

No. 23-156

In The
Supreme Court of the United States

SPEECH FIRST, INC.,

Petitioner,

v.

TIMOTHY SANDS, individually and in his official
capacity as President of the University of Virginia
Polytechnic Institute and State University,
Respondents.

**On Petition for Writ of Certiorari to the United
States Court of Appeals for the Fourth Circuit**

**BRIEF OF *AMICUS CURIAE* THE BUCKEYE
INSTITUTE IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

1. Whether bias-response teams objectively chill students' speech.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states.¹ The staff at The Buckeye Institute accomplishes the organization’s mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. section 501(c)(3). The Buckeye Institute’s Legal Center files and joins amicus briefs that are consistent with its mission and goals.

The Buckeye Institute is dedicated to protecting individual liberties, and especially those liberties guaranteed by the Constitution of the United States, against government interference. Like the drafters of the First Amendment, The Buckeye Institute believes that free and open debate, without fear of state retribution is vital to a functioning republic. This freedom is perhaps most vital on the campuses of our colleges and universities, institutions dedicated to the exchange of ideas and the training ground for the citizens of a republic.

¹ Pursuant to Rules 37.2(a), The Buckeye Institute states that it has provided timely notice of its intent to file this amicus brief to all the parties in the case. Further, pursuant to Rule 37.6, no counsel for any party has authored this brief in whole or in part and no person other than the amicus has made any monetary contribution to this brief’s preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fourth Circuit majority held that Speech First could not show any injury in fact because the challenged policy—a campus bias response team—does not create a credible threat of enforcement significant enough to chill students’ speech rights. But as the Fifth, Sixth, and Eleventh Circuits have held, bias response teams (“BRTs”) and the policies that support them objectively chill protected speech by creating a system where, in the name of civility and inclusion, members of the college community are encouraged to report speech or other conduct that violates vague and subjective prohibitions against “bias” to a committee of administrators.

Civility and inclusion are laudable goals and, undeniably, an important component of a college education. But when the policies used to pursue those goals undermine free debate and open inquiry—the fundamental operating system of Western education and liberal government codified in the First Amendment—those policies cannot stand.

Regardless of their motives, BRTs operate in a manner eerily similar to Orwell’s Thought Police. Because BRT policies define bias vaguely and broadly, students and faculty can never be sure what speech or conduct might earn them a referral to the BRT. Indeed, bias can be anything that a complaining party deems upsetting. Because bias—as used in BRT policies—is entirely subjective and ever changing, students and faculty can never know what speech or conduct can place them in the BRT’s crosshairs. The rational response is to avoid discussing any topic,

expressing any opinion, or using any words that anyone might find disagreeable.

To make matters worse, BRT policies operate through informants. Students are encouraged to keep a watchful eye on one another and to report speech or conduct that might be biased. This peer surveillance system furthers the chilling effect by putting speakers on notice that they are always being watched, and by telling the watchers to be aggressive in their reporting. This results in a feedback loop in which students and faculty, who are encouraged to find bias everywhere, come to believe that bias is pervasive, driving even more reporting.

In many BRT regimes, including Virginia Tech's, students and faculty can report bias incidents anonymously. This makes the system ripe for abuse by hoaxers or those looking to settle a score. Colleges and universities are often happy to play along to generate press coverage that shows their commitment to social justice.

And like the definition of bias, the powers of a BRT tend to be both broad and vague. The Fourth Circuit majority found that because the BRT lacked specific authority to discipline students, there could be no chilling effect. But this ignores the realpolitik of college life. The power disparity between college administrators and students is stark. Students likely recognize that colleges and universities often offer little in terms of due process in responding to bias response claims. Students, like all of us, sense that being labeled "racist," "misogynist," or "homophobic" is harmful emotionally and can negatively impact their friendships, relationships, and future careers.

Speech is effectively chilled when the potential costs vastly exceed the benefit of engaging in it. With the BRT around, it is better to stay quiet than risk unknown but potentially severe consequences.

Moreover, again echoing Orwell, the scientific literature demonstrates that being subject to constant surveillance not only chills speech through the conscious balancing of costs and benefits, but actually has measurable cognitive effects. People behave differently—indeed, think differently—when they think they are being watched. Using a system of surveillance to put boundaries on what students can think or discuss flies in the face of the purpose of Western education. BRTs’ system of surveillance also tends to undermine the values of inclusion and community it purports to advance by causing students to retreat into their own bubbles and echo chambers, breeding anger and resentment rather than understanding. And in the case of state institutions, it violates the First Amendment.

As the Petitioner has noted, three appellate circuits have held that BRT policies do, in fact, impermissibly chill protected speech. Two others have held the opposite. For years, colleges and universities have struggled to balance their desire to create a welcoming and bias free environment with their obligations to rigorous debate and First Amendment principles.

ARGUMENT

I. BRT Regimes Chill Speech Through Vague Prohibitions and Constant Surveillance

A. “Nothing is Illegal”

The intentional vagueness of a prohibition is a hallmark of a speech-chilling regime. When Winston Smith, Orwell’s protagonist, begins his discussion of the Thought Police, he notes that “nothing was illegal since there were no longer laws.” George Orwell, *1984* 7 (1949). That a totalitarian society would have no laws surprises the reader. It seems counterintuitive. Yet as Orwell develops the idea, it becomes clear how the lack of any defined offenses magnifies the chilling power of the government. Because citizens cannot conform their conduct to defined statutes, they never know where the line between allowed and disallowed activity lies. This inability to know where the line is leads to greater self-censorship. In the First Amendment context, “[s]elf-censorship is a constitutionally recognized injury.” *Wolfson v. Brammer*, 616 F.3d 1045, 1059 (9th Cir. 2010). And the mere “potential for this self-censorship is abhorrent to the First Amendment.” *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 318 (1979). Indeed, a minefield provides an effective barrier precisely because those seeking to cross it do not know exactly where the mines are buried. Thus, it is best to avoid the whole area.

Further, the lack of defined offenses gives the government the flexibility to adapt its enforcement to any situation based on changing political conditions. What might have been acceptable yesterday, may not

be tomorrow. Thus, our law finds a chilling effect when “a person of ordinary intelligence” lacks “reasonable opportunity to know what it prohibited.” *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1120 (11th Cir. 2022) (citing *Harrell v. Florida Bar*, 608 F.3d 1241 (11th Cir. 2010)).

Under a BRT regime, a student or faculty member can never be certain what topics or opinions can be labeled as bias, will thus wisely avoid entire topics of discussion. Chalk “Trump 2016” on the sidewalk and you could become the subject of a bias incident report. Joseph W. Yockey, *Bias Response on Campus*, 48 J. L. & Educ. 1, 22 (2019). Assign a writing exercise asking students to “[w]rite about a gay child being kicked out of the house, and make audience feel sorry for the person kicking them out” and the BRT will be there. *Id.* at 12 (quoting Found. for Individual Rights in Educ., *Bias Response Team Report* 18 (2017)). Refer to police as “terrorists” during a political rally and find yourself the subject of a bias report. *Id.* Compare Hillary Clinton to Adolph Hitler during a political discussion and you will be invited to discuss the matter further with college administrators. *Id.*

Under BRTs’ amorphous standards, briefs filed with this Court on any contentious issue could create a bias incident if read aloud or circulated on many of the nation’s college or university campuses. The panel in *Speech First v. Cartwright*, the Eleventh Circuit case holding the University of Central Florida’s BRT regime unconstitutional, explored the boundaries of what was permissible speech, asking the University’s counsel at oral argument whether “particular

statements would violate the anti-discriminatory-harassment policy . . .” 32 F.4th at 1121. Specifically, the court asked whether statements such as “abortion is immoral,” “unbridled open immigration is a danger to America on a variety of levels,” and “the Palestinian movement is antisemitic” would violate the policy. *Id.* The University’s counsel admitted that he could not say for sure whether those statements would violate the University’s policy. In other words, the University’s own counsel would find his speech chilled due to the uncertainty of whether it violated the anti-bias policy.

That these incidents (and many others—both reported and unreported—like them) range from the prosaic—like indicating support for a candidate or a moral belief—to cases of poorly chosen words and clear rhetorical excess is telling. Because “bias” is in the ears of the listener, any topic, opinion, or word can result in a report. And of course, bias is also in the ears of any person or university official tasked with making findings and imposing any restrictions, reprimands, or punishments. The important common thread is that all of the examples above involve speech that is plainly protected by the First Amendment. In today’s politically contentious era, it would be disingenuous to ignore the reality that there are some on college campuses who are eager to single-out as “biased” individuals whose political allegiance or social priorities conflict with their own. See *Cramp v. Board of Public Instruction*, 368 U.S. 278, 286 (1961) (“It would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose.”) Yet a speaker who wishes to avoid

a report must be on constant guard. The rational choice is to stay out of the minefield.

B. Surveillance 360

There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was even conceivable that they watched everybody all the time.

Orwell, *supra*, at 4.

Unlike Orwell's Thought Police, whose surveillance was primarily electronic, BRTs rely on informants. While the word "informants" conjures the East German Stasi, not American college students, the term is nevertheless apt. As the Fourth Circuit dissent pointed out, Virginia Tech actively encouraged its students to participate in the surveillance of their classmates, urging "if you see something, say something." *Speech First, Inc. v. Sands*, 69 F.4th 184, 209 (4th Cir. 2023) (Wilkinson, J., dissenting). The admonition in this case, however, is not asking the public to report information that might prevent terror attacks or other acts of violence but to engage the student body in rooting out instances of gauzily-defined "bias."

Slogans like "see something, say something" are a common and integral component of BRT regimes. Ohio University tells its students that "[a]ll Bobcats have a responsibility to make sure our community is free of discrimination and harassment. And when you hear it or see it, you stop it, you report it." *Education*

and Response: Campus Climate Concerns, Discrimination, and Harassment, Ohio University, <https://tinyurl.com/OU-Bias-Response> (last visited Sept. 15, 2023). Bowling Green State University’s website urges students to report bias incidents under a banner headline—in school colors—with the simple directive: “See it. Hear it. Report it.” Bowling Green State University, *See It. Hear It. Report It.*, BGSU, <https://www.bgsu.edu/report-incident.html?short=reportit> (last visited Sept. 15, 2023). Below the banner, the university provides links to file bias reports.

Writing in *The Chronicle of Higher Education*, Professor Christopher J. Ferguson said what common sense and a passing acquaintance with twentieth century history makes clear: “A system that depends on anonymous reports and encourages some people to turn in others for wrongthink is intrinsically abusive.” Christopher J. Ferguson, *Bias Response Teams are a Bad Idea*, *Chronicle of Higher Educ.* (June 5, 2023), <https://www.chronicle.com/article/bias-response-teams-are-a-bad-idea>. One example of those abuses comes from hoax reporting. John Carrol University, a small liberal-arts school outside of Cleveland reported that during the 2014-2015 school year, approximately 20% of the bias reports it investigated turned out to be hoaxes by a single student. John Carrol University, *Bias Reports 2014-2015* 9, <http://webmedia.jcu.edu/diversity/files/2015/12/2014-2015-Bias-Report-web-version.pdf>.

Equally troubling is that of the 72 bias incidents cataloged at John Carrol, 19% came from people who were neither witnesses nor victims of the alleged bias

but had been told about the incident. *Id.* at 7. They had simply heard about an alleged incident from someone else.

Similarly, in 2013, Oberlin College was gripped by fears of supposed campus “hate crimes” that culminated in the cancellation of classes when one student claimed to have seen a person walking across campus in the early morning hours in Klu Klux Klan regalia. See Richard Perez-Pena and Trip Gabriel, *Racist Incidents Stun Campus and Halt Classes at Oberlin*, N.Y. Times (March 4, 2013), <https://www.nytimes.com/2013/03/05/education/oberlin-cancels-classes-after-series-of-hate-related-incidents.html>. A police investigation eventually revealed that there was no Klansman, but rather a woman walking with a blanket. See J.K. Trotter, *That KKK Robe Sighting at Oberlin Was Probably Just a Student Wearing a Blanket*, The Atlantic (March 5, 2013), <https://tinyurl.com/Robe-Oberlin>. Likewise, Oberlin police stated the students who eventually admitted to antisemitic and homophobic graffiti told them that their actions were “a joke to see the college overreact.” Mark Memmott, *Oberlin Students Behind ‘Hate Postings’ Say They Were Joking*, NPR (Aug. 29, 2013), <https://www.npr.org/sections/thetwo-way/2013/08/29/216829325/oberlin-students-behind-hate-postings-say-they-were-joking>.

Alarminglly, the number of colleges and universities administrations using anonymous informers as their eyes and ears has doubled since 2017. Ivan Marinovic and John Ellis, *DEI meets East Germany: U.S. Universities Urge Students to Report One Another for ‘Bias’*, The Wall Street Journal (Apr.

6, 2023), <https://www.wsj.com/articles/snitches-get-sheepskins-as-colleges-train-student-informants-dei-east-germany-bias-protected-class-f941ee11>. And while the consequences of being reported for a bias incident are less draconian, the historical antecedents of the East German Stasi and Mao’s Cultural Revolution, which both relied heavily on informants—particularly students—to carry out the state’s surveillance should give American college administrators pause. As Professors Marinovic and Ellis note, “[a] system that rewards spying on friends and neighbors will disproportionately attract cowardly people motivated by the worst of human nature—resentment, jealousy, grudges and dogmatic intolerance. The snitches will be people who don’t understand the damage Stasi-like behavior will do to our universities.” Marinovic and Ellis, *supra*. That the trend is towards greater reliance on anonymous reporting militates in favor of granting the petition.

C. BRT Regimes Chill Speech by Making the Potential Costs Exceed any Benefit.

Again, students facing BRT intervention are not living in totalitarian states. But that is not to say that BRT attention is not without cost. Circumstances of the individual must be considered to determine the “chilling effect” of another’s actions on the exercise of First Amendment rights. *See Gill v. Pidlypchak*, 389 F.3d 379, 381 (2d Cir. 2004). The *Gill* court indicated that an objective standard requires determining if the situation “would deter a similarly situated individual of ordinary firmness” from exercising their Constitutional rights. *Id.* (citation omitted). This objective test was applied to prisoners claiming

retaliation for their exercise of free speech, and proposed a spectrum where the level of the retaliatory action necessary to constitute an actionable “chilling effect” depended on the fact that “[p]risoners may be required to tolerate more than public employees, who may be required to tolerate more than average citizens, before a [retaliatory] action taken against them is considered adverse.” *Dawes v. Walker*, 239 F.3d 489, 493 (2d Cir. 2001).

College is not prison. But students rely on their alma maters not only for education and the ability to get a job in the future but often for housing and employment. And college is not cheap. Students (or their families) often take on substantial debt to attend. Running afoul of the BRT risks that substantial investment.

The Fourth Circuit majority held that Virginia Tech’s BRT regime did not chill speech, because students were merely “invited” to meet with administrators. An invitation from the Dean of Students to an eighteen-year-old student to attend a meeting is difficult to decline. Students understandably anticipate that failure to attend the meeting will result in some form of discipline. Some students are likely also aware that colleges and universities are not required to afford them the full menu of due process rights available to citizens at large.

Again, while American college students are not subject to arbitrary seizure and detention, the parallels to repressive regimes are ominous. Chinese dissidents have dubbed the practice of being invited to meet (voluntarily) with a government official as “being

invited to tea.” Cindy Carter, *Spilling the Tea About Being “Invited to Tea” and Hearing the Police Read Aloud Your Tweets*, China Digital Times (Oct. 29, 2021), <https://tinyurl.com/Invited-to-Tea>. These ostensibly voluntary meetings, at which tea is sometimes served, serve as a warning that sterner measures may follow. Can any student reasonably believe that if he or she declines to meet with the Dean that the matter will be dropped? Would any student reasonably believe that the Dean wanted to meet to thank him or her for providing a diversity of viewpoints on campus?

For a chill to occur, the administration need only make the potential cost exceed the potential benefit of engaging in speech. Most “persons of ordinary firmness” would not gamble tens of thousands of dollars and chances at future employment against their right to express an unpopular opinion in class.

II. BRT Regimes and Constant Surveillance Chill Speech by Depriving Students of the Ability to Think Critically.

For some time he gazed stupidly at the paper It was curious that he seemed not merely to have lost the power of expressing himself, but even to have forgotten what it was that he had originally intended to say.

Orwell, *supra*, at 8. Orwell intuitively understood what modern psychology shows. A surveillance state not only chills speech at the conscious level—where speakers weigh the potential costs and benefits to

their speech—it operates to make its subjects think and act differently. Winston Smith realized this when he tried to put pen to paper.

As far back as 1898, when psychologists realized that “cyclists were faster when competing against each other than against a clock,” they posited that the “bodily presence of another caused a change in behavior.” Roser Caniguaeral, Antonia F. de C. Hamilton, *Being Watched: Effects on an Audience on Eye Gaze and Prosocial Behaviour*, 195 *Acta Psychologica* 50, 50 (2019). Caniguaeral and Hamilton studied how believing that one was being watched by another impacted prosocial behavior. Their study, which involved having test subjects interact with people posing as representatives of a charity, showed that when the subjects believed that they were on a live video feed, they acted more charitably. The authors explain that “[w]hen people are observed by others, one way to signal their reputation is by behaving in a more prosocial fashion” and that “studies have shown that the possibility of gaining reputation in front of others is a key factor to increase prosocial behavior.” *Id.* at 51. They posit that this reaction is largely unconscious. *Id.* In the same way, psychologist Brock Chisholm has performed studies that show persons who believe they are being monitored by someone who is hostile to them experienced “post-traumatic stress disorder-like symptoms.” Kaleigh Rogers, *What Constant Surveillance Does to Your Brain*, *Vice* (Nov. 14, 2018), <https://www.vice.com/en/article/pa5d9g/what-constant-surveillance-does-to-your-brain>. Likewise, Joshua Franco, a senior researcher and deputy

director of Amnesty Tech at Amnesty International explained that

The fear and uncertainty generated by surveillance inhibit activity more than any action by the police People don't need to act, arrest you, lock you up and put you in jail. If that threat is there, if you feel you're being watched, you self-police, and this pushes people out of the public space. It is so hard to operate under those types of conditions.

Id.

Again, college is not a prison or nation on Amnesty International's watch-list. But the knowledge that any wrong word or misunderstood social media post—or even someone mishearing—could result in an invitation from the Dean to discuss the speaker's views is bound to make college students circumspect about the subjects they discuss and the opinions they voice.

This creates an atmosphere uncondusive to learning that objectively chills free discussion and inquiry in violation of the First Amendment.

CONCLUSION

For all the forgoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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