

No. 24-361

IN THE
Supreme Court of the United States

SPEECH FIRST, INC.,

PETITIONER,

v.

PAMELA WHITTEN, *in her official capacity as President of
Indiana University, et al.,*

RESPONDENTS.

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

**BRIEF OF THE LIBERTY JUSTICE CENTER AS
AMICUS CURIAE IN SUPPORT OF PETITIONER**

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October 31, 2024

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.

The Fifth, Sixth, and Eleventh Circuits hold that bias-response teams objectively chill students’ speech; but the Seventh Circuit disagrees. *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); and *Speech First, Inc. v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022), with *Speech First, Inc. v. Killeen*, 968 F.3d 628 (7th Cir. 2020). All the cases in this split involve the same plaintiff, the same procedural posture, and the same basic facts. And this Court implicitly deemed the split certworthy before when it *Munsingwear*’d a similar decision from the Fourth Circuit after pre-certiorari mootness. *Speech First, Inc. v. Sands*, 144 S.Ct. 675 (2024).

The question presented is:

Whether bias-response teams objectively chill students’ speech.

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INTEREST OF *AMICUS CURIAE*¹

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation center that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights. *See, e.g., Janus v. AFSCME*, 138 S. Ct. 2448 (2018).

This case interests *amicus* because the right to speak is fundamental, and the need for free inquiry is at its most vital—and yet often most at risk—on university campuses.

¹ Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than *amicus* funded its preparation or submission. All parties received timely notice of the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

When universities invoke the power of the state to subject disfavored ideas to special opprobrium, that official sanction chills disfavored speech, whether or not it results in formal punishment. The Seventh Circuit below disregarded this chilling effect, holding that students could not challenge an arm of a state university expressly designated to police students' protected speech because the school lacked the power to formally punish students

The Seventh Circuit's decision in this case created a clear split among the circuits by rejecting the view of the Fifth, Sixth, and Eleventh Circuits that students can be injured by a "formal investigative process, which itself is chilling even if it does not result in a finding of responsibility or criminality." *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 765 (6th Cir. 2019); see also *Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020); *Speech First, Inc. v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022). The Court should grant the Petition to resolve this split and reject the Seventh Circuit's view, which provides insufficient protection for students' First Amendment rights.

To that end, *amicus* submits this brief to better illustrate the damage that Bias Response Teams are inflicting on the cause of free inquiry at American universities. These "teams" are deputized by universities not to facilitate dialogue, but to limit it, with the goal to "prescribe what shall be orthodox." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). *Amicus*

agrees with some of the speech the “bias” teams wish to stifle, disagrees with some of it, and finds some of it repulsive. Yet all such speech is protected under the First Amendment, and adherence to that amendment’s values is of heightened importance in the college context. As Chief Justice Warren explained:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

Amicus therefore submits that the courts below should be reversed, and Speech First should be allowed to proceed to the merits of their claim challenging the chilling effect of bias response teams.

ARGUMENT

Bias Response Teams are a significant and widespread danger to First Amendment freedoms.

As of 2016, at least 231 universities, charged with educating more than 2.84 million students, employed

Bias Response Teams to police their students’ speech. Foundation for Individual Rights in Education (FIRE), *Bias Response Team Report 2017*.² By 2022, Petitioner Speech First found as many as 454 had implemented Bias Reporting Systems. Speech First, *Free Speech in the Crosshairs: Bias Reporting on College Campuses* (2022).³

How schools define “bias” varies across institutions, as caprice is inherent in the endeavor, but many explicitly curtail expression of political disagreement: “14% of institutions include ‘political affiliation’ among their categories of bias. Still others include bias against similar categories such as ‘intellectual perspective’ (University of Central Arkansas), ‘political expression’ (Dartmouth), or ‘political belief’ (University of Kentucky).” FIRE, *Bias Response Team Report, supra*. Going further,

[m]any policies include catch-all categories of bias—e.g., “other” biases. In such cases, the definition of a bias incident encompasses not only protected speech, but also any speech that offends anyone for any reason. The net effect is that broad definitions of “bias” invite reports of any offensive speech, whether or not it is tethered to a discernable form of bias, thereby inviting scrutiny of student activists, organizations, and faculty engaged in political advocacy, debate, or academic inquiry.

² <https://www.thefire.org/research/publications/bias-response-team-report-2017>.

³ https://speechfirst.org/wp-content/uploads/2022/04/Free-Speech-in-the-Crosshairs_BRS-Report.pdf.

Id.

In the case at bar, Indiana University indulges in just such a catch-all. The school’s “bias incident” policy broadly defines “bias incident” as “any conduct, speech, or expression, motivated in whole or in part by bias or prejudice meant to intimidate, demean, mock, degrade, marginalize, or threaten individuals or groups based on that individual or group’s actual or perceived identities.” D.Ct.Doc.9-12 at 2. Examples of bias-related conduct include an offensive email or text message, a problematic phone call, a written comment, or verbal offenses. D.Ct.Doc.9-14 at 4-5. Such open-ended accruals of authority by an investigative agency represent an effort not to enlighten or educate, but to chill dissent by leaving all speech potentially subject to official disapproval. *See Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965) (vague definitions of proscribed conduct chill speech).

Across the country, Bias Response Teams often employ such authority to stifle protected speech. At the University of Wisconsin–La Crosse, “bias incidents” have run the gamut from vulgar bathroom graffiti, to common political slogans such as “Trump 2016,” to a Christian group’s use of a cross on a poster—because this most common symbol of the Christian faith ostensibly created an “unsafe” environment for gay and lesbian students. Nathan Hansen, *Students use UW-L bias/hate system to report everything from Christian posters to offensive images*, La Crosse Tribune, Sept. 26, 2016.⁴ At George Mason University, a professor

⁴ https://lacrossetribune.com/news/local/students-use-uw-l-bias-hate-system-to-report-everything/article_759c0e01-e64e-5aa4-bb29-4e7236d4f5f8.html.

was so horrified to find a Bible left behind in her classroom she reported it as “discrimination” and “harassment” against “religion.” Christian Schneider, *George Mason U. professor finds Bible, reports it to ‘bias’ hotline*, College Fix, Nov. 18, 2020.⁵

Emory University investigated chalk declaring “Trump 2016” as a “bias” incident, with the president of the university promising to seek out the culprits: “If they’re students,’ he said, ‘they will go through the conduct violation process.” Jeffrey Aaron Snyder & Anna Khalid, *The Rise of ‘Bias Response Teams’ on Campus*, The New Republic, Mar. 30, 2016.⁶ At Appalachian State University on the other hand, one student filed a bias report because he was “offended by the politically biased slander that is chalked up everywhere reading ‘TRUMP IS A RACIST.’” FIRE, *Bias Response Team Report*, *supra*. Meanwhile, at University of Nebraska-Lincoln, a professor was reported for simply having a Trump sticker in his office. Daniel Payne, *There’s No Safe Space for Ideas on Campus ‘Animal Farms’*, Wall Street Journal, November 25, 2019.⁷

Speech need not even be about a real political candidate to run afoul of a bias reporting scheme. At Wake Forrest, a satirical Instagram post in the style of a student government campaign ad was deemed “deeply offensive and unacceptable” for promising to “build a wall” between the school and nearby Winston-Salem

⁵ <https://www.thecollegefix.com/george-mason-u-professor-finds-bible-reports-it-to-bias-hotline/>.

⁶ <https://newrepublic.com/article/132195/rise-bias-response-teams-campus>.

⁷ <https://www.wsj.com/articles/theres-no-safe-space-for-ideas-on-campus-animal-farms-11574726733?page=1>.

State University. Adam Goldstein, *Wake Forest's investigation of 'build a wall' Instagram post chills free speech*, FIRE, Mar. 28, 2019.⁸

One professor was reported for simply bringing up the topic of pop singer Janet Jackson's famous "wardrobe malfunction." Payne, *There's No Safe Space for Ideas on Campus 'Animal Farms'*, *supra*. A Michigan State student had a bias report filed against him simply for watching a video of conservative pundit Ben Shapiro. *Id.* At the University of Wisconsin–Madison, an event featuring Shapiro's Daily Wire colleague Matt Walsh was reported as a bias incident before it had even taken place. Audrey Thibert, *LGBTQ+, GNC community sees bias incident ahead of conservative talk*, *Badger Herald*, Oct 13, 2022.⁹ A student at Stanford was reported for simply reading a copy of *Mein Kampf*, one of the most historically important books of the twentieth century. Haley Gluhanich, *Stanford University: Student Reported for Reading Adolf Hitler's Autobiography, 'Mein Kampf'*, FIRE, April 18, 2023.¹⁰ At SUNY-Cortland, a professor received a bias complaint for suggesting "we should be proud of how far we've come as a society relating to race and gender relations" since the 1930s—which one would have thought a banal point given the legal and social changes of the past 90 years. Christian Schneider, *Professor reported to bias team for saying race relations*

⁸ <https://www.thefire.org/news/wake-forests-investigation-build-wall-instagram-post-chills-free-speech>.

⁹ <https://badgerherald.com/news/2022/10/13/lgbtq-gnc-community-sees-bias-incident-ahead-of-conservative-talk/>.

¹⁰ <https://www.thefire.org/cases/stanford-university-student-reported-reading-adolf-hitlers-autobiography-mein-kampf>.

have improved since the 1930s, College Fix, Mar. 18, 2022.¹¹

The University in this case invokes the supposed informality of “bias” policing to protect it against any challenge—but that is an obfuscation that does not reflect the facts on the ground. A study that surveyed bias team members at 17 colleges found that “most of the teams spend relatively little time on their primary stated functions—trying to educate the campus community about bias—and instead devote their efforts mainly to punishing and condemning the perpetrators of specific acts.” Peter Schmidt, *Colleges Respond to Racist Incidents as if Their Chief Worry Is Bad PR, Studies Find*, *The Chronicle of Higher Education*, Apr. 21, 2015¹² (reporting a study by Texas academics presented at the 2015 conference of the American Educational Research Association). While they officially disclaimed authority to punish, “many team leaders nonetheless discussed their activities using terms associated with criminal-justice work. They spoke of the ‘victim,’ the ‘perpetrator,’ and the ‘offender,’ and talked about holding individuals accountable for specific actions.” *Id.* The “process by which they dealt with complaints often mimicked the procedures of campus police or judicial bodies, even in the absence of violations of the law or campus policies.” *Id.* Indeed, the Vice Chancellor of the University of California, Santa Barbara, as part of her announcement of the creation of a Bias Response Team, encouraged students to report “bias incidents” to campus *police*. Jason Garshfield,

¹¹ <https://www.thecollegefix.com/professor-reported-to-bias-team-for-saying-race-relations-have-improved-since-the-1930s/>.

¹² <https://www.chronicle.com/article/Colleges-Respond-to-Racist/229517/>.

UCSB Bias Response Team Speaks Volumes About Free Speech, The Bottom Line, Dec. 12, 2015.¹³ This is not the benign counseling program the University now portrays. See also Rikki Schlott, *Bias hotlines at US colleges have led to a witch hunt culture on campus*, New York Post, Aug. 27, 2022.¹⁴

Nor are “bias” incidents treated as simply opportunities for dialogue; they often result in swift and severe punishment. When some students at Bowdoin College threw a juvenile “fiesta,” featuring tequila and som-breros, the punishment for their wrongthink was swift indeed: the students were forced to move out of their dorm, banned from various college social events, and forced to attend mandatory reeducation sessions. Editorial, *Out of Focus*, The Bowdoin Orient, Mar. 4, 2016.¹⁵ Emerson College suspended a conservative student group for distributing stickers with the text “China kinda sus¹⁶”—criticizing a genocidal authoritarian foreign government is apparently a form of bias against Asian Americans. FIRE, *STICKER SHOCK: Emerson College doubles down on censorship, denies TPUSA chapter’s appeal of ‘bias’ charge for distrib-*

¹³ <https://thebottomline.as.ucsb.edu/2015/12/ucsb-bias-response-team-speaks-volumes-about-free-speech>.

¹⁴ <https://nypost.com/2022/08/27/us-colleges-bias-hotlines-lead-to-campus-witch-hunt-culture/>.

¹⁵ <https://bowdoinorient.com/bonus/article/11035>.

¹⁶ “Sus: Giving the impression that something is questionable or dishonest; suspicious. This word gained popularity with being the catchphrase in the online multiplayer game Among Us.” Urban Dictionary, <https://www.urbandictionary.com/define.php?term=sus>.

uting stickers criticizing China's government, November 16, 2021.¹⁷ And the offenders made aware of their offense are the lucky ones: a professor at Ohio Northern University was sanctioned and investigated without even being informed of the charge against him. Christopher J. Ferguson, *Bias-Response Teams Are a Bad Idea*, *Chronicle of Higher Education*, June 5, 2023.¹⁸

Santa Clara University's now-revised Bias Incident Reporting policy instructed students that "[i]f the bias incident is in progress or just occurred: **ALWAYS CALL 911 IMMEDIATELY.**" *Bias Incident Reporting*, Santa Clara University, Archived as of June 11, 2015¹⁹ (emphasis in original). The University has since had the minimal good sense to rewrite this policy and remove the reference to 911, instead giving students multiple options to report their "bias" incident, from calling campus security to using an online reporting form. *Bias Incident Reporting*, Santa Clara University.²⁰ At the University of Maryland, meanwhile, the police were called on students for making rude jokes while playing a "madlib"-style video game. Bill Rickards, *Resident assistants called the cops on students*

¹⁷ <https://www.thefire.org/news/sticker-shock-emerson-college-doubles-down-censorship-denies-tpusa-chapters-appeal-bias-charge>.

¹⁸ <https://www.chronicle.com/article/bias-response-teams-are-a-bad-idea>.

¹⁹ http://web.archive.org/web/20150611154725/http://www.scu.edu/provost/diversity/education_training/biasincidentreporting.cfm.

²⁰ <https://www.scu.edu/diversity/bias-incident-reporting/>.

playing an 'offensive' video game at University of Maryland, FIRE, June 5, 2019.²¹

The speech punished for “bias incidents” is not limited to white supremacist vandalism. The University of California publishes an official list of examples of what it deems biased “microaggressions,” including asking things like “Where are you from or where were you born?” and saying that “America is a melting pot” or “the land of opportunity.” *Id.*

If one doubts the extent to which these anti-“bias” initiatives target speech, one need only consider the ways schools imposing such policies have reacted to events *about freedom of speech*. For instance, a poster at the University of Minnesota advertised a panel discussion about speech and censorship in the wake of the *Charlie Hebdo* massacre. Given the subject of the event, the poster included an image of one of *Charlie Hebdo*'s magazine covers depicting the Prophet Mohammed. In response to an event about free expression inspired by then-recent events of serious public concern, “the university’s Equal Opportunity and Affirmative Action office held a formal investigation and concluded that ‘university members should condemn insults made to a religious community in the name of free speech.’” Snyder & Khalid, *The Rise of 'Bias Response Teams*, *supra*.

The policing of “bias” extends into the classroom as well, undermining the university’s role as a forum for developing and engaging with ideas. At the University

²¹ <https://www.thefire.org/news/resident-assistants-called-cops-students-playing-offensive-video-game-university-maryland>.

of Colorado, a professor was visited by the Bias Response Team for daring to encourage a classroom discussion regarding contemporary transgender issues. Adam Steinbaugh & Alex Morey, *Professor Investigated for Discussing Conflicting Viewpoints, 'The Coddling of The American Mind'*, FIRE, June 20, 2016.²² According to the report, the professor was advised to avoid discussing transgender issues in his classroom. *Id.* Another professor was investigated for encouraging his students to think critically and debate rhetoric and ideas related to gay rights. *Id.* In that case, a student complained that students should not be required to listen to arguments from opponents of gay marriage. *Id.* Thus, in classrooms subject to bias response schemes, critical thinking and debate are now treated as a danger to the college community, rather than its *raison d'être*.

The scope of what constitutes “bias” at a contemporary university envelopes everyday life, elevating even the most minor events to matters of official concern. At the University of Michigan, a snow-man style amateur sculpture was reported as a bias incident because the offended student deemed that the work reminded her of a phallus. Erin Dunne, *Snow Penis Reported as Bias-Incident*, *The Michigan Review*, Feb. 25, 2016.²³ At Colby College, a student was reported for bias after using the phrase “on the other hand,” which apparently is now deemed “ableist.” FIRE, *Bias Response Team Report, supra*. At the University of Wisconsin–Platteville, students were reported for dressing as the

²² <https://www.thefire.org/professor-investigated-for-discussing-conflicting-viewpoints-the-coddling-of-the-american-mind/>.

²³ <http://www.michiganreview.com/snow-penis-reported-as-bias-incident/>.

“Three Blind Mice” of nursery rhyme fame on Halloween, because someone somewhere might think the purpose of such a costume was not nostalgia for Mother Goose but rather to mock people with disabilities. *Id.*

Even if one were to write off the absurdity described above and limit the policing of “bias” to incidents of discrimination that all parties would agree are offensive, such a limitation would not save Bias Response Teams. This more limited version of “bias” would still be a fundamentally content-based policy, creating categories of approved and disapproved viewpoints that cannot survive First Amendment scrutiny. The government cannot discriminate on the basis of viewpoint in the name of rooting out discrimination. *See Am. Booksellers Assoc. v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985) (striking down an ordinance, which banned pornography that “subordinate[d]” women, as unconstitutional “thought control”). The government cannot ban or punish speech simply because it expresses repulsive views regarding certain ostensibly vulnerable classes of people. *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969). And once the policing of bias writ-large is allowed, there is no reason to believe it won’t be used against the very groups its advocates wish to protect—as occurred at John Carroll University, where a bias charge recorded that an “[a]nonymous student reported that African-American Alliance’s student protest was making white students feel uncomfortable.” Snyder & Khalid, *The Rise of ‘Bias Response Teams,’ supra*. This Court should take the opportunity to clarify that the First Amendment is not to be subordinated to the will of administrators seeking to punish students for impure thoughts.

As the Fifth, Sixth, and Eleventh Circuits rightly concluded, the potentially informal nature of the reprimand issued by a bias team makes it no less unconstitutional. “This states the obvious, but the possibility the Government could have imposed more draconian limitations on speech never has justified a lesser abridgment. Indeed, such an argument almost always is available; few of our First Amendment cases involve outright bans on speech.” *Denver Area Educ. Telcoms. Consortium v. FCC*, 518 U.S. 727, 809 (1996) (Kennedy, J., concurring/dissenting). A government agency that operates through the “informal censorship” of notice letters or classifications still violates the First Amendment by chilling speech through official opprobrium. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963) (notice letters); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 n.8 (1975) (classification). These bias policies, paired with teams responsible for implementation, constitute the academic equivalent of the informal censorship and threatening notices found unconstitutional in *Bantam Books*.

CONCLUSION

As this Court recently explained, the entire starting point for Indiana University’s policy is all wrong: “the school itself has an interest in protecting a student’s unpopular expression. . . .” *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021). This is so because “America’s public schools are the nurseries of democracy. Our representative democracy only works if we protect the ‘marketplace of ideas.’” *Id.* If this is true for a high school, as in *Mahanoy*, how much more so is it true for a college? Indeed, “schools have a strong

interest in ensuring that future generations understand the workings in practice of the well-known aphorism, ‘I disapprove of what you say, but I will defend to the death your right to say it.’” *Id.* Indiana University has taken the exact opposite approach: I disapprove of what you say, and so I will report you for it.

For the foregoing reasons, and those stated by Petitioner, the Petition should be granted and the decision below reversed.

Respectfully submitted,

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October 31, 2024