

No. 24-361

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In The  
Supreme Court of the United States

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SPEECH FIRST, INC.,  
*Petitioner,*  
v.

PAMELA WHITTEN,  
*Respondent.*

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

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**BRIEF OF AMICUS CURIAE WISCONSIN  
INSTITUTE FOR LAW & LIBERTY, INC.  
IN SUPPORT OF PETITIONER**

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**TABLE OF CONTENTS**

TABLE OF CONTENTS .....I  
TABLE OF AUTHORITIES ..... II  
INTEREST OF AMICUS ..... 1  
SUMMARY OF ARGUMENT ..... 2  
ARGUMENT ..... 4  
    I. College campuses, formerly recognized  
        as hubs of free expression and debate,  
        have eroded protections for free speech  
        in recent years. .... 4  
        A. Bias response teams have become  
            ubiquitous in American university  
            life..... 5  
        B. Recent surveys of college students, as  
            well as litigation involving Amicus,  
            establish that Petitioner’s concerns  
            about self-censorship and the chilling  
            of protected speech are well-founded.  
            ..... 10  
CONCLUSION ..... 14

## TABLE OF AUTHORITIES

### Cases

<i>Healy v. James</i> , 408 U.S. 169, 180--81 (1972).....	5
<i>Keyishian v. Bd. of Regents</i> 385 U.S. 589 (1967) .....	3
<i>McAdams v. Marquette Univ.</i> 2018 WI 88, 383 Wis. 2d 358, 914 N.W.2d 708.....	1, 13, 14
<i>Meriwether v. Hartop</i> 992 F.3d 492 (6th Cir. 2021).....	5
<i>Olsen v. Rafn</i> 400 F. Supp. 3d 770 (E.D. Wis. 2019).....	1, 13
<i>Papish v. Bd. of Curators of the Univ. of Mo.</i> 410 U.S. 667 (1973) .....	5
<i>Speech First, Inc. v. Cartwright</i> 32 F.4th 111 (11th Cir. 2022) .....	2
<i>Speech First, Inc. v. Fenves</i> 979 F.3d 319 (5th Cir. 2020).....	2
<i>Speech First, Inc. v. Killeen</i> 968 F.3d 628 (7th Cir. 2020).....	2
<i>Speech First, Inc. v. Schlissel</i> 939 F.3d 756 (6th Cir. 2019).....	2, 4
<i>Sweezy v. New Hampshire</i> 354 U.S. 234 (1957) .....	5

**INTEREST OF AMICUS<sup>1</sup>**

The Wisconsin Institute for Law & Liberty, Inc. (“WILL”) is a non-profit, public interest law firm dedicated to free speech, the rule of law, individual liberty, and constitutional government. WILL has litigated and won multiple cases involving free speech on college campuses. *See, e.g., Olsen v. Rafn*, 400 F. Supp. 3d 770 (E.D. Wis. 2019); *McAdams v. Marquette Univ.*, 2018 WI 88, 383 Wis. 2d 358, 914 N.W.2d 708. WILL also filed an *amicus curiae* brief in support of a writ of certiorari in *Speech First, Inc. v. Sands*, 144 S. Ct. 675 (2024), which was later granted.

WILL is interested in this case because college students in the Seventh Circuit have been experiencing infringement of their First Amendment rights due to the adoption of “bias response” mechanisms at their universities. The Seventh Circuit has said these mechanisms do not objectively chill speech, despite the Fifth, Sixth, and Eleventh Circuits finding that they do—creating a circuit split. *Speech First, Inc. v. Killeen*, 968 F.3d 628 (7th Cir. 2020), *as amended on denial of reh’g and reh’g en banc* (Sept. 4, 2020); *See also, Speech First, Inc. v. Fenves*,

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<sup>1</sup> As required by Supreme Court rules 37.3 and 37.6, Amicus states as follows. No counsel for a party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus or their counsel made such a monetary contribution. Counsel of Record for all parties received timely notice of intent to file this brief on October 21, 2024.

979 F.3d 319 (5th Cir. 2020), *as revised* (Oct. 30, 2020); *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019); *Speech First, Inc. v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022). As further described below, *all* University of Wisconsin schools has some form of “bias response team” akin to Indiana University’s. These mechanisms are having a demonstrative, negative impact on how college students understand the First Amendment and the scope of the rights it protects.

### SUMMARY OF ARGUMENT

This Court has long recognized that “[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). Yet colleges and universities have fallen prey to bias response teams and other mechanisms that both permit and encourage students and staff to report individuals who make comments or express positions that the reporting student perceives as biased, offensive, or harmful. These response teams invite complaints (often anonymous) based on vague and capacious notions of “bias,” “respect for diversity” or “exclusion,” often focused on the subjective reaction of the complaining party. This departure from core First Amendment principles to weaponize student disagreements has chilled intellectual debate and the ability of students to learn how to express and cope

with disagreement both inside and outside the classroom.

While these teams do not typically wield the power to issue formal discipline, their very existence nevertheless burdens speech and expression protected by the First Amendment; every student who considers expressing a viewpoint on a controversial issue knows that he or she may be reported to university leadership or to the community at large as a bigot if the student does so. While that alone is enough to impinge on First Amendment liberties, this case is especially important as the petitioners point out on page 12 of their petition for *writ of certiorari* that these bias response teams ensure the reports are “evaluated to determine if further investigation is required for potential violations of university policy and/or criminal law.” Petitioner App. B, p.6a.

Consequently, students frequently engage in self-censorship to avoid the burdens that would otherwise be imposed on their speech. This Court has previously held that a burden on speech or expression is unconstitutional just as an outright ban on the same protected speech would be. Because bias response teams pose a significant threat to the exercise of First Amendment rights on college and university campuses, and because this issue would presumably have been resolved before this Court in *Free Speech v. Sands* had the program not been discontinued, this Court should grant the petition and clarify that the constitutional rights of students and faculty to free expression of opinions merits protection.

## ARGUMENT

### **I. College campuses, formerly recognized as hubs of free expression and debate, have eroded protections for free speech in recent years.**

“Universities have historically been fierce guardians of intellectual debate and free speech, providing an environment where students can voice ideas and opinions without fear of repercussion.” *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 761 (6th Cir. 2019). “The college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas’” and “this Nation’s dedication to safeguarding academic freedom” has generally prevailed on college and university campuses over time. *Healy v. James*, 408 U.S. 169, 180–81 (1972)(citations omitted); *see also Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (“The essentiality of freedom in the community of American universities is almost self-evident .... Teachers and students must always remain free to inquire ...; otherwise, our civilization will stagnate and die.”) (plurality op.).

However, recent years have seen college campuses transformed from hubs of discussion and deliberation to self-proclaimed “safe spaces,” proudly advertising an environment free from stress-inducing “triggers” such as opposing or controversial viewpoints, despite this Court repeatedly explaining that under the First Amendment, “the mere dissemination of ideas ... on a state university campus may not be shut off in the name alone of ‘conventions of decency.’” *Meriwether v.*

*Hartop*, 992 F.3d 492, 506 (6th Cir. 2021) (quoting *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973) (per curiam)).

Sadly, as further explained below, an alarming proportion of students on university campuses now believe it is both permissible and preferable to silence, rather than engage with, students and professors with differing perspectives, particularly on controversial issues. Bias response teams of the type discussed in Speech First’s petition are anathema to the First Amendment because they burden the rights of students, faculty, and staff to freely exchange ideas without reprisal.

**A. Bias response teams have become ubiquitous in American university life.**

The speech-suppressing apparatus at issue in this case, bias response teams, is not limited to Indiana University. Universities across the country have moved toward establishing bias response teams and similar reporting structures in recent years. In fact, *all thirteen* of the University of Wisconsin schools have a bias reporting process or response team as of October 28, 2024.<sup>2</sup>

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<sup>2</sup> University of Wisconsin Superior Bias, *Discrimination and Harassment Reporting Form*, <https://tinyurl.com/54waa875>; University of Wisconsin River Falls, *Bias Incident Response Team*, <https://tinyurl.com/bdffcc6p>; University of Wisconsin Eau Claire, *Bias Incident Reporting*; University of Wisconsin Stout, *Bias Incident Reporting Team (BIRT)*, <https://tinyurl.com/2vfpwcek>; University of Wisconsin La Crosse, *Bias Support & Education Team*, <https://tinyurl.com/5c9b5c9m>;



While the details of each institution’s policy may vary, bias response teams generally have troubling features in common, and all seek to limit various forms of speech and expression based on the message’s content. The University of Wisconsin Superior even goes as far as to say a bias incident could be something said or done “unintentionally” or “unconsciously.”<sup>3</sup>

Students are encouraged to report on each other, often anonymously. Ironically, some universities purport to have bias response teams to “embrace and respect[] diversity of all kinds” in their campus communities, even as these same groups attempt to suppress differing points of view.<sup>4</sup>

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University of Wisconsin Steven’s Point, *Hate/Bias Response Team*, <https://tinyurl.com/bdzbupne>; University of Wisconsin Green Bay, *Bias Incident Report-All Campuses*, <https://tinyurl.com/4j5be9xs>; University of Wisconsin Oshkosh, *Campus Care and Belonging*, <https://tinyurl.com/y6xmrhuz>; University of Wisconsin Madison, *Report hate or bias incidents*, <https://tinyurl.com/bde4waxk>; University of Wisconsin Platteville, *University Bias Incident Report Team*, <https://tinyurl.com/28wf4wv9>; University of Wisconsin Whitewater, *Bias Support and Education Team*, <https://tinyurl.com/3fdwc3vy>; University of Wisconsin Milwaukee, *Hate/Bias Incident Reporting*, <https://tinyurl.com/mpteaemj>; University of Wisconsin Parkside, *Hate and Bias Reporting, Investigation, and Resolution Process*, <https://tinyurl.com/329wpn9a>.

<sup>3</sup> University of Wisconsin Superior Bias, *Discrimination and Harassment Reporting Form*, <https://tinyurl.com/54waa875>.

<sup>4</sup> University of Wisconsin Superior Bias, *Discrimination and Harassment Reporting Form*, <https://tinyurl.com/54waa875>.

In practice, bias response teams deal with incidents that are not unlawful or illegal, but are instead uncomfortable or disagreeable for those that hear or witness them. In addition to classifications already protected by anti-discrimination and harassment laws, universities often include other categories within their definitions of “bias.”<sup>5</sup> Actionable items subject to bias reporting taken directly from university websites include “jokes,”<sup>6</sup> “prank[s],”<sup>7</sup> “assuming characteristics of a minoritized group,”<sup>8</sup> “hosting ethnic themed parties”<sup>9</sup> and “imitating someone’s cultural norm or practice,”<sup>10</sup> in addition to activities and speech recognized as unlawful and subject to other processes (i.e., racial discrimination, sexual harassment). There is no requirement that these activities be “severe” or “pervasive” or possess any other characteristic that

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<sup>5</sup> See, e.g., Cornell University Diversity and Inclusion, *Bias Reporting at Cornell*, <https://tinyurl.com/2tuzavfd> (including “height” and “weight” among the “actual or perceived aspect[s] of diversity” subject to the policy).

<sup>6</sup> University of Denver, *Bias Incident Response Team*, <https://tinyurl.com/5ba27s34>.

<sup>7</sup> George Washington University Office for Diversity, Equity and Community Engagement, *Bias Incident Response*, <https://tinyurl.com/j33mb9b6>.

<sup>8</sup> Roger Williams University, *Bias Incident Response*, <https://tinyurl.com/4ddwadwc>.

<sup>9</sup> University of Wisconsin Superior Bias, *Discrimination and Harassment Reporting Form*, <https://tinyurl.com/54waa875>.

<sup>10</sup> Pacific University, *Bias Incident: What is it?*, <https://www.pacificu.edu/life-pacific/support-safety/office-equity-diversity-inclusion/bias-hate-incident-education/bias-incident-what-it>

have been typically required for the regulation of speech.

The Wisconsin Institute for Law & Liberty submitted an open records request to the University of Wisconsin Madison to see what types of reports were made through the Harassment, Discrimination, and Bias reporting form. Some of the reports were directly about discussions held in classes.

One report discussed how her professor was sexually harassing her because he told her he did not believe the conclusion she was coming to during a presentation based on data she turned in.<sup>11</sup> Another report stated that the class discussion resulted in a “microaggression” because someone “had [the] perspective of color blind racism of not seeing the facts that people of color go through.”<sup>12</sup> In other words, another student had expressed an opinion on how the matter of race should be handled with which the complainant disagreed. Another submission stated that a staff member was asked his pronouns during class and he responded “my pronouns? I haven’t decided yet” which was offensive to the complainant.<sup>13</sup> Another report claims that peers participating in

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<sup>11</sup> University of Wisconsin – Madison, *Bias Incident Report Form*, <https://will-law.org/wp-content/uploads/2024/10/UWM-Bias-Incident-Reports.pdf>, at 9–10.

<sup>12</sup> University of Wisconsin – Madison, *Bias Incident Report Form*, <https://will-law.org/wp-content/uploads/2024/10/UWM-Bias-Incident-Reports.pdf>, at 13–14.

<sup>13</sup> University of Wisconsin – Madison, *Bias Incident Report Form*, <https://will-law.org/wp-content/uploads/2024/10/UWM-Bias-Incident-Reports.pdf>, at 29–30.

class and expressing ideas that oppose her own, such as that white people are not more privileged than people of color, were affecting her mental health.<sup>14</sup> Perhaps the most illustrative report was of a student who complained of “problematic class contributions” of one of her peers.<sup>15</sup> The complainant stated that this incident impacted her because she “almost believed” some of her peer’s “damaging viewpoints” he expressed since they were “backed by research.”<sup>16</sup> These examples highlight that the mere expression of views not shared by other students can lead to complaints.

Some of these reports take this concept even further, and report conversations as offensive that were not directed at them, but simply overheard. One submission was a student offended that he overheard a classmate say that “gender-bread decorating was on brand for the university.”<sup>17</sup> Another submission stated that a student speaking Mandarin in the elevator did so with a “very bad ‘Chinese’ accent,” which the

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<sup>14</sup> University of Wisconsin – Madison, *Bias Incident Report Form*, <https://will-law.org/wp-content/uploads/2024/10/UWM-Bias-Incident-Reports.pdf>, at 15–16.

<sup>15</sup> University of Wisconsin – Madison, *Bias Incident Report Form*, <https://will-law.org/wp-content/uploads/2024/10/UWM-Bias-Incident-Reports.pdf>, at 19–22.

<sup>16</sup> University of Wisconsin – Madison, *Bias Incident Report Form*, <https://will-law.org/wp-content/uploads/2024/10/UWM-Bias-Incident-Reports.pdf>, at 21.

<sup>17</sup> University of Wisconsin – Madison, *Bias Incident Report Form*, <https://will-law.org/wp-content/uploads/2024/10/UWM-Bias-Incident-Reports.pdf>, at 3–4.

complainant thought was “very disrespectful.”<sup>18</sup> In other words, the complainant didn’t like someone’s pronunciation. Another report claims that because there is a conservative Christian group on campus lead by a “cis black man who believes in anti-vaxx and also conspiracy theories about how abortion is used as a tool to control black people and is inherently racist,” she feels “unsafe and threatened.”<sup>19</sup> Put differently, a complaint was filed because the complainant disagreed with the views of a student leading a group to which she did not belong and could simply ignore. These are primary examples of how pervasive and far this reporting will go—even private conversations simply overheard and not directed at any particular person could be and *were* reported on.

**B. Recent surveys of college students, as well as litigation involving Amicus, establish that Petitioner’s concerns about self-censorship and the chilling of protected speech are well-founded.**

Recent studies and litigation both demonstrate that the effect of policies like those described in the previous section is not merely theoretical but is part of a trend in the decline of free speech on campuses. A February 1, 2023, study by the University of

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<sup>18</sup> University of Wisconsin – Madison, *Bias Incident Report Form*, <https://will-law.org/wp-content/uploads/2024/10/UWM-Bias-Incident-Reports.pdf>, at 5–6.

<sup>19</sup> University of Wisconsin – Madison, *Bias Incident Report Form*, <https://will-law.org/wp-content/uploads/2024/10/UWM-Bias-Incident-Reports.pdf>, at 27–28.

Wisconsin System entitled “Student Views on Freedom of Speech” (hereafter “UW Study”) surveyed 10,445 students from across over a dozen UW campuses.<sup>20</sup> Among the topics surveyed were the students’ level of comfort expressing views about controversial topics, such as transgender issues and abortion. *Id.* at 22–23. The survey respondents were also asked whether expressing views perceived as offensive can be seen as an act of violence. *Id.* at 28.

Fifty-seven percent of the students responded that they have wanted to express views on a controversial topic in class but decided not to.<sup>21</sup> Among the most prevalent reasons for their decision not to do so were that “they worried other students would dismiss their views as offensive” (58%), they worried the instructor would dismiss their views as offensive (46%), and that they worried that someone would file a complaint about their views (31%).<sup>22</sup>

Many students also lack a basic knowledge of First Amendment principles. For example, 73.9% of students surveyed either believed the First Amendment allowed their university to ban so-called “hate speech” on campus or were not sure.<sup>23</sup>

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<sup>20</sup> April Bleske-Rechek, et al., *UW System Student Views on Freedom of Speech: Summary of Survey Responses*, available at <https://www.wisconsin.edu/civil-dialogue/download/SurveyReport20230201.pdf> (Feb. 1, 2023) (hereafter “UW Study”).

<sup>21</sup> UW Study at 63.

<sup>22</sup> UW Study at 66.

<sup>23</sup> UW Study at 78.

Censorship of viewpoints on campus is neither theoretical nor confined to the self-censorship of the sort revealed by the UW Study. In recent years, Amicus has represented students and staff who paid the price for spreading their viewpoints on campuses in Wisconsin. In *Olsen v. Rafn*, 400 F. Supp. 3d 770 (E.D. Wis. 2019), Amicus represented a student at Northeast Wisconsin Technical College who handed out handmade Valentine’s Day cards with Bible verses and Christian messages (such as “You are Loved! 1 John 4:19” and “God is Love! 1 John 4:16”). *Id.* at 773. For her trouble, she was reported to the campus’s security office as a “suspicious person” and told that she had to stop handing out her Valentines because “some people could find the message on her Valentines offensive” and that her actions could “disturb[] the learning environment.” *Id.* at 774. Olsen won summary judgment in her favor, with the district court noting that the college “had no more right to prevent her from handing out individual Valentines than it did to stop her from wishing each individual to have a ‘good morning and a blessed day’”—both were protected forms of expression. *Id.* at 779.

Professors have also faced the prospect of seeing their academic freedom diluted or eliminated by reports that their positions are biased. In *McAdams v. Marquette Univ.*, 2018 WI 88, Amicus represented a tenured political science professor who was suspended for criticizing a philosophy professor’s interaction with a graduate student in a blog post. McAdams took issue with the professor’s statement to the student that “some opinions are not appropriate,” including comments opposing homosexual marriage,

and referred to the philosophy professor's approach to controversial issues as "a tactic typical among liberals" and "totalitarian." *Id.* ¶ 7. The philosophy professor filed a complaint against McAdams based upon the blog post and the University ultimately suspended McAdams without pay. *Id.* ¶ 14.

The University's tenure agreement incorporated protections for tenured faculty from disciplinary action for activities involving the "exercise of academic freedom or other rights guaranteed them by the United States Constitution." *Id.* ¶ 80. While the Wisconsin Supreme Court's discussion focused on academic freedom rather than whether the school's action would unconstitutionally chill protected speech, the Court did recognize that the two analyses were linked. Per the majority opinion, academic freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Id.* ¶ 101 (citations omitted); *see also id.* ¶ 105 ("Academic freedom has also been expressed as a right under the First Amendment ...") (citation omitted).

Cases like *Olsen* and *McAdams*, along with the results of the UW Study, signal an alarming trend toward censorship of controversial viewpoints on university campuses in Wisconsin. The effect of formal discipline, security encounters, and self-censorship at institutions within the state represents a microcosm of the nation's college and university population and its tendency to repress unsavory viewpoints, whether they are previously orthodox or new and inventive. This Court should grant the petition and reverse the Seventh Circuit to send a



message that the First Amendment is alive and well in college and university settings.

### CONCLUSION

Amicus respectfully requests this Court grant the Petitioner’s petition for writ of certiorari and clarify that the First Amendment’s free speech protections remain in place for all students—whether or not their opinions may make others uncomfortable. Absent a definitive resolution of the issues Petitioners raise, students across the country may find themselves goaded into silence by the threat of anonymous reporting by others to “bias response teams.” The First Amendment cannot be allowed to condone, much less encourage, the self-censorship that these groups seek to impose.

Respectfully submitted,

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