, including the Supreme Court's 2024 decision in *NRA v. Vullo*.[314] The law firm policy is arguably inconsistent with the provisions of the New York Labor Law protecting employee speech rights. Even if that statute does not apply to the law firm policy, however, that policy – under which potential applicants are notified that their simple presence at a protest, participation in a protest, or association with those who protest, potentially disqualifies them from employment – is fairly subject to condemnation as inconsistent with free speech principles, especially where, as here, that policy is effectuated in tandem with government action. The legacy of McCarthyism haunts these blacklisting practices, where speech and expressive association that falls under the aegis of the First Amendment is targeted.

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[310] Branti v. Finkel, 445 U.S. 507, 520 (1980) (Stewart, J., dissenting).
[311] As noted above, the law firm's policy clearly goes beyond screening. *See* discussion *supra* notes 11-19 and accompanying text. The intent of the law firm's policy is to disqualify those who have participated in political protests ("even if they weren't using problematic language but were involved with a protest where others did") or have associated with protest groups that the law firm condemns. *See* Flitter, *supra* note 10. The effect of the policy is the same as that of any blacklist: chilling free speech and deterring political dissent.
[312] Michael Schmidt, *Book Note: The Logic of Persecution*, 41 HARV. C.R.-C.L. L. REV. 591, 596 (2006).
[313] *See* Zacharias, *supra* note 36, at 1608-09; MODEL RULES, *supra* note 36.
[314] 602 U.S. 175 (2024).

Blacklisting in the McCarthy era stemmed from the government's adoption of a loyalty program and a quasi-official blacklist, and soon became a mainstream phenomenon in both the public and private sectors. Its growth was enabled by the complicity of politicians, lawyers and the courts, including the Supreme Court. Blacklisting became pervasive, and protest was silenced. Professor Goldstein summarizes the effect at the time on student protest at institutions of higher education:

> One of the clearest indicators of the long-term effects of the Truman-McCarthy period was the political lethargy of American college students throughout the 1950's, which earned them the appellation, "The Silent Generation." The number of activist students during the entire decade – although increasing in the last two or three years of the 1950's – was miniscule, and most left-wing organizations on campus that had been active in the previous twenty years were virtually moribund.[315]

The Judges' Blacklist and the Law Firm Blacklist, which are now operating concurrently with congressional and executive branch actions similarly targeting protesters, raise the specter of a comparable wave of political repression. These hiring bans clearly will have, and undoubtedly have already had, the effect of chilling speech and association. Simply put, where prominent members of the legal profession blacklist political protesters, it will inevitably deter aspiring lawyers from voicing dissent. It is fair to look to the McCarthy era for insight in analyzing these developments, and it is appropriate to register serious concern that lawyers and judges are at the forefront of these efforts. Rather than abetting these measures, the legal profession should instead be leading the battle against actions to cabin speech and limit political dissent, as once the lawyers – the foot soldiers of our Constitution – begin to abandon the struggle, the prospect of maintaining those freedoms dims considerably.

[315] GOLDSTEIN, POLITICAL REPRESSION, *supra* note 61, at 381-82.