No. 23-156

In the Supreme Court of the United States

SPEECH FIRST, INC.,
Petitioner,

v.

TIMOTHY SANDS, in his individual capacity and official capacity as President of Virginia Polytechnic Institute and State University,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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October 26, 2023 *Attorneys for Petitioner*

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases

Constitution

Rules

REPLY

This case raises a "vitally important issue of free speech on college campuses" that has spawned a 3-2 "circuit split." App.73 (Wilkinson, J., dissenting). The University concedes importance and barely disputes the split. Even if it had put up more of a fight, actions speak louder than words. The University *knows* this case is certworthy, which is why it's scrambling to create new jurisdictional issues. Yet the law doesn't let respondents unilaterally pull the plug on a policy that they maintained for years and still defend, just in time to prevent this Court's review. And even if mootness were a close call, this Court can simply remand that question *after* resolving the question presented—itself a question of Article III jurisdiction. What this Court shouldn't do is honor a blatant attempt to prevent it from deciding a case that falls within the heartland of Rule 10(a). This Court should grant certiorari and hold that bias-response teams objectively chill students' speech.

1. The University doesn't deny that the question presented is "important." S.Ct.R.10(a). Judge Wilkinson, plus the twenty-one groups who filed ten amicus briefs, agree. Bias-response teams are proliferating, AFSA-Br.9-12; LJC-Br.4-13; FIRE-Br.5, and expanding to new contexts, PDE-Br.4-15. Meanwhile students feel less and less free to speak. ADF-Br.3-10; AFSA-Br.16-18; WILL-Br.2-9. This Court hasn't minced words about the importance of free speech on college campuses. Whether bias-response teams objectively chill that speech is plainly "an important issue of constitutional law." App.73 (dissent).

2. Nor can the University deny that the circuits are "in conflict." S.Ct.R.10(a). The University concedes a 3-1 split. BIO.32 n.18; *see* CA4.Doc.32 at 26 (University stressing below the circuit "conflict"). And no one buys that the Fourth Circuit didn't make this split 3-2. Judge Wilkinson stressed the majority's "circuit split." App.73 (dissent). Instead of denying it, the majority "recognize[d]" it was following the Seventh and departing from the Fifth, Sixth, and Eleventh. App.23. The district court "recognize[d]" it too. App.112. As do many commentators and amici. FIRE-Br.18-21; SLF-Br.14; LJC-Br.2.

This split turns on a disagreement of law, not differences in factual records. The Fourth Circuit didn't say the records in the other cases were different; it admitted all five cases were "similar." App.23. They were. As even a casual reading of those opinions reveals, each university raised the same defenses and presented the same evidence. The teams were similar too. Universities aren't being creative; these teams mostly copy each other. Pet.22-23. Here, too, BIRT has all the core features that create the chilling effect for students. Pet.22-23.[1]

The Fourth Circuit thus drew no factual distinctions; it faulted the other circuits for applying the

[1] The University complains that the question presented references "bias-response teams" generally. BIO.27-29. The University was free to reframe the question, but didn't. Regardless, this Court's decision will obviously turn on whether *BIRT* chills speech. That judgment will have broader significance because BIRT is indistinguishable from the other speech-chilling teams.

wrong legal "standard." App.24. That one circuit accused three others of "mak[ing] stuff up" only proves that this Court should step in. App.73 (Wilkinson, J., dissenting). And this Court's resolution of that split will turn on "law." *Id.* As the Fourth Circuit noted, "Speech First has not and does not challenge" the basic facts about BIRT—only whether those facts would cause a reasonable college student to hold his tongue. App.8 (majority).

Nor is this petition "premature." BIO.30. That this case arises in the preliminary-injunction posture is a feature. Every case in the split arose in that posture. (If this case were an appeal from "final" judgment, BIO.30, the University would say the split isn't real because the other cases were decided in a different posture.) Speech First should not be punished for seeking preliminary injunctions, which are vital for protecting its members' rights. If speech-chilling policies could remain unenjoined until the end of trial, whole classes of students would graduate without ever getting to fully enjoy their constitutional freedoms.

This case needs no more factual development. Whether bias-response teams objectively chill speech turns on the outward message they send to students, not on internal documents or post-hoc testimony. If discovery mattered, the University could have sought it before the preliminary-injunction hearing; but it didn't. It now says it wants to depose Students F-G. BIO.31. But it raised that same objection below, and the Fourth Circuit overruled it. App.8 n.3. The University doesn't say that ruling was an abuse of discretion. As all three judges explained, these declarations

and the voluminous record are more than adequate to resolve the legality of BIRT. *See* App.10-11; App.41 (dissent).

3. Precisely because the circuit split is ripe for this Court's review, the University tries to manufacture vehicle issues. It challenges standing based on an anonymity argument that it didn't raise below. And it argues mootness based on voluntary changes that it made on the eve of certiorari. These belated jurisdictional arguments are not reasons to deny certiorari: They are badly wrong, and this Court needn't address them before deciding the question presented.

a. Jurisdictional arguments are not vehicle problems when they are bad. Respondents often trot out jurisdictional arguments to defeat otherwise certworthy petitions. When those arguments are weak, this Court grants certiorari and simply addresses jurisdiction before turning to the question presented. Consider just last Term:

- In *MOAC Mall Holdings LLC v. Transform Holdco LLC*, respondents said the case was an "exceptionally poor vehicle" because an intervening mootness issued had destroyed any "actual case or controversy." *MOAC*-BIO.32-25. This Court granted certiorari anyway, unanimously rejected mootness, and resolved the merits. 598 U.S. 288, 295-97 (2023).
- In *SFFA v. Harvard*, respondents asked this Court to deny certiorari because peti-

tioner supposedly lacked standing. *Harvard*-BIO.26-28. This Court granted certiorari anyway, unanimously found standing, and resolved the merits. 600 U.S. 181, 198-99 (2023).

- In *Moore v. Harper*, respondents "contest[ed statutory] jurisdiction … from the very beginning." 600 U.S. 1, 18 (2023). Though a different issue later split the Court, that statutory argument "did not prevent [its] granting certiorari." *Id.*

Other examples abound. *E.g.*, *West Virginia v. EPA*, 142 S.Ct. 2587, 2606-07 (2022) (voluntary-cessation argument in BIO).

The University's jurisdictional arguments should not deter certiorari here either. Both are "clearly wrong." *Janus v. AFSCME*, 138 S.Ct. 2448, 2462 (2018). That Speech First referred to its members with pseudonyms has nothing to do with standing. And the University's attempt to moot this case through voluntary cessation badly fails the governing test.

Anonymity. The University admits that it "did not challenge" whether Speech First could refer to its members with pseudonyms. BIO.23. Then, with no sense of shame, it says this Court should wait for a case where that argument was raised. BIO.26. Per the University, this argument is so good that it will block the Court from reaching the question presented, yet not good enough to merit mention below. The University was right the first time: This argument shouldn't detain anyone long.

Associations do not lack standing when they refer to their members with pseudonyms. This Court has let associations sue on behalf of anonymous students, immigrants, law schools, and more.[2] Zero "circuit courts" have held otherwise. BIO.26. The University cites cases that didn't even involve pseudonyms. Those associations lacked standing because they either identified no *specific* member with standing, or identified a specific member who *lacked* standing. BIO.26. Speech First did neither. It identified and named several specific members and explained why they currently have standing. Divulging their legal names would have "'add[ed] no essential information,'" so according to the one circuit to consider this issue, their "anonymity is no barrier to standing." *Advocs. for Highway & Auto Safety v. FMCSA*, 41 F.4th 586, 594 (D.C. Cir. 2022).

That two district courts have gotten this wrong, BIO.25-26, is not a reason to deny certiorari. Both cases are currently on appeal. And several courts have already explained why they're wrong. *E.g.*, *AAFER v. Fearless Fund*, 2023 WL 6295121, at *2-4 (N.D. Ga. Sept. 27); *Chamber of Commerce v. CFPB*, 2023 WL 5835951, at *6 (E.D. Tex. Sept. 8). This Court could too, even without the Fourth Circuit's analysis. But the Fourth Circuit has weighed in as well. The "use, vel non, of pseudonyms"—it has explained—does not

[2] *E.g.*, *SFFA v. Harvard*, 2023 WL 3126414, at *6 (D. Mass. Apr. 27), *aff'g on standing*, 600 U.S. at 199; *New York v. U.S. Dep't of Com.*, 351 F.Supp.3d 502, 606 n.48 (S.D.N.Y.), *aff'g on standing*, 139 S.Ct. 2551 (2019); *FAIR v. Rumsfeld*, 291 F.Supp.2d 269, 286-89 (D.N.J. 2003), *aff'g on standing*, 547 U.S. 47, 52 n.2 (2006).

implicate a "court's *power* to adjudicate the dispute." *B.R. v. F.C.S.B.*, 17 F.4th 485, 495 (4th Cir. 2021).

Voluntary Cessation. "If this case is moot, it is because" the University has "ceased its offending conduct." *Adarand Constructors v. Slater*, 528 U.S. 216, 221-22 (2000). But voluntary cessation usually "'does not moot a case.'" *Chicago Tchrs. Union v. Hudson*, 475 U.S. 292, 306 n.14 (1986). If it did, a defendant "'could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where it left off.'" *United States v. Sanchez-Gomez*, 138 S.Ct. 1532, 1537 n.* (2018) (cleaned up). Voluntary cessation can't moot a case unless it's "'*absolutely* clear'" that the illegal conduct could not recur—a "'heavy burden'" that "'*lies with the party asserting mootness*.'" *Adarand*, 528 U.S. at 221-22. Without that clear showing, this Court disregards the voluntary cessation and "review[s] the legality of the practice defended [below]." *Chicago Tchrs.*, 475 U.S. at 306 n.14.

The University cannot carry its heavy burden. It won't even come close. Several factors weigh decisively against it.

The University "continues to defend [BIRT's] legality." *Knox v. SEIU*, 567 U.S. 298, 307 (2012). It defended BIRT in district court, insisting that bias-response teams are "fully consistent with the First Amendment." D.Ct.Doc.35 at 34. It defended BIRT on appeal, reiterating that these teams are "constitutionally benign." CA4.Doc.32 at 28. And it promises that it "will defend" BIRT here. BIO.21. Because the University "has consistently urged the validity of" BIRT,

a live "controversy between the parties … remains." *Walling v. Helmerich & Payne*, 323 U.S. 37, 42-43 (1944). And its insistence on defending BIRT means it's "not clear" why the University "would necessarily refrain" from reinstating a bias-response system "in the future." *Knox*, 567 U.S. at 307.

The University's maneuvering is also suspiciously "'timed.'" *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 n.5 (1953). Its policy on bias-related incidents is "'long standing.'" *Gray v. Sanders*, 372 U.S. 368, 376 (1963); *see* CA4.JA.357 (tracing it to 2016). The University made no changes to BIRT after the Sixth Circuit said these teams chill speech in 2019. After Speech First filed this case in 2021. Or after Speech First appealed in 2022. Instead, the University waited until right before Speech First sought certiorari.

The University's new, extra-record declaration raises more questions than it answers. Though President Sands says the decision to discontinue BIRT was not "prompted by" this litigation, Sands-Decl. ¶10, he's careful not to say that defeating this petition wasn't a *cause* for the change (and it's the only possible cause for his confidence that BIRT will never return, *see* ¶19). He says the relevant official decided to end BIRT in "early 2023." ¶¶8, 4-5. If true, the University said *nothing* to Speech First or the Fourth Circuit about that decision for five months, while the Fourth Circuit was drafting its opinion. Even after BIRT was supposedly discontinued in "June 2023," ¶9, the University again said nothing for a month—waiting until the Fourth Circuit issued its mandate and Speech First said it would seek certiorari.

This Court does not honor such gamesmanship. When respondents "attemp[t] to manipulate th[is] Court's jurisdiction," that scheming "counsels against a finding of mootness." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000). It matters little that the University now says, for the first time, that it wants vacatur under *Munsingwear*. Manipulation is manipulation, whether the goal is preserving a favorable decision or avoiding a ruling from this Court that the University likely violated the First Amendment. Vacatur would let the University avoid an adverse decision while ensuring it can recreate a bias-response team whenever it wants. The Fourth Circuit's decision, after all, said it was "control[led]" by a *different* circuit precedent from 2018—one that vacatur wouldn't reach. *See* App.19-22 (discussing *Abbott v. Pastides*, 900 F.3d 160 (4th Cir. 2018)).[3]

Honoring the University's tactics, moreover, could prevent this Court from ever resolving this important split. Universities with bias-response teams would have a playbook: Unable to prove the split isn't certworthy, they will defeat certiorari by telling this Court that they've disbanded their team. Virtually every school would run this play. Universities are notorious for trying to moot cases by claiming they've

[3] *Munsingwear* is not available here because Speech First's claim regarding BIRT is not moot. In addition to voluntary cessation, Speech First's request for nominal damages keeps this claim alive. *See Uzuegbunam v. Preczewski*, 141 S.Ct. 792 (2021). Though the University predicts it will defeat damages with an immunity defense, BIO.17-18, that argument goes to the merits, not mootness, and is premature here. *MOAC*, 598 U.S. at 296.

changed their challenged policies. *E.g.*, *Christian Legal Soc. v. Martinez*, 561 U.S. 661, 724 n.3 (2010) (Alito, J., dissenting). The problem, though, is that universities are equally notorious for bringing policies back once the coast is clear or their leadership changes. *See* FIRE-Br.21-25.

Indeed, unless this Court grants certiorari, the University will be "free to resume the use of" a bias-response team. *Walling*, 323 U.S. at 43. BIRT was apparently created, and then uncreated, at the unilateral discretion of one administrator. Sands-Decl. ¶¶4, 9. And the University "retains" the right to use bias-response teams again to address "misconduct"—a capacious term that the University can define however it wants. BIO.10 n.6. The University thus lacks any evidence that it "could not revert" to the illegal conduct. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458 n.1 (2017).

Given the University's "heavy" burden, it cannot prove mootness by having President Sands swear that BIRT "no longer exist[s]" or "disclaim[ing] any intention to revive" it. *W.T. Grant*, 345 U.S. at 633. President Sands, after all, speaks only for himself—not other officials or future presidents. *See* Sands-Decl. ¶19. And because he won't admit that BIRT is legally dubious, the only reason he offers for scrapping it is that BIRT did not "promote efficiency." ¶11. But last year, President Sands insisted that BIRT improved "coordinat[ion]," "avoid[ed] duplication," and "reduce[d] confusion." CA4.Doc.32 at 15 n.1; *accord* D.Ct.Doc.15 at 34. And ending BIRT, he said, would "harm" the University's "educational mission" and

"cripple [its] ability to deal with" bias. CA4.Doc.32 at 42. Given how fickle the University has been about BIRT's efficiency, its flimsy and utilitarian about-face cannot carry its heavy burden of proving mootness through voluntary cessation. *See United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968) (case not moot when defendants merely said "it would be uneconomical" to resume the illegal conduct).

b. Even if the University's jurisdictional arguments were debatable, those arguments wouldn't prevent this Court from reaching the question presented. That question is, itself, jurisdictional: whether Speech First has Article III standing. Because "there is no mandatory sequencing of jurisdictional issues," this Court can address that question and leave any other jurisdictional issues for remand. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (cleaned up). In *Laidlaw*, for example, this Court held that the plaintiff "had standing under Article III" before "turn[ing] to the question of mootness." *Friends of the Earth v. Laidlaw Env't Servs.*, 528 U.S. 167, 189 (2000). That question was another voluntary-cessation issue that arose "after the Court of Appeals issued its decision but before this Court granted certiorari." *Id.* at 179-180, 193. Because that mootness debate had "not been aired in the lower courts," this Court left it "open for consideration on remand." *Id.* at 193-94; *accord SBA List v. Driehaus*, 573 U.S. 149, 168 (2014) (resolving one standing question and remanding the others).

The order that jurisdictional arguments are resolved is a matter of discretion, and the proper use of that discretion is straightforward here. This Court should address the question presented—the only question supported, briefed, argued, or decided below. Speech First understands that a similar sequencing debate is occurring in *Acheson Hotels*, No. 22-429. But unlike there, petitioner here does *not* concede that the underlying case is moot. *Cf. Acheson*-O.A.Tr.6 ("We're not disputing" the case is "definitely moot."). Speech First strongly disputes the University's jurisdictional arguments. As in *Laidlaw*, these highly "disputed" issues are better left for remand. 528 U.S. at 193.

Nor need this Court decide whether Speech First is ultimately entitled to a preliminary injunction. The University argues that its voluntary cessation means there's no irreparable harm. BIO.18-19. But that argument goes to the requirements for injunctive relief, not Article III jurisdiction. *Concentrated Phosphate*, 393 U.S. at 203-04. Whether Speech First still meets those equitable requirements "surely is a question better addressed to the discretion of the trial judge." *W.T. Grant*, 345 U.S. at 634. The district court could easily conclude, in its "broad" discretion, that an injunction is still warranted given the "cognizable danger of recurrent violation." *Id.* But however it makes that call, the risk that it might deny an injunction on this alternative ground is not a reason to deny certiorari. It's a reason to resolve the question presented—the only basis for the decisions below—and leave the remaining analysis to the lower courts "on remand." *Concentrated Phosphate*, 393 U.S. at 203-04.

CONCLUSION

This Court should grant certiorari and set this case for argument.

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