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 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 FOR *AMICI CURIAE* AMERICANS FOR PROSPERITY FOUNDATION AND DEFENSE OF FREEDOM INSTITUTE FOR POLICY STUDIES IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICI CURIAE* AMERICANS FOR PROSPERITY FOUNDATION AND DEFENSE OF FREEDOM INSTITUTE FOR POLICY STUDIES IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2, Americans for Prosperity Foundation ("AFPF"), and Defense of Freedom Institute for Policy Studies ("DFI") respectfully submit this *amici curiae* brief in support of Petitioner.[1]

INTEREST OF *AMICI CURIAE*

AFPF is a 501(c)(3) nonprofit organization committed to educating and empowering Americans to address the most important issues facing our country, including civil liberties and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts. Throughout our nation's history, the fight for civil rights has relied on the exercise of civil liberties, which is one reason they must be protected. AFPF is interested in this case because the protection of the freedoms of expression and association, guaranteed by the First Amendment, is necessary for an open and diverse society.

DFI is a nonprofit, nonpartisan 501(c)(3) institute dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker, and to protecting the civil

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amici* or its counsel made any monetary contributions to fund the preparation or submission of this brief. Counsel for all parties were notified of *amici's* intent to file this brief greater than ten days prior to the date to respond.

and constitutional rights of Americans at school and in the workplace. Founded in 2021 by former senior leaders of the U.S. Department of Education who are experts in education law and policy and related constitutional and civil rights matters, DFI places a particular focus on protecting students, faculty, and staff in state-supported schools, colleges, and universities from the dangers posed to their First Amendment rights by the bias incident surveillance regimes at issue in this case. In addition, DFI's Senior Litigation Counsel has extensive experience with First Amendment challenges to government action, including in educational settings.

SUMMARY OF ARGUMENT

Virginia Tech's Bias Response Team (BIRT)—as its name implies—exists for a purpose: to "respond" to claims of "bias." The University argues and the Fourth Circuit accepted that such responses are harmless—a nothing-to-see-here, no-harm-no-foul, confrontation-without-consequence. But government burdens on speech cannot be excused on the grounds the regime does not go so far as punishing the speaker. Where the process itself is the punishment, procedural burdens are enough to run afoul of the First Amendment. Indeed, courts have long recognized the unconstitutional burden on speech imposed by government regimes that merely keep records to track speakers or deny speakers government benefits for speech some may find offensive.

All of this flies in the face of the purposes of the University and higher education in general: to seek truth and develop students' capacity to exercise the moral judgment needed for a virtuous people to sustain a republican form of government. As such, the

Court should grant certiorari and settle the circuit split over the bias incident surveillance systems that have taken hold across American universities.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS AGAINST BURDENING SPEECH AS WELL AS BANNING IT.

According to the lower court, Virginia Tech's Bias Reporting System allegedly imposes no punishment[2] and, therefore, "the Bias Policy does not proscribe 'anything at all.'" *Sands*, 69 F. 4th at 192 (quoting *Sands*, 2021 WL 3415459 at *10). But the "distinction between laws burdening and laws banning speech is but a matter of degree" and "content-based burdens must satisfy the same rigorous scrutiny as . . . content-based bans." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565–66 (2011). The Virginia Tech Bias Policy hugs the line between burden and ban by "publiciz[ing] the Bias Policy through a 'See something? Say something!' campaign," *Sands*, 69 F.4th at 188, reminiscent of the DHS campaign to engage the public in spotting terrorism.[3] Violent crime, such as terrorism, is, by definition, illegal. The clear implication here is that

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[2] The "district court identified only two occasions when the BIRT referred protected speech to the Student Conduct Office and, in both cases, the Student Conduct Office concluded that the speech was constitutionally protected and so did not sanction the accused students." *Speech First, Inc. v. Sands*, 69 F.4th 184, 189 (4th Cir. 2023) (citing *Speech First, Inc. v. Sands*, No. 21-00203, 2021 WL 4315459, at *10 (W.D. Va. Sept. 22, 2021)).

[3] "If You See Something, Say Something® is a national campaign that raises public awareness of the signs of terrorism and terrorism-related crime, and how to report suspicious activity to state and local law enforcement." Dept. of Homeland Security, https://www.dhs.gov/see-something-say-something (last accessed September 11, 2023)

"biased" speech is analogous to crime. But even if prospective speakers fail to appreciate the comparison, the process prescribed by the Virginia Tech Bias Response System imposes a sufficient burden to trigger First Amendment protection. *Sorrell*, 564 U.S. at 565–66 ("Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content."). Here, the burden is multifold.

A. Process Burdens Implicate the First Amendment and Chill Speech.

The Bias Reporting System subjects every student to the risk of being labelled, reported, and recorded as "biased." Students can only avoid the risk of losing their anonymity and privacy by not speaking publicly or by speaking only when surveillance is impossible. Like the content-based conditions held unconstitutional in *Sorrell*, the University here has conditioned speaker privacy on acquiescing to a content-based rule: speak not prohibited words or face the process.

In *Sorrell*, Vermont presented its doctors "a contrived choice," either: 1) consent to allowing dissemination and use of their prescriber-identifying information; or, 2) withhold consent—allowing use of their information by the limited group whose message the State supported. 564 U.S. at 574. The Court rejected that false choice as offering "a limited degree of privacy, but only on terms favorable to the speech the State prefers." *Id*. Notably, the law allowed only two possible outcomes—neither of which would have allowed doctors to retain complete privacy or control over their own information.

Likewise here, where even assuming bias reports have some basis in fact, a student may only avoid generating a record in the Office of the Dean of Students[4] by refraining from speech that may conceivably generate a complaint. Thus, like Vermont physicians, "[t]o obtain . . . limited privacy," *i.e.,* to not be named and documented, Virginia Tech students "are forced to acquiesce in the State's goal of burdening disfavored speech by disfavored speakers." *Sorrell*, 564 U.S. at 574. Submit and stay silent or speak up and risk the consequence of being chronicled as a potential violator in the school's disciplinary system.

Like in *Sorrell*, the University's justification for its content-based rule is inadequate to justify the infringement. Virginia Tech contends the bias reporting system is warranted because "bias incidents" are "detrimental to the University community." *Sands*, 69 F.4th at 188. In *Sorrell*, Vermont similarly contended its law protected doctors from "harassing sales behaviors," and that some doctors had "reported that they felt coerced and harassed." *Id.* at 75. But the Court found it "doubtful that concern for a few physicians who may have felt coerced and harassed . . . can sustain a broad content-based rule. *Sorrell*, 564 U.S. at 575 (cleaned up).

The Bias Response Policy goes further than Vermont's unlawful privacy violations by also imposing a discretionary re-education process that makes every student a watchman over the others, able

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[4] *Sands*, 69 F.4th at 189 ("as Dean Hughes explained in his written declaration, all BIRT-related records and correspondence are kept separately within the Dean of Students Office's case management system.).

to trigger re-education by the University for alleged speech infractions—even for speech the University acknowledges is protected by the First Amendment. As the Fourth Circuit found, "Virginia Tech believes that some complaints that do not violate the law or the Student Code of Conduct may nonetheless present an educational opportunity. In such cases, the BIRT sends a letter to both the complaining student and the responding student that invites them to take part in a voluntary conversation facilitated by an administrator in the Dean of Students Office." *Sands*, 69 F.4th at 190. Whether attendance at the conversation is truly voluntary, being labelled as needing re-education is not.

B. Reporting Regimes Allow the Process to Punish Adversaries.

Policing speech via public reporting regimes may allow adversaries to subvert the program for their own ends, chilling the speech of opponents by subjecting them to punitive administrative or adjudicative processes.

For example, in *Susan B. Anthony List v. Driehaus,* the broad public was empowered to report proscribed speech and trigger an administrative proceeding. 573 U.S. 149 (2014). There, "[a]ny person" acting on personal knowledge [could] file a complaint with the Ohio Elections Commission . . . alleging a violation of the false statement statute." *Susan B. Anthony List v. Driehaus*, 573 U.S. at 152–53. The Court held that, "[b]ecause the universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations, there is a real risk of complaints from, for example, political opponents." *Id*. at 160. Moreover,

Commission proceedings could burden speech by forcing "the target of a false statement complaint . . . to divert significant time and resources to hire legal counsel and respond to discovery," as well as battling public perception that the Commission's determination to proceed could be viewed as a sanction by the state. *Id*. at 165–66. Here, there is no express threat of criminal proceedings as part of the program; but the presence of the Virginia Tech Police Department on the BIRT[5] is sufficiently threatening that a prudent student would divert at least enough resources to consider whether mounting a formal legal defense is necessary.[6] Likewise, opening an investigation demonstrates the University found enough cause to move forward.

In *Fischer v. Thomas*, the Sixth Circuit Court of Appeals considered a similar process that allowed an unidentified complainant to trigger investigation of the campaign speech of candidates for judicial office. 52 F.4th 303, 306 (6th Cir. 2022). The Kentucky Judicial Conduct Commission sent two candidates letters requesting that they respond to anonymous accusations in writing, inviting them to an "informal conference," and instructing them to "'have counsel

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[5] The Bias Intervention and Response Team ("BIRT") "includes representatives from . . . the Virginia Tech Police Department, and the Housing and Residence Life Office" and "all BIRT-related records and correspondence are kept separately within the Dean of Students Office's case management system. *Sands*, 69 F.4th at 188–89.

[6] The Fourth Circuit, relying on the District Court, stated "that the Bias Policy does not proscribe anything at all, or require anything of anyone." *Id*. at 193. One must then ask, what does the BIRT do? Obviously, it does something or it would not exist.

file a written entry of appearance prior to the conference" if they planned to have legal representation *Id.* All of which was to take place during the weeks leading up to the election. *Id*.

The Sixth Circuit granted an injunction pending appeal, finding a likely unconstitutional chill of the candidates' speech due to the implications of the Commission's decision to notify these particular candidates (unlike the targets of ninety-two percent of the complaints it received), the susceptibility of the process to "political opponents with incentives to file frivolous complaints," and the Commission's refusal "to disavow enforcement of the challenged Code of Judicial Conduct provisions" against these candidates. *Id*. at 307–09. The threat was thus both current, forcing them to "divert significant time and resources to hire legal counsel and respond to discovery requests in the crucial days leading up to election," *Id.* at 309, and prospective.

Here, the same risk exists. Like *Driehaus* and *Fischer*, the system could be coopted by rivals to impose process harms on the accused, allowing any disgruntled student to draw a rival student into the machinery of the bias response system for personal reasons without an actual bias incident. This approach is squarely within the ambit of similar government schemes burdening disfavored speech that have been found wanting—regardless of whether they were implemented to protect sensitive ears. "Many are those who must endure speech they do not like, but that is a necessary cost of freedom." *Sorrell*, 564 U.S. at 575 (cleaned up) (citing *Erznoznik v. Jacksonville*, 422 U.S. 205, 210–211 (1975); *Cohen v. California*, 403 U.S. 15, 21 (1971)).

C. Burdening Speech Cannot Be Justified as Protecting the Public from Offense.

The First Amendment protects against government burdening speech to protect the public from offense. Placing a government label on would-be speakers based on the content of their speech has been rejected as an unconstitutional burden. In *Blitch v. City of Slidell*, an ordinance required "would-be panhandlers to register with the chief of police and wear identification before asking their fellow citizens for money." 260 F. Supp. 3d 656, 659 (E.D. La. 2017). The rule required "most, but not all, persons engaging in solicitation, peddling, and panhandling to register with the City before engaging in either activity." *Id*. at 668. That viewpoint distinction placed different burdens on solicitation depending on the message delivered. *Id*. at 669. The court held that such "content-based burdens must satisfy the same rigorous scrutiny as content-based bans." *Id.* at 667 (cleaned up). Even though the ordinance did not go so far as to ban pan-handling, the burden imposed on prospective pan-handlers implicated First Amendment rights. *Id*. at 672.

Likewise, in *Doe 1 v. Marshall*, the Alabama Sex Offender Registration and Community Notification Act, Ala. Code § 15-20A-1 *et seq*, required convicted adult sex offenders to register with law enforcement, report information about their internet use, and carry a driver's license branded with "CRIMINAL SEX OFFENDER" in bold, red letters, as well as imposing a variety of limitations on locations and activity. *Doe 1 v. Marshall*, 367 F. Supp. 3d 1310, 1318 (M.D. Ala. 2019). The purpose of the law was to protect the public, especially children, from recidivist sex

offenders. *Id*. The court held that while protecting the public was a compelling governmental interest, the "branded-identification requirement unnecessarily compels speech." *Id*. The law could not stand, even though it merely "burden[ed] rather than ban[ned] speech." *Id*. at 1327.

Nor can government withhold benefits to suppress speech the government deems potentially offensive.

In *Matal v. Tam*, for example, the issue was whether the burden imposed by the disparagement clause of the Lanham Act, § 2(a), 15 U.S.C.A. § 1052(a), which prohibited registration of trademarks that may disparage or bring into contempt particular people, could be justified "by pointing to the offensiveness of the speech to be suppressed." 582 U.S. 218, 227, 250 (2017). The Court held that it could not. *Id.* at 246. As Justice Kennedy explained in his concurrence, the First Amendment is not satisfied by the government's expectation of how people should respond.

> Indeed, a speech burden based on audience reactions is simply government hostility and intervention in a different guise. The speech is targeted, after all, based on the government's disapproval of the speaker's choice of message. And it is the government itself that is attempting in this case to decide whether the relevant audience would find the speech offensive.

Id. at 250 (Kennedy, J. concurring in part and concurring in the judgment). The Court held that burdening speech because the "Government has an interest in preventing speech expressing ideas that

offend" . . . "strikes at the heart of the First Amendment." *Id*. at 246. Two years later, *Iancu v. Brunetti*, raised a similar challenge to the Lanham Act prohibition on registration of trademarks that are "immoral" or "scandalous". *Iancu v. Brunetti*, 139 S. Ct. 2294, 2297 (2019). Again, the Court held the government cannot withhold a benefit because it disfavors certain ideas. *Id* at 2297, 2302.

A similar form of First Amendment protection applies to the reverse form of burden where, rather than withholding a benefit based on the speaker's viewpoint, government requires the speaker to support another viewpoint to access a benefit. In *Janus*, for example, the Court held that a law authorizing union agency fees was unconstitutional because "the compelled subsidization of private speech seriously impinges on First Amendment rights." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018). Either way you cut it, government cannot withhold or grant benefits based on compelled compliance with a favored viewpoint.

Public universities provide education and a myriad of forums in which students may speak. Consistent with the Constitution, those benefits may not be withheld by claiming disfavored viewpoints are offensive to the public. Here, the BIRT deprives students of access to the education and public fora the University purports to provide by chilling participation that may trigger a bias report and follow-on processing.

II. THE SYSTEM DEPRIVES STUDENTS OF THE OPPORTUNITY TO CONFRONT MORAL CHOICES AND STRENGTHEN THE VIRTUE NECESSARY TO A REPUBLICAN FORM OF GOVERNMENT.

The Founders well understood that the longevity of a republican form of government rests on the virtue of its people. John Adams expressed it this way, "Public virtue cannot exist in a Nation without private Virtue, and public Virtue is the only Foundation of Republics."[7] The means of developing that virtue is education. Thomas Jefferson, founder of Virginia's first public university, wrote, "No government can continue good but under the control of the people; and . . . their minds are to be informed by education what is right and what wrong; to be encouraged in habits of virtue and to be deterred from those of vice . . . These are the inculcations necessary to render the people a sure basis for the structure and order of government."[8]

The ability to discern and choose the virtuous path cannot be developed without challenge—which requires an environment in which one can speak freely and encounter new ideas. The role of the university in education requires, as does all education, moral development and learning to choose between good and evil. Imposing the "right" answer on students and silencing "wrong" answers, is the opposite of educating them. Indeed, as Charles Eliot

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[7] J. David Gowdy, *Without Virtue There Can Be No Liberty*, July 21, 2018 (citing John Adams to Mercy Otis Warren, April 16, 1776. A. Koch and W. Peden, eds., *The Selected Writings of John and John Quincy Adams* (Knopf, New York, 1946), p. 57.) https://mountlibertycollege.org/without-virtue-there-can-be-no-liberty/

[8] *Id*. (citing Thomas Jefferson to John Adams, 1819. ME 15:234).

declared in his Inaugural Address as President of Harvard College, "[t]he very word 'education' is a standing protest against dogmatic teaching."[9] To be well-educated, Virginia Tech students should be developing their moral discernment by encountering diverse positions, not impeding it by asking the school to eliminate them.

This approach is not new. In 1643, John Milton argued against censorship by highlighting the importance to moral development of examining even erroneous writings. Regarding the Printing Ordinance of 1643,[10] which allowed the seizure of "scandalous and lying Pamphlets," Milton presented two salient arguments against pre-publication bans. *First*, that readers may benefit from reading morally incorrect books along with good ones because "the practice of moral virtue requires the knowing choice of good over evil." [11] "Unless morally bad books were printed, readers would be denied the benefit of

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[9] Charles W. Eliot*, Inaugural Address as President of Harvard College*, at 8 (October 19, 1869), https://homepages.uc.edu/~martinj/Ideal%20University/5.%20%20The%2019th%20Century%20American%20College/Eliot%20-%20Inauguration%20Address%201869.pdf

[10] *See* Kevin R. Davis, *Printing Ordinance of 1643* (1643), The First Amendment Encyclopedia (2009), https://mtsu.edu/first-amendment/article/1033/printing-ordinance-of-1643

[11] Kevin R. Davis, *John Milton*, The First Amendment Encyclopedia (2009), https://www.mtsu.edu/first-amendment/article/1259/john-milton; *See also* John Milton, *Areopagitica*, (November 23, 1644) ("bad books, . . . to a discreet and judicious Reader serve in many respects to discover, to confute, to forewarn, and to illustrate.") https://milton.host.dartmouth.edu/reading_room/areopagitica/text.html

learning how to discern moral falsity through the vicarious experience of it in reading." *Id.*

Second, and relatedly, the knowledge of good and evil requires exercising reason to discern the difference on one's own rather than relying on the dictates of authority; thus "licensing would have the unintended effect of weakening people's ability to recognize and affirm truths by using their reason."[12] Accordingly, to completely shield people from hearing information they perceive as harmful and protect them from having to choose between good and evil does not lead them to virtue but stunts their moral growth.

The mission of the university, therefore, must be to pursue truth regardless of how uncomfortable.[13] Responding to a request from University of Chicago President George W. Beadle to prepare "a statement on the University's role in political and social Action," a committee of faculty issued the November 1967 Kalven Committee: Report on the University's Role in Political and Social Action, in which it declared that,

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[12] *Id.*; *see also* Milton, *Areopagitica*, ("those books, & those in great abundance which are likeliest to taint both life and doctrine, cannot be suppresst without the fall of learning, and of all ability in disputation") https://milton.host.dartmouth.edu/reading_room/areopagitica/text.html

[13] *See* Thomas Jefferson to William Roscoe. manuscript letter (December 27, 1820) (regarding the University of Virgnia, "this institution will be based on the illimitable freedom of the human mind. For here we are not afraid to follow the truth wherever it may lead, nor to tolerate any error as long as reason is left free to combat it."). Available at: https://www.loc.gov/exhibits/jefferson/jeffrep.html

> A university faithful to its mission will provide enduring challenges to social values, policies, practices, and institutions. By design and by effect, it is the institution which creates discontent with the existing social arrangements and proposes new ones. In brief, a good university, like Socrates, will be upsetting. [14]

Tasked with a similar question in 1974, the Yale committee on "the condition of free expression, peaceful dissent, mutual respect and tolerance at Yale," framed its findings as follows:

> The history of intellectual growth and discovery clearly demonstrates the need for unfettered freedom, the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable.[15]

Despite the "severe tests" imposed on the "University's commitment to the principle of freedom of expression," "during the years of campus upheaval," the Committee concluded that "even when some members of the university community fail to

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[14] Report of a faculty committee, under the chairmanship of Harry Kalven, Jr. Committee appointed by President George W. Beadle. Report published in the Record, Vol. I, No. 1, November 11, 1967. Available at: https://provost.uchicago.edu/reports/report-universitys-role-political-and-social-action

[15] Report of the Committee on Freedom of Expression at Yale, Yale College, 1974, available at: https://yalecollege.yale.edu/get-know-yale-college/office-dean/reports/report-committee-freedom-expression-yale

meet their social and ethical responsibilities, the paramount obligation of the university is to protect their right to free expression," leaving "secondary social and ethical responsibilities . . . to the informal processes of suasion, example, and argument." *Id*. Surely whatever moral challenges face students today fall well within the moral challenges of the early 1970s—and well within Virginia Tech students' capacity to confront them.

Carrying on the tradition, the 2014 Committee on Freedom of Expression at the University of Chicago maintained that,

> [I]t is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. . . ., concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community.[16]

Indeed, discomfort is an integral part of the university experience,[17] which, if expelled, would take

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[16] Report of the Committee on Freedom of Expression at the University of Chicago, July 2014, available at: https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf

[17] Eliot *Id*. at 16–17. (describing the provocative environment at Harvard, found the tumult a necessary part of the educational process: "Its scholarly tastes and habits, its eager friendships and quick hatreds, its keen debates, its frank discussions of character and of deep political and religious questions, all are safeguards against sloth, vulgarity, and depravity.").

with it the better part of a university education. By attempting to weed out discomfort, Virginia Tech protects one aspect of the university experience, but at the expense of the university's primary mission: to seek truth regardless how challenging.

More recently, a group of scholars produced the Princeton Principles for a Campus Culture of Free Inquiry, in which they "argue that universities have a special fiduciary duty to foster freedom of thought for the benefit of the societies that sustain them."[18] This need is particularly acute in America due to the critical place the university occupies.

> The American university is a historic achievement for many reasons, not least of which is that it provides a haven for free inquiry and the pursuit of truth. Its unique culture has made it a world leader in advancing the frontiers of practical and theoretical knowledge. The habits of mind required for this advancement of knowledge sustain our republic by educating citizens in the liberality and intellectual independence necessary to participate in self-government in a pluralistic society.[19]

Virginia Tech's Bias Response System and the environment it creates for free speech run contrary to

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[18] Princeton Principles for a Campus Culture of Free Inquiry (2023, https://jmp.princeton.edu/sites/g/files/toruqf5371/files/documents/Princeton%20Principles.pdf

[19] *Id*.

this historic understanding of the purpose and calling of higher education.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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