

No. 24-361

**In The
Supreme Court of the United States**

SPEECH FIRST, INC.,

Petitioner,

v.

PAMELA WHITTEN, *ET AL.*

Respondents.

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

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

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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 essential qualities of liberty. Because colleges and universities play a unique 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 the expressive rights of students and faculty nationwide through public advocacy, strategic litigation, and participation as *amicus curiae* in cases that implicate expressive rights under the First Amendment. *See, e.g., Flores v. Bennett*, No. 22-16762, 2023 WL 4946605 (Aug. 3, 2023); Br. of Appellees, *Novoa v. Diaz*, No. 22-13994-J (11th Cir., filed June 6, 2023); Br. of FIRE as *Amicus Curiae* Supp. Pet’r, *Speech First, Inc., v. Sands*, No. 23-156, 144 S.Ct. 675 (filed Sept. 18, 2023).

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 *Bias Response Team Report 2017* revealed that an increasing number of public colleges and universities invite students to anonymously report offensive, yet constitutionally protected, speech to administrators

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.

and law enforcement. FIRE files this brief in support of Petitioner to quantify the growing threat to free speech both on and off campus 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, Indiana University’s unconstitutional (and yes, Orwellian) “Bias Response & Education” regime explicitly targets protected expression: “speech[] or expression motivated . . . by bias or prejudice meant to intimidate, demean, mock, degrade, marginalize, or threaten individuals or groups based on that individual or group’s actual or perceived identities.” 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 Indiana, they are very often unconstitutional.

Three circuits have ruled BRTs unconstitutional because they objectively chill student speech. The Seventh Circuit, meanwhile, does not see BRTs as a

constitutional threat. As Justice Thomas’s dissent in *Speech First, Inc. v. Sands* explains, these conflicting approaches have created “a patchwork of First Amendment rights on college campuses.” 144 S.Ct. 675, 678 (2024).

The Seventh Circuit’s ruling also conflicts with this Court’s recent holding in *NRA v. Vullo*, 602 U.S. 175 (2024). BRT policies can violate the Constitution even if students are never formally sanctioned. It is enough that students reasonably perceive the threat of sanctions. Such threats chill speech, violating the First Amendment.

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 Indiana, Illinois, and Wisconsin live in fear of a faux pas. Our nation’s students deserve clarity about their expressive rights. 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 Indiana.

More than 200 colleges and universities maintain some type of system for reporting, often referred to as “Bias Response Teams.”² These teams receive, investigate, and resolve formal complaints about student expression, encouraging students to report one another to administrators wherever they subjectively perceive “bias.”³ Universities often employ expansive definitions of “bias” that include speech the First Amendment protects—that is, if they even define “bias” at all.⁴ BRTs are typically staffed

² *Bias Response Team Report 2017 (FIRE BRT Report)* at 11, FIRE (March 1, 2017), <https://www.thefire.org/presentation/wp-content/uploads/2017/03/01012623/2017-brt-report-corrected.pdf> [<https://perma.cc/Y3U2-4U87>]. Recent research from Speech First suggests the number could be double, depending on what one defines as a “Bias Response Team.” *Free Speech in the Crosshairs: Bias Reporting on College Campuses*, Speech First (Sept. 19, 2022), <https://speechfirst.org/report-free-speech-in-the-crosshairs-bias-reporting-on-college-campuses/>.

³ *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>].

⁴ 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

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 Indiana University’s “Bias Response & Education” system, which acts as a police force targeting speech. This Court should grant *certiorari* to affirm that these attacks on student free speech violate the First Amendment.

A. Bias response teams unconstitutionally police speech across the country.

Bias response reporting systems have proliferated throughout higher education.⁵ 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.⁶ FIRE discovered 231 BRTs at public and private

expressive or academic freedom.” This definition precludes reporting systems limited to criminal offenses involving hate or bias. *BRT Report, supra*, at 6.

⁵ 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>].

⁶ *FIRE BRT Report, supra* note 2, at 4.

institutions across the country that have a combined enrollment of at least 2.84 million students.⁷ 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.⁸

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

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 certain enumerated characteristics.⁹ For example, most universities encourage students to report bias incidents related to race, religion, disability, national origin, and sexual orientation.¹⁰ The definitions also target speech that students subjectively find "harmful or hurtful," or cause "alarm" or "anger," implicating broad swaths of protected speech.¹¹ 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.¹² These broad conceptions of bias invite students to report protected expression, including core

⁷ *Id.* at 4.

⁸ *Id.* at 11.

⁹ Eighty-six percent of the BRTs FIRE surveyed set forth specific, enumerated categories of "bias." *Id.* at 13.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 14.

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 titled some variation of “Bias Response Team,” to administer bias reporting systems.¹³ Others forego a dedicated team and instead send bias reports directly to existing offices or departments including deans, housing authorities, or the police.¹⁴ 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.¹⁵ Approximately 63 percent of BRTs include representatives from student conduct offices, which typically wield disciplinary power.¹⁶ Although nearly half of institutions surveyed publicly acknowledged the inherent tension between free expression and bias policies, as of 2017 only one school—Louisiana State University—offered its BRT any type of substantive

¹³ 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>]; 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>].

¹⁴ *FIRE BRT Report*, *supra* note 2, at 11.

¹⁵ *Id.* at 19.

¹⁶ *Id.*

First Amendment training at the time of FIRE's survey.¹⁷

Deploying teams to police subjective definitions of “bias” means universities and colleges frequently react to complaints by investigating or punishing protected expression¹⁸:

- The University of Northern Colorado's BRT advised professors against teaching controversial subjects to avoid offending students. Widespread public backlash eventually convinced the university to disband the BRT.¹⁹
- 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.²⁰

¹⁷ *Id.* at 23.

¹⁸ *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.

¹⁹ 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].

²⁰ 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].

- A dean at Connecticut College investigated pro-Palestinian students for posting flyers that mimicked Israeli eviction notices.²¹
- And the BRT at Wake Forest University investigated a parody campaign ad calling to “build a wall” between Wake Forest and a neighboring university.²²

Students across the ideological spectrum have used BRTs to report protected core political speech, controversial discourse, and outspoken activism.²³ 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.”²⁴

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

²¹ *FIRE BRT Report*, *supra* note 2, at 16–17.

²² 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-wall-instagram-post-chills-free-speech> [<https://perma.cc/2FQV-6RZ7>].

²³ *FIRE BRT Report*, *supra* note 2, at 15–18.

²⁴ Texas Tech Univ. 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>].

and a reporter.²⁵ 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.”²⁶

Not all BRTs serve disciplinary functions. Some colleges claim to maintain BRTs as a means of surveying student perspectives and general campus climate.²⁷ Some provide programming and resources to students who submit reports or for the larger campus community.²⁸ 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.²⁹

²⁵ 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>].

²⁶ 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-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).

²⁷ *FIRE BRT Report*, *supra* note 2, at 21.

²⁸ *Id.*

²⁹ Lukianoff, *supra* note 5; *see also* Melchior, *supra* note 3; *see also* *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 764 (6th Cir. 2019) (although “the mere existence, *without more*, of a governmental investigative and data-gathering activity is insufficient . . . the threat of punishment from a public official

What’s more, BRTs have expanded to policing *off-campus* speech. The University of Connecticut BRT reporting form includes a drop-down box listing “OFF-CAMPUS LOCATIONS,” and Worcester State likewise lists “NON CAMPUS LOCATIONS.”³⁰ Schools have thus shifted from policing university locations or activities to expressly policing speech, such as when “[a] student makes a racist, anti-Semitic, or anti-LGBTQ+ comment, joke, or statement to a peer,” no matter the location.³¹ Social media, one can imagine, is fertile ground for such *verboten* speech. And BRT teams, like that at the University of Illinois–Chicago, police cyberspace no matter where the college-related speaker is located.³²

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

who *appears* to have punitive authority can be enough to produce an objective chill”).

³⁰ Univ. of Conn. Bias Incident Report Form, https://cm.maxient.com/reportingform.php?UnivofConnecticut&layout_id=32; Worcester State Univ. Bias Incident Report, https://cm.maxient.com/reportingform.php?WorcesterStateUniv&layout_id=6.

³¹ Univ. of Southern Maine Bias Incident Form, https://cm.maxient.com/reportingform.php?UnivofMaineSystem&layout_id=26.

³² Bias Reporting & Prevention, UNIV. OF ILL.—CHI., <https://dos.uic.edu/diversity-education/bias-reporting-prevention/>; Univ. of Ill.—Chi. Bias Reporting Tool, https://cm.maxient.com/reportingform.php?UnivofIllinoisChicago&layout_id=24 (defining “harmful social media posts” as bias incidents; including “Off-Campus” in a drop-down box on its reporting form).

divide us and make us uncomfortable[.]”³³ 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.

B. Indiana’s bias response system chills student speech.

Indiana’s “Bias Response and Education” system impermissibly chills student expression in violation of the First Amendment. The University asks its students to pledge to “call out and take the appropriate steps to report bias.” Pet. 11–12 (quoting Dist. Ct. Docs. 9-23 & 9-24). And the BRT asks that students “report something if you see it.” Pet. 11 (quoting Dist. Ct. Doc. 9-20 at 3). Upon receiving these reports of “bias incidents,” the BRT may “[e]ngage” the “person(s) impacting others,” or ask them to take part in “[m]ediation and facilitated dialogue.” App. 5a. The BRT then evaluates the incidents for “violations of university policy and/or criminal law,” for which it may refer the incident to “offices who can appropriately respond” or who can perform “further investigation.” App. 6a. These policies objectively chill student speech, even when the “engagement[s]” are “voluntary.” App. 7a.

Indiana makes no bones about policing speech: It defines “bias incidents” as “any conduct, *speech*, or *expression*, motivated in whole or in part by bias or

³³ 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>].

prejudice meant to intimidate, demean, mock, degrade, marginalize, or threaten individuals or groups based on that individual or group’s actual or perceived identities.” Pet. 9 (quoting Dist. Ct. Doc. 9-12 at 2) (emphasis added). This definition, which delineates the BRT’s jurisdiction, specifically targets speech, and is not limited to actionable harassment as defined by law.³⁴ The BRT website provides examples of bias incidents, including “[d]iscrimination,” “[h]arassment,” “[h]ate crime,” “[h]ate incident,” and “[r]etaliation.”³⁵ But it goes on to clarify that “[i]t is not required that an incident fit within one of the types listed below to be reported.”³⁶

True, Indiana’s BRT lacks the power to punish students directly—that is, to file criminal charges or levy academic sanctions. App. 13a. Yet the manner of investigation the institution advertises on its official channels suggests to students that when they “report something,” the BRT will *do something*.

³⁴ Discriminatory 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 Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

³⁵ Bias Incident Reporting, UNIV. OF IND., <https://reportincident.iu.edu/incident-types/index.html>

³⁶ *Id.*

The Indiana BRT website details a four-step process:

1. IU community member . . . reports [a bias incident].
2. Within 1–2 days, IU officials contact involved parties.
3. IU officials meet with those affected, collect information, offer support, and discuss next steps.
4. IU officials activate response plan with ongoing support.³⁷

This process is enough to chill students’ speech. Speech can be chilled even if Indiana’s BRT lacks the formal authority to punish students. Just last term, this Court reaffirmed decades-old precedent that public entities can unconstitutionally chill speech even if “they ‘lack[] the power to apply formal legal sanctions.’” *N.R.A. v. Vullo*, 602 U.S. 175, 189 (2024) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66–67 (1963)). In *Bantam*, it was precisely “notices,” “followup visits,” and the “authority to refer matters for prosecution” that made it reasonable for speakers to “reasonably underst[and]” there to be a threat of punishment. *N.R.A.* 602 U.S. at 189. It’s no different for Indiana students: The BRT threatens to “[e]ngage” the students accused of bias incidents, “evaluate” incidents “for potential violations of university policy and/or criminal law,” and “refer the allegations to the

³⁷ What is the Incident Process?, UNIV. OF IND., https://reportincident.iu.edu/images/home/bias_process.jpg.

Office of Student Conduct” or other “appropriate campus office.” App. 5a–6a, 12a. As the Sixth Circuit wrote regarding the University of Michigan’s BRT, “[a]lthough there is no indication that the invitation to meet contains overt threats, the referral power lurks in the background of the invitation.” *Schlissel*, 939 F.3d at 765. Students reasonably understand that their speech—if reported as a bias incident—may result in sanctions. Even if their cases are never referred, an “investigation” can “unquestionably chill[] . . . their First Amendment rights.” *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000).

II. This Court Should Grant Review to Resolve the Current “Patchwork of First Amendment Rights on College Campuses.”

“This petition presents a high-stakes issue for our Nation’s system of higher education,” on which there is “a patchwork of First Amendment rights.” *Speech First, Inc. v. Sands*, 144 S. Ct. 675, 678 (2024) (Thomas, J., dissenting). The circuit split identified in this petition cries out for review. Across the country, students facing identical suppression of their speech by BRTs will be entitled to very different remedies, and in the Seventh Circuit, they will be entitled to no remedy at all. “Students in part of the country may pursue challenges to their universities’ policies, while students in other parts have no recourse and are potentially pressured to avoid controversial speech to escape their universities’ scrutiny and condemnation.” *Id.* This Court’s intervention is necessary to protect the expressive rights of millions of students and even Americans beyond school campuses.

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 Indiana’s BRT, Michigan’s BRT had the power to refer reported “bias” incidents to 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 Indiana’s policy in at least one way: It purported to proscribe “conduct” only. *Id.* at 762. By contrast, Indiana’s challenged policy explicitly defines “bias incidents” as “any conduct, *speech, or expression.*”

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.*

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 Indiana: Students could be anonymously reported for wide ranges of speech and conduct; the investigating BRT included school officials; the BRT could invite any accused student to a voluntary mediation; and the BRT could refer the incident to other school disciplinary offices. 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 Seventh Circuit allows public universities to police student speech on campus.

The Seventh Circuit has come to the opposite conclusion. In *Speech First, Inc. v. Killeen*, it 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. 968 F.3d 628, 641 (7th Cir. 2020). 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 protected from BRTs, while others don’t even get their day in court. A state line should not determine whether a student has First Amendment rights. That alone is reason for this Court to intervene.

There is yet another reason: Local and state governments are considering the BRT model for their own uses. Washington, for example, considered a bill that would have created statewide BRTs.³⁸ The

³⁸ Sofia Lopez, *Washington state bill set to create statewide bias response teams with law enforcement powers fails in committee*, FIRE (March 10, 2023), <https://www.thefire.org/>

defeated bill proposed a “bias incidents hotline,” where members of the public could file reports.³⁹ The hotline was required to pass the reported information to “local law enforcement.”⁴⁰ It further incentivized such reporting, enabling the government to give financial rewards to those making reports.⁴¹ Finally, the term “bias incident” was defined broadly, reaching a great deal of protected expression:

a person’s hostile expression of animus toward another person, relating to the other person’s actual or perceived race, color, religion, ancestry, national origin, gender, sexual orientation, gender expression or identity, or mental, physical, or sensory disability, of which criminal investigation or prosecution is impossible or inappropriate.⁴²

This Court’s intervention is needed to nip this trend in the bud.

CONCLUSION

Bias Response Teams like Indiana’s unconstitutionally threaten students with consequences for disfavored speech. For that and the foregoing reasons, this Court should grant *certiorari*.

news/washington-state-bill-set-create-statewide-bias-response-teams-law-enforcement-powers-fails.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

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Respectfully Submitted,

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