No. ______

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

PETITION FOR WRIT OF CERTIORARI

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September 27, 2024 *Attorneys for Petitioner*

QUESTION PRESENTED

Hundreds of universities have a "bias response team"—an official entity that solicits anonymous reports of bias, tracks them, investigates them, asks to meet with the perpetrators, and threatens to refer students for formal discipline. Universities formally define "bias" to cover wide swaths of protected speech, and their teams are staffed with high-ranking university administrators.

The Fifth, Sixth, and Eleventh Circuits hold that bias-response teams objectively chill students' speech; but the Seventh Circuit disagrees. *Compare Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019), *Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020), *and Speech First, Inc. v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022)*, with Speech First, Inc. v. Killeen*, 968 F.3d 628 (7th Cir. 2020). All the cases in this split involve the same plaintiff, the same procedural posture, and the same basic facts. And this Court implicitly deemed the split certworthy before, when it *Munsingwear*'d a similar decision from the Fourth Circuit after pre-certiorari mootness. *Speech First, Inc. v. Sands*, 144 S.Ct. 675 (2024).

The question presented is:

Whether bias-response teams objectively chill students' speech.

RULE 29.6 STATEMENT

Speech First, Inc. has no parent company or publicly held company with a 10% or greater ownership interest in it.

PARTIES TO THE PROCEEDING

Petitioner is Speech First, Inc., which was the plaintiff in the district court and the appellant in the Seventh Circuit.

Respondents, who were the defendants in the district court and appellees in the Seventh Circuit, are:

- Pamela Whitten, in her official capacity as President of Indiana University;
- Lamar R. Hylton, in his official capacity as Vice Provost for Student Life for Indiana University Bloomington;
- Kathy Adams Riester, in her official capacity as Associate Vice Provost for Student Life and Dean of Students for Indiana University Bloomington;
- Cedric Harris, in his official capacity as Assistant Dean of Student Support and Bias Education for Indiana University Bloomington;
- Jason Spratt, in his official capacity as Associate Vice Chancellor and Dean of Students for Indiana University Indianapolis;
- Heather Brake, in her official capacity as Associate Dean of Students for Indiana University Indianapolis;
- Katherine Betts, in her official capacity as Assistant Vice Chancellor of Diversity, Equity, and Inclusion at Indiana University Indianapolis;

- W. Quinn Buckner, Cindy Lucchese, Cathy Langham, Jeremy A. Morris, J. Timothy Morris, Kyle S. Seibert, Donna B. Spears, Isaac Torres, and Vivian Winston, in their official capacities as members of the Indiana University Board of Trustees.

RELATED PROCEEDINGS

United States District Court (S.D. Ind.):

Speech First, Inc. v. Whitten, No. 1:24-cv-00898 (Aug. 8, 2024) (order denying motion for preliminary injunction)

United States Court of Appeals (7th Cir.):

Speech First, Inc. v. Whitten, No. 24-2501 (Sept. 5, 2024) (order below)

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The Seventh Circuit's opinion is reproduced at App.3a. The Southern District of Indiana's opinion is reported at 2024 WL 3964864 and is reproduced at App.1a.

JURISDICTION

The Seventh Circuit's judgment was entered on September 5, 2024. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III vests "[t]he judicial Power of the United States" in the federal courts and limits that power to certain "Cases" and "Controversies." U.S. Const. art. III, §§1-2.

The Free Speech Clause of the First Amendment prohibits Congress from abridging "the freedom of speech"; the Fourteenth Amendment extends that prohibition to the States and guarantees "due process of law." U.S. Const. amends. I, XIV.

INTRODUCTION

This Court hasn't addressed the free-speech rights of college students since at least 2010. *See Christian Legal Soc. v. Martinez*, 561 U.S. 661 (2010). Over that time, those rights have not fared well. "[C]ampus censorship has reached epidemic levels." *Unsafe Space: The Crisis of Free Speech on Campus* 2 (Slater ed. 2016). "Every month, if not every week, has brought additional instances of campuses being urged to punish students for their speech." Chemerinsky & Gillman, *Free Speech on Campus* 7 (2017). And universities, "in a spirit of panicked damage control, are delivering." *A Letter on Justice and Open Debate*, Harper's (July 7, 2020), perma.cc/48K8-H73R. The result, according to "overwhelming survey research," is that students don't feel free to speak. Bipartisan Pol'y Ctr., *Campus Free Expression: A New Roadmap* 6 (Nov. 2021), perma.cc/7LB7-E7CA. "Simply put, at most of America's colleges and universities, speech is far from free." FIRE, *Guide to Free Speech on Campus* 5 (2d ed. 2012).

Though the First Amendment contains no exception for "hateful," "harassing," or "biased" speech, universities often try to suppress it. Speech codes—outright prohibitions on speech—are one tool. But speech codes have a terrible record in court. *Fenves*, 979 F.3d at 338-39 & n.17. Precisely because speech codes are often struck down, universities have looked for subtler, more sophisticated ways to chill disfavored speech.

Enter the bias-response team. Instead of outright banning biased speech, these teams deter it by threatening students with adverse consequences. They also burden it by imposing a series of administrative and other costs on students who commit "bias incidents." Jurists and commentators have dubbed these teams

- "the clenched fist in the velvet glove of student speech regulation," *Fenves*, 979 F.3d at 338;
- a "bureaucratic superstructure" with "such incipient inquisitorial overtones" that it "turns its campus into a surveillance state," *Speech First, Inc. v. Sands*, 69 F.4th 184, 204, 206 (4th Cir. 2023) (Wilkinson, J., dissenting), *vacated as moot*, 144 S.Ct. 675; and
- "the stuff of Orwell, although even he might have found the name 'Bias Response Team' to be over-the-top," Steinbaugh, *Hundreds of Campuses Encourage Students to Turn in Fellow Students for Offensive Speech*, Wash. Exam'r (Feb. 21, 2017), perma.cc/YL4Q-PB52.

The resulting atmosphere created by these teams is arguably even "more stifling" than traditional speech codes. Schneider, *A Year of Discontent on Campus*, Dispatch (Feb. 6, 2020), perma.cc/J2J9-RMKB.

Bias-response teams are designed to get as close to the constitutional line as possible, so it's no surprise that they "have divided" the lower courts. *Sands*, 144 S.Ct. at 676 (Thomas, J., dissenting from denial of cert.). Five circuits have weighed in—all in lawsuits

filed by Speech First, against major universities, with similarly structured bias-response teams.

Three of those circuits (the Fifth, Sixth, and Eleventh) say Speech First has Article III standing to challenge bias-response teams because these teams "have a 'chilling effect' on students' speech." *Id.* One circuit (the Seventh) says otherwise. *See Killeen*, 968 F.3d 628. While another circuit (the Fourth) once agreed with the Seventh, *Sands*, 69 F.4th 184, its decision was vacated as moot after that university eliminated its bias-response team, 144 S.Ct. 675 (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)). This Court doesn't usually take that step unless a majority agrees that, absent the pre-certiorari mootness, the question presented would have been certworthy. *See* Shapiro et al., *Supreme Court Practice* §19.4, at 28-29 n.34 (11th ed. 2019).

Resolving this dispute is vitally important to the rights of college students across the country. As two Justices explained last Term, bias-response teams present "a high-stakes issue for our Nation's system of higher education." 144 S.Ct. at 678 (Thomas, J., joined by Alito, J., dissenting). This circuit split creates "a patchwork of First Amendment rights on college campuses." *Id.* In some parts of the country, students can sue when they are "pressured to avoid controversial speech to escape their universities' scrutiny and condemnation." *Id.* In other parts, students "have no recourse." *Id.* This Court "should grant certiorari to resolve this issue." *Id.*

STATEMENT OF THE CASE

Bias-response teams are the latest in a long-running effort by universities to deter certain undesirable speech. Indiana University's aptly titled "Bias Response Team" is a classic of the genre. The Seventh Circuit, applying its prior precedent in *Killeen*, held that Indiana's team doesn't objectively chill speech—entrenching a 3-1 circuit split.

A. Universities adopt policies to silence "biased" speech by students.

"The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (cleaned up). The "'vigilant protection'" of these freedoms is "'nowhere more vital than in the community of American schools.'" *Healy v. James*, 408 U.S. 169, 180 (1972). Universities are "peculiarly the marketplace of ideas," training future leaders "through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than … authoritative selection." *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967) (cleaned up). So the "mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973).

Yet universities across the country have resisted these principles. Instead of allowing free-ranging debate, many colleges are more interested in protecting students from ideas that make them uncomfortable.

They embody the "unfortunate tendency by some to defend First Amendment values only when they find the speaker's message sympathetic." *303 Creative LLC v. Elenis*, 600 U.S. 570, 602 (2023). As former Harvard president Lawrence Summers recently warned, universities too often "resist intellectual diversity, including conservative and non-coastal viewpoints," and have "creat[ed] a stifling orthodoxy … as oppressive as McCarthyism." Hoffman, *Summers Tells Sun He Worries Economic Policy Being Driven by 'Sentiment,' 'Politics,'* N.Y. Sun (Mar. 4, 2022), perma.cc/9GVS-6SPH. Universities do this by adopting policies and procedures that discourage speech by students who reject the prevailing campus orthodoxy.

One rapidly growing effort to suppress speech is the "bias-response team." Living up to their Orwellian name, these teams encourage students to monitor each other's speech and report "bias incidents" to university authorities. But universities offer little guidance as to what exactly is covered. Indiana, for example, does not even define "bias," and it circularly describes a "bias incident" as "any" activity "motivated … by bias." D.Ct.Doc.9-12 at 2. Students have been reported to bias-response teams for, among other things:

- writing a satirical article about "safe spaces";
- tweeting "#BlackLivesMatter";
- chalking "Build the Wall" on a sidewalk; and
- expressing support for Donald Trump.

D.Ct.Doc.9-11 at 16-19; Schneider, *'Bias Teams' Welcome the Class of 1984*, Wall St. J. (Aug. 5, 2019),

perma.cc/KMA3-33DK. Because accusers need not identify themselves, these policies create "anonymous snitch system[s]" where students "aggressively police one another's speech." Ferguson, *Bias-Response Teams Are a Bad Idea*, Chron. of Higher Educ. (June 5, 2023). Their "expansive" definitions and their "anonymous reporting" prompt students to escalate "any and all perceived slights." *Sands*, 144 S.Ct. at 677 (Thomas, J., dissenting).

After receiving reports of a bias incident, bias-response teams typically log the incident, investigate it, meet with the relevant parties, attempt to reeducate the "offender," and recommend an intervention (including formal or informal discipline). *E.g.*, *Fenves*, 979 F.3d at 325-26; *Schlissel*, 939 F.3d at 762-63. Bias-response teams are usually staffed by university administrators, disciplinarians, and even police officers—a literal "speech police." D.Ct.Doc.9-11 at 9. Studies have found that, "[d]espite espousing educational philosophies," bias-response teams adopt a "punitive/criminal justice orientation." Miller et al., *A Balancing Act: Whose Interests Do Bias Response Teams Serve?*, 42 Rev. of Higher Ed. 313, 326-27 (2018). As Judge Cabranes puts it, these campus "'Civility Police' have started to adopt the tactics of the real police"—except "to fight speech, not to fight crime." Cabranes, *For Freedom of Expression, For Due Process, and For Yale: The Emerging Threat to Academic Freedom at a Great University*, 35 Yale L. & Pol'y Rev. Inter Alia 345, 358 (2017).

Though universities insist that bias-response teams aren't threatening, they know that students

don't see things that way. According to a comprehensive study by FIRE, bias-response teams "effectively establish a surveillance state on campus where students … must guard their every utterance for fear of being reported to and investigated by the administration." D.Ct.Doc.9-11 at 29. Professors, too, stress that these teams "result in a troubling silence": They leave students "afraid to speak their minds" and empower virtually anyone to "leverage bias reporting policies to shut down unpopular or minority viewpoints." D.Ct.Doc.9-10 at 11. Other professors say these policies resemble "McCarthyism," or "the way citizens were encouraged to inform on one another by governments in the Soviet Union, East Germany and China." Belkin, *Stanford Faculty Say Anonymous Student Bias Reports Threaten Free Speech*, Wall St. J. (Feb. 23, 2023).

Yet bias-response teams are proliferating. In 2017, more than 200 universities had bias-response teams and the number was "growing rapidly." D.Ct.Doc.9-11 at 5. By 2022, that number had more than doubled, with more than 450 universities maintaining sophisticated bias-reporting schemes. *See* D.Ct.Doc.9-9 at 5. To be sure, Speech First has challenged several of these teams in court, including Michigan's Bias Response Team, Texas's Campus Climate Response Team, and Central Florida's Just Knights Response Team. Those teams no longer exist: Once the appellate courts held that Speech First likely had standing, all three universities signed binding settlement agreements eliminating their bias-response teams. *See Court Battles*, Speech First, perma.cc/4MLT-2NR6. Despite these victories, the overall trend

is negative: Many more universities are creating new bias-response teams or clinging to old ones. D.Ct.Doc.9-9 at 5.

B. Indiana University adopts a bias-incident policy enforced by its Bias Response Team.

Indiana University joined this unfortunate trend. For years, it has monitored, logged, and responded to student speech through its "bias incident" policy. That policy is enforced by the university's Bias Response Team. D.Ct.Doc.9-12 at 2-5. The team is staffed with senior university officials who are "committed" to "prevent[ing] future incidents" of biased speech. D.Ct.Doc.9-12 at 2.

Indiana's policy formally defines "bias incident." Its definition is broad and legalistic: "any conduct, speech, or expression, motivated in whole or in part by bias or prejudice meant to intimidate, demean, mock, degrade, marginalize, or threaten individuals or groups based on that individual or group's actual or perceived identities." D.Ct.Doc.9-12 at 2. The policy does not define "bias" or any other key term, and the precise contours of what the policy covers are vague. The policy's circular definition of "bias incident" as "any" incident "motivated … by bias" provides little guidance.

What *is* clear is that the policy encompasses pure speech. Students can be reported for, among other things, an offensive "Email or Text Message," a problematic "Phone Call," a written comment, or "Verbal" offenses. D.Ct.Doc.9-14 at 4-5. The university even instructs complainants that, "[i]f slurs or derogatory

language were used against you or another person, please place that language in quotes so we know that it is a part of the incident you are reporting." D.Ct.Doc.9-14 at 5. And the policy's coverage is not limited to the campus; it includes "social media" and "other digital source[s]." D.Ct.Doc.9-14 at 4-5.

Bias reports often involve protected speech. These reports can be obtained via public-records requests, and journalists obtained several reports to the Bias Response Team in 2019. *See* Schneider, *Janet Jackson's Nipple Triggers Bias Complaint at Indiana University*, College Fix (May 17, 2019), perma.cc/V7AF-XUFR. Those reports are in the record. They show that students at Indiana have been accused of a bias-related incident for, among other things,

- expressing dislike of "China" or "East Asia" in front of "a Chinese student" and an "East Asian student";
- posting "hate speech" on social media; and
- commenting on a male "wearing lipstick in[t]o class."

D.Ct.Doc.9-30.

Reporting bias incidents is easy. Accusers can submit a report online, by emailing an administrator directly, or through a cell-phone app created by the university. *E.g.*, D.Ct.Doc.9-15 at 2. Like a crime-reporting hotline, complaints about biased speech can be made anonymously. "All you have to do is complete a form—and it's anonymous." D.Ct.Doc.9-17 at 2. And

anyone can file a bias complaint, even if they have "no IU affiliation." D.Ct.Doc.9-14 at 4.

The intake form asks for detailed information. Complainants are asked to specify the date and location of the alleged incident and to provide key details about the "involved parties," including the perpetrator's name, university ID, and email. D.Ct.Doc.9-14 at 3. And they are asked to describe the alleged bias and to specify whether they "directly experienced the bias," are "supporting" someone else who experienced the bias, "observed" the bias in person or "online," or merely have a "bias concern without being directly impacted." D.Ct.Doc.9-14 at 3-4. Complainants must also specify if "the Police" were involved. D.Ct.Doc.9-14 at 7.

Indiana vigorously promotes its Bias Response Team and encourages anyone who suspects bias to report. The student-life office, for example, says: "If you experience, witness, or are aware of a bias incident, report it." D.Ct.Doc.9-26 at 2. In an article about bias incidents on the university's website, the head of the Bloomington campus's Bias Response Team asked community members to "report something if you see it because it is easier [for the team] to take action when we know about it." D.Ct.Doc.9-20 at 3. The university has even posted unsolicited replies on social media, encouraging people to submit bias reports about controversial statements on the internet. *E.g.*, D.Ct.Doc.9-21 at 2. And in 2021, the university's DEI office launched a campaign—"Together We Commit"—asking students to pledge to "call out and take

the appropriate steps to report bias." D.Ct.Doc.9-23; D.Ct.Doc.9-24.

The university devotes considerable resources to its Bias Response Team. It hired multiple senior administrators "specifically" to "address bias reports as [their] full-time job." D.Ct.Doc.9-18 at 5; *see* D.Ct.Doc.9-19 at 2. It also promises that a "team of trained university officials privately reviews all submitted bias incident reports" and "typically" responds within "1-2 business days." D.Ct.Doc.9-12 at 2. After receiving a complaint, the team contacts the involved parties and tries to "resolve" the situation. D.Ct.Doc.9-13. In some cases, this takes the form of "[m]ediation and facilitated dialogue." D.Ct.Doc.9-12 at 3. In other cases, the Bias Response Team meets with "the offending person[s] to offer some educational insights" about their supposedly problematic speech and to "improve how they interact and connect with other students." D.Ct.Doc.9-13. In still other cases, the team will "[r]efer [the] reporter to [an] appropriate campus offic[e] that can effectively respond." D.Ct.Doc.9-12 at 3. Regardless, all "reports will be evaluated to determine if further investigation is required for potential violations of university policy and/or criminal law." D.Ct.Doc.9-14 at 2. The Bias Response Team also keeps detailed records of reported incidents in a "Bias Response & Education database," "track[s] for trends," and "[n]otif[ies] campus leaders of ongoing bias incidents." D.Ct.Doc.9-12 at 5; D.Ct.Doc.25-1 at 9.

C. Speech First sues on behalf of its members who attend Indiana University.

Speech First is a nationwide membership organization of students, alumni, and others that is dedicated to preserving the freedom of speech. D.Ct.Doc.9-2 at 1. Speech First has successfully vindicated students' rights at the University of Michigan, the University of Texas, the University of Illinois, Iowa State University, the University of Central Florida, the University of Houston, and more. *See Court Battles*.

Speech First has members who currently attend Indiana University. App.8a; D.Ct.Doc.9-2; D.Ct.Doc.9-3; D.Ct.Doc.9-4; D.Ct.Doc.9-5; D.Ct.Doc.9-6; D.Ct.Doc. 9-7. These students hold views that are "unpopular, controversial, and in the minority on campus." *E.g.*, D.Ct.Doc.9-3 at 1. For example, one believes that "sex is determined by biology" and that "biological males who identify as transgender or non-binary should not be allowed to compete in women's sports." D.Ct.Doc.9-5 at 2. Another is "strenuously opposed to illegal immigration" and thinks the use of "euphemisms like 'undocumented immigrant' instead of accurate words like 'illegal'" hinders "the frank conversations necessary to address the border crisis." D.Ct.Doc.9-3 at 2. Speech First's members "feel strongly about these issues" and want to "engage in open and robust intellectual debate with [their] fellow students" to "point out the flaws in their arguments and convince them to change their minds." *E.g.*, D.Ct.Doc.9-3 at 3.

But these students censor their speech because of the university's bias policy. App.8a; *e.g.*, D.Ct.Doc.9-3 at 3. They fear that students, faculty, or others will

report them to university officials for committing a "bias incident." *E.g.*, D.Ct.Doc.9-4 at 3. Because the definition of "bias" is so broad and vague, they know that someone will find their speech to be biased and report them. *E.g.*, D.Ct.Doc.9-5 at 3. And they fear "that the Bias Response Team will keep a record on [them], share the allegations with campus leaders and others within the university, call [them] in for meetings, or refer the allegations to the Office of Student Conduct." *E.g.*, D.Ct.Doc.9-6 at 3. As a result, they do not fully express their beliefs and avoid certain topics altogether. *E.g.*, D.Ct.Doc.9-7 at 3.

D. The Seventh Circuit rules for the university.

In May 2024, Speech First sued Indiana and moved for a preliminary injunction, asking the district court to enjoin the university from enforcing its bias-incident policy. Speech First supported its motion with a verified complaint, nearly two dozen exhibits, and declarations from its executive director and five student members. And its brief explained why its constitutional claims have merit and why it's otherwise entitled to a preliminary injunction. D.Ct.Doc.10 at 19-25.

In *Killeen*, however, the Seventh Circuit denied a similar motion. There, Speech First challenged a similar bias-response team at the University of Illinois. 69 F.4th at 632. The Seventh Circuit held that Speech First lacked Article III standing to pursue a preliminary injunction because Illinois' team lacks the power to formally punish students. *Id.* at 644. Speech First

thus "failed to demonstrate" that the team has an "objective chilling effect." *Id.* And the team's other functions—like meeting with reported students for "educational" conversations—did not rise to "the level of coercion" required for a First Amendment violation because the meetings are "voluntary." *Id.* at 640-43.

Judge Brennan concurred in part and dissented in part. He agreed that bias-response teams "can collide with the First Amendment's free speech protections." *Id.* at 647. "Reasonably risk-averse students" will refrain from speaking on controversial topics because they fear being labeled an "offender" and wish to avoid the bias-response team's "burdensome investigative process." *Id.* at 652. "No educational institution," he added, "should force students to balance academic and professional success against the free expression of political viewpoints." *Id.* But Judge Brennan faulted Speech First for not submitting certain kinds of evidence with its motion, *id.* at 650-53—a record-based criticism that does not apply here.

Because of the majority's *legal* analysis in *Killeen*, Speech First acknowledged below that the district court had to deny its preliminary-injunction motion here. D.Ct.Doc.10 at 5-7. The university agreed, D.Ct.Doc.30 at 6-7, and so did the district court, App.12a. The district court denied a preliminary injunction and stayed further proceedings so that Speech First could "'promptly … appeal to a court that has the power to overrule *Killeen*.'" App.14a. Speech First then asked the Seventh Circuit to summarily affirm so it could challenge *Killeen* in this Court, and

the Seventh Circuit agreed. App.2a. (The Seventh Circuit had already declined to rehear *Killeen* en banc.)

Speech First filed this timely petition. Unlike in *Killeen*, Indiana has not eliminated its bias-response team. It has submitted no evidence—or even hinted in passing conversation—that it's considering any changes to the team. All its policies and websites are unchanged. And it has aggressively defended its team throughout this litigation, urging the lower courts to not just deny Speech First's motion for a preliminary injunction but also to dismiss its case outright. *See* D.Ct.Doc.24; CA7.Doc.10. (Both courts refused that extreme request. App.2a, 14a.)

REASONS FOR GRANTING THE PETITION

The most common reason why this Court grants certiorari—and the first one listed in its rules—is to resolve circuit splits on important questions of federal law. The question here has created an acknowledged four-circuit split, and the answer could not be more important to the constitutional rights of college students. This case is an ideal vehicle to resolve the split because Indiana's bias-response team is typical, the material facts are undisputed, and the legal question is fully vetted. The Seventh Circuit answered that question incorrectly in *Killeen*. As explained by the three circuits on the other side of the split, bias-response teams objectively chill the speech of dissenting college students like Speech First's members. This Court should grant certiorari and reverse.

I. Whether bias-response teams objectively chill speech is an important question that splits four circuits.

Per this Court's Rule 10(a), certiorari is warranted when two or more circuits "conflict" on the "same important matter." This case "raises an important question," and "the Courts of Appeals have divided" on it. *Sands*, 144 S.Ct. at 676 (Thomas, J., dissenting).

1. The circuits are split, three to one, on whether bias-response teams objectively chill speech. The Fifth, Sixth, and Eleventh Circuits are on one side, while the Seventh is on the other. And the cases are materially indistinguishable. All involve the same plaintiff (Speech First). All were decided at the same stage (preliminary injunction). And all address the same question (Article III standing).

This split is widely acknowledged. Members of this Court have already recognized that "the Courts of Appeals [are] divided over whether bias response policies have a 'chilling effect' on students' speech." *Sands*, 144 S.Ct. at 676 (Thomas, J., dissenting). Other courts have likewise noted the disagreement. *E.g.*, *Speech First, Inc. v. Cartwright*, 2021 WL 3399829, at *4-5 (M.D. Fla. July 29); *Speech First, Inc. v. Sands*, 2021 WL 4315459, at *12 (W.D. Va. Sept. 22); *Sands*, 69 F.4th at 197-98; *id.* at 218-19 (Wilkinson, J., dissenting). Commentators on both sides of the issue recognize this split too. *E.g.*, Shultz, *Ice Ice, Maybe?: Do University Bias Incident Report Teams Really Chill Student Speech, or Are They Just a Conduit?*, U. Cin. L. Rev. Blog (Oct. 21, 2022),

perma.cc/S4ZR-H3WP ("circuit split"); Note, *University Bias Response Teams: Balancing Student Freedom from Discrimination and First Amendment Rights Through Student Outreach*, 55 Ind. L. Rev. 809, 817 (2022) ("split"); Garces et al., *Legal Challenges to Bias Response Teams on College Campuses*, 51 Sage Journals 431, 433 (2022) (similar); Ed. Bd., *Virginia Tech's Bias Response Team and the First Amendment*, Wall St. J. (June 11, 2023), perma.cc/JY86-QJEY (similar).

And while a 3-1 circuit split is plenty deep, the conflict runs even deeper than that. Most of the appellate panels that addressed the issue were divided, and five district courts have weighed in too. All told, twenty federal judges have considered whether bias-response teams objectively chill speech. That question split those judges right down the middle: Ten said yes.[1] And ten said no.[2]

Resolving questions that divide the lower courts is perhaps the strongest justification for this Court's discretionary jurisdiction. Most of this Court's cases are granted because the federal circuits are split—often far less deeply and evenly than they're split here. *E.g.*, *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175, 183-85

[1] Judge Wilkinson (CA4), Judge Jones (CA5), Judge Costa (CA5), Judge King (CA5), Judge Cook (CA6), Judge McKeague (CA6), Judge Newsom (CA11), Judge Marcus (CA11), and one district judge sitting by designation. Judge Brennan (CA7) largely agreed that bias-response teams chill speech.

[2] Judge Diaz (CA4), Judge Motz (CA4), Judge White (CA6), Judge St. Eve (CA7), Judge Scudder (CA7), and five district judges.

(2023) (1-1 split); *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 294-95 & n.3 (2023) (2-1 split); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 386 (2023) (2-1 split); *Moody v. NetChoice, LLC*, 144 S.Ct. 2383, 2397 (2024) (1-1 split). For reference, the four circuits that comprise this split contain nearly half the country's population, including six of the ten most populous States.

Review is especially critical when a circuit conflict implicates core constitutional rights, like the freedom of speech. *E.g.*, *Counterman v. Colorado*, 600 U.S. 66, 72 (2023) (certiorari granted because "[c]ourts are divided" on a First Amendment issue); *accord Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 186-87 (2021); *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 807-08 (2019); *Lane v. Franks*, 573 U.S. 228, 235 (2014). The rights secured by our foundational charter should not turn on arbitrary distinctions like which federal circuit happens to contain a student's college. To quote members of this Court, this "split" creates "a patchwork of First Amendment rights on college campuses." *Sands*, 144 S.Ct. at 676, 678 (Thomas, J., dissenting). In some parts of the country, students can "pursue challenges to their universities' policies, while students in other parts have no recourse." *Id.* at 678.

2. If the Seventh Circuit is right in *Killeen*, then bias-response teams are immune from judicial review—an "important matter" that merits this Court's consideration. S.Ct.R.10(a). This Court maintains an "enduring commitment to protecting the speech rights

of all comers, no matter how controversial." *303 Creative*, 600 U.S. at 600-01. It regularly deems "First Amendment issues" to be "important" enough for certiorari. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540 (2001); *Ward v. Rock Against Racism*, 491 U.S. 781, 784 (1989). These issues are "'nowhere more vital'" than on college campuses. *Healy*, 408 U.S. at 180. Our nation's universities are tasked with training our future leaders. *Keyishian*, 385 U.S. at 603. They must remain a free "'marketplace of ideas,'" else "'our civilization will stagnate and die.'" *Id.*

If Speech First is right, then bias-response teams are chilling the speech of millions of college students nationwide. The number of bias-response teams continues to grow, approximately doubling over the last five years. D.Ct.Doc.9-9 at 5. Speech First studied 824 universities and found that more than half have a bias-reporting system. D.Ct.Doc.9-9 at 5. These policies are just as common at public universities as they are at private ones. D.Ct.Doc.9-9 at 5. No wonder then that, over this same period, students report feeling less free to speak on campus than ever. According to one comprehensive survey, "[m]ore than 80% of students reported self-censoring their viewpoints at their colleges." College Pulse et al., *College Free Speech Rankings* 3 (2021), perma.cc/8TAA-NZ8H. Even absent a circuit split, this troubling trend would warrant this Court's review. *See Harris v. Quinn*, 573 U.S. 616, 627 (2014) (granting certiorari because "other States

were following Illinois' lead by enacting laws" that raise "important First Amendment questions").[3]

The broader implications of the Seventh Circuit's approach are also troubling. According to that court, Speech First doesn't even have *standing* to challenge bias-response teams because they don't do enough to chill speech. By that logic, a university could set up a team that targets any disfavored speech: a Zionism Response Team (for speech favorable to Israel), a Patriotism Response Team (for speech critical of the war on terror), or a MAGA Response Team (for speech supporting President Trump). And if these teams don't even implicate the First Amendment, then cities and States can set them up too. Far from theoretical, several jurisdictions have already established their own bias-response teams or other formal processes for reporting "bias incidents" to the authorities. *See, e.g.*, *CA vs. Hate*, Cal. Civ. Rights Dep't, perma.cc/8LQU-SMQC; *Strategies for Responding to Hate Crimes and Bias Incidents*, Md. Att'y Gen. Civ. Rights Div. (2020), perma.cc/5HC5-GV33; *Report a Bias Crime or Incident*, Ore. Dep't of Just., perma.cc/7LCH-FVPN; *Responding to Bias*, NYC, perma.cc/YZX2-HRNY; *Annual Report on Hate Crimes in Vermont and the Bias Incident Reporting System*, Vt. Att'y Gen. Off. Civ.

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[3] Universities too—if you gave them truth serum—would say they need this Court's guidance on how to address "bias within the parameters of the First Amendment." Lee, *General Counsel's Corner: Bias Response Teams – No Easy Answers*, JD Supra (Feb. 2, 2022), perma.cc/28NY-7L9Y.

Rights (Jan. 6, 2022), perma.cc/3JPA-VVYG. A decision from this Court is needed to halt these disturbing trends.

3. Confirming its importance, this Court has already granted certiorari on the question presented before. Last term, Speech First petitioned for certiorari from the Fourth Circuit's decision in *Sands*, which followed the Seventh Circuit's decision in *Killeen* and held that Speech First lacked standing to preliminarily enjoin Virginia Tech's bias-response team. Virginia Tech eliminated its team, however, just before Speech First could file its petition. So this Court granted certiorari and vacated the Fourth Circuit's decision under *Munsingwear*. *See* 144 S.Ct. at 675; *id.* at 675 n.2 (Thomas, J., dissenting).

Though this Court's vacatur did not resolve the merits of the question presented, it confirmed the question's certworthiness. Vacatur is an "extraordinary remedy." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994). When a case becomes moot *before* certiorari, this Court typically vacates the circuit's decision only if "the petition presents an issue (other than mootness) worthy of review." *Supreme Court Practice* §19.4 at 28-29 n.34; *accord Clarke v. United States*, 915 F.2d 699, 713 (D.C. Cir. 1990) (en banc) (Edwards, J., dissenting) ("All of the available evidence suggests" that the Supreme Court's "practice" is to "vacat[e] moot court of appeals" decisions "if, but only if, they are otherwise certworthy"). If the question were not certworthy, after all, then the petition would have been denied anyway. The equities

typically do not warrant vacatur in that context because the intervening mootness did not make the petitioner any worse off. *Cf. Camreta v. Greene*, 563 U.S. 692, 712 (2011) ("'vacatur'" is for the benefit of "'those who have been prevented from obtaining the review to which they are entitled'").

This Court's *Munsingwear* vacatur in *Sands* is thus strong evidence that bias-response teams present an issue "worthy" of certiorari. *Supreme Court Practice* §19.4 at 28-29 n.34. In fact, two members of the Court would have heard *Sands* on the merits despite Virginia Tech's maneuver. 144 S.Ct. at 675-78 (Thomas, J., joined by Alito, J., dissenting). Though this Court's vacatur left the circuit split 3-1 instead of 3-2, it did not eliminate the split, minimize the importance of the question presented, or stop bias-response teams from continuing to divide lower-court judges.

II. This case is an ideal vehicle for reaching the question presented.

If this Court agrees that it should resolve the split over bias-response teams, then it should do so here. The team at Indiana is representative of the other problematic teams nationwide. Whether that team objectively chills speech is a pure question of law. And no further percolation—either here or in other circuits—is needed.

1. Despite slight differences, bias-response teams "work much the same from school to school." Yockey, *Bias Response on Campus*, 48 J.L. & Educ. 1, 3 (2019). They "follow the same basic structure." *Id.* at 5. The

cases that comprise this split all involve university policies that

- create a formal entity with "response team" in its name;
- staff the team with senior university administrators;
- adopt a formal definition of "bias incident" that broadly covers protected speech;
- solicit anonymous reports;
- log the reports and conduct follow-up;
- contact students accused of bias incidents and ask them to attend a "voluntary" meeting; and
- warn students that the team can refer incidents for formal discipline.

See Fenves, 979 F.3d at 325-26; *Schlissel*, 939 F.3d at 762-63; *Killeen*, 968 F.3d at 632-35; *Cartwright*, 32 F.4th at 1115-18.

Indiana's team has all these features. Created to "educate" the university community about bias, the team encourages anonymous reports, asks reported students to attend "voluntary" meetings, "logs" reported incidents in a "Bias Response & Education database," "notif[ies] community leaders of ongoing bias incidents," and refers reports to other university offices who "can appropriately respond." App.5a-7a. The record here also contains a series of alleged bias incidents that were actually reported to the university—

concrete examples that will further aid this Court's review. D.Ct.Doc.9-30.

2. The question presented is purely legal. It's a question of Article III standing. And it turns on whether the university's policy would chill the speech of a reasonable college student—an "objective" inquiry. *Cartwright*, 32 F.4th at 1118-20 & n.2. That chilling effect comes from the outward-facing materials that students see: the text of the policy, the structure of the bias-response team, and what the university tells students about it. Those written materials are in the record. Further discovery into unwritten policies and practices would serve little purpose. Indiana agrees, as it waived its right to discovery on this motion and twice asked the lower courts to resolve this case as a matter of law. D.Ct.Doc.27; D.Ct.Doc.28; CA7.Doc.10.

Though *Killeen* wrapped itself in the district court's "findings of fact," 968 F.3d at 638-42, that framing is largely beside the point. Speech First does not dispute what bias-response teams say they do. *Schlissel*, 939 F.3d at 765. It disputes whether, given what the university says, a reasonable student would refrain from speaking. Contra *Killeen*, that determination is a legal question, not a "factual finding." 968 F.3d at 639. Speech First can prevail without disturbing anything that the district court found about Indiana's bias-response operations. Hence why, below, the Seventh Circuit did not rely on the district court's factual findings. It denied relief as a matter of law because "any issues which could be raised are foreclosed by [its] holding in" *Killeen*. App.2a.

3. This legal question needs no further percolation. Twenty federal judges have addressed whether bias-response teams objectively chill speech in fifteen separate opinions. Collectively, these opinions cover all the possible arguments on both sides of the issue. (Though the Fourth Circuit's opinion is vacated, both the majority and Judge Wilkinson's dissent are still available and helpful.) While the split might deepen if more teams are challenged in new circuits, those additional decisions will not meaningfully help this Court. Delay would have costs, however. Until this Court addresses bias-response teams, students in nearly every State will be "pressured to avoid controversial speech to escape their universities' scrutiny and condemnation." *Sands*, 144 S.Ct. at 678 (Thomas, J., dissenting). Leaving such an important "First Amendment" question unanswered for years, as entire classes of college students have their speech chilled by bias-response teams, "would be intolerable." *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974).

Nor could the university resist certiorari because this case is "interlocutory." Its position below was that this case is ready for final judgment *now*. D.Ct.Doc.27; CA7.Doc.10. And though Speech First appealed from the denial of a preliminary injunction, all lower-court proceedings are stayed pending this Court's decision. App.14a. All four cases in this 3-1 split were decided at the preliminary-injunction stage too. This Court often grants certiorari in that posture. *E.g.*, *Fulton v. Philadelphia*, 593 U.S. 522, 531-32 (2021); *Chrysafis v. Marks*, 141 S.Ct. 2482, 2482-83 (2021); *Ramirez v. Collier*, 595 U.S. 411, 416, 420-21 (2022); *Whole*

Woman's Health v. Jackson, 141 S.Ct. 2494, 2495 (2021); *Murthy v. Missouri*, 144 S.Ct. 1972, 1985 (2024); *Moody*, 144 S.Ct. at 2395-97.

This Court is especially willing to hear cases before final judgment when they involve "the proper scope of First Amendment protections." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55 (1989). These "protections should not be placed at the sufferance of extended rounds of litigation." *Sands*, 69 F.4th at 205 (Wilkinson, J., dissenting). "The longer [their] beneficiaries languish in litigation, the more [their] value and meaning is lost." *Id.*

III. The Seventh Circuit got it wrong.

This much is common ground: To prove associational standing, Speech First must prove that one of its members would have standing to sue on her own. *SFFA v. Harvard*, 600 U.S. 181, 198 (2023). And for a member to have injury, causation, and redressability herself, the university's policy must objectively chill her speech. *Killeen*, 968 F.3d at 638; *Cartwright*, 32 F.4th at 1120; *Fenves*, 979 F.3d at 333; *Schlissel*, 939 F.3d at 764.

This much *should be* common ground: The government can objectively chill speech without directly prohibiting it. *Am. Commc'ns Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 402 (1950); *Sands*, 144 S.Ct. at 676 (Thomas, J., dissenting). A policy can be challenged "even though it has only an indirect effect on the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 11-13 (1972). The government "may no more silence unwanted speech by burdening its utterance than by

censoring its content." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011). Administrative burden thus can chill speech. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 165 (2014). So can "concer[n] about the expense of becoming entangled." *Counterman*, 600 U.S. at 75. So can "informal sanctions," "threat[s]," and "other means of coercion, persuasion, and intimidation." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). When it comes to free speech, the government "cannot do indirectly what [it] is barred from doing directly." *NRA v. Vullo*, 602 U.S. 175, 190 (2024).

This Court applied these principles in *Bantam Books*. Because the First Amendment strictly limits States' power to ban obscenity, Rhode Island tried to discourage obscenity through a Commission to Encourage Morality in Youth. 372 U.S. at 59. The commission's mission was to "educate the public" about obscene materials. *Id.* It would receive "complaints from outraged parents," "investigate" incidents, circulate "lists of objectionable publications," and "recommend legislation, prosecution and/or treatment" to address them. *Id.* at 60 n.1. If the commission concluded that a book was "objectionable," the commission would send a notice to the publisher and thank it for its "cooperation" in preventing the spread. *Id.* at 62-63. A "local police officer" would then follow up with the publisher. *Id.* at 63. The commission had no "power to apply formal legal sanctions," *id.* at 66, and publishers were "'free' to ignore the Commission's notices," *id.* at 68. Yet this Court—"look[ing] through forms to the substance"—held that this threatening, coercive scheme objectively chilled speech. *Id.* at 67-68, 72.

The Second Circuit, in an opinion joined by then-Judge Sotomayor, reached a similar conclusion in *Okwedy v. Molinari*. The plaintiff there rented billboards in Staten Island denouncing homosexuality. 333 F.3d 339, 341 (2d Cir. 2003). The president of the borough wrote a letter to the billboard company, on official letterhead, stating that the billboards were "unnecessarily confrontational and offensive" and "convey[ed] an atmosphere of intolerance." *Id.* at 341-42. The president asked the company to "contact" the "Chair of [the] Anti-Bias Task Force" to "establish a dialogue" and "discuss" these issues. *Id.* He appealed to the company "as a responsible member of the business community." *Id.* at 342. But the president had no authority over billboards. *Id.* at 343. The Second Circuit nevertheless held that his letter crossed the line "between attempts to convince and attempts to coerce." *Id.* at 344. "Even though [the President] lacked direct regulatory control over billboards," the company "could reasonably have feared that [he] would use whatever authority he does have" against it. *Id.* And the fact that the letter called for "dialogue" did not dissipate its "implicit threat." *Id.*

Like the commission in *Bantam Books* and the task force in *Okwedy*, bias-response teams objectively chill speech. Consider a reasonable student at Indiana who holds views out of step with her peers. If she expresses those opinions in *any* medium—even just a conversation with friends—her speech could be reported as a "bias incident." App.4a-5a. The term "bias-related incident" is formally defined, with the prolixity of a legal code. The university "prompt[s] students to report any and all perceived slights," and it allows

anonymous reporting, "meaning there is little to no social cost for accusing a classmate of bias." *Sands*, 144 S.Ct. at 677 (Thomas, J., dissenting). Bias-incident reports can have "weighty consequences." *Id.* Reports go to an official entity called the "Bias Response Team." That team is staffed by high-level university officials who can log the student's speech in a university database, ask the student to attend a meeting to "[e]ducate" them about their speech, decide if "further investigation is required for potential violations of university policy and/or criminal law," and potentially refer the incident to other offices. App.5a-7a. Even if a reported student can technically decline a meeting, "it is hard to believe a college student could so easily ignore a university official's request, especially when the report will be filed" in an official database and potentially referred to law enforcement. *Sands*, 144 S.Ct. at 677 (Thomas, J., dissenting). Instead of risking a trip through this wringer, a reasonable student could conclude: "Better to just keep quiet." *Sands*, 69 F.4th at 207 (Wilkinson, J., dissenting).

Killeen ignored the totality of this process, instead slicing and dicing its components and explaining why each component wouldn't chill speech. 968 F.3d at 639-44. That piecemeal approach was wrong. Courts addressing First Amendment claims must ask whether the alleged scheme, "assessed as a whole" and "viewed in context," would dissuade a reasonable person from speaking. *Vullo*, 602 U.S. at 193-94. Here, for example, the bias-response team's practice of inviting reported students to attend meetings to discuss their controversial speech must be viewed against

"the backdrop" of the team's other powers—like logging the student in a bias database and referring him to law enforcement for additional investigation. *Id.* at 191-92, 195. *Killeen*'s alternative approach, evaluating each component "in isolation," fails to capture the full extent of a bias policy's coercive effect. *Id.* at 194; *see id.* at 199 (Gorsuch, J., concurring) (it's "mistaken" to "break up [the] analysis into discrete parts").

In any event, *Killeen* was wrong about the components too. Bias-response teams chill speech by creating a formalized system where students constantly monitor and anonymously report each other to the university. *Fenves*, 979 F.3d at 338; *Sands*, 69 F.4th at 209 (Wilkinson, J., dissenting). The reputational damage from being labeled a bias offender is chilling too. *Killeen*, 968 F.3d at 652 (Brennan, J., concurring/dissenting); *Cartwright*, 32 F.4th at 1124; *Schlissel*, 939 F.3d at 765. As is the knowledge that officials are logging and investigating protected speech. *Killeen*, 968 F.3d at 652 (Brennan, J., concurring/dissenting); *Cartwright*, 32 F.4th at 1124; *Sands*, 69 F.4th at 210-11 (Wilkinson, J., dissenting). The prospect of being personally contacted by a high-ranking university official also chills speech. *Sands*, 144 S.Ct. at 677 (Thomas, J., dissenting); *Schlissel*, 939 F.3d at 765; *Cartwright*, 32 F.4th at 1124 n.5. So does the threat of being referred to other university authorities or even law enforcement. *Sands*, 144 S.Ct. at 677 (Thomas, J., dissenting); *Schlissel*, 939 F.3d at 765; *Fenves*, 979 F.3d at 333. Even if the student did nothing wrong, his "worry" that the bias-response team "will err" and his desire to avoid "becoming entangled"

in this bureaucratic morass could "lead him to swallow [his] words." *Counterman*, 600 U.S. at 75, 77-78. Hence why students, professors, experts, studies, surveys, and even universities agree that bias-response teams chill speech on campus. *See Sands*, 69 F.4th at 221 (Wilkinson, J., dissenting); *Fenves*, 979 F.3d at 338; D.Ct.Doc.9-9; D.Ct.Doc.9-10; D.Ct.Doc.9-11.

It's no answer to say that bias-response teams cannot *themselves* administer formal discipline. *Cf. Killeen*, 968 F.3d at 639. Their members include officials who do have that authority. *Sands*, 69 F.4th at 207, 209-10 (Wilkinson, J., dissenting). Plus they can refer students to other university officials with that authority. App.6a; *Killeen*, 968 F.3d at 641; *Schlissel*, 939 F.3d at 765; *Fenves*, 979 F.3d at 333. And, of course, bias-response teams chill speech in other ways besides threatening discipline.

Bias-response teams are also designed to *appear* as though students who commit bias incidents will face discipline-like consequences. *Schlissel*, 939 F.3d at 764; *Sands*, 69 F.4th at 210-11 (Wilkinson, J., dissenting). The team's name, membership, and terminology all convey that message. *Fenves*, 979 F.3d at 338. A reasonable student "could be forgiven for thinking that inquiries from and dealings with the [team] could have dramatic effects such as currying disfavor with a professor, or impacting future job prospects." *Schlissel*, 939 F.3d at 765. The team's "overall tenor" is that "if your speech crosses our line, we will come after you." *Cartwright*, 32 F.4th at 1124 n.5. And that appearance is the critical factor when assessing coercion. *See Vullo*, 602 U.S. at 191 (asking "whether a

reasonable person would *perceive* the official's communication as coercive" (emphasis added)); *accord Okwedy*, 333 F.3d at 344; *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230-31 (7th Cir. 2015).

It's also no answer to say that, even without bias-response teams, universities can solicit reports and meet with students as part of their ordinary student-conduct process. *Cf. Killeen*, 968 F.3d at 640-42. It is one thing to investigate and collect reports about conduct that universities have the power to ban. It is another thing to investigate and collect reports about "bias-related incidents"—protected speech that a university could never ban in a speech code. If the ordinary student-conduct process were enough, why create a separate team, staff it with authority figures, formally define "bias incident," use disciplinary lingo, solicit anonymous complaints, create a dossier, threaten referrals, and ask to meet with students? This elaborate regime is designed to *eliminate* biased speech by implicitly threatening students with consequences "that they otherwise would not face." *Schlissel*, 939 F.3d at 765.

Finally, Speech First needn't prove that bias-response teams chill speech just as much as the schemes in *Bantam Books* or *Okwedy*. *Cf. Sands*, 69 F.4th at 193-95 & nn.8-10. College students are typically "teenagers and young adults" who "are more likely to be cowed by subtle coercion than the relatively sophisticated business owners in those cases." *Cartwright*, 32 F.4th at 1123. And more fundamentally, bias-response teams can be over the constitutional line even

if other chilling schemes are *more* over the constitutional line. But make no mistake: Bias-response teams are further over the line than other chilling conduct. *E.g.*, *Levin v. Harleston*, 966 F.2d 85, 88 (2d Cir. 1992) (university chilled professor's speech by creating an "alternative" section of his class that students could take instead); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 76 n.8 (1990) (public employer can chill employee's speech by "'failing to hold a birthday party'").

At the end of the day, the question is "whether the average college-aged student would be intimidated—and thereby chilled from exercising her free-speech rights—by subjection to the bias-related-incidents policy and [the bias-response team's] role in enforcing it." *Cartwright*, 32 F.4th at 1124. "The answer to that question," as three out of four circuits correctly hold, "is yes." *Id.* So it should be for all students.

CONCLUSION

This Court should grant certiorari.

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APPENDIX

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Appendix A — Order of the United States Court of Appeals for the Seventh Circuit, filed September 5, 2024

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 24-2501

SPEECH FIRST, INC.,

Plaintiff-Appellant,

v.

PAMELA WHITTEN, *et al.*,

Defendants-Appellees.

September 5, 2024

ORDER

Originating Case Information:
District Court No: 1:24-cv-00898-JPH-MG
Southern District of Indiana, Indianapolis Division
District Judge James P. Hanlon

The following are before the court:

1. **APPELLANT'S MOTION TO SUSPEND BRIEFING AND SUMMARILY AFFIRM**, filed on August 30, 2024, by counsel for the appellant.

2. **APPELLEES' MOTION TO DISMISS APPEAL AND RESPONSE TO MOTION TO SUSPEND**

BRIEFING AND SUMMARILY AFFIRM, filed on September 4, 2024, by counsel for the appellees.

3. **APPELLEES' APPENDIX IN SUPPORT OF THEIR MOTION TO DISMISS APPEAL AND THEIR RESPONSE TO APPELLANT'S MOTION TO SUSPEND BRIEFING AND SUMMARILY AFFIRM**, filed on September 4, 2024, by counsel for the appellees.

This court has carefully reviewed the final order of the district court, the record on appeal, appellant's motion to suspend briefing and for summary affirmance, and appellees' motion to dismiss. Based on this review, the court has determined that any issues which could be raised are foreclosed by this court's holding in *Speech First, Inc. v. Killeen*, 968 F.3d 628 (7th Cir. 2020). "Summary disposition is appropriate 'when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists.'" *Williams v. Chrans*, 42 F.3d 1137, 1139 (7th Cir. 1995) (citing *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994)). Based on this court's precedent, the district court correctly held that Speech First does not have standing to seek a preliminary injunction because it has not shown that its members face a credible fear of discipline.

Accordingly, **IT IS ORDERED** that the appellant's motion to suspend briefing and for summary affirmance is **GRANTED**, the appellees' motion to dismiss is **DENIED** as unnecessary, and the judgment of the district court is summarily **AFFIRMED**.

Appendix B — Order of the United States District Court for the Southern District of Indiana, Indianapolis Division, filed August 28, 2024

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

No. 1:24-cv-00898-JPH-MG

SPEECH FIRST, INC.,

Plaintiff,

v.

PAMELA WHITTEN, LAMAR HYLTON, KATHY ADAMS RIESTER, CEDRIC HARRIS, JASON SPRATT, HEATHER BRAKE, KATHERINE BETTS, QUINN BUCKNER, CINDY LUCCHESE, CATHY LANGHAM, JEREMY A. MORRIS, J. TIMOTHY MORRIS, KYLE S. SEIBERT, DONNA B. SPEARS, ISAAC TORRES, VIVIAN WINSTON,

Defendants.

Filed August 28, 2024

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

Speech First, an organization that seeks to protect free speech rights on college campuses, brought this case against Indiana University officials alleging that IU's

"bias incident" policy violates the First and Fourteenth Amendments. Dkt. 1. Although Speech First has filed a motion for a preliminary injunction preventing Defendants from enforcing IU's policy, dkt. 9, the parties agree that *Speech First*, *Inc. v. Killeen*, 968 F.3d 628 (7th Cir. 2020), requires the Court to deny Speech First's motion. Dkt. 10 at 5–6; dkt. 30 at 6–7, 23; dkt. 31 at 2 (Speech First acknowledging that "it must lose under *Killeen*").

For the reasons below, the motion for preliminary injunction is **DENIED** under *Killeen* and this case is **STAYED** pending Speech First's anticipated appeal. Dkt. [9].

I. Facts & Background

The parties have filed affidavits and other documentary evidence, the relevant parts of which are uncontested. *See* dkt. 1 (verified complaint); dkt. 9; dkt. 25. Neither party requested an evidentiary hearing, *see* dkt. 21, so these facts are based on that designated evidence.

A. Indiana University's Bias Response & Education Initiative

Indiana University is an institution of higher education that "encourages the free and civil exchange of ideas." Dkt. 9-12 at 5. In order to "foster[ ] campus communities where all are welcomed, valued, respected, and belong," IU has created Bias Response & Education, an initiative that includes a bias incident process. *Id.* at 4. Through this process, IU invites reports of "bias incidents," which include "any conduct, speech, or expression, motivated in

whole or in part by bias or prejudice meant to intimidate, demean, mock, degrade, marginalize, or threaten individuals or groups based on that individual or group's actual or perceived identities." *Id.* at 2. IU has encouraged reports on several of its websites, *see id.*; dkt. 9-23; dkt. 9-26, and on social media, *see* dkt. 9-22.

IU's Bias Response & Education website explains that it "privately reviews all submitted bias incident reports" and responds to them:

The university's response includes:	**Possible outcomes include:**
• Conversation(s) centered around the incident and impacted person(s) • Refer reporter to appropriate campus offices that can effectively respond • Refer impacted to support resources • Incident assessment, response plan • Ongoing support and check-ins	• 1-on-1 ongoing support • Engage person(s) impacting others • Engage leaders to address systemic issues • Mediation and facilitated dialogue

Dkt. 9-12 at 2-3. The website goes on to explain what Bias Response 85 Education does and does not do:

Appendix B

What We Do:	What We Don't Do:
• Conversation(s) centered around the incident and impacted person(s) • Refer to support services or offices who can appropriately respond • Log all reported incidents and track for trends • Notify campus leaders of ongoing bias incidents and trends • Educate and consult the campus community about bias • Inform the campus community about our work through informational meetings and annual reports	• Take disciplinary action • Conduct formal investigations • Impinge on free speech rights <https://freespeech.iu.edid> and academic freedom

The form for reporting incidents of bias adds that the "primary goal is to provide support to the individual or community impacted," though reports are also "evaluated to determine if further investigation is required for potential violations of university policy and/or criminal law." Dkt. 9-14 at 2.

Any student engagement with Bias Response & Education is "entirely voluntary." Dkts. 25-1 at 3; 25-2 at 3. If a student—whether reporting or alleged to have engaged in reported behavior—"does not want to meet or otherwise engage with Bias Response & Education, the student does not have to, and will not be penalized or sanctioned as a result of that decision." Dkts. 25-1 at 3; 25-2 at 3. Reported students may receive an email asking to schedule a voluntary meeting. Dkts. 25-1 at 10; 25-2 at 10. Many students—"the majority" at the Indianapolis campus and "numerous" at the Bloomington campus—either do not respond or decline a meeting. Dkts. 25-1 at 10; 25-2 at 10. If a student agrees to meet, "Bias Response & Education does not ask or require students to change what they do or say" and "leaves no doubt that [students] are not being charged with any Code violation, nor are the students 'in trouble.'" Dkts. 25-1 at 10; 25-2 at 10.

Regardless of the situation, "Bias Response & Education never makes a 'finding' that a bias-motivated incident has occurred, nor does it have any disciplinary function whatsoever." Dkts. 25-1 at 3; 25-2 at 3. Bias-incident reports are kept in "an internal Bias Response & Education database" and data from them are aggregated—without names or personal identifiers—to track, for example, the volume, categories, and locations of reports. Dkts. 25-1 at 9, 11; 25-2 at 9, 11. Those reports are "kept secure and private" and "are not recorded in students' academic or disciplinary records." Dkts 25-1 at 10–11; 25-2 at 10–11. In short, "Bias Response & Education has no power to sanction, punish, or otherwise discipline any student for any reason." Dkts. 25-1 at 3; 25-2 at 3.

B. Speech First and its IU Student Members

Speech First "is a nationwide membership organization of students, alumni, and other concerned citizens" that "seeks to protect the rights of students and others at colleges and universities." Dkt. 1 at 3. Some of its members attend Indiana University, including anonymous students A, B, C, D, and E. *Id.*

Students A, B, C, D, and E are all "politically conservative and hold views that are unpopular, controversial, and in the minority on campus." Dkts. 9-3 at 1; 9-4 at 1; 9-5 at 1; 9-6 at 1; 9-7 at 1. They each "want to speak directly to [their] classmates" and "want to talk frequently and repeatedly" about issues such as gender identity, immigration, affirmative action, and the Israel–Palestine conflict. Dkts. 9-3 at 1–3; 9-4 at 1–2; 9-5 at 1–2; 9-6 at 1–3; 9-7 at 1–3. IU's "bias incidents policy, however, makes [them] reluctant to openly express [their] opinions or have these conversations in the broader University community." Dkts. 9-3 at 3; 9-4 at 3; 9-5 at 3; 9-6 at 3; 9-7 at 3. They therefore "do not fully express" themselves because "others will likely report [them] to University officials for committing a 'bias incident.'" Dkts. 9-3 at 3; 9- 4 at 3; 9-5 at 3; 9-6 at 3; 9-7 at 3. Each student is "afraid that the Bias Response Team will keep a record on me, share the allegations with campus leaders and others within the university, call me in for meetings, or refer the allegations to the Office of Student Conduct." Dkts. 9-3 at 3; 9-4 at 3; 9-5 at 3; 9-6 at 3; 9-7 at 3.

Speech First brings a facial challenge against IU's "bias incident" policy, alleging that it should be enjoined in its entirety under the First and Fourteenth Amendments. Dkt. 1. It has filed a motion for a preliminary injunction under Federal Rule of Civil Procedure 65, requesting that the Court "enjoin Defendants from enforcing [IU's bias-incident] policies during this litigation." Dkt. 9. Speech First concedes, however, that the Seventh Circuit's opinion in *Killeen*—which addressed a facial challenge to the University of Illinois's bias-response policies—is "binding" and "requires this Court to deny Speech First's motion for a preliminary injunction." Dkt. 10 at 5; dkt. 31 at 1 ("Speech First agrees that its preliminary-injunction motion must be denied" and "asks this Court to rule promptly so it can appeal.").

II. Preliminary Injunction Standard

Injunctive relief under Federal Rule of Civil Procedure 65 is "an exercise of very far-reaching power, never to be indulged in except in a case clearly demanding it." *Cassell v. Snyders*, 990 F.3d 539, 544 (7th Cir. 2021). To obtain such extraordinary relief, the party seeking the preliminary injunction carries the burden of persuasion by a clear showing. *See id.*; *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

Determining whether a plaintiff "is entitled to a preliminary injunction involves a multi-step inquiry." *Int'l Ass'n of Fire Fighters, Local 365 v. City of E. Chicago*, 56 F.4th 437, 446 (7th Cir. 2022). "As a threshold matter, a party seeking a preliminary injunction must demonstrate

(1) some likelihood of succeeding on the merits, and (2) that it has no adequate remedy at law and will suffer irreparable harm if preliminary relief is denied." *Id.* "If these threshold factors are met, the court proceeds to a balancing phase, where it must then consider: (3) the irreparable harm the non-moving party will suffer if preliminary relief is granted, balancing that harm against the irreparable harm to the moving party if relief is denied; and (4) the public interest, meaning the consequences of granting or denying the injunction to non-parties." *Cassell*, 990 F.3d at 545. This "involves a 'sliding scale' approach: the more likely the plaintiff is to win on the merits, the less the balance of harms needs to weigh in his favor, and vice versa." *Mays v. Dart*, 974 F.3d 810, 818 (7th Cir. 2020). "In the final analysis, the district court equitably weighs these factors together, seeking at all times to minimize the costs of being mistaken." *Cassell*, 990 F.3d at 545.

III. Analysis

"To invoke federal jurisdiction, [a plaintiff] must have standing, which is a short-hand term for the right to seek judicial relief for an alleged injury." *Simic v. City of Chicago*, 851 F.3d 734, 738 (7th Cir. 2017). "A plaintiff bears the burden of showing that she has standing for each form of relief sought," including "injunctive relief." *Id.* "A district court . . . can address a motion for a preliminary injunction without making a conclusive decision about whether it has subject-matter jurisdiction." *Id.* But "issues of subject matter jurisdiction are always on the table in federal courts," including in preliminary-injunction proceedings. *Id.* Accordingly, if a plaintiff lacks

standing to seek injunctive relief, a motion for preliminary injunction should be denied on that basis. *Id.* at 738–39; *Killeen*, 968 F.3d at 638–39, 647.

In *Killeen*, Speech First brought a facial challenge against bias-response policies at the University of Illinois at Urbana–Champaign, arguing that they "impermissibly chill[ed] the speech of student members of its organization." 968 F.3d at 632. Those policies were implemented by a Bias Assessment and Response Team ("BART"), which "collect[ed] and respond[ed] to reports of bias-motivated incidents that occur within the University of Illinois at Urbana– Champaign community." *Id.* BART was housed in the same office that enforced the student code and had a law-enforcement liaison from the University Police Department. *Id.* at 633. It could not, however, "require students to change their behavior and [did] not have authority to issue sanctions." *Id.* And while BART published an "annual report of incidents with all personally identifiable information removed," interactions with students were kept private and did "not appear on students' academic or disciplinary records." *Id.*

The Seventh Circuit affirmed the district court's denial of Speech First's motion for a preliminary injunction, holding that Speech First lacked standing to seek a preliminary injunction. *Id.* at 647. The Seventh Circuit explained that the University of Illinois had "not investigated or punished any of the students who are members of Speech First pursuant to any of the challenged University policies." *Id.* at 639. Nor had Speech First "demonstrated that these policies pose[d] a credible threat of enforcement to any student or whether any

student has faced an objectively reasonable chilling effect on his or her speech." *Id.* That was because Speech First (1) did not contest that its members could not be disciplined under the student code for expressing the views they wished to express; (2) did not identify the statements its student– members wished to make; (3) designated no evidence that any student fears consequences from interacting (or deciding not to interact) with BART, and has therefore self-censored; (4) did not contest that BART lacked disciplinary authority; and (5) did not contradict that BART's "interactions with students are private." *Id.* at 639–42.

Here, the parties agree that the Court must deny Speech First's motion because under *Killeen*, Speech First lacks standing to seek a preliminary injunction. Dkt. 10 at 5–6; dkt. 30 at 6–7, 23; dkt. 31 at 2 (Speech First acknowledging that "it must lose under *Killeen*").

Considering Speech First's concessions and the factual record established by the parties' filings, *Killeen* cannot be meaningfully distinguished. Speech First's student–members at IU have identified the general topics they'd like to speak about and expressed fear "that the Bias Response Team will keep a record on me, share the allegations with campus leaders and others within the university, call me in for meetings, or refer the allegations to the Office of Student Conduct." Dkts. 9-3; 9-4; 9-5; 9-6; 9-7. But Speech First concedes that these affidavits are not enough for standing because, under *Killeen*, Bias Response & Education at IU is "materially similar" to the University of Illinois's policy and therefore does "not chill speech." Dkt. 31 at 4–5.

Indeed, Speech First admits that Bias Response & Education lacks disciplinary authority and that "[b]ias-motivated speech alone is not a Student Code violation" at IU. *Id.* at 4. It further admits "that students are not punished" for declining to meet with Bias Response & Education. *Id.* And it admits that interactions with Bias Response & Education are anonymized and "not recorded in academic or disciplinary records." *Id.* Speech First also does not contest that many students either decline or do not respond to Bias Response & Education's meeting invitations. *Id.* at 3.

Speech First therefore has not shown that it has standing to seek preliminary injunctive relief under *Killeen*. *See id.* at 647 ("Speech First . . . failed to demonstrate that any of its members face a credible threat of any enforcement on the basis of their speech or that . . . responses to reports of bias-motivated incidents have an objective chilling effect."); *Simic*, 851 F.3d at 738–39. This Court is bound to follow *Killeen*, and therefore must deny Speech First's motion for preliminary injunction.[1] *See Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1029 (7th Cir. 2004).

1. The Court's analysis of the facts in this order speak only to whether Speech First "has met its burden to demonstrate that any of its members experience an actual, concrete, and particularized injury as a result of [IU]'s policies for the purpose of standing to pursue a preliminary injunction." *Killeen* 968 F.3d at 643–44.

IV. Conclusion

Under binding Seventh Circuit precedent, Speech First lacks standing to seek preliminary injunctive relief, so its motion for preliminary injunction is **DENIED**. Dkt. [9]; *see Killeen*, 968 F.3d at 638–39, 647.

This case, including briefing on IU's motion to dismiss, dkt. 24, is **STAYED** pending resolution of Speech First's anticipated appeal. Dkt. 31 at 1 ("Speech First asks this Court to rule promptly so it can appeal to a court that has the power to overrule *Killeen*."); *see Killeen*, 968 F.3d at 655 n.7 (concurrence in part noting that "the defendants' obligation to answer or otherwise respond to the complaint" had been stayed during the preliminary-injunction appeal); *Simic*, 851 F.3d at 740. Any party may file a motion to lift the stay for good cause.

SO ORDERED.

Date: 8/28/2024

/s/________________________
James Patrick Hanlon
United States District Judge
Southern District of Indiana