No. _____

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

PETITION FOR WRIT OF CERTIORARI

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August 14, 2023 *Attorneys for Petitioner*

QUESTION PRESENTED

Hundreds of universities have a "bias-response team"—an official entity that solicits reports of bias, tracks them, investigates them, asks to meet with the perpetrators, and threatens to refer students for formal discipline. Universities formally define "bias" to cover wide swaths of protected speech. Bias-response teams are staffed by administrators, disciplinarians, and even police officers—a literal speech police.

The Fifth, Sixth, and Eleventh Circuits hold that bias-response teams objectively chill students' speech; but the Fourth and Seventh Circuits hold that they don't. *Compare 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)*, with Speech First, Inc. v. Sands*, 69 F.4th 184 (4th Cir. 2023); *Speech First, Inc. v. Killeen*, 968 F.3d 628 (7th Cir. 2020). All five cases in this 3-2 split involve the same plaintiff, the same procedural posture, and the same basic facts. To quote Judge Wilkinson's dissent below: "This circuit split creates a patchwork of First Amendment jurisprudence for schools across the country" on "the vitally important issue of free speech." Appendix (App.) 73.

The question presented is:

Whether bias-response teams objectively chill students' speech.

RULE 29.6 STATEMENT

Speech First, Inc., has no parent company or publicly held company with a 10% or greater ownership interest in it.

RELATED PROCEEDINGS

United States District Court (W.D. Va.):

Speech First, Inc. v. Sands, No. 7:21-cv-203 (Sept. 22, 2021) (opinion granting in part and denying in part motion for preliminary injunction)

United States Court of Appeals (4th Cir.):

Speech First, Inc. v. Sands, No. 21-2061 (May 31, 2023) (opinion below)

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JURISDICTION

The Fourth Circuit's judgment was entered on May 31, 2023. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III vests "[t]he judicial Power of the United States" in the federal courts and limits that power to certain "Cases" and "Controversies." U.S. Const. art. III, §§1-2.

The Free Speech Clause of the First Amendment prohibits Congress from abridging "the freedom of speech"; the Fourteenth Amendment extends that prohibition to the States and guarantees "due process of law." U.S. Const. amends. I, XIV.

INTRODUCTION

This Court hasn't addressed the free-speech rights of college students since at least 2010. *See Christian Legal Soc. v. Martinez*, 561 U.S. 661 (2010). Over that time, those rights have not fared well. "[C]ampus censorship has reached epidemic levels." *Unsafe Space: The Crisis of Free Speech on Campus* 2 (Slater ed. 2016). "Every month, if not every week, has brought additional instances of campuses being urged to punish students for their speech." Chemerinsky & Gillman, *Free Speech on Campus* 7 (2017). And universities, "in a spirit of panicked damage control, are delivering." *A Letter on Justice and Open Debate*, Harper's (July 7, 2020), perma.cc/48K8-H73R. The result, according to "overwhelming survey research," is that students don't feel free to speak. Bipart. Policy Ctr., *Campus Free Expression: A New Roadmap* 6 (Nov. 2021), perma.cc/7LB7-E7CA. "Simply put, at most of America's colleges and universities, speech is far from free." FIRE, *Guide to Free Speech on Campus* 5 (2012).

Though the First Amendment contains no exception for "hateful," "harassing," or "biased" speech, universities often try to suppress it. Speech codes—outright prohibitions on speech—are one tool. But speech codes have a terrible record in court. *Fenves*, 979 F.3d at 338-39 & n.17. Precisely because speech codes are often struck down, universities have looked for subtler, more sophisticated ways to chill "offensive" speech. CA4.Joint.App'x (JA) 246.

Enter the bias-response team. Instead of outright banning biased speech, these teams deter it by threatening students with adverse consequences. They also

burden it by imposing a series of administrative and other costs on students who commit "bias incidents." Jurists and commentators have dubbed these teams

- "the clenched fist in the velvet glove of student speech regulation," *Fenves*, 979 F.3d at 338;
- a "bureaucratic superstructure" with "such incipient inquisitorial overtones" that it "turns its campus into a surveillance state," App.40, 44 (Wilkinson, J., dissenting); and
- "the stuff of Orwell, although even he might have found the name 'Bias Response Team' to be over-the-top," Steinbaugh, *Hundreds of Campuses Encourage Students to Turn in Fellow Students for Offensive Speech*, Wash. Examiner (Feb. 21, 2017), perma.cc/YL4Q-PB52.

The resulting atmosphere created by these teams is arguably even "more stifling" than traditional speech codes. Schneider, *A Year of Discontent on Campus*, Dispatch (Feb. 6, 2020).

Bias-response teams are designed to get as close to the constitutional line as possible, so it's no surprise that they've divided the lower courts. Five circuits have considered five lawsuits. All were filed by Speech First, against major universities, challenging similarly structured teams. The circuits have split 3-2 on whether Speech First has Article III standing—specifically on whether bias-response teams objectively chill students' speech. Because the answer to that question is vitally important to the rights of college students nationwide, this Court should grant certiorari.

STATEMENT OF THE CASE

Bias-response teams are the latest in a long-running effort by universities to deter certain undesirable speech. Virginia Tech's team—the Bias Intervention Response Team, or BIRT—is a classic of the genre. The Fourth Circuit held that it doesn't objectively chill speech, joining the bottom of a 3-2 circuit split.

A. Universities adopt policies to silence "biased" speech by students.

The First Amendment reflects "'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). The "'vigilant protection'" of these freedoms is "'nowhere more vital than in the community of American schools.'" *Healy v. James*, 408 U.S. 169, 180 (1972). Universities are "peculiarly the marketplace of ideas," training future leaders "through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than … authoritative selection." *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967) (cleaned up). So the "mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973).

Yet universities across the country have resisted these principles. Instead of allowing free-ranging debate, many colleges are more interested in protecting students from ideas that make them uncomfortable. They embody the "unfortunate tendency by some to

defend First Amendment values only when they find the speaker's message sympathetic." *303 Creative LLC v. Elenis*, 143 S.Ct. 2298, 2321 (2023). As former Harvard president Lawrence Summers recently warned, universities too often "resist intellectual diversity, including conservative and non-coastal viewpoints," and have "creat[ed] a stifling orthodoxy … as oppressive as McCarthyism." Hoffman, *Summers Tells Sun He Worries Economic Policy Being Driven by 'Sentiment,' 'Politics,'* N.Y. Sun (Mar. 4, 2022), perma.cc/9GVS-6SPH. Universities do this by adopting policies and procedures that discourage speech by students who reject the prevailing campus orthodoxy.

One rapidly growing effort to suppress speech is the "bias response team." Living up to their Orwellian name, these teams encourage students to monitor each other's speech and to report incidents of "bias" to the university. "Bias" is defined broadly and covers protected speech on virtually any topic; in fact, whether speech is "biased" often turns on the listener's subjective reaction to it. JA.246, 249-51. Students have been reported to bias-response teams for, among other things,

- writing a satirical article about "safe spaces";
- tweeting "#BlackLivesMatter";
- chalking "Build the Wall" on a sidewalk; and
- watching a video of Ben Shapiro.

JA.252-55; Schneider, *'Bias Teams' Welcome the Class of 1984*, Wall St. J. (Aug. 5, 2019), perma.cc/KMA3-33DK. Because accusers need not identify themselves,

these policies create "anonymous snitch system[s]" where students "aggressively police one another's speech." Ferguson, *Bias-Response Teams Are a Bad Idea*, Chron. of Higher Ed. (June 5, 2023).

After receiving reports of a bias incident, the bias-response team typically logs the incident, investigates it, meets with the relevant parties, attempts to reeducate the "offender," and recommends an intervention (including formal or informal discipline). *E.g.*, *Fenves*, 979 F.3d at 325-26; *Schlissel*, 939 F.3d at 762-63. Bias-response teams are usually staffed by university administrators, disciplinarians, and even police officers—a literal "speech police." JA.245, 256. Studies have found that, "[d]espite espousing educational philosophies," bias-response teams really adopt a "punitive/criminal justice orientation toward focusing on individual acts and the individuals responsible." Miller et al., *A Balancing Act: Whose Interests Do Bias Response Teams Serve?*, 42 Rev. of Higher Ed. 313, 326-27 (2018). As Judge Cabranes puts it, these campus "'Civility Police' have started to adopt the tactics of the real police"—except "to fight speech, not to fight crime." 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. Inter Alia 345, 360 (2017).

Though universities insist that bias-response teams aren't threatening, they know that students don't see it that way. According to a comprehensive study by FIRE, bias-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."

JA.265. Professors, too, stress that these teams "result in a troubling silence": They leave students "afraid to speak their minds" and empower virtually anyone to "leverage bias reporting policies to shut down unpopular or minority viewpoints." JA.264. Other professors say these policies resemble "McCarthyism," or "the way citizens were encouraged to inform on one another by governments in the Soviet Union, East Germany and China." Belkin, *Stanford Faculty Say Anonymous Student Bias Reports Threaten Free Speech*, Wall St. J. (Feb. 23, 2023), perma.cc/4ZWC-LVT6.

Yet bias-response teams are proliferating. In 2017, more than 200 universities had bias-response teams and the number was "growing rapidly." JA.241. By 2022, that number has more than doubled, with more than 450 universities maintaining sophisticated bias-reporting schemes. *See* Speech First, *Free Speech in the Crosshairs: Bias Reporting on College Campuses* 3 (2022), perma.cc/DGR4-ERU3. To be sure, Speech First has challenged several of these teams in court, including Michigan's Bias Response Team, Texas's Campus Climate Response Team, and Central Florida's Just Knights Response Team. Those teams no longer exist: Once the appellate courts held that Speech First likely had standing, all three universities signed binding settlement agreements eliminating their bias-response teams. *See Court Battles*, Speech First, perma.cc/4MLT-2NR6. Despite these victories, the overall trend is negative: Many more universities are creating new bias-response teams or clinging to old ones. *Crosshairs* 3.

B. Virginia Tech adopts a bias-incidents policy enforced by its Bias Intervention and Response Team.

Virginia Tech joined this unfortunate trend. For years, it has monitored, logged, and responded to student speech through its "bias-incidents" policy. That policy is enforced through a bias-response team, called the Bias Intervention and Response Team or BIRT. App.4; JA.368. BIRT is staffed with senior university officials, including administrators with disciplinary power. App.4-5 & n.1; JA.370. On BIRT are members of the Office of Student Conduct, the Virginia Tech Police Department, and others. JA.370. BIRT's purpose, as reflected in its name, is straightforward: to "eliminate" biased speech through "immediate direct or indirect responses to bias-related incidents." JA.369.

The University's policy formally defines "bias incident." JA.333. The definition is broad, legalistic, and focused on speech: Bias incidents are "*expressions* against a person or group" based on "age, color, disability, gender (including pregnancy), gender identity, gender expression, genetic information, national origin, political affiliation, race, religion, sexual orientation, veteran status, or any other basis protected *by law*." App.4 (emphases added); *see* JA.333, 204. A bias incident can occur on or off campus, including on social media. App.105; JA.149. Students "can be referred for bias-related behavior" at all times—"[f]rom admission to commencement." JA.372.

Examples of bias incidents include "words or actions that contradict the spirit of the Principles of

Community," "jokes that are demeaning to a particular group of people," "assuming characteristics of a minority group for advertising," and "posting flyers that contain demeaning language or images." App.101; JA.333. To avoid a bias incident, the University warns students to "[b]e aware of words, images, and situations that suggest all or most of a group are the same"; "[b]e aware of language that has questionable racial, ethnic, class, or sexual orientation connotations"; and "[r]eview language, images, and other forms of communication to make sure all groups are fairly represented." JA.144.

Reporting bias incidents is easy. Students and third parties can submit complaints through an online reporting tool ("Bias Incident Reporting Form"), email, or social media. App.105; JA.355-56 ¶8; JA.146-47. Like a crime-reporting hotline, complaints about biased speech can be made anonymously. App.4. The intake form asks students to specify the date and location of the alleged incident and to "list all involved parties." JA.147-48. Entries include the perpetrator's name, role in a student organization (if any), email address, and Virginia Tech student ID number. JA.147-48. Complainants can choose from a list of twelve personal characteristics (*e.g.*, race, gender identity, political affiliation) as the alleged source of bias. JA.148-49. Complainants then identify where the speech was made, such as a "Comment in Class or Assignment," "Comment in Person," "Comment in Writing or on Internet," "Comment via Email/Text," or "Comment via Phone/Voicemail." JA.149.

The University has long encouraged students to report bias incidents and ensured that BIRT is "publicized and known to all community members." JA. 372; App.4. For example, the University developed a "See Something? Say Something!" campaign—borrowing from the Department of Homeland Security's famous program to stop terrorism. App.4; JA.204; *see generally If You See Something, Say Something*, DHS, perma.cc/USW7-UGQH. The Dean of Students "encourage[s]" students "to make a report" if they "hear or see something that *feels* like a bias incident, statement, or expression," even if they are "unsure." JA.200 (emphasis added). "In short, if you see something, say something!" JA.200; *accord* JA.202, 209, 213. Like law enforcement, BIRT uses terminology suggesting that serious wrongdoing has occurred, including "perpetrator," "victim," "bystander," "targeted," "incident," and "accused." JA.369-70.

Bias reports often involve protected speech. These reports can be obtained via public-records requests, and journalists obtained several reports to BIRT from 2018. *See* Schneider, *Virginia Tech on the Hunt for Campus Penis Artists*, The College Fix (May 3, 2019), perma.cc/JSL9-RT8V. Those reports are in the record. They show that students at Virginia Tech have been accused of a bias-related incident for, among other things,

- writing "Saudi Arabia" on a whiteboard outside of a student's dorm room (bias based on "national or ethnic origin");
- describing female students as unathletic (bias based on "gender"); and

- telling a joke that included "Caitlyn Jenner's deadname" (bias based on "gender identity").

App.105-06.

Virginia Tech strives to be "proactive and responsive" to bias incidents. JA.368, 372. BIRT usually responds to complaints "within 24 hours." JA.278. Complaints about bias incidents are directed to the Office of the Dean of Students. App.101; JA.372. The Dean's office will "[r]ecord exactly what was said" and will "[l]og details of the incident" in a case-management system. JA.368-69; JA.372; JA.361 ¶17; App.102. To determine whether "bias" occurred, the Dean's office will ask, among other things, whether the expression was "bias-motivated" or "violate[s] the shared values and expectations of university community members." JA.333. If BIRT "determine[s] [that] bias exists," it will engage in an "interventio[n]" with the student that is "educational or restorative." JA.372; *see* JA.143. If "appropriate," the incident will be referred to the "Virginia Tech or Blacksburg Police Department, [the] Threat Assessment Team, [the] Student Conduct Office, [or the] Title IX Office." JA.368; JA.355-56 ¶8; JA.359-60 ¶15; App.102.

C. Speech First sues on behalf of its members who attend Virginia Tech.

Speech First is a nationwide membership organization of students, alumni, and others that is dedicated to preserving civil rights secured by law, including the freedom of speech. App.84; JA.640. Speech First has successfully vindicated students' rights at the University of Michigan, the University of Texas,

the University of Illinois, Iowa State University, the University of Central Florida, and the University of Houston. *See Court Battles*.

Speech First has members who currently attend Virginia Tech. App.8 n.3; *see* CA4.Dkt.67-4 ¶1; CA4.Dkt.67-5 ¶1.[1] These students' views are "unpopular, controversial, and in the minority on campus." CA4.Dkt.67-4 ¶4; CA4.Dkt.67-5 ¶4; CA4.Dkt.67-6 ¶6. For example, one student believes that "biological males are [not] actually 'female' simply because they identify that way." CA4.Dkt.67-4 ¶6; *accord* CA4.Dkt.67-5 ¶6. Another believes that Black Lives Matter is "destructive and fundamentally racist" and that "people who cross the border should be referred to as 'illegal aliens,' because that is what they are." CA4.Dkt.67-5 ¶7. Speech First's members want to "engage in open and robust intellectual debate" with their fellow students and "speak passionately and repeatedly" about their views in class, online, and in the broader community.

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[1] In the district court, Speech First provided declarations from three of its members who self-censor because of the University's bias-response team. *See* App.84-86; JA.337-51. After those students graduated, the Fourth Circuit allowed Speech First to "supplement the appellate record with affidavits from four additional students … who assert identical injuries and are currently enrolled at Virginia Tech." App.8 n.3; *see* CA4.Dkt.67. The Fourth Circuit thus "consider[ed] the declarations of [these students] as part of the record on appeal." App.8 n.3; *accord Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 718-19 (2007). Two of those students are still enrolled at Virginia Tech, and the youngest will not graduate until 2025. CA4.Dkt.67-4 ¶1; CA4.Dkt.67-5 ¶1.

CA4.Dkt.67-4 ¶9-10; CA4.Dkt.67-5 ¶9-10; CA4.Dkt. 67-6 ¶7.

But these students censor their speech because of the University's bias-incidents policy. CA4.Dkt.67-5 ¶11-12; CA4.Dkt.67-5 ¶11-12; CA4.Dkt.67-6 ¶8. They fear that students, faculty members, or others will report them to university officials for committing a bias incident. CA4.Dkt.67-4 ¶12; CA4.Dkt.67-5 ¶12. Because the definition of "bias" is so broad and vague, they know that someone will find their speech to be biased and report them to BIRT, and they fear the many repercussions. CA4.Dkt.67-4 ¶12; CA4.Dkt.67-5 ¶12. For example, they fear that the Dean will keep a dossier on them, share the allegations with others at the university, call them in for meetings or "interventions," or refer the allegations to disciplinary authorities, including the Office of Student Conduct. CA4. Dkt.67-4 ¶12; CA4.Dkt.67-5 ¶12. As a result, these students do not fully express their beliefs and avoid certain topics altogether. CA4.Dkt.67-4 ¶12; CA4. Dkt.67-5 ¶12; CA4.Dkt.67-6 ¶8.

D. The Fourth Circuit, over Judge Wilkinson's dissent, rules for Virginia Tech.

In April 2021, Speech First sued Virginia Tech and moved for a preliminary injunction, asking the Court to enjoin the University from enforcing its bias-incidents policy. Speech First supported its motion with a verified complaint, more than two dozen exhibits, and declarations from its executive director and three student-members. JA.9-351.

The district court declined to enjoin enforcement of the bias-incidents policy. Speech First lacked standing, the court reasoned, because the policy "do[es] not proscribe anything" and BIRT "lacks any authority to discipline or otherwise punish students." App.107. In so holding, the court "recogniz[ed] its departure from the Sixth Circuit's decision in *Speech First v. Schlissel* and the Fifth Circuit's decision in *Speech First v. Fenves,*" but it found the Seventh Circuit's decision in *Speech First v. Killeen* more persuasive. App.109, 112 (cleaned up). After the district court issued its opinion, the Eleventh Circuit held that Speech First had standing to challenge another bias-response team in Florida, further deepening the split. *Cartwright*, 32 F.4th at 1110.

The Fourth Circuit affirmed in a divided opinion, with Judge Wilkinson in dissent. Like the district court, the majority found that Speech First lacked standing because Virginia Tech's bias-response team has no "'authority to discipline or otherwise punish students'" and so no "objectively reasonable student would self-censor to avoid encountering it." App.19, 22. Acknowledging the split, the majority sided with "the Seventh Circuit and [the dissent in] the Sixth Circuit." App.23-25. In stark contrast to the Fifth, Sixth, and Eleventh Circuits, the majority praised the University's bias-response team as "a way to educate [the] student body" about "harmful stereotypes," "discriminatory tropes," and "'the role of tolerance in the campus community.'" App.27.

Judge Wilkinson dissented. In his view, BIRT is not the "sweet, innocent little system the majority envisions." App.78. It imposes a "regime of comprehensive surveillance," creating "an oppressive atmosphere of scrutiny from which there is no reprieve." App.49-50. The University's "proffered assurance that BIRT cannot directly punish students" ignores the "real-world consequences." App.39. The "reality" is that the University "has constructed a complex apparatus for policing and reporting whatever administrators may deem 'biased speech.'" App.39.

This "intricate program," Judge Wilkinson observed, has "a straightforward effect: students self-censor, fearing the consequences of a report to BIRT and thinking that speech is no longer worth the trouble." App.39-40. The policy's "prohibitive effect on speech" is "evident from its face" and follows "as surely as the night follows the day." App.42. The University's bias apparatus "causes students to self-censor for fear of being reported, thus effecting an objective chill on speech." App.43. Speech First "of course … has standing." App.43.

"Making matters worse," Judge Wilkinson continued, the majority's decision "splits from three of our sister circuits." App.70. No "mere theoretical disagreement," this "circuit split creates a patchwork of First Amendment jurisprudence for schools across the country." App.73. On "the vitally important issue of free speech on college campuses," this "circuit spli[t]" means that "students in Michigan, Florida, and Texas [are] protected from unconstitutional policies while students in Virginia remain exposed." App.73. Judge

Wilkinson would have "enjoin[ed] this ill-conceived experiment in its entirety," thus "allowing the University a new start, one which returns the fresh air of free speech to its rightful place in campus life." App.40.

Speech First filed this timely petition. All proceedings in the district court are stayed until this Court finally resolves the petition. *See* D.Ct.Dkt.51. A month after the Fourth Circuit issued its mandate (and days after the University learned that Speech First was likely seeking certiorari), counsel for the University emailed counsel for Speech First, asserting that the University "has dissolved its Bias Intervention and Response Team." Whatever that means in practice, the University has not argued that such a late-breaking, voluntary change—after the University defended BIRT's legality for two years in two courts—could possibly moot the case. Any such argument would be a blatant attempt to manipulate this Court's jurisdiction, plainly wrong, and not a reason to deny certiorari anyway. *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 179, 189, 193-94 (2000). If the University argues otherwise in its opposition, Speech First will respond in reply.

REASONS FOR GRANTING THE PETITION

The most common reason why this Court grants certiorari—and the first one listed in its rules—is to resolve circuit splits on important questions of federal law. The question here has created an acknowledged five-circuit split, and the answer could not be more important to the constitutional rights of college students. This case is an ideal vehicle to resolve the split because Virginia Tech's team is typical, the material

facts are undisputed, and the legal question is fully vetted. The Fourth Circuit answered that question incorrectly. As explained by Judge Wilkinson and the three circuits in the majority, bias-response teams objectively chill the speech of dissenting college students like Speech First's members. This Court should grant certiorari and reverse.

I. Whether bias-response teams objectively chill speech is an important question that has split five circuits.

A circuit split is the most common and obvious reason for this Court to exercise its discretionary jurisdiction. Shapiro et al., *Supreme Court Practice* §4.I.4 (11th ed. 2019). To quote this Court's Rule 10(a), certiorari is warranted when two or more circuits "conflict" on the "same important matter." The conflict here runs five circuits deep. And it is vitally important to the free-speech rights of college students across the country.

1. The circuits are split, three to two, on whether bias-response teams objectively chill speech. The Fifth, Sixth, and Eleventh Circuits are on one side, while the Fourth and Seventh are on the other.

These five cases are materially indistinguishable, as the Fourth Circuit acknowledged below. App.23-25. All involve the same plaintiff (Speech First). All were decided at the same stage (preliminary injunction). And all address the same question of Article III standing. Hence why the Fourth Circuit did not *distinguish* the other four cases; it said one was right and the other three were wrong. App.24-25.

This split is widely acknowledged. The Fourth Circuit "recognize[d]" that it was joining the Seventh and splitting with the Fifth, Sixth, and Eleventh Circuits. App.23. The dissent was blunter: "[T]oday's decision splits from three of our sister circuits." App.70 (Wilkinson, J., dissenting). Even before the Fourth Circuit deepened the split, courts recognized that the "circuit courts of appeals are split on whether the implementation of a bias-response team … can support standing." *Speech First, Inc. v. Cartwright*, 2021 WL 3399829, at *4 (M.D. Fla. July 29); *accord* App.112 (district court recognizing its "departure" from the Fifth and Sixth Circuits). Commentators on both sides of the issue recognize the split too. *E.g.*, Ed. Bd., *Virginia Tech's Bias Response Team and the First Amendment*, Wall St. J. (June 11, 2023), perma.cc/JY86-QJEY ("other circuits have taken the view that Judge Wilkinson does"); Shultz, *Ice Ice, Maybe?: Do University Bias Incident Report Teams Really Chill Student Speech, or Are They Just a Conduit?*, U. Cinn. L. Rev. Blog (Oct. 21, 2022) ("circuit split"); Note, *University Bias Response Teams: Balancing Student Freedom from Discrimination and First Amendment Rights Through Student Outreach*, 55 Ind. L. Rev. 809, 817 (2022) ("split"); Garces et al., *Legal Challenges to Bias Response Teams on College Campuses*, 51 Sage Journals 431, 433 (2022) (similar).

And while a 3-2 circuit split is plenty deep, the conflict is deeper than that. Most of the appellate panels were divided, and five district courts have weighed in too. All told, twenty federal judges have considered whether bias-response teams objectively chill speech.

That question split those judges right down the middle: Ten said yes.[2] And ten said no.[3]

Resolving questions that divide the lower courts is perhaps the strongest justification for this Court's discretionary jurisdiction. Most of this Court's cases are granted because the lower courts are split—often far less deeply and evenly than they're split here. *E.g.*, *Axon Enterprise, Inc. v. FTC*, 143 S.Ct. 890, 899-900 (2023) (1-1 split); *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 143 S.Ct. 927, 934 & n.3 (2023) (2-1 split); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 143 S.Ct. 1689, 1695 (2023) (2-1 split). For reference, the five circuits that comprise this split contain about half the country's population, including seven of the ten most populous States.

Review is especially critical when a circuit conflict implicates core constitutional rights, like the freedom of speech. *E.g.*, *Counterman v. Colorado*, 143 S.Ct. 2106, 2113 (2023) (certiorari granted because "[c]ourts

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[2] Judge Wilkinson (CA4), Judge Jones (CA5), Judge Costa (CA5), Judge King (CA5), Judge Cook (CA6), Judge McKeague (CA6), Judge Newsom (CA11), Judge Marcus (CA11), and one district judge sitting by designation. Judge Brennan (CA7) largely agreed that bias-response teams chill speech, but he faulted Speech First for evidentiary issues not present here. *See Killeen*, 968 F.3d at 652-53 (Brennan, J., concurring in part and dissenting in part).

[3] Judge Diaz (CA4), Judge Motz (CA4), Judge White (CA6), Judge St. Eve (CA7), Judge Scudder (CA7), and five district judges.

are divided" on a First Amendment issue); *accord Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S.Ct. 2038, 2044 (2021); *Manhattan Cmty. Access Corp. v. Halleck*, 139 S.Ct. 1921, 1927 (2019); *Lane v. Franks*, 573 U.S. 228, 235 (2014). The rights secured by our foundational charter should not turn on arbitrary distinctions like which federal circuit happens to contain a student's college. To quote Judge Wilkinson, this "circuit split" on "the vitally important issue of free speech on college campuses" results in "students in Michigan, Florida, and Texas being protected from unconstitutional policies while students in Virginia remain exposed." App.73 (dissent).

2. If the Fourth Circuit was right below, then bias-response teams are immune from judicial review—an "important matter" that merits this Court's consideration. S.Ct.R.10(a). This Court maintains an "enduring commitment to protecting the speech rights of all comers, no matter how controversial." *303 Creative*, 143 S.Ct. at 2320. It regularly deems "First Amendment issues" to be "important" enough for certiorari. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540 (2001); *Ward v. Rock Against Racism*, 491 U.S. 781, 784 (1989). These issues are "'nowhere more vital'" than on college campuses. *Healy*, 408 U.S. at 180. Our nation's universities are tasked with training our future leaders. *Keyishian*, 385 U.S. at 603. They must remain a free "'marketplace of ideas,'" else "'our civilization will stagnate and die." *Id.*

If Speech First is right, then bias-response teams are chilling the speech of millions of college students

nationwide. The number of bias-response teams continues to grow, approximately doubling over the last five years. *Crosshairs* 3. Speech First studied 824 universities and found that more than half had a bias-reporting system. *Id.* These policies are just as common at public universities as they are at private universities. *Id.* No wonder then that, over this same period, students report feeling less free to speak on campus than ever. According to one comprehensive survey, "[m]ore than 80% of students reported self-censoring their viewpoints at their colleges." College Pulse et al., *College Free Speech Rankings* 3 (2021), perma.cc/8TAA-NZ8H; *accord* JA.319 (only 20% of Hokies said they felt comfortable expressing minority views in class). Even absent a circuit split, this troubling trend would warrant this Court's review. *See Harris v. Quinn*, 573 U.S. 616, 627 (2014) (granting certiorari because "other States were following Illinois' lead by enacting laws" that raise "important First Amendment questions").[4]

The broader implications of the Fourth Circuit's decision are also troubling. According to that court, Speech First doesn't even have *standing* to challenge bias-response teams because they don't do enough to chill speech. By that logic, a university could set up a team that targets any disfavored speech: a Zionism

[4] Universities too—if you gave them truth serum—would say they need this Court's guidance on how to address "bias within the parameters of the First Amendment." Lee, *General Counsel's Corner: Bias Response Teams – No Easy Answers*, JD Supra (Feb. 2, 2022), perma.cc/28NY-7L9Y.

Response Team (for speech favorable to Israel), a Patriotism Response Team (for speech critical of the war on terror), or a MAGA Response Team (for speech supporting President Trump). And if these teams don't even implicate the First Amendment, then cities and States can set them up too. Far from theoretical, Oregon now has a formal process for reporting "bias incidents" to its attorney general. *Report a Bias Crime or Incident*, Ore. DOJ, perma.cc/KQ3P-HUNN (captured Aug. 8, 2023). And New York City has its own "Bias Response Team." *Responding to Bias*, NYC, perma.cc/WU5A-7FBT (captured Aug. 8, 2023). A decision from this Court is needed to halt these disturbing trends.

II. This case is an ideal vehicle for reaching the question presented.

If this Court agrees that it should resolve the split over bias-response teams, it might never see a better vehicle. The team at Virginia Tech is representative of the other problematic teams nationwide. Whether that team objectively chills speech is a pure question of law. And no further percolation—either here or in other circuits—is needed.

1. Despite slight differences, bias-response teams "work much the same from school to school." Yockey, *Bias Response on Campus*, 48 J.L. & Educ. 1, 3 (2019). They "follow the same basic structure." *Id.* at 5. The five cases that comprise this split all involve university policies that

- create a formal entity with "response team" in its name;

- staff the team with university officials who otherwise have disciplinary authority;
- adopt a formal definition of "bias incident" that broadly covers protected speech;
- solicit anonymous reports;
- log the reports and conduct follow-up;
- contact students accused of bias incidents and ask them to attend a "voluntary" meeting; and
- warn students that the team can refer incidents for formal discipline.

See Fenves, 979 F.3d at 325-26; *Schlissel*, 939 F.3d at 762; *Killeen*, 968 F.3d at 632-35; *Cartwright*, 32 F.4th at 1115-18; App.4-6 (majority); App.44-51 (Wilkinson, J., dissenting).

Virginia Tech's BIRT has all these features. It is a classic bias-response team that was created in 2019, when these teams were first starting to proliferate nationwide. The record here also contains a year's worth of bias incidents that were actually reported to Virginia Tech—concrete examples that will further aid this Court's review.

2. The question presented is purely legal. It's a question of Article III standing. And it turns on whether the University's policy would chill the speech of a reasonable college student—an "objective" inquiry. *Cartwright*, 32 F.4th at 1119-20 & n.2. That chilling effect comes from the outward-facing materi-

als that students see: the text of the policy, the structure of BIRT, and what the University tells students about it. Those written materials are in the record. Further discovery into unwritten policies and practices would serve little purpose. As Judge Wilkinson recognized below, the existing record "is wholly sufficient to resolve this matter here and now." App.41 (dissent).

Though the Fourth Circuit wrapped itself in the district court's "findings of fact," App.25, that framing is largely beside the point. Speech First does not dispute what BIRT says it does. *Schlissel*, 939 F.3d at 765. It disputes whether, given what BIRT says it does, a reasonable student would refrain from speaking. Contra the Fourth Circuit, that latter determination is a legal question, not a "factual finding." App.14. Speech First, in other words, can prevail without disturbing anything that the district court found about BIRT's operations. The Fourth Circuit's assertion that the Fifth, Sixth, and Eleventh Circuits did not give proper "deference" to the district courts is thus wrong and simply highlights the split. App.24. Those circuits "sized up an important issue of constitutional *law*," and "their *legal* analysis strives to protect First Amendment rights where [the Fourth Circuit's] stumbles." App.72-73 (Wilkinson, J., dissenting) (emphases added). The Fourth Circuit's conflation of law and fact is yet another way it erred.

3. This legal question needs no further percolation. Twenty federal judges have addressed whether bias-response teams objectively chill speech in twelve separate opinions. Collectively, those opinions cover

all the possible arguments on both sides of the issue. Though the split might deepen if more teams are challenged in more circuits, those additional decisions will not meaningfully help this Court. But the delay would have costs. "Whichever way [this Court] were to decide on the merits, it would be intolerable to leave unanswered" this important "First Amendment" question for years, as entire classes of college students have their speech chilled by bias-response teams. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974).

Nor could the University resist certiorari because this case is "interlocutory." Though Speech First appealed from the denial of a preliminary injunction, all lower-court proceedings are stayed pending this Court's decision. And all five cases in this 3-2 split were decided at the preliminary-injunction stage too. This Court often grants certiorari in that posture. *E.g.*, *Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1876 (2021); *Chrysafis v. Marks*, 141 S.Ct. 2482, 2482-83 (2021); *Ramirez v. Collier*, 142 S.Ct. 1264, 1272, 1275 (2022); *Whole Woman's Health v. Jackson*, 141 S.Ct. 2494, 2495 (2021). This Court is especially willing to hear cases before final judgment when they involve "the proper scope of First Amendment protections." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55 (1989). These "protections should not be placed at the sufferance of extended rounds of litigation," as "[t]he longer its beneficiaries languish in litigation, the more its value and meaning is lost." App.41 (Wilkinson, J., dissenting).

III. The Fourth Circuit got it wrong.

This much is common ground: To prove associational standing, Speech First must prove that one of its members would have standing to sue on her own. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S.Ct. 2141, 2157 (2023). And for a member to have injury, causation, and redressability herself, the University's policy must objectively chill her speech. App.13; *Cartwright*, 32 F.4th at 1120; *Fenves*, 979 F.3d at 333; *Killeen*, 968 F.3d at 638; *Schlissel*, 939 F.3d at 764.

This much *should be* common ground: The government can objectively chill speech without directly prohibiting it. *Am. Commc'ns Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 402 (1950). A policy can be challenged "even though it has only an indirect effect on the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 12-13 (1972). The government "may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011). Administrative burdens thus can chill speech. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 165 (2014). So can "concer[n] about the expense of becoming entangled." *Counterman*, 143 S.Ct. at 2115. So can "informal sanctions," "threat[s]," and "other means of coercion, persuasion, and intimidation." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).

This Court applied these principles in *Bantam Books*. Because the First Amendment strictly limits States' power to ban obscenity, Rhode Island tried to

discourage obscenity through a Commission to Encourage Morality in Youth. *Id.* at 59. The commission's mission was to "educate the public" about obscene materials. *Id.* It would receive "complaints from outraged parents," "investigate" incidents, circulate "lists of objectionable publications," and "recommend legislation, prosecution and/or treatment" to address them. *Id.* at 60 n.1. If the commission concluded that a book was "objectionable," the commission would send a notice to the publisher and thank it for its "cooperation" in preventing the spread. *Id.* at 62-63. A "local police officer" would then follow up with the publisher. *Id.* at 63. The commission had no "power to apply formal legal sanctions," *id.* at 66, and publishers were "'free' to ignore the Commission's notices," *id.* at 68. Yet this Court—"look[ing] through forms to the substance"—held that this threatening, coercive scheme objectively chilled speech. *Id.* at 67-68, 72.

The Second Circuit, in an opinion joined by then-Judge Sotomayor, reached a similar conclusion in *Okwedy v. Molinari*. The plaintiff there rented billboards in Staten Island denouncing homosexuality. 333 F.3d 339, 341 (2d Cir. 2003). The president of the borough then wrote a letter to the billboard company, on official letterhead, stating that the billboards were "unnecessarily confrontational and offensive" and "convey[ed] an atmosphere of intolerance." *Id.* at 341-42. The president asked the company to "contact" the "Chair of [the] Anti-Bias Task Force" to "establish a dialogue" and "discuss" these issues. *Id.* He appealed to the company "as a responsible member of the business community." *Id.* at 342. But the president had no

authority over billboards. *Id.* at 343. The Second Circuit nevertheless held that his letter crossed the line "between attempts to convince and attempts to coerce." *Id.* at 344. "Even though [the President] lacked direct regulatory control over billboards," the company "could reasonably have feared that [he] would use whatever authority he does have" against it. *Id.* And the fact that the letter called for "dialogue" did not dissipate its "implicit threat." *Id.*

Like the commission in *Bantam Books* and the task force in *Okwedy*, bias-response teams objectively chill speech. Consider a reasonable college student who is contemplating sharing a controversial view on campus. If she speaks, anyone on campus can report what she said as a "bias-related incident." The university encourages those reports (even anonymously) and compares bias on campus to bombs at the airport. The term "bias-related incident" is formally defined, with the prolixity of a legal code. And reports go to a formal entity called the Bias Intervention and Response Team. That team is staffed by officials at the highest levels of the university, including disciplinarians and police. As the student can see from the team's name and mission statement, these officials will intervene and respond to her speech with the goal of "eliminat[ing]" bias. JA.369. The team will start by logging her reported speech in an official database. It will then investigate her speech: reviewing whether it meets the definition, talking to the "victim," and contacting her (the "perpetrator") for a meeting. JA.369-70. Even if she can technically decline, saying no to a university official is daunting. And she doesn't know whether her

no will have negative consequences. The bias-response team warns students, after all, that it can refer students for formal discipline (which, for several team members, means referring incidents to themselves). Instead of risking a trip through this wringer, a reasonable student could conclude: "Better to just keep quiet." App.46 (Wilkinson, J., dissenting).

The Fourth Circuit ignored the totality of this process, instead slicing and dicing its components and explaining why each component wouldn't chill speech. But it was wrong about the components too. Bias-response teams chill speech by creating a formalized system where students constantly monitor and anonymously report each other to the university. App.49-51 (Wilkinson, J., dissenting); *Fenves*, 979 F.3d at 338. The reputational damage from being labeled a bias offender is chilling too. *Killeen*, 968 F.3d at 652 (Brennan, J., concurring/dissenting); *Cartwright*, 32 F.4th at 1124; *Schlissel*, 939 F.3d at 765. As is the knowledge that officials are logging and investigating protected speech. App.53-54 (Wilkinson, J., dissenting); *Cartwright*, 32 F.4th at 1124; *Killeen*, 968 F.3d at 652 (Brennan, J., concurring/dissenting). The prospect of being personally contacted by a high-ranking university official also chills speech. *Schlissel*, 939 F.3d at 765; *Cartwright*, 32 F.4th at 1124 n.5. So does the explicit threat of being referred for formal discipline. *Schlissel*, 939 F.3d at 765; *Fenves*, 979 F.3d at 333. Even if the student did nothing wrong, his "worry" that the bias-response team "will err" and his desire to avoid "becoming entangled" in this bureaucratic morass could "lead him to swallow [his] words." *Coun-*

terman, 143 S.Ct. at 2115-16; *accord* App.55-60 (Wilkinson, J., dissenting). Hence why students, professors, experts, studies, surveys, and even some universities agree that bias-response teams chill speech on campus. *See* App.76 (Wilkinson, J., dissenting); *Fenves*, 979 F.3d at 338; JA.18-19 ¶¶33-34; JA.242; JA.280-91; JA.237-272; JA.319; JA.340 ¶19; JA.350 ¶18.

It's no answer to say that bias-response teams cannot *themselves* administer formal discipline. *Cf.* App.18-19. These teams still chill speech because their members include officials who do have that authority. App.51-52 (Wilkinson, J., dissenting). They can also refer students for formal discipline. *Schlissel*, 939 F.3d at 765; App.51-53 (Wilkinson, J., dissenting); *Fenves*, 979 F.3d at 333. And they are designed to *appear* as though students who commit bias incidents will face discipline-like consequences. *Schlissel*, 939 F.3d at 764; App.53-55 (Wilkinson, J., dissenting). The team's name, membership, and terminology all convey that message. *Fenves*, 979 F.3d at 338. A reasonable student "could be forgiven for thinking that inquiries from and dealings with the [team] could have dramatic effects such as currying disfavor with a professor, or impacting future job prospects." *Schlissel*, 939 F.3d at 765. The team's "overall tenor" is that "if your speech crosses the line, we will come after you." *Cartwright*, 32 F.4th at 1124 n.5. Such a threat can violate the First Amendment "even if it turns out to be empty" and even if the defendant "'lacks direct regulatory or decisionmaking authority.'" *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230-31 (7th Cir. 2015) (quoting

Okwedy, 333 F.3d at 344). And, of course, bias-response teams chill speech in other ways besides threatening discipline.

It's also no answer to say that, even without bias-response teams, universities can solicit reports and meet with students as part of their ordinary student-conduct process. *Cf.* App.18. It is one thing to investigate and collect reports about conduct that universities have the power to ban. It is another thing to investigate and collect reports about "bias-related incidents"—protected speech that a university could never ban in a speech code. True, "member[s] of the university community" can report misconduct even without a bias-response team. App.18. But why, then, are universities creating a separate entity, staffing it with authority figures, formally defining bias incident, using disciplinary lingo, soliciting anonymous complaints, threatening referrals, and asking to meet with students? This elaborate regime is designed to eliminate biased speech by implicitly threatening students with consequences "that they otherwise would not face." *Schlissel*, 939 F.3d at 765.

Finally, Speech First needn't prove that bias-response teams chill speech just as much as the schemes in *Bantam Books* or *Okwedy*. *Cf.* App.15-18 & nn.8-10. For starters, college students are typically "teenagers and young adults" who are "more likely to be cowed by subtle coercion than the relatively sophisticated business owners in those cases." *Cartwright*, 32 F.4th at 1123. More fundamentally, bias-response teams can be over the constitutional line even if other chilling schemes are *more* over the constitutional line. Bias-

response teams are further over the line than other chilling conduct. *E.g.*, *Levin v. Harleston*, 966 F.2d 85, 88 (2d Cir. 1992) (university chilled professor's speech by creating an "alternative" section of his class that students could take instead); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 76 n.8 (1990) (public employer can chill employee's speech by "'failing to hold a birthday party'"). At the end of the day, the question is "whether the average college-aged student would be intimidated—and thereby chilled from exercising her free-speech rights—by subjection to the bias-related-incidents policy and [BIRT's] role in enforcing it." *Cartwright*, 32 F.4th at 1124. "The answer to that question," as three out of five circuits have correctly held, "is yes." *Id.*

CONCLUSION

This Court should grant certiorari.

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