

21-2061

**United States Court of Appeals
for the Fourth Circuit**

Speech First, Inc.,
Plaintiff-Appellant,

v.

Timothy Sands, In His Personal Capacity and His Official Capacity as
President of Virginia Polytechnic Institute and State University,
Defendant-Appellee,

On Appeal from the United States District Court
for the Western District of Virginia
Case No. 7:21-cv-00203 (Urbanski, J.)

**BRIEF OF *AMICI CURIAE* LIBERTY JUSTICE CENTER, CATO
INSTITUTE, AND AMERICAN COUNCIL OF TRUSTEES AND
ALUMNI IN SUPPORT OF PLAINTIFF-APPELLANT AND
REVERSAL**

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CORPORATE AND FINACIAL DISCLOSURE STATEMENT

Pursuant to Fourth Circuit Local Rule 26.1, amici make the following declarations:

- Liberty Justice Center is a nonprofit organization, has no parent organization, and issues no stock.
- The Cato Institute is a nonprofit organization, has no parent organization, and issues no stock.
- American Council of Trustees and Alumni is a nonprofit organization, has no parent organization, and issues no stock.
- No publicly held corporation has a direct financial interest in the outcome of this litigation due to the participation of amici.

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INTEREST OF THE AMICI CURIAE¹

The Liberty Justice Center (LJC) is a nonprofit, nonpartisan, public-interest litigation center located in Chicago, Illinois 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). LJC is counsel to the plaintiffs in *Menders, et al. v. Loudoun County School Board*, 1:21-cv-00669-AJT-TCBVAED (E.D. Va.). In that case, plaintiffs are parents of children subject to a bias response system in a K-12 school similar to the system at issue in this case.

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the

¹ Fed. R. App. P. 29 statement: All parties consented to the filing of this amicus brief. No counsel for any party authored any part of this brief, and no person or entity other than *amici* funded its preparation or submission.

principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and produces the annual *Cato Supreme Court Review*.

American Council of Trustees and Alumni (ACTA) is an independent, nonprofit 501(c)(3) organization committed to academic freedom, academic excellence, and fiscal accountability at America's colleges and universities. ACTA works with alumni, donors, trustees, policymakers, and campus leaders across the United States to support liberal arts education, uphold high academic standards, safeguard the free exchange of ideas on campus, and ensure that the next generation receives an intellectually rich, high-quality college education at an affordable price. ACTA has a long history of advocating for an open and engaging marketplace of ideas in the American academy—at trustee conferences, in state houses, in opinion editorials, and in best practices guides for campus leaders in higher education.

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

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Official sanction is inherent in the power of officials. Whether they use their official station to exact punishment, or decline to, the invocation of authority against speech which they disapprove of is itself official action designed to chill disfavored speech. The court below disregarded this chilling effect, holding that an arm of a state university expressly designated to police the protected speech of students could not be challenged because it did not impose fines or jailtime. This Court should reverse and, joining the Fifth and Sixth Circuits, recognize the injury inherent in 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).

To that end, *amici* submit this brief in order 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). *Amici* agree with some of the speech the “bias” teams wish to stifle, disagree with some of it, and find 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).

Amici therefore submit that the judgment below should be reversed, and Speech First should be allowed to proceed on 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 How these Teams 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)." *Id.* 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.

Id.

In the case at bar, Virginia Tech indulges in just such a catch-all.

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

The “What is Bias” page on the University’s website explains that “[b]ias incidents are expressions against a person or group because of the person’s or group’s 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.*” Virginia Tech Dean of Students, *What is Bias?* (emphasis added).³ “Examples of bias-related conduct include: . . . jokes that are demeaning to a particular group of people, . . . hosting a culturally themed party, . . . posting flyers that contain demeaning language or images,” or just generally any “words or actions that contradict the spirit of the Principles of Community.” *Id.* 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).

And this authority granted to Bias Response Teams is often employed to stifle protected speech. At the University of Wisconsin–La

³ https://dos.vt.edu/express_a_concern/bias-related-incident.html.

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 their poster—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 Emory University, chalk declaring “Trump 2016” was likewise investigated as a “bias” incident, with the president of the university affirming that the culprits would be sought out. “‘If they’re students,’ he said, ‘they will go through the conduct violation process.’” Jeffrey Aaron Snyder & Amna Khalid, *The Rise of ‘Bias Response Teams’ on Campus*, The New Republic, Mar. 30, 2016.⁵ 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*.

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

⁵ <https://newrepublic.com/article/132195/rise-bias-response-teams-campus>.

The supposed informality of “bias” policing, which the University in this case wishes to invoke to absolve its policy, is an obfuscation that does not reflect the facts on the ground. One study, which 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, 2015⁶ (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.* And far from being a forum for dialogue, 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.”

⁶ <https://www.chronicle.com/article/Colleges-Respond-to-Racist/229517/>.

Id. This is not the benign counseling program the University now portrays.

Nor are “bias” incidents treated as simply opportunities for dialogue, lacking the threat of punishment. When some students at Bowdoin College threw a juvenile “fiesta,” featuring tequila and sombreros, 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, 2016.⁷ 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, *UCSB Bias Response Team Speaks Volumes About Free Speech*, The Bottom Line, Dec. 12, 2015.⁸ And lest one think such “bias incidents” are 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

⁷ <https://bowdoinorient.com/bonus/article/11035>.

⁸ <https://thebottomline.as.ucsb.edu/2015/12/ucsb-bias-response-team-speaks-volumes-about-free-speech>.

where were you born?” and saying that “America is a melting pot” or “the land of opportunity.” *Id.*

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, 2015⁹ (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.¹⁰

If one doubts the extent to which these anti-“bias” initiatives target speech, one need only consult the ways in which they 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

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

¹⁰ <https://www.scu.edu/diversity/bias-incident-reporting/>.

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 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, 2016.¹¹ 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

¹¹ <https://www.thefire.org/professor-investigated-for-discussing-conflicting-viewpoints-the-coddling-of-the-american-mind/>.

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.* That critical thinking and debate are now treated as a danger to the college community, rather than its *raison d'être*, should give this Court pause before it rubber stamps Virginia Tech's policy.

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, 2016.¹² 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 "Three Blind Mice" of nursery rhyme fame on Halloween, because someone somewhere might think the purpose of such a costume was not nostalgia

¹² <http://www.michiganreview.com/snow-penis-reported-as-bias-incident/>.

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.

Finally, this Court should also join the Fifth and Sixth Circuits in stating clearly that the 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, 95 S. Ct. 1239, 1245 (1975) (classification). These bias policies, paired with teams responsible for implementation, constitute the academic equivalent of the informal

ensorship and threatening notices found unconstitutional by the Supreme Court in *Bantam Books*.

Conclusion

As Justice Breyer recently explained for the Court, the entire starting point for Virginia Tech’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? Breyer concludes, “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.* Virginia Tech has taken the exact opposite approach: I disapprove of what you say, and so I will report you for it.

For the reasons stated above, and those given by Speech First in its own brief, the decision below should be reversed.

January 18, 2022

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Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and because it contains 2,759 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using Word 2016 and uses a proportionally spaced typeface, Century Schoolbook, in 14-point type for body text and 14-point type for footnotes.

January 18, 2022

/s/ Reilly Stephens

Certificate of Service

On January 18, 2022, I filed this *Brief of Amici Curiae Liberty Justice Center, Cato Institute, and American Council of Trustees and Alumni in support of Plaintiff-Appellant and Reversal*, using the CM/ECF System, which will send a Notice of Filing to all counsel of record.

January 18, 2022

/s/ Reilly Stephens