

No. 21-12583

**In the United States Court of Appeals
for the Eleventh Circuit**

SPEECH FIRST, INC.,
Plaintiff-Appellant,

v.

ALEXANDER CARTWRIGHT,
in his personal capacity and official capacity as
President of the University of Central Florida,
Defendant-Appellee.

Appeal from the U.S. District Court for the Middle District of Florida
Civil Case No. 6:21-cv-313 (Gregory A. Presnell)

**BRIEF OF *AMICI CURIAE*
INDEPENDENT WOMEN'S LAW CENTER &
AMERICAN COUNCIL OF TRUSTEES AND ALUMNI
IN SUPPORT OF PLAINTIFF-APPELLANT
SUPPORTING REVERSAL**

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SEPTEMBER 15, 2021

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to the Eleventh Circuit rules, the following persons and corporation have an interest in the outcome of this appeal:

1. American Council of Trustees and Alumni
2. Independent Women's Law Center, a project of the Independent Women's Forum
3. Braceras, Jennifer
4. Jaffe, Erik S.
5. Klukowski, Kenneth A.
6. SCHAERR | JAFFE LLP

Pursuant to Eleventh Circuit rules, *amici* state that neither do they have a parent corporation, nor does a publicly held corporation hold 10% or more of their stock. The Independent Women's Forum and the American Council of Trustees and Alumni are 501(c)(3) non-profit organizations.

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STATEMENT OF INTEREST¹

Amicus curiae the American Council of Trustees and Alumni (ACTA) is an independent, nonprofit 501(c)(3) organization committed to academic freedom, academic excellence, and fiscal accountability at America's colleges and universities. ACTA works with alumni, donors, trustees, policymakers, and campus leaders across the United States to support liberal arts education, uphold high academic standards, safeguard the free exchange of ideas on campus, and ensure that the next generation receives an intellectually rich, high-quality college education at an affordable price. ACTA has a long history of advocating for an open and engaging marketplace of ideas in the American academy—at trustee conferences, in state houses, in opinion editorials, and in best practices guides for campus leaders in higher education.

Amicus curiae Independent Women's Law Center is a project of Independent Women's Forum (IWF), a nonprofit, nonpartisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic policy issues. Independent Women's Law Center is committed to expanding educational opportunity, individual liberty, and access to the marketplace of ideas. Independent

¹ Appellant has consented to the filing of this brief. Appellee did not consent, and *amici* have accordingly moved for leave of court to file. No counsel for any party authored any part of this brief, and no person or group, other than *amici* and their counsel, financially contributed to the writing or submission of this brief.

Women’s Law Center respectfully submits this brief in support of Speech First out of concern that bias response teams have a chilling effect on speech and the free exchange of ideas on campus.

SUMMARY OF ARGUMENT

Bias response teams, such as those employed by the University of Central Florida, have normalized the idea that it is appropriate for an academic institution to investigate speech that falls outside the campus’s political orthodoxy. It is not.

By threatening administrative sanction or “intervention” for speech (whether outside or inside the classroom) that causes subjective offense—regardless of intent—such committees unconstitutionally chill student speech.

A growing body of empirical survey research, including campus-specific surveys, demonstrates that students self-censor out of fear of reprimand, punishment, and social stigma. Where students are fearful that uttering the wrong words could trigger a burdensome intervention, the very mission of the American university—learning through the free exchange of ideas—is at risk. The desire to discourage offensive speech, however laudable, cannot justify overbroad policies and ambiguous punitive frameworks that deter the spirit of bold inquiry critical to a truly liberal education.

ARGUMENT AND CITATIONS OF AUTHORITY

I. Students at American Colleges and Universities Today Are Not Free to Discuss Issues of Social or Political Policy Without Risk of Formal or Informal Sanction.

Public institutions have a duty to establish policies that protect a free and open marketplace of ideas because “[t]he vitality of civil and political institutions in our society depends on free discussion.” *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). Nowhere is the vigilant protection of such freedoms more vital than in the community of American higher education. *Healy v. James*, 408 U.S. 169, 180 (1972). And yet, many campuses around the country effectively stifle free and open discussion about controversial subjects. This is true even where campus policies do not expressly forbid disfavored viewpoints or formally punish those who express them. An ocean of survey data and anecdotal evidence demonstrate that campus culture is one in which speakers are routinely shouted down, political bias is rampant, and members of the community with dissenting political opinions are afraid to reveal their views.

A. Too Many Students Now Approve of Disrupting Speakers and Support the Use of Vandalism and Violence to Silence Those with Whom They Disagree.

A 2020 survey of almost 20,000 students commissioned by the Foundation for Individual Rights in Education (FIRE) found that large numbers of students lack confidence in the administration’s commitment to free speech. Asked what the

“administration [would] be more likely to [do]” faced with a “controversy over offensive speech,” 42% said “punish the speaker” compared to 57% who said “defend the speaker’s right to express their views.”² In other words, almost half of students believe their university would punish a speaker for expressing a viewpoint that caused a campus controversy.

The FIRE survey also found reason to think such controversies will continue to be frequent occurrences. Large numbers of students approve of efforts to disruptively protest campus speakers, including 27% who believe it “always” (4%) or “sometimes” (23%) acceptable to engage in shout downs to “prevent [a speaker] from speaking on campus” and an alarming 18% who approve of violence to “stop a speech or event on campus” under some circumstances (1% said it is “always” acceptable, 3% said “sometimes,” and 13%, “rarely”).³ The FIRE study is only one of the more recent studies in a deep pool of public opinion research detailing the grim state of intellectual freedom on American college campuses. In a 2018 national survey of over 4,400 full time college students commissioned by the Knight Foundation, a majority approved of silencing speakers at least some of the time. A

² FIRE, College Pulse, and RealClearEducation, *2020 College Free Speech Rankings*, 3, <https://www.thefire.org/research/publications/student-surveys/2020-college-free-speech-rankings/2020-college-free-speech-rankings-view-rankings/> [hereinafter FIRE, *Speech Rankings*].

³ *Id.* at 22.

total of 86% of students surveyed by Knight answered that it is “always” (27%) or “sometimes” (59%) acceptable to engage in sit-ins or “similar attempts to disrupt campus operations,” and 51% answered that it is “always” (6%) or “sometimes” (45%) acceptable to shout down speakers or otherwise “prevent them from talking.”⁴

Given such hostility to free speech, it is hardly surprising that disinvitations, disruptions, and violent campus protests have prevented or otherwise interfered with open discussion of mainstream policy issues around the country in recent years. High profile disruptions have occurred at lectures by Heather MacDonald on police shootings at UCLA and Claremont McKenna College, Charles Murray on problems facing the white working class at Middlebury College and the University of Michigan, and Christina Hoff Sommers on feminism at Lewis & Clark Law School. But these are only some of the most well-known examples. FIRE reports that there have been more than 470 instances since 2000 in which invited speakers, often quite eminent figures, like Secretary of State Condoleezza Rice and Christine Lagarde, were discouraged from coming to campus. Other examples involved women’s rights

⁴ Knight Foundation & College Pulse, *Free Expression on College Campuses*, 4 (May 2019), <https://tinyurl.com/y4fjn792>.

activist Ayaan Hirsi Ali and European Parliament member Ryszard Legutko, in which the institution explicitly withdrew the invitation.⁵

In addition to attempting to silence invited speakers, students have resorted to vandalism to squelch the speech of faculty members. When Sarah Lawrence College Professor Samuel Abrams pointed out the ideological imbalance on college campuses in a *New York Times* opinion piece, students punished his dissent from orthodoxy by vandalizing his office door.⁶ Similarly, students upset by the participation of Harvard Law School Professor Ronald Sullivan in the Harvey Weinstein defense team vandalized a university building with graffiti aimed at Professor Sullivan.⁷ Events of this nature reinforce in the minds of students that there can be consequences for dissenting from the prevailing orthodoxy.

⁵ See FIRE, Disinvitation Database, https://www.thefire.org/research/disinvitation-database/#home/?view_2_page=1&view_2_per_page=1000 (last visited Nov. 4, 2019).

⁶ Scott Jaschik, *Vandalism Follows Professor's Critique on Ideology*, INSIDE HIGHER ED. (Nov. 5, 2018), <https://www.insidehighered.com/quicktakes/2018/11/05/vandalism-follows-professors-critique-ideology>.

⁷ Jan Ransom & Michael Gold, *'Whose Side Are You On?': Harvard Dean Representing Weinstein Is Hit with Graffiti and Protests*, N. Y. TIMES (Mar. 4, 2019), <https://www.nytimes.com/2019/03/04/nyregion/harvard-dean-harvey-weinstein.html?module=inline>.

B. Faculty Admit to Discriminating Against Conservative Colleagues.

It is not just students who have expressed a willingness to police campus speech. Researchers have shown that faculty routinely allow their political biases to affect their professional behavior and deliberately suppress viewpoints that are unpopular in the faculty lounge. According to a recent study of academic philosophers, over 30% of left-leaning respondents admitted a “willingness to discriminate” against a right-leaning paper in the peer-review process, about 40% admitted a “willingness to discriminate” against right-leaning grants and symposia, and over 55% admitted a “willingness to discriminate” against a right-leaning faculty hire.⁸

In another study, significant numbers of social psychologists admitted to being “somewhat (or more) inclined to discriminate against conservatives” when inviting colleagues to symposia (14.0%), reviewing their papers (18.6%), reviewing grant applications (23.8%), and making hiring decisions (37.5%).⁹ Anecdotal evidence suggests that this political bias leads those with conservative viewpoints to self-censor. In fact, at a gathering of approximately 1,000 social psychologists, only three were willing to identify themselves as conservative when asked to do so by a

⁸ Uwe Peters, et al., *Ideological Diversity, Hostility, and Discrimination*, 33 PHIL. PSYCH. 511, 523 (2020).

⁹ Yoel Inbar & Joris Lammers, *Political Disparity in Social and Personal Psychology*, 7 PERSP. ON PSYCH. 496, 500 (2012).

show of hands. Respondents in the Peters study identified their personal reasons for self-censoring. One respondent said, “If my professional colleagues knew that I am moderately right-wing then half of them would call me a ‘subhuman pig’ and treat me accordingly.”¹⁰ Another put it this way: “Comments and jokes about those on the right are frequent, and this makes it difficult to gauge the true balance of opinion as any right-leaning individual is likely to remain quiet.”¹¹ A third respondent expressed reluctance to discuss a controversial idea for which there is considerable empirical evidence: “I suspect that men and women are predisposed to have different interests, and that this accounts for the disparities in gender ratios across disciplines/professions. Yet this view is not one I am able to voice openly[.]”¹²

These studies demonstrate that conservative faculty members have strong professional incentives to censor their speech. As Inbar and Lammers conclude, the climate of hostility to diverging viewpoints found on campuses “offers a simple explanation of why conservatives hide their political opinions from their colleagues.”¹³

¹⁰ Peters, *supra* note 8, at 532.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Inbar & Lammers, *supra* note 9, at 501.

C. Conservative Students Routinely Self-Censor Out of Fear of Faculty Bias and Many Students Are Afraid to Have Open Conversations about Controversial Issues.

If conservative professors are under pressure not to espouse conservative viewpoints, that pressure can only be more acute for students. First, it is well known that university faculties lean left. Second, faculty members have a huge impact on student success in higher education.

The most comprehensive study to date found that 59.9% of faculty across disciplines self-identify as “liberal” or “far left,” compared to 12.1% who identify as “conservative” or “far right.”¹⁴ The imbalance is even more acute in social science and humanities disciplines. A study of faculty voter registration at 40 top universities found registered Democrat to registered Republican ratios as high as 60 to 1.¹⁵ Another study found that, from a sample of 8,688 tenure track, Ph.D.-holding professors from 51 of the top 66 liberal arts colleges in the U.S. News 2017 report, “78.2 percent of the academic departments” surveyed “have either zero Republicans, or so few as to make no difference.”¹⁶ Among university administrators—responsible for most co-curricular programming, disciplinary proceedings, housing

¹⁴ Ellen B. Stolzenberg, *et al.*, *Undergraduate Teaching Faculty: The HERI Faculty Survey 2016–2017*, 17 (2019).

¹⁵ Mitchell Langbert, *et al.*, *Faculty Voter Registration in Economics, History, Journalism, Law, and Psychology*, 13 *ECON J. WATCH* 422, 424 (2016).

¹⁶ Mitchell Langbert, *Homogenous: The Political Affiliations of Elite Liberal Arts College Faculty* (Summer 2018), <https://tinyurl.com/y5dg3e2k>.

policies, and institutional diversity policies and programming—the imbalance is similarly lopsided: Only 6% of campus administrators identified as conservative to some degree, while 71% classified themselves as liberal or very liberal.¹⁷

Given that conservative faculty members, many protected by academic tenure, feel compelled by such imbalance to self-censor in a university setting, the pressure on students to self-censor can only be higher. Not only does the predominately liberal faculty set the intellectual tone of a university, they also have a significant impact on a student’s success. Professors determine students’ grades, control scholarship and research funds, open doors to law schools, medical schools, and graduate schools with their letters of recommendation, and can support or impede students’ academic and career success in myriad other ways.

This common-sense intuition is supported by ample survey data suggesting that college students across the country are self-censoring out of fear of reprimand or reprisal on campus. No wonder that 55% of student respondents said they are “somewhat” (33%) or “very uncomfortable” (22%) “publicly disagreeing with a professor about a controversial topic” in the 2020 FIRE survey of almost 20,000 current students.¹⁸ A 2019 ACTA-IWF survey of over 2,100 current college students

¹⁷ Samuel J. Adams, *Think Professors Are Liberal? Try School Administrators*, N.Y. TIMES (Oct. 16, 2018), <https://www.nytimes.com/2018/10/16/opinion/liberal-college-administrators.html>.

¹⁸ FIRE, *Speech Rankings*, *supra* note 2, at 53.

found that 61% of those surveyed answered that they had stopped themselves from expressing an “opinion on sensitive political topics in class because of concerns [a] professor might disagree with them” at least occasionally, while 39% of students answered that they do so “often” (13%) or “sometimes” (26%). Among students who identify as strong Republicans, the figure rises to 81%, with 32% self-censoring in class “often,” 36% “sometimes,” and 13% “occasionally.”¹⁹ A 2017 YouGov survey is similarly disturbing. YouGov questioned 1250 undergraduates and found that a majority (54%) “agree that they have stopped themselves from sharing an idea or opinion in class at some point since beginning college.”²⁰ The same survey revealed that “very conservative” students were 21% less likely than their “very liberal” peers to feel comfortable “expressing opinions outside of the classroom while on campus.”²¹

Although the reasons for self-censorship are no doubt complex, a Heterodox Academy survey from 2017 identifies some of the factors that make students fearful

¹⁹ ACTA and IWF, *Killing Campus Civility and Derailing Civic Dialogue: How Speech Codes and Student Self-Censorship Undermine Political Discourse and Student Fellowship*, forthcoming [hereinafter ACTA & IWF, *Killing Campus Civility*] [data available on request].

²⁰ Kelsey Naughton, ‘*Speaking Freely*’: *What Students Think about Expression at American Colleges*, FIRE (Oct. 11, 2017), <https://tinyurl.com/te5trhpj>.

²¹ *Ibid.*

of speaking up.²² Students in the Heterodox survey were most concerned that other students would find their views on topics such as race, politics, or gender “offensive,” but they were also concerned about the possibility that someone might file a complaint under a “campus harassment policy or code of conduct,” and that professors would “criticize [their] views as offensive” or give them a lower grade because of their views.²³ The 2019 ACTA-IWF survey revealed similar student concerns, with 38% of students answering that they stop themselves “from expressing . . . opinions on sensitive topics on campus because of concerns related to . . . college[] speech policies” at least “occasionally.” Among respondents who identify as strong Republicans, the figure rises to 54% (with 11% doing so “often” and 29% doing so occasionally).²⁴

II. Bias Response Teams, Commonplace on American College Campuses, Have A Chilling Effect on Campus Speech.

A. Bias Response Teams Have Become a Disturbing, But Common, Feature of Campus Life.

Students who fear being reported under a campus code of conduct are not suffering from paranoia. In recent years, campus speech policies, and the

²² Sean Stevens, *The Fearless Speech Index: Who is Afraid to Speak, and Why?*, HETERODOX ACADEMY (July 19, 2017), <https://heterodoxacademy.org/blog/the-fearless-speech-index-who-is-afraid-to-speak-and-why/>.

²³ *Ibid.*

²⁴ ACTA & IWF, *Killing Campus Civility*, *supra* note 19.

administrative bureaucracies that enforce them, have become a widespread part of campus life. Bias response teams—once thought to live only on the pages of dystopian novels or in repressive dictatorial regimes—are today neither unusual nor uncommon. According to a study by FIRE, in 2016 there were at least 231 publicly disclosed bias response teams at four-year and post-graduate institutions—143 of which were at public institutions. FIRE estimated that “at least 2.84 million American students are subject to often-anonymous reporting systems monitored by administrators and police officers.”²⁵

These committees invite members of the community to report comments or statements they subjectively find offensive. Shockingly, but not surprisingly, students commonly report speech on important political topics. Thus, at the University of Oregon a student reported a professor because she found his defense of Brett Kavanaugh’s nomination to the United States Supreme Court to be offensive.²⁶ At Indiana University a teaching assistant filed a complaint because a guest lecturer brought up the 2004 Janet Jackson Super Bowl “Nipplegate” controversy to illustrate the role of the Federal Communications Commission.²⁷ And

²⁵ FIRE, *2017 Bias Response Team Report*, <https://tinyurl.com/y34m2off> (last visited Nov. 4, 2019) [hereinafter FIRE, *2017 Bias Response Team Report*].

²⁶See Christian Schneider, *Bias Teams Welcome the Class of 1984*, WALL ST. J. (Aug. 5, 2019), <https://www.wsj.com/articles/bias-teams-welcome-the-class-of-1984-11565045215>.

²⁷ *Id.*

at Michigan State a student famously reported his roommate for watching a video of conservative commentator Ben Shapiro.²⁸

Students also report trivial comments and jokes that they find offensive. Thus, at Colby College in Maine, one student reported a peer for using the phrase “on the other hand”²⁹—which the school classified as assuming a person’s ability to use two hands and, apparently, marginalizing disabled students. At Portland State University, a student filed a complaint against a woman who jokingly described herself as sometimes being “schizophrenic.”³⁰ And at Yale University, students reported—and Yale began investigating—a student who posted an Instagram photo of a snowy mountain with the caption “All this ICE but no detention centers in sight.”³¹

²⁸ See Robby Soave, *Michigan State Students Filed Bias Incident Reports Over Some Really Petty Things*, REASON (Apr. 4, 2019), <https://reason.com/2019/04/05/michigan-state-students-filed-bias-incid/>

²⁹ See Evan Lips, *Maine College’s Website Offers Glimpse of Which ‘Biases’ Spark Investigations*, NEW BOSTON POST (June 28, 2016), <https://newbostonpost.com/2016/06/28/maine-colleges-website-offers-glimpse-at-which-biases-spark-investigations/>.

³⁰ Schneider, *supra* note 26.

³¹ See Serena Cho, *Santos Email Fuels Free Speech Debate*, YALE DAILY NEWS (Sept. 19, 2019), <https://yaledailynews.com/blog/2019/09/19/santos-email-fuels-free-speech-debate/>.

At some colleges, even looking at someone the wrong way can get you reported to the campus bias committee. At the University of Indiana, a self-identified “trans feminine” student reported a professor for giving the student a “rude look.”³²

As these examples make clear, bias response teams institutionalize surveillance of political and social activity and encourage already hostile students and faculty to complain about their peers for even minor deviations from campus orthodoxy and for common, widely used, turns of speech. As one federal judge noted several years ago, bias reporting structures are “reminiscent of the neighborhood watches that serve as the eyes and ears of totalitarian regimes, much like the *Comites de Defensa de la Revolución* in Castro’s Cuba.”³³ In this way, a bias response team, like the one at issue here, impacts not only those people who are caught in its investigatory web. It impacts all social and academic interactions, thereby poisoning every aspect of campus life.

³² See Schneider, *Bias Teams Welcome the Class of 1984*, *supra* note 26.

³³ José A. Cabranes, *For Freedom of Expression, For Due Process, and For Yale*, *YALE L. & POL’Y REV.* (Jan. 13, 2017), https://ylpr.yale.edu/inter_alia/freedom-expression-due-process-and-yale-emerging-threat-academic-freedom-great-university.

B. Bias Response Teams Have a Chilling Effect on Campus Speech.

i. Bias Response Teams are Set Up for the Very Purpose of Chilling Certain Forms of Speech on Campus.

Despite claims that bias committees merely foster “safe” and “inclusive” campus environments, the entire *purpose* of such reporting structures is to deter expression that some members of the community consider offensive. It is well established that “constitutional violations may arise from the ‘chilling’ effect of governmental regulations that fall short of a direct prohibition against the exercise of first amendment rights.” *Penny Saver Publications, Inc. v. Village of Hazel Crest*, 905 F.2d 150, 154 (7th Cir. 1990). Although the “mere existence” of a broad, intelligence-gathering program does not, “without more,” impermissibly chill speech, *Laird v. Tatum*, 408 U.S. 1, 10 (1972), bias response teams clearly do “more” than collect information.

Most bias response teams have the power to investigate claims, initiate attempts at reconciliation, create a record of the event, condemn behavior or speech, or punish offenders.³⁴ Bias response teams with the power to impose sanctions run afoul of the First Amendment by using state power to punish and deter those with specific viewpoints. But even bias teams that stop short of opening formal investigations or meting out punishment can violate the First Amendment simply by

³⁴ FIRE, *2017 Bias Response Team Report*, *supra* note 25, at 14.

discouraging protected speech. *See Backpage.com, LLC v. Dart*, 807 F.3d 229, 236 (7th Cir. 2015) (A government official can violate the First Amendment even if he “ha[s] no authority to take any official action,” and acts only to indirectly discourage the exercise of First Amendment rights). By condemning insensitive speech, attempting to reconcile the parties, or even talking with students whose speech has caused offense, bias teams raise the social cost of expressing certain viewpoints, thereby creating a chilling effect on constitutionally protected speech.

By subjecting those who dissent from orthodox campus opinion to an onerous and potentially reputation-damaging process, bias response teams at public universities use the power of government to change the ideational climate of the university. This is not simply an incidental effect of efforts to promote inclusivity. This is the *raison d’etre* of bias response teams.

ii. The Structure and Methods Employed by Bias Response Teams Are Implicitly Punitive.

The majority of bias response teams do much more than simply discourage controversial speech—they aim to punish it by way of formal and/or informal sanctions. As a result, the “processes used by bias response teams often mimick[]” the criminal justice system.³⁵ Even when reported incidents did not constitute criminal acts or policy violations, bias response teams often used investigatory

³⁵ Ryan A. Miller, et al., *A Balancing Act: Whose Interests Do Bias Response Teams Serve?*, 42 REV. HIGHER EDUC. 313, 326-27 (2018).

processes similar to those that would be used to investigate serious or criminal misconduct.

To begin with, bias response teams are largely controlled by administrators with the power to punish students and often include representatives of law enforcement, as well as students and faculty.³⁶ In fact, a study of 167 bias response teams conducted by FIRE found that almost half of such teams included administrators with the power to discipline students. Even more troubling is FIRE's finding that over half the bias response teams they examined were staffed with members of law enforcement, creating what FIRE refers to as "'speech police,' in a quite literal sense."³⁷

Moreover, because the work of bias response teams is often driven by public relations concerns and a desire to prove to the community that the campus is doing something about "hate," these teams often "speak the language of crime and punishment."³⁸ Thus, most bias response teams focus on individual acts and working

³⁶ See Jeffrey Aaron Snyder & Amna Khalid, *The Rise of "Bias Response Teams" on Campus*, NEW REPUBLIC (Mar. 30, 2016), <https://newrepublic.com/article/132195/rise-bias-response-teams-campus>; FIRE, *2017 Bias Response Team Report*, *supra* note 25.

³⁷ FIRE, *2017 Bias Response Team Report*, *supra* note 25.

³⁸ Miller, *supra* note 35, at 330-31.

with the individuals responsible for them, often referring to students as “alleged offenders” and treating them like criminal defendants.³⁹

Some bias response teams are authorized to mete out punishment or to refer complaints to the police or other authorities with the power to punish. But even those that are not often attempt to deal with reported incidents by mediating disputes or attempt to talk with (read: re-educate) the “offender.” Bias teams may attempt to resolve a complaint by way of some sort of an agreement, which can entail the so-called offender apologizing to the complainant, recanting his or her speech, or engaging in some other form of restorative action. Of course, these attempts to mediate and re-educate are themselves inherently coercive, as the prospect of being investigated by a team that includes college administrators and/or police is intimidating in and of itself. Moreover, the goal of any such “discussion” is quite obviously to convince the accused person to change his or her mind—or else keep quiet.

Thus, despite claims that bias response teams seek merely to educate, their real purpose is often much broader, requiring them to address incidents in such a way as to satisfy powerful left-leaning constituencies—often to the detriment of students’ First Amendment rights.

³⁹ *See id.* at 326-27.

Significantly, when the University of Northern Colorado abandoned its bias response team in 2016, President Kay Norton explained that the decision represented a renewal of the campus’s commitment to intellectual freedom: “Free speech and academic freedom fuel the ferment of ideas, insights and discoveries that emerge from university communities, and we must do all we can to encourage this ferment. We have an ongoing obligation to talk openly about the inherent tension between upholding academic freedom and building community. These are hard conversations, but this tension is what allows us to be a university community.”⁴⁰ Students’ educational experience is enhanced by such rigorous and challenging exchanges.

III. The University of Central Florida’s Bias Response Team Has an Objectively Chilling Effect on Campus Speech.

A bias or harassment accusation with the weight of a university intervention behind it can do lasting reputational damage to the student accused in the incident. As a result, the predictable (and, indeed, the intended) consequence of the policies enacted by the University of Central Florida is to chill student expression of potentially controversial political viewpoints.

⁴⁰ Scott Jaschik, *U of Northern Colorado Will Abandon Bias Unit*, INSIDE HIGHER ED. (Sept. 9, 2016), <https://www.insidehighered.com/quicktakes/2016/09/09/u-northern-colorado-will-abandon-bias-unit>.

A. The University’s Bias Response Team Lacks Clear Processes and Guidelines, Thus Creating Uncertainty That Discourages Students from Expressing Controversial Viewpoints.

Amici believe the University of Central Florida’s Just Knights Response Team (JKRT) operates according to unnecessarily vague policies and procedures and that its actions inevitably deter speech based on the viewpoint a student expresses. Specifically, JKRT warns students that “a bias-related incident” includes “any behavior or action directed towards an individual or group based upon actual or perceived identity characteristics or background ... including but not limited to: race, sex (including gender identity/expression), color, religion, ancestry, national origin, age, disability, veteran status, military status, or sexual orientation.”⁴¹ In principle, the definition could cover any word or deed considered unwelcome by almost anyone.

The policy also acknowledges that “bias-related incidents occur without regard to whether the act is legal, illegal, intentional, or unintentional.” This means that the protocol can “be initiated in cases when ... incidents have harmful effects” even though the acts in question “do not necessarily rise to the level of a crime, a violation of state law, university policy, or the student code of conduct.”⁴² By

⁴¹ University of Central Florida, *Just Knights Response Team, What We Cover*, <https://jkrt.sdes.ucf.edu/bias/>.

⁴² *Ibid.*

establishing a policy that targets speech that causes offense, even *unintentionally*, the university promises to use state resources to punish protected speech whenever it subjectively (and perhaps even inconsistently) causes offense.

The University's process is particularly concerning as it seeks to prohibit all speech that creates "an unsafe, negative, unwelcoming environment of the victim, or anyone who shares the same social identity as the victim, and/or community members at the university."⁴³ What this means is, of course, anybody's guess, particularly today where terms such as "unsafe" are often used to describe feelings elicited by speech with which one disagrees, rather than legitimate concerns regarding the threat of bodily harm. By deliberately conflating protected utterances with violent or threatening actions, policies like those at the University of Central Florida unconstitutionally chill free expression.

In addition to the University of Central Florida's vague definition of prohibited speech, the University also makes vague threats to launch "timely interventions" into complaints of prohibited speech, involving "discussion, mediation, training, counseling and consensus building."⁴⁴ Where universities adopt

⁴³ *Ibid.*

⁴⁴ University of Central Florida, *Just Knights Response Team, Home*, <https://jkrt.sdes.ucf.edu>. While the JKRT explains that "individual participation" is "voluntary" and describes the taskforce's work as "educational at its core," the taskforce prominently discloses its close cooperation with "the Office of Student

such vague terms in their speech policies, reasonable students will be left wondering what exactly the University means to prohibit, what process will be used to determine whether a word or action has had a “harmful effect,” and what kind of interventions they may be subject to if they utter the wrong words.⁴⁵

What does an “effective intervention” consist of? Again, it is hard to say. But the goal of such interventions is to prevent future incidents—*i.e.*, to reshape the campus environment. In June, 2020, UCF President Alexander Cartwright professed a “commitment from our university to not merely celebrate our diversity, but to be actively anti-racist” and identified JKRT as an initiative designed to respond to “hate and bias-related incidents” in order to “help ensure a safe and inclusive UCF experience.”⁴⁶ This necessarily requires that the university label protected speech as “biased,” as having created “an unsafe ... environment,” and as having “harmful effects”—all of which stigmatize the student or student group labeled as biased and

Conduct and Academic Integrity, Office of Student Rights and Responsibility, Office of Institutional Equity, and/or the UCF Police Department”—with whom it shares information. *Id.* The not-so-implicit message: JKRT can escalate its concerns to administrative and law enforcement personnel with the power to change the course of a student’s academic career.

⁴⁵ Even Acts of Congress are sometimes invalidated for being too vague to provide sufficient fair warning of the line between legal and illegal conduct to satisfy due process. *See, e.g., Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018).

⁴⁶ Alexander Cartwright, *Our Future is Inclusion*, UFC TODAY (June 2, 2020), <https://www.ucf.edu/news/our-future-is-inclusion/>.

targeted for re-education. Even where formal disciplinary action is not taken by the university, JKRT action singles students out for public censure. If it is other students who themselves work to publicize the administration's action via social media, the effect is the same.

As reputational damage can impair a student's prospects for academic and professional success, objectively reasonable students can be expected to behave in ways that mitigate their exposure to the kind of accusation that could trigger a bias investigation. And the multiple surveys discussed above confirm that they are, in fact, moved to self-censor. In all, then, the mere existence of a bias response team deters students from expressing protected viewpoints—even those who are not directly subjected to re-education activities or formal disciplinary processes. As such, the University's policies betray a core, deliberative effort to force students to balance academic and professional success against the free expression of political—if potentially controversial—viewpoints.

Such policies are both overbroad and vague and do not provide students with fair or precise warning as to what is prohibited and in what context. *See, e.g., Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968, 972 (9th Cir. 1996) (institutions may not “impermissibly delegate basic policy matters ... for resolution on an ad hoc and subjective basis” thereby “discourag[ing] the exercise of first amendment freedoms.”).

B. JKRT's Policies are Designed to Discourage Students from Expressing Disfavored Viewpoints.

By discouraging disfavored viewpoints, the JKRT policy disproportionately harms conservative students. Even though JKRT does not specifically define where it draws the line between permissible and impermissible speech, the easiest way to stay on the right side of it is to refrain altogether from expressing conservative viewpoints or any others that might, however distantly, provide fodder for students to complain to the bias response team.

Because identity and identity politics are innately intertwined with important debates in science and public policy—including everything from policing reform and immigration policy to biological sex differences and LGBT rights—the practical effect of broad speech restrictions is to communicate to students that open discussion should cease at whatever point it might begin to upset an interlocutor—or bystander.

In concrete terms, a university that encourages students to report “sexist” speech inevitably discourages open and wide-ranging deliberation on a host of issues, from the #MeToo and Black Lives Matter movements, to Justice Kavanaugh’s confirmation, to the achievements, failures, and limitations of American feminism. Is it even possible to discuss the traditional understanding of marriage—something of interest to academic historians, at the very least—without running the risk that someone will report the discussion as a “homophobic” expression? Similarly, the term “illegal” in reference to certain immigrants appears

in various statutes.⁴⁷ Should political science majors studying at public universities have to wonder whether discussing those statutes in anything other than disparaging terms exposes them to a bias investigation or “intervention”?

Bias response processes are ripe for being used by those who disagree with a viewpoint to provoke an onerous inquiry into the speech of other members of the campus. Indeed, at the University of Central Florida, top administrators actively encouraged students to file official complaints to protest a faculty member’s extramural political speech. On June 3, 2020, Charles Negy, a tenured professor of psychology, tweeted “Black privilege is real: Besides affirm. action, special scholarships and other set asides, being shielded from legitimate criticism is a privilege.” He followed up with a “sincere question:” “If Afr. Americans as a group, had the same behavioral profile as Asian Americans (on average, performing the best academically, having the highest income, committing the lowest crime, etc.), would we still be proclaiming ‘systematic racism’ exists?”⁴⁸

⁴⁷ Although the (un)popular term “illegal alien” is not itself common in statutes, the term “illegal” is otherwise used as a descriptive term—and thus as a modifier—to “alien” in other statutes. *See, e.g.*, 8 U.S.C. § 1103(a)(5). It is also used in synonymous terms, such as “illegal entrants” and “illegal violators.” *See, e.g.*, 8 U.S.C. § 1182(a)(6).

⁴⁸ Adam Goldstein, *UCF Is Killing Academic Freedom to Punish Tweets It Didn’t Like*, FIRE NEWSDESK (Jan. 27, 2021), <https://www.thefire.org/ucf-is-killing-academic-freedom-to-punish-tweets-it-didnt-like/>.

Negy's tweet was not offensive because it was obscene or derogatory in nature. The tweet was problematic because the idea expressed fell outside of the campus's Overton window—even though the subject, achievement disparities across racial groups, is an open, academic, question.⁴⁹ Still, the next day, in a press release entitled “Addressing Intolerance in Our Community”—signed by UCF's President, Interim Provost, and Interim Chief Diversity Officer—the university took the position that “Negy's words are not only wrong, but particularly painful.”⁵⁰ The administration announced to campus that an investigation into alleged “bias and unfair treatment in Dr. Negy's classroom” had been launched and (in the next paragraph) encouraged current and former students to report “discriminatory behavior by any faculty or staff member,” *i.e.*, to pile on.⁵¹

The ensuing investigation, based on 300 interviews, yielded a 244-page report covering 15 years of teaching. UCF ultimately claimed a basis for terminating Professor Negy that had nothing to do with his political speech. But the process itself was launched in direct retaliation for the viewpoints he expressed; and the rationale the burdensome investigation turned up was mere pretext to satisfy students

⁴⁹ CHARLES MURRAY, *FACING REALITY: TWO TRUTHS ABOUT RACE IN AMERICA* (2021).

⁵⁰ Alexander Cartwright, Michael Johnson & Kent Butler, *Addressing Intolerance in Our Community*, *UCF TODAY* (June 4, 2020), <https://www.ucf.edu/news/addressing-intolerance-in-our-community/>.

⁵¹ *Ibid.*

demanding institutional action against a faculty member for asking a forbidden question. As FIRE concludes, “UCF implemented a process calculated to find reasons to fire an employee who had offended people with this speech. ... Negy’s job was never going to survive this inquiry. That was the whole point.”⁵²

Unfortunately, events of this kind are increasingly common. An August 2021 FIRE report documenting 426 calls to sanction academics for their speech since 2015 found that 74% were successful in that they resulted in some form of sanction.⁵³ A similar database of “academic cancellations” maintained by the National Association of Scholars has quickly grown to 185 incidences.⁵⁴ Would an objectively reasonable UCF student (or faculty member) who witnessed the persecution and public shaming of Professor Negy at UCF (or one of so many other examples elsewhere) feel free to express a similar viewpoint about Black Lives Matter movement? Or ask probing questions about disparate crime rates and college admissions success rates across racial groups? Is it reasonable to risk the potential

⁵² Goldstein, *supra* note 48.

⁵³ FIRE, *Scholars Under Fire* (Aug. 31, 2021), <https://www.thefire.org/research/publications/miscellaneous-publications/scholars-under-fire/scholars-under-fire-full-text/>.

⁵⁴ David Acevedo, *Tracking Cancel Culture in Higher Education*, NATIONAL ASSOCIATION OF SCHOLARS (Aug. 14, 2021), <https://www.nas.org/blogs/article/tracking-cancel-culture-in-higher-education> (last visited Aug. 15, 2021).

damage to reputation and career? Of course not. The whole point of vague speech codes and arbitrary investigative processes is to raise the cost of expressing disfavored opinions—precisely in order to deter students from discussing them.

It is, therefore, unnecessary to establish that university officials are purposefully targeting specific viewpoints in order to find that vague speech codes and a bias response team are unconstitutional. Their entire purpose is to empower the political majority on campus to police and deter the expression of viewpoints it opposes, thus chilling speech protected by the First Amendment.

The result is a climate of fear and a much shallower public discourse. *Amici*'s 2019 College Pulse survey of over 2,100 current students found that only 15% of students have never stopped themselves “from expressing [their] opinions on sensitive political topics to avoid offending other students”; 62% answered that they do so “sometimes” or “often.”⁵⁵ Political conservatives were disproportionately affected. Majorities of self-described “strong” and “weak” Republicans answered that “it is hard to have open and wide-ranging discussions about” President Trump (80% and 83%), abortion (71% and 74%), U.S. immigration policy (72% and 71%), gender discrimination (50% and 58%), and the #MeToo movement (51% and 45%).⁵⁶ Institutions that establish overbroad speech policies and bias response teams

⁵⁵ ACTA & IWF, *Killing Campus Civility*, *supra* note 19.

⁵⁶ *Ibid.*

thereby contribute to a toxic campus climate that undermines not only discussion of political and social policy, but even fellowship and comity among students. Today, 48% of students agree or strongly agree with the statement, “pressure to conform to political correctness can negatively affect the development of close interpersonal relationships on my campus.” These figures are even higher for “strong” and “weak” Republicans (78% and 68%, respectively).⁵⁷

CONCLUSION

The U.S. Supreme Court has repeatedly affirmed that public university students enjoy robust protections of their First Amendment rights. In doing so, the Court has rejected arguments that officials at public institutions may restrict student speech where they fear disruptive activities may result or where the restrictions supposedly are designed to prevent students from making disparaging, demeaning, or uncivil comments. In fact, the Court has expressly noted that free speech “may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.” *Terminiello*, 337 U.S. at 4.

Because “[t]he vitality of civil and political institutions in our society depends on free discussion,” public institutions have a duty to establish policies that protect

⁵⁷ *Ibid.*

a free and open marketplace of ideas. *Id.* Where such an environment is known to be under threat—as it is on many campuses today—a desire to encourage civility and to discourage offensive speech, however laudable, cannot justify the enactment of overbroad policies and ambiguous punitive frameworks susceptible to being used by members of the campus to deter the expression of disfavored viewpoints.

Respectfully submitted,

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September 15, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document is in compliance with the word limit of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Eleventh Circuit Local Rule 32-4 it contains 6,197 words. I further certify that the foregoing complies with the type-space and type-style requirements of Rules 32(a)(5), and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in Size 14 Times New Roman font.

Dated: September 15, 2021

/s/ Erik S. Jaffe
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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2021, I electronically filed the foregoing Brief of *Amici Curiae* with the Clerk of the Court using the CM/ECF system, which will notify such filing to all counsel of record.

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