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

BRIEF OF AMICUS CURIAE SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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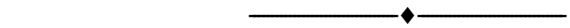
INTEREST OF AMICUS CURIAE[1]

Founded in 1976, Southeastern Legal Foundation ("SLF") is a national, nonprofit legal organization dedicated to defending liberty and Rebuilding the American Republic. For nearly 50 years, SLF has advocated, both in and out of the courtroom, to protect our First Amendment rights. This aspect of its advocacy is reflected in its regular support of those challenging overreaching governmental actions in violation of their freedom of speech. *See*, *e.g.*, *303 Creative v. Elenis*, 143 S. Ct. 2298 (2023); *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719 (2018); *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

Through its 1A Project, SLF educates college students and administrators about the First Amendment and defends the right to engage in open inquiry on our nation's college campuses. This case concerns SLF because it has an abiding interest in the protection of our First Amendment freedoms—namely the freedom of speech. SLF also has an abiding interest in the preservation of the college campus as the traditional "marketplace of ideas."



[1] Rule 37 statement: The parties were notified that Amicus intended to file this brief 10 days before its filing. *See* Sup. Ct. R. 37.2(a). No party's counsel authored any of this brief; Amicus alone funded its preparation and submission. *See* Sup. Ct. R. 37.6.

SUMMARY OF ARGUMENT

Since 1724, freedom of speech has famously been called the "great Bulwark of liberty[.]" 1 John Trenchard & William Gordon, *Cato's Letters: Essays on Liberty, Civil and Religious* 99 (1724), reprinted in Jeffrey A. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* 25 (Oxford University Press 1988). Our Founding Fathers recognized that different opinions would always accompany liberty. *See* The Federalist No. 10, at 73 (James Madison) (Clinton Rossiter ed., Signet Classics 2003). In "response to the repression of speech and the press that had existed in England" and to curb such tyranny in the future, the Founders established the First Amendment. *Citizens United v. FEC*, 558 U.S. 310, 353 (2010).

The Founders recognized that nowhere are the threats of censorship more dangerous than when a restriction prohibits public discourse on current affairs. Therefore, they sought to ensure complete freedom for "discussing the propriety of public measures and political opinions." Benjamin Franklin's 1789 newspaper essay, reprinted in Smith, at 11. "Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form." *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

As this Court has held, "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free

discussion of governmental affairs." *Brown v. Hartlage*, 456 U.S. 45, 52 (1982) (quoting *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966)). The First Amendment has "its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). It guards against prior restraint or threat of punishment for voicing one's opinions publicly and truthfully. *Meyer v. Grant*, 486 U.S. 414, 421 (1988). It protects and encourages discussion about political candidates, government structure, and political processes. *Mills*, 384 U.S. at 218–19.

In addition to providing a check on tyranny, freedom of speech ensures the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Id*. (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957) (internal quotation marks omitted)). Speech about public affairs is thus "the essence of self-government" because citizens must be well-informed. *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). They must know "the identities of those who are elected [that] will inevitably shape the course that we follow as a nation." *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976); *see also Citizens United*, 558 U.S. at 349. For these reasons, public discussion is not merely a right; "[it] is a political duty." *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring).

The freedom to speak about political issues on our country's college and university campuses is critical to both a functioning democracy *and* a well-rounded college experience. College students are in the unique

position of being surrounded by true diversity: diversity of thought, background, religion, politics, and culture. For many, this is the first—and perhaps only—time they will be exposed to a "marketplace of ideas" that differ from their own. The college experience can have a significant impact on the leaders of tomorrow. And during their four years of college, most students will be first-time voters. Colleges should therefore encourage lively political discussion to develop a well-informed student body and citizenry.

But at Virginia Tech, and too many schools like it, open debate is stifled. That is because these universities maintain bias reporting systems and bias response teams, whereby students can report each other for so-called "bias incidents." *See* Pet. at 5–7. With no accountability for the accusers, and a lot to lose for the accused, these bias reporting systems scare students like the members of Speech First into self-censorship. As a result, they effectively silence debate on current affairs like the Black Lives Matter movement, immigration, and gender identity. Pet. at 12.

It is imperative that if a public college or university suppresses speech directly or indirectly, students can challenge its actions. This Court has consistently held that a plaintiff need not expose himself to prosecution before challenging censorship. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158–61 (2014) (finding plaintiffs sufficiently alleged a threat of future enforcement when they showed "an intention to engage in a course of conduct arguably affected with a constitutional interest"). To do otherwise would turn

respect for the law on its head and force law-abiding Americans into self-censorship because they would face an unreasonable choice: either break the rules and face the consequences or keep quiet out of fear of prosecution. Likewise, this Court has never required a showing of formal punishment or the authority to impose it before a speaker may challenge censorship. Censorship is insidious; it lurks behind even the most seemingly benevolent decrees. Pre-enforcement challenges are thus an important tool for speakers, including students, to shine a light on censorship in all its forms.

Ignoring these principles, the Court of Appeals for the Fourth Circuit rejected Speech First's challenge to Virginia Tech's Bias Intervention and Response Team ("BIRT"). In doing so, it effectively forces students to subject themselves to punishment that could lead to the end of their college and future careers before asserting their First Amendment freedoms in court. The Fourth Circuit's approach abridges the freedom of speech and suppresses open discussion of governmental affairs and debate on public issues, both of which are vital to America's civil and educational institutions. To ensure the University does not violate the Constitution through forced self-censorship, and to prevent it from robbing its students of their freedom to participate in the political process and everything their campus has to offer, this Court should grant certiorari.

ARGUMENT

I. Certiorari is needed to affirm standing in First Amendment pre-enforcement challenges, even when no actual prosecution or conviction has occurred.

As Justice Brandeis explained in his famous *Whitney v. California* concurrence, "[i]t is therefore always open to Americans to challenge a law abridging free speech and assembly[.]" 274 U.S. at 377 (Brandeis, J., concurring). Nowhere is this more true than when a university's policy punishes or threatens speech, causing a student to choose between her college and future career or self-censorship.

Under typical standing law, an individual must violate a law and be punished before he can challenge the law's constitutionality.[2] But most students are unwilling to risk their college education and future careers in this way. These days, students must tiptoe around each other to avoid offending their classmates. Students live in constant fear that the words they say will be taken out of context, blasted on social media, and turned into a cancellation campaign. Their fears are well-founded; over the last decade, more than 1,400 students, professors, student groups, guest speakers,

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[2] The basic inquiry made to determine whether a party has alleged a case or controversy under Article III of the Constitution "is whether the conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 297–98 (1979) (internal quotations omitted).

buildings, mascots, and more have fallen victim to cancel culture. *See* The College Fix, *Campus Cancel Culture Database*.[3] Facing such intense scrutiny from peers and administrators, students will conclude that they are better off not exercising their First Amendment rights at all.

Recognizing this Catch-22, this Court does not require speakers to expose themselves to prosecution before raising a First Amendment challenge. *See Doe v. Bolton*, 410 U.S. 179, 188 (1973) (holding that a plaintiff "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief"); *see also Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (finding that although the plaintiff had not been arrested for violating the contested law, he had standing to challenge the law because he claimed that it deterred his constitutional rights). Instead, a person may hold his tongue and challenge the law or policy immediately, for the harm of self-censorship is a harm that can be realized even without an actual prosecution. *See Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392–93 (1988) (finding that the plaintiffs had standing to challenge the constitutionality of a criminal statute prohibiting the display of sexually explicit materials even though the plaintiffs were neither charged nor convicted of the crime); *see also Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013) ("[W]hen a challenged statute risks chilling the exercise of First Amendment rights, the Supreme Court has dispensed with rigid standing

[3] https://www.thecollegefix.com/ccdb/.

requirements[.]") (internal quotation marks and citation omitted). All that is needed is a "credible threat of enforcement." *Susan B. Anthony List*, 573 U.S. at 159.

Speakers need not point to a formal law or policy conferring enforcement power on government officials to have First Amendment standing. In *Bantam Books, Inc. v. Sullivan*, this Court struck down a state obscenity commission when its appearance of authority caused publishers to remove books from their shelves for fear of consequences. 372 U.S. 58, 67 (1963). The state officials did not dole out any punishments; indeed, they had *no* authority to punish or otherwise enforce their statements. *Id*. at 59–63. But this Court looked "through forms to the substance," understanding that the mere words and actions of government officials can be enough to prompt unconstitutional self-censorship. *Id*. at 67.

To hold otherwise would incentivize the government never to write anything down. If the government could avoid liability by failing to make a consequence clear, it would simply issue vague proclamations that force speakers to wonder whether the rules apply to them. "Herein lies the vice of the system." *Bantam Books*, 372 U.S. at 69–70. By employing vague language that leaves speakers guessing what penalties will accompany "biased" expression, the harm the government imposes becomes "markedly greater" than if it listed concrete sanctions because it "eliminate[s] the safeguards of the criminal process." The First Amendment protects against such laziness.

But that is exactly what Virginia Tech has done. It broadly bans biased "expressions"—including words, images, and jokes—that "contradict the spirit of the Principles of Community." Pet. at 8–9; CA4.Joint.App'x (JA) 333, 204, 209. The university does little to cabin its terms to avoid infringing on protected speech. In fact, the only standard the university appears to give students is that they should report anything that "*feels*" like a biased "statement or expression." JA200. Students can do so entirely anonymously at the press of a button. App.4; JA147.

Reports of bias travel to the Virginia Tech BIRT, an entire department devoted to eliminating so-called biased speech.[4] *Id*. at 8, 11. BIRT consists of university officials, including members of the Dean of Students Office, the Office of Student Conduct, and the Virginia Tech Police Department. *Id*. at 8, 11. BIRT's guidelines for determining whether something is biased are as loose as the guidelines for students. *See id*. at 8; *see also* JA333. For example, BIRT is expected to determine whether expression is biased by begging the question of whether it "*seem*[*s*] . . . bias-motivated." JA333. If BIRT concludes that bias or a possible conduct violation exists, it will refer the incident to other departments, including the Virginia Tech Police Department

[4] As Petitioner notes, this case is not moot despite Virginia Tech's sudden about-face. *See* Pet. at 16; *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189) (2000) (holding that voluntary cessation does not moot a case unless "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur") (citation omitted).

and the Student Conduct Office—meaning members of the BIRT refer bias incidents to themselves. JA368.

To hold that there is no chill because BIRT cannot actually punish students for perceived bias "misses the point. The lack of discipline against students could just as well indicate that speech has already been chilled." *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 766 (6th Cir. 2019). Moreover, even the mere appearance of authority is enough to chill speech. *See Bantam Books*, 372 U.S. at 66–68.

BIRT gave every appearance of having such authority. The very name "Bias Intervention and Response Team" suggests wrongdoing, and accused students are automatically disadvantaged with the use of terminology like "victim" and "perpetrator." Pet. at 10.

BIRT information is housed directly on the Virginia Tech Dean of Students' webpage. JA333. The team itself is composed of university officials across several campus departments, some of whom have direct authority to discipline students in their own departments. Other BIRT officials may encounter people who are more directly involved in students' everyday lives, from resident assistants, to faculty advisors, to members of the student activities department. A student could reasonably fear reputational harm or similar punishment if word got out that she is "biased." Surely this overlap is enough to deter students from saying or doing anything to appear on BIRT's radar.

It took filing a lawsuit for students get some answers about the extent of authority BIRT possesses.[5] If students are expected to take the drastic step of suing their university each time they are unsure about the authority an official or department has over them, it can hardly be said there is no risk of a chilling effect on their speech.

The ominous nature of bias response teams not only chills the speech of college students but also opens the door wide to abuse by their peers. These days, hecklers go to great lengths to silence speakers. *See* The College Fix, *Campus Cancel Culture Database* (listing 250 examples of guest speakers being protested, heckled, and canceled). With reporting forms at their fingertips, students wishing to prevent a controversial speaker from visiting campus or to stop a student organization from garnering interest in their cause can simply report members of that organization for engaging in bias, tarnishing the students' reputation and impeding their right to speak. Because bias reporting forms, like Virginia Tech's, are typically anonymous, there is no safeguard to ensure that false accusers are held accountable.

And it is only a matter of time before anti-bias codes and their related enforcement mechanisms come

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[5] The district court below held, "Nothing in the Student Code, the protocol, or the BIRT procedures document indicates that the protocol or BIRT procedures document are policies that can be violated and punished under the Code." App.90. But by the same token, nothing says they *aren't*. A reasonable eighteen- to twenty-two-year-old cannot know the difference.

into conflict with the First Amendment. Let's say fictitious Student X decides to hand out flyers depicting abortion procedures to raise awareness for pro-life causes. Another student believes the flyer is "demeaning" and reports Student X to the bias response team. *See* JA140, 333 (listing examples of bias incidents, including "posting flyers that contain demeaning language or images"). At some point, the bias response team will have a decision to make. Does it agree that it is best not to offend anyone and demand that Student X find a different image for her flyer in violation of the First Amendment? Or does the team tell the offended student that the flyer is *not* demeaning, essentially invalidating the student's personal feelings and defeating the team's own mission? Or does the bias response team agree that the flyer is demeaning, but advise the student there is nothing it can do, thereby ignoring the perceived injustice? This option is probably the best out of the three, but it demonstrates that the bias reporting process is an enormous waste of resources that only results in disappointment for the offended party and confusion and reputational harm for the reported party. Either a university is committed to eliminating bias in *all* forms—which necessitates infringing on protected speech—or it is not. In this way, bias codes clash with the First Amendment. This is the appropriate vehicle to remedy it.

II. Certiorari is needed to prevent forced self-censorship and ensure our nation's college students can partake in open political discourse.

This Court has long held that a college campus is the "marketplace of ideas" where students are exposed "to that robust exchange of ideas which discovers truth." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). Indeed, freedom of speech and academic inquiry are "vital" on college campuses, because only through thoughtful debate and discourse can real education occur. *Healy v. James*, 408 U.S. 169, 180 (1972). Open dialogue is particularly vital on college campuses where students are formed into tomorrow's leaders; as such, they must be well-versed on matters of public import and our nation's founding principles. *See Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).

For this reason, unique standing considerations associated with the First Amendment are even more critical when the speech codes that a party seeks to challenge tend to suppress political speech. At Virginia Tech, bias includes expression against individuals based on race, gender identity, sexual orientation, and even political affiliation. JA140. In today's world, it is inevitable that political speech is woven into each of those topics.

Three circuit courts of appeals have applied these well-settled standards and found that college students who want to engage in political speech have standing to challenge their bias response teams, regardless of

the enforcement authority the bias response team has. *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). Two have not. *Speech First, Inc. v. Sands*, 69 F.4th 184 (4th Cir. 2023); *Speech First, Inc. v. Killeen*, 968 F.3d 628 (7th Cir. 2020). Brought by the same challenger each time, with nearly identical policies and bias response teams, the split could not be purer.

The circuit split must be resolved in favor of open inquiry and debate on campus. Here, the mere appearance of disciplinary authority is tantamount to forced censorship of students who wish to contribute to political and public discourse. "[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United*, 558 U.S. at 340. The Fourth and Seventh Circuits' treatment of standing scares university students who would otherwise partake in political debate into self-censorship. Reversal is imperative to protect political speech and to ensure that university students—and all Americans—may continue to freely participate in the democratic process with open and lively debate.

CONCLUSION

For the reasons stated in the Petition for Writ of Certiorari and this amicus curiae brief, this Court should grant the writ of certiorari.

Respectfully submitted,

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