19-2807

United States Court of Appeals for the Seventh Circuit

Speech First, Inc.,

Plaintiff-Appellant,

v.

Timothy L. Killeen, In His Official Capacity as President of the University of Illinois, et al.

Defendants-Appellees,

On Appeal from the United States District Court
for the Central District of Illinois
Case No. 3:19-cv-3142 (Bruce, J.)

BRIEF OF *AMICUS CURIAE* LIBERTY JUSTICE CENTER IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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November 5, 2019

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November 5, 2019 /s/ Jeffrey M. Schwab

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INTEREST OF THE AMICI CURIAE[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation center located in Chicago, Illinois that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights. *See, e.g., Janus v. AFSCME,* 138 S. Ct. 2448 (2018).

This case interests *amicus* because the right to speak is fundamental, and the need for free inquiry is at its most vital on university campuses.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Official sanction is inherent in the power of officials. Whether they use their official station to exact punishment, or decline to, the invocation of authority against speech which they disapprove of is itself official action designed to chill disfavored speech. The court below disregarded this chilling effect, holding that an arm of a state university expressly designated to police the protected speech of students could not be challenged because it did not impose formal sanctions. This Court should reverse and, joining Sixth Circuit, recognize the injury inherent in a "formal investigative process, which itself is chilling even if it does not result in a finding of responsibility or criminality." *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019).

[1] Fed. R. App. P. 29 statement: All parties consented to the filing of this brief, and no counsel for any party authored any part of this brief, and no person or entity other than *amici* funded its preparation or submission.

To that end, *amicus* submits this brief in order to better articulate the damage that Bias Response Teams are inflicting on the cause of free inquiry at American universities. These "teams" are deputized by universities not to facilitate dialog, but to limit it, with the goal to "prescribe what shall be orthodox." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Some of the speech the "bias" teams wish to stifle *amicus* agrees with, some *amicus* disagrees with, and some *amicus* finds repulsive. Yet all are protected under the First Amendment, and adherence to that amendment's values is of heightened importance in the college context. As Chief Justice Warren explained:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and 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 v. New Hampshire, 354 U.S. 234, 250 (1957).

Amicus therefore submits that the judgement below should be reversed, and Speech First should be allowed to proceed on their claim challenging the chilling effect of bias response teams.

ARGUMENT

Bias Response Teams are a significant and widespread danger to First Amendment freedoms.

As of 2016, at least 231 universities, charged with educating more than 2.84 million students, employed Bias Response Teams to police their student's speech.

Foundation for Individual Rights in Education (FIRE), *Bias Response Team Report 2017*, https://www.thefire.org/research/publications/bias-response-team-report-2017. How these Teams define "bias" varies across institutions, as caprice is inherent in the endeavor, but many explicitly curtail expression of political disagreement: "14% of institutions include 'political affiliation' among their categories of bias. Still others include bias against similar categories such as "intellectual perspective" (University of Central Arkansas), "political expression" (Dartmouth), or "political belief" (University of Kentucky)." *Id.* Going further,

> "Many policies include catch-all categories of bias—e.g., "other" biases. In such cases, the definition of a bias incident encompasses not only protected speech, but also any speech that offends anyone for any reason. The net effect is that broad definitions of "bias" invite reports of any offensive speech, whether or not it is tethered to a discernable form of bias, thereby inviting scrutiny of student activists, organizations, and faculty engaged in political advocacy, debate, or academic inquiry."

Id.

In the case at bar, the University of Illinois indulges in just such a catch-all. The Bias Team's website defines its targets as "actions or expressions that are motivated, at least in part, by prejudice against or hostility toward a person (or group) because of that person's (or group's) actual or perceived age, disability/ability status, ethnicity, gender, gender identity/expression, national origin, race, religion/spirituality, sexual orientation, socioeconomic class, *etc.*" University of Illinois Bias Assessment and Response Team, *About the Team*, https://bart.illinois.edu/team (emphasis added). Such open-ended accruals of authority by an investigative agency represent an effort not to enlighten or educate,

but to chill dissent by leaving all speech potentially subject to official disapproval. *See Dombrowski v. Pfister,* 380 U.S. 479, 494 (1965) (vague definitions of proscribed conduct chill speech).

And this authority granted to Bias Response Teams is often employed to stifle protected speech. At the University of Wisconsin—La Crosse, "bias incidents" have run the gamut from vulgar bathroom graffiti, to common political slogans such as "Trump 2016," to a Christian group's use of a cross on their poster—this most common symbol of the Christian faith ostensibly created an "unsafe" environment for gay and lesbian students. Nathan Hansen, "Students use UW-L bias/hate system to report everything from Christian posters to offensive images," La Cross Tribune, September 26, 2016, https://lacrossetribune.com/news/local/students-use-uw-l-bias-hate-system-to-report-everything/article_759c0e01-e64e-5aa4-bb29-4e7236d4f5f8.html. At Emory University, chalk declaring "Trump 2016" was likewise investigated as a "bias" incident, with the President of the University affirming that the culprits would be sought out and "'If they're students,' he said, 'they will go through the conduct violation process.'" Jeffrey Aaron Snyder and Amna Khalid, "The Rise of "Bias Response Teams" on Campus", *The New Republic*, March 30, 2016, https://newrepublic.com/article/132195/rise-bias-response-teams-campus. At Appalachian State University on the other hand, one student filed a bias report because he was "offended by the politically biased slander that is chalked up everywhere reading 'TRUMP IS A RACIST.'" FIRE, *Bias Response Team Report, supra*.

The supposed informality of 'bias' policing, which the University in this case wishes to invoke to absolve its policy, is an obfuscation that does not reflect the facts on the ground. One study, which surveyed bias team members at 17 colleges, found that "most of the teams spend relatively little time on their primary stated functions—trying to educate the campus community about bias—and instead devote their efforts mainly to punishing and condemning the perpetrators of specific acts." Peter Schmidt, "Colleges Respond to Racist Incidents as if Their Chief Worry Is Bad PR, Studies Find," The Chronicle of Higher Education, April 21, 2015, https://www.chronicle.com/article/Colleges-Respond-to-Racist/229517/ (reporting a study by Texas academics presented at the 2015 conference of the American Educational Research Association). While they officially disclaimed authority to punish, "many team leaders nonetheless discussed their activities using terms associated with criminal-justice work. They spoke of the 'victim,' the 'perpetrator,' and the 'offender,' and talked about holding individuals accountable for specific actions." *Id.* And far from being a forum for dialog, the "process by which they dealt with complaints often mimicked the procedures of campus police or judicial bodies, even in the absence of violations of the law or campus policies." *Id.* This is not the benign counseling program the University now portrays.

Nor are 'bias' incidents treated as simply opportunities for dialog, lacking the threat of punishment. When some students at Bowdoin College threw a juvenile "fiesta," featuring tequila and sombreros, the punishment for their wrongthink was swift indeed: the students were forced to move out of their dorm, banned from

various college social events, and forced to attend mandatory reeducation sessions. Editorial, "Out of Focus," *The Bowdoin Orient*, March 4, 2016, https://bowdoinorient.com/bonus/article/11035. The Vice Chancellor of the University of California, Santa Barbara, as part of her announcement of the creation of a Bias Response Team, encouraged students to report "bias incidents" to campus police. Jason Garshfield, "UCSB Bias Response Team Speaks Volumes About Free Speech," *The Bottom Line*, December 12, 2015, https://thebottomline.as.ucsb.edu/2015/12/ucsb-bias-response-team-speaks-volumes-about-free-speech. And lest one think such "bias incidents" are limited to white supremist vandalism, the University of California publishes an official list of examples of what it deems biased "microaggressions," including asking things like "Where are you from or where were you born?" and saying that "America is a melting pot" or "the land of opportunity." *Id.*

Santa Clara University's now-revised Bias Incident Reporting policy, which defined a "Bias Incident" as "a speech, act, or harassing action that targets, threatens, or attacks an individual or group because of their actual or perceived race, color, national origin, ethnicity, religious affiliation, sex, gender identity, disability, or sexual orientation," instructed students that "If the bias incident is in progress or just occurred: **ALWAYS CALL 911 IMMEDIATELY**." *Bias Incident Reporting*, Santa Clara University, Archived as of June 11, 2015, available at http://web.archive.org/web/20150611154725/http:/www.scu.edu/provost/diversity/education_training/biasincidentreporting.cfm (emphasis in original). The University

has since had the minimal good sense to rewrite this policy and remove the reference to 911, instead giving students multiple options to report their "bias" incident, from calling campus security to using an online reporting form. *Bias Incident Reporting*, Santa Clara University, https://www.scu.edu/diversity/initiatives-and-reports/bias-incident-reporting.

If one doubts the extent to which these anti-"bias" initiatives target speech, one need only consult the ways in which they have reacted to events *about freedom of speech*. For instance, a poster at the University of Minnesota advertised a panel discussion about speech and censorship in the wake of the *Charlie Hebdo* massacre. Given the subject of the event, the poster included an image of one of *Charlie Hebdo*'s magazine covers depicting the Prophet Mohammed. In response to an event about free expression inspired by then-recent events of serious public concern, "the university's Equal Opportunity and Affirmative Action office held a formal investigation and concluded that 'university members should condemn insults made to a religious community in the name of free speech.'" Snyder and Khalid, "The Rise of 'Bias Response Teams'", *supra*.

The policing of "bias" extends into the classroom as well, undermining the university's role as a forum for developing and engaging with ideals. At the University of Colorado, a professor was visited by the Bias Response Team for daring to encourage a classroom discussion regarding contemporary transgender issues. Adam Steinbaugh and Alex Morey, "Professor Investigated for Discussing Conflicting Viewpoints, 'The Coddling of The American Mind,'" FIRE, June 20,

2016, https://www.thefire.org/professor-investigated-for-discussing-conflicting-viewpoints-the-coddling-of-the-american-mind/. According to the report, the professor was advised to avoid discussing transgender issues in his classroom. *Id.* Another professor was investigated for encouraging his students to think critically and debate rhetoric and ideas related to gay rights. *Id.* In that case, a student complained that students should not be required to listen to arguments from opponents of gay marriage. *Id*. That critical thinking and debate are now treated as a danger to the college community, rather than its *raison d'etre*, should give this Court pause before it rubber stamps the University of Illinois' policy.

The scope of what constitutes "bias" at a contemporary university envelopes everyday life, elevating even the most minor events to matters of official concern. At the University of Michigan, a snow-man style amateur sculpture was reported as a bias incident because the offended student deemed that the work reminded her of a phallus. Erin Dunne, "Snow Penis Reported as Bias-Incident," *The Michigan Review*, February 25, 2016, http://www.michiganreview.com/snow-penis-reported-as-bias-incident/. At Colby College, a student was reported for bias after using the phrase "on the other hand," which apparently is now deemed "ableist." FIRE, Bias Response Team Report, *supra.* At the University of Wisconsin-Platteville, students were reported for dressing as the "Three Blind Mice" of nursery rhyme fame on Halloween, because someone somewhere might think the purpose of such a costume was not nostalgia for Mother Goose but rather to mock people with disabilities. *Id.*

Even if one were to write off the absurdity described above, and limit the

policing of "bias" to incidents of discrimination that all parties would agree are distasteful, such a limitation would not save Bias Response Teams. This more limited version of "bias" would still be a fundamentally content-based policy, creating categories of approved and disapproved viewpoints that cannot survive First Amendment scrutiny. The government cannot discriminate on the basis of viewpoint in the name of rooting out discrimination. *See Am. Booksellers Assoc. v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985) (striking down an ordinance, which banned pornography that "subordinate[d]" women, as "thought control"). The government cannot ban or punish speech simply because it expresses repulsive views regarding certain ostensibly vulnerable classes of people. *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969). And once the policing of bias writ-large is allowed, there is no reason to believe it won't be used against the very groups its advocates wish to protect—as occurred at John Carroll University, where a bias charge recorded that "Anonymous student reported that African-American Alliance's student protest was making white students feel uncomfortable." Snyder and Khalid, "The Rise of 'Bias Response Teams,'" *supra*. This Court should take the opportunity to clarify that the First Amendment is not to be subordinated to the will of administrators seeking to punish students for impure thoughts.

Finally, this Court should also join the Sixth Circuit in stating clearly that the informal nature of the reprimand issued by a bias team makes it no less unconstitutional. "This states the obvious, but the possibility the Government could have imposed more draconian limitations on speech never has justified a lesser

abridgment. Indeed, such an argument almost always is available; few of our First Amendment cases involve outright bans on speech." *Denver Area Educ. Telcoms. Consortium v. FCC*, 518 U.S. 727, 809 (1996) (Kennedy, J., concurring/dissenting). A government agency that operates through the "informal censorship" of notice letters or classifications still violates the First Amendment by chilling speech through official opprobrium. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963) (notice letters); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 n.8, 95 S. Ct. 1239, 1245 (1975) (classification). Such a system meets the 7th Circuit's definition of censorship: "an effort by administrative methods to prevent the dissemination of ideas or opinions thought dangerous or offensive." *Backpage.com, LLC v. Dart*, 807 F.3d 229, 235 (7th Cir. 2015) (quoting *Blue Canary Corp. v. City of Milwaukee*, 251 F.3d 1121, 1123 (7th Cir. 2001)). These bias policies, paired with teams responsible for implementation, constitute the academic equivalent of the informal censorship and threatening notices found unconstitutional by the Supreme Court in *Bantam Books* and by this circuit in *Backpage.com*.

CONCLUSION

For the reasons stated above, and those given by Speech First in its own brief, the decision below should be reversed.

November 5, 2019

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Seventh Circuit Rule 29 because it contains 2448 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Seventh Circuit Rule 32(b) and the type style requirements of Fed. R. App. P. 32(a)(6) and Seventh Circuit Rule 32(c) because it was prepared using Word 2016 and uses a proportionally spaced typeface, Century Schoolbook, in 12-point type for body text and 11-point type for footnotes.

November 5, 2019

/s/ Jeffrey M. Schwab

CERTIFICATE OF SERVICE

On November 5, 2019, I filed this *Brief of Amicus Curiae Liberty Justice Center in support of Plaintiff-Appellant and Reversal*, using the CM/ECF System, which will send a Notice of Filing to all counsel of record.

November 5, 2019

/s/ Jeffrey M. Schwab