No. 24-361

In the Supreme Court of the United States

SPEECH FIRST, INC.,
Petitioner,

v.

PAMELA WHITTEN, in her official capacity as President of Indiana University, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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December 3, 2024

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases

Other Authorities

REPLY

At least seven Justices have already deemed the question presented certworthy. Two Justices said so explicitly when they dissented from the denial of certiorari in *Speech First, Inc. v. Sands*, explaining that bias-response teams raise an "important" question of constitutional law that has "divided" the courts of appeal. 144 S.Ct. 675, 676 (2024) (Thomas, J., dissenting). And at least five other Justices voted to *grant* certiorari in *Sands*, vacating the Fourth Circuit's decision under *Munsingwear* because Virginia Tech had eliminated its bias-response team before certiorari could be granted. *Id.* at 675. Indiana never denies that this Court's practice is not to vacate in that scenario unless, absent the mootness, the petition would have been granted.

It is now time to hear this important question on the merits. This case is concededly live. Indiana's bias-response team is up and running, and Indiana is committed to defending both it and the decision below. And Indiana's weak objections to certiorari are the same ones that Virginia Tech raised—and that at least seven Justices implicitly rejected—in *Sands*. In short, all these bias-response teams are the same; the circuit split is acknowledged and purely legal; and Indiana's one vehicle argument is meritless and waived.

This Court has not opined on the free-speech rights of college students in over a decade. It should grant certiorari here and end the national disunity on whether bias-response teams objectively chill students' speech.

I. This Court *already* deemed the question presented certworthy when it *Munsingwear*'d the Fourth Circuit in *Sands*.

Though Speech First stressed this Court's implicit certworthiness determination in *Sands*, Indiana ignores it entirely. Indiana thus accepts that this Court's practice is to not vacate a case for precertiorari mootness unless it first concludes that it would have granted certiorari. And it accepts that this Court drew that conclusion when it vacated the Fourth Circuit's decision. *See* Pet.22-23.

Indiana gives no reason why *Sands* would be certworthy but this case would not be. *Sands* was brought by the same plaintiff, against a similar bias-response team, raising the same claims, and decided on the same grounds in the same posture. 144 S.Ct. at 675 (Thomas, J., dissenting). The Fourth Circuit's opinion leaned heavily on *Killeen*, the precedent from the Seventh Circuit that's at issue here. *See, e.g.*, *Speech First, Inc. v. Sands*, 69 F.4th 184, 196-97 (4th Cir. 2023) (citing *Speech First, Inc. v. Killeen*, 968 F.3d 628 (7th Cir. 2020)). And Indiana's opposition makes no argument not already made by the opposition in *Sands*. Virginia Tech likewise urged this Court to deny certiorari because Speech First discussed bias-response teams generally, because the circuit split was illusory, and because Speech First referred to its members with pseudonyms. *Compare* BIO.18-21, 30-32, *with Sands*-BIO.23, 27, 32, No. 23-156. But this Court *granted* certiorari in *Sands*, implicitly rejecting these arguments.

The only difference between this case and *Sands* is that this one should be not only granted, but also heard on the merits. Unlike Virginia Tech, Indiana doesn't suggest that this case is moot. Its bias-response team is alive and well. BIO.1-9. Indiana has not repealed it, or even suggested that it might change. Indiana also defends the Seventh Circuit's precedent as "correct." *E.g.*, BIO.2, 17, 21, 23, 29. And it defends the judgment below, arguing strenuously that Speech First lacks Article III standing. BIO.13, 29-32. Though this Court's vacatur in *Sands* made the circuit split 3-1 instead of 3-2, the split remains. This live controversy over Indiana's bias-response team is the ideal place to resolve it.

II. Whether bias-response teams objectively chill students' speech is an important issue that has split the circuits.

Though Indiana quibbles over the circuit split, it never denies that bias-response teams present "an important question"—an independent ground for certiorari. S.Ct.R.10(c). Indiana thus agrees that these teams are proliferating. Pet.8-9. That they are a main driver of the free-speech crisis currently plaguing college campuses. Pet.6-8, 20-21. And that they are spreading to K-12 schools, cities, and even States. Pet.21-22. As the eleven amici supporting this petition attest, the question presented is vitally important for our students, schools, and republic. To quote Justices Thomas and Alito in *Sands*, bias-response teams present "an important question affecting universities nationwide"—a "high-stakes issue for our Nation's system of higher education." 144 S.Ct. at 676, 678.

Anyway, Indiana is badly wrong about the circuit split. Even before the Fourth Circuit's decision in *Sands*, courts and commentators recognized the 3-1 "'split'" between the Fifth, Sixth, Eleventh, and Seventh Circuits. Pet.17 (collecting sources). And even after this Court vacated the Fourth Circuit's decision, two Justices observed that the circuits remain "divided over whether bias response policies have a 'chilling' effect on students' speech." 144 S.Ct. at 676 (Thomas, J., dissenting) (citing, inter alia, *Killeen*). "Until [this Court] resolves" that question on the merits, "there will be a patchwork of First Amendment rights on college campuses." *Id.* at 678. "Students in part of the country may pursue challenges to their universities' policies, while students in other parts have no recourse." *Id.* Speech First's standing to challenge these teams has split individual federal judges right down the middle—ten to ten. Pet.18.

The split that Justices Thomas and Alito identified explicitly—and that at least five other Justices identified implicitly—is not "illusory." *Contra* BIO.21. As Speech First explained, the question splitting the circuits is whether bias-response teams objectively chill students' speech. Pet.17, 29-34. That question is legal, not factual. As even Indiana agrees, the facts concerning what bias-response teams say and do are largely undisputed. BIO.26, 29-30. The dispute instead concerns whether, given those representations, a reasonable college student would refrain from saying something "biased." Indiana's discussion of the cases comprising the split shows how the circuits disagree not on the facts, but on the legal implications of

those facts for objective chill and Article III standing. *See* BIO.27-28.

The bias-response teams in these cases do not "materially vary across universities." *Contra* BIO.21. Speech First would know, since it brought all the cases. The teams it challenged all share the same core features: a formal team staffed with senior administrators; a formal definition of "bias" that covers protected speech; and a formal system that solicits and tracks anonymous reports, asks to meet with perpetrators, and warns students that they can be referred for discipline. Pet.23-25. Those similarities are not accidental. These policies emerged at roughly the same time, and the universities largely copied each other's teams. *See* Pet.23.

No surprise, then, that Indiana's "Bias Response Team" is not meaningfully different from Michigan's "Bias Response Team," Illinois' "Bias Assessment Response Team," or the other teams in these cases. Indiana never denies that its bias-response team has all the core features above. And *every* team in the split promised that it protected free speech, denied that it conducted investigations, disclaimed disciplinary authority, and the like. *Compare* BIO.19-20, *with, e.g.*, *Speech First, Inc. v. Fenves*, 979 F.3d 319, 325-26 (5th Cir. 2020); *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 762-63 (6th Cir. 2019); *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1115-18 (11th Cir. 2022). Tellingly, Indiana takes great pains to equate its team to Illinois's team in *Killeen*. *See* BIO.24-26. Those two teams *are* essentially identical, which is why both the district court and the Seventh Circuit deemed that

case indistinguishable from this one. Pet.App.2a, 12a. But as both the Fourth and Eleventh Circuits recognized, Illinois' team and all the teams in the split are "similar." *Sands*, 69 F.4th at 197; *Cartwright*, 32 F.4th at 1120. The bias-response teams that Speech First has challenged are "typical" and so these cases present "a largely indistinguishable set of facts." Brian Soucek, *Speech First, Equality Last*, 55 Ariz. St. L.J. 681, 705, 708 (2023).

It was thus entirely proper for Speech First to frame the question presented as "[w]hether bias-response teams objectively chill students' speech." Pet.i; *contra* BIO.18-21. If certiorari is granted, the parties will obviously brief whether *Indiana's* Bias Response Team objectively chills students' speech. But Indiana's team is no different from other teams across the country; those teams will shed light on Indiana's team; and the prevalence of those teams proves this petition raises an issue of national importance. This Court granted certiorari in *Sands* after Speech First framed the question the same way. Justices Thomas and Alito phrased the question that way too. 144 S.Ct. at 676. And given the chance to reframe it, Indiana wrote the question in terms that are equally abstract—except Indiana's question presented is argumentative and imprecise. *See* BIO.i. Its quibbles over wording are no reason to deny certiorari.

III. There are no obstacles to this Court's review.

Indiana makes only one vehicle argument. It doesn't say this case is meaningfully interlocutory. BIO.29 (acknowledging that all proceedings are

stayed pending this Court's decision); *see* Pet.26-27. And it doesn't say the question presented needs any more percolation. *See* Pet.26. It says only that Speech First might lack standing for an alternative reason that the Seventh Circuit didn't reach: that Speech First's preliminary-injunction papers referred to its standing members with pseudonyms, rather than divulging their real names. BIO.30-32. Virginia Tech raised the same objection in *Sands*, *see Sands*-BIO.23-27, but this Court granted certiorari anyway. This argument amounts to nothing here too.

Indiana's objection is not an obstacle to review because this Court can ignore it. Though Indiana insists that pseudonyms implicate "standing," BIO.31-32, the question presented is already about standing: whether bias-response teams objectively chill students' speech (and thus cause Speech First's members an Article III injury). Because jurisdictional issues can be resolved "in any order," this Court can address that question and leave any other arguments for remand. *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 4 (2023). That course would be especially appropriate here, since the lower courts reached that question and nothing else. *See Friends of the Earth v. Laidlaw Env't Servs.*, 528 U.S. 167, 194 (2000) (declining to address a jurisdictional issue that had "not been aired in the lower courts"). Indiana never raised its pseudonymity argument in the Seventh Circuit or in its preliminary-injunction opposition. In fact, Indiana *waived* its right to discovery at the preliminary-injunction stage. D.Ct.Doc.21. Indiana cannot now claim a vital need for information that it never tried to get below. *See Chamber of Commerce v. CFPB*, 691 F. Supp. 3d 730,

735, 739 (E.D. Tex. 2023). The weakness of its belated "standing" objection is another reason why this Court could ignore it. All the courts in the circuit split have ignored it too, even though Speech First referred to its members with pseudonyms every time.

Even if this Court wanted to address Indiana's argument about pseudonyms, it could quickly reject that argument before answering the question presented. *See, e.g.*, *SFFA v. Harvard*, 600 U.S. 181, 198-99 (2023). It could explain that this Court has long allowed associations to sue on behalf of pseudonymous members. *E.g.*, *New York v. U.S. Dep't of Com.*, 351 F.Supp.3d 502, 606 n.48 (S.D.N.Y. 2019), *aff'd on standing*, 588 U.S. 752, 766-68 (2019); *FAIR v. Rumsfeld*, 291 F.Supp.2d 269, 286-89 (D.N.J. 2003), *aff'd on standing*, 547 U.S. 47, 52 n.2 (2006). Whether and when associations can shield their members' names turns on the procedural rules governing discovery and the public's right of access, not on Article III standing. *AAER v. Fearless Fund Mgmt., LLC*, 103 F.4th 765, 773 (11th Cir. 2024); *B.R. v. F.C.S.B.*, 17 F.4th 485, 495-97 (4th Cir. 2021). Though Article III requires associations to identify specific members who currently have standing, Speech First always does that. *Speech First, Inc. v. Shrum*, 92 F.4th 947, 952 (10th Cir. 2024). It proved below what its members want to say and why Indiana's policy chills that speech. Pet.App.8a. Divulging their first and last names would have added no information relevant to Article III. *Advocs. for Highway & Auto Safety v. FMCSA*, 41 F.4th 586, 594 (D.C. Cir. 2022). The Second Circuit's lone decision to the contrary is unpersuasive and still pending en banc. *See Do No Harm v.*

Pfizer Inc., 96 F.4th 106 (2d Cir. 2024), *rehearing pet'n pending*.

CONCLUSION

This Court should grant certiorari and set this case for argument during the current Term.

Respectfully submitted,

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