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

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BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Moral Law is an Alabama-based legal organization dedicated to religious liberty, freedom of speech and the press, and the strict interpretation of the Constitution as intended by its Framers. The Foundation believes that freedom of speech and freedom of the press are God-given rights, enshrined with religious liberty as a first priority in the Bill of Rights, not only to protect the God-given rights of individual persons, but also to check the power of government.

Believing that protecting the free exchange of ideas (particularly controversial, politically charged ideas) is key to maintaining a free society, the Foundation for Moral Law has filed *amicus* briefs in several cases involving the First Amendment rights of students.

SUMMARY OF THE ARGUMENT

When one person's right to speak is suppressed, the entire public discourse is impoverished. For example, take modern college campuses. This case

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[1] Counsel of record for all parties received notice at least ten days prior to the due date of amicus curiae's intention to file this brief. Pursuant to Rule 37.6, *amicus curiae* certifies that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae,* its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

involves a practice that is increasing in popularity among public universities across the U.S.: creating task forces devoted to monitoring and minimizing speech of certain content that is, in someone's opinion, unsavory. The problem is that our marketplaces of ideas are already suffering. Studies show that universities are less safe places in which to express controversial ideas than ever before. Societal trends like "cancel culture" informally punish and chill contentious speech enough. But now, government-enacted speech codes like Virginia Tech's bias-incidents policy and the corresponding groups assigned to enforcing them are worsening the problem and implicating the government, giving rise to a First Amendment question. This question, despite being directly addressed by five circuit courts of appeals, has yet to be resolved. In fact, the question has split circuits down the middle, tearing a hole in First Amendment precedent that needs quick mending. To restore the protections of the First Amendment to the Framers' original intent, these speech codes ought to be declared unequivocally unconstitutional.

ARGUMENT

In *Shelton v. Tucker*, a case about teachers in public elementary and secondary schools, this Court said that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than

in the community of American schools."[2] But at state universities, free speech considerations are given *greater* protection by the Constitution.[3] This Court has called public universities "peculiarly the marketplace of ideas" and said that there is "no room for the view that First Amendment protections should apply with less force on college campuses than in the community at large."[4] This Court's opinion in *Sweezy v. New Hampshire* warned that if state-supported institutions of higher education stifle student speech and prevent the open exchange of ideas on campus, "our civilization will stagnate and die."[5]

Just as anticipated, there is an increasing intolerance of unorthodox and foreign viewpoints on American college campuses today. It is being perpetuated by students and enforced by the government through its university administrations—using speech codes and "bias response teams"—in blatant violation of the First Amendment. This Court has a responsibility and an opportunity in this case to halt the erosion of free speech on campus and restore the marketplace of ideas.

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[2] 364 U.S. 479, 487 (1960).
[3] *Tilton v. Richardson*, 403 U.S. 672, 685–86 (1971).
[4] *Healy v. James*, 408 U.S. 169, 180 (1972).
[5] 354 U.S. 234, 250 (1957).

I. There is a circuit split creating a "patchwork" of First Amendment precedent that needs reconciliation.

Five federal courts of appeals have decided *Speech First* cases with the same parties, procedural posture, and facts as this case. But, they have come to contradictory conclusions, aligning themselves into two groups: three circuits hold that bias response teams objectively chill student speech enough to create an injury in fact and support Article III standing to challenge the existence of the teams,[6] and two hold that no such injury exists[7].

Of the cases involved in the split, *Speech First v. Schlissel* was decided first. In it, the Sixth Circuit reviewed the district court's denial of Speech First's motion for a preliminary injunction against the University of Michigan's speech code and corresponding bias response team.[8] To begin its analysis, the court provided the four factors that determine whether to grant a preliminary injunction:

> (1) whether the movant has a strong likelihood of success on the merits;

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[6] *See Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019); *Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020); *Speech First, Inc. v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022).

[7] *See Speech First, Inc. v. Sands*, 69 F.4th 184 (4th Cir. 2023); *Speech First, Inc. v. Killeen*, 968 F.3d 628 (7th Cir. 2020).

[8] 939 F.3d at 764.

> (2) whether the movant would suffer irreparable injury without the injunction;
>
> (3) whether the issuance of the injunction would cause substantial harm to others;
>
> and (4) whether the public interest would be served by the issuance of the injunction.[9]

The first factor was the key issue on appeal and was reviewable de novo, but the overall determination of whether the lower court should have issued the preliminary injunction had to be reviewed for abuse of discretion, and thus be "highly deferential" to the district court. [10]

The four circuit courts to subsequently decide *Speech First* cases applied this same factor test and these same standards of review because all of the cases were presented to the circuit courts in the same posture: The district courts below had concluded that Speech First lacked standing to challenge the bias response team policies and on that basis, without examining any of the preliminary injunction factors, denied Speech First a preliminary injunction.[11]

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[9] *Id.*

[10] *Id.* at 763–64 (quoting *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011)).

[11] *Schlissel*, 939 F.3d at 736; *Fenves*, 979 F.3d at 338 (in this case, the district court had dismissed the case entirely); *Cartwright*, 32 F.4th at 1128; *Sands*, 69 F.4th at 191–92; *Killeen*, 968 F.3d at 640, 647.

As a result, the Fifth, Sixth, and Eleventh circuit courts reviewed standing and remanded the likelihood of success determination and the weighing of the other three factors (i.e. whether to grant the preliminary injunction) back to the district court.[12] The Fourth and Seventh Circuits also focused on the standing question but did not remand any issues because they affirmed instead.[13]

Naturally, the Fifth, Sixth, and Eleventh circuits' analyses were largely similar and can be outlined in this brief together. We will start with the law that each circuit applied and the contradictions to be found there, and then move to the facts.

In *Speech First v. Fenves*, the Fifth Circuit considered "several policies that intend[ed] to regulate speech at the University of Texas at Austin," including one that created a bias response team.[14] As stated, the district court in *Fenves* had gone a step further than the others and dismissed Speech First's case based on the lack of standing.[15] The Fifth Circuit began by acknowledging that "[a]t earlier stages of litigation . . . the manner and degree of evidence required to show standing is less than at later stages."[16] It also explained that at the

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[12] *Id.*; *Schlissel*, 939 F.3d at 766; *Cartwright*, 32 F.4th at 1128.

[13] *Killeen*, 968 F.3d at 640, 647; *Sands*, 69 F.4th at 191–92.

[14] 979 F.3d at 322.

[15] *Id.*

[16] *Id.* at 329 (citing *Lujan v. Def's of Wildlife*, 504 U.S. 555,

preliminary injunction stage, the movant only has to show that "each element of standing is likely to obtain in the case at hand."[17]

The Fifth and Sixth circuits described the requirements for Speech First's associational standing as a clear showing of likelihood that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit,"[18] and said that only the first was at issue.[19] They then gave the three elements of standing: injury in fact, traceability, and redressability, and injury in fact became the main focus of both opinions.[20]

The Eleventh Circuit, however, further narrowed down the issue to a subpart of the injury prong found in the test for Article III standing that was described by this Court in *Lujan v. Def's of Wildlife*: In addition to being concrete, an injury must be "imminent, not conjectural, or hypothetical," to support standing.[21] The Eleventh

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561 (1992)).

[17] *Id.* 330.

[18] *Fenves*, 979 F.3d at 330 (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)); *Schlissel*, 939 F.3d at 763.

[19] *Fenves*, 939 F.3d at 330; *Schlissel*, 939 F.3d at 763.

[20] *Fenves*, 939 F.3d at 330; *Schlissel*, 939 F.3d at 764.

[21] *Cartwright*, 32 F.4th at 1119 (quoting *Lujan*, 504 U.S. at

Circuit then explained that to determine imminence, the ordinary question is whether the plaintiff is subject to "a credible threat of enforcement."[22] But, the court said, its precedent held that objective chill is the appropriate standard for determining whether an injury is imminent in pre-enforcement cases.[23] And "objective chill" is found where a government policy (like a speech code) would cause a reasonable would-be speaker to self-censor, "even where the policy fall[s] short of a direct prohibition against the exercise of First Amendment rights."[24]

None of the other circuits mentioned this "imminence" aspect of injury in fact, but they each employed some form of the objective chill standard, the credible threat test, or both, to determine whether there was an injury. The Sixth Circuit looked for objective chill,[25] along with the Fourth Circuit in this case.[26] But the Fifth Circuit did not discuss a distinction between the chill and credible threat standards. It employed the three-part test written by this court in *Susan B. Anthony List v.*

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560).

[22] *Id.* at 1119–20 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 162 (2014)).

[23] *Id.* at 1120.

[24] *Id.* (quoting *Laird v. Tatum*, 408 U.S. 1, 11 (1972)).

[25] *Schlissel*, 939 F.3d at 764.

[26] *Sands*, 69 F.4th at 192. Although, the Fourth Circuit practically applied a hybrid test, stating that "a credible threat of enforcement is the *sine qua non* of a speech chilling claim." *Id.* at 193 (internal quotation marks omitted).

Driehaus instead.[27] Finally, the Seventh Circuit stated that plaintiffs bringing facial challenges under the First Amendment pre-enforcement have the *option* to establish their injury by showing either a credible threat of enforcement or objective chill that caused the plaintiff to self-censor.[28]

How to find an injury in fact in the pre-enforcement context of these *Speech First* cases evidently needs clarification from this Court. But *Amicus* contends that picking a test is not necessary to resolve this case. Speech First has shown both a threat of enforcement and objective chill in this case, just like it did in the Fifth, Sixth, and Eleventh Circuits. Further, case law suggests that these two tests should be considered separate grounds, each independently sufficient to support standing in the pre-enforcement context.[29]

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[27] *Fenves*, 979 F.3d at 331–35 (citing 573 U.S. 149, 161–64 (2014). This was a lot like the credible threat test because the third factor in *Susan B. Anthony List* is whether "the threat of future enforcement of the challenged policies is substantial." 573 U.S. at 164 (internal quotation marks omitted).

[28] *Killeen*, 968 F.3d at 638.

[29] *See Houston Chronicle v. City of League City*, 488 F.3d 613, 618 (5th Cir. 2007) ("[c]hilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement"); *Fenves*, 979 F.3d at 331 (describing objective chill as an independently sufficient grounds for standing); *Cartwright*, 32 F.4th at 1120 (distinguishing between the objective chill and credible threat tests for an injury in fact); *Killeen*, 968 F.3d at 638 (explaining that plaintiffs bringing

Nevertheless, the variance among the circuits on how to find an injury in fact does not explain the circuit split. There is no pattern to be found of one test resulting in a finding of standing and the other resulting in no standing.[30]

There is also no variance in the facts to explain this circuit split. The same material facts were presented to all of the circuit courts deciding the *Speech First* cases. Thus, the split could only be a result of varying applications (and misapplications) of the law. To highlight that the split before this Court is in legal reasoning alone, the following is a list of facts material to the issue of standing that were present in all five *Speech First* cases:[31]

- Speech First submitted evidence that its student members wanted to speak on

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facial challenges under the First Amendment pre-enforcement have the *option* to establish their injury by showing either a credible threat of enforcement or objective chill).

[30] Three circuits found an injury: the Fifth applied the factor test from *Susan B. Anthony List* requiring a "substantial" threat among other things, the Sixth looked for objective chill, and the Eleventh looked for objective chill specifically to establish an "imminent" injury. Two found no injury: the Seventh would have been satisfied with a finding of either a credible threat or objective chill, and the Fourth in this case considered factors related to both objective chill and the threat of enforcement.

[31] This list uses the terms "bias response team" and "bias incidents policy" uniformly to describe the various taskforces and policies that were at issue in the *Speech First* cases, which each had different titles.

controversial topics on campus and that those students were afraid to do so under the university's speech codes.[32]

- The bias incidents policy had not yet resulted in the discipline of any student.[33]
- The categories of expression covered by the bias incidents policy were mostly categories protected by the First Amendment (e.g. expressions of "bias").[34]
- The bias response team invited anonymous reports of incidents any time a student thought an incident constituted a violation of the bias incident policy.[35]
- The bias response team had no authority to directly discipline reported students. [36]
- The bias response team could only request or

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[32] *Schlissel*, 939 F.3d at 774; *Fenves*, 979 F.3d at 331–32, 336; *Cartwright*, 32 F.4th at 1119; *Sands*, 69 F.4th at 190 n.3; *Killeen*, 968 F.3d at 632.

[33] *Schlissel*, 939 F.3d at 765–66; *Fenves*, 979 F.3d at 336; *Cartwright*, 32 F.4th at 1119–20; *Sands*, 69 F.4th at 195; *Killeen*, 968 F.3d at 648.

[34] *Schlissel*, 939 F.3d at 762; *Fenves*, 979 F.3d at 325; *Cartwright*, 32 F.4th at 1116; *Sands*, 69 F.4th at 188; *Killeen*, 968 F.3d at 632–33.

[35] *Schlissel*, 939 F.3d at 762; *Fenves*, 979 F.3d at 338; *Cartwright*, 32 F.4th at 1117; *Sands*, 69 F.4th at 188; *Killeen*, 968 F.3d at 633.

[36] *Schlissel*, 939 F.3d at 763; *Fenves*, 979 F.3d at 332; *Cartwright*, 32 F.4th at 1117–18; *Sands*, 69 F.4th at 193; *Killeen*, 968 F.3d at 633.

invite reported students to meet with them voluntarily.[37]

- The bias response team logged and either published all reported incidents online with personally identifiable information removed or kept them on file in the university's case management system.[38]
- The bias response team could refer a reported student for punishment to the university administration, the police, or other similar authorities as a result of a bias incident.[39] These referrals were not inherently punitive.[40]

Analyzing these common facts, the same law, and a purely legal question of standing,[41] the outcomes of the *Speech First* cases should not have diverged. Yet, they did.

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[37] *Schlissel*, 939 F.3d at 762; *Fenves*, 979 F.3d at 332; *Cartwright*, 32 F.4th at 1117–18, 1122; *Sands*, 69 F.4th at 194; *Killeen*, 968 F.3d at 633.

[38] *Schlissel*, 939 F.3d at 762-63; *Fenves*, 979 F.3d at 335; *Sands*, 69 F.4th at 212; *Cartwright*, 32 F.4th at 1117; *Killeen*, 968 F.3d at 633–34.

[39] *Schlissel*, 939 F.3d at 763, 765, 771; *Fenves*, 979 F.3d at 338; *Cartwright*, 32 F.4th at 1117; *Sands*, 69 F.4th at 194; *Killeen*, 968 F.3d at 633, 641.

[40] *Schlissel*, 939 F.3d at 763, 765, 771; *Fenves*, 979 F.3d at 338; *Cartwright*, 32 F.4th at 1117 n.1; *Sands*, 69 F.4th at 195; *Killeen*, 968 F.3d at 641.

[41] All of the facts in this list were found below by the district courts and upheld by the circuit courts. None of the circuits overruled a finding of fact of the district court.

The Sixth Circuit found that Speech First had standing to challenge the bias response team at the University of Michigan because Speech First "members face[d] an objective chill based on the functions of the Response Team." [42] The court reasoned that the team "act[ed] by way of implicit threat of punishment and intimidation to quell speech" and "[b]oth the referral power and the invitation to meet with students objectively chill[ed] speech.".[43]

The Fifth Circuit, reasoning that "[i]t is not hard to sustain standing for a pre-enforcement challenge in the highly sensitive area of public regulations governing bedrock political speech," held that "the existence of the University's policies . . . suffices to establish that the threat of future enforcement, against those in a class whose speech is arguably restricted, is likely substantial."[44]

The Eleventh Circuit reversed the district court's finding that Speech First had no standing to challenge the bias response team at issue because the lower court "erred in focusing so singularly on the [team's] power to punish," reasoning that "a government actor can objectively chill speech—through its implementation of a policy—even without formally sanctioning it." [45] Of course, the

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[42] *Schlissel*, 939 F.3d at 765, 770.
[43] *Id.* at 765.
[44] *Fenves*, 979 F.3d at 331, 338.
[45] *Cartwright*, 32 F.4th at 1122.

court said, punitive power is relevant to the inquiry, but it is not required, because the question is whether a reasonable college student would choose to self-censor rather than risk being subjected to the consequences instituted by this policy.[46] The court used *Bantam Books v. Sullivan*, 372 U.S. 58 (1963) and *Okwedy v. Molinari*, 333 F.3d 339 (2nd Cir. 2003) to "demonstrate a commonsense proposition: Neither formal punishment nor the formal power to impose it is strictly necessary to exert an impermissible chill on First Amendment rights—indirect pressure may suffice."[47]

In contrast, the Fourth Circuit distinguished *Bantam Books* from this case, reasoning that Virginia Tech's bias response team did not have as much "coercive authority" as the group in *Bantam Books* because compliance with the *Bantam Books* group was not voluntary, whereas it was with Virginia Tech's team.[48] However, the facts of this case and *Cartwright* are not different in any material way.[49] So, the circuits have applied the *Bantam Books* precedent in a contradictory manner that needs resolving by this Court.

Despite the fact that three circuits had concluded, by the time of the Fourth Circuit's

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[46] *Id.*

[47] *Id.*

[48] *Sands*, 69 F.4th 184, 193–94.

[49] *See* list of material facts common to both cases *supra* pp. 11–13; *id.* at 188–90; *Cartwright*, 32 F.4th at 1114–18.

decision in this case, that the speech codes at other public universities objectively chilled the speech of Speech First's student members, the Fourth Circuit held that Speech First lacked standing to challenge the Bias Policy at Virginia Polytechnic University for lack of an injury in fact.[50] The court even acknowledged that an injury in fact could be sufficient to support standing when the state had simply chilled protected speech, and not yet punished it, and explained that this must be established by an objective test.[51] Yet, on the same facts as those that were before the Fifth, Sixth, and Eleventh circuits, the Fourth Circuit affirmed the district court's ruling of no standing.[52]

As Petitioner highlighted, the Fourth Circuit below did not attempt to factually distinguish the other *Speech First* cases in its opinion.[53] Rather, the court justified its unsupported holding by claiming that the Fifth, Sixth, and Eleventh circuits did not give enough deference to the district courts' findings of fact.[54] However, this missed the fact that the circuits that found standing did so without disturbing any of the fact-findings made by the district court. They decided the question of pure law (whether Speech First had established Article III standing) on a record identical to the Fourth

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[50] *Sands*, 69 F.4th at 198.
[51] *Id.* at 192.
[52] *Id.* at 198.
[53] *Id.* at 197.
[54] *Id.*

Circuit's in all material respects and came to an opposite conclusion without upsetting that record.

Finally, the Fourth Circuit has joined the Seventh Circuit in striking down Speech First's standing.[55] But that court is similarly unsupported in its conclusion. The Fourth Circuit's only justification for joining the Seventh Circuit over the others was that it "followed what [the Fourth Circuit] believe[d] to be the only appropriate approach: it based 'its standing analysis around a series of factual findings by the district court.'"[56] But, the Seventh Circuit was charged with resolving the same purely legal question on the same bed of facts as the other circuits (none of which overruled a single fact-finding by their respective district courts). So, this is not a justification for splitting with the other circuits.

The Fourth Circuit also aligned itself with the Seventh Circuit in its reasoning by misapplying *Abbott v. Pastides,* 900 F.3d 160 (4th Cir. 2018), for the point that the threat of a mandatory meeting with university officials is not significant enough to establish the "credible threat of enforcement" needed to show an injury in fact, especially since the threat of a meeting in this case was "only voluntary."[57] However, this argument ignores that

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[55] *Killeen*, 968 F.3d at 640, 647.

[56] *Sands*, 69 F4th at 197 (citing *Killeen*, 968 F.3d at 649 (Brennan, J., concurring in part and dissenting in part)).

[57] *Id.* at 196.

the chilling effect of a threat of enforcement is an independently sufficient grounds for an injury in fact.[58] To establish objective chill, there is no requirement that the policy against speech be particularly burdensome. There are many other reasons that a reasonable college student might self-censor in response to a speech code, like being fearful of being reported to the administration for an act labeled "harassing," "biased," or "bullying," being fearful of academic discrimination as a result of a run in with the policy, or not wanting a stain on their record, for example.[59] And if such self-censorship is found, objective chill and an injury in fact is established, regardless of the particulars of the speech code's prosecution procedures. *Abbott* spoke on the threat of enforcement standard,[60] but the alternative objective chill test is separate and independently sufficient.[61]

As explained by Judge Wilkinson in his dissent below, "[t]his circuit split creates a patchwork of First Amendment jurisprudence for schools across the country. . . .[o]n the vitally important issue of free speech on college campuses . . . which results in students in Michigan, Florida, and Texas being protected from unconstitutional policies while students in Virginia remain exposed."[62] The Foundation urges this court to grant the present

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[58] *Supra* note 29.

[59] *See Cartwright*, 32 F.4th at 1124.

[60] *See Sands*, 69 F.4th at 195–96.

[61] *Supra* note 29.

[62] *Sands*, 69 F.4th at 219.

Petition for a Writ of Certiorari and resolve this troubling split.

II. Bias response teams are the latest and worst symptom of a larger censorship problem this Court should address.

Speech codes instituted by public universities to outright ban speech based on its "bias" or "offensive" content have been consistently struck down for being unconstitutionally overbroad or vague.[63] In their wake, bias incident policies are being created in an attempt to quell this undesirable speech despite the First Amendment. Often, however, employing standards like "bias" and "offensive," these policies flag speech simply for being outside the prevailing left-wing ideology of today.

The stealth of this tactic can make it even more stifling than traditional speech codes.[64] "[B]ias-response teams "effectively establish a surveillance state on campus where students . . . must guard their every utterance for fear of being reported to and investigated by the administration."[65] As one expert explains, "[i]n both concept and design, such

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[63] *Speech First, Inc. v. Fenves*, 979 F.3d 319, 338–339 n.17 (5th Cir. 2020).

[64] *See* Christian Schneider, *A Year of Discontent on Campus*, THE DISPATCH, Feb. 6, 2020, https://thedispatch.com/article/a-year-of-discontent-on-campus/.

[65] FIRE, *Bias Response Team Report 2018*, https://www.thefire.org/sites/default/files/2022/09/Bias%20Response%20Team%20Report%202017.pdf.

efforts [by "bias response teams"] to encourage students to anonymously initiate disciplinary proceedings for perceived acts of bias or to shelter themselves from disagreeable ideas are likely to subvert free and open inquiry and invite fears of political favoritism."[66]

However, there are other stealthy tactics universities are using to stifle speech today. For example, in 2016, the Foundation for Moral Law was called upon to help the College Republicans defend against substantial, undetermined fees leveled against them by the University of Alabama to supposedly cover the cost of security for the group's upcoming speaking event.[67] As a result of these combined factors, the state of free speech on college campuses is alarmingly poor. It is high time that this Court step in to restore the marketplace of ideas.

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[66] Keith Whittington, *Free Speech and the Diverse University*, 87 FORDHAM L. REV. 2453, 2466 (2019); *see also* Hon. Jose Cabranes, *For Freedom of Expression, For Due Process, and For Yale: The Emerging Threat to Academic Freedom at a Great University*, 35 YALE L. & POL. REV. 345, 360 (2017) (lamenting potential dangers of anonymous reports and recordkeeping by campus bias "police").

[67] After the Foundation sent a demand letter to the university, it dropped its claims and allowed the event to take place as planned.

III. Rising intolerance of intellectual diversity on American college campuses is a key threat to the free exchange of ideas.

A Dartmouth College study in 2017 showed a surprising level of ideological intolerance.[68] In it, 45 percent of Democrat students responded that they would be uncomfortable living with someone with different political views from themselves, and only 39 percent said they would feel comfortable.[69] Of the most tolerant group, Republican students, only 69 percent said they would be comfortable living with a politically diverse roommate.[70] A more recent survey of over 1,000 students at the University of North Carolina found that about 22 percent of liberals felt that UNC would be a better place without conservatives. Almost 15 percent of conservatives responded that UNC would be better without liberals.[71]

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[68] Amanda Zhou & Alexander Agadjanian, *A survey of Dartmouth's political landscape*, Apr. 26, 2017, https://www.thedartmouth.com/article/2017/04/a-survey-of-dartmouths-political-landscape.

[69] *Id.*

[70] *Id.*

[71] Timothy J. Ryan, et al., *Free Expression and Constructive Dialogue at the University Of North Carolina At Chapel Hill*, March 2nd, 2020, at 36–37, https://fecdsurveyreport.web.unc.edu/wp-content/uploads/sites/22160/2020/02/UNC-Free-Expression-Report.pdf. Roughly 92 percent of conservatives also said they would be friends with a liberal, while almost a quarter of liberals, interestingly, said they would not have a conservative friend. *Id.* at 35–37.

The Buckley Institute's annual survey shows the rise in attitudes like these:

> Of the students surveyed [in 2022], 58%, a record high, reported feeling intimidated in sharing an opinion that was different than a professor's, 8% higher than last year. The number reporting never having had this issue fell to a record low of 38%. A higher 63% reported feeling intimidated in sharing opinions different than their peers, also a record high and a jump of 13% from the 2021 survey.[72]

Additionally, a poll taken in 2023 by North Dakota State University surveying 2,250 undergrad students from 131 colleges in America revealed an attitude of incredible intellectual intolerance among today's college students.[73] An astounding 74 percent of students said that if a professor says something they find "offensive," the professor ought to be reported to the university.[74]

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[72] Buckley Institute, *Buckley Program Releases Eighth Annual College Student Survey*, Oct. 25, 2022, https://buckleyinstitute.com/buckley-program-releases-eighth-annual-college-student-survey/.

[73] John Bitzan, *2023 American College Student Freedom, Progress And Flourishing Survey*, at 3, https://www.ndsu.edu/fileadmin/challeyinstitute/Research_Briefs/American_College_Student_Freedom_Progress_and_Flourishing_Survey_2023.pdf.

[74] *Id.* at 16. Notably, 81 percent of liberal-leaning students and 53 percent of conservative-leaning students answered this question in agreement.

More specifically, 40 percent of students thought a professor should be reported for making the statement, "If you look at the data, there is no evidence of anti-Black bias in police shootings"; 34 percent felt this way about the statement, "Requiring vaccination for COVID is an assault on individual freedom"; and 27 percent would have a professor reported for stating, "Biological sex is a scientific fact. There are two sexes, male and female."[75]

Clearly, free expression is challenging on college campuses today, but according to the authors of the UNC study, "these challenges seem to be more acute for students who identify as conservative."[76] It is clear to students that certain speech, though protected by the First Amendment, is not politically acceptable. The UNC study found that 40 percent of conservative students had some level of "concern" that other students would file a complaint against them based on something they say in a class that discusses politics, while more than 96 percent of self-identifying liberal students responded that this issue was "irrelevant" or that they were not concerned about others filing a complaint.[77] "Even at the University of Chicago, which was ranked by FIRE as the best institution for free speech in 2020,

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[75] *Id.* at 17–18. Interestingly, only 8 percent of students thought a professor should be reported for saying, "There are a wide variety of sexes. Sex is not binary." *Id.* at 18.

[76] Ryan, et al., *supra* note 71, at 1.

[77] *Id.* at 26.

75 percent of students identifying as "strong Republicans" report self-censorship because they are afraid of how their peers will respond." [78] Although intolerance and censorship on campus seems to affect conservative students more harshly than liberals, anyone who believes in preserving the free exchange of ideas in America would be concerned when presented with these recent survey findings.

Many of these surveys also asked about controversial speakers on college campuses because this issue can indicate the level of ideological tolerance at any given school. According to a one conducted by the Higher Education Research Institute at the University of California at Los Angeles in 2019 that included 95,505 freshmen across 148 colleges in the U.S., half of students agreed that "colleges have the right to ban extreme speakers from campus." [79] Of course, what constitutes extremism is not defined by law, and to some, may include any opinion outside of political correctness.

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[78] Noa Faye, *What Conservative Free Speech Advocates are Missing: Self-Censorship on College Campus is a Choice, Not a Requirement*, COLUMBIA POL. REV., Nov. 8, 2020, http://www.cpreview.org/blog/2020/11/what-conservative-free-speech-advocates-are-missing-self-censorship-on-college-campus-is-a-choice-not-a-requirement.

[79] Ellen Bara Stolzenberg, et al., *The American Freshman: National Norms Fall 2019*, https://heri.ucla.edu/monographs/TheAmericanFreshman2019.pdf.

According to the Buckley Institute's annual survey mentioned previously, in 2022, 44 percent (the highest percentage on record) believed it was "okay to shout down speakers" on campus. [80] Another survey showed that 51 percent of students felt this way.[81] And according to the UNC survey, 25 percent of students are prepared to create an "obstruction" to interfere with a speaker.[82]

These distressing views held by students and university administrations have caused an increase in disinvitations, [83] heckler's vetoes, and withdrawals of controversial speakers. The *Brown Political Review* compiled a list of a few examples:

> In 2017, in order to speak safely at the University of California at Berkeley, conservative commentator Ben Shapiro required about $600,000 worth of security. . .
>
> [Also] in 2017, due to his belief that the Roman Catholic Church should welcome members of the LGBTQ+ community, Reverend James Martin was disinvited from speaking at the Catholic University of

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[80] Buckley Institute, *supra* note 72.

[81] Knight Foundation, *Free Expression on College Campuses*, May 2019, at 4, https://kf-site-production.s3.amazonaws.com/media_elements/files/000/000/351/original/Knight-CP-Report-FINAL.pdf.

[82] Ryan, et al., *supra* note 71, at 41.

[83] FIRE, Campus Disinvitation Database, https://www.thefire.org/research-learn/campus-disinvitation-database.

America.[84]

Violence also broke out at the University of California, Berkeley in February 2017 in advance of a scheduled appearance by Milo Yiannopoulos, then a senior editor for the right-wing publication Breitbart, who is best known for supporting Donald Trump and having controversial views on gender and sexual orientation. Through setting fires and starting fireworks, damaging property, and throwing rocks at police, students got the university to cancel the speech citing public safety concerns.[85]

Threats of similar events lead to the cancellation of conservative Ann Coulter's appearance at Berkely in April 2017[86] and Anita Sarkeesian's talk on gender discrimination at Utah State University in October 2014. [87] Though a

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[84] Jillian Lederman, *When the Majority Suffers: The Case for Intellectual Diversity on College Campuses*, BROWN POL. REV., Dec. 16, 2020, https://brownpoliticalreview.org/2020/12/when-the-majority-suffers-the-case-for-intellectual-diversity-on-college-campuses/.

[85] Doug Lederman & Scott Jaschik, *Amid Violence, Yiannopoulos Speech at Berkeley Canceled*, INSIDE HIGHER ED, Feb. 2, 2017, https://www.insidehighered.com/news/-2017-/02/02/violent-protests-visiting-mob-lead-berkeley-cancel-speech-milo-yiannopoulos.

[86] Thomas Fuller & Stephanie Saul, *Berkeley Is Being Tested on 2 Fronts: Free Speech and Safety*, N.Y. TIMES, Apr. 21, 2017, https://www.nytimes.com/2017/04/21/us/berkeley-ann-coulter-speech.html.

[87] Simon Parkin, *Gamergate: A Scandal Erupts in the Video-*

progressive liberal feminist, Sarkeesian could still not escape censorship. Heather MacDonald, a conservative critic of the Black Lives Matter movement, was also prevented from speaking at Claremont McKenna by student protesters.[88]

Thankfully, public opinion does not control what speech is protected on college campuses. According to a survey conducted by *Deseret News* in 2022, 63 percent of students reported being afraid to share their ideas around their classmates (a record high since 2015), but 44 percent supported shout-downs, so there was "a cross section of students who fear[ed] social cancellation but still support[ed] censorship anyway."[89]

Besides being misinformed, what is causing the rising intolerance of free speech, particularly in young people? *The Coddling of the American Mind*, by Greg Lukianoff and Jonathan Haidt, attempts to explain through psychology how, "in the name of emotional well-being, college students are increasingly demanding protection from words and

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Game Community, NEW YORKER, Oct. 17, 2014, https://www.newyorker.com/tech/annals-of-technology/gamergate-scandal-erupts-video-game-community.

[88] Robby Soave, *Claremont McKenna Students, Silencing Heather Mac Donald Is the Stupidest Way to Battle The War on Cops*, REASON, Apr. 10, 2017, https://reason.com/2017/04/10/claremont-mckenna-students-silencing-hea/.

[89] Lauren Noble, *Campus chill*, May 1, 2023, https://www.deseret.com/2023/5/1/23681256/college-campus-cancel-culture-free-speech.

ideas they don't like," and "why that's disastrous."[90] Their aim, Lukianoff and Haidt say, is to turn campuses into "safe spaces" where "young adults are shielded from words and ideas that make some uncomfortable."[91]

However,

> When students are given license to silence speech simply because it does not conform to their own political beliefs, the natural result is a misguided sense of moral and political superiority that runs counter to the democratic values of the United States. Additionally, shutting down minority viewpoints encourages members of that minority to self-censor.[92]

For these reasons alone (even aside from the circuit split), this Court should take up this case.

If this Court does not intervene, the *Sands* case will be tacked on to the already long list of cases addressing university speech codes[93] that have obscured the answer to a key question for American students: What am I safe to speak? This Court has an opportunity to resolve a deep circuit split in this

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[90] Andrew B. Meyers, *The Coddling of the American Mind*, Sep. 2015, https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/.

[91] *Id.*

[92] Jillian Lederman, *supra* note 84.

[93] *See Speech First, Inc. v. Fenves*, 979 F.3d 319, 338–339 n.17 (5th Cir. 2020).

case and with it to clarify that even "bias" speech is protected by the First Amendment and must be tolerated for the sake of preserving freedom.

CONCLUSION

Under this Court's Rule 10(a), certiorari is warranted when two or more circuits "conflict" on the "same important matter." This case presents a clear conflict on a tremendously important matter. As Justice Robert H. Jackson said in *West Virginia Board of Education v. Barnette*, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[94] Public universities have successfully done this through bias incident policies and this cannot be left alone. The Foundation urges this Court to grant Speech First's Petition for a Writ of Certiorari.

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[94] 319 U.S. 624, 642 (1943).

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