

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 THE CATO INSTITUTE AS *AMICUS
CURIAE* IN SUPPORT OF PETITIONER**

Thomas A. Berry
Counsel of Record
Brent Skorup
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 789-5202
tberry@cato.org

Dated: October 22, 2024

i

QUESTION PRESENTED

Whether bias-response teams objectively chill students' speech.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. IU'S BIAS-RESPONSE TEAM PROTOCOLS ARE STATE ACTIONS DESIGNED TO CHILL PROTECTED SPEECH.....	5
II. IU'S BIAS-RESPONSE TEAM OBJECTIVELY CHILLS STUDENT SPEECH.....	8
A. The Seventh Circuit Misread <i>Bantam Books</i> and Ignored the Threat of Informal Censorship.....	9
B. Other Circuits Correctly Recognize that Universities' Speech Policies Can Abridge Freedom of Speech.....	12
C. IU Students Reasonably Fear Discipline Arising from Bias- Incident Reports.....	13
III. BIAS-RESPONSE TEAMS THREATEN ACADEMIC FREEDOM.....	18
CONCLUSION	20

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Backpage.com, LLC v. Dart</i> , 807 F.3d 229 (7th Cir. 2015)	9
<i>Bantam Books, Inc. v. Sullivan</i> , 372 U.S. 58 (1963)	7, 8, 9, 10, 11, 12, 13
<i>Denver Area Educ. Telcoms. Consortium v. FCC</i> , 518 U.S. 727 (1996)	9
<i>Healy v. James</i> , 408 U.S. 169 (1972).....	2, 16, 19, 20
<i>Herbert v. Lando</i> , 441 U.S. 153 (1979).....	5
<i>Keyishian v. Bd. of Regents</i> , 385 U.S. 589 (1967)	18
<i>Levin v. Harleston</i> , 966 F.2d 85 (2d Cir. 1992).....	13
<i>Moody v. NetChoice</i> , 144 S. Ct. 2383 (2024)	4
<i>NCAA v. Tarkanian</i> , 488 U.S. 179 (1988).....	4, 5
<i>NRA of Am. v. Vullo</i> , 602 U.S. 175 (2024)	8, 9
<i>Okwedy v. Molinari</i> , 333 F.3d 339 (2d Cir. 2003).....	9
<i>Speech First, Inc. v. Cartwright</i> , 32 F.4th 1110 (11th Cir. 2022)	3, 4, 8, 12, 13
<i>Speech First, Inc. v. Fenves</i> , 979 F.3d 319 (5th Cir. 2020)	3, 4, 8
<i>Speech First, Inc. v. Killeen</i> , 968 F.3d 628 (7th Cir. 2020)	4, 5, 8, 10, 11
<i>Speech First, Inc. v. Renu Khator</i> , 603 F. Supp. 3d 480 (S.D. Tex. 2022)	3, 8

<i>Speech First, Inc. v. Sands</i> , 69 F.4th 184 (4th Cir. 2023)	4, 8, 17
<i>Speech First, Inc. v. Schlissel</i> , 939 F.3d 756 (6th Cir. 2019)	3, 4, 8, 14
<i>Speech First, Inc. v. Shrum</i> , 92 F.4th 947 (10th Cir. 2024)	8
<i>Speech First, Inc. v. Wintersteen</i> , No. 4:20-cv-00002, 2020 WL 43012 (S.D. Iowa Mar. 12, 2020)	8
<i>Sweezy v. New Hampshire</i> , 354 U.S. 234 (1957)	2
<i>UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis.</i> , 774 F. Supp. 1163 (E.D. Wis. 1991).....	6
<i>Virginia v. Hicks</i> , 539 U.S. 113, 119 (2003).....	6
Other Authorities	
<i>Adam Steinbaugh & Alex Morey, Professor Investigated for Discussing Conflicting Viewpoints, 'The Coddling of The American Mind,'</i> FIRE (June 20, 2016)	15
<i>Bias Incident Reporting</i> , UNIV. OF IND. (last visited Oct. 19, 2024).....	2, 6, 7, 14
<i>Bias Response Team Report 2017</i> , FIRE (2017)	16
<i>Brief Amici Curiae</i> of the Goldwater Institute, Cato Institute, and Texas Public Policy Foundation, <i>Speech First, Inc. v. Fenves</i> , 384 F. Supp. 3d 732 (W.D. Tex. 2019) (No. 1:18-cv-1078)	14

<i>Catching up with ‘Coddling’ Part Eleven: The Special Problem of ‘Bias Response Teams,’</i> FIRE (Mar. 11, 2021)	6, 16
Christopher J. Ferguson, <i>Bias-Response Teams Are a Bad Idea</i> , CHRON. OF HIGHER EDUC. (June 5, 2023)	2
Emily Nayyer, <i>Surveys Reveal Rising Student and Faculty Concern About Censorship, Self-censorship Post-October 7</i> , FIRE (Jul. 12, 2024)	19
<i>Free Speech in the Crosshairs: Bias Reporting on College Campuses</i> , SPEECH FIRST (2022)	2, 3
Joy Liwanag, <i>Oklahoma State University Settles with Speech First, Disbands Bias Response Team And Rewrites Harassment Policy</i> , SPEECH FIRST (Apr. 22, 2024)	7
N. Honeycutt, S.T. Stevens & E. Kaufmann, <i>The Academic Mind in 2022: What Faculty Think About Free Expression and Academic Freedom on Campus</i> , FIRE (2023)	18, 19
Peter Schmidt, <i>Colleges Respond to Racist Incidents as if Their Chief Worry Is Bad PR</i> , Studies Find, CHRON. OF HIGHER EDUC. (Apr. 21, 2015)	17
Rachel Weiner, <i>Supreme Court Declines to rule on Bias-Reporting Program at Va. Tech</i> , WASH. POST (Mar. 4, 2024)	7
Rikki Schlott, <i>Bias Hotlines at US Colleges Have Led to a Witch Hunt Culture on Campus</i> , N.Y. POST (Aug. 27, 2022)	3

Robby Soave, <i>Rollins College Allegedly Suspends Conservative After He Challenged Islamic Student Who Threatened Gays</i> , REASON (Mar. 28, 2017)	15
Ryan Knapick, <i>University of Central Florida Disbands Bias Response Team to Settle Free Speech Lawsuit</i> , THE FREE SPEECH PROJECT (Oct. 25, 2022)	7
<i>Speech First Settlement and Disbanding of the CCRT</i> , UT NEWS (2020)	7
<i>Sticker Shock: Emerson College doubles down on censorship, denies TPUSA chapter's appeal of 'bias' charge for distributing stickers criticizing China's government</i> , FIRE (Nov. 16, 2021).....	15
Tobias Hoonhout, <i>University of Michigan Disbands 'Bias Response Team' In Response to First Amendment Challenge</i> , NAT'L REV. (Nov. 1, 2019)	7
Constitutional Provisions	
U.S. CONST. amend. I.....	5

INTEREST OF *AMICUS CURIAE*¹

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 in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

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

¹ Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party’s counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

This Court has consistently affirmed the importance of free speech on college campuses. *See, e.g.*, *Healy v. James*, 408 U.S. 169, 180 (1972); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (“The essentiality of freedom in the community of American universities is almost self-evident”). However, free speech norms are fragile, and universities in recent years have implemented policies that abridge the freedom of speech of students and faculty. Among the most alarming such policies are “bias-response teams,” which chill speech and raise grave First Amendment concerns.

Indiana University—a state university—has created a bias-response team that resembles the bias-response teams popping up at hundreds of schools across the nation.² Students are encouraged to anonymously report to this team “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.”³ Students and faculty at schools that have established

² In 2022, Speech First reported that more than 400 universities had bias-response teams. *Free Speech in the Crosshairs: Bias Reporting on College Campuses*, SPEECH FIRST 3, 9–10 (2022), <https://tinyurl.com/4ntnb3px>. *See also* Christopher J. Ferguson, *Bias-Response Teams Are a Bad Idea*, CHRON. OF HIGHER EDUC. (June 5, 2023), <https://tinyurl.com/ytaxmwzt> (“Because bias-response teams often involve college administrators and college police officers, the perception of the teams as coercive bodies is not unreasonable.”).

³ *Bias Incident Reporting*, UNIV. OF IND. (last visited Oct. 19, 2024), <https://tinyurl.com/2s3t6rx3>.

bias-response teams reasonably fear expressing controversial or minority opinions. That's because school officials at some universities have punished students after complaints of ostensibly biased or offensive speech. *See, e.g.*, Rikki Schlott, *Bias Hotlines at US Colleges Have Led to a Witch Hunt Culture on Campus*, N.Y. POST (Aug. 27, 2022) (detailing such reports).⁴ A recent study found that 80 percent of American college students self-censor, and that these anonymous reporting systems almost certainly account for some of the degradation of free speech norms on campuses. *See Free Speech in the Crosshairs, supra*, at 6.

Petitioner Speech First is a nationwide membership organization. Among its members are students who wish to express their viewpoints on public policy matters related to gender identity, immigration, and race, but who are justifiably afraid to do so.⁵ Some of these members are Indiana University students who have suffered a First Amendment injury because “the University’s bias incidents policy makes [them] reluctant to openly express [their] opinions or have these conversations in the broader University community.” Pet. App. 8a (quoting Speech First’s complaint). As

⁴ Available at <https://tinyurl.com/y6vy4rtj>. “On-campus humor publication The Koala at the University of California San Diego, for example, was defunded by the school for poking fun at campus ‘safe spaces’ after bias reports (including one requesting the school ‘stop funding’ the publication) were submitted” *Id.*

⁵ To vindicate the First Amendment rights of students and faculty, Speech First has successfully sued public universities for creating bias-response teams that unconstitutionally chill speech. *See Speech First, Inc. v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022); *Speech First, Inc. v. Renu Khator*, 603 F. Supp. 3d 480 (S.D. Tex. 2022); *Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020); *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019).

this Court stated last term, “On the spectrum of dangers to free expression, there are few greater than allowing the government to change the speech of private actors in order to achieve its own conception of speech nirvana.” *Moody v. NetChoice*, 144 S. Ct. 2383, 2407 (2024).

Public universities are state actors and thus are obligated by the First Amendment to permit free speech and the free exchange of ideas on their campuses. *See NCAA v. Tarkanian*, 488 U.S. 179, 192 (1988) (“A state university without question is a state actor.”). Applying that principle, the Fifth, Sixth, and Eleventh Circuits have each held that bias-response teams at public universities objectively chill speech in violation of the First Amendment. *See Fenves*, 979 F.3d at 319; *Schlissel*, 939 F.3d at 756; *Cartwright*, 32 F.4th at 1110.

But the Seventh Circuit has held the opposite. In a prior case, the Seventh Circuit held that Speech First lacked standing to challenge the bias-response team at the University of Illinois because the team did not objectively chill student speech. *Speech First, Inc. v. Killeen*, 968 F.3d 628 (7th Cir. 2020). The Seventh Circuit panel below considered itself bound by *Killeen* and thus likewise denied Speech First’s motion for a preliminary injunction against Indiana University.

This Court should grant the petition not only to resolve this circuit split but also because of the importance of constraining informal censorship by state actors. Just last term, this Court agreed to grant a petition on this same issue when Speech First challenged the Fourth Circuit’s decision in *Speech First, Inc. v. Sands*, 69 F.4th 184 (4th Cir. 2023), *vacated as moot*, 144 S. Ct. 675 (2024). The lower court’s decision in

Sands was vacated because Virginia Tech disbanded its bias-response team and mooted the lawsuit, but this example shows that universities will continue to informally chill speech on campuses until this Court resolves the issue.

This case will not require the Court to resolve difficult questions about when universities may prevent disruption on campus by temporarily restricting speech. This case is about a more basic question: whether bias-response teams restrict speech *at all*. Granting this petition would allow the Court to resolve a circuit split and vindicate the First Amendment rights of public university students. This Court should make clear that a student who self-censors because of credible fear of reprisal from a bias-response team has suffered a First Amendment injury.

ARGUMENT

I. IU'S BIAS-RESPONSE TEAM PROTOCOLS ARE STATE ACTIONS DESIGNED TO CHILL PROTECTED SPEECH.

The First Amendment prohibits the government from “abridging the freedom of speech[.]” U.S. CONST. amend. I. This prohibition applies to every “government agency—local, state, or federal[.]” *Herbert v. Lando*, 441 U.S. 153, 168 n.16 (1979). Public universities are state actors and their enforcement of university policies is, generally, state action. *See Tarkianian*, 488 U.S. at 192; *Killeen*, 968 F.3d at 646 (“The University [of Illinois] is a public entity and an arm of the state government of Illinois . . .”).

By design, public university bias-response teams abridge students’ freedom of speech. Universities first created bias-response teams after courts struck down

their content-based “speech codes,” which had authorized universities to discipline students for “offensive” but constitutionally protected speech. *See, e.g., UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis.*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Catching up with ‘Coddling’ Part Eleven: The Special Problem of ‘Bias Response Teams,’* FIRE (Mar. 11, 2021).⁶ Bias-response teams attempt to achieve the same result as speech codes, but more subtly. Rather than enacting outright bans on broad categories of speech, “campuses have merely empowered a group to act as a de facto speech police, in the name of tolerance, education, awareness, and [giving] those impacted by bias an opportunity to report without fear of retaliation.” *Id.*

Indiana University’s “Bias Incident Reporting” system fits this pattern; by design it has had a chilling effect on protected speech. The University’s definition of “bias” is broad and circular—two characteristics that tend to chill protected expression.⁷ *See Virginia v. Hicks*, 539 U.S. 113, 119 (2003). Strictly interpreted, “bias” at Indiana University includes political speech that is merely disputed or polemical. Suppose a student makes a social media post or a protest sign depicting former President Trump kissing Vladimir Putin, calling Zionists supporters of an “apartheid state,” or proclaiming that “Democrats = Communists.” Each of these examples would be a

⁶ Available at <https://tinyurl.com/3794xdkp>.

⁷ “Bias” is defined 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.” *Bias Incident Reporting, supra*.

reportable “bias incident” since it would “demean” or “mock” an individual or group.

Chilling students’ speech is an express goal of Indiana University’s bias reporting system. The reporting page instructs students as follows:

If you experience, witness, or are aware of a bias incident, submit a report to alert the university. Reporting an incident allows IU to . . . *take steps to prevent future incidents.*⁸

IU thus encourages students to report protected political speech and makes a record of which students uttered the offending speech “to prevent future incidents.” Such a reporting scheme will have a predictable and impermissible chilling effect on protected speech. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). That is why many state universities have realized that their bias-response protocols threatened protected speech and have quietly disbanded or reformed their teams.⁹ Other bias-response teams have

⁸ *Id.* (emphasis added). The website links to an easy-to-use form for making reports.

⁹ *See, e.g.*, Joy Liwanag, *Oklahoma State University Settles with Speech First, Disbands Bias Response Team And Rewrites Harassment Policy*, SPEECH FIRST (Apr. 22, 2024), <https://tinyurl.com/4abst44w>; Rachel Weiner, *Supreme Court Declines to rule on Bias-Reporting Program at Va. Tech*, WASH. POST (Mar. 4, 2024), <https://tinyurl.com/2234cbn4>; Ryan Knapick, *University of Central Florida Disbands Bias Response Team to Settle Free Speech Lawsuit*, THE FREE SPEECH PROJECT (Oct. 25, 2022), <https://tinyurl.com/3jk836jj>; Tobias Hoonhout, *University of Michigan Disbands ‘Bias Response Team’ In Response to First Amendment Challenge*, NAT’L REV. (Nov. 1, 2019), <https://tinyurl.com/hpdwkhxk>; *Speech First Settlement and Disbanding of the CCRT*, UT NEWS (2020), <https://tinyurl.com/2aw3yvxc>.

been disbanded after universities lost or settled legal challenges.¹⁰

However, both the district court and the Seventh Circuit denied standing to Speech First’s members, finding that Speech First failed to “demonstrate that any of its members experience an actual, concrete, and particularized injury as a result of [IU]’s policies” See Pet. App. 13a n.1 (quoting *Killeen*, 968 F.3d at 643–44). The out-of-step decisions in this case merit the Court’s review.

II. IU’S BIAS-RESPONSE TEAM OBJECTIVELY CHILLS STUDENT SPEECH.

Indiana University’s bias-response team resembles the Morality in Youth Commission that this Court condemned in *Bantam Books*. Like that Commission, the bias-response team chills speech and inflicts First Amendment injuries.

This Court and lower courts, including the Seventh Circuit, have long recognized that formal sanctions or coercion are not necessary to chill speech. See, e.g., *NRA of Am. v. Vullo*, 602 U.S. 175 (2024); *Bantam Books*, 372 U.S. at 67 (“We are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief.”);

¹⁰ See, e.g., *Sands*, 144 S. Ct. 675 (2024) (settled after the Supreme Court denied certiorari and vacated Fourth Circuit decision); *Speech First, Inc. v. Shrum*, 92 F.4th 947 (10th Cir. 2024) (settled); *Cartwright*, 32 F.4th at 1110 (won and settled); *Renu Khator*, 603 F. Supp. 3d at 480 (won and settled); *Fenves*, 979 F.3d at 319 (won and settled); *Killeen*, 968 F.3d at 628 (settled); *Speech First, Inc. v. Wintersteen*, No. 4:20-cv-00002, 2020 WL 43012 (S.D. Iowa Mar. 12, 2020) (settled); *Schlissel*, 939 F.3d at 756 (won and settled).

Backpage.com, LLC v. Dart, 807 F.3d 229 (7th Cir. 2015); *Okwedy v. Molinari*, 333 F.3d 339 (2d Cir. 2003) (per curiam) (holding it unconstitutional for a borough president to send letters to a billboard operator requesting the removal of Bible verses, despite the president's lack of regulatory authority over the operator). "Indeed," this Court has said, "few of our First Amendment cases involve outright bans on speech." *Denver Area Educ. Telcoms. Consortium v. FCC*, 518 U.S. 727, 809 (1996). Last term, this Court unanimously reaffirmed that the government "cannot do indirectly what [it] is barred from doing directly." *Vullo*, 602 U.S. at 190. Several circuits have had no trouble applying these principles to public university bias-response teams, which makes the Seventh Circuit's blinkered approach particularly alarming.

A. The Seventh Circuit Misread *Bantam Books* and Ignored the Threat of Informal Censorship.

In *Bantam Books*, this Court struck down a state law creating the Rhode Island Commission to Encourage Morality in Youth (Morality in Youth Commission). 372 U.S. at 58. The state legislature established the Morality in Youth Commission and tasked it merely with "educat[ing] the public concerning any [publication] or other thing containing obscene, indecent or impure language, or manifestly tending to the corruption of youth" *Id.* at 59–60. The commissioners were volunteers and had no formal authority to punish booksellers. *Id.* at 60 n.1. All meetings and discussions with publishers were voluntary. *Id.* at 68. Nevertheless, this Court concluded that the Commission's "operation was in fact a scheme of state censorship effectuated by extralegal sanctions" and that the

Commission “acted as an agency not to advise but to suppress.” *Id.* at 72. The book publishers’ standing to bring a suit was so plain that the state did not even raise the issue. *Id.* at 64 n.6 (“Appellants standing has not been, nor could it be, successfully questioned. . . . The finding that the Commission’s notices impaired sales of the listed publications, which include two books published by appellants, establishes that appellants suffered injury.”).

The activities of IU’s bias-response team closely resemble the practices of the Morality in Youth Commission that were deemed unconstitutional in *Bantam Books*. Like the members of the Morality in Youth Commission, the members of IU’s bias-response team are appointed by state employees to compile lists of people who commit the “offense” of sharing objectionable ideas. In both cases, these state appointees initiate “voluntary” meetings with the reported speakers to “educate” them, even though they were engaged in protected speech. *Id.* at 66–68; *see also* Pet. at 24.

The Seventh Circuit in *Killeen* deemed it significant that the bias-response meetings with reported students are non-mandatory. *See Killeen*, 968 F.3d at 640 (“[S]tudents view the conversations with BART as optional . . . [which] distinguishes this case from *Bantam Books*”). This was error. In *Bantam Books*, the Commission’s notices subtly encouraged censorship of books inappropriate for minors, but compliance with these notices was similarly voluntary and the notices could similarly have been ignored by the recipient. *See Bantam Books*, 372 U.S. at 68. (“It is true . . . that [a book seller] was ‘free’ to ignore the Commission’s notices, in the sense that his refusal to ‘cooperate’ would have violated no law.”). This Court found

signs of intimidation only by looking beyond the formal, nominally voluntary nature of Commission protocols. Those informal signals of intimidation included police officer drop-ins on reported book sellers based on tips from the Morality in Youth Commission. *Id.*

The Seventh Circuit in *Killeen* failed to see the similarities between bias-response teams and the Commission in *Bantam Books*. The court denied standing to Speech First and its student members with only a brief observation that the bias-response team protocols were voluntary. *See Killeen*, 968 F.3d at 640. But just as in *Bantam Books*, these “voluntary” proceedings came with serious implied consequences. Both the Commission and the bias-response team made it known to reported parties that they could be referred for criminal prosecution. *See* Pet. at 12 (the university’s policy is that all bias “reports will be evaluated to determine if further investigation is required for potential violations of university policy and/or criminal law”); *Bantam Books*, 372 U.S. at 62. Because the Morality in Youth Commission had the power to refer publishers to law enforcement and because it exercised other informal powers over reported parties, this Court characterized the Commission’s notices as “thinly veiled threats” and found its practices unconstitutional. *Id.* at 68.

The Seventh Circuit dismissed these and other similarities and tersely distinguished *Bantam Books* because some students have declined to attend meetings initiated by a bias-response team. *Killeen*, 968 F.3d at 640. The Seventh Circuit should have recognized that a party can still have standing even when the state-appointed body’s process is nominally voluntary and even when some people are able to withstand

the threat. The book publishers in *Bantam Books* had unquestioned standing to sue despite the Commission's lack of enforcement authority and the nominally voluntary nature of its inquiries. The Seventh Circuit has misapplied and significantly weakened the force of *Bantam Books*.

B. Other Circuits Correctly Recognize that Universities' Speech Policies Can Abridge Freedom of Speech.

Any chilling effect—if demonstrated—secures litigants standing under the First Amendment, irrespective of “formality.” See *Bantam Books*, 372 U.S. at 64 n.6 (“The finding that the Commission’s notices impaired sales of the listed publications, which include two books published by appellants, establishes that appellants suffered injury.”).

In contrast to the Seventh Circuit’s approach, other circuits have looked beyond the informal nature of universities’ speech policies and recognized that bias-response teams and similar committees abridge the freedom of speech. The Eleventh Circuit, for instance, noted the “commonsense proposition” from *Bantam Books* that “Neither formal punishment nor the formal power to impose it is strictly necessary to exert an impermissible chill on First Amendment rights—indirect pressure may suffice.” *Cartwright*, 32 F.4th at 1110. The Eleventh Circuit recognized the similarities between a public university bias-response team and the Morality and Youth Commission and held that Speech First had standing to sue on behalf of its student members. *Id.* at 1124. Similarly, the Second Circuit has held that a professor had standing to challenge the acts of an academic committee that the university created in response to a controversial

article he had published about race. Even though the committee lacked formal disciplinary powers, the court held that the professor had standing. *See Levin v. Harleston*, 966 F.2d 85, 89–90 (2d Cir. 1992). The Second Circuit reasoned that “[i]t is the chilling effect on free speech that violates the First Amendment, and it is plain that an implicit threat can chill as forcibly as an explicit threat.” *Id.*

Nevertheless, the Seventh Circuit wrongly held that Speech First lacks standing in this case because Indiana University’s bias-response team has no formal authority to punish students. Pet. App. 2a. According to Indiana University, the bias-response team relies on a “voluntary” process by which students are invited to meet with university staff. Pet. at 24. This claim, however, ignores the coercive pressures inherent in the interactions between students and administrators, who possess the power to discipline students. Reasonable students invited to what are effectively re-education meetings would thus feel pressure to change their speech and avoid future such “invitations.” Of the circuits to have issued currently precedential opinions on this question, only the Seventh Circuit has found that bias-response team policies do not objectively chill student speech.

C. IU Students Reasonably Fear Discipline Arising from Bias-Incident Reports.

This Court in *Bantam Books* was clear that the relevant inquiry is not whether a speech-reporting team has the authority to discipline; rather, it is whether a reasonable person would objectively perceive the possibility of punishment and refrain from speaking under the circumstances. 372 U.S. at 67–68. *See* Pet. at 34; *Cartwright*, 32 F.4th at 1124. IU’s procedures

produce exactly this result by design. Students are encouraged to report on each other anonymously, even if such speech is protected or occurs off-campus.¹¹ Whenever there is a report of a bias incident, Indiana University tracks and logs it. Pet. at 24. The broad definition of “bias” combined with the broad jurisdiction of the bias-response team gives university officials virtually unfettered discretion to selectively choose which speech is actionable.

Given this system, a student would reasonably fear discipline—and possibly even criminal charges—for uttering protected but controversial speech. When a reasonable student learns that the bias-response team encourages anonymous reporting, can refer incidents to the police, and responds to even off-campus speech, that student will likely decide that expressing a controversial opinion or political view is simply not worth it.

As the Sixth Circuit explained, a student “could be forgiven for thinking that inquiries from and dealings with the Bias Response Team could have dramatic effects such as currying disfavor with a professor, or impacting future job prospects.” *Schlissel*, 939 F.3d at 765. That’s because university bias-response teams have a well-documented history of penalizing students through suspension or forced apology, or by defunding student groups. See Brief *Amici Curiae* of the Goldwater Institute, Cato Institute, and Texas Public Policy Foundation at 4, *Speech First, Inc. v. Ferves*, 384 F. Supp. 3d 732 (W.D. Tex. 2019) (No. 1:18-cv-1078). Given that history, reasonable students know that

¹¹ *Bias Incident Reporting, supra.*

punishment and costly process is a real possibility, and they will self-censor accordingly.

Moreover, while bias-response teams claim to target “bias,” in practice they often silence core political speech. Consider a student group at Emerson College suspended for distributing stickers that said “China kinda sus.” *Sticker Shock: Emerson College doubles down on censorship, denies TPUSA chapter’s appeal of bias’ charge for distributing stickers criticizing China’s government*, FIRE (Nov. 16, 2021).¹² Even though this was protected political speech intended to mock the authoritarian tendencies of the Chinese government in colloquial language, the university found it discriminatory against Asian-Americans. *Id.* Another example occurred at the University of North Carolina, where a member of a bias-response team advised a professor not to speak about transgender issues in his class. Adam Steinbaugh & Alex Morey, *Professor Investigated for Discussing Conflicting Viewpoints, ‘The Coddling of The American Mind’*, FIRE (June 20, 2016).¹³ This, too, was protected speech, but universities sanctioned the expression nonetheless.

Conservative students are an unpopular minority at many universities and, anecdotally, seem particularly susceptible to receiving bias reports and discipline.¹⁴ Conservative students are not the only

¹² Available at <https://tinyurl.com/bded7sck>.

¹³ Available at <https://tinyurl.com/3cd2ztxh>.

¹⁴ For instance, a conservative student was suspended from Rollins College after one of his professors reported that he was making her feel “unsafe.” Robby Soave, *Rollins College Allegedly Suspends Conservative After He Challenged Islamic Student Who Threatened Gays*, REASON (Mar. 28, 2017),

minorities on campus, however, and students have reported speech on all sides of the political discourse to university bias-response teams.¹⁵

Universities may be motivated by noble ends when establishing bias-response teams, but the fact remains: “The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.” *Healy*, 408 U.S. at 188. Students justifiably fear ostracism from social, educational, and career opportunities when a bias-response team reaches out to discuss their speech. One study, which surveyed the bias-response 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*

<https://tinyurl.com/4rknrs3s>. In another incident, a student running for student government at Wake Forest was investigated for a parody Instagram post stating that he would “build a wall” between the campus and a neighboring school. *Catching up with ‘Coddling,’ supra*.

¹⁵ At Appalachian State University, one student filed a bias report after taking offense to “the politically biased slander . . . ‘TRUMP IS A RACIST.’” At Texas Tech University, the Black Student Union was reported for tweeting, “All lives don’t matter... White lives don’t matter...Blue lives don’t matter... #BlackLivesMatter.” At John Carroll University, an anonymous student reported an African-American Alliance protest for making white students feel uncomfortable. *Bias Response Team Report 2017*, FIRE (2017), <https://tinyurl.com/48khv8xx>.

Their Chief Worry Is Bad PR, Studies Find, CHRON. OF HIGHER EDUC. (Apr. 21, 2015).¹⁶

The Seventh Circuit dismissed the implicit threat of a bias-response team because some students, perhaps out of fortitude or perhaps because of the facts in their “bias incidents,” refused to attend a team-initiated meeting. That blinkered view of the power of bias-response teams would allow universities to silence speech while simultaneously evading First Amendment review. Judge Wilkinson articulated the fraught position of students in his *Sands* dissent:

The reasonable student hears a vague promise to protect free speech followed by [the bias-response team] doubling down on the “crucial” need for responding “in a timely and consistent manner” to bias with “educational interventions,” a creative euphemism for disruptive measures meant to stop the student from engaging in heterodox speech again.

Sands, 69 F.4th at 212 (Wilkinson, J., dissenting).

So, too, Indiana University boasts support for free speech on the very same website where it allows students to anonymously report their fellow students for protected expression.¹⁷ The Seventh Circuit erred in holding that students would see no threat in a university policy that gives state actors broad power to

¹⁶ Available at <https://tinyurl.com/2ta7c6wc> (reporting on a study by Texas academics presented at the 2015 conference of the American Educational Research Association).

¹⁷ *Bias Incident Reporting*, UNIV. OF IND. (last visited Oct. 19, 2024), <https://tinyurl.com/2s3t6rx3>.

initiate “educational” meetings, and even criminal referrals, for reported speech.

III. BIAS-RESPONSE TEAMS THREATEN ACADEMIC FREEDOM.

“Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.” *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). Academic freedom is “a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.” *Id.* University bias-response teams, like the one at Indiana University, are a direct threat to academic freedom because they allow university officials to decide which ideas prevail. A universal feature of bias-response teams is that they encourage students to police each other and their professors in an Orwellian manner. *See Pet.* at 24.

Although Speech First’s members are students, students are not the only part of the campus community impacted by bias-response teams. Professors also rely on academic freedom to honestly conduct research, to teach, and to share their scholarship. But some professors fear discipline for the content of their teaching or scholarship. In 2022, a national survey of 1,491 faculty members at American universities reported that roughly 11 percent of professors reported being disciplined or threatened with discipline because of their teaching. N. Honeycutt, S.T. Stevens & E. Kaufmann, *The Academic Mind in 2022: What Faculty Think About Free Expression and Academic Freedom on Campus*, FIRE (2023).¹⁸ Perhaps more worrisome is

¹⁸ Available at <https://tinyurl.com/yt9744aw>.

that about half of faculty worry for their jobs and reputation because of their speech. *Id.* Bias-response teams provide yet another avenue to silence professors who teach or write on controversial topics. Students and society benefit from universities hosting discussions about provocative social and political issues, but professors will avoid such topics altogether rather than risk an incident with a bias-response team.

After the recent escalation of the Israel-Palestine conflict, Professor Marc Lynch published a survey where he found that “76% of U.S.-based scholars of the Middle East have felt a greater direct or indirect need to self-censor since the start of the war.” Emily Nayyer, *Surveys Reveal Rising Student and Faculty Concern About Censorship, Self-censorship Post-October 7*, FIRE (Jul. 12, 2024).¹⁹ FIRE explained that “[t]hese scholars may be self-censoring to avoid punishment by their administrations” *Id.* Free inquiry at public universities is in great peril if professors fear speaking about current events. University scholars depend on universities to maintain cultures of free expression so that they can honestly contribute to scholarship without fear of punishment. Society benefits from the norm of free expression at American public universities, and that norm will suffer with the rise of bias-response teams.

While universities do have an interest in keeping their classrooms civil and free of distraction, “state colleges and universities are not enclaves immune from the sweep of the First Amendment.” *Healy*, 408 U.S. at 180. Thus, a public university “may not restrict speech or association simply because it finds the views

¹⁹ Available at <https://tinyurl.com/43phxf6s>.

expressed by any group to be abhorrent.” *Id.* at 188. Because universities can already punish student conduct that constitutes an actual threat or disruption, bias-response teams serve mainly to chill unpopular views on campuses.

CONCLUSION

For the foregoing reasons, and those stated by the petitioner, this Court should grant the petition.

Respectfully submitted,

Thomas A. Berry
Counsel of Record
Brent Skorup
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 789-5202
tberry@cato.org

Dated: October 22, 2024