No. 24-361

IN THE

Supreme Court of the United States

SPEECH FIRST, INC.,

Petitioner,

v.

PAMELA WHITTEN, IN HER OFFICIAL CAPACITY AS PRESIDENT OF INDIANA UNIVERSITY, *et al.*,

Respondents.

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

BRIEF OF AMICI CURIAE SOUTHEASTERN LEGAL FOUNDATION AND YOUNG AMERICA'S FOUNDATION IN SUPPORT OF PETITIONER

BRADEN H. BOUCEK
Counsel of Record
KIMBERLY S. HERMANN
SOUTHEASTERN LEGAL FOUNDATION
560 West Crossville Road, Suite 104
Roswell, GA 30075
(770) 977-2131
bboucek@southeasternlegal.org

Counsel for Amici Curiae

October 30, 2024

120087

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTEREST OF AMICI CURIAE[1]

Founded in 1976, Southeastern Legal Foundation ("SLF") is a national, nonprofit legal organization dedicated to defending liberty and Rebuilding the American Republic. For nearly 50 years, SLF has advocated, both in and out of the courtroom, to protect our First Amendment rights. This aspect of its advocacy is reflected in its regular support of those challenging overreaching governmental actions in violation of their freedom of speech. *See*, *e.g.*, *303 Creative v. Elenis*, 143 S. Ct. 2298 (2023); *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719 (2018); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

Through its 1A Project, SLF educates college students and administrators about the First Amendment and defends the right to engage in open inquiry on our nation's college campuses. This case concerns SLF because it has an abiding interest in the protection of our First Amendment freedoms—namely the freedom of speech. SLF also has an abiding interest in the preservation of the college campus as the traditional "marketplace of ideas."

Young America's Foundation (YAF) is a national non-profit organization that ensures young Americans understand and are inspired by the ideas of individual freedom, a strong national defense, free enterprise, and

1. Rule 37 statement: The parties were notified that Amici intended to file this brief at least 10 days before its filing. *See* Sup. Ct. R. 37.2. No party's counsel authored any of this brief; Amici alone funded its preparation and submission. *See* Sup. Ct. R. 37.6.

traditional values. Young Americans for Freedom is YAF's chapter affiliate on high school and college campuses across the country.

YAF works with young people on more than 2,000 campuses. YAF has a chapter at the Indiana University.

Time and again, YAF has seen public universities suppress speech in traditional public for a, both explicitly and under cover of supposedly viewpoint-neutral regulations. These actions injure the rights of non-students, but work even greater harm to students. YAF has a substantial interest in this case in ensuring the existence of a robust space on, and adjacent to, college campuses for the exercise of free speech (including YAF's oftentimes disfavored conservative speech).

SUMMARY OF ARGUMENT

This case involves the intersection of our nation's time-honored tradition of protecting academic freedom and First Amendment rights in colleges and universities with the principle that demonstrating standing for a pre-enforcement First Amendment challenge is not difficult. This well-trodden intersection should have proved navigable for the Seventh Circuit. Confronting this crossroads, other circuits have acknowledged that university policies—i.e. Bias Response Teams—can chill speech through coercion and intimidation and that punishments can take many forms, including a university pejoratively labeling a prospective speaker "biased" and "hateful." *See Speech First, Inc. v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022); *Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020); *Speech First, Inc. v. Schlissel*, 939

F.3d 756 (6th Cir. 2019). This is particularly true when the speaker is young, resulting in such labeling having far-reaching consequences in an era wherein employers are highly reticent to hire an individual labeled as "biased" or "hateful." *See Cartwright*, 32 F.4th at 1123 ("[T]he students targeted here are—for the most part—teenagers and young adults who, it stands to reason, are more likely to be cowed by subtle coercion than the relatively sophisticated business owners in [other First Amendment cases where an injury existed without punishment].").

Rather than join its sibling circuits, the Seventh Circuit, in this case and in *Speech First, Inc. v. Killeen*, 968 F.3d 628 (7th Cir. 2020), charted its own path. The Seventh Circuit, by not recognizing that coercion and intimidation, coupled with punishment in the form of pejorative labeling, chills speech, forces students to weave through a proverbial triple-roundabout to protect their right to voice controversial opinions on topics of the day. This difficult hurdle does not comport with the nation's history of protecting the First Amendment in the academic setting or the relaxed standing inquiry governing pre-enforcement, First Amendment challenges. This Court must step in to address the circuit conflict and protect the ability of students and student organizations to advance First Amendment pre-enforcement challenges to ever-more-popular college speech codes.

ARGUMENT

I. Protecting Free Speech in the Academic Setting is of Utmost Importance.

The freedom to speak about political issues on our country's college and university campuses is critical to

both a functioning democracy *and* a well-rounded college experience. College students are in the unique position of being surrounded by true diversity: diversity of thought, background, religion, politics, and culture. For many, this is the first—and perhaps only—time they will be exposed to a "marketplace of ideas" that differ from their own. The college experience can have a significant impact on the leaders of tomorrow. And during their four years of college, most students will be first-time voters. Colleges should therefore encourage lively political discussion to develop a well-informed student body and citizenry.

But college administrators often have a different priority—creating a "welcoming," environment full of "safe spaces," where only politically correct views—not politically provocative and enlightening views—may be expressed without fear of repercussions. This challenge of school administrators constricting speech on their campuses and stifling disfavored viewpoints is not new. As this case demonstrates, the crafty school administrator will find new and subtle ways to discourage the utterance of views he disfavors. But such efforts are an afront to the constitution and our nation's history.

For almost three-quarters of a century, this Court has recognized that "[t]he essentiality of freedom in the community of American universities is almost self-evident." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Thus, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). "The Nation's future depends upon leaders trained through wide exposure to th[e] robust exchange of ideas which discovers truth 'out of a multitude of tongues,

rather than through any kind of authoritative selection.'" *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1976) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)); *see also Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). To ensure growth and progress, "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us." *Keyishian*, 385 U.S. at 603. As such, "students must always remain free to inquire, to study and to evaluate, to *gain new maturity and understanding*; otherwise, our civilization will stagnate and die." *Sweezy*, 354 U.S. at 250 (emphasis added).

Bias Response Teams have the exact opposite effect on the educational setting. They restrain the growth of both the speaker and the alleged victim. They stifle the vetting of controversial ideas while removing any expectation from those who disagree with a controversial idea to develop and provide a mature retort. University bias report policies cast a wide net, encouraging students to report any speech they find offensive. *Speech First, Inc. v. Sands*, 144 S. Ct. 675, 677 (2024) (Thomas, J., dissenting from order vacating decision below as moot) (describing broad bias reporting policy as "prompt[ing] students to report any and all perceived slights"); *Speech First, Inc. v. Sands*, 69 F.4th 184, 209 (4th Cir. 2023) (Wilkerson, J., dissenting) (quoting Virginia Tech bias reporting policy as stating "'student, if you hear or see something that feels like a bias incident, statement, or expression, we encourage you to make a report. In short, if you see something, say something!'"). To this point, in accord with bias reporting polices, Teams have fielded reports on core political issues of the day such as support for Israel and opposition to affirmative action. *Fenves*, 979 F.3d at 335.

If left unchecked bias response teams have the potential to produce a generation of timid speakers and snowflake listeners. Given the growing prevalence of Bias Response Teams on college campuses, this fear is anything but hyperbole. *See* Jenna A. Robinson and Ashlynn Warta, *Bias Response Teams Have No Place on N.C. Campuses*, (Sept. 19, 2022), Bias Response Teams Have No Place on N.C. Campuses—The James G. Martin Center for Academic Renewal (available at: https://www.jamesgmartin.center/2022/09/bias-response-teams-have-no-place-on-n-c-campuses/) (reviewing literature showing that 56 percent of colleges and universities have bias reporting systems and that, over the last five years, there has been a 230% increase in bias response teams at private universities and a 175% increase at public universities); *see also* Jeffrey Aaron Snyder and Amna Khalid, *The Rise of 'Bias Response Teams' on Campus*, (Mar. 30, 2016), The Rise of "Bias Response Teams" on Campus | The New Republic (available at: https://newrepublic.com/article/132195/rise-bias-response-teams-campus) (noting Bias Response Teams on over 100 college campuses as of 2016); Foundation for Individual Rights in Education, Bias Response Team Report 2017, at 4 (2017), Microsoft Word—2017 Report on Bias Reporting Systems.docx (available at: https://www.thefire.org/sites/default/files/2017/02/07011550/2017-report-bias-reporting-systems.pdf) (estimating that at least 2.84 million students were enrolled in institutions with Bias Response Teams).

The Supreme Court has a long tradition of protecting free speech rights in the academic setting. It recognizes that impermissible coercion is highly context specific. *See Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469 (1997). The state may not only *literally* force people to

speak; it also cannot use peer pressure and psychological tactics to achieve that end. *See Lee v. Weisman*, 505 U.S. 577, 593 (1992). In the highly suffocating and politically charged context of the current college environment and the willingness of administrators to pejoratively label dissenting viewpoints, viewpoints are easily chilled. With the changing college landscape, it is time for the court to revisit the matter, renew its commitment to the constitutional mandate in favor of academic freedom, and assure that the most critical "marketplace of ideas" remains sacred and thrives.

II. The Standing Threshold for a Pre-enforcement First Amendment Challenge is Relaxed and Easy to Satisfy.

This Court's and this nation's tradition of protecting speech in the academic setting is but one of two broad principles that favor review and reversal. The second is the relaxed standard that applies to the injury inquiry for purposes of Article III standing in the context of a pre-enforcement First Amendment challenge. As Justice Brandeis explained in his famous *Whitney v. California* concurrence, "[i]t is therefore always open to Americans to challenge a law abridging free speech and assembly[.]" 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

A diverse set of circuits have applied this very principle regarding a flexible standing analysis to the Bias Response Team setting. *See Menders v. Loudoun Cnty. Sch. Bd.*, 65 F.4th 157, 164 (4th Cir. 2023) (describing standard for demonstrating standing on First Amendment chilled speech claim as "not that demanding"); *Fenves*, 979 F.3d at 331 ("It is not hard to sustain standing for a

pre-enforcement challenge in the highly sensitive are of public regulations governing bedrock political speech."); *Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1173–75 (9th Cir. 2022) ("We apply the requirements of . . . standing less stringently in the context of First Amendment claims." (brackets and internal quotation marks omitted)); *Rio Grande Found. v. City of Santa Fe*, 7 F.4th 956, 959 (10th Cir. 2021) (describing the Article III standing test for a pre-enforcement First Amendment challenge as "relatively relaxed"). Furthermore, "[w]hen dealing with pre-enforcement challenges to recently enacted (or, at least, non-moribund) statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence." *Fenves*, 979 F.3d at 331 (quoting *N.H. Right to Life PAC v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996), and citing, among other authority, *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 237–39 (3d Cir. 2010); *Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1006–07 (9th Cir. 2003); *N.C. Right to Life Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999)).

This Court has done nothing to dissuade use of this flexible standard. Rather, it has recognized the "sensitive nature of constitutionally protected expression," and the unique challenges presented by standing in the First Amendment context. *Dombrowski v. Pfizer*, 380 U.S. 479, 486 (1965); *see also Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392–93 (1988). Along these lines, the Court has made clear that a would-be litigant "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Doe v. Bolton*, 410 U.S. 179, 188 (1973); *see also Steffel v. Thompson*, 415 U.S. 452, 459 (1974). Now, the Court should take the next step, grant

certiorari, and clearly apply the flexible standard within the context of defining what qualifies as a punishment capable of supporting an Article III injury for purposes of a First Amendment pre-enforcement challenge.

III. As Several Circuit Have Held, Coercion, Intimidation, and Pejorative Labels by Bias Response Teams Establish an Article III Injury.

If a government regulation chills constitutionally protected speech and causes self-censorship, it renders injury for purposes of the Article III standing inquiry. *Susan B. Anthony List*, 573 U.S. at 158–59. Bias response teams operate in two ways to chill speech—they (1) use coercion and intimidation by intimating at consequences and (2) punish speakers by labeling them "biased." "hateful," "uncivil," etc.

A. Credible Chill Through Coercion and Intimidation.

While, as discussed next, Bias Response Teams do punish students, a plaintiff advancing a pre-enforcement First Amendment challenge to government action need not demonstrate that he is subject to punishment to establish the objective reasonableness of the chill. *See Cartwright*, 32 F.4th at 1120 (recognizing that no formal punishment is required to establish objective nature of chill and result in a reasonable person self-censoring); *Schlissel*, 939 F.3d at 764 ("That an official or regulator lacks actual authority to punish an individual, although relevant to the question of concrete harm, is not dispositive." (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68 (1963); *Okwedy v. Molinari*, 331 F.3d 339, 344 (2d Cir. 2003); *Levin v.*

Harleston, 966 F.2d 85, 88–89 (2d Cir. 1992))). Rather, where a governmental body uses "coercion, persuasion and intimidation" in the course of "set[ting] about to achieve the suppression of [constitutionally protected speech]," the chill is real. *Bantam Books, Inc.*, 372 U.S. at 67; *see also Cartwright*, 32 F.4th at 1123 (recognizing that "an impermissible type or degree of pressure" can be sufficient to chill speech and support an Article III injury (quoting *Okwedy*, 331 F.3d at 343)). A government action, statement, or policy that unduly "chill[s] speech" is "in direct contravention of the First Amendment's dictates." *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 794 (1988). In this sense, "informal censorship" may be sufficient to "inhibit" constitutionally protected speech and inflict an Article III injury. *Bantam Books, Inc.*, 372 U.S. at 67.

Members of this Court have recognized the application of this concept from *Bantam Books* to the context of college Bias Response Teams and the indirect means by which these Teams objectively chill speech. *See Sands*, 144 S. Ct. at 676 (Thomas, J., dissenting)[2] ("'The threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation' may cause self-censorship in violation of the First Amendment just as acutely as a direct bar on speech." (quoting *Bantam Books, Inc.*, 372 U.S. at 67)). Lower courts have likewise held that Bias Response Teams "act[] by way of implicit threat of punishment and intimidation to quell speech." *Schlissel*, 939 F.3d at 765; *see also Fenves*, 979 F.3d at 338 (reporting policies governing Bias Response teams "carr[y] particular overtones of intimidation to students whose views are 'outside the mainstream.'").

2. Justice Alito joined Justice Thomas's statement.

Bias Response Teams present themselves to an accused student, or in their words a "target[],"[3] with the offer of a meeting to investigate the matter, all the while often holding the power to refer the matter to a higher authority, such as a university body for a Student Code of Conduct violation or the police. *Sands*, 144 S. Ct. at 677 (Thomas, J., dissenting) ("[E]ven if the [accused student] is not technically required to accept the team's invitation to meet, it is hard to believe a college student could so easily ignore a university official's request, especially when the report will be filed and the 'referral power lurks in the background of the invitation.'" (quoting *Schlissel*, 939 F.3d at 765)); *Fenves*, 979 F.3d at 338. In this respect, Bias Response Teams "represent the clenched fist in the velvet glove," *Fenves*, 979 F.3d at 338, and the reasonable youthful college-aged student could not turn down such a meeting, *cf. Cartwright*, 32 F.4th at 1124 (noting the increased coercion Bias Response Teams present given the youthful and less sophisticated nature of the teenage and young adult population that makes up college student bodies).

B. Pejorative Labels are a Form of Punishment.

Even though a plaintiff raising a pre-enforcement First Amendment challenge need not demonstrate he suffered a punishment to satisfy the Article III injury standard, Bias Response Teams do inflict punishments on the students they investigate. "Punishment" is defined as "suffering, pain, or loss that serves as retribution" and "severe, rough, or disastrous treatment." "Punishment,"

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3. *See Fenves*, 979 F.3d at 338 (noting that Bias Response Team policy labeled accessed students as "targets.").

Merriam-Webster Online Dictionary (available at https://www.merriam-webster.com/dictionary/punishment)

Outside of the Bias Response Team context, courts have recognized that labels that are "calculated to give[] a negative impression" are one way of punishing speakers. *Gralike v. Cook*, 191 F.3d 911, 918 (8th Cir. 1999); *see also Miller v. Moore*, 169 F.3d 1119, 1125 (8th Cir. 1999); *Ibanez v. Albemarle Cnty. Sch. Bd.*, 897 S.E.2d 300, 344–46 (Va. Ct. App. 2024) (Humphreys, J., concurring in part and dissenting in part). Cases specific to Bias Response Teams demonstrate that students against whom a report is filed are labeled as or, if they do not cooperate, face the label of "offensive," "hostile," "harmful," "hateful," and "targets." *Cartwright*, 32 F.4th at 1124; *Fenves*, 979 F.3d at 338.

No reasonable college student wants to be branded as intolerant or biased. In fact, as aptly pointed out by the Sixth Circuit, "the very name 'Bias Response Team' suggests that the accused student's actions have been prejudged to be biased." *Schlissel*, 939 F.3d at 765.

Contrary to the Seventh Circuit's position, a majority of circuits have concluded that students do face punishment if their speech results in a fellow classmate filing a complaint with a Bias Response Team. *See Cartwright*, 32 F.4th at 1124; *Schlissel*, 939 F.3d at 765; *see also Menders*, 65 F.4th at 164–66 (bias reporting process in middle and high school that allegedly labeled students as having engaged in microaggressions for defending colorblindness sufficient to chill speech and render Article III injury). This is particularly true for the college-student population given what is at stake both in terms of reputation and career

opportunities. To this point, "[n]obody would choose to be considered biased, and an individual could be forgiven for thinking that inquiries from and dealings with the Bias Response Team could have dramatic effects such as currying disfavor with a professor, or impacting future job prospects." *Schlissel*, 939 F.3d at 765.

The reasonable college student is justified to believe he will face suffering, loss, and rough treatment were he to be the target of a Bias Response Team investigation. As such, Bias Response Teams do punish those who express controversial views and, therefore, do objectively chill speech. In turn, a student or student organization can allege a sufficient injury to challenge a Bias Response Team.

CONCLUSION

This Court came close to addressing the pressing matter of the impact of Bias Response Teams on free speech in the academic setting in *Speech First, Inc. v. Sands*. While a vehicle issue deterred review in *Sands*, this case presents a clean and clear opportunity for the Court to address the issue. Thus, for the reasons stated in the Petition for Writ of Certiorari and this amicus curiae brief, this Court should grant the writ of certiorari.

Respectfully submitted,

Braden H. Boucek
Counsel of Record
Kimberly S. Hermann
Southeastern Legal Foundation
560 West Crossville Road, Suite 104
Roswell, GA 30075
(770) 977-2131
bboucek@southeasternlegal.org

Counsel for Amici Curiae

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