

NO. 19-50529

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SPEECH FIRST, INCORPORATED,

Plaintiff-Appellant,

v.

GREGORY F. FENVES, in his official capacity as
President of the University of Texas-Austin,

Defendant-Appellee.

On appeal from the United States District Court
for the Western District of Texas
NO. 1:18-CV-1078
THE HONORABLE LEE YEAKEL

BRIEF OF *AMICI CURIAE*
AMERICAN COUNCIL OF TRUSTEES AND ALUMNI
AND INDEPENDENT WOMEN'S FORUM
IN SUPPORT OF PLAINTIFF-APPELLANT

Erik S. Jaffe
Gene C. Schaerr
Stephen S. Schwartz
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
EJaffe@Schaerr-Jaffe.com

TABLE OF CONTENTS

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iv

STATEMENT OF AUTHORITY TO FILEvii

STATEMENT OF INTEREST AND RULE 26.1 STATEMENT.....viii

SUMMARY OF ARGUMENT..... 1

ARGUMENT4

I. EVIDENCE SUPPORTS SPEECH FIRST’S CLAIM THAT AMERICAN UNIVERSITIES ARE NO LONGER BASTIONS OF FREE INQUIRY AND THAT STUDENTS CANNOT DISCUSS BROAD CATEGORIES OF POLICY ISSUES WITHOUT RISKING FORMAL OR INFORMAL PUNISHMENT.....4

 A. A majority of students approve shouting down speakers.....4

 B. Faculty in the humanities and social sciences admit discriminating against conservative colleagues.5

 C. A majority of students surveyed report censoring themselves from fear their views will be considered offensive.....10

II. NOTWITHSTANDING PROFESSED COMMITMENTS TO RESPECT STUDENTS’ FIRST AMENDMENT RIGHTS, UT-AUSTIN HAS ENACTED POLICIES AND PRACTICES THAT PROHIBIT PROTECTED SPEECH AND, IN THEIR TOTALITY, CONVEY A CLEAR VIEWPOINT BIAS.12

III. THE UNIVERSITY’S SPEECH POLICIES REFERENCE PENALTIES BUT FAIL TO ARTICULATE CLEAR PROCESSES OR GUIDELINES FOR THEIR ENFORCEMENT. THE RESULTING UNCERTAINTY CREATES STRONG PRESSURES THAT REASONABLY INCLINE RISK-AVERSE STUDENTS TO REFRAIN FROM EXPRESSING CONTROVERSIAL VIEWPOINTS ALTOGETHER.....16

IV. EXISTING ACADEMIC RESEARCH ON BIAS RESPONSE TEAMS HAS SHOWN THAT “THE LANGUAGE AND DESCRIPTIONS [TEAM LEADERS] PROVIDED OF ACTUAL RESPONSES IN PRACTICE APPEARED TO CONFORM TO A CRIMINAL JUSTICE ORIENTATION”—EVEN WHERE THE TEAMS CLAIMED TO BE ENACTING AN EDUCATIVE FRAMEWORK.....18

 A. The process *is* punitive and it involves humiliation and public shaming.....18

 B. The history of the Campus Climate Response Team at UT-Austin indicates that the tool has been used repeatedly by students for the purpose of discouraging others from expressing disfavored viewpoints.20

CONCLUSION	23
CERTIFICATE OF SERVICE.....	25
CERTIFICATE OF COMPLIANCE.....	26

TABLE OF AUTHORITIES

Cases

<i>Cohen v. San Bernardino Valley Coll.</i> , 92 F.3d 968 (9th Cir. 1996)	12
<i>Keyishian v. Board of Regents</i> , 385 U.S. 589 (1967)	1
<i>Laird v. Tatum</i> , 408 U.S. 1 (1972)	22
<i>NAACP v. Button</i> , 371 U.S. 415 (1963)	1
<i>Rosenberger v. Rectors and Visitors of the University of Virginia</i> , 515 U.S. 819 (1995)	14
<i>Suarez Corp. Industries v. McGraw</i> , 202 F.3d 676 (4th Cir. 2000)	23
<i>Terminiello v. Chicago</i> , 337 U.S. 1 (1949)	24

Other Authorities

ACTA and Freedom Foundation of Minnesota, <i>At a Crossroads: A Report Card on Public Higher Education in Minnesota</i> (2010)	11
ACTA and Illinois Public Policy Institute, <i>For the People: A Report Card on Public Higher Education in Illinois</i> (2009)	11
ACTA, <i>Shining the Light: A Report Card on Georgia's System of Public Higher Education</i> (2008)	11
ACTA, <i>Show Me: A Report Card on Public Higher Education in Missouri</i> (2008)	11
CCRT, UT-Austin, <i>2015-2016 Campus Climate Trend Report</i> (2016)	13

CCRT, UT-Austin, <i>2012-2013 Campus Climate Trend Report</i> (2013)	18
CCRT, UT-Austin, <i>2014-2015 Campus Climate Trend Report</i> (2015)	21
Ellen B. Stolzenberg et al., Higher Education Research Institute at UCLA, <i>Undergraduate Teaching Faculty: The HERI Survey, 2016-2017</i> (2019).....	8
FIRE, <i>Bias Response Team Report</i> (2017).....	22
FIRE, <i>School Spotlight: University of Texas at Austin</i> , https://www.thefire.org/schools/university-of-texas-at-austin/	12
Information Security Office, UT-Austin, <i>Acceptable Use Policy for University Students</i>	17
John Villasenor, <i>Views among college students regarding the First Amendment: Results from a new survey</i> , Brookings Institution (Sept. 18, 2017),	4
José L. Duarte et al., <i>Political Diversity Will Improve Social Psychological Science</i> , 38 <i>Behav. and Brain Sci.</i> 1 (2015).....	9
Kelsey Naughton, FIRE, <i>'Speaking Freely': What Students Think about Expression at American Colleges</i> (Oct. 2017)	10
Mitchell Langbert et al., <i>Faculty Voter Registration in Economics, History, Journalism, Law, and Psychology</i> , 13 <i>Econ. J. Watch</i> 422 (2016).....	8
Ryan A. Miller et al., <i>A Balancing Act: Whose Interests do Bias Response Teams Serve?</i> , 42 <i>Rev. Higher Educ.</i> 313 (2018).....	2, 20
Samantha Pell, <i>Girls say Connecticut's transgender athlete policy violates Title IX, file federal complaint</i> , <i>The Washington Post</i> (June 19, 2019), https://www.washingtonpost.com/sports/2019/06/19/girls-say-connecticuts-transgender-athlete-policy-violates-title-ix-file-federal-complaint/	15
Samuel J. Abrams, <i>Think Professors Are Liberal? Try School Administrators</i> , N.Y. <i>Times</i> (Oct. 16, 2018), https://www.nytimes.com/2018/10/16/opinion/liberal-college-administrators.html	8

Scott Jaschik, <i>Vandalism Follows Professor’s Critique on Ideology</i> , Inside Higher Ed (Nov. 5, 2018), https://www.insidehighered.com/quicktakes/2018/11/05/vandalism-follows-professors-critique-ideology	9
Sean Stevens, <i>The Fearless Speech Index: Who is afraid to speak and why?</i> , Heterodox Academy, July 19, 2017.....	11, 12
Stephanie Adeline, <i>Campus Climate Response Team’s new webpage addresses transparency in bias incident reports</i> , The Daily Texan, Feb. 15, 2018.....	21
UT-Austin, <i>Handbook of Operating Procedures, Hate and Bias Incidents</i> (2017)	18
UT-Austin, <i>Hate and Bias Incidents Policy, Handbook of Operating Procedures, FAQ</i> (2017).....	19
UT-Austin, <i>Residence Hall Manual</i> (2018).....	2, 13, 16
UT-Austin, , <i>Chapter 13. Speech, Expression and Assembly</i> , https://catalog.utexas.edu/general-information/appendices/appendix-c/speech-expression-and-assembly/	14
Uwe Peters et al., <i>Ideological Diversity, Hostility, and Discrimination in Philosophy</i> , https://philpapers.org/archive/PETIDH-2.pdf	5, 6
Yoel Inbar & Joris Lammers, <i>Political Disparity in Social and Personal Psychology</i> , Perspectives on Psychol. Sci. (2012).....	7

STATEMENT OF AUTHORITY TO FILE

All parties have consented to the filing of this brief, as required by Federal Rules of Appellate Procedure 29(a)(2) and 29(a)(4)(D). In accordance with Rule 29(a)(4)(E), *Amici* aver that: (i) no party's counsel authored this brief in whole or in part; (ii) no party or party's counsel contributed money to fund the preparation or submission of this brief; and (iii) no person—other than *amici curiae*, their members, or their counsel—contributed money intended to fund the preparation or submission of this brief.

STATEMENT OF INTEREST AND RULE 26.1 STATEMENT

Amicus curiae the American Council of Trustees and Alumni (“ACTA”) is an independent, non-profit 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 long history of advocating for an open and engaging marketplace of ideas in the American academy and respectfully submits this brief in support of Appellant Speech First.

Amicus curiae Independent Women’s Forum (“IWF”) is a non-profit, non-partisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic policy issues. IWF is committed to increasing opportunity for women, and for all Americans, through policies that expand economic liberty, encourage personal responsibility, and limit the reach of government. IWF has a particular interest in expanding educational opportunity and access to the marketplace of ideas. Because IWF is concerned that bias response teams have a chilling effect on speech and the free exchange of ideas on college campuses, IWF respectfully submits this brief in support of Speech First.

Pursuant to Rule 26.1, neither ACTA nor IWF are publicly traded, and they have no parent companies.

SUMMARY OF ARGUMENT

Cultivating an environment that fosters the free exchange of ideas is central to the mission of public universities in the United States. Indeed, “The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection.” *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (internal citations and punctuations omitted). As such, and “[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.” *NAACP v. Button*, 371 U.S. 415, 433 (1963).

Amici ACTA and IWF believe that UT-Austin’s speech policies and Campus Climate Response Team (CCRT) impermissibly chill student speech on campus for four reasons. First, there is clear and overwhelming evidence that the “general” discussions in which members of Speech First would like to engage are roundly discouraged at UT-Austin and elsewhere; that faculty and administrators’ clear and overwhelming political biases create strong and persistent pressures not to express conservative viewpoints; and that conservative students routinely self-censor from a reasonable fear of potential academic and professional repercussions, including the specific fear that other students will report their speech under policies designed to deter offensive speech.

Second, the actions of UT-Austin have created an environment that would lead an objectively reasonable student to self-censor. By prohibiting “uncivil ... language

that interfere[s] with the ... individuality” of other students, the University is *stating an intention* to change the contours of public discussion on campus. UT-Austin, *Residence Hall Manual* 18 (2018). Because individual identity—commonly understood today to involve sexual orientation, gender identity, racial identity, economic status, etc.—cannot be disentangled from important issues of public policy, campus policies that aim to discourage “uncivil” speech as the University has defined it will *inevitably* chill political speech. In fact, they are designed to.

Third, UT-Austin’s speech policies reference penalties, sometimes in unnecessarily menacing terms, but fail to articulate clear processes or guidelines according to which complaints will be adjudicated. The resulting uncertainty creates strong pressures that reasonably incline risk averse students to refrain from expressing controversial viewpoints altogether.

Fourth, UT-Austin’s policies create instruments and processes that are predictably and demonstrably susceptible to being used by students to deter others from speaking for ideological reasons. Existing academic research has also shown that “the processes used by bias response teams often mimic[]” campus police and judicial systems—even when their governing policies espouse an educative framework. Ryan A. Miller et al., *A Balancing Act: Whose Interests do Bias Response Teams Serve?*, *The Review of Higher Education*, 313 Rev. Higher Educ. 313, 327 (2018). The process employed by UT-Austin’s CCRT is itself minatory and punitively intense, the kind of encounter a reasonable student will generally desire to avoid. In publishing the details of a bias

complaint such that a reasonably informed member of the campus community can deduce the identity of the student or student group being accused, the public employees who make up the CCRT may also be engaging in retaliatory speech.

ARGUMENT

I. EVIDENCE SUPPORTS SPEECH FIRST'S CLAIM THAT AMERICAN UNIVERSITIES ARE NO LONGER BASTIONS OF FREE INQUIRY AND THAT STUDENTS CANNOT DISCUSS BROAD CATEGORIES OF POLICY ISSUES WITHOUT RISKING FORMAL OR INFORMAL PUNISHMENT.

A. A majority of students approve shouting down speakers.

According to a national survey commissioned by the Brookings Institution in 2017, 51% of students studying at public institutions agreed that it is acceptable for a student group opposed to a speaker's viewpoint to "disrupt[] the speech by loudly and repeatedly shouting so that the audience cannot hear the speaker." John Villasenor, *Views among college students regarding the First Amendment: Results from a new survey*, Brookings Institution (Sept. 18, 2017). Alarming, many support those who would go further to suppress disfavored viewpoints; 18% of students studying at public institutions (and 21% of those studying at private institutions) answered that it is acceptable for "a student group opposed to the speaker [to use] violence to prevent the speaker from speaking..." *Id.*

Disinvitations, disruptions, and violent campus protests have prevented or otherwise interfered with open discussion of mainstream policy issues around the country in recent years: including Heather Mac Donald 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. In light of so many recent high-

profile disruptions—replicated on a smaller scale in college classrooms, dining facilities, and campus living spaces every day—the district court is wrong to assume that free and open discussion about controversial subjects occurs unimpeded as long as campus policies do not expressly forbid disfavored viewpoints or formally specify punishments for those who express them.

B. Faculty in the humanities and social sciences admit discriminating against conservative colleagues.

The academic research and several recent attitudes surveys demonstrate that limitations on free and open inquiry are pervasive. Insofar as professors set, or should set, the intellectual tone on a college or university campus, it is appropriate to begin by considering their self-reported behavior as it relates to intellectual freedom. Recent studies have revealed that startlingly high proportions of college and university faculty in a range of disciplines admit that their political biases affect their professional behavior. According to a forthcoming 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. Uwe Peters et al., *Ideological Diversity, Hostility, and Discrimination in Philosophy* 30, <https://philpapers.org/archive/PETIDH-2.pdf>. The study found that across the sample, “participants reported believing that

colleagues would engage in discrimination against right-leaning individuals ... more often than against left-leaning individuals.” *Id.* at 13.

The anecdotal evidence collected by the researchers suggests that anti-conservative bias leads to self-censorship by conservative academic philosophers. The study’s authors categorized 76 “free response” responses answers as relating to “underrepresentation of / hostility towards right-leaning individuals / views”—about triple the number they categorized as falling into the analogous category for left-leaning views and individuals. *Id.* at 15. One respondent answered, “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.” *Ibid.* 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.” *Id.* at 16. 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[.]” *Ibid.*

Researchers have documented the same dynamic in social psychology. Shortly after Jonathan Haidt drew attention to a lack of political diversity among social psychologists by asking conservatives to identify themselves at a gathering of about a thousand members of the discipline (three hands went up), Yoel Inbar and Joris

Lammers surveyed “all 1,939 members of the SPSP [Society for Personality and Social Psychology] electronic mailing list.” Yoel Inbar & Joris Lammers, *Political Disparity in Social and Personal Psychology*, *Perspectives on Psychol. Sci.* 2 (2012).

More than one quarter (508) responded, and the results were alarming. *Id.* “The more conservative respondents were, the more they had personally experienced a hostile climate.” *Id.* at 4. Significant numbers admitted to being “somewhat (or more) inclined to discriminate against conservatives” when inviting colleagues to a symposia (14.0%), reviewing their papers (18.6%), reviewing grant applications (23.8%), and making hiring decisions (37.5%). As the authors conclude, “willingness to discriminate... is strongest when it comes to the most important decisions... This hostile climate offers a simple explanation of why conservatives hide their political opinions from their colleagues.” *Id.* at 6.

In light of these findings, conservative faculty members have strong incentives to self-censor; given that their professional success depends on hiding their political views, it would be hard to argue they are not behaving reasonably. If conservative professors are under pressure not to espouse conservative viewpoints, not to investigate controversial issues at all if the discussion could “out” them to the broader campus, it cannot simply be assumed that conservative students who feel likewise are acting unreasonably. After all, left-leaning professors not only set the intellectual tone of a university. They 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.

It is well known that university faculties lean left. The most comprehensive study 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.” Ellen B. Stolzenberg et al., Higher Education Research Institute at UCLA, *Undergraduate Teaching Faculty: The HERI Survey, 2016-2017*, at 17 (2019). But studies have repeatedly documented severe partisan imbalances in social science and humanities disciplines. One such study looked at faculty voter registration at 40 top universities; it found one registered Republican for every 33.5 registered Democrats in history departments, and campus registered Democrat to registered Republican ratios as high as 60 to 1 in the five disciplines it surveyed. Mitchell Langbert et al., *Faculty Voter Registration in Economics, History, Journalism, Law, and Psychology*, 13 Econ. J. Watch 422, 424 (2016). When Samuel Abrams surveyed 900 “student-facing” campus administrators, he found a more shocking imbalance yet: “liberal staff members outnumber their conservative counterparts by the astonishing ratio of 12-to-one. Only 6 percent of campus administrators identified as conservative to some degree, while 71 percent classified themselves as liberal or very liberal.” Samuel J. Abrams, *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>. Abrams found no real differences among school types (private versus public), but did find regional variations. In New England, for example,

the ratio is 25-to-one. Abrams' point was that student life programming on most campuses has an almost monolithically left-leaning tone, which is a disservice to a student body that is not monolithically liberal. When Abrams made the point in a *New York Times* opinion editorial, students at Sarah Lawrence College punished his dissent from orthodoxy by vandalizing his office door. 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>.

Does an anti-conservative bias among faculty and administrators affect conservative students? Research in social psychology suggests that we should expect so. As Duarte et al. summarize in a 2014 study, "The literature on political prejudice demonstrates that strongly identified partisans show little compunction about expressing their overt hostility toward the other side. Partisans routinely believe that their hostility towards opposing groups is justified because of the threat posed to their values by dissimilar others." José L. Duarte et al., *Political Diversity Will Improve Social Psychological Science*, 38 *Behav. and Brain Sci.* 1, 10 (2015) (internal citations omitted). In other words, research suggest that liberal faculty are willing to admit they discriminate against conservatives because they view their actions as righteous or just. If this explanation is correct, there is good reason to suppose some proportion of liberal professors and administrators would not be opposed to fostering a campus

environment in which objectively reasonable conservative students feel compelled to self-censor.

C. A majority of students surveyed report censoring themselves from fear their views will be considered offensive.

The available survey data suggest that this is happening all over the country and strongly support claims made by the Speech First students. A 2017 YouGov survey of 1,395 undergraduates revealed that a majority (54%) “agree that they have stopped themselves from sharing an idea or opinion in class at some point since beginning college.” Kelsey Naughton, FIRE, *‘Speaking Freely’: What Students Think about Expression at American Colleges* 9 (Oct. 2017) . The same survey revealed that “very conservative” students were 21 percentage points less likely than their “very liberal” peers to feel comfortable “expressing opinions outside of the classroom while on campus.” In other words, students *are* deterred from expressing disfavored viewpoints in such high numbers that it is difficult to posit they are doing so from imaginary concerns, and harder still to argue that the campus climate is not inhospitable to conservative opinions in ways that would deter objectively reasonable students from expressing disfavored controversial opinions.

When Amicus ACTA assessed the condition of intellectual freedom and diversity in four states by commissioning professional surveys of students at public institutions as part of our “report card” series on the state systems of higher education in Illinois, Georgia, Minnesota, and Missouri, the results were similarly dispiriting. A total of

39.1% of the Minnesota students surveyed agreed that “On my campus, there are certain topics or viewpoints that are off limits.” ACTA and Freedom Foundation of Minnesota, *At a Crossroads: A Report Card on Public Higher Education in Minnesota* 16 (2010). Similar proportions answered the same way in Georgia (38.6%), Missouri (39.6%), and Illinois (33.1%). ACTA and Illinois Public Policy Institute, *For the People: A Report Card on Public Higher Education in Illinois* 15 (2009); ACTA, *Shining the Light: A Report Card on Georgia’s System of Public Higher Education* 10 (2008); ACTA, *Show Me: A Report Card on Public Higher Education in Missouri* 10 (2008).

The Heterodox Academy’s Campus Expression Survey has revealed broadly similar trends at the national level. It goes further, however, by asking students what factors deter them from freely expressing their views on matters of race, politics, and gender. In line with other surveys, 53% of students answered that their institution does *not* “frequently encourage[] students to consider a wide variety of viewpoints and perspectives,” with conservatives (32%) much more likely than liberals (8%) to be “very reluctant to discuss politics in the classroom.” Sean Stevens, *The Fearless Speech Index: Who is afraid to speak and why?*, Heterodox Academy, July 19, 2017. When it asked students “why?,” the Campus Expression Survey found that students were most concerned that “other students would criticize my views as offensive.” *Id.* But it also found three other drivers that made students significantly more reluctant to speak openly on matters of race, politics, or gender than on non-controversial issues: concerns someone might file a complaint under a “campus harassment policy or code of

conduct,” concerns “the professor would criticize my views as offensive,” and concerns “the professor would give me a lower grade for my views.” *Id.*

II. NOTWITHSTANDING PROFESSED COMMITMENTS TO RESPECT STUDENTS’ FIRST AMENDMENT RIGHTS, UT-AUSTIN HAS ENACTED POLICIES AND PRACTICES THAT PROHIBIT PROTECTED SPEECH AND, IN THEIR TOTALITY, CONVEY A CLEAR VIEWPOINT BIAS.

Vague policies restricting speech violate students’ rights because they do “not provid[e] fair warning[,] ... impermissibly delegate basic policy matters ... for resolution on an ad hoc and subjective basis ... [and] discourage[] the exercise of first amendment freedoms.” *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968, 972 (9th Cir. 1996) (capitalization in original). This leads us to a question, centrally important to Speech First’s claims: is there a reasonable basis to believe that campus speech policies at UT-Austin contribute to the problems described above? The Foundation for Individual Rights in Education (FIRE), a leading authority on campus civil liberties, has assigned UT-Austin a “red” rating, indicating its policies “clearly and substantially” restrict students’ freedom of speech. FIRE, *School Spotlight: University of Texas at Austin*, <https://www.thefire.org/schools/university-of-texas-at-austin/> (last visited August 16, 2019).

Amici believe that the University’s policies are unnecessarily vague and specifically designed to deter speech based on the viewpoint a student means to express. Policies *are designed* to affect behavior. The *purpose* of a Campus Climate Response Team is to change the ideational environment of the campus, “to foster a more welcoming,

inclusive campus culture.” CCRT, UT-Austin, *2015-2016 Campus Climate Trend Report 1* (2016). The University is not encouraging students to strive to express opinions with due concern for norms of civility; it has established formal and informal punishment regimes that target broad categories of speech based on the viewpoint expressed.

For example, UT-Austin’s Residence Hall Manual warns students that “Residence Life is committed to responding appropriately to acts of racism, sexism, heterosexism, cissexism, ageism, ableism, and any other force that seeks to suppress another individual or group of individuals”; the policy also expressly forbids “[u]ncivil behaviors and language that interfere with the privacy, health, welfare, individuality, or safety of other persons.” UT-Austin, *Residence Hall Manual* 18 (2018).

The institution does not define “uncivil behaviors and language that interfere with the ... individuality” of other students. *Ibid.* That is probably because anyone acquainted with contemporary political discourse will recognize immediately that the “uncivil behaviors and language” in question are words and deeds that students on one side of the political spectrum are apt to term racist, sexist, homophobic, cissexist, etc. As terms like “racist,” “sexist,” and “cissexist” are so vague, subjective, and encompassing that they are routinely used by Congressmen to describe other elected officials, they are of negligible value in providing guidance for what can and cannot be uttered in a college dorm on a public campus. They are highly susceptible to being deployed indiscriminately, however, by those who disagree with the viewpoint in order to disparage it. Because the “individualit[ies]” in question are inextricably entangled with

important debates in science and public policy—respecting same-sex marriage, biological sex differences, the #MeToo movement, etc.—the speech code in question has the practical effect of communicating to students that open discussion should cease at whatever point it might begin to interfere with an interlocutor’s (or listener’s) subjective understanding of his or her own identity or individuality. “When the government targets... particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.” *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995).

Similarly, the University’s policy on “Speech, Expression, and Assembly” bans “verbal harassment”, but extends its definition to “offensive” speech that includes “insults, epithets, ridicule, [and] personal attacks” “based on the victim’s ... personal characteristics[] or group membership...” UT-Austin, *Chapter 13. Speech, Expression and Assembly*, <https://catalog.utexas.edu/general-information/appendices/appendix-c/speech-expression-and-assembly/>. What, exactly, does this prohibit? Again, the policy provides no guidance. Speech First should not have to provide specific examples of the viewpoints its members cannot discuss as the district court has suggested. The problem is that UT-Austin’s policies help to foster an environment in which broad categories of conversation cannot take place without causing conservative students to worry that a slip of the tongue might provoke an academically damaging accusation. Consider two concrete examples. Today, many people consider the term “illegal alien” to be an insult, epithet, or personal attack. But it can also be used, and traditionally has

been used, as a cool and sedate description of a *would-be* immigrant who did not follow the country's immigration laws, i.e., who is not actually an immigrant. Under the University's "Speech, Expression, and Assembly" policy, one student's good faith effort to discuss immigration policy using precise legal terminology could, if it provoked offense (real or imagined), enable another to make a complaint. Similarly, questioning whether biological males who are undergoing gender reassignment therapy should perhaps not compete in female athletics leagues is, to some, "cissexist." But the U.S. Education Department's Office for Civil Rights is investigating a Title IX complaint against the state of Connecticut for allowing biological males to compete in female sports if they identify as female. Samantha Pell, *Girls say Connecticut's transgender athlete policy violates Title IX, file federal complaint*, The Washington Post (June 19, 2019), <https://www.washingtonpost.com/sports/2019/06/19/girls-say-connecticuts-transgender-athlete-policy-violates-title-ix-file-federal-complaint/>. Is this discussion, highly relevant to a meaningful policy question, "cissexist"—and therefore forbidden in a UT-Austin dorm room? Who knows? In an environment where the rules governing speech are ambiguous by design, tied to terms with no clear definition but which can be used to disparage conservative viewpoints, reasonable students will refrain from discussing controversial subjects from fear of causing offense—especially when using the wrong word can trigger an investigation. It bears repeating that this is not a speculative claim. National surveys confirm that students are self-censoring in alarming numbers; UT-Austin's policies help us to understand why.

III. THE UNIVERSITY’S SPEECH POLICIES REFERENCE PENALTIES BUT FAIL TO ARTICULATE CLEAR PROCESSES OR GUIDELINES FOR THEIR ENFORCEMENT. THE RESULTING UNCERTAINTY CREATES STRONG PRESSURES THAT REASONABLY INCLINE RISK-AVERSE STUDENTS TO REFRAIN FROM EXPRESSING CONTROVERSIAL VIEWPOINTS ALTOGETHER.

The University argues that it can forbid protected speech in the language of its policies as long as it avers to the court that it has never enforced its policies contrary to First Amendment protections. This is a dangerous suggestion because it allows a university to cultivate an environment in which deliberately ambiguous rules, ill-defined consequences, and unclear enforcement processes create the kind of confusion that leads risk-averse but objectively reasonable students to refrain from expressing controversial viewpoints.

Consider the consequences for violating “Institutional Rules” articulated in the Residence Hall Manual. The policy warns residents that those accused of “suppress[ing] another individual” may be subject to a “floor or hall meeting to discuss the incident” in which the “community” will decide “appropriate steps that need to be taken to address the incident.” UT-Austin, *Residence Hall Manual* 18 (2018). In other words, the policy is not clear about what it proscribes, how accusations will be adjudicated, what penalties can be considered, nor even who will do the adjudicating. Even if residence life staff do not refer a student accused of “suppress[ing] another individual” to “the Dean of students for possible disciplinary action,” being summoned to a public floor meeting to discuss spurious allegations of “racism, sexism, heterosexism, cissexism, ageism, or ableism” can do lasting reputational damage. *Ibid.* As reputational damage

can impair a student's prospects for future academic and professional success, the University's policies effectively force students to balance professional success against the free expression of controversial viewpoints. Where the rules, process, potential punishment, and adjudicators are all determined *post hoc*, it is positively dangerous to engage in policy debates that relate even tangentially to issues of race, class, or gender.

Likewise, the University's "Acceptable Use Policy," designed to govern students' use of information technology resources, prohibits electronic communications that are "rude" or "harassing." Information Security Office, UT-Austin, *Acceptable Use Policy for University Students*, <https://security.utexas.edu/policies/aup>. The same policy also warns students that "electronic communications transmitted across a [university] network should never be considered private or confidential" *Id.* at 3.1. In other words, the University is insinuating that electronic communications are monitored (or could be accessed to permit a *post hoc* assessment of their content) whilst warning students that a "rude" or "harassing" email or blog post could result in serious repercussions—all without offering any guidance on where that line is drawn. The language is vague and unnecessarily menacing; the predictable consequence is that the policy will deter speech that, while protected by the First Amendment, might nonetheless fall on the wrong side of the institution's definition of uncivil speech.

IV. EXISTING ACADEMIC RESEARCH ON BIAS RESPONSE TEAMS HAS SHOWN THAT “THE LANGUAGE AND DESCRIPTIONS [TEAM LEADERS] PROVIDED OF ACTUAL RESPONSES IN PRACTICE APPEARED TO CONFORM TO A CRIMINAL JUSTICE ORIENTATION”—EVEN WHERE THE TEAMS CLAIMED TO BE ENACTING AN EDUCATIVE FRAMEWORK.

A. The process *is* punitive and it involves humiliation and public shaming.

UT-Austin launched its Campus Climate Response Team (CCRT) in March 2012. The stated purpose of the CCRT is to “foster a more welcoming, inclusive, campus culture for all” and even to “eliminate” bias incidents altogether. CCRT, UT-Austin, *2012-2013 Campus Climate Trend Report 2–4* (2013). The University’s 2017 “Hate and Bias Incidents” policy also specifies a reporting function for the CCRT. While that policy is almost entirely focused on speech that the institution can prohibit without violating students’ First Amendment rights, it encourages individuals to report instances of protected speech to the CCRT, including “concerns such as a student organization hosting a party with a racist theme” and “concerns that someone has created... [an] offensive classroom environment.” UT-Austin, *Handbook of Operating Procedures, Hate and Bias Incidents* (2017), <https://policies.utexas.edu/policies/hate-and-bias-incidents>.

The University has nonetheless argued that Speech First has “mischaracterized” the CCRT and that it is a “non-adjudicating body” the main function of which “is to support reporters of bias incidents and to provide information regarding university resources.” Edna Dominguez, a member of the response team, has explained to the district court that “no student at the University has been investigated or punished by the CCRT for engaging in speech or expression protected by the First Amendment.”

Amici curiae believe that the institution is defining the terms “investigate” and “punish” too narrowly, and that the CCRT plays an important role in the disciplinary processes of the institution. On its own account of its activities, the CCRT logs incidents and conducts interviews; it “tracks and records [bias] allegations” and can refer cases to the institution’s formal disciplinary processes where it judges appropriate; the CCRT’s membership includes personnel whose main function at the institution is disciplinary in nature (for example, a University Police Department lieutenant), as well as mid-level administrators who can impede or advance a student’s academic career; it uses justice administration terminology—“offense,” “victim,” “motiv[e],” etc.; and its work, which includes shaming students and student groups for their speech activities, is designed to engineer a more inclusive campus climate by changing what and how viewpoints are expressed on campus. UT-Austin, *Hate and Bias Incidents Policy, Handbook of Operating Procedures, FAQ 4* (2017).

The best academic study of bias response teams, based on interviews with team leaders around the country, found that this is the norm. As the study’s authors put it, “[d]espite espousing educational philosophies, analysis of the data revealed an implicit punitive / criminal justice orientation toward focusing on individual acts and the individuals responsible for them in responding to bias... Even when incidents were not pursued as part of campus police and judicial systems because they did not constitute criminal acts or policy violations, the processes used by bias response teams often mimicked these systems.” Ryan A. Miller et al., *A Balancing Act: Whose Interests do Bias*

Response Teams Serve?, 42 Rev. Higher Educ. 313, 326-27 (2018). The study also found that response teams' work is often driven by public relations concerns, to make clear to the community that the institution is not ignoring or covering up an incident. Indeed, "many colleges and universities created teams in part because of a perceived demand that the institution become visible in condemning bias incidents." *Id.* at 327.

All this is to say that bias response teams may claim to play primarily educative and coordinating roles, but their real purpose is often much broader, requiring them to address incidents in such a way as to satisfy powerful, left-leaning constituencies. As the authors put it, "team leaders... may view themselves as being accountable to at least two groups: senior-level administrators concerned with institutional reputation... and students... who report bias and often desire to see punishment enacted." *Id.* at 329. This leads bias response teams to "speak the language of crime and punishment," probably because "those reporting bias may be more interested in seeing punishment rather than education as a response." *Id.* at 330-31.

B. The history of the Campus Climate Response Team at UT-Austin indicates that the tool has been used repeatedly by students for the purpose of discouraging others from expressing disfavored viewpoints.

As though to prove its real purpose is not simply educative, the CCRT at UT-Austin updated its website in 2017 to make public all bias incidents reported to it, and to outline the CCRT's response; it admitted to doing so because students were expressing concerns that "no actions [were being] taken in response to their reports." Stephanie Adeline, *Campus Climate Response Team's new webpage addresses transparency in bias*

incident reports, The Daily Texan, Feb. 15, 2018. Prior to this, the CCRT published annual reports that included details about bias incidents and alleged offenders. For example, in 2014-15, the response team “received 21 reports pertaining to an event deemed a ‘Border Patrol’ party sponsored by a student organization, Phi Gamma Delta (also known as Fiji).” CCRT, UT-Austin, *2014-2015 Campus Climate Trend Report 2* (2015). Revealing this information to the campus serves no educative function whatsoever; but it does shame a student organization and its members for exercising their First Amendment rights. The report also notes that “a plurality of respondents (33%) wished for disciplinary action against Fiji and its members,” which is as much as to admit that a good number of those who report bias incidents are using the process with the intention of provoking the University to punish the offender for his or her speech. *Id.* Other examples of protected speech reported as bias incidents that year include: “student organizations participating in traditions perceived as insensitive or based on stereotypes” and “insensitive online posts pertaining to race, gender identity, or sexual orientation.” *Id.* at 15.

Even if the court rejects the argument that the CCRT plays an important role in the disciplinary processes of the institution, it is still evident that its activities chill speech. While the U.S. Supreme Court has ruled that the “mere existence” of a broad, intelligence-gathering program does not, “without more,” impermissibly chill speech, bias response teams clearly do “more” than collect information; and because students can use them to provoke an investigative response, the government is not in full control

of how the program affects citizens. *Laird v. Tatum*, 408 U.S. 1, 10 (1972). This means the court should ask whether members of the campus with a desire to deter the expression of disfavored viewpoints are aided in their efforts by the existence of the CCRT.

As FIRE outlined in a 2017 report on bias response teams, institutions that have commissioned them are arguably engaging in retaliatory speech where damaging information is disclosed in response to a student or faculty member's exercise of his or her First Amendment rights:

To mount a First Amendment retaliation claim... an aggrieved party must demonstrate three things: “first, that his speech or act was constitutionally protected; second, that the defendant’s retaliatory conduct adversely affected the protected speech; and third, that there is a causal connection between the retaliatory actions and the adverse effect on speech.” Whether government conduct has an adverse effect is determined by an objective standard: if the retaliatory conduct “would likely deter ‘a person of ordinary firmness’ from the exercise of First Amendment rights.” The retaliatory conduct need not be successful, as the cause of action is intended to address “conduct that tends to chill [speech], not just conduct that *freezes* it completely.”

FIRE, *Bias Response Team Report 21* (2017) (internal footnotes and citations omitted).

Appeals courts have also acknowledged that “the retaliatory disclosure of information” by public employees may violate First Amendment protections if it “relates to those personal rights that can be deemed fundamental or implicit in the concept of ordered liberty ... [and the] resulting injury caused by the disclosure of the information in retaliation for engaging in protected conduct is sufficiently embarrassing,

humiliating, or emotionally distressful.” *Suarez Corp. Industries v. McGraw*, 202 F.3d 676, 688 (4th Cir. 2000) (internal quotation marks omitted). This means that the CCRT’s practice of publicly disclosing information about the complaints it receives may impermissibly chill speech—even where team members do not, or cannot, meet with, refer for discipline, or otherwise reeducate the offender. Whether the CCRT deliberately discloses the identity of a student who is subject to a bias complaint, or does so incidentally such that the subject is identifiable to a reasonably well-informed member of the campus, the question should be: does the disclosure cause sufficient embarrassment to incline objectively reasonable students—those involved or observing—to self-censor?

CONCLUSION

The U.S. Supreme Court has repeatedly affirmed that students at public universities can expect 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 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 v. Chicago*, 337 U.S. 1, 4 (1949).

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 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,

/s/ Erik S. Jaffe

Erik S. Jaffe
Gene C. Schaerr
Stephen S. Schwartz
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
GSchaerr@Schaerr-Jaffe.com
Counsel for *Amici* ACTA and IWF

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing on August 16, 2019 with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Erik S. Jaffe

Counsel for Amici Curiae ACTA and IWF

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(B), undersigned counsel certifies that this brief complies with the applicable type-volume limitations. This was prepared using a proportionately spaced typeface using Microsoft Word 2019 (14-point Garamond).

This brief contains 5843 words, excluding the portions exempted by Federal Rules of Appellate Procedure 32(a)(7)(B). This certificate was prepared in reliance on the word-count function in Microsoft Word 2019.

/s/ Erik S. Jaffe

Counsel for Amici Curiae ACTA and IWF