No. 23-156

IN THE
# Supreme Court of the United States

SPEECH FIRST, INC.,
*Petitioner*,
v.
TIMOTHY SANDS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY,
*Respondent.*

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

## BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PETITIONER AND REVERSAL

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## QUESTION(S) PRESENTED

Whether bias-response teams objectively chill students' speech.

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## INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the most essential qualities of liberty. Because colleges and universities play an essential role in preserving free thought, FIRE places a special emphasis on defending these rights on our nation's campuses. Since 1999, FIRE has successfully defended individual rights through public advocacy, strategic litigation, and participation as *amicus curiae* in cases that implicate expressive rights under the First Amendment. *See, e.g.*, Brief of FIRE as *Amicus Curiae* in Supp. of Petitioner, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); Brief of FIRE as *Amicus Curiae* in Supp. of Respondents, *Mahanoy Area Sch. Dist.* v. *B.L.*, 141 S. Ct. 2038 (2021).

FIRE has a direct interest in this case because FIRE frequently advocates on behalf of students and faculty who have been targeted by Bias Response Teams (BRTs) on campus. FIRE's groundbreaking 2017 Report on BRTs revealed that an increasing number of public colleges and universities invite students to anonymously report offensive, yet constitutionally protected, speech to administrators and law enforcement. FIRE files this brief in support

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[1] Under Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* or its counsel contributed money intended to fund preparing or submitting this brief. Under Rule 37.2, *amicus* affirms that all parties received timely notice of the intent to file this brief.

of Petitioner to quantify the growing threat to free speech posed by BRTs, to highlight the discordant patchwork of rulings on their constitutionality in different Circuit Courts of Appeal, and to explain why this case is ripe for review.

## SUMMARY OF ARGUMENT

Few adjectives are more abused in legal writing than "Orwellian." Yet when a government institution recruits students to anonymously report their peers' unpopular speech, and those reports can result in a referral to law enforcement, the comparison to *1984*'s Thought Police is inescapable. Here, Virginia Tech's unconstitutional (and yes, Orwellian) Bias Intervention and Response Team (BIRT)[2] regime explicitly targets protected expression, including political speech, off-color jokes, and Cinco de Mayo parties. In the university context, Bias Response Teams (BRTs) are formal systems that solicit reports from students, faculty, staff, or the community concerning offensive conduct or speech that is protected by the First Amendment or principles of expressive or academic freedom. FIRE's research proves that BRTs are widespread. And when they are present at public colleges and universities like Virginia Tech, they are very often unconstitutional.

Three circuits have ruled BRTs unconstitutional because they objectively chill student speech. Two others, including the Fourth Circuit here, do not see BRTs as a constitutional threat. As Judge Wilkinson's

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[2] Throughout this brief, Bias Response Team (BRT) refers to bias reporting systems generally. BIRT specifically refers to Virginia Tech's bias reporting system.

dissent to the Fourth Circuit's decision explains, these conflicting approaches have created a patchwork of jurisprudence that will impact students nationwide. Navigating the social consequences of political disagreements (or simply a bad joke) is an essential part of the college experience. Yet under the current state of the law, students in Michigan, Texas, and Florida engage with their peers free from bureaucratic oversight, while those in Virginia and Illinois live in fear of a faux pas. Our nation's students deserve clarity about their expressive rights. And because colleges have a bad habit of resurrecting unconstitutional policies after a litigation threat fades, this Court should invoke the doctrine of voluntary cessation to provide that clarity regardless of whether Virginia Tech has voluntarily chosen, mid-litigation, to reform.

When high school seniors send out college applications this fall, they will compare schools on a variety of metrics: cost, athletics, Greek life, even academics. They should not have to compare whether they have First Amendment rights, too. This Court should grant review.

## ARGUMENT

### I. Unconstitutional BRTs Chill Speech on Campuses Nationwide, Including Virginia Tech.

More than 200 colleges and universities maintain some type of system for reporting, often referred to as "Bias Response Teams."[3] These teams receive,

[3] *Bias Response Team Report 2017* at 11, FIRE (2017), https://www.thefire.org/presentation/wp-content/uploads/

investigate, and resolve formal complaints about student expression, encouraging students to report one another to administrators wherever they subjectively perceive "bias."[4] Universities often employ overbroad definitions of "bias" that include speech the First Amendment protects.[5] BRTs are typically staffed by 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.

That is exactly what transpired with Virginia Tech's bias response system, "BIRT," which acts as a police force targeting speech. This Court should grant

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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*, FIRE (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, *The Bias Response Team Is Watching*, Wall St. J. Opinion (May 8, 2018), 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 reporting systems limited to criminal offenses involving hate or bias. *FIRE BRT Report*, *supra* note 3 at 6.

*certiorari* to affirm that these attacks on student free speech violate the First Amendment.

### 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 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 BRTs chill free and open discourse foundational to our system of higher education.

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[6] Greg Lukianoff & Adam Goldstein, *Catching up with 'Coddling' Part Eleven: The Special Problem of 'Bias Response Teams,'* FIRE (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].

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

[8] *Id.* at 4.

[9] *Id.* at 11.

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

BRTs 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

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

[11] *Id*.

[12] *Id.*

[13] *Id*. at 14.

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 police or security officials, signaling to students that subjectively offensive expression may be subject to police investigation.[16] Approximately 63 percent 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 at the time of FIRE's survey.[18]

Deploying teams to police subjective definitions of "bias" means universities and colleges frequently

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[14] *See, e.g.*, *The Bias Response Team (BRT)*, Institute Discrimination & Harassment Response Office, Mass. Inst. of Tech., https://idhr.mit.edu/our-office/brt [https://perma.cc/VR3A-LW3E] (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 BRT Report*, *supra* note 3 at 11.

[16] *Id*. at 19.

[17] *Id*.

[18] *Id*. at 23.

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 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]

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[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.

[20] Adam Steinbaugh, *University of Northern Colorado to End 'Bias Response Team,' But What Next?*, FIRE (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), https://www.documentcloud.org/documents/3234843-University-of-New-Mexico-Chick-Fil-a-Report.html [https://perma.cc/T9RH-V64W].

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

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

Students across the ideological spectrum have used BRTs to report protected core political speech, controversial discourse, and outspoken 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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wall-instagram-post-chills-free-speech [https://perma.cc/2FQV-6RZ7].

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

[25] Texas Tech University Campus Climate & Incident Reporting Form Submitted on July 14, 2016, 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*, FIRE (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*, FIRE (June 1, 2016), https://www.thefire.org/as-the-koala-files-lawsuit-against-university-of-california-san-diego-public-records-reveal-

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 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.

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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 BRT Report*, *supra* note 3 at 21.

[29] *Id*.

[30] Lukianoff, *supra* note 6; *see also* Melchior, *supra* note 4.

[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].

### C. Virginia Tech's bias response system chills student speech.

Virginia Tech's BIRT impermissibly chills student expression in violation of the First Amendment. 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, while addressing "hurtful" expression *not* reportable to the police or university adjudicative offices. These policies objectively chill student speech, even when the "resolutions" 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."[32] This definition, which delineates BIRT's jurisdiction, specifically targets speech, and is not limited to actionable harassment as defined by law.[33]

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[32] *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).

[33] Harassment is unprotected where it is "so severe, pervasive, and objectively offensive that it effectively bars the

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
- posting flyers that contain demeaning language or images[.][34]

The introduction to BIRT itself makes clear the purpose of the reporting system is to eliminate bias incidents at Virginia Tech by providing community

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victim's access to an educational opportunity or benefit." *Davis v. Monroe Cnty. Bd. of Educ.,* 526 U.S. 629, 633 (1999).

[34] *Supra* note 32. The introductory page to Virginia Tech's bias reporting system linked 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).

members a tool to report them. Up through Virginia Tech's Fourth Circuit appeal, the introductory page was entitled "See Something? Say Something!"[35] reflecting sentiment that gained popularity in the national consciousness after the terrorist attacks on September 11, 2001.[36] Following this model of policing through 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!"[37]

The bias incident reporting form to which the page links furthers this mission, resembling an actual police report, with fields for names of the reporting individual, the "alleged bias," the "involved parties" (*e.g.*, "impacted person," "witnesses"), along with incident date, time and location.[38] 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

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[35] *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).

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

[37] *See Something? Say Something!*, *supra* note 35.

[38] *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).

Assignment," "Comment in Person," "Comment in Writing or on Internet," "Offensive Picture or Image," and "Written Slur."[39] The form also offers "Emotional Assault/Attack" and "Verbal Attack/Assault" as distinct options from "Physical Assault or Attack" and "Harassment."[40]

Although BIRT purports to lack power to punish students directly—that is, to 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."[41] Nevertheless, it indicates BIRT can offer a resolution for student "[b]ehavior that is discriminatory or otherwise hurtful to members of the community," promising "[i]nterventions of either an **educational** or **restorative** nature will also be conducted by the [university] office closest to the

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[39] *Id*.

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

[41] *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).

students."[42] 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.[43] Lastly, BIRT also may itself summon students alleged to have committed bias incidents for "voluntary conversations."[44] Ultimately, BIRT monitors each case it refers to other offices "to ensure that some resolution [is] reached."[45]

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 4315459, at *10 (W.D. Va. Sept. 22, 2021). The Fourth Circuit relied on this in dismissing Speech First's suit, maintaining that BIRT's authority "to 'invite' students to participate in a 'voluntary conversation about the alleged bias or refer reports elsewhere" was not sufficient to chill speech. *Speech First, Inc. v. Sands*, 69 F.4th 184, 194 (4th Cir. 2023) (quoting *Sands*, 2021 WL 4315459, at *10). But the

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

[43] 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. 30,406 (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.").

[44] Hughes Decl. at ¶ 17, *Speech First, Inc. v. Sands*, 69 F.4th 184 (4th Cir. 2023).

[45] *Id.* at ¶ 16.

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.

## II. This Court Should Grant Review to Resolve the Current "Patchwork of First Amendment Jurisprudence" on BRTs.

The circuit split identified in this petition cries out for review by this Court. Across the country, students facing identical suppression of their speech by BRTs will be entitled to very different remedies, and in the Fourth and Seventh Circuits, they will be entitled to no remedy at all. As Judge Wilkinson explained in his dissent, the current state of the law "creates a patchwork of First Amendment jurisprudence for schools across the country. On the vitally important issue of free speech on college campuses, [this circuit split] results in students in Michigan, Florida, and Texas being protected from unconstitutional policies while students in Virginia remain exposed." *Sands*, 69 F.4th at 219 (Wilkinson, J., dissenting). This Court's intervention is necessary to protect the expressive rights of millions of students.

### A. The Fifth, Sixth, and Eleventh Circuits all protect students from BRTs that chill speech.

Three other circuit courts have already held that BRTs are unconstitutional to the extent they apply to protected speech under the First Amendment, and thus create injuries-in-fact that confer standing.

In *Speech First, Inc. v. Schlissel*, Speech First challenged the University of Michigan's BRT on behalf of its student members. 939 F.3d 756 (6th Cir. 2019). Like Virginia Tech's BIRT, Michigan's BRT had the power to refer reported "bias" incidents to the police or university adjudicatory offices, and to invite accused students to meet voluntarily. *Id.* at 762–63. The Sixth Circuit held that these powers objectively chilled protected speech. *Id.* at 765. Because Michigan's BRT could refer reports to the police or other university offices as it pleased, regardless of whether the initial students making the report sought such a referral or would have reported elsewhere on their own, the BRT could "subject individuals to consequences that they otherwise would not face." *Id.* The court further held the BRT's power to "invite" students to a voluntary meeting chilled student speech by creating fear of reputational damage inherent in being implicated in a "bias incident" investigation, and also through fear of reprisal for failure to meet. *Id.*

Notably, the bias response policy in *Schlissel* was less expansive than Virginia Tech's policy in at least one way: It purported to proscribe "conduct" only. *Id.* at 762. By contrast, Virginia Tech's challenged policy explicitly defines "bias incidents" as "expressions"—in other words, it polices speech. *Sands*, 69 F.4th at 188.

Similarly, in *Speech First, Inc. v. Fenves*, the Fifth Circuit held that Speech First had standing to challenge the University of Texas at Austin's BRT because the school's bias response policies chilled student speech. 979 F.3d 319, 322 (5th Cir. 2020). UT Austin's policies encouraged students to report perceived discrimination on several bases, including

"ideology, political views, or political affiliation." *Id.* at 325. UT Austin instituted a BRT known as the "Campus Climate Response Team" to investigate such reports, including reports of "hateful or violent speech." *Id.* When the BRT "determine[d] there [was] a possible violation," it would "refer[] the incident to the appropriate entity." *Id.* at 333. Citing *Schlissel*, the court held that enforcement of this policy was "sufficiently proscriptive to objectively chill student speech." *Id.*

The Eleventh Circuit reached the same conclusion when it held Speech First had standing to challenge the University of Central Florida (UCF)'s BRT. *See Speech First, Inc. v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022). UCF's BRT was composed of "UCF students, faculty, and staff," including representatives from "the UCF Police Department." *Id.* at 1116. The BRT allowed any UCF student to "be anonymously accused of an act of 'hate or bias'—*i.e.*, an 'offensive' act, even if 'legal' and 'unintentional.'" *Id.* at 1118. The BRT could "coordinate[] 'interventions' among affected parties," on a voluntary basis and make referrals to the Offices of Student Conduct or Student Rights and Responsibility, as well as the UCF Police Department. *Id.* at 1118.

Like the Sixth and Fifth Circuits, the Eleventh Circuit held that UCF's BRT "objectively chills student speech." *Id.* at 1124. Citing this Court's decision in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1962), the court noted that "[n]either 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 1123. The court held

that "[n]o reasonable college student wants to run the risk of being accused of 'offensive,' 'hostile,' 'negative,' or 'harmful' conduct—let alone 'hate or bias.' Nor would the average college student want to run the risk that the University will 'track' her, 'monitor' her, or mount a 'comprehensive response' against her." *Id.* at 1124. Combining the "broad, vague, and accusatory language [of the bias-related-incidents policy] with the task-force-ish name of the investigating organization," the BRT, the court held it was "clear that the average college student would be intimidated, and quite possibly silenced, by the policy." *Id.*

These three circuits confronted very similar BRT policies to those at Virginia Tech: Students could be anonymously reported for wide ranges of speech and conduct; the investigating BRT included school officials and campus police; the BRT could invite any accused student to a voluntary mediation; and the BRT could refer the incident to other school disciplinary offices or the local police department. Though none of those BRTs had the express ability to punish or mandate a student's attendance to a mediation meeting, the courts held the BRTs still sufficiently chilled speech to satisfy Article III standing.

### B. By contrast, the Fourth and Seventh Circuits allow public universities to police student speech on campus.

The Fourth Circuit reached the opposite conclusion of those courts. It held that Speech First lacked standing because "BIRT does not mandate involuntary compliance or anything of the sort."

*Sands*, 69 F.4th at 194. It further held that Speech First presented no evidence that its members "feel pressured to attend the [voluntary conversation] meetings," even though Speech First did present evidence that they self-censored expressly to avoid even the "invitation" to said meetings. *Id.* at 194. The court also disregarded BIRT's ability to refer incidents to the police or other university offices, claiming that BIRT "has specifically disclaimed the ability to adjudicate matters involving protected speech," so its referral power is a dead letter. *Id.* at 195. When confronted with the contrary holdings of the Fifth, Sixth, and Eleventh Circuits, the court refused to engage with their reasoning and merely derogated those cases as "seemingly ignoring" relevant facts or making their "own factual finding[s]." *Id.* at 197.

Instead, the Fourth Circuit noted its accordance with the Seventh Circuit's holding in *Speech First, Inc. v. Killeen*, 968 F.3d 628 (7th Cir. 2020). In *Killeen*, the Seventh Circuit ruled that Speech First had no standing to challenge the University of Illinois's BRT and associated policies because an invitation to attend a voluntary bias response meeting did not chill speech. *Id.* at 641. There, despite similar bias response policies to those at issue in *Schlissel* (which had been decided just a year earlier), the court held that because there was evidence many students had refused a meeting with the school's BRT, it must be true that an invitation lacked the "implicit threat of consequences." *Id.* at 642. The court additionally noted that the BRT's referral power was not a threat of enforcement because, although the referral lied with the BRT, the "determination [of whether to punish] is left to [the office of student conduct] or the Police." *Id.*

The result of this split: Some students are still subject to "bias response bureaucracies," while others are protected from the exact same threat. *Sands*, 69 F.4th at 218 (Wilkinson, J., dissenting). A state line should not determine whether a student has First Amendment rights. That alone is reason for this Court to intervene.

## III. Voluntary Cessation Is No Bar to the Court's Consideration of this Case.

To the extent Virginia Tech has since eliminated BIRT, that elimination is laudable. But it is no bar to this Court's review. "It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). "[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 190.

And for good reason. Time and time again, FIRE has seen universities revise unconstitutional policies, only to bring them back when there is employee or state government turnover. Courts have rejected these attempts to moot student claims, *see, e.g.*, *DeJohn v. Temple Univ.*, 537 F.3d 301, 309 (3d Cir. 2008) (holding voluntary cessation of school sexual harassment policy did not moot student's First Amendment claim), and the rationale is clear. If voluntary policy changes during litigation can so

easily moot a student's First Amendment claim, students seeking to vindicate their—and their fellow students'—constitutional rights in court will face an all but insurmountable hurdle and lasting uncertainty over the contours of their First Amendment rights.

### A. Universities often revise policies, only to reinstate them later.

*Amicus* FIRE's archives abound with examples of universities that eliminated problematic restrictions on student speech, only to reinstate them (or substantially similar policies) later. The only real safeguard against continued censorship is a clear judicial precedent delineating the appropriate limits of policies regulating campus speech.

For example, in 2003, student Chris Stevens sued California's Citrus College in federal court, challenging a policy that limited students' expressive activities to three small "free speech areas" and required students to provide advance notice of their intent to use those areas. Complaint, *Stevens v. Citrus Comm. Coll. Dist.*, No. 2:03-cv-03539 (C.D. Cal. filed May 20, 2003). On June 5, 2003, the Citrus College Board of Trustees unanimously adopted a resolution revoking the policies, and the lawsuit was settled.[46]

In 2013, however, the Citrus College Board of Trustees adopted a new "Time, Place, and Manner" regulation, once again limiting students' expressive

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[46] *Victory: Speech Code Falls at Citrus College*, FIRE (June 10, 2003), https://www.thefire.org/news/victory-speech-code-falls-citrus-college [https://perma.cc/V8B4-GGFY].

activities to a designated free speech area—and prompting another lawsuit. Complaint, *Sinapi-Riddle v. Citrus Comm. Coll. Dist.*, No. 14-cv-05104 (C.D. Cal. filed Jul. 1, 2014). Under this new policy, Citrus student Vincenzo Sinapi-Riddle was threatened with removal from campus for soliciting signatures for a petition against the National Security Agency outside of Citrus' small free speech area, which comprised just 1.37 percent of the college's campus. Citrus settled with Sinapi-Riddle, once again agreeing to revise its policies.[47]

In 2003, two students at Shippensburg University of Pennsylvania brought a federal lawsuit alleging that several of the university's speech codes violated their First Amendment rights. *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003). After a judge in the Middle District of Pennsylvania issued a preliminary injunction against Shippensburg, the university settled with the students, agreeing to repeal the challenged policies as part of the settlement.[48]

The university did not, however, comply with the terms of the settlement. According to a 2008 complaint filed by a Christian student group at Shippensburg, administrators "failed and/or refused to rewrite the [previously challenged policy], and instead, reenacted the stricken policy *verbatim* in the

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[47] Settlement Agreement, *Sinapi-Riddle*, (C.D. Cal. Dec. 3, 2014), https://www.thefire.org/settlement-agreement-sinapi-riddle-v-citrus-college [https://perma.cc/QY6G-55PX].

[48] *A Great Victory for Free Speech at Shippensburg*, FIRE (Feb. 23, 2004), https://www.thefire.org/a-great-victory-for-free-speech-at-shippensburg [https://perma.cc/UD6C-QTSY].

Code of Conduct." Complaint, *Christian Fellowship of Shippensburg Univ. of Pa. v. Ruud*, No. 4:08-cv-00898 (M.D. Pa. filed May 7, 2008). In October 2008, Shippensburg settled this second lawsuit as well, agreeing—for the second time—to revise its speech codes.[49]

In other instances, FIRE has worked with administrators at colleges and universities to revise problematic policies, only to have other administrators reinstate those policies, or equally problematic policies, later. In 2012, for example, the University of Mississippi revised a policy that limited unplanned student demonstrations and other expressive activities to designated "Speaker's Corners," severely restricting the ability of students to engage in spontaneous expressive activity on campus. In its place, the university adopted a policy providing that students could engage in spontaneous expression anywhere on campus "so long as the expressive activities or related student conduct does not violate any other applicable university policies."[50]

Five years later, however, the university amended that policy to once again prohibit spontaneous student demonstrations on campus, requiring that student organizations must "contact the Dean of Students in

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[49] Will Creeley, *Victory for Free Speech at Shippensburg: After Violating Terms of 2004 Settlement, University Once Again Dismantles Unconstitutional Speech Code*, FIRE (Oct. 24, 2008), https://www.thefire.org/news/victory-free-speech-shippensburg-after-violating-terms-2004-settlement-university-once-again [https://perma.cc/BM72-LWGP].

[50] *Free Inquiry, Expression, and Assembly*, Univ. of Miss., (Jan. 18, 2012) (on file with *amicus* FIRE).

advance of the activity and complete a [Registered Student Organization] Event Registration form.[51] A subsequent administration once again adopted a speech-friendly policy.[52] While the current policy affirms the right of students to engage in spontaneous speech, this demonstrates how easy it is for universities to slip back into bad speech policies.

Only action from this Court can protect Virginia Tech students against the possibility that the school will reinstate BIRT in the future, and only a clear statement by this Court that BIRT unconstitutionally chills speech can secure the free speech rights of students at Virginia Tech and throughout the Fourth and Seventh Circuits against similarly unconstitutional BRTs going forward.

### B. Facial challenges are critical to ending the nationwide problem of unconstitutional BRTs.

The First Amendment rights of public college students are threatened with depressing regularity. As highlighted in *amicus* FIRE's most recent Spotlight Report on Speech Codes, for the first time in 15 years, the percentage of colleges and universities earning an overall red light rating—indicating policies that clearly and substantially restrict free

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[51] *Free Inquiry, Expression, and Assembly*, Univ. of Miss. (Nov. 27, 2017) (on file with *amicus* FIRE).

[52] *Free Inquiry, Expression, and Assembly*, Univ. of Miss. (Aug. 8, 2022), https://policies.olemiss.edu/ShowDetails.jsp?istatPara=1&policyObjidPara=11079224 [https://perma.cc/34PK-PW3K].

speech—increased year over year.[53] Of 375 four-year public institutions whose policies FIRE reviewed, only 14.9 percent of public institutions surveyed were found to not seriously threaten campus expression, meaning the remaining 85.1 percent of schools had at least one policy that restricts speech or expression protected by the First Amendment.[54]

Free speech is in trouble on America's public college campuses. Litigation can help, but not if colleges and universities are able to moot facial challenges by voluntary cessation. Some of the most important constitutional challenges to campus First Amendment violations have been facial challenges like this one. *See, e.g.*, *DeJohn*, 537 F.3d at 305 (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"); *Bair*, 280 F. Supp. at 365 (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 Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1164 (E.D. Wis. 1991) (granting summary judgment in First Amendment lawsuit brought by student newspaper that argued discriminatory harassment policy was unconstitutional "on its face"); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 858 (E.D.

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[53] *Spotlight on Speech Codes 2023*, FIRE, https://www.thefire.org/research-learn/spotlight-speech-codes-2023 [https://perma.cc/A8XJ-KW7W].

[54] *Id.*

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").

*Amicus* FIRE and other free-speech advocacy groups have cited these precedents countless times to persuade universities to revise unconstitutional policies. But if universities may moot students' First Amendment claims simply by changing their policies under pressure during litigation, facial challenges like the ones filed in these foundational cases will rarely, if ever, lead to decisions. In practice, therefore, students will have to wait until after they have been the victim of censorship—and are thus able to bring a claim for damages—to challenge the flawed policy in court. Because students already face stiff practical and legal hurdles to vindicating their First Amendment rights (including lack of resources, qualified immunity of campus officials, and having injunctive relief mooted by graduation), this will result in many constitutional violations going without remedy.

## CONCLUSION

For the foregoing reasons, this Court should grant *certiorari*.

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