

NO. 19-2807

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

SPEECH FIRST, INC.,

Plaintiff-Appellant,

v.

TIMOTHY L. KILLEEN, *et al.*

Defendant-Appellees.

On appeal from the United States District Court
for the Central District of Illinois,
No. 3:19-cv-03142-CSB-EIL
The Honorable Colin S. Bruce, Judge Presiding.

**BRIEF OF *AMICI CURIAE*
INDEPENDENT WOMEN'S LAW CENTER
& AMERICAN COUNCIL OF TRUSTEES AND ALUMNI
IN SUPPORT OF PLAINTIFF-APPELLANT**

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Appellate Court No: NO. 19-2807

Short Caption: SPEECH FIRST, Inc. v. TIMOTHY L. KILLEEN, et al.

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	iii
STATEMENT OF AUTHORITY TO FILE	vii
STATEMENT OF INTEREST AND RULE 26.1 STATEMENT.....	vii
SUMMARY OF ARGUMENT.....	1
ARGUMENT	2
I. STUDENTS AT AMERICAN COLLEGES AND UNIVERSITIES TODAY ARE NOT FREE TO DISCUSS ISSUES OF SOCIAL OR POLITICAL POLICY WITHOUT RISK OF FORMAL OR INFORMAL SANCTION.	2
A. Too many students now approve shouting down speakers and support the use of vandalism and violence to silence those with whom they disagree.....	3
B. Faculty admit to discriminating against conservative colleagues.....	5
C. Conservative students routinely self-censor out of fear of faculty bias.....	7
II. BIAS RESPONSE TEAMS, COMMONPLACE ON AMERICAN COLLEGE CAMPUSES, HAVE A CHILLING EFFECT ON CAMPUS SPEECH,.....	11
A. Bias response teams have become a disturbing, but common, feature of campus life.	11
B. Bias response teams have a chilling effect on campus speech.	13
III. THE UNIVERSITY OF ILLINOIS’S BIAS RESPONSE TEAM HAS AN OBJECTIVELY CHILLING EFFECT ON CAMPUS SPEECH.	18

A. The University’s speech policies lack clear processes or guidelines, thus creating uncertainty that discourages students from expressing controversial viewpoints..... 188

B. BART’s processes and its history at the University of Illinois demonstrate that the tool can and has been used to discourage students from expressing disfavored viewpoints. 20

CONCLUSION 26

CERTIFICATE OF SERVICE..... 28

CERTIFICATE OF COMPLIANCE..... 29

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STATEMENT OF AUTHORITY TO FILE

All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money to fund the preparation or submission of this brief, and no person other than *amici curiae*, their members, or their counsel contributed money intended to fund the preparation or submission of this brief.

STATEMENT OF INTEREST AND RULE 26.1 STATEMENT

Amicus curiae the American Council of Trustees and Alumni (ACTA) is an independent, nonprofit 501(c)(3) organization committed to academic freedom, academic excellence, and fiscal accountability at America's colleges and universities. ACTA works with alumni, donors, trustees, policymakers, and campus leaders across the United States to support liberal arts education, uphold high academic standards, safeguard the free exchange of ideas on campus, and ensure that the next generation receives an intellectually rich, high-quality college education at an affordable price. ACTA has a long history of advocating for an open and engaging marketplace of ideas in the American academy—at trustee conferences, in state houses, in opinion editorials, and in best practices guides for campus leaders in higher education.

Amicus curiae Independent Women's Law Center is a project of Independent Women's Forum (IWF), a nonprofit, nonpartisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic policy issues.

Independent Women’s Law Center is committed to expanding educational opportunity, individual liberty, and access to the marketplace of ideas. Independent Women’s Law Center respectfully submits this brief in support of Speech First out of concern that bias response teams have a chilling effect on speech and the free exchange of ideas on campus.

Pursuant to Rule 26.1, neither ACTA nor IWF are publicly traded, and they have no parent companies.

The only law firm that have appeared in this case on behalf of *amici* is Schaerr | Jaffe LLP, listed on this brief. In-house counsel for *amicus* IWF also represents the *amici* in this court.

SUMMARY OF ARGUMENT

Cultivating an environment that fosters the free exchange of ideas is central to the mission of public universities in the United States. Yet today, American institutions of higher learning are no longer places where students can discuss the full range of important political and social issues without risking formal or informal sanctions.

On many campuses, including the University of Illinois, deliberate institutional action poses the most serious threat to a free and open marketplace of ideas. It is already problematic that overwhelming faculty bias often discourages students from expressing their honest opinions in class. College students also face threats of administrative sanction by Orwellian “bias response teams” and other administrative policies that hang over the campus like the Sword of Damocles. A bias accusation with the weight of a university investigation behind it can do lasting reputational damage. As a result, the predictable (and, indeed, the intended) consequence of the policies enacted by the University of Illinois is to chill the free expression of potentially controversial political viewpoints.

A growing pool of public opinion research demonstrates that fear of repercussions, including the specific fear that they will be reprimanded or punished by those who regard their speech as offensive, routinely leads many reasonable students to self-censor. Self-censorship puts the very mission of the American university—learning through the free exchange of ideas—at risk. A desire to encourage civility and

discourage offensive speech, however laudable, cannot justify the enactment of overbroad policies and ambiguous punitive frameworks that deter the spirit of bold inquiry critical to a truly liberal education.

ARGUMENT

I. STUDENTS AT AMERICAN COLLEGES AND UNIVERSITIES TODAY ARE NOT FREE TO DISCUSS ISSUES OF SOCIAL OR POLITICAL POLICY WITHOUT RISK OF FORMAL OR INFORMAL SANCTION.

Public institutions have a duty to establish policies that protect a free and open marketplace of ideas because “[t]he vitality of civil and political institutions in our society depends on free discussion.” *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). Nowhere is the vigilant protection of such freedoms more vital than in the community of American higher education. *Healy v. James*, 408 U.S. 169, 180 (1972). And yet, contrary to the assumption of the District Court below, many campuses around the country effectively stifle free and open discussion about controversial subjects. This is true regardless whether campus policies expressly forbid disfavored viewpoints or formally punish those who express them. In fact, anecdotal evidence and national survey data both demonstrate that campus culture is one in which speakers are routinely shouted down, political bias is rampant, and members of the community with dissenting political opinions are afraid to reveal their views.

A. Too many students now approve shouting down speakers and support the use of vandalism and violence to silence those with whom they disagree.

In a 2018 national survey of over 4,400 full time college students commissioned by the Knight Foundation, a majority approved of silencing speakers at least some of the time. A total of 86% of students surveyed by Knight answered that it is “always” (27%) or “sometimes” (59%) acceptable to engage in sit-ins or “similar attempts to disrupt campus operations,” and 51% answered that it is “always” (6%) or “sometimes” (45%) acceptable to shout down speakers or otherwise “prevent them from talking.”¹

The Knight Foundation study is only one of the more recent studies in a deep pool of public opinion research detailing the grim state of intellectual freedom on American college campuses. For example, a survey commissioned by the Foundation for Individual Rights in Education (FIRE) found that, while 89% of students agree it is important that their university encourage students to have a public voice and share their ideas openly, 57% think colleges and universities should be able to restrict expression of political views that are hurtful or offensive to certain students.² Alarming, many students support the use of violence to suppress disfavored viewpoints. According to the Knight Foundation study, a significant minority of students (16%) believe it is

¹ Knight Foundation & College Pulse, *Free Expression on College Campuses* 4 (May 2019), <https://tinyurl.com/y4fpn792>.

² Kelsey Ann Naughton, *What Students Think About: Expression, Association, and Student Fees on Campus*, FIRE 12 (Jan. 2019), <https://tinyurl.com/y3jsx2u3>.

acceptable to “always” (2%) or “sometimes” (14%) “us[e] violence to stop a speech, protest, or rally.”³

Given such hostility to free speech, it is hardly surprising that disinvitations, disruptions, and violent campus protests have prevented or otherwise interfered with open discussion of mainstream policy issues around the country in recent years. High-profile disruptions have occurred at lectures by Heather Mac Donald on police shootings at UCLA and Claremont McKenna College, Charles Murray on problems facing the white working class at Middlebury College and the University of Michigan, and Christina Hoff Sommers on feminism at Lewis & Clark Law School. But these are only the most well-known examples. FIRE reports that there have been more than 400 instances since 2000 in which invited speakers, often quite eminent figures, like Condoleezza Rice and Christine Lagarde, were discouraged from coming to campus. Other examples involved women’s rights activist Ayaan Hirsi Ali and European Parliament member Ryszard Legutko, in which the institution explicitly withdrew the invitation.⁴

In addition to attempting to silence invited speakers, students have resorted to vandalism to squelch the speech of faculty members. When Sarah Lawrence College Professor Samuel Abrams pointed out the ideological imbalance on college campuses

³ Knight Foundation & College Pulse, *Free Expression on College Campuses*, at 4.

⁴ See FIRE, *Disinvitation Database*, https://www.thefire.org/research/disinvitation-database/#home/?view_2_page=1&view_2_per_page=1000 (last visited Nov. 4, 2019).

in a *New York Times* opinion piece, students punished his dissent from orthodoxy by vandalizing his office door.⁵ Similarly, students upset by the participation of Harvard Law School Professor Ronald Sullivan in the Harvey Weinstein defense team vandalized a university building with graffiti aimed at Professor Sullivan.⁶

That many students today believe and act upon the view that it is appropriate to silence opposing viewpoints reveals a startling culture of censorship that impedes free and open discussion on American college campuses.

B. Faculty admit to discriminating against conservative colleagues.

The culture of censorship on college campuses is not limited to callow students but is amply modeled by their professors as well. Academic research indicates that faculty routinely allow their political biases to affect their professional behavior and deliberately suppress viewpoints that are unpopular in the faculty lounge. This self-reported faculty behavior reveals a troubling lack of intellectual freedom across American universities.

According to a forthcoming study of academic philosophers, over 30% of left-leaning respondents admitted a “willingness to discriminate” against a right-leaning paper in the peer-review process, about 40% admitted a “willingness to discriminate”

⁵ Scott Jaschik, *Vandalism Follows Professor's Critique on Ideology*, INSIDE HIGHER ED. (Nov. 5, 2018), <https://www.insidehighered.com/quicktakes/2018/11/05/vandalism-follows-professors-critique-ideology>.

⁶ Jan Ransom & Michael Gold, *Whose Side Are You On?: Harvard Dean Representing Weinstein Is Hit With Graffiti and Protests*, NEW YORK TIMES (Mar. 4, 2019), <https://www.nytimes.com/2019/03/04/nyregion/harvard-dean-harvey-weinstein.html?module=inline>.

against right-leaning grants and symposia, and over 55% admitted a “willingness to discriminate” against a right-leaning faculty hire.⁷

In another study, significant numbers of social psychologists admitted to being “somewhat (or more) inclined to discriminate against conservatives” when inviting colleagues to a symposia (14.0%), reviewing their papers (18.6%), reviewing grant applications (23.8%), and making hiring decisions (37.5%).⁸

Anecdotal evidence suggests that this political bias leads those with conservative viewpoints to self-censor. In fact, at a gathering of approximately 1,000 social psychologists, only three were willing to identify themselves as conservative when asked to do so by a show of hands. Respondents in the Peters study identified their personal reasons for self-censoring. One respondent said, “If my professional colleagues knew that I am moderately right-wing then half of them would call me a ‘subhuman pig’ and treat me accordingly.”⁹ Another put it this way: “Comments and jokes about those on the right are frequent, and this makes it difficult to gauge the true balance of opinion as any right-leaning individual is likely to remain quiet.”¹⁰ A third respondent expressed reluctance to discuss a controversial idea for which there is considerable empirical evidence: “I suspect that men and women are predisposed to have different interests,

⁷ Uwe Peters *et al.*, *Ideological Diversity, Hostility, and Discrimination in Philosophy* 33, <https://philpapers.org/archive/PETIDH-2.pdf> [hereinafter Peters, *Ideological Diversity*].

⁸ Yoel Inbar & Joris Lammers, *Political Disparity in Social and Personal Psychology*, PERSPECTIVES ON PSYCHOL. SCI. 6 (2012) [hereinafter Inbar, *Political Disparity*].

⁹ Peters, *Ideological Diversity*, *supra* note 7, at 16.

¹⁰ *Ibid.*

and that this accounts for the disparities in gender ratios across disciplines/professions. Yet this view is not one I am able to voice openly[.]”¹¹

Self-censorship is entirely understandable given the repeated academic findings that a significant proportion of faculty members admit to knowingly discriminating against conservative colleagues. These studies demonstrate that conservative faculty members have strong professional incentives to censor their speech. As Inbar and Lammers conclude, the climate of hostility to diverging viewpoints found on campuses “offers a simple explanation of why conservatives hide their political opinions from their colleagues.”¹²

C. Conservative students routinely self-censor out of fear of faculty bias.

If conservative professors are under pressure not to espouse conservative viewpoints, that pressure can only be more acute for students. First, it is well known that university faculties lean left. Second, faculty members have a huge impact on student success in higher education.

The most comprehensive study to date found that 59.9% of faculty across disciplines self-identify as “liberal” or “far left,” compared to 12.1% who identify as “conservative” or “far right.”¹³ The imbalance is even more acute in social science and

¹¹ *Ibid.*

¹² Inbar, *Political Disparity*, *supra* note 8, at 6.

¹³ Ellen B. Stolzenberg, *et al.*, Higher Education Research Institute at UCLA, Undergraduate Teaching Faculty: The HERI Survey, 2016-2017, at 17 (2019).

humanities disciplines. A study of faculty voter registration at 40 top universities found registered Democrat to registered Republican ratios as high as 60 to 1.¹⁴ Another study found that, from a sample of 8,688 tenure track, Ph.D.-holding professors from 51 of the top 66 liberal arts colleges in the *U.S. News* 2017 report, “78.2 percent of the academic departments” surveyed “have either zero Republicans, or so few as to make no difference.”¹⁵ Among university administrators—responsible for most co-curricular programming, disciplinary proceedings, housing policies, and institutional diversity policies and programming—the imbalance is similarly lopsided: Only 6% of campus administrators identified as conservative to some degree, while 71% classified themselves as liberal or very liberal.¹⁶

If conservative faculty members, many protected by academic tenure, feel compelled by such imbalance to self-censor in a university setting, the pressure on students to self-censor can only be higher. Not only does the predominately liberal faculty set the intellectual tone of a university, they also have a significant impact on a student’s success. Professors determine students’ grades, control scholarship and research funds, open doors to law schools, medical schools, and graduate schools with

¹⁴ Mitchell Langbert, *et al.*, *Faculty Voter Registration in Economics, History, Journalism, Law, and Psychology*, 13 *ECON. J. WATCH* 422, 424 (2016).

¹⁵ Mitchell Langbert, *Homogenous: The Political Affiliations of Elite Liberal Arts College Faculty* (Summer 2018), <https://tinyurl.com/y5dg3e2k>.

¹⁶ Samuel J. Abrams, *Think Professors Are Liberal? Try School Administrators*, *NEW YORK TIMES* (Oct. 16, 2018), <https://www.nytimes.com/2018/10/16/opinion/liberal-college-administrators.html>.

their letters of recommendation, and can support or impede students' academic and career success in myriad other ways.

This common-sense intuition is supported by ample survey data suggesting that college students across the country are self-censoring out of fear of reprimand or reprisal on campus. A 2019 ACTA-IWF survey of over 2,100 current college students conducted by College Pulse found that 61% of those surveyed answered that they had stopped themselves from expressing an “opinion on sensitive political topics in class because of concerns [a] professor might disagree with them” at least occasionally, while 39% of students answered that they do so “often” (13%) or “sometimes” (26%). Among students who identify as strong Republicans, the figure rises to 81%, with 32% self-censoring in class “often,” 36% “sometimes,” and 13% “occasionally.”¹⁷

A 2017 YouGov survey is similarly disturbing. YouGov questioned 1,395 undergraduates and found that a majority (54%) “agree that they have stopped themselves from sharing an idea or opinion in class at some point since beginning college.”¹⁸ The same survey revealed that “very conservative” students were 21% less likely than their “very liberal” peers to feel comfortable “expressing opinions outside of the classroom while on campus.”¹⁹

¹⁷ ACTA & IWF, *Killing Campus Civility and Derailing Civic Dialogue: How Speech Codes and Student Self-Censorship Undermine Political Discourse and Student Fellowship*, forthcoming [hereinafter ACTA & IWF, *Killing Campus Civility*] [data available on request].

¹⁸ Kelsey Naughton, FIRE, *‘Speaking Freely’: What Students Think about Expression at American Colleges* 9 (Oct. 2017).

¹⁹ *Ibid.*

The state of self-censorship on college campuses is not a new phenomenon. *Amicus* ACTA found similar results in 2009 when it assessed the condition of intellectual freedom and diversity in four state surveys of students at public institutions. At that time, 33.1% of the students in the Illinois survey agreed with the statement: “On my campus, there are certain topics or viewpoints that are off limits.”²⁰

Although the reasons for self-censorship are no doubt complex, a Heterodox Academy survey from 2017 identifies some of the factors that make students fearful of speaking up.²¹ Students in the Heterodox survey were most concerned that other students would find their views on topics such as race, politics, or gender “offensive,” but they were also concerned about the possibility that someone might file a complaint under a “campus harassment policy or code of conduct,” and that professors would “criticize [their] views as offensive” or give them a lower grade because of their views.²² The 2019 ACTA-IWF survey revealed similar student concerns, with 38% of students answering that they stop themselves “from expressing . . . opinions on sensitive topics on campus because of concerns related to . . . college[] speech policies” at least “occasionally.” Among respondents who identify as strong Republicans, the figure rises to 54% (with 11% doing so “often” and 29% doing so occasionally).²³

²⁰ ACTA & Illinois Public Policy Institute, *For the People: A Report Card on Public Higher Education in Illinois* 15 (2009).

²¹ Sean Stevens, *The Fearless Speech Index: Who is afraid to speak and why?*, Heterodox Academy, July 19, 2017, <https://heterodoxacademy.org/the-fearless-speech-index-who-is-afraid-to-speak-and-why/>.

²² *Id.*

²³ ACTA & IWF, *Killing Campus Civility*, *supra* note 17.

II. BIAS RESPONSE TEAMS, COMMONPLACE ON AMERICAN COLLEGE CAMPUSES, HAVE A CHILLING EFFECT ON CAMPUS SPEECH.

A. Bias response teams have become a disturbing, but common, feature of campus life.

Students who fear being reported under a campus code of conduct are not suffering from paranoia. In recent years, campus speech policies, and the administrative bureaucracies that enforce them, have become a widespread part of campus life. Bias response teams—once thought to live only on the pages of dystopian novels or in repressive dictatorial regimes—are today neither unusual nor uncommon. According to a study by FIRE, in 2016 there were at least 231 publicly disclosed bias response teams at four-year and post-graduate institutions—143 of which were at public institutions, such as the University of Illinois. FIRE estimates that “at least 2.84 million American students are subject to often-anonymous reporting systems monitored by administrators and police officers.”²⁴

These committees invite members of the community to report comments or statements they subjectively find offensive. Shockingly, but not surprisingly, students commonly report speech on important political topics. Thus, at the University of Oregon a student reported a professor because she found his defense of Brett

²⁴ FIRE, *2017 Bias Response Team Report*, <https://tinyurl.com/y34m2off> (last visited Nov. 4, 2019) [hereinafter FIRE, *2017 Bias Response Team Report*].

Kavanaugh’s nomination to the United States Supreme Court to be offensive.²⁵ At Indiana University a teaching assistant filed a complaint because a guest lecturer brought up the 2004 Janet Jackson Super Bowl “Nipplegate” controversy to illustrate the role of the Federal Communications Commission.²⁶ And at Michigan State a student famously reported his roommate for watching a video of conservative commentator Ben Shapiro.²⁷

Students also report trivial comments and jokes that they find offensive. Thus, at Colby College in Maine, one student reported a peer for using the phrase “on the other hand”—which the school classified as assuming a person’s ability to use two hands and, apparently, marginalizing disabled students.²⁸ At Portland State University, a student filed a complaint against a woman who jokingly described herself as sometimes being “schizophrenic.”²⁹ And at Yale University, students reported—and Yale began investigating—a student who posted an Instagram photo of a snowy mountain with the caption “All this ICE but no detention centers in sight.”³⁰

²⁵ See Christian Schneider, *Bias Teams Welcome the Class of 1984*, WALL STREET JOURNAL (Aug. 5, 2019), <https://www.wsj.com/articles/bias-teams-welcome-the-class-of-1984-11565045215> [hereinafter Schneider, *Bias Teams Welcome the Class of 1984*].

²⁶ *Id.*

²⁷ See Robby Soave, *Michigan State Students Filed Bias Incident Reports Over Some Really Petty Things*, REASON (April 4, 2019), <https://reason.com/2019/04/05/michigan-state-students-filed-bias-incid/>.

²⁸ See Evan Lips, *Maine College’s website offers glimpse of which ‘biases’ spark investigations*, NEWBOSTONPOST (June 28, 2016), <https://newbostonpost.com/2016/06/28/maine-colleges-website-offers-glimpse-at-which-biases-spark-investigations/>.

²⁹ See Schneider, *Bias Teams Welcome the Class of 1984*, *supra* note 25.

³⁰ See Serena Cho, *Santos email fuels free speech debate*, YALE DAILY NEWS (Sept. 19, 2019), <https://yaledailynews.com/blog/2019/09/19/santos-email-fuels-free-speech-debate/>.

At some colleges, even looking at someone the wrong way can get you reported to the campus bias committee. At the University of Indiana, a self-identified “trans feminine” student reported a professor for giving him a “rude look.”³¹

As these examples make clear, bias response teams institutionalize surveillance of political and social activity and encourage already hostile students and faculty to inform on their peers for even minor deviations from campus orthodoxy and for common, widely used turns of speech. As one federal judge noted several years ago, bias reporting structures are “reminiscent of the neighborhood watches that serve as the eyes and ears of totalitarian regimes, much like the *Comites de Defensa de la Revolución* in Castro’s Cuba.”³² In this way, a bias response team, like the one at issue here, impacts not only those people who are caught in its investigatory web. It impacts all social and academic interactions, thereby poisoning every aspect of campus life.

B. Bias response teams have a chilling effect on campus speech.

i. Bias response teams are set up for the very purpose of chilling certain forms of speech on campus.

Despite claims that bias committees merely foster “safe” and “inclusive” campus environments, the entire *purpose* of such reporting structures is to deter expression that some members of the community consider offensive. It is well established that

³¹ See Schneider, *Bias Teams Welcome the Class of 1984*, *supra* note 25.

³² José A. Cabranes, *For Freedom of Expression, For Due Process, and For Yale*, YALE LAW & POLICY REVIEW (Spring 2017), https://ylpr.yale.edu/inter_alia/freedom-expression-due-process-and-yale-emerging-threat-academic-freedom-great-university.

“constitutional violations may arise from the ‘chilling’ effect of governmental regulations that fall short of a direct prohibition against the exercise of first amendment rights.” *Penny Saver Publications Inc. v. Village of Hazel Crest*, 905 F.2d 150, 154 (7th Cir. 1990). Although the “mere existence” of a broad, intelligence-gathering program does not, “without more,” impermissibly chill speech, *Laird v. Tatum*, 408 U.S. 1, 10 (1972), bias response teams clearly do “more” than collect information.

Most bias response teams have the power to investigate claims, initiate attempts at reconciliation, create a record of the event, condemn behavior or speech, or punish offenders.³³ Bias response teams with the power to impose sanctions run afoul of the First Amendment by using state power to punish and deter those with specific viewpoints. But even bias teams that stop short of opening formal investigations or meting out punishment can violate the First Amendment simply by discouraging protected speech. *See Backpage.com, LLC v. Dart*, 807 F.3d 229, 236 (7th Cir. 2015) (A government official can violate the First Amendment even if he “ha[s] no authority to take any official action,” and acts only to indirectly discourage the exercise of First Amendment rights). By condemning insensitive speech, attempting to reconcile the parties, or even talking with students whose speech has caused offense, bias teams raise the social cost of expressing certain viewpoints, thereby creating a chilling effect on constitutionally protected speech.

³³ FIRE, *2017 Bias Response Team Report*, *supra* note 24.

By subjecting those who dissent from orthodox campus opinion to an onerous and potentially reputation-damaging process, bias response teams at public universities use the power of government to change the ideational climate of the university. This is not simply an incidental effect of efforts to promote inclusivity. This is the *raison d'être* of bias response teams.

ii. The structure and methods employed by bias response teams are implicitly punitive.

The majority of bias response teams do much more than simply discourage controversial speech—they aim to punish it. As a result, the “processes used by bias response teams often mimick[]” the criminal system.³⁴ Even when reported incidents did not constitute criminal acts or policy violations, bias response teams often used investigatory processes similar to those that would be used to investigate serious or criminal misconduct.

To begin with, bias response teams are largely controlled by administrators with the power to punish students and often include representatives of law enforcement, as well as students and faculty.³⁵

In fact, a study of 167 bias response teams conducted by FIRE found that almost half of such teams included administrators with the power to discipline students. Even

³⁴ Ryan A. Miller et al., *A Balancing Act: Whose Interests do Bias Response Teams Serve?*, 42 REV. HIGHER EDUC. 313, 326-27 (2018) [hereinafter Miller, *A Balancing Act*].

³⁵ See Jeffrey Aaron Snyder & Amna Khalid, *The Rise of “Bias Response Teams” on Campus*, NEW REPUBLIC (March 30, 2016), <https://newrepublic.com/article/132195/rise-bias-response-teams-campus>; FIRE, 2017 *Bias Response Team Report*, *supra* note 24.

more troubling is FIRE's finding that over half the bias response teams they examined were staffed with members of law enforcement, creating what FIRE refers to as "speech police," in a quite literal sense."³⁶

Moreover, because the work of bias response teams is often driven by public relations concerns and a desire to prove to the community that the campus is doing something about "hate," these teams often "speak the language of crime and punishment."³⁷ Thus, most bias response teams focus on individual acts and working with the individuals responsible for them, often referring to students as "alleged offenders" and treating them like criminal defendants.³⁸

Some bias response teams are authorized to mete out punishment or to refer complaints to the police or other authorities with the power to punish. But even those that are not often attempt to deal with reported incidents by mediating disputes or attempt to talk with (read: re-educate) the "offender." Bias teams may attempt to resolve a complaint by way of some sort of an agreement, which can entail the so-called offender apologizing to the complainant, recanting his or her speech, or engaging in some other form of restorative action. Of course, these attempts to mediate and re-educate are themselves coercive, as the prospect of being investigated by a team that includes college administrators and/or police is intimidating in and of itself. Moreover,

³⁶ FIRE, *2017 Bias Response Team Report*, *supra* note 24.

³⁷ Miller, *A Balancing Act*, *supra* note 34, at 330-31.

³⁸ *See id.* at 326-27.

the goal of any such “discussion” is quite obviously to convince the accused person to change his or her mind—or else keep quiet.

Thus, despite claims that bias response teams seek merely to educate, their real purpose is often much broader, requiring them to address incidents in such a way as to satisfy powerful left-leaning constituencies—often to the detriment of students’ First Amendment rights.

Significantly, when the University of Northern Colorado abandoned its bias response team in 2016, President Kay Norton explained that the decision represented a renewal of the campus’s commitment to intellectual freedom: “Free speech and academic freedom fuel the ferment of ideas, insights and discoveries that emerge from university communities, and we must do all we can to encourage this ferment. We have an ongoing obligation to talk openly about the inherent tension between upholding academic freedom and building community. These are hard conversations, but this tension is what allows us to be a university community.”³⁹

³⁹ Scott Jaschik, *U of Northern Colorado Will Abandon Bias Unit*, INSIDE HIGHER ED. (Sept. 9, 2016), <https://www.insidehighered.com/quicktakes/2016/09/09/u-northern-colorado-will-abandon-bias-unit>.

III. THE UNIVERSITY OF ILLINOIS'S BIAS RESPONSE TEAM HAS AN OBJECTIVELY CHILLING EFFECT ON CAMPUS SPEECH.

A. The University's speech policies lack clear processes or guidelines, thus creating uncertainty that discourages students from expressing controversial viewpoints.

Amici believe the University's Bias Assessment and Response Team (BART) operates according to unnecessarily vague policies and procedures and that its actions inevitably deter speech based on the viewpoint a student means to express. Specifically, BART warns students that "bias-motivated incidents" include "actions and expressions that are motivated, at least in part, by prejudice or hostility toward a person (or group) because of that person's (or group's) actual or perceived age, disability/ability status, ethnicity, gender, gender identity/expression, national origin, race, religion/spirituality, sexual orientation, socioeconomic class, etc."⁴⁰ Similarly, the institution's "University Housing" webpage notes that "University Housing does not tolerate any acts of bias and discrimination within its communities." Invoking the authority of "The Office of the Dean of Students," University Housing "encourages all members of the University to report acts of intolerance," whether by reporting "the details to a Residential Life professional or paraprofessional" or by initiating a report to BART, to which it provides a link.⁴¹

⁴⁰ UI-Urbana-Champaign, *Bias Assessment and Response Team, About the Team*, <https://bart.illinois.edu/team/> [hereinafter UI-Urbana-Champaign, *About the Team*].

⁴¹ UI-Urbana-Champaign, *University Housing Bias Protocol and Illinois Intervenes*, <https://housing.illinois.edu/Living-Options/Why-Housing/Inclusive-Communities/bias-protocol> [hereinafter UI-Urbana-Champaign, *University Housing Bias Protocol and Illinois Intervenes*].

What, exactly, does the University seek to prohibit? It is hard to say. The institution does not explain how it determines whether a specific combination of words falls on the wrong side of its bias line, whether that line is fixed or evolving, nor how precisely campus officials peer into students' hearts to determine whether students' "expressions" were motivated by some unspecified metric of "prejudice or hostility." It does, however, encourage students to "report bias-motivated incidents" whether they occurred "within the university community" or simply "involved members of our community" and asks students to report the names of "all individuals involved" and to provide a "[d]etailed narrative of the incident."⁴² Although the policy provides negligible detail about what it proscribes, how accusations will be adjudicated, what specific manners of remediation or reeducation can be considered, whether "alleged offender(s)" have any rights, or how those rights are protected, the University nonetheless claims broad jurisdiction extending to off-campus speech and behavior, and almost unlimited discretion to determine whether specific behavior and speech falls on the wrong side of its bias line. Similarly, the "Bias Incident Protocol in University Housing" solicits complaints and allows for the convening of a "response meeting . . . to review the report, investigate further, and consider options for parties involved and the community." But the protocol provides no specifics about processes and procedures, the nature of potential "responses" (including any punitive measures it can

⁴² UI-Urbana-Champaign, *About the Team*, *supra* note 40.

consider), who is eligible to serve in adjudicatory roles when response meetings are initiated, or what rights those accused of biased speech, behavior, or motivations will be afforded.⁴³

Such policies are both overbroad and vague and do not provide students with fair or precise warning as to what is prohibited and in what context. *See, e.g., Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968, 972 (9th Cir. 1996) (Institutions may not “impermissibly delegate basic policy matters ... for resolution on an ad hoc and subjective basis” thereby “discourag[ing] the exercise of first amendment freedoms.”) (capitalization in original).

B. BART’s processes and its history at the University of Illinois demonstrate that the tool can and has been used to discourage students from expressing disfavored viewpoints.

In addition to being vague in what it proscribes, *amici* contend that BART’s process is itself punitive and that, as a result, reasonable students refrain from expressing protected viewpoints to avoid becoming the subject of a bias investigation. BART’s description of its mission and activities verges on menacing, replete with terms drawn from the world of criminal justice. To begin with, BART refers to those accused of perpetrating “bias motivated incidents” as “alleged offender[s].”⁴⁴ Moreover, the team is made up of a University of Illinois Police Department detective, an associate

⁴³ UI-Urbana-Champaign, *University Housing Bias Protocol and Illinois Intervenes*, *supra* note 41.

⁴⁴ UI-Urbana-Champaign, *Bias Assessment and Response Team Annual Report, 2017-18*, at 1, <https://bart.illinois.edu/reports/docs/bart-statistics-2017-18.pdf>.

dean of students, and three assistant deans of students—all individuals with authority to punish students in their own right.⁴⁵ BART claims the power to involve “alleged offender[s]” in some manner of “[e]ducational conversations,” “[m]ediation [and] facilitated dialogue,” “[e]ducational referrals,” and “[r]esolution agreements”; and it has the authority to refer incidents that “also violate university policy to the appropriate office for investigation.”⁴⁶

As though to confirm the process is punitive by design, on December 27, 2018, the University of Illinois Police published a post on Facebook and Twitter encouraging students and other members of the campus to report acts of intolerance that “create an unsafe and unwelcoming environment for campus community members” to BART.⁴⁷ Nor was the warning published on a lark by an overly enthusiastic public relations official; almost a year later, the warning remains in effect, still present on the police department’s Facebook page. Reasonably risk-averse students generally try to avoid burdensome investigative processes advertised by law enforcement. The important point here is that the investigation is punishment in and of itself—not simply because it is onerous and burdensome, but also because BART legitimizes a bias accusation simply by deciding to investigate. This can amplify the reputational damage suffered by

⁴⁵ UI-Urbana-Champaign, *About the Team*, *supra* note 40.

⁴⁶ UI-Urbana-Champaign, *Bias Assessment and Response Team, Procedures*, <https://bart.illinois.edu/procedures/>; UI-Urbana-Champaign, *About the Team*, *supra* note 40.

⁴⁷ University of Illinois Police, Facebook.com (Dec. 27, 2018, <https://www.facebook.com/UIpolice/photos/a.10150638976996060/10156926862201060/> (last accessed November 1, 2019)).

affected students (“alleged offender[s]” if we adopt BART’s terminology) even where their speech is firmly protected.

As reputational damage can impair a student’s prospects for academic and professional success, objectively reasonable students can be expected to behave in ways that mitigate their exposure to the kind of accusation that *could* trigger a bias investigation. And the multiple surveys discussed above confirm that they are, in fact, moved to self-censor. In all, then, the mere existence of a bias response teams deters students from expressing protected viewpoints—even those whom are not directly subjected to re-education activities or formal disciplinary processes. As such, the University’s policies betray a core, deliberative function of the academy by forcing students to balance academic and professional success against the free expression of political, if potentially controversial, viewpoints.

This affects conservative students disproportionately. If BART does not clearly define where it draws the line between permissible and impermissible speech, it is abundantly clear that the easiest way to stay on the right side of it, to mitigate the risk of an investigation into one’s own expressions, is to refrain altogether from expressing conservative viewpoints or any others that might, however distantly, draw the attention of BART.

Consider the incidents BART logs in its “annual statistics.” In 2017–18, the response team received 265 reports (up from 176 the previous year) detailing 128

unique incidents (up from 116).⁴⁸ The highest proportions involved race/ethnicity, religion (anti-Islamic and anti-Semitic), national origin, and sexual identity.⁴⁹ Anyone acquainted with contemporary political discourse will recognize immediately that the “expressions” bias response teams investigate are those which students on one side of the political spectrum are apt to term racist, sexist, Islamophobic, homophobic, cissexist, etc. The problem is that these terms are so vague, subjective, and encompassing that they are routinely bandied about in the popular press, by celebrities and influencers, and even by Congressmen to describe other elected officials. As such, they are of negligible value in providing guidance for what can and cannot be uttered on a public university campus. When colleges establish processes to investigate students for espousing ideas elected politicians venture routinely, they abandon any claim to foster a free and open marketplace of ideas.

Because identity and identity politics are innately intertwined with important debates in science and public policy—respecting everything from U.S. immigration policy, to biological sex differences, to LGBT rights in the context of religious freedoms—the practical effect of broad speech restrictions is to communicate to students that open discussion should cease at whatever point it might begin to interfere with an interlocutor’s (or listener’s) subjective understanding of his or her own identity.

⁴⁸ UI-Urbana-Champaign, *Bias Assessment and Response Team Annual Report, 2017-18*, *supra* note 44, at 1.

⁴⁹ *Id.* at 2.

In concrete terms, a university that encourages students to report “sexist” speech inevitably discourages open and wide-ranging deliberation on a host of issues, from the #MeToo movement, to Justice Kavanaugh’s confirmation, to the achievements, failures, and limitations of American feminism. Is it even possible to discuss the traditional understanding of marriage—something of interest to academic historians, at the very least—without running the risk that someone will report the discussion as a “homophobic” expression? The term “illegal alien” appears in countless statutes. Should political science majors studying at public universities have to wonder whether discussing those statutes in anything other than disparaging terms exposes them to a bias investigation?

At the very least, bias response processes are susceptible to being used by those who disagree with a protected viewpoint to provoke an onerous inquiry into the speech and motivation of another student. This raises the cost of expressing those opinions, which in turn discourages students from discussing them. The result is a shallower public discourse. It is, therefore, unnecessary to establish that university officials are purposefully targeting specific viewpoints. The establishment of a bias response team at a public institution helps politically lop-sided students, faculty, and campus activists deter the expression of disfavored viewpoints and chills speech protected by the First Amendment.

Bias response teams are transforming the American collegiate experience by normalizing the idea that it is appropriate for an institution to investigate purportedly

offensive utterances that fall outside an established orthodoxy as determined by the most extreme and intolerant members of an already politically slanted university community. *Amici's* 2019 College Pulse survey of over 2,100 current students found that only 15% of students have *never* stopped themselves “from expressing [their] opinions on sensitive political topics to avoid offending other students”; 62% answered that they do so “sometimes” or “often.”⁵⁰ Majorities or near-majorities of self-described “strong” and “weak” Republicans answered that “it is hard to have open and wide-ranging discussions about” President Trump (80% and 83%), abortion (71% and 74%), U.S. immigration policy (72% and 71%), gender discrimination (50% and 58%), and the #MeToo movement (51% and 45%).⁵¹ Institutions that establish overbroad speech policies and bias response teams thereby contribute to a toxic campus climate that undermines not only discussion of political and social policy, but even fellowship and comity among students. Today, 48% of students agree or strongly agree with the statement, “pressure to conform to political correctness can negatively affect the development of close interpersonal relationships on my campus.” These figures are even higher for “strong” and “weak” Republicans (78% and 68%, respectively).⁵² Thus, the campus becomes more polarized and atomized.

⁵⁰ ACTA & IWF, *Killing Campus Civility*, *supra* note 17.

⁵¹ *Id.*

⁵² *Id.*

Policies and processes that make it possible for one student to catalyze an investigation because another student has expressed a disfavored viewpoint, or simply spoke inartfully, create an environment in which broad categories of conversation are less likely to take place. Students who have to worry that a slip of the tongue might provoke an academically damaging accusation are not free to participate energetically in a vibrant marketplace of ideas. It is, therefore, not surprising that members of Speech First at the University of Illinois fear being reported to BART if they engage in controversial speech on campus, and that they engage in self-censorship to avoid it.

CONCLUSION

Today, the idea of the American public university as a place where students and faculty can test out ideas, free from fear of reprisal, is under siege. The mere existence of campus policies that discourage unpopular viewpoints by threat of investigation or the potential for sanction have a chilling effect on expression. Because members of Speech First at the University of Illinois have a reasonable fear of being reported if they engage in controversial speech on campus, *amici* urge this court to reverse the District Court's finding that student members of Speech First lack standing to enforce their First Amendment rights.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing on November 5, 2019 with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Erik S. Jaffe

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(B), undersigned counsel certifies that this brief complies with the applicable type-volume limitations. This was prepared using a proportionately spaced typeface using Microsoft Word 2019 (14-point Garamond).

This brief contains 6405 words, excluding the portions exempted by Federal Rules of Appellate Procedure 32(a)(7)(B). This certificate was prepared in reliance on the word-count function in Microsoft Word 2019.

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