

Standing in the Line of Fire: Compulsory Campus Carry Laws and Hostile Speech Environments

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I. INTRODUCTION

A first-year law student sits in her Constitutional Law class, listening intently but nervously. All semester, the student's professor has encouraged active class participation, and the student has been quick to raise her hand, engage with the class, and offer her views on the topic at hand. Today, the class is discussing Supreme Court jurisprudence on reproductive rights. The student has strong views on the issue, and she has always been outspoken about those views. But this time, she feels great trepidation about speaking up. The discussion is getting heated, and her law school is in a state that has enacted a "compulsory campus carry law"¹—a state law that requires public colleges and universities to allow students with concealed carry permits to carry firearms on campus, even in the classroom.² Keenly aware that one or more of her classmates could be armed, the student starts to raise her hand, but then hesitates. Finally, she puts her hand down.

Critics of compulsory campus carry laws have noted that permitting firearms in the classroom, as colleges and universities must do in states that have enacted such laws, implicates the First Amendment by chilling classroom speech.³ Unfortunately, as illustrated by the recent decision of the United States Court of Appeals for the Fifth Circuit in *Glass v. Paxton*, plaintiffs challenging compulsory campus carry laws on First Amendment grounds face a significant hurdle in establishing standing.⁴

¹ See Shaundra K. Lewis, *Crossfire on Compulsory Campus Carry Laws: When the First and Second Amendments Collide*, 102 IOWA L. REV. 2109, 2111 (2017) [hereinafter Lewis, *Crossfire*].

² See *id.*

³ See Aurora Temple Barnes, *Guns and Academic Freedom*, 53 GONZ. L. REV. 45, 48 (2017); Shaundra K. Lewis, *Bullets and Books by Legislative Fiat: Why Academic Freedom and Public Policy Permit Higher Education Institutions to Say No to Guns*, 48 IDAHO L. REV. 1, 4 (2011) [hereinafter Lewis, *Bullets and Books*]; Shaundra K. Lewis & Daniel Alejandro De Luna, *Symposium on "Texas Gun Law and the Future": The Fatal Flaws in Texas's Campus Carry Law*, 41 T. MARSHALL L. REV. 135, 136 (2016); Laura Houser Oblinger, Note, *The Wild, Wild West of Higher Education: Keeping the Campus Carry Decision in the University's Holster*, 53 WASHBURN L.J. 87, 89 (2013); Christopher M. Wolcott, Comment, *The Chilling Effect of Campus Carry: How the Kansas Campus Carry Statute Impermissibly Infringes upon the Academic Freedom of Individual Professors and Faculty Members*, 65 U. KAN. L. REV. 875, 877 (2017); Kathy L. Wyer, Comment & Note, *A Most Dangerous Experiment? University Autonomy, Academic Freedom, and the Concealed-Weapons Controversy at the University of Utah*, 2003 UTAH L. REV. 983, 985 (2003); Lewis, *Crossfire*, *supra* note 1, at 2111.

⁴ 900 F.3d 233, 242 (5th Cir. 2018).

In *Glass*, the Fifth Circuit upheld a district court decision dismissing in its entirety a suit brought by three University of Texas at Austin (“UT”) professors against the State of Texas and UT.⁵ In their complaint, the professors challenged Texas’s compulsory campus carry law and UT’s policies implementing that law.⁶ The professors alleged, among other things, that requiring professors to allow students to carry firearms in the classroom violated the professors’ First Amendment right to academic freedom.⁷

In upholding the district court’s dismissal of the professors’ complaint, the Fifth Circuit rejected the professors’ First Amendment claims in part because it concluded that the injury alleged by the professors was not “certainly impending,” as required by the Supreme Court’s decision in *Clapper v. Amnesty International USA*,⁸ and in part because it concluded that the professors had failed to establish a direct causal connection between the chilling of their speech and specific actions of state and university officials.⁹ According to the Fifth Circuit, because the professors independently “self-censored” their speech out of fear of potential violence at the hands of hypothetical armed and angry students, their First Amendment claims rested on the speculative conduct of independent third parties.¹⁰

⁵ See *Glass v. Paxton*, No. 1:16-CV-845-LY, 2017 WL 4506806 (W.D. Tex. July 6, 2017), *aff’d*, 900 F.3d 233 (5th Cir. 2018).

⁶ Amended Complaint at 1–2, *Glass v. Paxton*, No. 1:16-CV-845-LY (W.D. Tex. July 6, 2017).

⁷ *Id.* at 11. This Article does not address the issues of whether, in cases challenging compulsory campus carry laws, students or professors would make better plaintiffs, or whether traditional free speech claims might fare better or worse than First Amendment claims based on academic freedom. Academic freedom claims brought by professors raise several unsettled issues: (1) uncertainty about whether the First Amendment creates a distinct right to academic freedom; *see, e.g.*, *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000); W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 NEB. L. REV. 301, 302 (1998); Dahlia Lithwick & Richard C. Schragger, *Jefferson v. Cuccinelli: Does the Constitution Really Protect a Right to “Academic Freedom”?*, SLATE (June 1, 2010), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/06/jefferson_v_cuccinelli.html. (2) uncertainty about whether, if it does, that right belongs to individual faculty members or just academic institutions; *see, e.g.*, Richard H. Hiers, *Institutional Academic Freedom vs. Faculty Academic Freedom in Public Colleges and Universities: A Dubious Dichotomy*, 29 J.C. & U.L. 35, 36 (2002); and (3) uncertainty about the extent to which the First Amendment protects public university and college professors’ right to free speech, in light of the Supreme Court’s decision in *Garcetti v. Ceballos*, which held that the First Amendment protects a public employee’s speech only if the employee speaks “as a citizen” and not “pursuant to their official duties.” 547 U.S. 410, 417, 421 (2006); *see, e.g.*, Mark Strasser, Pickering, *Garcetti*, & *Academic Freedom*, 83 BROOK. L. REV. 579, 594 (2018). For a discussion of these issues in the campus carry context, *see* Lewis, *Crossfire*, *supra* note 1, at 2117–29.

⁸ 568 U.S. 398, 401 (2013).

⁹ *See Glass*, 900 F.3d at 238–42.

¹⁰ *Id.* at 242.

This Article asserts that the argument against standing in cases where plaintiffs challenge compulsory campus laws on First Amendment grounds is based on a narrow and imprecise view of injury and causation, and a misunderstanding of the plaintiffs' allegations in these cases. Plaintiffs who raise First Amendment challenges to compulsory campus carry laws do not solely claim that their speech is chilled by a potential threat of future violence; they also claim that the "mere presence," or even potential presence, of firearms in the classroom presently creates an environment hostile to speech.¹¹ Therefore, this Article proposes adopting a "hostile speech environment" framework¹² for purposes of analyzing injury and causation in cases involving campus carry laws. The hostile speech environment framework adapts a Title VII "hostile work environment" framework to a First Amendment context.¹³ This framework would permit plaintiffs to demonstrate that, although campus carry laws do not explicitly prohibit speech on campus, when state and university officials enact or implement such laws, they engage in conduct that is hostile toward classroom speech in a manner "'sufficiently severe or pervasive' as to reasonably affect [that] speech and create an environment objectively

¹¹ See Barnes, *supra* note 3, at 79.

The presence of concealed carry weapons within the classroom directs the content of the professor's discourse away from controversial topics that may be contrary to popular opinion. This aversion to provocative content to preserve the safety of the class impedes the free inquiry of scholarship, which is exactly what the doctrine of academic freedom was created to prevent.

Id.; Lewis, *Crossfire*, *supra* note 1, at 2117, 2127 ("[S]tate legislation that compels concealed carry of firearms on campus offends the post-secondary institutions', the faculties', and the students' First Amendment rights to academic freedom and free speech because the very presence of firearms is likely to suppress freedom of thought and expression. . . . The presence of guns inhibits students from freely exchanging ideas with each other."); Lewis & De Luna, *supra* note 3, at 139 ("[T]he mere presence of firearms has already affected the way that some University of Houston professors teach." (footnote omitted)); Oblinger, *supra* note 3, at 109 ("Even if a shot is never fired, a gun's presence can still have the effect of intimidation or suppression, which would inhibit healthy academic discourse." (citing Joan H. Miller, Comment, *The Second Amendment Goes to College*, 35 SEATTLE U. L. REV. 235, 260 (2011))); see also Brief for Appellants at 15–16, 27, 34–35, *Glass v. Paxton*, 900 F.3d 233 (5th Cir. 2018) (No. 17-50641), 2017 WL 5665494 at *15–16, *27, *34–35 [hereinafter Appellants' Brief]; Reply Brief for Appellants at 4, 7–8, *Glass v. Paxton*, 900 F.3d 233 (5th Cir. 2018) (No. 17-50641), 2018 WL 841882, at *4, *7–8 [hereinafter Reply Brief]; Supplemental Brief for Appellants at 14, *Glass v. Paxton*, 900 F.3d 233 (5th Cir. 2018) (No. 17-50641), 2018 WL 3634819, at *14 [hereinafter Supplemental Brief]; Brief for American Association of University Professors, Giffords Law Center to Prevent Gun Violence, and Brady Center to Prevent Gun Violence as Amici Curiae Supporting Plaintiffs-Appellants at 5–6, 12, 17, 23, *Glass v. Paxton*, 900 F.3d 233 (5th Cir. 2018) (No. 17-50641), 2017 WL 6506802, at *5–6, *12, *17, *23 [hereinafter AAUP Amicus Brief].

¹² This framework was first proposed in another context in S. Cagle Juhan, Note, *Free Speech, Hate Speech, and the Hostile Speech Environment*, 98 VA. L. REV. 1577, 1580 (2012).

¹³ See *id.* at 1579.

abusive towards that speech.”¹⁴ The hostile environment itself is a present injury causally connected to the conduct of state and university officials.

Part II of this Article chronicles the history of the litigation in *Glass* and explores the nature of the allegations raised in that case. Part III discusses the current standing framework applied by the Supreme Court in cases involving “probabilistic” First Amendment injuries—injuries based on possible, but not certain, “future threats.”¹⁵ This Part first discusses the development of that framework. It then argues that this framework is ill-suited for cases involving First Amendment challenges to compulsory campus carry laws because the injury alleged in compulsory campus carry cases is an environment that presently chills speech, rather than a chilling caused by fear of future harm.

Part IV of this Article recommends adopting the hostile speech environment framework in cases involving First Amendment challenges to compulsory campus carry laws. First, it traces the evolution of the hostile work environment framework, from its origins in the Fifth Circuit’s decision in *Rogers v. EEOC*,¹⁶ to its incorporation by the Equal Employment Commission (EEOC) into EEOC guidelines, and, finally, to its adoption by the Supreme Court in *Meritor Savings Bank, FSB v. Vinson*¹⁷ and refinement in *Harris v. Forklift Systems, Inc.*¹⁸ Second, it addresses the origins and philosophical underpinnings of the hostile speech environment framework, which incorporates “terminology from Title VII’s ‘hostile work environment’ framework” to address First Amendment issues involving campus speech.¹⁹

Part V of this Article explains how the hostile speech environment cause of action would apply in the context of campus carry laws. First, it defines a hostile speech environment standard. Then, it explains how First Amendment challenges to compulsory campus carry laws and policies can be understood as arguments that these laws create an environment that is hostile toward classroom speech in a manner “‘sufficiently severe or pervasive’ as to reasonably affect [classroom] speech and create an

¹⁴ *Id.* at 1601 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)).

¹⁵ See F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 57 (2012) (“Threatened future injuries are probabilistic; they might not occur.”); see also Andrew C. Sand, Note, *Standing Uncertainty: An Expected-Value Standard for Fear-Based Injury in Clapper v. Amnesty International USA*, 113 MICH. L. REV. 711, 713 (2015) (“Probabilistic injury refers to any injury where it is uncertain that the underlying injury will actually occur . . .” (footnote omitted)).

¹⁶ 454 F.2d 234 (5th Cir. 1971), *disapproved by* *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984).

¹⁷ 477 U.S. 57, 66 (1986).

¹⁸ 510 U.S. 17, 22–23 (1993).

¹⁹ See Juhan, *supra* note 12, at 1579.

environment objectively abusive towards that speech.”²⁰

II. COMPULSORY CAMPUS CARRY LAWS, *GLASS V. PAXTON*, AND THE PROBLEM OF STANDING

A. *Campus Carry in the United States*

The term “campus carry laws” refers broadly to state statutes and regulations governing the carrying of firearms by students, faculty members, staff members, and visitors on the premises of state public institutions of higher education.²¹ “Compulsory campus carry laws” are state laws that require institutions of higher education to allow on their premises the carrying of firearms by, at the very least, students and faculty members.²²

Residents of all fifty states may carry concealed firearms in some locations in those states if “they meet certain state requirements.”²³ The following sixteen states have enacted “prohibitory campus carry laws,”²⁴ which explicitly prohibit individuals from carrying concealed firearms on the campuses of institutions of higher education: California, Florida, Illinois, Louisiana, Massachusetts, Michigan, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, South Carolina, and Wyoming.²⁵ The following twenty-three states either explicitly or implicitly allow institutions of higher education to decide for themselves whether to allow individuals to carry concealed firearms on their campuses: Alabama, Alaska, Arizona, Connecticut, Delaware, Hawaii, Indiana, Iowa, Kentucky, Maine, Maryland, Minnesota, Montana, New Hampshire, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Vermont, Virginia, Washington, and West Virginia.²⁶

²⁰ *Id.* at 1601 (first quoting *Harris*, 510 U.S. at 21; and then quoting *Meritor*, 477 U.S. at 65, 67).

²¹ See Lewis, *Crossfire*, *supra* note 1, at 2111.

²² See *id.*

²³ *Guns on Campus: Overview*, NAT’L CONF. ST. LEGISLATORS (Aug. 14, 2018), <http://www.ncsl.org/research/education/guns-on-campus-overview.aspx>.

²⁴ Lewis, *Crossfire*, *supra* note 1, at 2113.

²⁵ See CAL. PENAL CODE § 626.9(h) (West 2018); FLA. STAT. ANN. § 790.06(12)(a), (13) (West 2017); 430 ILL. COMP. STAT. ANN. § 66 / 65(a)(15) (West 2015); LA. STAT. ANN. § 14:95(A)(5)(a) (2018); MASS. GEN. LAWS ANN. ch. 269, § 10(j) (West 2015); MICH. COMP. LAWS ANN. § 28.425o(1)(h) (West 2017); MO. ANN. STAT. § 571.107(1)(10) (West 2014); NEB. REV. STAT. ANN. § 28-1204.04(1) (West 2018); NEV. REV. STAT. ANN. § 202.265(1)(e) (West 2015); N.J. STAT. ANN. § 2C:39-5(e)(1) (West 2013); N.M. STAT. ANN. § 30-7-2.4(A) (West 2018); N.Y. PENAL LAW § 265.01-a (McKinney 2016); N.C. GEN. STAT. ANN. § 14-269.2(b) (West 2015); N.D. CENT. CODE ANN. § 62.1-02-13(1) (West 2015); S.C. CODE ANN. § 16-23-420(A) (2018); WYO. STAT. ANN. § 6-8-104(t)(x) (West 2018); see also Lewis, *Crossfire*, *supra* note 1, at 2113; *Guns on Campus*, *supra* note 23.

²⁶ See Lewis, *Crossfire*, *supra* note 1, at 2116; *Guns on Campus*, *supra* note 23.

The following ten states have enacted laws allowing concealed-carry permit holders to carry firearms on the campuses of institutions of higher education: Arkansas, Colorado, Georgia, Idaho, Kansas, Mississippi, Oregon, Texas, Utah, and Wisconsin.²⁷ The following six states have enacted “compulsory campus carry laws,” which “limit the discretion of higher education institutions to decide whether to ban guns inside academic buildings[:]. . . Colorado, Idaho, Tennessee, Texas, and Wisconsin.”²⁸ Tennessee law permits the carrying of firearms on campuses of institutions of higher learning by faculty members who are licensed to carry them, “but the law does not extend to students or the general public.”²⁹ Nationally, the trend has been toward permitting more concealed firearms on college and university campuses.³⁰

B. *Glass v. Paxton*

1. Texas’s Campus Carry Law and the University of Texas’s Campus Carry Policy

To date, the most significant legal challenge to a state campus carry law has been *Glass v. Paxton*,³¹ in which three professors at UT challenged Texas’s campus carry law and UT’s policies implementing that law. Texas’s campus carry law, passed as Senate Bill 11³² and codified into law in section 411.2031 of the Texas Government Code,³³ went into effect on August 16, 2016.³⁴ The statute allows a handgun “license holder”³⁵ to “carry a

²⁷ See ARK. CODE ANN. § 5-73-322(b)–(c) (West 2016); COLO. REV. STAT. ANN. § 18-12-214(1)(a) (West 2016); GA. CODE ANN. § 16-11-127.1 (West 2016); IDAHO CODE ANN. § 18-3309(1)–(2) (West 2016); KAN. STAT. ANN. § 75-7c20(a) (West 2015); MISS. CODE ANN. § 97-37-17(6)(c) (West 2011); OR. REV. STAT. ANN. § 166.370(3)(j) (West 2015); TEX. GOV’T CODE ANN. § 411.2031(c) (West 2016); UTAH CODE ANN. § 76-10-505.5(2) (West 2015); WIS. STAT. ANN. § 941.23(2)(d) (West 2016); *Guns on Campus*, *supra* note 23; Lewis, *Crossfire*, *supra* note 1, at 2116–17.

²⁸ Lewis, *Crossfire*, *supra* note 1, at 2114–15.

²⁹ *Guns on Campus*, *supra* note 23.

³⁰ See *id.* (noting that “[i]n 2013, at least 19 states introduced legislation to allow concealed carry on campus in some regard and in the 2014 legislative session, at least 14 states introduced similar legislation” and that, since 2015, three states (Arkansas, Georgia, and Texas) have “passed legislation to allow students and faculty to carry guns on college campuses” and one state (Ohio) passed legislation “lift[ing] [a] ban on firearms on college campuses and leav[ing] the decision to individual institutions”); see also Lewis, *Crossfire*, *supra* note 1, at 2113–17.

³¹ 900 F.3d 233 (5th Cir. 2018).

³² S.B. 11, 84th Leg., Reg. Sess. (Tex. 2015).

³³ TEX. GOV’T CODE ANN. § 411.2031 (West 2018).

³⁴ See *Glass v. Paxton*, No. 1:16-CV-845-LY, 2017 WL 4506806, at *1 (W.D. Tex. July 6, 2017).

³⁵ TEX. GOV’T CODE ANN. §§ 411.171–.209 (providing for the licensing of handguns in Texas).

concealed handgun on or about the license holder's person while the license holder is on the campus of an institution of higher education."³⁶ It prohibits institutions of higher education from adopting policies that would bar "license holders from carrying handguns on the campus of the institution[s]," except as provided for in the statute.³⁷

The statute requires a university or college president, or other equivalent officer, to "establish reasonable rules, regulations, or other provisions" for implementing and executing the campus carry law.³⁸ Before establishing such rules and regulations, however, the president or an equivalent officer must first "consult[] with students, staff, and faculty of the institution regarding the nature of the student population, specific safety considerations, and the uniqueness of the campus environment."³⁹

The statute permits amendments to the relevant university policies by the president or an equivalent officer, "as necessary for campus safety."⁴⁰ It further allows the university's or college's "governing board" to amend the policies "wholly or partly."⁴¹ It does not, however, allow the university or college to establish any policies that would "generally prohibit or have the effect of generally prohibiting license holders from carrying concealed handguns on [campus]."⁴² In an advisory opinion, the Attorney General of Texas interpreted this language as prohibiting any provision that would bar, or allow individual professors to bar, students from carrying firearms in university or college classrooms.⁴³

After the state enacted the campus carry law, UT formed a working group made up of members of the campus community.⁴⁴ The group included "students, alumni, staff, and faculty."⁴⁵ The working group's job was to recommend university policies that implemented and executed the law.⁴⁶ Prior to making its recommendations, the working group considered "thousands of comments from the public."⁴⁷ Many commenters expressed serious concerns that the presence or potential presence of firearms in the

³⁶ *Id.* § 411.2031(b).

³⁷ *Id.* § 411.2031(c).

³⁸ *Id.* § 411.2031(d-1).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ TEX. GOV'T CODE ANN. § 411.2031(d-2).

⁴² TEX. GOV'T CODE ANN. § 411.2031(d-1) (West 2016).

⁴³ Tex. Attorney Gen., Opinion Letter on Authority of an Institution of Higher Education to Establish Certain Rules Regarding the Carrying of Handguns on Campus, Op. No. KP-0051 (Dec. 21, 2015), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2015/kp0051.pdf>.

⁴⁴ *See* Glass v. Paxton, 900 F.3d 233, 236 (5th Cir. 2018).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

classroom would chill classroom discussions.⁴⁸

The working group issued a final report, which recommended policies and procedures to UT's president.⁴⁹ The report contained summaries of stakeholders' comments both for and against permitting students to carry concealed firearms inside classrooms.⁵⁰ Although the working group sympathized "with the concerns about chilled speech," it "recommended against banning concealed carry inside classrooms because [it believed that] such a regulation would likely violate the campus carry law by effectively prohibiting concealed carry for those traveling to campus to attend class."⁵¹ UT's president ultimately "accepted the recommendations,"⁵² and UT's Board of Regents "incorporated all . . . of the President's new policies into the University's operating procedures,"⁵³ with the exception of one procedure "that prohibited license holders from keeping a live-round loaded in the chamber of their handguns while on campus."⁵⁴

2. The Lawsuit

On July 6, 2016, three UT professors, Dr. Jennifer Lynn Glass, Dr. Lisa Moore, and Dr. Mia Carter, filed a complaint in the United States District Court for the Western District of Texas against UT and the State of Texas.⁵⁵ The professors alleged, among other things, that Texas's compulsory campus carry law and UT's policies implementing that law violated the First Amendment.⁵⁶ According to the professors, "[c]ompelling professors at a public university to allow, without any limitation or restriction, students to carry concealed guns in their classrooms chills their First Amendment rights to academic freedom."⁵⁷

The professors based their First Amendment cause of action on the premise that the presence of firearms in the classroom would chill classroom speech.⁵⁸ The professors contended that

⁴⁸ *Id.* at 236–37. Supporters of the law, however, "countered that such fears [we]re unfounded, citing data 'from the Texas Department of Public Safety establishing that license holders, as a group, are extremely law-abiding.'" *Id.* at 237.

⁴⁹ *Id.* at 236.

⁵⁰ *Glass*, 900 F.3d at 236–37.

⁵¹ *Id.* at 237.

⁵² *Id.* at 236.

⁵³ *Id.* at 237.

⁵⁴ *Id.* at 237 n.1.

⁵⁵ *See generally* Complaint, *Glass v. Paxton*, No. 1:16-CV-845-LY (W.D. Tex. July 6, 2017). The professors subsequently filed an amended complaint on August 9, 2016. *See generally* Amended Complaint, *supra* note 6.

⁵⁶ Amended Complaint, *supra* note 6, at 11–15, 17–18.

⁵⁷ *Id.* at 11.

⁵⁸ *Id.* at 11–15.

robust academic debate in the classroom inevitably will be dampened to some degree by the fear that it could expose other students or themselves to gun violence by the professor's awareness that one or more students has one or more handguns hidden but at the ready if the gun owner is moved to anger and impulsive action.⁵⁹

Referring to academic studies on the behavioral effects of individuals' proximity to firearms, the professors argued that the hidden presence of handguns in the classroom would chill the speech of students carrying firearms and students who were in close proximity to those carrying firearms.⁶⁰ The professors sought, among other things, a declaratory judgment that Texas's compulsory campus carry law and UT's policies implementing the law were unconstitutional, as well as preliminary and permanent injunctions prohibiting the implementation of the law and its attendant policies.⁶¹

In their complaint, each of the three professors individually illustrated the potential chilling effect the presence of firearms would have in their classrooms.⁶² Each also expressed their own specific concerns about "[their] safety, and the safety of [their] students, as a result of the current concealed carry rules and [their] inability to bar concealed carry in [the] classroom."⁶³

Professor Glass stated that she typically sought to "generate debate" in her courses, including one "on fertility and reproduction which include[d] classroom discussion on such currently volatile topics as abortion and unwanted pregnancies."⁶⁴ She maintained, however, that "[t]he possible presence of hidden weapons that can quickly deal death threaten[ed] to chill [her] manner of teaching."⁶⁵ To illustrate her point, Professor Glass described an incident "in her own classroom" in which "a verbally aggressive student, disappointed in a grade handed out during class, display[ed] a level of animosity and aggressiveness toward [her] teaching assistant."⁶⁶ According to Professor Glass, "had the current concealed carry rule been in place, [it] would have left her hesitant to confront the student in defense of her teaching assistant and urge a reasoned discussion of the matter at hand."⁶⁷

⁵⁹ *Id.* at 12.

⁶⁰ *Id.* at 12–13.

⁶¹ *Id.* at 19–20.

⁶² Amended Complaint, *supra* note 6, at 13–15.

⁶³ *Id.* at 13.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 13–14.

Professor Moore, who taught a class entitled “LGBT Literature and Culture,” asserted that “[p]rejudices against those who are part of the LGBT community has sometimes made the class a target of hate.”⁶⁸ To illustrate her point, Professor Moore described incidents involving two students.⁶⁹ The first student “announced on the first day of class that she was enrolled to monitor and report on Professor Moore’s ‘homosexual agenda.’”⁷⁰ The second student made “increasingly troubling statements, and [took] personally intrusive steps, toward the professor and his co-students, to the point that seemed personally threatening.”⁷¹ Professor Moore maintained that these incidents “dampened” classroom discussion, participation, and debate.⁷² She further stated that some students even dropped her class as a result of the second student’s conduct.⁷³ According to Professor Moore, the “possibility of guns in the classroom would only have exacerbated the deleterious effect on academic discussion and freedom for those in the class.”⁷⁴

Professor Carter described her “courses in modern and contemporary cultures, both of which include[d] controversial topics such as imperialism and power structures related to sexuality and gender.”⁷⁵ In these courses, Professor Carter employed a “pedagogic approach [that] emphasize[d] dialogue and debate and the critical examination of one’s own ideas and others’ beliefs.”⁷⁶ According to Professor Carter, “[e]ngendering a community of trust is crucial for the classroom to work as it should.”⁷⁷ Therefore, “[t]he potential of having a student carrying a weapon in the classroom would jeopardize the community of trust and be destructive to the dynamic educational process.”⁷⁸

Professor Carter also maintained that “[f]urther exacerbating this situation would be the presence of students with mental health issues, a situation that the professor ha[d] encountered in the past.”⁷⁹ According to Professor Carter, who claimed that she and her students had been threatened in the past, “[a]ll this would be made even worse were guns allowed into the classroom, with the consequence that classroom debate would be chilled to

⁶⁸ Amended Complaint, *supra* note 6, at 14.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Amended Complaint, *supra* note 6, at 14.

⁷⁵ *Id.* at 14–15.

⁷⁶ *Id.* at 14.

⁷⁷ *Id.* at 15.

⁷⁸ *Id.*

⁷⁹ *Id.*

a greater degree.”⁸⁰

In support of their argument that “the hidden presence of handguns” exacerbates the “problem of squelched academic debate and discussion,” the professors referred to “peer-reviewed academic studies” about the “weapons effect.”⁸¹ The professors maintained that “[t]hese academic studies show that the presence of handguns changes people’s behavior.”⁸² More specifically, “[t]hose who are already agitated will behave more aggressively if they[] see, talk about, handle[,] or even think about a nearby gun.”⁸³ According to the professors, “the behavioral effect of being near a weapon applies not only to the person in possession of the gun but also to other classmates if they are aware that some other student in the class is armed.”⁸⁴

3. The District Court Decisions

On August 22, 2016, the district court denied the professors’ motion for a preliminary injunction.⁸⁵ Because of the procedural posture of the case, the district court’s decision reached “only [the professors’] request for immediate relief and ma[de] no final ruling on any asserted issue.”⁸⁶ Nevertheless, the district court based its ruling in part on its conclusion that the professors had “failed to establish a substantial likelihood of ultimate success on the merits” on any of their claims.⁸⁷

In addressing the professors’ First Amendment claim, the district court focused largely on what it perceived to be the professors’ failure to establish a causal connection between the chilling of their speech, and the conduct of state and university officials.⁸⁸ According to the district court, even if the facts alleged in the professors’ complaint were true, they were insufficient to establish a First Amendment violation because the professors had censored their speech out of fear of being shot by some hypothetical armed and angry student, and not because the state or the university had prohibited the professors from speaking.⁸⁹

The district court stated that “[t]he burden of which [the professors] complain[ed] . . . [did] not fit within any recognized right of academic freedom,” because “neither the Campus Carry Law nor the Campus Carry

⁸⁰ Amended Complaint, *supra* note 6, at 15.

⁸¹ *Id.* at 12–13.

⁸² *Id.* at 13.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Glass v. Paxton*, No. 1:16-CV-845-LY, 2016 WL 8904948, at *1 (W.D. Tex. Aug. 22, 2016).

⁸⁶ *Id.*

⁸⁷ *Id.* at *6.

⁸⁸ *Id.* at *4–6.

⁸⁹ *Id.*

Policy [wa]s a content-based regulation of speech, nor c[ould] either reasonably be construed as a direct regulation of speech.”⁹⁰ The district court further contended that Texas’s campus carry law and UT’s policy did “not direct [the professors] either toward or away from any particular subject or point of view” or forbid them from “speak[ing] and teach[ing] freely.”⁹¹

On July 6, 2017, the district court granted the State of Texas’s and UT’s various motions to dismiss the professors’ Amended Complaint in its entirety.⁹² The district court dismissed the complaint for lack of subject matter jurisdiction, ruling that the professors lacked standing under Article III.⁹³ In so ruling, the district court relied in part, on the Supreme Court’s decisions in *Laird v. Tatum*⁹⁴ and *Clapper v. Amnesty International USA*,⁹⁵ both of which involved allegations of First Amendment chill. The district court concluded not only that the professors had failed to establish an injury-in-fact but that they also failed to demonstrate “that [their] alleged injury [wa]s traceable to any conduct of Defendants.”⁹⁶ In particular, the district court concluded that the professors failed to establish that the chilling of their speech was “fairly traceable to the Campus Carry Law and Campus Carry Policy.”⁹⁷

The district court noted that the Supreme Court had been “reluctan[t] to endorse standing theories that rest on speculation about the decisions of independent actors.”⁹⁸ The district court characterized the basis of the professors’ First Amendment claim as a “self-imposed censoring of classroom discussions caused by their fear of the possibility of illegal activity by persons not joined in this lawsuit.”⁹⁹ According to the district court, the professors presented “no concrete evidence to substantiate their fears, but instead rest[ed] on ‘mere conjecture about possible . . . actions.’”¹⁰⁰

⁹⁰ *Id.* at *3–4 (citing *Univ. of Pa. v. EEOC*, 493 U.S. 182, 188 (1990)) (stating that the district court “ha[d] found no precedent for Plaintiffs’ proposition that there is a right of academic freedom so broad that it allows them such autonomous control of their classrooms—both physically and academically—that their concerns override decisions of the legislature and the governing body of the institution that employs them”).

⁹¹ *Glass*, 2016 WL 8904948, at *4 (citing *Univ. of Pa.*, 493 U.S. at 198).

⁹² *Glass v. Paxton*, No. 1:16-CV-845-LY, 2017 WL 4506806, at *1 (W.D. Tex. July 6, 2017), *aff’d*, 900 F.3d 233 (5th Cir. 2018).

⁹³ *Id.* at *3.

⁹⁴ 408 U.S. 1 (1972).

⁹⁵ 568 U.S. 398 (2013).

⁹⁶ *Glass*, 2017 WL 4506806, at *3 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)).

⁹⁷ *Id.*

⁹⁸ *Id.* (quoting *Clapper*, 568 U.S. at 414); *see also Clapper*, 568 U.S. at 413 (“In the past, we have been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment.”).

⁹⁹ *Id.*

¹⁰⁰ *Id.* (quoting *Clapper*, 568 U.S. at 420).

The district court further maintained that the professors neither “challenge[d] a direct regulation or restriction on speech,” specified “a subject matter or point of view they feel they must eschew as a result of the Campus Carry Law and Campus Carry Policy,” nor pointed “to a specific harm they ha[d] suffered or w[ould] suffer as a result of the law and policy.”¹⁰¹ Instead, the court contended, the professors pointed only to an alleged “chilling effect” that “appear[ed] to arise from [the professors’] subjective belief that a person may be more likely to cause harm to a professor or student as a result of the law and policy.”¹⁰²

4. The Fifth Circuit Appeal

The professors appealed the decision of the district court to the Fifth Circuit.¹⁰³ In their briefs, the professors and Amici clarified that the professors’ First Amendment claims were not based solely on the allegation that fear of violent reprisals from armed students caused the professors to self-censor.¹⁰⁴ Instead, the professors also alleged that the presence of firearms in the classroom created an environment of intimidation that itself chilled speech.¹⁰⁵

The professors argued that Texas’s compulsory Campus Carry Law and the university’s policy implementing that law “creat[ed] an unavoidable pressure pushing against exploration of matters that are of the moment controversial” and “ha[d] the effect of lessening the vigor and extent of the ideas explored in college classroom teaching.”¹⁰⁶ According to the professors, the mere knowledge that their classmates might be carrying guns would cause faculty and students to refrain from addressing controversial

¹⁰¹ *Id.*

¹⁰² *Glass*, 2017 WL 4506806, at *3.

¹⁰³ *See Glass v. Paxton*, 900 F.3d 233 (5th Cir. 2018).

¹⁰⁴ *See Reply Brief, supra* note 11, at 4 (chiding the district court for reducing the professors’ “specific allegations about the inter-relation of academic pedagogy, hidden weaponry they could not keep from their classrooms, and historic experience with the great human damage done by guns in the hands of college students to being nothing more than a ‘self-imposed censoring of classroom discussions’ caused by fear”); *Supplemental Brief, supra* note 11, at 14 (“It is not their (or their students) being shot or having a gun waived in their face that is the immediate concern in terms of classroom pedagogy and method. It is the context, both immediate and historical, that affects their conduct of the classroom.”); *AAUP Amicus Brief, supra* note 11, at 12 (“Plaintiffs allege (and social science confirms) that the presence of guns—even if not flourished or discharged—can significantly alter the dynamics of provocative exchanges.”); *see also id.* at 17 (“The alleged chill does not depend on uncertain third-party actions, such as a student brandishing or firing a handgun . . .”).

¹⁰⁵ *See Appellants’ Brief, supra* note 11, at 15–16, 27, 34–35; *Reply Brief, supra* note 11, at 4, 7–8; *Supplemental Brief, supra* note 11, at 14; *AAUP Amicus Brief, supra* note 11, at 5–6, 12, 17, 23.

¹⁰⁶ *Appellants’ Brief, supra* note 11, at 27.

topics.¹⁰⁷ The professors chided the district court for

reduc[ing] their specific allegations about the inter-relation of academic pedagogy, hidden weaponry they could not keep from their classrooms, and historic experience with the great human damage done by guns in the hands of college students to being nothing more than a “self-imposed censoring of classroom discussions” caused by fear.¹⁰⁸

They maintained that “[i]t is not [the professors’] (or their students) being shot or having a gun waived in their face that is the immediate concern in terms of classroom pedagogy and method. It is the context, both immediate and historical, that affects their conduct of the classroom.”¹⁰⁹

The professors challenged the notion that the alleged injury was speculative or based on some fear of future injury. They maintained that they did “not assert[] that sometime in the future they may decide that they need to curtail their classroom teaching activities because of [the] implementation [of Texas’s campus carry law] at [UT].”¹¹⁰ Instead, they were asserting that the law’s “implementation w[ould] affect them presently, leading them to dampen the kind of intellectual inquiry that they normally engage in with their students in class.”¹¹¹ According to the professors, “from the beginning of guns-in-the-classroom, academic activities will be adversely affected.”¹¹² Finally, the professors connected the chilling of their speech to the conduct of state and university officials, maintaining that

the facts at this stage of the case point to a direct link between the challenged policy and the lessening of debate and discussion—a shortening of the academic spectrum—in these professors’ classrooms. The intimidatory impact of an official policy that prevents the exclusion of guns from their classrooms lessens First Amendment activity in these three professors’ classrooms.¹¹³

The American Association of University Professors (“AAUP”), the Giffords Law Center to Prevent Gun Violence, and the Brady Center to Prevent Gun Violence (collectively, the “Amici”) jointly filed an amicus brief in support of the professors.¹¹⁴ The Amici characterized the professors’

¹⁰⁷ *Id.* at 16.

¹⁰⁸ Reply Brief, *supra* note 11, at 4 (citation omitted).

¹⁰⁹ Supplemental Brief, *supra* note 11, at 14.

¹¹⁰ Appellants’ Brief, *supra* note 11, at 34.

¹¹¹ *Id.* at 34–35.

¹¹² *Id.* at 35; *see also* Reply Brief, *supra* note 11, at 7–8 (“The guns-in-the-classroom mandate is a concrete fact, in place since the fall semester of 2016. Its adverse impact occurred from the moment the policy was forced into effect and imposed on these three professors in particular to deny them any options to ban the guns from their classrooms that the state officials have told them they must allow in with those students who wish to tote them.”).

¹¹³ Supplemental Brief, *supra* note 11, at 15.

¹¹⁴ *See* AAUP Amicus Brief, *supra* note 11, at 3–6.

“core contention” as the proposition “that admitting handguns into classrooms alters the educational environment,”¹¹⁵ and their alleged injury as “chill arising from a necessary accommodation to the potential presence of firearms in the classroom and students’ knowledge of that potential.”¹¹⁶ According to the Amici, the Professors’ “allegations articulate[d] a widespread belief among educators that the presence of guns interferes with pedagogy.”¹¹⁷

The Amici further argued that the Professors’ allegations could not “reasonably be dismissed as ‘subjective fear,’”¹¹⁸ in part because they were not based solely on fear of some future violent reprisal.¹¹⁹ According to the Amici, the chill alleged by the Professors did “not depend on uncertain third-party actions, such as a student brandishing or firing a handgun.”¹²⁰ Instead, the professors alleged “(and social science confirm[ed]) that the presence of guns—even if not flourished or discharged—can significantly alter the dynamics of provocative exchanges.”¹²¹

The Fifth Circuit affirmed the district court’s decision that the professors lacked standing on all claims.¹²² In affirming the district court’s decision on the First Amendment cause of action, the Fifth Circuit, like the district court before it, focused on a perceived lack of injury, and lack of a causal connection between the chilling of the professors’ speech and the conduct of state or university officials.¹²³ Like the district court, the Fifth Circuit relied on *Laird* and *Clapper*.¹²⁴ Applying these cases, the Fifth Circuit concluded that the professors “lacked standing because [they] alleged a ‘subjective’ First Amendment chill that was contrary to the presumption [their] students ‘will conduct their activities within the law and so avoid prosecution and conviction.’”¹²⁵

The Fifth Circuit asserted that whether the professors had “standing [turned] on whether the alleged harm threatened by concealed-carrying students [was] ‘certainly impending.’”¹²⁶ The court concluded that the

¹¹⁵ *Id.* at 5.

¹¹⁶ *Id.* at 17–18.

¹¹⁷ *Id.* at 6.

¹¹⁸ *Id.* at 5.

¹¹⁹ *Id.* at 5, 12–13, 17.

¹²⁰ AAUP Amicus Brief, *supra* note 11, at 17; *see also id.* at 23 (“Plaintiffs’ alleged chill does not turn on a belief that, as the Attorney General flamboyantly put it in the court below, ‘adults who have been licensed to carry handguns could attack them at any moment if they say anything potentially controversial in class.’”).

¹²¹ *Id.* at 12.

¹²² *Glass v. Paxton*, 900 F.3d 233, 236 (5th Cir. 2018).

¹²³ *Id.* at 238–42.

¹²⁴ *Id.*

¹²⁵ *Id.* at 238 (quoting *O’Shea v. Littleton*, 414 U.S. 488, 497 (1974)).

¹²⁶ *Id.* at 240.

professors lacked standing because their “allegation[s] of harm involve[d] a ‘chain of contingencies’” and “[e]ach link in the chain of contingencies” was not “certainly impending.”¹²⁷

The Fifth Circuit characterized the professors’ alleged injury as follows: the professors’ “fear of potential violent acts by firearm-carrying students prompt[ed] [them] to self-censor by avoiding topics [they] worr[ied] might incite such violence or intimidation, which would be unnecessary but for the law and policy that prevent[ed] [them] from banning firearms in [their] classroom[s].”¹²⁸ The court concluded that “[u]ltimately, whether concealed-carrying students pose certain harm to [the professors] turns on their independent decision-making.”¹²⁹ Therefore, “[b]ecause [the professors] fail[ed] to allege certainty as to how these students w[ould] exercise their future judgment, the alleged harm [wa]s not certainly impending.”¹³⁰ According to the court, the professors could not “manufacture standing by self-censoring [their] speech based on what [they] allege[d] to be a reasonable probability that concealed-carry license holders w[ould] intimidate professors and students in the classroom.”¹³¹

The Fifth Circuit acknowledged that the professors had put forward opinion evidence from “multiple University faculty members and multiple national educational organizations” who “believe[d] that the presence of guns in the classroom w[ould] chill professors’ speech,” and that the Professors had even “cite[d] to various academic studies discussing a so-called ‘weapons effect,’” whereby “the hidden presence of guns does threaten disruption of classroom activities, increases the likelihood that violence will erupt in the classroom, and intimidates non-carrying students—and undoubtedly professors, too.”¹³² The court, however, concluded “that

¹²⁷ *Id.* at 239 (quoting *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 410–14 (2013)).

¹²⁸ *Glass*, 900 F.3d at 240.

¹²⁹ *Id.* at 241.

¹³⁰ *Id.*

¹³¹ *Id.* at 242.

¹³² *Id.* at 240. The Fifth Circuit was referring to the amicus brief filed by the Amici. *See generally* AAUP Amicus Brief, *supra* note 11. In the brief, the Amici maintained that “[s]tudies dating back to 1967 have demonstrated the ‘weapons effect’: the tendency of provoked individuals to behave aggressively when in the presence of actual guns, pictures of guns, and even words referring to weapons.” *Id.* at 21 (first citing Leonard Berkowitz & Anthony LePage, *Weapons as Aggression-Eliciting Stimuli*, 7 J. PERSONALITY & SOC. PSYCHOL. 202, 202 (1967); and then citing Arlin James Benjamin, Jr. & Brad J. Bushman, *The Weapons Effect*, 19 CURRENT OPINION PSYCHOL. 93, 96 (2018)). According to the Amici, the research both “suggests that carrying a concealed weapon can increase aggressive behavior by the person carrying” and “demonstrates that words or pictures of guns exert a priming effect on individuals—even if they themselves are not carrying guns—triggering the accessibility of aggressive concepts. *Id.* at 21–22 (first citing David Hemenway et al., *Is an Armed Society a Polite Society? Guns and Road Rage*, 38 ACCIDENT ANALYSIS & PREVENTION 687, 687 (2006); and then citing Craig A. Anderson et al., *Does the Gun Pull the Trigger?*

none of the cited evidence alleges a certainty that a license-holder will illegally brandish a firearm in a classroom.”¹³³

III. STANDING PROBLEMS IN COMPULSORY CAMPUS CARRY LAW CASES

As the *Glass* decisions demonstrate, plaintiffs seeking to challenge compulsory campus carry laws face a significant hurdle: establishing, for purposes of Article III standing, a causal connection between the chilling of their speech and the conduct of state and university officials.¹³⁴ The professors’ claims failed in *Glass* because, in assessing injury and causation, the district court and the Fifth Circuit applied a rigid application of the current Supreme Court framework for analyzing Article III standing in cases involving what some scholars have called “probabilistic” First Amendment injuries—injuries based on possible, but not certain, “future threats.”¹³⁵ As discussed below, even assuming the courts in *Glass* correctly applied the Supreme Court’s “probabilistic” First Amendment injury framework, the framework is ill-suited for compulsory campus carry cases. The “probabilistic” First Amendment injury framework applies to cases in which speech is chilled by a fear of future harm. In contrast, in campus carry cases, the alleged chill is caused by a present injury: an “altered educational environment” of fear and intimidation that *itself* chills speech.¹³⁶

Automatic Priming Effects of Weapons Pictures and Weapon Names, 9 PSYCHOL. SCI. 308, 308 (1998)). The Amici concluded, “[i]n other words, the ‘mere presence of weapons’ magnifies both aggressive cognition and aggressive conduct—particularly in stressful situations. And this heightened aggression afflicts both those who carry weapons and those who perceive their mere presence.” *Id.* at 22.

¹³³ *Glass*, 900 F.3d at 241.

¹³⁴ See Barnes, *supra* note 3, at 83 (noting, prior to the Fifth Circuit’s decision in *Glass*, that the plaintiffs in that case must establish “that the state law is closely related to the infringement of their academic freedom,” and concluding that “[i]f the imposition on their academic freedom is too ‘remote and attenuated’ from the state and university action, their case will fail.” (quoting *Univ. of Pa. v. EEOC*, 493 U.S. 182, 200 (1990))).

¹³⁵ See Hessick, *supra* note 15, at 57; Sand, *supra* note 15, at 713.

¹³⁶ See AAUP Amicus Brief, *supra* note 11, at 5–6 (“Plaintiffs’ core contention [is] that admitting handguns into classrooms alters the educational environment Plaintiffs’ allegations articulate a widespread belief among educators that the presence of guns interferes with pedagogy, a belief confirmed by social science research demonstrating that the very presence of guns can propel discomfort into overt aggression, even if no one threatens an actual shooting.”); see also Barnes, *supra* note 3, at 83 (“[I]f the presence of guns creates an ‘atmosphere of suspicion and distrust’ within which ‘scholarship cannot flourish,’ academic freedom has been infringed.” (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957))).

A. *Standing in Cases Involving “Probabilistic” First Amendment Injuries*

Federal courts apply a three-part test to determine whether a plaintiff has standing under Article III.¹³⁷ First, a plaintiff must demonstrate that the plaintiff “suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent, not “conjectural” or “hypothetical.””¹³⁸ Second, the plaintiff must establish “a causal connection between the injury and the conduct complained of.”¹³⁹ The injury must “be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.’”¹⁴⁰ Finally, the plaintiff must show that it is “‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’”¹⁴¹

Frederick Shauer has defined a chilling injury as an injury that “occurs when individuals seeking to engage in activity protected by the [F]irst [A]mendment are deterred from so doing by governmental regulation not specifically directed at that protected activity.”¹⁴² Although the government regulation at issue may have only an “indirect effect on the exercise of First Amendment rights,” to establish standing, plaintiffs alleging such injuries must still establish that the regulation directly injured them.¹⁴³

In assessing standing in *Glass*, both the Fifth Circuit and the district court rigidly applied Supreme Court precedent involving “probabilistic” First Amendment injuries.¹⁴⁴ The court considered the following Supreme

¹³⁷ See *Allen v. Wright*, 468 U.S. 737, 738 (1984), *abrogated by* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014) (holding that, to establish standing, “[a] plaintiff must allege [1] personal injury [2] fairly traceable to the defendant’s allegedly unlawful conduct and [3] likely to be redressed by the requested relief”).

¹³⁸ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citation omitted) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)) (first citing *Allen*, 468 U.S. at 756; then citing *Warth v. Seldin*, 422 U.S. 490, 508 (1975); and then citing *Sierra Club v. Morton*, 405 U.S. 727, 740–41 n.16 (1972)).

¹³⁹ *Id.* at 560.

¹⁴⁰ *Id.* at 560–61 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)).

¹⁴¹ *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 43).

¹⁴² Frederick Shauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect”*, 58 B.U. L. REV. 685, 693 (1978); see also Jonathan R. Siegel, Note, *Chilling Injuries as a Basis for Standing*, 98 YALE L.J. 905, 913 (1989) (“[G]overnment action that exerts only a chilling effect on expression, by definition, does not directly and affirmatively prohibit it.”).

¹⁴³ *Laird v. Tatum*, 408 U.S. 1, 12–13 (1972).

¹⁴⁴ *Glass v. Paxton*, 900 F.3d 233, 238–42 (5th Cir. 2018); *Glass v. Paxton*, No. 1:16-CV-845-LY, 2017 WL 4506806, at *2–3 (W.D. Tex. July 6, 2017), *aff’d*, 900 F.3d 233 (5th Cir. 2018).

Court cases in its analysis: *Laird v. Tatum*,¹⁴⁵ *Meese v. Keene*,¹⁴⁶ and *Clapper v. Amnesty International USA*.¹⁴⁷

1. *Laird v. Tatum*

In *Laird v. Tatum*, the Supreme Court held that plaintiffs alleging a First Amendment chill based on fear of a future injury could not establish standing by alleging a mere “subjective ‘chill.’”¹⁴⁸ There, the plaintiffs alleged that their First Amendment rights were violated by a United States Army program, in which Army intelligence collected data about civilian activities deemed potentially disruptive.¹⁴⁹ According to the plaintiffs, the program’s “very existence” impermissibly chilled their speech.¹⁵⁰

The Court held that the plaintiffs lacked standing because they could not establish an injury that was fairly traceable to the Army’s conduct.¹⁵¹ The Court concluded that the plaintiffs’ allegations amounted to claims “of a subjective ‘chill’” based on speculation about some undetermined future harm.¹⁵² According to the Court, “[a]llegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.”¹⁵³

The Court acknowledged that its precedent supported the proposition that laws and regulations that do not directly prohibit or restrict speech may still violate the First Amendment by indirectly chilling speech.¹⁵⁴ It maintained, however, that none of its prior cases permitted standing based on plaintiffs’ fear of some uncertain, hypothetical future government action.¹⁵⁵ The Court concluded that, to establish standing under its

¹⁴⁵ 408 U.S. 1 (1972).

¹⁴⁶ 481 U.S. 465 (1987).

¹⁴⁷ 568 U.S. 398 (2013).

¹⁴⁸ *Laird*, 408 U.S. at 13–14.

¹⁴⁹ *Id.* at 2.

¹⁵⁰ *Id.* at 13.

¹⁵¹ *Id.*

¹⁵² *Id.* at 13 & n.7 (stating that plaintiffs based their allegations on “speculative apprehensiveness that the Army may at some future date misuse the information in some way that would cause [plaintiffs] direct harm”).

¹⁵³ *Id.* at 13–14.

¹⁵⁴ See *Laird*, 408 U.S. at 11 (first citing *Baird v. State Bar of Ariz.*, 401 U.S. 1 (1971); then citing *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); then citing *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965); and then citing *Baggett v. Bullitt*, 377 U.S. 360 (1964)) (“In recent years this Court has found in a number of cases that constitutional violations may arise from the deterrent, or “chilling,” effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights.”); see also *id.* at 12–13 (“The decisions in these cases fully recognize that governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights.”).

¹⁵⁵ See *id.* at 11 (“In none of these cases, however, did the chilling effect arise merely

precedent, plaintiffs must show that they “ha[ve] sustained, or [are] immediately in danger of sustaining, a direct injury as the result of [the relevant government] action.”¹⁵⁶ According to the Court, the plaintiffs “d[id] not meet this test.”¹⁵⁷

2. *Meese v. Keene*

Fifteen years later, the Supreme Court addressed another alleged “probabilistic” First Amendment injury in *Meese v. Keene*,¹⁵⁸ this time with a much different result. There, the Court reiterated that plaintiffs may still establish injury and causation by showing that their speech was chilled by a law or regulation that does not directly target or infringe upon that speech.¹⁵⁹

In *Keene*, the plaintiff, a lawyer and California state senator, sought to show films that the Department of Justice (DOJ) had identified as “political propaganda” under the Foreign Agents Registration Act of 1938 (the “Registration Act”).¹⁶⁰ The plaintiff sued to enjoin the DOJ from so designating the films.¹⁶¹

The Court held that the plaintiff established standing to challenge the DOJ’s application of the Registration Act.¹⁶² The Court determined that the plaintiff had adequately demonstrated both an injury-in-fact and a causal connection between that injury and the DOJ’s conduct.¹⁶³ The Court distinguished *Laird*.¹⁶⁴ It noted that, unlike the plaintiffs in *Laird*, the plaintiff in the case before it had “alleged and demonstrated more than a ‘subjective chill.’”¹⁶⁵ The plaintiff did not rely on mere allegations that the DOJ’s designation of the films as “political propaganda” had chilled his speech by deterring him from showing the films.¹⁶⁶ Instead, he alleged and provided evidence that “if he were to exhibit the films while they bore such characterization, his personal, political, and professional reputation would suffer and his ability to obtain re-election and to practice his profession

from the individual’s knowledge that a governmental agency was engaged in certain activities or from the individual’s concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and additionl [sic] action detrimental to that individual.”).

¹⁵⁶ *Id.* at 13 (quoting *Ex parte Levitt*, 302 U.S. 633, 634 (1937)).

¹⁵⁷ *Id.*

¹⁵⁸ 481 U.S. 465 (1987).

¹⁵⁹ *Id.* at 472–74.

¹⁶⁰ *Id.* at 467.

¹⁶¹ *Id.* at 468.

¹⁶² *Id.* at 472–77.

¹⁶³ *See id.* at 472–74.

¹⁶⁴ *Meese*, 481 U.S. at 472–74.

¹⁶⁵ *Id.* at 473.

¹⁶⁶ *Id.*

would be impaired.”¹⁶⁷

The Court acknowledged that the DOJ’s designation of the film did not directly infringe on the plaintiff’s First Amendment rights because it did not actually prohibit the plaintiff from acquiring or showing the films.¹⁶⁸ It maintained, however, that “[w]hether the statute [itself] in fact constitutes an abridgement of the plaintiff’s freedom of speech is . . . irrelevant to the standing analysis.”¹⁶⁹

3. *Clapper v. Amnesty International USA*

More recently, in *Clapper v. Amnesty International USA*,¹⁷⁰ the Court held that the plaintiffs failed to establish standing because they could not show that their “threatened injury” was “certainly impending.”¹⁷¹ According to the Court, “[a]llegations of possible future injury are not sufficient.”¹⁷² In *Clapper*, a group of attorneys and journalists challenged, on First Amendment grounds, section 702 of the Foreign Intelligence Surveillance Act of 1978 (the “Surveillance Act”),¹⁷³ which permits the surveillance by the United States of certain foreign individuals.¹⁷⁴ The plaintiffs argued that the Surveillance Act chilled their speech by causing them to refrain from communicating with “likely targets of surveillance” with whom their work “require[d] them to engage in sensitive international communications.”¹⁷⁵ According to the plaintiffs, “there w[as] an objectively reasonable likelihood that their communications [would] be acquired under [the Surveillance Act] at some point in the future.”¹⁷⁶

The Court held that the plaintiffs lacked standing.¹⁷⁷ The Court concluded that the plaintiffs’ allegations of injury “relie[d] on a highly attenuated chain of possibilities”¹⁷⁸ involving “speculation about the decisions of independent actors.”¹⁷⁹ According to the Court, the plaintiffs could not “manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly

¹⁶⁷ *Id.* (quoting *Keene v. Smith*, 569 F. Supp. 1513, 1515 (E.D. Cal. 1983)).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 473 (quoting *Keene v. Meese*, 619 F. Supp. 1111, 1118 (E.D. Cal. 1985)).

¹⁷⁰ 568 U.S. 398 (2013).

¹⁷¹ *Id.* at 401, 410.

¹⁷² *Id.* at 409 (citations omitted).

¹⁷³ 50 U.S.C. § 1881a (2018).

¹⁷⁴ *Clapper*, 568 U.S. at 401.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 422.

¹⁷⁸ *Id.* at 410.

¹⁷⁹ *Id.* at 414.

impending.”¹⁸⁰

Significantly, although the Court articulated a “requirement that ‘threatened injury must be certainly impending to constitute injury in fact,’”¹⁸¹ the text of footnote five of the decision suggested a different standard: the “substantial risk” standard.¹⁸² In footnote five, the Court stated:

Our cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about. In some instances, we have found standing based on a “substantial risk” that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm.¹⁸³

However, the Court concluded, “to the extent that the ‘substantial risk’ standard is relevant and is distinct from the ‘clearly impending’ requirement, respondents fall short of even that standard, in light of the attenuated chain of inferences necessary to find harm here.”¹⁸⁴ A year later, in *Susan B. Anthony List v. Driehaus*,¹⁸⁵ the Court, citing *Clapper*, stated that “[a]n allegation of future injury may suffice if the threatened injury is ‘certainly impending,’ or there is a ‘substantial risk’ that the harm will occur.”¹⁸⁶

B. Misapplication of the Supreme Court’s “Probabilistic” First Amendment Injury Jurisprudence to Compulsory Campus Carry Law Cases

In *Glass*, the district court and the Fifth Circuit rigidly applied the Supreme Court’s “probabilistic” First Amendment injury framework. Both courts relied on *Laird* and *Clapper*.¹⁸⁷ In particular, both courts strictly

¹⁸⁰ *Clapper*, 568 U.S. at 416 (citations omitted).

¹⁸¹ *Id.* at 410 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

¹⁸² *Id.* at 414 n.5; see also Bradford C. Mank, *Clapper v. Amnesty International: Two or Three Competing Philosophies of Standing Law?*, 81 TENN. L. REV. 211, 230 (2014) (“[T]his footnote acknowledged that the Court had sometimes used a ‘substantial risk’ test for standing injury that is arguably different from the ‘certainly impending’ test used by the majority in the rest of its opinion.”).

¹⁸³ *Clapper*, 568 U.S. at 414 n.5 (first citing *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153–55 (2010); then citing *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988); then citing *Blum v. Yaretsky*, 457 U.S. 991, 1000–01 (1982); and then citing *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979)).

¹⁸⁴ *Id.* (“In addition, plaintiffs bear the burden of pleading and proving concrete facts showing that the defendant’s actual action has caused the substantial risk of harm. Plaintiffs cannot rely on speculation about ‘the unfettered choices made by independent actors not before the court.’” (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992))).

¹⁸⁵ 573 U.S. 149 (2014).

¹⁸⁶ *Id.* at 158 (emphasis added) (quoting *Clapper*, 568 U.S. at 409, 414 n.5).

¹⁸⁷ See *Glass v. Paxton*, 900 F.3d 233, 238–42 (5th Cir. 2018); *Glass v. Paxton*, No. 1:16-CV-845-LY, 2017 WL 4506806, at *3 (W.D. Tex. July 6, 2017), *aff’d*, 900 F.3d 233 (5th Cir. 2018).

applied the “certainly impending” standard from *Clapper*.¹⁸⁸ The Fifth Circuit, moreover, distinguished *Keene*.¹⁸⁹ Both courts then concluded that because neither campus carry laws nor university policies that implement those laws directly prohibit or restrict speech, any injury alleged in such cases is not “certainly impending,” but is rather a mere “subjective chill” involving “a chain of contingencies” that requires speculation about the future conduct of third parties.¹⁹⁰ The courts further rejected the notion of a causal connection between the chilling of classroom speech and compulsory campus carry laws or university policies implementing those laws, contending that any such link would necessarily be based on speculation that armed students would react violently to plaintiff’s speech.¹⁹¹ Therefore, according to the courts, any attempt at establishing injury-in-fact or causation in compulsory campus carry law cases must fail under *Laird* and *Clapper*.¹⁹²

Relying on the Supreme Court’s “probabilistic” First Amendment injury framework to bar standing in compulsory campus carry cases is problematic for two reasons. First, after *Clapper*, uncertainty remains about the application and “scope” of the “certainly impending” standard.¹⁹³ Second, the framework is inapplicable to compulsory campus carry cases because the injury alleged in such cases is not a “probabilistic” injury.

As an initial matter, the courts in *Glass* failed to acknowledge the current ambiguity about the scope and applicability of the “certainly impending standard.”¹⁹⁴ The Court’s references in *Clapper* to both “the certainly impending” standard and the “substantial risk” standard left some uncertainty as to which standard it would apply in future cases.¹⁹⁵ Its

¹⁸⁸ See *Glass v. Paxton*, 900 F.3d 233, 238–42 (5th Cir. 2018); *Glass v. Paxton*, No. 1:16-CV-845-LY, 2017 WL 4506806, at *2–3 (W.D. Tex. July 6, 2017), *aff’d*, 900 F.3d 233 (5th Cir. 2018).

¹⁸⁹ See *Glass*, 900 F.3d at 242 (“Although Keene’s allegation of harm involved the contingency of individual voter decisions, he nonetheless alleged *certainly* about voter decision-making based on supporting affidavits and opinion polling.”).

¹⁹⁰ See *Glass*, 900 F.3d at 238–42; *Glass*, 2017 WL 4506806, at *3

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Standing—Challenges to Government Surveillance—Clapper v. Amnesty International USA*, 127 HARV. L. REV. 298, 298 (2013) (noting that *Clapper* “left the scope of the ‘certainly impending’ standard unclear”).

¹⁹⁴ *Id.*

¹⁹⁵ See Courtney Chin, Note, *Standing Still: The Implications of Clapper for Environmental Plaintiffs’ Constitutional Standing*, 40 COLUM. J. ENVTL. L. 323, 325–36 (2015) (“An important concession in footnote 5 of *Clapper* also leaves open the possibility that plaintiffs may demonstrate injury in fact based on a ‘substantial risk’ of harm.”) (emphasis in original); Mank, *supra* note 182, at 230 (noting that “footnote [5] acknowledged that the Court had sometimes used a ‘substantial risk’ test for standing injury that is arguably different from the ‘certainly impending’ test used by the majority in the rest of its opinion”).

reference to both standards in *Driehaus* did not clear things up.¹⁹⁶ As some commentators have noted, it is particularly unclear “whether its approach to standing was generally applicable to all cases or whether it was more limited to standing in intelligence-gathering and foreign affairs cases.”¹⁹⁷

This ambiguity matters. Depending on the standard applied, courts may consider different allegations and evidence, and may weigh those allegations and evidence differently. Andrew C. Sand maintains that under the “substantial risk” standard, courts should consider “both the likelihood and magnitude of harm,” while under the “certainly impending” standard, courts should consider “only the likelihood that a threatened harm would occur.”¹⁹⁸ In Sand’s view, determining which standard applies requires determining whether the injury alleged is one of two different types of “probabilistic injuries”: (1) a “threatened injury” or (2) a “fear-based injury.”¹⁹⁹ Sand defines “threatened injuries” as “future injuries in which injury to the plaintiff is anticipated but has not yet occurred,” and “fear-based injuries” as “present injuries in which the plaintiff suffers actual injury based on fear or anticipation of a threatened injury.”²⁰⁰

Sand contends that “because fear-based injuries are suffered presently,” it is inappropriate to analyze them under a standard “based solely on the likelihood that harm will occur,” like the “certainly impending” standard.²⁰¹ Instead, they should be analyzed using a standard like the “substantial risk” standard that also considers the “magnitude of harm.”²⁰² Sand categorizes “chilling-effect injuries” as “fear-based injuries.”²⁰³ Therefore, courts

¹⁹⁶ See *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014) (emphasis added) (quoting *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409, 414 n.5 (2013)).

¹⁹⁷ Mank, *supra* note 182, at 225; see also Chin, *supra* note 195, at 344 (stating that “Justice Alito not only made sure to contextualize the case, but also went out of his way to specify that the standing analysis was more likely to fail specifically because it arose in the national security context” and concluding that “[g]iven such extenuating circumstances, as well as Justice Alito’s carefully worded decision, it is reasonable to believe that this restrictive view of standing would and should be limited to its context”); *Standing—Challenges to Government Surveillance*, *supra* note 193, at 304 (quoting *Clapper*, 568 U.S. at 408–09) (arguing that the inconsistent standards articulated in *Clapper* along with *dicta* there noting that the Court’s “standing inquiry has been especially rigorous when reaching the merits of . . . an action taken by one of the other two branches of the Federal Government,” particularly in cases challenging decisions of ‘the political branches in the fields of intelligence gathering and foreign affairs’ suggests that “‘certainly impending’ may only apply to litigants challenging governmental decisions in foreign affairs or intelligence.”).

¹⁹⁸ Sand, *supra* note 15, at 732.

¹⁹⁹ *Id.* at 713.

²⁰⁰ *Id.* (citing Brian Calabrese, Note, *Fear-Based Standing: Cognizing an Injury-in-Fact*, 68 WASH. & LEE L. REV. 1445, 1455–73 (2011)).

²⁰¹ *Id.* at 732.

²⁰² *Id.*

²⁰³ *Id.* Sand also maintains that the alleged injury in *Clapper* constituted a “fear-based injury” because the plaintiffs alleged that they had incurred “costly and burdensome

should analyze them under the “substantial risk” standard.²⁰⁴ Sand contends that “[t]he *Clapper* majority inappropriately blurred the distinction between future threatened injury and present fear-based injury.”²⁰⁵ In doing so, the Court applied an inappropriate standard.²⁰⁶

In *Glass*, the district court and the Fifth Circuit exacerbated this problem when they rigidly applied the “certainly impending” standard. Both courts failed to acknowledge footnote five and treated the alleged injury as a “threatened injury,” looking only at the likelihood of harm, and ignoring the magnitude of harm already suffered by the professors. However, even if the plaintiffs had alleged only that students and faculty self-censor because they are afraid that hypothetical armed students might react violently to their speech, they would have alleged a “fear-based injury,” and not a “threatened injury,” because the alleged chill was “presently suffered.”²⁰⁷ Therefore, under Sand’s proposed methodology, the magnitude of harm the professors suffered would have been relevant.²⁰⁸

But even if the courts’ interpretation of the “probabilistic” First Amendment injury framework were correct, a rigid application of that framework is inappropriate in cases involving First Amendment challenges to compulsory campus carry laws. The First Amendment injury alleged by opponents of compulsory campus carry laws is not a “probabilistic” injury. It is a present chill caused by a present injury.²⁰⁹ The argument against compulsory carry laws is not based solely on the proposition that faculty and students self-censor because they are afraid of violent reprisals from armed students.²¹⁰ The argument is also based on the proposition that the presence or perceived presence of lethal weapons in the classroom creates an atmosphere of intimidation that is so oppressive it chills classroom speech, independent of the real or hypothetical conduct of third parties.²¹¹ Students

measures,” to avoid surveillance. *Id.* at 732.

²⁰⁴ Sand, *supra* note 15, at 732.

²⁰⁵ *Id.* at 731. Sand claims, however, that the Court applied the appropriate standard in footnote 5. *Id.* at 732.

²⁰⁶ *Id.* at 731–32.

²⁰⁷ See Appellants’ Brief, *supra* note 11, at 34–35.

²⁰⁸ See Sand, *supra* note 15, at 732.

²⁰⁹ See Appellants’ Brief, *supra* note 11, at 34–35.

²¹⁰ See, e.g., Barnes, *supra* note 3, at 80 (“Whether a student is actually carrying a weapon in the classroom is not the crux of the issue. The issue is that professors feel compelled to avoid topics that could incite confrontation now that concealed weapons could be present in their classrooms.”); see also Reply Brief, *supra* note 11, at 4; Supplemental Brief, *supra* note 11, at 14 (“It is not the [professors] (or their students) being shot or having a gun waived in their face that is the immediate concern in terms of classroom pedagogy and method. It is the context, both immediate and historical, that affects their conduct of the classroom.”); AAUP Amicus Brief, *supra* note 11, at 5, 12, 17.

²¹¹ See Barnes, *supra* note 3; Lewis, *Crossfire*, *supra* note 1, at 2117, 2127; Lewis & De Luna, *supra* note 3, at 139; Oblinger, *supra* note 3, at 109; Appellants’ Brief, *supra* note 11,

and faculty members are injured as soon as the presence or perceived presence of firearms creates that environment.²¹²

Furthermore, unlike the plaintiffs in *Laird* and *Clapper*, who were never themselves subject to the regulations they challenged, plaintiffs challenging compulsory campus carry laws and policies are subject to those laws and policies whenever they enter a classroom at a public college or university in a state where such laws have been enacted.²¹³ And they are not just subject to the laws in an abstract sense; they are physically subject to them. Indeed, what makes campus carry cases so different from the “probabilistic harm” cases relied upon by the courts in *Glass* is the physical proximity of the plaintiffs to the alleged harm.²¹⁴ They are literally in the same room as the deadly weapons that create that atmosphere of fear and intimidation.

For these reasons, the alleged injury to faculty and students subject to compulsory carry laws is neither subjective nor speculative. The alleged injury is an objective one: an “altered educational environment” of fear and intimidation.²¹⁵ It does not require speculation about third-party conduct. Furthermore, that injury is readily traceable to the conduct of state and university officials.²¹⁶ State and university officials are responsible for

at 15–16, 27, 34–35; Reply Brief, *supra* note 11, at 4, 7–8; Supplemental Brief, *supra* note 11, at 14; AAUP Amicus Brief, *supra* note 11, at 5–6, 12, 17, 23.

²¹² See Barnes, *supra* note 3; Lewis, *Crossfire*, *supra* note 1, at 2117, 2127; Lewis & De Luna, *supra* note 3, at 139; Oblinger, *supra* note 3, at 109.

The professors are not asserting that sometime in the future they may decide that they need to curtail their classroom teaching activities because of SB 11’s implementation at UT-Austin. Rather, they are asserting that SB 11’s implementation will affect them presently, leading them to dampen the kind of intellectual inquiry that they normally engage in with their students in class. That is, from the beginning of guns-in-the-classroom, academic activities will be adversely affected. The professors are not subject to the new policy at some ill-defined future date. The policy is (or was) effective the day classes started in August 2016—and its effects on them began that day and have continued since.

Appellants’ Brief, *supra* note 11, at 34–35.

²¹³ See Jennifer L. Bruneau, Comment, *Injury-in-Fact in Chilling Effect Challenges to Public University Speech Codes*, 64 CATH. U. L. REV. 975, 1002 (2015) (“[I]n *Laird*, there was no evidence that the plaintiff had been subject to government surveillance, but a student is always subject to the policies of the college or university in which he is enrolled.” (first citing *DeJohn v. Temple Univ.*, 537 F.3d 301, 312 (3d Cir. 2008); and then citing *Lopez v. Candaele*, 630 F.3d 775, 784 (9th Cir. 2010))).

²¹⁴ See Rachel Bayefsky, *Psychological Harm and Constitutional Standing*, 81 BROOK. L. REV. 1555, 1606 (2016) (arguing that in cases where plaintiffs allege standing based on psychological harm, “[g]eographical proximity to the source of the challenged legal violation is [a] tool that courts can use to gauge the nexus between the alleged violation and a particular plaintiff’s experience of psychological harm”).

²¹⁵ See AAUP Amicus Brief, *supra* note 11, at 5–6.

²¹⁶ See *id.* at 17.

enacting and implementing campus carry laws and their attendant university policies. Because those laws and policies create the environment described above, those laws and policies have caused or contributed to the chilling of speech in the classroom.²¹⁷

The framework used by the courts in *Glass* is inadequate for analyzing injury and causation in cases involving First Amendment challenges to compulsory campus carry laws. The hostile speech environment framework would prove more appropriate.

IV. THE HOSTILE SPEECH ENVIRONMENT

The hostile speech environment framework presents an alternative, broader view of injury and causation that allows for a more accurate understanding of the alleged injuries in compulsory campus carry law cases. This “novel” framework adopts “terminology from Title VII’s ‘hostile work environment’ framework.”²¹⁸ To understand how the hostile speech environment framework applies to campus carry law cases, it is important to first understand the development of the Title VII hostile work environment standard.

A. *Evolution of the Title VII Hostile Work Environment Framework*

The Title VII hostile work environment framework is useful for analyzing standing in compulsory campus carry law cases because the framework acknowledges that an individual or institution can injure a plaintiff through conduct that creates or contributes to an environment that is psychologically harmful, even when the individual or institution does not engage in specific acts that directly harm the plaintiff or, in some cases, even target the plaintiff.²¹⁹ The framework developed to allow an employee to recover against an employer where the employee was subject to “a hostile or

²¹⁷ *Id.* at 4; see also Supplemental Brief, *supra* note 11, at 14.

²¹⁸ Juhan, *supra* note 12, at 1579.

²¹⁹ See, e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (“[E]ven without regard to . . . tangible effects, the very fact that . . . discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII’s broad rule of workplace equality.”); Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 684 (2000) [hereinafter Grossman, *First Bite*] (“Sexual harassment that does not result in a tangible employment action is actionable, if at all, under a hostile work environment theory[,] . . . [which is] based on the notion that unwelcome sexual conduct, if sufficiently severe or pervasive, violates Title VII because it alters the terms and conditions of employment on the basis of sex.”); see also Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1709 (1998) (“The concept of a hostile work environment was developed out of an awareness that some actions by supervisors or coworkers can create an atmosphere that undermines ‘the right to participate in the work place on [an] equal footing,’ even though these actions may not affect any tangible job benefit.”) (quoting *King v. Bd. of Regents*, 898 F.2d 533, 537 (7th Cir. 1990)).

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abusive work environment,”²²⁰ even where the employee could not demonstrate that the employer’s discriminatory conduct was “directly linked to the grant or denial of an economic *quid pro quo*,”²²¹ or that it resulted in specific instances of “‘economic’ or ‘tangible’ discrimination.”²²²

From the inception of the hostile work environment framework, its proponents acknowledged that discriminatory conduct need not be directly harmful to the plaintiff, or even precisely targeted at the plaintiff, for it to create or contribute to an abusive environment.²²³ The first court “to articulate[] the concept of hostile work environment harassment”²²⁴ was the Fifth Circuit in *Rogers v. EEOC*.²²⁵ In *Rogers*, a Hispanic employee filed an employment discrimination claim with the EEOC against the optometry practice for which she worked.²²⁶ In her EEOC charge, the employee alleged that her employer discriminated against her by, among other things, discriminating against the practice’s patients based on their ethnicity.²²⁷ As part of its investigation, the EEOC demanded evidence about the employer’s patients and their applications for services from the practice.²²⁸ The United States District Court for the Eastern District of Texas denied this demand, concluding that even if the employer had discriminated against its patients, the employee had been not “aggrieved” by this conduct, as required by Title VII.²²⁹

The Fifth Circuit reversed.²³⁰ In doing so, the court held, in effect, that even conduct that may not directly discriminate against an employee or even directly target that employee may nevertheless constitute discrimination if it

²²⁰ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986).

²²¹ *Id.* at 65.

The principal substantive distinction between harassment resulting in a tangible employment action (*quid pro quo*) and that not so resulting (hostile environment) is that the latter requires a showing that the harassment was severe and pervasive, while the former simply requires evidence that some tangible employment action was taken based on an employee’s refusal to submit to a supervisor’s sexual advances.

Grossman, *First Bite*, *supra* note 219, at 681.

²²² *See Harris*, 510 U.S. at 21; Grossman, *First Bite*, *supra* note 219, at 684; *see also* Schultz, *supra* note 219, at 1709.

²²³ *See, e.g., Rogers v. EEOC*, 454 F.2d 234, 236–41 (5th Cir. 1971), *disapproved by* EEOC v. Shell Oil Co., 466 U.S. 54 (1984).

²²⁴ Schultz, *supra* note 219, at 1714.

²²⁵ *Rogers*, 454 F.2d at 238.

²²⁶ *Id.* at 236.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 237 (quoting *Rogers v. EEOC*, 316 F. Supp. 422, 425 (E.D. Tex. 1970), *rev’d*, 454 F.2d 234 (5th Cir. 1971)).

²³⁰ *Id.* at 241.

creates or contributes to a discriminatory environment.²³¹ The court determined that language in Title VII prohibiting an employer from discriminating against employees “with respect to [their] . . . terms, conditions, or privileges of employment”²³² was “expansive” enough to “sweep[] within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.”²³³ According to the Fifth Circuit, discrimination against an employers’ patients or customers “could be so employee demeaning as to constitute an invidious condition of employment.”²³⁴ After *Rogers*, courts continued to apply the hostile work environment framework in cases involving racial, religious, and national origin discrimination.²³⁵

As the hostile work environment framework developed, its proponents continued to distinguish between conduct that directly injures plaintiffs and conduct that creates or contributes to a psychologically harmful environment. The term “hostile work environment” was “first coined,” along with its “underlying analysis,” in 1979 by Catharine MacKinnon,²³⁶ who adopted the hostile work environment framework into the sexual harassment context.²³⁷ The following year, when the EEOC first issued its sexual harassment guidelines, the agency incorporated MacKinnon’s

²³¹ See *Rogers*, 454 F.2d at 238.

I am simply not willing to hold that a discriminatory atmosphere could under no set of circumstances ever constitute an unlawful employment practice. One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and I think Section 703 of Title VII was aimed at the eradication of such noxious practices.

Id.

²³² *Id.* at 238 (quoting 42 U.S.C.A. § 2000e-2(a)(1) (West 2018)).

²³³ *Id.*

²³⁴ *Id.* at 240.

²³⁵ See, e.g., *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) (first citing *Firefighters Inst. for Racial Equal. v. City of St. Louis*, 549 F.2d 506, 514–15 (8th Cir. 1977); then citing *Gray v. Greyhound Lines, E.*, 545 F.2d 169, 176 (D.C. Cir. 1976); then citing *Compston v. Borden, Inc.*, 424 F. Supp. 157 (S.D. Ohio 1976), *disapproved by* *Harrington v. Vandalia-Butler Bd. of Educ.*, 585 F.2d 192 (6th Cir. 1978); and then citing *Cariddi v. Kan. City Chiefs Football Club*, 568 F.2d 87, 88 (8th Cir. 1977)).

²³⁶ See Grossman, *First Bite*, *supra* note 219, at 679 (citing CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 1–23 (1979)).

²³⁷ See Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 447 n.4 (1997) (citing MACKINNON, *supra* note 236, at 32 (noting that MacKinnon divided sexual harassment “into two categories: quid pro quo harassment and hostile or abusive environment harassment”); Joanna L. Grossman, *Moving Forward, Looking Back: A Retrospective on Sexual Harassment Law*, 95 B.U. L. REV. 1029, 1034 n.32 (2015) [hereinafter Grossman, *Moving Forward*] (quoting MACKINNON, *supra* note 236, at 32) (“MacKinnon distinguished between harassment ‘in which sexual compliance is exchanged, or proposed to be exchanged, for an employment opportunity,’ and harassment that is a ‘persistent condition of work.’”).

“framework . . . virtually wholesale.”²³⁸

In 1986, in *Meritor Savings Bank, FSB v. Vinson*,²³⁹ the Supreme Court first adopted the hostile work environment framework into its own jurisprudence.²⁴⁰ There, the Court held for the first time that a sexual discrimination claim based on a hostile work environment cause of action “is actionable under Title VII.”²⁴¹ According to the Court, a plaintiff may recover under Title VII by establishing that an employer’s discriminatory conduct “created a hostile or abusive work environment,” as long as the harassment is “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”²⁴²

In *Meritor*, a bank employee brought a Title VII sexual harassment action against her employer.²⁴³ The employee alleged that her supervisor at the bank repeatedly raped and sexually assaulted her, and continuously subjected her to unwanted sexual advances and acts of sexual coercion and exhibitionism.²⁴⁴ She further alleged that he harassed other female employees.²⁴⁵ The district court denied the employee’s claim, concluding that the employee “was not the victim of sexual harassment [or] sexual discrimination.”²⁴⁶ The district court based this conclusion on its assumption

²³⁸ Grossman, *Moving Forward*, at 1034 (citing Guidelines on Discrimination Because of Sex, 45 Fed. Reg. 74,676, 74,677 (EEOC Nov. 10, 1980) (codified at 29 C.F.R. § 1604.11(c) (1980)). The EEOC guidelines included under its definition of sexual harassment, “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature,” not only when “submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment,” or “submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual,” but also when “such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.” See 29 C.F.R. § 1604.11(a).

²³⁹ 477 U.S. 57 (1986).

²⁴⁰ See *id.* at 66–67 (“Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.” (first citing *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982); then citing *Katz v. Dole*, 709 F.2d 251, 254–55 (4th Cir. 1983); then citing *Bundy v. Jackson*, 641 F.2d 934, 934–44 (D.C. Cir. 1981); and then citing *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780 (E.D. Wis. 1984)).

²⁴¹ *Id.* at 73.

²⁴² *Id.* at 66–67 (alteration in original).

²⁴³ *Id.* at 60.

²⁴⁴ *Id.* According to the employee, she initially agreed to have sexual intercourse with her supervisor “out of what she described as fear of losing her job.” *Id.* Her supervisor “thereafter made repeated demands upon her for sexual favors, usually at the branch, both during and after business hours; she estimated that over the next several years she had intercourse with him some 40 or 50 times.” *Id.* Additionally, her supervisor “fondled her in front of other employees, followed her into the women’s restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions.” *Id.*

²⁴⁵ *Meritor*, 477 U.S. at 61.

²⁴⁶ *Id.* at 61. Although the employee testified that the supervisor “touched and fondled

that sexual harassment required a tangible economic injury.²⁴⁷

The United States Court of Appeals for the District of Columbia reversed the decision of the district court, and the Supreme Court affirmed.²⁴⁸ The Supreme Court concluded that language in Title VII that prohibited “discrimination with respect to ‘compensation, terms, conditions, or privileges’ of employment” could apply to “purely psychological aspects of the workplace environment”²⁴⁹ and rejected the proposition that this language applied only to “‘tangible loss’ of ‘an economic character.’”²⁵⁰

In *Harris v. Forklift Systems, Inc.*,²⁵¹ the Supreme Court reaffirmed and refined the *Meritor* standard.²⁵² There, the Court held that a hostile work environment that “would reasonably be perceived, and is perceived, as hostile or abusive,” is actionable, even if it is not “psychologically injurious.”²⁵³ In *Harris*, the plaintiff, a former manager of an equipment rental company, brought a hostile work environment claim against the company because the company’s president “often insulted her because of her gender and often made her the target of unwanted sexual innuendos.”²⁵⁴ The district court ruled that, although it was “a close case,” the president’s “conduct did not create an abusive environment,” and the Sixth Circuit affirmed.²⁵⁵ The Supreme Court reversed.²⁵⁶ The Court noted that it granted cert to “resolve a conflict among the Circuits on whether conduct, to be

other women employees of the bank,” the district court also precluded the employee from presenting “wholesale evidence of a pattern and practice relating to sexual advances to other female employees in her case in chief, but advised her that she might well be able to present such evidence in rebuttal to the defendants’ cases,” which she declined to do. *See id.* at 60–61.

²⁴⁷ *See id.* at 67–68 (noting that “[t]he District Court apparently believed that a claim for sexual harassment will not lie absent an *economic effect* on the complainant’s employment”).

²⁴⁸ *Vinson v. Taylor*, 753 F.2d 141, 152 (D.C. Cir. 1985), *aff’d and remanded sub nom. Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

²⁴⁹ *See Meritor*, 477 U.S. at 64.

²⁵⁰ *Id.*

²⁵¹ 510 U.S. 17 (1993).

²⁵² *Id.* at 21–23.

²⁵³ *Id.* at 22 (citing *Meritor*, 477 U.S. at 67).

²⁵⁴ *Id.* at 19. According to the findings of a magistrate judge, the president “told [the plaintiff] on several occasions, in the presence of other employees, ‘[y]ou’re a woman, what do you know’ and ‘[w]e need a man as the rental manager.’” *Id.* On at least one occasion, “he told her she was ‘a dumb ass woman.’” *Id.* On another occasion, “in front of others, he suggested that the two of them ‘go to the Holiday Inn to negotiate [the plaintiff’s] raise.’” *Id.* In other instances, he “asked [the plaintiff] and other female employees to get coins from his front pants pocket,” “threw objects on the ground in front of [the plaintiff] and other women, and asked them to pick the objects up,” and “made sexual innuendos about [the plaintiff’s] and other women’s clothing.” *Id.* Once, moreover, “[w]hile [the plaintiff] was arranging a deal with [a customer], he asked her, again in front of other employees, ‘[w]hat did you do, promise the guy . . . some [sex] Saturday night?’” *Id.*

²⁵⁵ *Id.* at 20.

²⁵⁶ *Id.* at 23.

actionable as ‘abusive work environment’ harassment . . . must ‘seriously affect [an employee’s] psychological well-being’ or lead the plaintiff to ‘suffe[r] injury.’”²⁵⁷ The Court held that it did not.²⁵⁸ According to the Court:

Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees’ psychological well-being, can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII’s broad rule of workplace equality.²⁵⁹

The Title VII hostile work environment framework acknowledges that the conduct of an individual or an institution can result in injury to a plaintiff by impacting the “purely psychological aspects of the . . . environment” as a whole,²⁶⁰ even where the individual or the institution may not have directly and tangibly injured or even targeted the plaintiff.²⁶¹ By adapting this framework to a First Amendment context, a hostile speech environment framework would provide a better means for analyzing First Amendment challenges to compulsory campus carry laws.

B. *From the Hostile Work Environment to the Hostile Speech Environment*

S. Cagle Juhan first proposed the hostile speech environment as a “novel” cause of action to address what he perceived to be problems with public universities’ attempts to regulate hate speech and impose respect for diversity.²⁶² Juhan was concerned that the existing First Amendment free speech framework was insufficient to address what he considered to be “pervasive efforts [by university administrators] to alienate, chastise, punish,

²⁵⁷ *Harris*, 510 U.S. at 20 (alterations in original).

²⁵⁸ *Id.* at 22.

²⁵⁹ *Id.*

²⁶⁰ *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986).

²⁶¹ *See Schultz*, *supra* note 219, at 1714–15 (“[T]he original impetus behind creating the cause of action was to ensure that the prohibition against discrimination extended to actions that did not in and of themselves effect a tangible job detriment.”); *id.* at 1715 (“The cause of action for hostile work environment harassment, however, was devised precisely to cover situations that do not affect the plaintiffs’ jobs in any tangible or ultimate sense.”); *see also* Grossman, *First Bite*, *supra* note 219, at 681.

²⁶² *See Juhan*, *supra* note 12, at 1579.

or indoctrinate those who hold or espouse hateful or unpopular views”²⁶³ because, in his view, “isolated incidents are often insufficiently severe to warrant the investment of time and money necessary to advocate for one’s rights.”²⁶⁴ According to Juhan, the hostile speech environment cause of action could protect “free speech by ensuring that colleges and universities cannot inflict a First Amendment death by a thousand cuts.”²⁶⁵

The suggestion that a Title VII hostile work environment framework should be used to prevent colleges and universities from addressing the precise type of discriminatory conduct Title VII was meant to address is perverse on its face and unsound for reasons beyond the scope of this Article. Nevertheless, the notion that students should be able to challenge laws and policies that create an environment that itself chills speech is a sound one. Under the Title VII framework, an employee can establish that an employer’s conduct was discriminatory by demonstrating that the conduct created an abusive environment, even where the employer’s conduct did not directly target or tangibly injure the employee.²⁶⁶ Under the hostile speech environment framework, a plaintiff could similarly establish that a state or university officials’ conduct chilled classroom speech by demonstrating that that conduct created an environment that was itself hostile toward classroom speech, even if that conduct did not directly target or tangibly²⁶⁷ injure the plaintiff.²⁶⁸

V. COMPULSORY CAMPUS CARRY LAWS AND THE HOSTILE SPEECH ENVIRONMENT

A. *Defining a Hostile Speech Environment Standard*

Juhan proposed the hostile speech environment as a separate cause of action, and suggested the following three elements:²⁶⁹ (1) the First Amendment must protect the plaintiff’s speech;²⁷⁰ (2) “state action traceable

²⁶³ *Id.* at 1595.

²⁶⁴ *Id.* at 1603.

²⁶⁵ *Id.*

²⁶⁶ See J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2297 (1999) (“Even if individual acts do not constitute a hostile environment separately, they can be actionable when taken together. The test is whether the conduct, taken as a whole, would lead to an environment that the employee reasonably perceives as abusive.”); Grossman, *First Bite*, *supra* note 219, at 686 (“[W]here . . . harassment manifests as a longstanding pattern of conduct, no individual incident need be particularly severe in order for the environment to be actionable.”).

²⁶⁷ See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (recognizing that an intangible harm can constitute an injury-in-fact for Article III standing purposes).

²⁶⁸ See Juhan, *supra* note 12, at 1595, 1600–03.

²⁶⁹ *Id.* at 1600.

²⁷⁰ *Id.*

to [a state] university must regulate, chill, or suppress the [plaintiff's] protected speech";²⁷¹ and (3) "the hostility manifested by [the] state university towards a speaker must be 'sufficiently severe or pervasive' as to reasonably affect the speaker's speech and create an environment objectively abusive towards that speech."²⁷²

This Article recommends adopting the hostile speech environment framework only as a means of analyzing injury and causation in cases involving First Amendment challenges to compulsory campus carry laws, and not as a separate cause of action. Nevertheless, the second and third elements parallel the injury-in-fact and causation elements of the Supreme Court's standard for establishing Article III standing.²⁷³ Therefore, for purposes of analyzing standing in cases involving campus carry laws, this Article suggests focusing on the questions of whether "state action traceable" to state and university officials was hostile toward classroom speech in a manner "'sufficiently severe or pervasive' as to reasonably affect [that] speech and create an environment objectively abusive towards that speech."²⁷⁴ Furthermore, just as a hostile work environment is actionable if it can "reasonably be perceived, and is perceived, as hostile or abusive,"²⁷⁵ so too would a hostile speech environment be actionable if it can "reasonably be perceived, and is perceived, as" so hostile to speech as to chill that speech.²⁷⁶

B. *Applying the Hostile Speech Environment Framework in Compulsory Campus Carry Law Cases*

The hostile speech environment framework is well-suited to cases in which plaintiffs raise First Amendment challenges to compulsory campus carry laws. As an initial matter, when opponents of campus carry laws contend that the presence, or even potential presence, of firearms in the classroom itself chills speech,²⁷⁷ they are in essence arguing that laws that

²⁷¹ *Id.*

²⁷² *Id.* at 1600–01 (first citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); and then citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)).

²⁷³ See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (explaining the Article III standing requirements).

²⁷⁴ See *Juhan*, *supra* note 12, at 1601 (first citing *Harris*, 510 U.S. at 21; and then citing *Meritor*, 477 U.S. at 65, 67).

²⁷⁵ See *Harris*, 510 U.S. at 22.

²⁷⁶ *Id.*; see also *Siegel*, *supra* note 142, at 922 (arguing that "[t]he standard for testing a claim of chill [should] be the standard that rules all such claims in our legal system: the reasonable person test. The trial court would ask whether the challenged governmental action would chill a reasonable person in the way the plaintiff claims to be chilled").

²⁷⁷ See Appellants' Brief, *supra* note 11, at 15–16, 27, 34–35; Reply Brief, *supra* note 11, at 4, 7–8; Supplemental Brief, *supra* note 11, at 14; AAUP Amicus Brief, *supra* note 11, at 5–6, 12, 17, 23; Barnes, *supra* note 3, at 79; Lewis, *Crossfire*, *supra* note 1, at 2117, 2127;

permit the presence of firearms in the classroom create an environment so hostile to speech as to chill that speech. At the heart of these arguments is the proposition that because firearms have enormous lethal potential, and because the harm they can cause can be almost instantaneous, they possess a “unique capacity to arouse fear in some people simply through their presence,”²⁷⁸ or even through their potential presence.²⁷⁹ Therefore, critics of compulsory campus carry laws maintain that the knowledge that firearms may be present in the classroom is sufficient to create an environment in which students and faculty members are too intimidated to engage in classroom discussions, especially when those discussions involve controversial topics.²⁸⁰ As Laura Houser Oblinger has noted, “[e]ven if a shot is never fired, a gun’s presence can still have the effect of intimidation or suppression, which would inhibit healthy academic discourse.”²⁸¹

Opponents of compulsory carry laws argue, in essence, both that the presence of firearms in the classroom creates an environment that is hostile to free speech, and that the perception of that environment as hostile to speech is reasonable. In doing so, they rely on empirical evidence, both statistical and anecdotal, that supports the proposition that the presence of firearms in an academic setting creates an environment of intimidation. As Shaundra K. Lewis has noted, multiple studies indicate “that the majority of students are uncomfortable with firearms being inside academic buildings,

Lewis & De Luna, *supra* note 3, at 139; Oblinger, *supra* note 3, at 109.

²⁷⁸ Wyer, *supra* note 3, at 1016.

²⁷⁹ See, e.g., AAUP Amicus Brief, *supra* note 11, at 17–18; Barnes, *supra* note 3, at 84 (“The potential presence of concealed weapons chills speech within the classroom. If speech is chilled, scholarship cannot flourish, and academic freedom is infringed.”).

²⁸⁰ See, e.g., Appellants’ Brief, *supra* note 12, at 16 (“[S]tudies suggest that classmates’ knowledge that a fellow student has a gun in class will impede a professor’s ability to generate discussion on controversial topics, which is a core teaching function.”); Barnes, *supra* note 3, at 79 (“The presence of concealed carry weapons within the classroom directs the content of the professor’s discourse away from controversial topics that may be contrary to popular opinion. This aversion to provocative content to preserve the safety of the class impedes the free inquiry of scholarship, which is exactly what the doctrine of academic freedom was created to prevent.”); Lewis, *Crossfire*, *supra* note 1, at 2112, 2123, 2128–29 (noting that (1) “students who feel uncomfortable in the presence of firearms may be afraid to freely engage in debates over controversial issues”; (2) the presence of “[f]irearms may discourage students from expressing unpopular political perspectives”; (3) “[k]nowing that their classmates may be carrying pistols may dissuade some students from voicing diverse or unpopular intellectual, political, or social ideas out of fear that they may be shot by someone with strongly held opposing views in the heat of an argument.”; and (4) “[k]nowing that students may be carrying concealed firearms may cause professors to avoid discussing provocative, delicate or political issues”); Lewis & De Luna, *supra* note 3, at 139 (“Undoubtedly, knowing that their classmates, professors, or administrators are ‘packing’ will make students more reluctant to debate controversial and sensitive topics or to challenge a professor over a grade.”).

²⁸¹ Oblinger, *supra* note 3, at 109 (citing Joan H. Miller, Comment, *The Second Amendment Goes to College*, 35 SEATTLE U. L. REV. 235, 260 (2011)).

including classrooms.”²⁸² According to Professor Lewis, “[i]f they are uncomfortable, they cannot learn in violation of their constitutional academic freedom.”²⁸³

In a 2013 study, a group of health sciences professors surveyed students from fifteen randomly selected public universities in the Midwest about their “perceptions and practices regarding carrying concealed handguns on university campuses.”²⁸⁴ Of the 1,649 students who responded, 79% did not support allowing concealed carry permit holders to carry firearms on university grounds.²⁸⁵ A nearly equal percentage felt that allowing concealed carry on campus would make most students feel unsafe.²⁸⁶

In 2014, another group of health sciences professors, which included some of those involved in the 2013 study, randomly surveyed “college and university presidents regarding their support for concealed handguns being carried on college campuses.”²⁸⁷ Of the 401 college and university presidents who responded, 95% did not support allowing concealed carry on campus.²⁸⁸ Moreover, 89% “perceived that most . . . students . . . would feel unsafe” under such conditions.²⁸⁹ Additionally, in a survey of college faculty and staff members in Kansas, conducted after the passage of a Kansas State law permitting concealed firearms on college and university campuses, “82 percent said they would feel less safe if students were allowed to carry concealed handguns on campus.”²⁹⁰

Opponents of compulsory campus carry laws have also pointed to multiple documented cases of potential students and faculty members

²⁸² Lewis, *Crossfire*, *supra* note 1, at 2128.

²⁸³ *Id.*

²⁸⁴ See Amy Thompson et al., *Student Perceptions and Practices Regarding Carrying Concealed Handguns on University Campuses*, 61 J. AM. C. HEALTH 243, 243–45 (2013); see also Lewis, *Crossfire*, *supra* note 1, at 2128 n.116 (citing Marc Ransford, *Study: Most College and University Presidents Don’t Want Guns on Campus*, BALL ST. U. (June 2, 2014), <http://cms.bs.u.edu/news/articles/2014/6/study-most-college-and-university-presidents-dont-want-guns-on-campus>).

²⁸⁵ Thompson et al., *supra* note 284, at 247.

²⁸⁶ *Id.*

²⁸⁷ See James H. Price et al., *University Presidents’ Perceptions and Practice Regarding the Carrying of Concealed Handguns on College Campuses*, 62 J. AM. C. HEALTH 461, 461 (2014).

²⁸⁸ *Id.* at 463; see also Lewis, *Crossfire*, *supra* note 1, at 2111 n.4 (citing Price et al., *supra* note 287, at 463).

²⁸⁹ Price et al., *supra* note 287, at 463.

²⁹⁰ Ryan Newton, *Survey: Kansas Shows Strong Opposition to Law Allowing Guns on Campus*, KSN.COM (Jan. 14, 2016), <https://www.ksn.com/news/local/kansas-shows-strong-opposition-to-law-allowing-guns-on-campus/1024162729>; see also Wolcott, *supra* note 3, at 883 n.51 (citing Sam Zeff, *Kansas Campuses Prepare for Guns in Classrooms*, NPR ED (Mar. 22, 2016), <http://www.npr.org/sections/ed/2016/03/22/470717996/kansas-campuses-prepare-for-guns-in-classrooms>).

avoiding or leaving schools, including highly-ranked schools, at which firearms are permitted in the classroom.²⁹¹ Following the passage of Texas's compulsory campus carry law, multiple students cited the law as their reason for rejecting offers from UT.²⁹² In one example, a UT graduate and prospective law student asserted that he decided not to attend the University of Texas at Austin Law School, despite a "deep" and "emotional connection" to the University and the "great value" it offered "in the face of rising law school tuition across the nation."²⁹³ The student said that he based his decision in part on Texas's recently enacted campus carry law.²⁹⁴ In another example, a prospective graduate student declined an offer to pursue her masters' degree at UT because of the university's Campus Carry policy.²⁹⁵ Both students specifically stated that they would fear speaking openly about sensitive topics in a classroom where firearms were present.²⁹⁶

Similarly, multiple faculty members or potential faculty members have left or declined positions at UT following the passage of Texas's campus carry law.²⁹⁷ After the law passed, Daniel Hamermesh, a professor emeritus of economics, announced his withdrawal from his position.²⁹⁸ Similarly,

²⁹¹ See, e.g., Barnes, *supra* note 3, at 86; Lewis, *Crossfire*, *supra* note 1, at 2128, 2141–42 nn.115, 203 (first citing Tom Dart, *Texas Academics Told to Avoid "Sensitive Topics" if Gun Law Goes into Effect*, GUARDIAN (Feb. 24, 2016), <http://www.theguardian.com/us-news/2016/feb/24/university-of-houston-faculty-campus-carry-law-texas-guns>; and then citing Liam Stack, *Dean at University of Texas Resigns in Part Over Handgun Law*, N.Y. TIMES (Feb. 27, 2016), <http://www.nytimes.com/2016/02/27/us/dean-at-university-of-texas-resigns-in-part-over-handgun-law.html>); Lewis & De Luna, *supra* note 3, at 139–40; see also AAUP Amicus Brief, *supra* note 11, at 19 nn.13–14 (first citing Michael Martinez & Don Melvin, *Texas Dean Quits, Partly Over State's New Campus Gun Law*, CNN (Feb. 26, 2016), <https://www.cnn.com/2016/02/26/us/texas-professor-quits-gun-law/index.html>; and then citing Eleanor Dearman & W. Gardner Selby, *Professor: "Concrete Examples" of Teachers, Students Spurning University of Texas Due to Gun Law*, POLITIFACT TEX. (Aug. 26, 2016), <https://www.politifact.com/texas/statements/2016/aug/26/lisa-moore/professor-concrete-examples-teachers-students-spur/>).

²⁹² See Andrew Wilson, *Why I Wouldn't Go to the University of Texas Law School*, NATION (May 5, 2016), <http://www.thenation.com/article/why-i-wouldnt-go-to-the-university-of-texas-law-school>; Lewis, *Crossfire*, *supra* note 1, at 2128 n.115; Dart, *supra* note 291; Dearman & Selby, *supra* note 291.

²⁹³ See Wilson, *supra* note 292.

²⁹⁴ *Id.*

²⁹⁵ See Dart, *supra* note 291; see also Lewis, *Crossfire*, *supra* note 1, at 2128 n.115.

²⁹⁶ See Dart, *supra* note 291 (quoting graduate student who declined admission to UT as stating, "If I know a person could have a gun in class I'm not so interested in speaking openly"); Wilson, *supra* note 292 (noting that law students "must grapple with the stress of grades and careers, but also with topics like abortion and marriage equality, adding fuel to the fire," and asserting, "[t]he potential for offense in legal classrooms is high, and adding guns in the mix is dangerous").

²⁹⁷ See, e.g., Lewis, *Crossfire*, *supra* note 1, at 2128, 2141–42 nn.115, 203; Lewis & De Luna, *supra* note 3, at 139–40; Dart, *supra* note 291; Dearman & Selby, *supra* note 291; Martinez & Melvin, *supra* note 291; see also AAUP Amicus Brief, *supra* note 11, at 19 n.13.

²⁹⁸ Samantha Ketterer, *Citing Concerns with Campus Carry, Professor Emeritus to*

Frederick Steiner, the Dean of UT's School of Architecture, stated that Texas's campus carry law "was 'a factor' in his decision to leave [UT]."²⁹⁹ Both Hamermesh and Steiner found the proposition of guns in the classroom intimidating.³⁰⁰ Another UT professor stated that she "personally [knew] of at least two cases of senior faculty hires in which a top candidate withdrew [one from Harvard, one from the University of Virginia], citing concern over [Texas's campus carry laws]."³⁰¹ In an open letter to UT, moreover, sociologist Harry Edwards "rescind[ed] all association and affiliation with [a] lecture forum [at UT] named in [his] honor."³⁰² Other potential faculty members have declined teaching or speaking positions at UT because of Texas's campus carry law.³⁰³

Opponents of campus carry laws have also pointed to evidence of self-censoring on the part of faculty because of the presence of firearms on campus.³⁰⁴ After Texas enacted its campus carry law, the faculty senate at the University of Houston warned faculty members in a slideshow that they "may want to be careful discussing sensitive topics; drop certain topics from [their] curriculum; not 'go there' if [they] sense anger; limit student access off hours; go to appointment-only office hours; [and] only meet 'that student' in controlled circumstances."³⁰⁵

Under a hostile speech environment framework, evidence that some students or faculty members may not feel intimidated by the presence or perceived presence of firearms would not establish the absence of a hostile speech environment any more than evidence that some employees are not offended by an employer's discriminatory conduct would establish the absence of a hostile work environment. The question is whether such fear is

Withdraw from University, DAILY TEXAN (Oct. 7, 2015), <http://www.dailytexanonline.com/2015/10/07/citing-concerns-with-campus-carry-professor-emeritus-to-withdraw>; see also Lewis, *Crossfire*, *supra* note 1, at 2111 n.7.

²⁹⁹ Martinez & Melvin, *supra* note 291.

³⁰⁰ According to Hamermesh, "With a huge group of students, my perception is that the risk that a disgruntled student might bring a gun into the classroom and start shooting at me has been substantially enhanced by the concealed-carry law." Ketterer, *supra* note 298. Steiner stated, "When you have a stressful situation like exams, performance review or studio, I don't see how a firearm can enhance that learning experience[.]" Martinez & Melvin, *supra* note 291. According to Steiner, "[t]here's no shortage of examples of stressful work settings that result in people being shot. It's not abstract. We see it all the time. So why add firearms to a situation where we know there is stress involved." *Id.*

³⁰¹ Dart, *supra* note 291.

³⁰² Harry Edwards, *A Letter to the University of Texas About Campus Concealed Carry*, HUFFINGTON POST (Aug. 25, 2016), https://www.huffingtonpost.com/entry/a-letter-to-the-university-of-texas-about-campus-concealed-carry_us_57bf596ce4b04193420e57e6.

³⁰³ See Dearman & Selby, *supra* note 291; see also AAUP Amicus Brief, *supra* note 11, at 19.

³⁰⁴ See Lewis, *Crossfire*, *supra* note 1, at 2123.

³⁰⁵ Dart, *supra* note 291; see also Lewis, *Crossfire*, *supra* note 1, at 2123.

reasonable.³⁰⁶ As Laura Houser Oblinger has noted, moreover, “[i]f even one person in each classroom felt uncomfortable by the presence of guns, that one person is prevented from freely and comfortably participating in classroom and campus debates, thereby contravening the purpose of higher education.”³⁰⁷

Based on the above, opponents of the campus carry laws could use the hostile speech environment framework to demonstrate that the presence or perceived presence of firearms in classrooms creates an environment that is severely and pervasively hostile toward speech, and that state and university officials create such an environment by enacting and implementing compulsory campus carry laws and policies. Therefore, if that environment leads students or faculty members to self-censor, those officials have caused the chilling of their speech.

VI. CONCLUSION

Rigid application of the Supreme Court’s current framework for cases involving fear-based First Amendment injuries present a roadblock to students and faculty members seeking to challenge compulsory campus carry laws on First Amendment grounds. It should not, however, be a permanent barrier. The hostile speech environment framework offers a way forward.

³⁰⁶ See *supra* Part V.A.

³⁰⁷ Oblinger, *supra* note 3, at 109.