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 WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC. IN SUPPORT OF PETITIONER

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## INTEREST OF AMICUS[1]

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 is interested in this case because it has significant implications for students not only in Wisconsin but nationwide. As further described below, not only do many Wisconsin schools have some form of "bias response team" akin to Virginia Tech's, but these mechanisms are having a palpable, negative impact on how college students understand the First Amendment and the scope of the rights it protects.

## SUMMARY OF ARGUMENT

Colleges and universities, once beacons of free expression, have fallen prey to bias response teams

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[1] As required by Supreme Court Rules 37.2 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 were timely informed of Amicus' intent to file this brief on August 31, 2023.

and other similar mechanisms that both permit and encourage students and staff to report individuals who make comments that the reporting individual perceives as biased, offensive, or harmful.

While these bias response teams do not typically wield the power to issue formal discipline, they nevertheless burden speech and expression protected by the First Amendment through their very existence; 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. 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, 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 protection for speech has generally prevailed on college and university campuses over time. *Healy v. James*, 408 U.S. 169, 180 (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.") (Warren, C.J., 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. Sadly, as further explained below, an alarming proportion of students on university campuses now believe it 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 Virginia

Tech. Universities across the country have moved toward establishing bias response teams and similar reporting structures in recent years. While the details of each institution's policy may vary, bias response teams generally have a number of troubling features in common, and all seek to limit various forms of speech and expression based upon the content of the message. In practice, incidents categorized as reportable include bans on "degrading language" or "slurs," as well as posting an "offensive social media post" or engaging in "microaggressions[2]."[3] Students are encouraged to report on each other, often anonymously. Ironically, some universities purport to have bias response teams to cultivate "an appreciation of differences"[4] in their campus communities, even as these same groups attempt to suppress various points of view.

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[2] A "microaggression" has been defined as "a comment or action that subtly and often unconsciously or unintentionally expresses a prejudiced attitude toward a member of a marginalized group (such as a racial minority)." "Microaggression," Merriam-Webster.com, https://www.merriam-webster.com/dictionary/microaggression (accessed Sept. 14, 2023).

[3] University of Wisconsin-River Falls, *Bias Incident Response Team*, https://www.uwrf.edu/Inclusivity/ConcernsOrSuggestions/bert.cfm; Smith College, *Bias Response Team*, https://www.smith.edu/about-smith/equity-inclusion/policies/bias-reporting; St. Olaf College, *Bias Reporting*, https://wp.stolaf.edu/equity-inclusion/bias-reporting/; University of Wisconsin-Madison Dean of Students Office, *Report Bias or Hate*, https://doso.students.wisc.edu/report-an-issue/bias-or-hate-reporting/.

[4] *See* Smith College Bias Response Team, *supra* n.3.

In practice, bias response teams frequently deal with incidents that are not themselves 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."[5] Actionable items subject to bias reporting taken directly from university websites include "jokes,"[6] "prank[s],"[7] "assuming characteristics of a minoritized group,"[8] and "imitating someone's cultural norm or practice."[9]

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[5] *See*, *e.g.*, Cornell University Diversity and Inclusion, *Bias Reporting at Cornell*, https://diversity.cornell.edu/our-commitments/bias-reporting-cornell (including "height" and "weight" among the "actual or perceived aspect[s] of diversity" subject to the policy).

[6] University of Denver, *Bias Incident Response Team*, https://www.du.edu/equalopportunity/bias-incident-response-team-birt

[7] George Washington University Office for Diversity, Equity and Community Engagement, *Bias Incident Response*, https://diversity.gwu.edu/bias-incident-response

[8] Roger Williams University, *Bias Incident Response*, https://www.rwu.edu/undergraduate/student-life/about-student-life/bias-incident-response

[9] 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

### 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 Wisconsin System entitled "Student Views on Freedom of Speech" surveyed 10,445 students from across over a dozen UW campuses.[10] 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. *Id.* at 63. 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

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[10] 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").

(46%), and that they worried that someone would file a complaint about their views (31%). *Id.* at 66.

Many students also lack a basic knowledge of First Amendment principles. For example, 73.9% of students surveyed either incorrectly believed the First Amendment allowed their university to ban so-called "hate speech" on campus, or were not sure. *Id.* 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 faculty who paid the price for spreading their viewpoints on campuses in Wisconsin. In *Olsen v. Rafn*, 400 F. Supp. 3d 770, 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") on them. *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 judge 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.'" All 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 in Wisconsin in these cases representative but a subset of the nation's colleges and universities and their tendency to repress unsavory viewpoints, whether previously orthodox or new and inventive. This Court should grant the petition and reverse the Fourth Circuit to send a message that the First Amendment is alive and well in college and university settings.

## II. Burdening speech through a bias response team is unconstitutional, just as banning the expression of an unpopular viewpoint would be.

Bias response teams encourage the self-censorship currently occurring on campuses, including behaviors and concerns like those outlined in the UW Study. While in many instances a bias response team does not itself have the power to punish a student through suspension, expulsion, or other formal means, the threat of being reported on by other students and accused of prejudice or bigotry to university staff sets in motion a process that has a chilling effect on speech and thus burdens First Amendment freedoms. For these reasons, this Court should grant the petition and clarify that the actions of bias response teams, conducted under the guise of university endorsement, are subject to strict scrutiny and violate the First Amendment.

### A. The First Amendment prohibits state institutions like Virginia Tech from enforcing a speech code.

This Court, and many intermediate appellate and district courts following its precedent, has repeatedly held that regulations or practices burdening speech based upon its content are presumptively unconstitutional and may only pass muster if they are the least restrictive means to further a compelling interest. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Sable Commc'ns of Cal. v. F.C.C.*, 492 U.S. 115, 126 (1989).

For example, in *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011), the State of Vermont passed a law restricting the sale and use of pharmacy records that revealed doctors' prescribing practices, justifying the law as a safeguard for medical privacy and to "diminish the likelihood that marketing will lead to prescription decisions not in the best interests of patients." This Court concluded that the law "enact[ed] content-and speaker-based restrictions" on the information at issue. *Id.* at 563. While pharmaceutical companies were prohibited from using prescriber information, anyone who wished to engage in "educational communications" based on it could purchase the data. *Id.* at 564. The effect of the law was to prevent certain speakers from communicating with physicians "in an effective and informative manner." *Id.*

Although the law at issue in *Sorrell* did not ban speech outright, this Court observed that it was "designed to impose a specific, content-based burden

on protected expression," warranting "heightened judicial scrutiny." *Id.* at 565. Whether a regulation on speech bans or simply burdens the expression of certain viewpoints, "the Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *Id.* 566 (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000)). "An individual's right to speak is implicated when information he or she possesses is subjected to 'restraints on the way in which the information might be used' or disseminated.'" *Sorrell*, 564 U.S. at 568 (citations omitted).

Since *Sorrell*, numerous federal courts have followed this Court's lead across a variety of factual and legal contexts and confirmed that placing regulatory burdens on certain speech-related activities leads to self-censorship and implicates First Amendment freedoms. *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 835 (7th Cir. 2014) ("Vague or overbroad speech regulations carry an unacceptable risk that speakers will self-censor . . .") (statute defining "political purposes" and imposing restrictions on speech within certain timeframes from elections unconstitutional).

Additionally, in *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015), the Federal Circuit confirmed that the United States Trademark Trial and Appeal Board ran afoul of the First Amendment when it refused to register an applicant's mark that it found offensive. Tam sought to register "The Slants," a reference to his Asian heritage and its treatment in American culture, as a name for his band. Noting that Tam "conveys more about our society than many volumes of undisputedly protected speech" with such a name, *id.* at 1328, and

acknowledging that many rejected marks "convey hurtful speech that harms members of oft-stigmatized communities," the court concluded that the government could not refuse to register marks because it disapproves with the messages they convey because such refusal is tantamount to viewpoint discrimination. *Id.*

Similarly, in *Blitch v. City of Slidell*, 260 F. Supp. 3d 656 (E.D. La. 2017), panhandlers successfully challenged a local regulation requiring them to register with the chief of police and wear identification prior to asking the public for money. The court noted that while some commercial solicitors were also required to register, only panhandlers were required to wear identification, and some door-to-door advocates (such as religious or political workers) were not required to register at all. *Id.* at 668. Because only speakers seeking to "beg or panhandle" were subjected to the enhanced requirements, the ordinance was content based and therefore subject to strict scrutiny. *Id.* at 666. The fact that the ordinance merely burdened, but did not outright ban, the activity made no difference.

The presumption that individuals may speak their minds without government burdens is a strong one, extending to protect even very unpopular groups and viewpoints. In *Doe v. Harris*, 772 F.3d 563, 568 (9th Cir. 2014), the Ninth Circuit affirmed a preliminary injunction striking down California's requirement that convicted sex offenders report any identities they use on the internet and any internet service providers they used to law enforcement. Repeating *Sorrell*'s warning that laws burdening speech and prohibiting

speech both implicate the First Amendment, the court observed that the reporting burden on the offenders was "substantial," particularly when it came to the ability to engage in anonymous online speech. *Id.* at 574. Not only did the regulation burden illegal activity like sending child pornography, but it used the same mechanism to suppress speech about political topics and current events. *Id.* at 573. While the state unquestionably had a legitimate interest in preventing the former conduct, it could not do so in a way that unnecessarily chilled speech in the latter and other similarly innocuous categories. *Id.* at 578. Similarly, another district court struck down Alabama's requirement that sex offenders notify the government within three days of engaging in certain online activity—including reporting every email address or instant message name used—because the regulation required offenders to weigh the benefits of speech against the burden of reporting it. *Doe 1 v. Marshall*, 367 F. Supp. 3d 1310, 1327 (M.D. Ala. 2019). Even giving these regulations the benefit of intermediate scrutiny rather than the strict scrutiny that applies to most speech regulations, neither regulation could survive because while neither penalized the speech itself, the government made speaking so burdensome for a particular group of individuals that the rule infringed on their constitutional rights.

Much of the First Amendment problem in these and other similar cases can be traced to the vague nature of what is and is not burdened by a particular regulation. For example, in *Tam*, the court noted the "uncertainty as to what *might be deemed* disparaging." 808 F.3d at 1341. The record of PTO

grants and denials over the years provided little "reliable guidance" to the public. *Id.* at 1342. For example, the office registered "The Devil is a Democrat" while rejecting "Have You Heard Satan is a Republican" and approved the mark "Fagdog" three times while also rejecting it twice, at least once as disparaging. *Id.* at 1342 and n.7. Similar examples abound from across the country in a number of contexts. *See Doe*, 772 F.3d at 578 (statute "not readily susceptible" to saving construction of otherwise ambiguous definitions of "internet identifier" and "internet service provider" in reporting statute); *Doe 1*, 367 F. Supp. 3d at 1329 (registration requirement as drafted could apply to "broad swaths of lawful speech"); *United States v. Stevens*, 559 U.S. 460, 476 (2010) (statute criminalizing depiction of animal cruelty could also be applied to lawful conduct such as hunting); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) (virtual child pornography ban rejected as overbroad, even against argument that it "whets the appetites of pedophiles"). The arbitrary nature of what speech is and is not subject to government regulation leaves open significant possibilities for abuse in the enforcement of even the best-intentioned regulations.

Similar issues appear in this case and across the country with bias response teams similar to Virginia Tech's: what constitutes "offensive speech" is often anyone's guess and can vary drastically based upon the propensity of a given individual to be offended by a statement, whether that be a statement of opinion or one of fact. Bias response teams are but the latest example of institutions imposing burdens on free expression that operate in practice to deter certain

speakers or viewpoints from entering the public square.

### B. Bias response teams unconstitutionally chill speech by subjecting speakers on unpopular topics to burdens not faced by speakers espousing the university's favored views.

The argument by Virginia Tech and similar institutions will likely be that because students are not formally punished by the university for their speech (with, say, expulsion) if reported to a bias response team, the First Amendment is not implicated. This Court should take this case to reiterate that this is not so. In keeping with the case law described above, universities need to be put on notice that the processes these groups use burdens free expression and is punishment enough to warrant protection for students' constitutional speech rights. Furthermore, institutions may not deputize students to censor for them in an effort to evade First Amendment concerns or potential liability.

A student who is reported to a bias response team can experience a wide variety of retribution for the student's speech. These actions may include "conversation[s] with university leadership,"[11] a "restorative circle,"[12] "public posting about the

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[11] North Carolina State University, *How We Work*, https://diversity.ncsu.edu/bias-impact/how-we-work/

[12] *Id.*

incident in question,[13] conversations to "address[] the nature and impact of harmful expressions,"[14] and other "educational interventions."[15] Some universities will take into account the reporting student's "suggestions for redress"[16] when investigating an incident and developing remedies. Additionally, multiple universities include contacting 911 as an appropriate part of a response to some bias incidents.[17]

The threat of conversations with university leadership and the prospect of "re-education" with a bias response team or similar group chills speech and expression in a way not permitted by the First Amendment. The fact that a bias response team member cannot formally kick the student out of the university or impose other sanctions does not mean

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[13] University of Utah, *Incidents and Updates*, https://diversity.utah.edu/initiatives/rbirt/updates/

[14] Gettysburg College, *Bias Response and Education Protocol*, https://www.gettysburg.edu/offices/diversity-inclusion/bias-response-education-protocol/#bertresponse

[15] American University, *Bias Education and Response*, https://www.american.edu/student-affairs/bias-education.cfm. Notably, in AU's case even "[b]ias that does not violate a university policy" can still subject a student to "educational interventions."

[16] Oklahoma State University, *Oklahoma State Bias Incident Response*, https://studentaffairs.okstate.edu/students/bias-incident-response.html

[17] Cornell University, https://diversity.cornell.edu/our-commitments/bias-reporting-cornell; University of Denver, https://www.du.edu/equalopportunity/bias-incident-response-team-birt.

that the process itself is not punitive enough to invoke the Constitution's protections.

Federal courts have previously found that subjecting a person's speech to a process not imposed on other viewpoints or speakers is constitutionally problematic. An action is "sufficiently chilling" to raise the First Amendment if it is likely to deter an individual of ordinary firmness from the exercise of the person's First Amendment rights. *Benham v. City of Charlotte, NC*, 635 F.3d 129, 135 (4th Cir. 2011) (citation omitted). In a successful challenge to a similar set of policies at the University of Texas made by Petitioner, the Fifth Circuit observed that the process countenanced by UT's policy, which included "facilitating conversation between those who were targeted by and those who initiated an incident[,] and making referrals to campus resources such as the UT Austin Police Department, the Office of the Dean of Students, and the Office for Inclusion and Equity" represented "the clenched fist in the velvet glove of student speech regulation." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 338 (5th Cir. 2020). In other words, the reporting process *was* the punishment—even if none of the entities involved in the enforcement of the university's bias policy ultimately prosecuted or took formal disciplinary action against the "initiator" of the so-called "biased" speech. The result is an "overtone[]" of "intimidation to students whose views are 'outside the mainstream.'" *Id.*

The same is true here. Surveys like the UW Study confirm that self-censorship is already occurring on college and university campuses. Bias response teams and the mechanisms they employ provide official

imprimatur to viewpoint discrimination by encouraging students to snitch on others with whom they disagree and discouraging those with opposing viewpoints from expressing them in the first place. Where speakers are left to balance the burden of speaking against the possible consequences, speech is objectively chilled and students, faculty, and the world at large lose the opportunity to honestly debate controversial topics in one of the settings historically and principally known for the free flow and exchange of ideas. Speech policing and attendant self-censorship, as enforced by bias response policies like Virginia Tech's, threaten the core values the First Amendment itself.

## 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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