No. 21-2061

United States Court of Appeals

for the

Fourth Circuit

SPEECH FIRST, INC.,

Plaintiff/Appellant,

– v. –

TIMOTHY SANDS, in his individual capacity and 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 AT ROANOKE

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF PLAINTIFF/APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amicus* certifies that (1) *amicus* does not have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in *amicus*.

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to promoting and protecting civil liberties at our nation's institutions of higher education. Since 1999, FIRE has worked to protect First Amendment rights at campuses nationwide. FIRE believes that to best prepare students for success in our democracy, the law must remain unequivocally on the side of robust free speech rights on campus.

FIRE coordinates and engages in targeted litigation and regularly files briefs as *amicus curiae* to ensure student First Amendment rights are vindicated when threatened at public institutions like Virginia Polytechnic Institute and State University. The students FIRE defends rely on access to federal courts to secure meaningful and lasting legal remedies to the irreparable harm of censorship. If allowed to stand, the lower court's ruling will hinder students at all educational levels from vindicating their First Amendment rights in court.

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[1] No counsel for a party authored this brief in whole or in part. Further, no person, other than *amicus*, its members, or its counsel contributed money intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

A public university that adopts the anti-terrorism campaign "See Something, Say Something" to encourage students to report "offensive" speech not only has strayed far from its purpose, but its First Amendment obligations. Our public campuses are intended to be "vital centers for the Nation's intellectual life," and must vigilantly protect "individual thought and expression." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835–36 (1995). Instead, Virginia Tech has formed an Orwellian speech police—the "Bias Intervention and Response Team"—that forces students to self-censor or risk punishment.

So-called "Bias Response Teams" (BRTs) are widespread in higher education, chilling speech far beyond Virginia Tech's campus, consequently presenting an emerging threat to free and open discourse. According to *amicus* FIRE's 2016 survey, 231 colleges and universities—with a combined enrollment of at least 2.84 million students—maintain BRTs. Although they vary in name and structure across universities, BRTs regularly target protected speech. By encouraging students to report speech they dislike, BRTs silence the frank conversations that ready students for participation in our pluralistic democracy.

Virginia Tech's BRT expressly targets protected speech through its broad definition of "bias incident." Indeed, Virginia Tech lists "hosting a culturally themed party" and other forms of protected expression as examples of "bias related conduct." Courts have routinely invalidated university policies that chill student expression. Recently, two sister circuits struck down bias reporting policies less hostile to speech than Virginia Tech's.[2]

Virginia Tech has also implemented an Informational Activities Policy that acts as a prior restraint on student speech. The blanket permitting policy grants administrators unfettered discretion to discriminate based on viewpoint. It also denies students unaffiliated with administratively recognized groups the opportunity to distribute informational materials, and unreasonably holds even recognized groups accountable if others turn their materials into litter.

Virginia Tech's unconstitutional policies are no anomaly in higher education. To protect the First Amendment rights of students at Virginia Tech and nationwide, this Court must reverse the district court.

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[2] *See Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020); *Speech First, Inc. v. Schlissel,* 939 F.3d 756 (6th Cir. 2019).

ARGUMENT

I. Bias Response Teams Chill Speech on Campuses Nationwide.

More than 200 colleges and universities maintain some type of system for reporting, often referred to as "Bias Response Teams."[3] These teams receive, investigate, and resolve formal complaints about student expression, encouraging students to report one another to administrators wherever they subjectively perceive "bias."[4] While BRTs are not always unconstitutional, universities employ overbroad definitions of "bias" that include speech the First Amendment protects.[5] BRTs are often staffed by

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[3] FOUND. FOR INDIVIDUAL RTS. IN EDUC., BIAS RESPONSE TEAM REPORT 2017, at 11 (2017), https://www.thefire.org/presentation/wp-content/uploads/2017/03/01012623/2017-brt-report-corrected.pdf [https://perma.cc/Y3U2-4U87].

[4] *First National Survey of 'Bias Response Teams' Reveals Growing Threat to Campus Free Speech*, NEWSDESK (Feb. 7, 2017), https://www.thefire.org/first-national-survey-of-bias-response-teams-reveals-growing-threat-to-campus-free-speech/ [https://perma.cc/5SHS-Z8JM]; Jillian Kay Melchior, Opinion, *The Bias Response Team Is Watching*, WALL ST. J. (May 8, 2018; 3:11 PM), https://www.wsj.com/articles/the-bias-response-team-is-watching-1525806702 [https://perma.cc/C8D6-7LUD].

[5] FIRE defines a bias reporting system as "any system identified as such or that provides: (1) A formal or explicit process for or solicitation of (2) reports from students, faculty, staff, or the community (3) concerning offensive conduct or speech that is protected by the First Amendment or principles of expressive or academic freedom." This definition precludes

campus administrators with little First Amendment training, and many include law enforcement officials and student conduct administrators with authority to police and punish student and faculty expression. Too often, BRTs are designed to chill student speech, and succeed in stultifying open and honest discourse on campus.

A. As *Amicus* FIRE's Research Shows, Bias Response Teams Are Widespread.

Bias response reporting systems have proliferated throughout higher education.[6] In 2016, FIRE conducted an extensive survey of BRTs after receiving an increasing number of reports that colleges and universities were using them to investigate—and sometimes discipline—subjectively offensive yet constitutionally protected expression.[7] FIRE discovered 231 BRTs at public and private institutions across the country

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reporting systems limited to criminal offenses involving hate or bias. FIRE REPORT, *supra* note 3 at 6.

[6] Greg Lukianoff & Adam Goldstein, *Catching up with 'Coddling' Part Eleven: The Special Problem of 'Bias Response Teams,'* NEWSDESK (Mar. 11, 2021), https://www.thefire.org/catching-up-with-coddling-part-eleven-the-special-problem-of-bias-response-teams [https://perma.cc/7XHA-44MF]; *see also* Jeffrey Aaron Snyder & Amna Khalid, *The Rise of "Bias Response Teams" On Campus*, NEW REPUBLIC (Mar. 30, 2016), https://newrepublic.com/article/132195/rise-bias-response-teams-campus [https://perma.cc/N5JC-T4FK].

[7] FIRE REPORT, *supra* note 3 at 4.

that have a combined enrollment of at least 2.84 million students.[8] Of these, 143 were public universities, bound by the First Amendment, while a majority of the 88 private universities with BRTs profess commitment to ideals of free expression and academic freedom.[9]

FIRE's research demonstrates that, wherever employed, BRTs chill free and open discourse foundational to our system of higher education.

B. Bias Response Teams Police Protected Speech.

BRTs respond to "bias incidents," the definition of which varies from institution to institution. Most of the reporting systems FIRE surveyed invited students to report instances of bias predicated on enumerated characteristics.[10] For example, most universities encourage students to report bias incidents related to race, religion, disability, national origin, and sexual orientation.[11] The definitions also target speech that students subjectively find "harmful or hurtful," or cause "alarm" or "anger," implicating broad swaths of protected speech.[12] The

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[8] *Id.* at 4.

[9] *Id.* at 11.

[10] Eighty-six percent of the BRTs FIRE surveyed set forth specific, enumerated categories of "bias." *Id.* at 13.

[11] *Id.*

[12] *Id.*

reach of BRTs is particularly troubling when considering an alarming 21% of public institutions surveyed invited bias reports on the basis of political affiliation.[13] Such broad conceptions of bias invite students to report protected expression, including core political speech, academic debate, and unpopular, dissenting, or simply controversial expression.

BRTs also vary in structure and name from campus to campus, but their makeups betray a fundamental intent to police student speech. Many institutions maintain a committee, often called some variation of "Bias Response Team," to administer bias reporting systems.[14] Others forego a distinct team and instead send bias reports directly to existing offices or departments including deans, housing authorities, or the police.[15] Roughly 42 percent of BRTs FIRE surveyed actually include

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[13] *Id.* at 14.

[14] *See, e.g.*, Institute Discrimination & Harassment Response Office, *The Bias Response Team (BRT)*, MASS. INST. OF TECH., https://idhr.mit.edu/our-office/brt [https://perma.cc/VR3A-LW3E] (last visited Jan. 5, 2022); Division of Equity and Inclusion, *Bias Education and Response Team*, UNIV. OF OR., https://inclusion.uoregon.edu/bias-response-team [https://perma.cc/9FQX-YL2Q] (last visited Jan. 5, 2022); Campus and Student Life, *Bias Education & Support Team (BERT)*, UNIV. OF CHI., https://csl.uchicago.edu/get-help/uchicago-help/bias-education-support-team-best/ [https://perma.cc/9FQX-YL2Q] (last visited Jan. 5, 2022).

[15] FIRE REPORT, *supra* note 3 at 11.

police or security officials, signaling to students that subjectively offensive expression may be subject to police investigation.[16] Approximately 63% of BRTs include representatives from student conduct offices, which typically wield disciplinary power.[17] Although nearly half of institutions surveyed publicly acknowledged the inherent tension between free expression and bias policies, FIRE could locate definitive proof that only one school—Louisiana State University—offered its BRT any type of substantive First Amendment training.[18]

The result of deploying teams to police subjective definitions of "bias" is that universities and colleges frequently react to complaints by investigating or punishing protected expression.[19] After University of Northern Colorado's BRT advised professors against teaching controversial subjects to avoid offending students, widespread public

[16] *Id.* at 19.

[17] *Id.*

[18] *Id.* at 23.

[19] *Id.* at 15–18. The Report contains a more detailed discussion of the specific bias complaints unearthed in FIRE's survey. Many of the reports FIRE received failed to disclose what action (if any) was taken in response to BRT reports.

backlash convinced the university to disband the BRT.[20] At the University of New Mexico, the Office of the Dean of Students investigated a member of the College Republicans for criticizing another student and her organization during a public debate.[21] A dean at Connecticut College investigated pro-Palestinian students for posting flyers that mimicked Israeli eviction notices.[22] And the BRT at Wake Forest University investigated a parody campaign ad calling to "build a wall" between Wake Forest and a neighboring university.[23]

Students across the ideological spectrum have used BRTs to report protected core political speech, controversial discourse, and outspoken

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[20] Adam Steinbaugh, *University of Northern Colorado to End 'Bias Response Team,' But What Next?*, NEWSDESK (Sept. 9, 2016), https://www.thefire.org/university-of-northern-colorado-to-end-bias-response-team-but-what-next [https://perma.cc/9P2K-3N93].

[21] University of New Mexico Hate/Bias Incident Reporting Form, Feb. 27, 2013, produced to the Foundation for Individual Rights in Education in response to a public records request, *available at* https://www.documentcloud.org/documents/3234843-University-of-New-Mexico-Chick-Fil-a-Report.html [https://perma.cc/T9RH-V64W].

[22] FIRE REPORT, *supra* note 3 at 16–17.

[23] Adam Goldstein, *Wake Forest's investigation of 'build a wall' Instagram post chills free speech*, NEWSDESK (March 28, 2019), https://www.thefire.org/wake-forests-investigation-of-build-a-wall-instagram-post-chills-free-speech [https://perma.cc/2FQV-6RZ7].

activism.[24] For example, when the Black Student Union at Texas Tech University tweeted "All lives don't matter…White lives don't matter…Blue lives don't matter…#BlackLivesMatter," a student demanded the university categorize it as a "hate group."[25]

Universities have also relied on bias reports to justify interference with student press. After receiving a complaint that the University of Oregon's student paper gave inadequate press coverage to trans students and students of color, a BRT case manager stepped in, meeting with the paper's editor and a reporter.[26] And at the University of California, San Diego, a student humor publication lost its funding after the university received complaints about an article satirizing "safe spaces."[27]

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[24] FIRE REPORT, *supra* note 3 at 15–18.

[25] Texas Tech University Campus Climate & Incident Reporting Form Submitted on July 14, 2016, produced to the Foundation for Individual Rights in Education in response to a public records request, *available at* https://www.documentcloud.org/documents/3255186-Texas-Tech-BSA-Black-Lives-Matter-tweet.html [https://perma.cc/7LDD-S34L].

[26] Adam Steinbaugh, *University of Oregon on 'Bias Report Team': Nothing to See Here*, NEWSDESK (May 27, 2016), https://www.thefire.org/university-of-oregon-on-bias-response-team-nothing-to-see-here [https://perma.cc/QF2N-TT2P].

[27] Adam Steinbaugh, *As 'The Koala' Files Lawsuit Against University of California, San Diego, Public Records Reveal Administration's Censorship*, NEWSDESK (June 1, 2016), https://www.thefire.org/as-the-koala-files-lawsuit-against-university-of-california-san-diego-public-

Not all BRTs serve disciplinary functions. Some colleges claim to maintain BRTs as a means of surveying student perspectives and general campus climate.[28] Some provide programming and resources to students who submit reports or for the larger campus community.[29] Although these goals do not inherently run afoul of the First Amendment, the mere existence of BRTs can chill the type of conversations meant to flourish on college campuses, leaving students ill-suited for participation in our pluralistic democracy. [30]

After terminating the University of Northern Colorado's BRT, President Kay Norton announced, "[w]e must ensure that UNC is a place where it is safe to question and argue, safe to talk about things that

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records-reveal-administrations-censorship [https://perma.cc/3SHU-UC9C]. The students ultimately prevailed on their First Amendment claims. *Koala v. Khosla*, 931 F. 3d 887 (9th Cir. 2019).

[28] FIRE REPORT, *supra* note 3 at 21.

[29] *Id.*

[30] Lukianoff, *supra* note 6 ("Even in those cases where BRTs are organized properly and stay on the lawful side of the fence, creating university offices devoted to investigating expression that may create a 'hostile learning environment' will create a substantial chilling effect on the speech."); *see also* Melchior, *supra* note 4.

divide us and make us uncomfortable[.]"[31] Ultimately, colleges and universities that implement BRTs risk doing so at the expense of the robust expressive rights to which our country's students are constitutionally entitled.

II. Virginia Tech's Bias Response System Unconstitutionally Chills Student Speech.

Virginia Tech's bias response system, "BIRT," acts as a police force targeting student speech. Courts have routinely invalidated public university speech codes that chill student expression as BIRT does, including recent decisions in the Fifth and Sixth Circuits holding bias response policies sufficiently chilled student speech to constitute an injury-in-fact.[32] Those policies mirror the one at issue here, and this Court should join the Fifth and Sixth Circuits in finding Virginia Tech's bias response team susceptible to First Amendment challenge.

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[31] Kay Norton, President, Univ. of N. Colo., State of the University Address (Sept. 7, 2016), https://www.unco.edu/news-archive/assets/pdfs/2016SOUtext.pdf [https://perma.cc/N9G3-BKVR].

[32] *See Fenves*, 979 F.3d 319; *Schlissel,* 939 F.3d 756.

A. Virginia Tech's BIRT Explicitly Targets Protected Expression.

Touting the slogan "See Something, Say Something," Virginia Tech's BIRT, organized under the Office of the Dean of Students, encourages students to report others based on protected speech. The program solicits reports of biased speech, referring allegations of criminal activity and violations of university policy to the appropriate authorities, through "educational" and "restorative" resolutions while addressing "hurtful" expression *not* reportable to the police or university adjudicative offices. These policies go beyond even the policy challenged in *Schlissel* and objectively chill student speech, even when the "resolutions" to merely offensive expression are voluntary.

Virginia Tech makes no bones about policing speech: it defines "bias incidents" as "**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."[33] This definition, which delineates BIRT's jurisdiction, specifically targets speech, and is not limited to actionable harassment as defined by law.[34]

Moreover, Virginia Tech clarifies its definition of "bias incident" by providing the following examples of "bias related conduct"—each of which describe protected expression:

- words or actions that contradict the spirit of the Principles of Community
- jokes that are demeaning to a particular group of people
- holding a "date" or "slave" auction
- performing a skit in which participants use blackface or other ethnic group makeup or props
- hosting a culturally themed party
- assuming characteristics of a minority group for advertising

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[33] *What is Bias?*, Va. Tech. Univ., https://dos.vt.edu/express_a_concern/bias-related-incident.html [https://perma.cc/LV7S-G39R] (last visited Jan. 9, 2022) (emphasis added).

[34] Harassment is unprotected where it is "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

- posting flyers that contain demeaning language or images[.][35]

The introduction to BIRT itself makes clear the purpose of the reporting system is to eliminate bias incidents at Virginia Tech by providing community members a tool to report them. Until January 2022, the introductory page was entitled "See Something, Say Something!"[36] reflecting sentiment that gained popularity in the national consciousness after the terrorist attacks on September 11, 2001.[37] The Department of Homeland Security now uses the slogan to "emphasize the importance of reporting suspicious activity to the proper state and local law enforcement authorities."[38] Following this model of policing through

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[35] *Id.* The introductory page to Virginia Tech's bias reporting system links to the above definition and examples. *Commitment to Bias-Free Experiences*, Va. Tech. Univ., https://dos.vt.edu/express_a_concern.html [https://perma.cc/QCX7-6MEN] (last visited Jan. 9, 2022).

[36] *See Something, Say Something!*, Va. Tech. Univ., https://web.archive.org/web/20211219194115/https://dos.vt.edu/express_a_concern.html [https://perma.cc/4FYB-VLDW] (last visited Jan. 9, 2022).

[37] Stuart Elliot, *Do You Know Where Your Slogan Is?*, N.Y. Times, Mar. 16, 2007, *available at* https://www.nytimes.com/2007/03/16/business/media/16adco.html [https://perma.cc/8MV8-6SNY].

[38] *If You See Something, Say Something® Campaign Overview*, Dept. Homeland Sec, https://www.dhs.gov/publication/if-you-see-something-say-something%E2%84%A2-campaign-overview [https://perma.cc/2XLS-Z56H] (last visited Jan. 9, 2022).

public reporting, Virginia Tech included a call to action at the bottom of the page: "As a student, if you hear or see something that feels like a bias incident, statement, or expression, we encourage you to make a report. In short, if you see something, say something!"[39]

The bias incident reporting form to which the page links clearly furthers this mission, resembling an actual police report, with fields for names of the reporting individual, the "alleged," the "impacted person," and witnesses, along with incident date, time and location.[40] In addition to requiring a narrative describing the incident, the form also asks the reporting individual to select from a preset list of nineteen identified offenses within BIRT's purview, the majority of which encompass protected speech, including: "Comment in Class or Assignment," "Comment in Person," "Comment in Writing or on Internet," "Offensive

[39] *See Something, Say Something!*, *supra*, note 36. Recent amendments to the webpage are little improvement: although Virginia Tech removed the "see something, say something" language, the title "Commitment to Bias-Free Experiences" betrays the university's intent to remove all expressions of bias, even protected ones, from its campus.

[40] *Bias Incident Reporting Form*, Va. Tech. Univ., https://cm.maxient.com/reportingform.php?VirginiaTech&layout_id=6 [https://perma.cc/5T2P-VJ8B] (last visited Jan. 9, 2022).

Picture or Image," and "Written Slur."[41] The form also offers "Emotional Assault/Attack" and "Verbal Attack/Assault" as distinct options from "Physical Assault or Attack" and "Harassment."[42]

Although BIRT purports to lack power to punish students directly—that is, file criminal charges or levy academic sanctions—the manner of investigation described above suggests to students that when they "see something," then "say something," in response to protected speech, BIRT will *do something* about it. Virginia Tech concedes in its 2020–2021 Bias Incident Response Summary that "a bias-related incident may not be a crime" and that the university "cannot adjudicate matters that are deemed protected speech."[43] Nevertheless, it indicates BIRT can offer a resolution for student "[b]ehavior that is discriminatory or otherwise hurtful to members of the community," promising

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[41] *Id.*

[42] *Id.* Like a police report, the form features the ability to attach supporting documentation—i.e., evidence—including pictures and other files. *Id.*

[43] *Bias Incident Response Summary – 2020-2021*, Va. Tech. Univ., https://dos.vt.edu/content/dos_vt_edu/en/express_a_concern/_jcr_content/content/vtcontainer/vtcontainer-content/vtmulticolumn_409208/vt-items_1/vtmultitab/vt-items_0/download_1038950987/file.res/Bias%20Incident%20Response%20Summary%20-%202020-2021.pdf [https://perma.cc/Y9FY-4KQA] (last visited Jan. 9, 2022).

"[i]nterventions of either an **educational** or **restorative** nature will also be conducted by the [university] office closest to the students."[44] This last measure appears to be mandatory given the use of the word "will," and both "educational" and "restorative" suggest that the "alleged" must participate.[45] Lastly, BIRT also may itself summon students alleged to have committed bias incidents for "voluntary conversations."[46] Ultimately, BIRT monitors each case it refers to other offices "to ensure that some resolution [is] reached."[47]

Nevertheless, the district court held BIRT does not proscribe conduct, that all it can do is refer reports, and that students would face whatever punishment the police or other university offices can dole out anyway. *Speech First, Inc. v. Sands*, No. 7:21-cv-00203, 2021 WL

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[44] *Id.* (emphasis added).

[45] Educating only the "impacted person" would not serve the goal of making Virginia Tech "bias free," and "restorative" resolutions require the participation of both parties to a conflict. *See, e.g.*, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed Reg. 30,026 (May 19, 2020) ("[t]he Department [of Education] acknowledges that generally a critical feature of restorative justice is that the respondent admits responsibility at the start of the process.").

[46] *Id.* at ¶ 17.

[47] Hughes Decl., ECF No. 15-1, at ¶ 16.

4315459, at *10 (W.D. Va. Sept. 22, 2021). But the above demonstrates that BIRT offers itself as a resource to ensure the protected expression that those bodies cannot punish is nevertheless prohibited at Virginia Tech. Other circuits have already held such a policy has a chilling effect on free speech.

B. Courts Routinely Strike Down College and University Policies That Chill Student Expression.

It is well established that plaintiffs who have not yet been disciplined or sanctioned may assert a facial challenge to the constitutionality of an overbroad and vague policy whose very existence chills speech. This Circuit has recognized pre-enforcement challenges to such policies, emphasizing that "First Amendment cases raise unique standing considerations that tilt dramatically toward a finding of standing." *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013). In such challenges, the Court held, injury-in-fact exists where state action is "likely to deter a person of ordinary firmness from the exercise of First Amendment rights," an element "commonly satisfied by a sufficient showing of 'self-censorship[.]'" *Id.* at 235–36 (quoting *Benham v. City of Charlotte*, 635 F.3d 129, 135 (4th Cir. 2011)).

Courts have routinely found threat of punishment sufficient to grant students standing in challenges like that Speech First brought against Virginia Tech's bias response policy. *See, e.g.*, *Schlissel*, 939 F.3d 756, 765 (holding BRT's powers to refer cases for discipline and call student meetings objectively chilled speech); *Fenves*, 979 F.3d 319, 333 (holding bias policy enforced by referrals for discipline "sufficiently proscriptive to objectively chill student speech"); *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 236 (3d Cir. 2010) (holding student had standing to challenge university's code of conduct because challenged provisions had the potential to chill protected speech); *DeJohn v. Temple Univ.*, 537 F.3d 301, 305 (3d Cir. 2008) (upholding facial challenge to university sexual harassment policy by student who was "concerned that discussing his social, cultural, political, and/or religious views regarding these issues might be sanctionable by the University").[48] Under this standard, BIRT's chilling effect on free expression confers standing here.

[48] *See also Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 365 (M.D. Pa. 2003) (invalidating portions of student conduct code challenged by students who alleged that the code "had a chilling effect on [their] rights to freely and openly engage in appropriate discussions of their theories, ideas and political and/or religious beliefs"); *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1164 (E.D. Wis. 1991) (granting summary judgment in First Amendment lawsuit brought by

C. Virginia Tech's BIRT Chills Speech More Directly than in *Schlissel*.

In *Schlissel*, the Sixth Circuit held that a BRT's powers to refer incidents to the police or university adjudicatory offices, and to invite accused students to meet voluntarily, objectively chilled protected speech. 939 F.3d at 765. As the BRT may refer reports to the police or other university offices as it sees fit, regardless of whether reporting individuals seek such referral or would have reported to those bodies themselves, the BRT "can subject individuals to consequences that they otherwise would not face." *Id*. The invitation power chills student speech by creating fear of reputational damage inherent in being implicated in a "bias incident" investigation, and through fear of reprisal for failure to meet. *Id*. These injuries-in-fact confer standing on students who complain of such a policy. *Id*.

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student newspaper that argued discriminatory harassment policy was unconstitutional "on its face"); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 858 (E.D. Mich. 1989) (upholding facial challenge to racial harassment policy by psychology student who feared discussions of controversial theories in his field "might be sanctionable under the Policy."); *but see Speech First, Inc. v. Killeen*, 968 F.3d 628, 641 (7th Cir. 2020) (holding a university's invitation to a voluntary bias response meeting does not chill speech).

Virginia Tech's BIRT can be distinguished from the BRT in *Schlissel* in one obvious way, which only renders BIRT more chilling to First Amendment expression: Virginia Tech expressly defines "bias incident" as "expression."[49] The policy in *Schlissel* at least purported to proscribe "conduct;" Virginia Tech has ensured its students know it polices speech.

Otherwise, BIRT's referral power and promises of "education" and "restoration" parallel *Schlissel*'s BRT. As the Sixth Circuit observed, "[e]ven 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." *Schlissel*, 939 F.3d at 764 (*citing Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68, 83 (1963)). The BIRT reporting, investigation and resolution process creates the appearance of a body with authority to take action against students for exercising First Amendment rights. BIRT has the same power described in *Schlissel* to initiate criminal and adjudicative proceedings, and to call students to meet regarding alleged bias incidents. As the Sixth Circuit held, that kind of power over student expression alone objectively chills

[49] *What is Bias?*, *supra,* note 33.

protected speech. But Virginia Tech has also implemented a policy that assures its students that those whose speech runs afoul of BIRT's bias definition will face "educational" and "restorative" resolutions.

In denying standing to students called in to meet with administrators in *Abbott v. Pastides*, this Court held the university's investigation into allegations of unprotected harassment [50] was narrowly tailored to serve its compelling interest, undisputed by the parties, in "maintaining a school environment free from **illegal** discrimination and harassment." 900 F.3d 160, 172 (4th Cir. 2018) (emphasis added).

BIRT, on the other hand, expressly polices expression merely "against"[51] a person, or "hurtful"[52] to them. Virginia Tech makes clear that some expression subject to reporting and administrative action is neither criminal, nor violative of the Student Code of Conduct.[53] BIRT's role, therefore, is to intervene to police and punish what's left: student speech that merely offends. But this speech is protected by the First

[50] As defined by the Supreme Court in *Davis*, 526 U.S. 629.

[51] *What is Bias?, supra* note 33.

[52] *Bias Incident Response Summary*, *supra* note 43.

[53] *Id.*

Amendment.[54] This Court emphasized in *Abbott* "the University here did not seek to advance its end of maintaining a campus environment free of illegal discrimination and harassment through the kinds of broad steps that most commonly lead to First Amendment litigation." 900 F.3d at 173–74. Virginia Tech's BIRT, conversely, relies on precisely such broad steps.

As noted, BRTs may operate without violating the First Amendment to the extent they seek "to better understand students' perspectives, to prepare general programming to constituents of the institution, or to provide resources to a complaining student, these goals are unobjectionable on First Amendment grounds."[55] But nowhere in Virginia Tech's bias reporting materials does it suggest BIRT seeks to do any of those things. Instead, its processes focus solely on identifying discrete uses of disfavored expression and promise university intervention where speech is protected by the First Amendment. This chills speech.

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[54] *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011) ("[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate.").

[55] FIRE Report, *supra* note 3 at 21.

III. Virginia Tech's Informational Activities Policy Violates Students' Free Speech Rights.

FIRE has more than 20 years of experience fighting for free expression, and BIRT is just one of many unconstitutional speech codes it has found at colleges and universities nationwide. BIRT is not even the only policy currently infringing on students' free speech at Virginia Tech, which ranked 107 out of 154 schools surveyed in FIRE's 2021 College Free Speech Rankings,[56] with ten ambiguous policies that too easily encourage administrative abuse and arbitrary application contributing to its low spot on the list. One of these, Virginia Tech's informational activities policy challenged here, places a prior restraint on students' distribution of materials, risks abusive application, and imposes other unconstitutional restrictions on student speech.

[56] *2021 College Free Speech Rankings*: *Virginia Tech.*, FIRE, https://rankings.thefire.org/rank/school/virginia-polytechnic-institute-and-state-university [https://perma.cc/6UU8-Y8DZ] (last visited Jan. 14, 2022).

A. Unconstitutional Regulations on Campus Expression Are Prevalent Nationwide.

FIRE publishes an annual report on the state of free expression on the nation's campuses, *Spotlight on Speech Codes*.[57] FIRE's 2022 report finds that of 374 public universities reviewed, 318 received a red or yellow light rating.[58] This means these public institutions maintain either (1) a "severely restrictive" speech policy that "clearly and substantially restricts protected speech" (12%); or (2) a policy that could easily be applied to suppress protected speech (73%).[59]

Of 481 total sets of policies FIRE reviewed, 203 included unreasonable regulations on posting or distributing written materials.[60] For example, California State University, Sacramento requires students distributing non-commercial materials to register with the administration in advance, and restricts them to "the edge of walkways"

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[57] *Spotlight on Speech Codes 2022*, FIRE, https://www.thefire.org/resources/spotlight/reports/spotlight-on-speech-codes-2022 [https://perma.cc/6P88-A2T7] (last visited Jan. 14, 2022).

[58] *Id.*

[59] *Id.*

[60] Spotlight Database, FIRE, https://www.thefire.org/resources/spotlight [https://perma.cc/FL2F-YYSQ] (last visited Jan. 14, 2022).

adjacent to quad areas on campus.[61] Eastern Illinois University's policy permits distribution of only non-commercial materials, only in its campus "Free Speech Zone."[62] At Vanderbilt University, students may only hand out materials "on Rand Terrace or outside the building in which a meeting has been scheduled by another organization."[63]

Virginia Tech is thus not alone in maintaining policies that unreasonably restrict students' right to freedom of expression. If the Court allows Virginia Tech's informational activities policy to stand, it gives administrators everywhere license to implement unconstitutionally restrictive measures just like it.

B. Virginia Tech's Informational Activities Policy Is Unconstitutional.

As shown in Speech First's motion for preliminary injunction, Virginia Tech's blanket prior-approval requirement acts as an

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[61] *Time, Place & Manner Restrictions on Speech and Speech-Related Activities*, California State Univ., Sacramento (Oct. 25, 2016) csus.edu/umanual/student/stu-0125.htm [https://perma.cc/U7VV-VD7A].

[62] *#138.1 – Posting and Distribution of Materials*, Eastern Illinois Univ. Internal Governing Policies (July 27, 2020), eiu.edu/auditing/igp/138.1 [https://perma.cc/W97A-7T94].

[63] *Freedom of Expression*, Vanderbilt Univ. Student Handbook, vanderbilt.edu/student_handbook/student-engagement/#freedom-of-expression [https://perma.cc/4BFS-PYS8] (last visited Jan. 3, 2022).

unconstitutional prior restraint on student's protected speech. The policy prohibits students who cannot obtain university sponsorship from distributing informational materials, and unreasonably holds those who can responsible when others litter.

1. Virginia Tech's informational activities policy is an unconstitutional prior restraint on protected speech.

A requirement that a person obtain a permit before speaking is a prior restraint on speech, *see Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992), which is highly disfavored and difficult to justify under well-established law. *See N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.") (internal quotation marks and citations omitted). As Speech First argues, Virginia Tech's requirement that students obtain prior approval before conducting informational activities constitutes a prior restraint.

Even if a prior restraint on speech is content-neutral, it "must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication." *Forsyth*, 505 U.S. at

130. Policies that so severely restrict expression—by requiring *any* speaker to obtain permission before engaging in *any* distribution of materials *anywhere* on a public campus—cannot pass constitutional muster. They delegate too much discretion to administrative decision-makers, are not narrowly tailored to serve any significant administrative interest, and do not allow ample alternative channels of communication. The Virginia Tech policy fails on each of these accounts.

a. Blanket approval requirements without objective criteria to cabin administrative decision making cannot survive constitutional scrutiny.

Speech First is correct that Virginia Tech's informational activities policy risks content- and viewpoint-based application, because it lacks finite standards to cabin administrators' discretion. Appellant's Br. 32. Permit requirements that grant administrators unbridled discretion violate the First Amendment. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150 (1969). A "law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Id.* at 150–51. A lack of clearly defined and limited standards make it too easy for decision-makers to engage in viewpoint discrimination. *See City*

of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 758 (1998) ("Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech.").

As Speech First highlights, the Virginia Tech informational activities policy merely states that activities are subject to "the reasonable guidelines of the authorizing official," whose decisions will take into account "overall campus safety and security, any special circumstances relating to university activities, and the impact such activity may have on the university."[64] Such vaguely stated guidelines hardly constitute clearly defined and limited standards for administrators to apply, and risk abusive application.

While Virginia Tech's SECL Director Heather Wagoner explains that "SECL does not exercise any discretion in deciding which [student organizations] will be permitted to use University spaces," this limitation is not stated in the policy itself.[65] Consequently, individual

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[64] *Sales, Solicitation and Advertising on Campus*, Va. Tech. Univ., https://policies.vt.edu/assets/5215.pdf [https://perma.cc/V4TL-SLCS] (last revised Aug. 25, 2020).

[65] Wagoner Decl., ECF No. 15-4, at ¶ 14.

administrators tasked with applying it may indeed exercise broad discretion. Fortunately, the First Amendment "does not leave us at the mercy of *noblesse oblige*," such that this Court could uphold an unconstitutional policy "merely because the Government promised to use it responsibly." *United States v. Stevens*, 559 U.S. 460, 480 (2010).

b. Blanket prior approval policies covering all informational activities anywhere on campus are not narrowly tailored.

Courts have roundly rejected the blanket application of prior approval requirements to individuals or small groups in a public forum on grounds that such wide-reaching restrictions are not sufficiently tailored to significant government interests. "Almost every . . . circuit . . . ha[s] refused to uphold registration requirements that apply to individual speakers or small groups in a public forum." *Berger v. City of Seattle*, 569 F.3d 1029, 1039 (9th Cir. 2009). This is because "[p]ermit schemes and advance notice requirements that potentially apply to small groups are nearly always overly broad and lack narrow tailoring." *American-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 608 (6th Cir. 2005); *see also Boardley v. Dep't of the Interior*, 615 F.3d 508, 524 (D.C. Cir. 2010); (invalidating permit

requirement for any expression in national park as overbroad and not narrowly tailored because it applied to individuals and small groups); *Cox v. City of Charleston*, 416 F.3d 281, 285 (4th Cir. 2005) ("unflinching application" of permit requirement "to groups as small as two or three renders it constitutionally infirm").

Courts have repeatedly held public universities cannot impose blanket waiting or permission requirements on students who wish to exercise First Amendment rights on campus. In *University of Cincinnati Chapter of Young Americans for Liberty v. Williams*, a federal district court enjoined a policy requiring students to give the university at least five days' notice before engaging in expressive activity outside a designated free speech area. No. 1:12-cv-155, 2012 U.S. Dist. LEXIS 80967, at *4 (S.D. Ohio June 12, 2012). The "mere fact that the notice requirement applie[d] to *all* student speech raise[d] constitutional concerns." *Id*. at *20. In holding that the campus speech policies were not narrowly tailored to a significant government interest, the *Williams* court noted the university could have easily drafted rules targeted at specific situations posing a real threat to campus safety or operations,

but failed to do so. *Id.* at *20–22; *Roberts v. Haragan*, 346 F. Supp. 2d 853, 870 n.20 (N.D. Tex. 2004).

The Virginia Tech informational activities policy's blanket prior approval requirement for all informational activities on campus—even to a single individual distributing flyers—also flunks narrow tailoring because it prevents spontaneous speech. Courts consistently overturn prior restraints that burden a substantial amount of spontaneous speech. *See Watchtower Bible & Tract Society of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 167–68 (2002) (striking down village ordinance preventing all door-to-door canvassing without a permit where it "effectively banned" a "significant amount of spontaneous speech"); *Shaw v. Burke*, No. 2:17-CV-02386, 2018 U.S. Dist. LEXIS 7584, at *30–31 (C.D. Cal. Jan. 17, 2018) (student plaintiff alleged First Amendment violation where campus permit requirement prevented spontaneous speech); *see also Shuttlesworth*, 394 U.S. at 163 (Harlan, J., concurring) ("[T]iming is of the essence in politics. . . . [W]hen an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all.").

c. Blanket prior notice policies covering all informational activities anywhere on campus do not provide adequate alternative channels of communication.

To survive First Amendment scrutiny, a speech restriction must also leave open ample alternative channels of communication. *Forsyth*, 505 U.S. at 130 (1992); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984). By requiring students to seek prior approval to conduct informational activities in all circumstances, Virginia Tech's informational activities policy fails to provide any alternative channel for the spontaneous distribution of materials.

2. Virginia Tech's informational activities policy provides no opportunity for those who have not been sponsored by a university-affiliated organization to engage in this avenue for protected expression.

Speech First also cites the provision of Virginia Tech's informational activities policy allowing students to distribute informational materials only when they have been sponsored by a university-affiliated organization. This rule prevents individual students, as well as students who are part of non-affiliated groups, from participating in informational activities unless they can obtain sponsorship to do so. That may be relatively easy for some students, such as an individual wishing to express conservative ideas

seeking sponsorship from the college Republicans. Such an individual would still, however, be burdened by this process prior to engaging in protected expression, causing even more of a delay than the prior approval requirement.

Others, however, particularly those who wish to express unpopular or unorthodox ideas, may struggle to obtain sponsorship. The First Amendment does not exist to protect only non-controversial expression. *See, e.g.*, *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (noting that free speech "may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger."). The informational activities policy's sponsorship requirement poses far too great a risk that only popular, orthodox ideas may be shared on Virginia Tech's campus.

3. Virginia Tech's information activities policy unreasonably makes groups responsible for litter of their materials.

Virginia Tech's informational activities policy also states: "Distribution of advertisements or literature must be accomplished in such a manner as to avoid litter or disruption."[66] However, an interest in reducing litter is not a sufficient basis to restrict informational activities.

[66] *Sales, Solicitation and Advertising on Campus*, *supra* note 64.

See Members of City Council, 466 U.S. at 808–09 ("cities could adequately protect the aesthetic interest in avoiding litter without abridging protected expression merely by penalizing those who actually litter.").

This provision fails to specify whether students will be held responsible for failing to prevent those who have accepted their materials from littering them afterwards. As a result, this vague provision could be applied to restrict the activities of groups whose materials have been littered by others, rather than "those who actually litter." This policy represents yet another unconstitutional burden on students protected speech.

CONCLUSION

To protect students from Virginia Tech's deliberate efforts to chill protected speech, and its imposition of unconstitutional barriers to student expression, this Court should reverse the decision below.

Dated: January 18, 2022

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The undersigned certifies that on January 18, 2022, an electronic copy of the Foundation for Individual Rights in Education Brief of *Amicus Curiae* was filed with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit using the CM/ECF system. The undersigned also certifies all parties in this case are represented by counsel who are registered CM/ECF users and that service of the brief will be accomplished by the CM/ECF system.

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