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 a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

D. Sean Nation
Counsel of Record
James L. Kerwin
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
snation@mslegal.org
Attorney for Amici Curiae

October 31, 2024

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

IDENTITIES AND INTERESTS OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. THE COURT SHOULD SETTLE THE CIRCUIT SPLIT BECAUSE BIAS RESPONSE TEAMS OBJECTIVELY CHILL SPEECH. 4

A. Defining objective chill and its relevance to First Amendment law 5

B. The importance of clarifying the doctrine at the Supreme Court level 7

II. IT IS FALLACIOUS TO ASSUME THAT STUDENTS HAVE TOTAL KNOWLEDGE OF SCHOOL OPERATIONS AND POTENTIAL CONSEQUENCES. 9

A. The average student would be uncertain about potential consequences of being reported to the Bias Response Team. 10

B. Students could reasonably fear referral and permanent documentation. 11

III. INDIANA UNIVERSITY'S BIAS RESPONSE TEAM ILLUSTRATES THE NEED FOR SUPREME COURT REVIEW. 13

A. Universities are attempting to subvert the law in its repeated rejections of speech codes by using less direct means to police speech. 14

B. The structure and function of bias response teams creates an atmosphere of mistrust. 16

CONCLUSION 17

TABLE OF AUTHORITIES

CASES **PAGES(S)**

303 Creative LLC v. Elenis,
600 U.S. 570 (2023)..... 1

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995)..... 1

Dambrot v. Cent. Mich. Univ.,
55 F.3d 1177 (6th Cir. 1995) 6, 14

Doe v. Univ. of Mich.,
721 F. Supp. 852 (E.D. Mich. 1989) 5, 14

Grayned v. City of Rockford,
408 U.S. 104 (1972)..... 12

Laird v. Tatum,
408 U.S. 1 (1972)..... 12

McCauley v. Univ. of the V.I.,
618 F.3d 232 (3d Cir. 2010) 14

Speech First, Inc. v. Cartwright,
32 F.4th 1110 (11th Cir. 2022) 8

Speech First, Inc. v. Fenves,
979 F.3d 319 (5th Cir. 2020) 8, 11

Speech First, Inc. v. Killeen,
968 F.3d 628 (7th Cir. 2020) 8

Speech First, Inc. v. Sands,
144 S. Ct. 675 (2024)..... 4, 5, 6, 9

Speech First, Inc. v. Schlissel,
939 F.3d 756 (6th Cir. 2019) 8, 9

Speech First, Inc. v. Whitten,
No. 1:24-cv-00898-JPH-MG, 2024 U.S. Dist. LEXIS 154371 (S.D. Ind. 2024)..... 2

Susan B. Anthony List v. Driehaus,
573 U.S. 149 (2014)..... 6

Tinker v. Des Moines Indep. Cmty. Sch. Dist.,
393 U.S. 503 (1969)..... 2

UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.,
774 F. Supp. 1163 (E.D. Wis. 1991) 5, 14

IDENTITIES AND INTERESTS OF AMICI CURIAE[1]

Mountain States Legal Foundation ("MSLF") is a nonprofit, public-interest law firm organized under the laws of the state of Colorado. MSLF is dedicated to bringing before the courts issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, MSLF attorneys have been active in litigation regarding the proper interpretation and application of statutory, regulatory, and constitutional provisions. *See*, *e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (MSLF serving as lead counsel); *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023) (amicus curiae in support of petitioners); *Garland v. VanDerStok*, 23-10718 (argued Oct. 8, 2024) (counsel on the briefs for respondents VanDerStok, Andren, Tactical Machining, and Firearms Policy Coalition, Inc.).

MSLF has an abiding interest in protecting the freedoms set forth in the First Amendment—

---

[1] The parties were timely notified of the filing of this amici curiae brief. See Supreme Court Rule 37.2. Pursuant to Supreme Court Rule 37.6, the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than amici curiae or their counsel, made a monetary contribution specifically for the preparation or submission of this brief.

specifically the freedom of speech at institutions of higher learning. To secure these interests, MSLF files this *amicus curiae* brief urging this Court grant certiorari in this case.

SUMMARY OF THE ARGUMENT

"It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

In this case, the Seventh Circuit incorrectly affirmed the district court's denial of a preliminary injunction requested by Speech First. *See Speech First, Inc. v. Whitten*, No. 1:24-cv-00898-JPH-MG, 2024 U.S. Dist. LEXIS 154371 (S.D. Ind. Aug. 28, 2024), *aff'd,* No. 24-2501, 2024 U.S. App. LEXIS 25160 (7th Cir. Sep. 5, 2024) (affirming the lower court's denial of a preliminary injunction). The case raises the question of whether "bias response teams" like those at Indiana University objectively chill student speech by intimidating or otherwise coercing students into silence on issues deemed controversial. In this context, Speech First had standing to sue and should have been granted its injunction.

The district court held, and the Seventh Circuit affirmed, that Speech First lacked standing because its members lacked a credible fear of being disciplined for their speech. *Id*. This was in error.

Bias response teams do not need formal, direct disciplinary authority to chill speech. As should be obvious, even without disciplinary authority, bias response teams' ability to investigate, document, scrutinize, and refer alleged incidents to other authorities that do have such authority create credible fears of discipline or at least social, academic, and professional consequences that objectively chill speech.

The use by public colleges and universities of bias response teams is a clear attempt to evade judicial decisions finding that outright bans on "biased" or otherwise disfavored speech fail First Amendment scrutiny. The use of such teams is therefore antithetical to the text and spirit of the First Amendment and to the essence of open, civil discourse in higher education.

The Court should take this opportunity to settle the conflict among the circuits and set a clear rule that colleges and universities that infringe on the First Amendment rights of their students, whether through direct or indirect means, are in violation of the Constitution.

ARGUMENT

I. THE COURT SHOULD SETTLE THE CIRCUIT SPLIT BECAUSE BIAS RESPONSE TEAMS OBJECTIVELY CHILL SPEECH.

Bias Response Teams ("BRTs"), like the one at Indiana University, are blatant attempts by colleges and universities to suppress speech in a way that avoids judicial scrutiny. By applying indirect means to discourage, rather than outright ban, disfavored speech, these institutions of higher learning objectively chill speech. Objectively chilling speech through indirect means, colleges believe, will allow them to bypass judicial review and maintain a stranglehold on campus discourse. This state of affairs cannot stand. Multiple circuits are currently split on the question presented, with three holding that BRTs objectively chill speech and one holding that the BRTs' lack of formal disciplinary power saves the practice from being declared unconstitutional. This, to borrow from Justice Thomas, creates a "patchwork" of First Amendment rights. *Speech First, Inc. v. Sands*, 144 S. Ct. 675, 678 (2024) (Thomas, J., Dissenting). Students' rights are enforced to different degrees depending on where they choose to attend college. This is unacceptable under the First Amendment, it is unacceptable under the Fourteenth Amendment, and it offends the very essence and purpose of higher education institutions.

While the objective-chill doctrine has existed for some time and has been applied to cases like this by the circuits, it is incumbent on this Court to clarify that the doctrine prohibits indirect attempts at speech control like those imposed by BRTs. As pointed out in petitioner's brief, this Court has already granted certiorari on this issue, although the case was vacated under *Munsingwear*. *Sands*, 144 S. Ct. at 675. This case provides a crucial opportunity for the Court to finally settle this issue in favor of students' First Amendment rights.

A. Defining objective chill and its relevance to First Amendment law

The doctrine of objective chill deals with the phenomenon by which public entities silence dissenting viewpoints through indirect means which discourage rather than outright prohibit speech. The First Amendment's protection of free speech proscribes not only direct action like speech codes, but also indirect means of speech suppression. Universities like Indiana University have implemented policies which, while not outright banning certain kinds of speech, objectively place students in a position where it is reasonable to choose silence to avoid investigation, scrutiny, or even discipline. Direct speech codes have not fared well in court. *See*, *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 863 (E.D. Mich. 1989); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991); *Dambrot v. Cent. Mich. Univ.*,

55 F.3d 1177, 1183-84 (6th Cir. 1995). BRTs are universities' attempts to evade these rulings and to silence disfavored speech. This is the case for Indiana University, and this Court should address this issue to protect the rights of not only Indiana University students, but college students around the country.

This Court has previously held that the credible threat of future legal or administrative consequences is enough to chill protected speech, even if no formal punishment is imposed. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 163 (2014). In that case, the Court recognized that the mere possibility of being subjected to a burdensome investigation could deter individuals from speaking out. *Id*. at 158. Similarly, in university settings, BRTs are designed to investigate reports of "biased" speech. Although these teams may not formally discipline students, the possibility of an investigation or record being made against them is sufficient to chill speech. It is "at least a close question" whether imperfect knowledge, which should be expected of the average college student, may reasonably lead one to believe they will be subjected to disciplinary proceedings when they are contacted and investigated by a BRT. *Sands*, 144 S. Ct. at 677 (Thomas, J., Dissenting). Even if the student is aware, however, that the BRT itself (to say nothing of the departments it can refer cases to) cannot discipline her, simply being subjected to an investigation, being scrutinized, and having one's

constitutionally protected words recorded in a permanent record is enough to cause the average college student to choose to refrain from speaking on topics which may be seen as controversial.

The vague definition of "bias" or "bias incident" itself can have a chilling effect. As Justice Thomas points out in his dissent in *Speech First v. Sands*, the phrase "bias incident" is so vague, the nature of these programs so extensive, that they effectively create a "literal speech police" that deters students from engaging in open discourse out of fear of being reported. *Id.* at 676-77.

B. The importance of clarifying the doctrine at the Supreme Court level

Circuit Courts are currently split on the question of how to apply the objective chill doctrine to university BRTs, with three circuits recognizing the potential for a chilling effect, while one has held otherwise. This Court has a responsibility to clarify the doctrine's application and resolve the inconsistency across jurisdictions for the sake of protecting open dialogue on college campuses. Sup. Ct. R. 10(a).

The Fifth, Sixth, and Eleventh Circuits have all found that university BRT policies can unconstitutionally chill speech by creating an environment where students reasonably fear that their speech will be investigated or reported by

classmates. *Speech First, Inc. v. Fenves*, 979 F.3d 319, 335 (5th Cir. 2020); *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 764-65 (6th Cir. 2019) ("Even if an official lacks actual power to punish, the threat of punishment from a public official who *appears* to have punitive authority can be enough to produce an objective chill."); *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1121-22 (11th Cir. 2022).

In contrast, the Seventh Circuit found that the University of Illinois' bias response team did not unconstitutionally chill speech because the team lacked formal disciplinary power. *Speech First, Inc. v. Killeen*, 968 F.3d 628, 643 (7th Cir. 2020). This ruling, however, overlooks the broader reputational and psychological pressures students face when reported to such teams, particularly when reports are logged and may be escalated to other university authorities. It also overlooks the fact that, as pointed out in *Fenves*, a policy enforced by openly advertising the possibility of referral to other departments—or even law enforcement—is enough to objectively chill speech. 979 F.3d at 333.

The stark contrast between these rulings illustrates the need for the Supreme Court to step in and provide clear guidance. As bias response teams proliferate on campuses across the country, students' First Amendment rights should not be contingent on the jurisdiction in which their university is located. By granting certiorari, this Court can resolve the conflicting interpretations of

the objective chill doctrine and ensure consistent protections for free speech at universities nationwide. As noted in this Court's Rule 10(a), certiorari is appropriate to settle splits between the circuits on important issues. Sup. Ct. R. 10(a). As Justice Thomas pointed out in his dissent in *Sands*, this issue is of great importance to the protection of speech—particularly minority views—and a conflict in authority creates a "patchwork" of First Amendment protection around the country. *Sands*, 144 S. Ct. at 678 (2024) (Thomas, J., Dissenting).

II. IT IS FALLACIOUS TO ASSUME THAT STUDENTS HAVE TOTAL KNOWLEDGE OF SCHOOL OPERATIONS AND POTENTIAL CONSEQUENCES.

The primary argument relied on by the Seventh Circuit in holding that BRTs do not objectively chill speech is that BRTs themselves lack formal disciplinary power. This contention is flawed for two reasons. First, the average college student, is unlikely to know the BRT lacks this power. All she knows is that she received an email from an administrator—a figure of authority—and is being scrutinized by a department of the university. This alone is enough to chill speech, as any person or entity who *appears* to have authority to punish is enough to chill speech. *Schlissel*, 939 F.3d at 764.

Even if the student is more aware of the inner workings of the BRT, however, she will likely be

aware of the record-keeping and referral power of the department. While Indiana University's BRT cannot itself impose formal discipline, it does keep a record of "bias incidents." This record, as far as the student is concerned, is permanent and presumably can be accessed by any number of individuals. And while the BRT cannot itself impose discipline, it can be a conduit for disciplinary action by other university departments. The BRT can, if it sees fit, escalate a claim of bias to a department that can impose discipline. Faced with the option of either staying silent or being scrutinized, investigated, or even recommended for discipline, the reasonable student would choose to stay silent.

A. The average student would be uncertain about potential consequences of being reported to the Bias Response Team.

The university's defense of bias response teams may hinge on the claim that these teams cannot formally discipline students, implying that students should not feel deterred from speaking. However, this defense overlooks the average student's perspective. Most students are unaware of the potential disciplinary ramifications of a bias report and do not operate with perfect knowledge of university policy. The idea that students should know they cannot be disciplined by bias response teams assumes a "God's-eye view," or omniscience, that is not realistic.

In *Fenves*, the Fifth Circuit addressed the chilling effect created by bias response teams, noting that students could reasonably feel threatened by the possibility of an investigation, even if no direct punishment was administered. 979 F.3d at 335. The same concerns apply here. Students are unlikely to understand the nuanced distinctions between university offices and may reasonably fear that a bias report could lead to more severe consequences down the road.

Furthermore, the emotional burden of being summoned for a bias incident investigation—regardless of the outcome—can deter students from speaking freely. Knowing that a single comment or opinion could result in an official university inquiry is enough to dissuade many from participating in open debate, particularly those with minority or controversial viewpoints.

B. Students could reasonably fear referral and permanent documentation.

Even if students know that BRTs lack formal disciplinary authority, they still face significant deterrents. Chief among these is the fear that their case could be escalated to a department with disciplinary power. BRTs often have broad discretion to refer cases to other university authorities, where students may indeed face consequences for their speech. This Court has recognized that the mere collection of data on

individuals' activities can have a chilling effect on First Amendment rights, as individuals reasonably fear that such information may later be used against them. *Laird v. Tatum*, 408 U.S. 1, 24-26 (1972).

Students are likely aware that being reported to a bias response team creates a record that may follow them throughout their academic career. Bias reports are often logged in databases, raising concerns about how this information may be accessed or used in the future. Whether or not formal action is taken, students know that being reported could affect their relationships with professors, future employment opportunities, or graduate school admissions. The uncertainty surrounding the potential use of these reports—whether internally or externally—adds to the chilling effect.

This Court has recognized that vague laws which lead people to question whether their conduct is permissible create a chilling effect on speech. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Even without disciplinary power, a university which promulgates vague denunciations of "biased" speech chills students who believe their words may or may not be classified as such. When this fact is added to the fact that referral and documentation are actions the university can take, a reasonable fear arises in the mind of a student whose future is in the hands of the same administrators who are now investigating her.

III. INDIANA UNIVERSITY'S BIAS RESPONSE TEAM ILLUSTRATES THE NEED FOR SUPREME COURT REVIEW.

Indiana University serves as an ideal case study for the need to clarify that the First Amendment prohibits BRTs. The university currently has an abysmal record of silencing dissent and disfavored speech. Foundation for Individual Rights and Expression, *2025 College Free Speech Rankings- Indiana University* (2024). A concerning percentage of students there report self-censoring on important, albeit controversial topics. *Id*. Colleges and universities are meant to be arenas for open and robust debate, but practices like those at Indiana University and other schools have turned that principle on its head. Instead, many students feel less free to speak on campus than they do outside it. BRTs are just the newest method of achieving the results campus censors aim for.

Not only do BRTs run afoul of the First Amendment, but they also create an atmosphere of mistrust on campus. Students cannot feel comfortable speaking their minds anywhere on campus (or off-campus on social media). At any moment, they can be reported by fellow students to the authorities for speaking the wrong opinions. This is reminiscent of times and places this country has strived not to emulate—namely, Cold War-era authoritarian states. Even if it were not for the First Amendment challenges with these practices, they

would still be undesirable for what they do to the academic environment.

A. Universities are attempting to subvert the law in its repeated rejections of speech codes by using less direct means to police speech.

The most concerning aspect of this problem is the apparent intent of universities to skirt prior judicial rulings prohibiting them from directly infringing on student speech. While this Court has not directly ruled on the constitutionality of prohibitory speech codes on college campuses, federal courts around the nation have consistently ruled against them as violations of the First Amendment. *See, e.g., Doe*, 721 F. Supp. at 863 (striking down the University of Michigan's speech code because it prohibited speech the administration disagreed with in violation of the First Amendment); *UWM Post, Inc.*, 774 F. Supp. at 1177 (invalidating the University of Wisconsin's hate speech policy as unconstitutionally overbroad); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1183-84 (6th Cir. 1995) (finding Central Michigan University's discriminatory harassment policy unconstitutional because it was overbroad and prohibited protected speech based on its content); *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 247 (3d Cir. 2010) ("Public universities have significantly less leeway in regulating student speech than public elementary or high schools.").

Higher education institutions like Indiana University thus faced a decision: either stop prohibiting disfavored speech through unconstitutional means, or find a way to achieve the same goal without openly breaking the law. By implementing policies intended to and having the effect of objectively chilling speech, Indiana University and other institutions of higher learning are attempting to reach the same goal (suppression of disfavored views) through indirect means. Of course, as clarified in three circuits and discussed above, such means are not, in fact, constitutional.

In its 2025 College Free Speech Rankings, the Foundation for Individual Rights and Expression (FIRE) places Indiana University second-to-last in its protection and recognition of free speech rights. Foundation for Individual Rights and Expression, *2025 College Free Speech Rankings- Indiana University* (2024). Particularly, it ranks the university 143rd for "self-censorship," with "about a third of IU students report[ing] self-censoring during classroom discussions (31%)." *Id*. The problem, therefore, is demonstrable: Indiana University students, likely in part as a result of their fear of being reported to university authorities for controversial views, self-censor. This achievement by the university is attained without the need for directly prohibitory speech codes. It is, therefore, an attempt by the university to create a "work-around" for unfavorable court cases addressing such codes.

It is clearly inappropriate for a public institution like a publicly funded university to ignore the spirit of the law by finding ways to subvert legal rulings they disagree with. It is therefore imperative that this Court clarify that the law prohibits both direct suppressions of free speech and measures which objectively chill disfavored speech.

B. The structure and function of bias response teams creates an atmosphere of mistrust.

A deep dive into recent history, particularly of the early-to-mid-twentieth century, is not required to recognize the whiff of authoritarianism present in the environment created by a BRT. BRTs solicit students to make reports on their colleagues for perceived slights and offenses. This is reminiscent, to name one example, of the Stasi, the secret police of communist East Germany which operated in the mid-to-late twentieth century. Thomas M. C. Roberts, *Living with the Stasi: Experiences and Opinions of East Germans, 1945-90*, 13 *Armstrong Undergraduate Journal of History* 47, 47-61 (2023). Under Soviet-occupied East Germany, a predominant and reasonable fear among East German citizens was that of being reported to the Stasi by their friends and neighbors for dissenting speech. *Id*. While the consequences may not be as dire as those inflicted by the Soviets, a reasonable fear of reputational and professional damage still

exists for American college students under the regime of BRTs. An attitude of mistrust, of self-censoring around certain people, will develop in an institution where anyone who overhears a verbal comment can (and is encouraged to) report the speaker to the authorities.

This is not an environment which tracks with the principles of the First Amendment, and it is not one this Court should tolerate in large swaths of the country. The conflict between the circuits has led to inconsistency between large regions of the country in regard to the protection of speech at our colleges and universities. A student's freedom to speak openly about potentially controversial but important ideas depends largely on where she chooses to go to school. This is an unacceptable state of affairs, as the freedom of speech is incorporated equally to all states.

CONCLUSION

BRTs like those at Indiana University create an unconstitutional chilling effect on student speech, even though they may not themselves impose formal discipline. The fear of being investigated, the uncertainty surrounding potential consequences, and the risk of having a permanent record created are enough to deter students from expressing their opinions openly.

This case presents an opportunity for the Supreme Court to resolve the circuit split on this

important First Amendment issue. By granting certiorari, the Court can clarify the application of the objective chill doctrine, ensuring that students' speech is not stifled by systems like BRTs. The Court should act now to protect free expression on college campuses and reaffirm the fundamental importance of the First Amendment in academic settings. It should grant certiorari to resolve this issue and affirm that students' First Amendment rights cannot be abridged by indirect, review-escaping means.

Respectfully submitted,

D. Sean Nation
Counsel of Record
James L. Kerwin
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way,
Lakewood, Colorado
80227
(303) 292-2021
snation@mslegal.org

October 31, 2024

Attorney for Amicus Curiae