

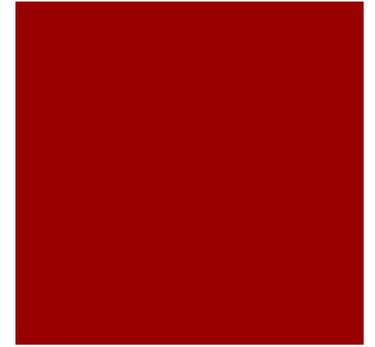


# **Bias Response Teams: A Closer Look at Recent Litigation**

**Will Creeley, Legal Director**  
Foundation for Individual Rights in Education

**Legal Issues Conference, Mississippi State University**  
**May 4, 2022**

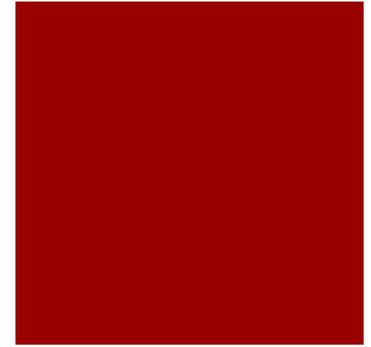
# Bias Response Teams



## BIAS RESPONSE TEAM REPORT 2017

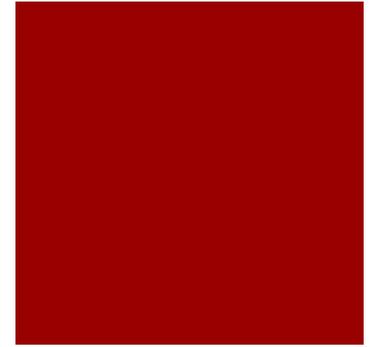


# Bias Response Teams



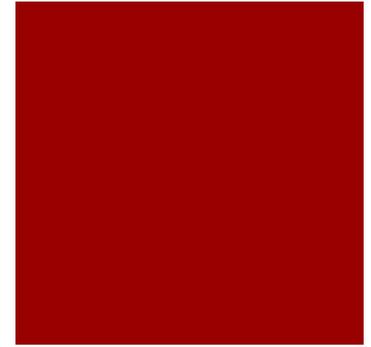
- FIRE discovered and surveyed 232 Bias Response Teams at public and private institutions during 2016.
- BRTs encourage students to formally report on one another and on faculty members whenever they subjectively perceive that someone's speech is "biased."
- The expression of at least 2.84 million American students is subject to review by Bias Response Teams.
- 42% report speech to members of law enforcement or campus security officers.
- Fewer than a third of teams include faculty members.

# Bias Response Teams



- Teams tend to cast a wide net when defining “bias.” Almost all use categories widely found in discrimination statutes (race, sex, sexual orientation, etc.), while others investigate bias against obscure categories, such as “smoker status,” “shape,” and “intellectual perspective.” A significant minority include **political affiliation or speech as a potential bias, inviting reports of and investigations into political speech by law enforcement and student conduct administrators.**

# Bias Response Teams: Why implement them?



- Constitutional bar against implementing speech codes.
- Expanding employment-based anti-discrimination systems is cheap.
- BRTs might provide an early warning about **public controversies**.  
(Twelve percent of Bias Response Teams included media relations administrators.)
- **Students might ask for them.**

# Students & Student Groups

## ■ Bias Response Teams

### REPORTING A BIAS INCIDENT

Give it. Get it.  
EXPECT  
RESPECT



Walk through the steps to reporting a bias incident, either experienced or witnessed.

#### IS IT A BIAS INCIDENT?

A bias incident is non-criminal activity committed against a person or property that is motivated, in whole or in part, by the offender's **bias against a:**

RACE • COLOR • ETHNICITY • NATIONAL ORIGIN • SEX •  
GENDER IDENTITY OR EXPRESSION • SEXUAL ORIENTATION •  
DISABILITY • AGE • RELIGION

# Speech First's History

- Founded in February 2018 as “litigation-focused organization in the campus free speech realm”
- Membership-based structure: \$5 lifetime membership available to students, faculty, parents, alumni, general public



**SPEECH FIRST**

# Speech First's Leadership

- **Nicole Neily, President & Founder**
- Also: President & Founder of Parents Defending Education, launched 2020
- Former President of Franklin Center for Government and Public Integrity
- Former Executive Director and Senior Fellow at the Independent Women's Forum
- Married to Clark Neily, Senior Vice President for Legal Studies at the Cato Institute



**SPEECH FIRST**

# Speech First's Leadership

- **Cherise Trump, executive director (April 2021)**
- Previously: Associate Director of Coalition Relations at Heritage Foundation, “focusing on defense policy, foreign policy, and immigration reform issues”
- Program Manager, Alexander Hamilton Society (AHS), “managed their national network of university and professional chapters which focused on bringing speakers to campus to debate professors on foreign policy issues”



**SPEECH FIRST**

# Speech First: Activities, Identity, Branding

- Conservative in practice
- 2018 Form 990: ~1.5M in expenses
- Limited advocacy, *amicus* work
- Focus on litigation
- Regular media appearances
- Steady activity, small following on Twitter (~3,000 followers)
- “Student Spotlight” profiles
- Podcast (“Well Said”)



**SPEECH FIRST**

# Speech First's Litigation

## Cases filed

### ■ 2018

*Speech First v. Schlissel* (University of Michigan) (CA6)

*Speech First v. Fenves* (University of Texas – Austin) (CA5)

### ■ 2019

*Speech First v. Killeen* (University of Illinois) (CA7)

### ■ 2020

*Speech First v. Wintersteen* (Iowa State University) (CA8)

### ■ 2021

*Speech First v. Cartwright* (University of Central Florida) (CA11)

*Speech First v. Sands* (Virginia Tech University) (CA4)

### ■ 2022

*Speech First v. Khator et al.* (University of Houston) (CA5)



**SPEECH FIRST**

# Speech First's Litigation

## Cases filed

### ■ 2018

*Speech First v. Schlissel* (University of Michigan) (CA6) (opinion; settled)

*Speech First v. Fenves* (University of Texas – Austin) (CA5) (opinion; settled)

### ■ 2019

*Speech First v. Killeen* (University of Illinois) (CA7) (opinion; settled)

### ■ 2020

*Speech First v. Wintersteen* (Iowa State University) (CA8) (**settled**)

### ■ 2021

*Speech First v. Cartwright* (Univ. of Central Florida) (CA11) (opinion)

*Speech First v. Sands* (Virginia Tech) (CA4) (partial loss, on appeal)

### ■ 2022

*Speech First v. Khator et al.* (University of Houston) (CA5)



**SPEECH FIRST**

# Speech First's Litigation



## Hallmarks of Speech First's Challenges

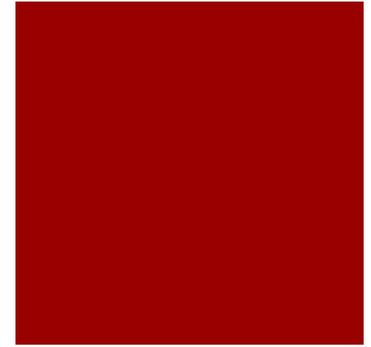
- All litigation handled by Consovoy McCarthy
- DOJ support under Trump Administration
- Pseudonymous student members expressing concern about punishment under speech codes for voicing conservative views
- Facial challenges w/ no enforcement; preliminary injunctions sought
- Variety of speech codes targeted, with emphasis on bias response teams
- Willingness to challenge “yellow light” policies & BRTs without disciplinary mechanism; citations to FIRE’s Spotlight Database and BRT Report
- Mootness questions following institutional policy revisions post-filing
- Standing questions regarding alleged chill / threat of enforcement



**SPEECH FIRST**

# ***Speech First, Inc. v. Schlissel***

333 F. Supp. 3d 700 (E.D. Mich. 2018)



- Anonymous student plaintiffs challenge “Statement of Student Rights and Responsibilities,” which included undefined ban on “[h]arassing or bullying another person—physically, verbally, or through other means,” and BRT
- “(a) support for gun rights, President Trump, the border wall, and the right of “highly unpopular speaker[s]” to lecture on campus;  
(b) opposition to illegal immigration, abortion, affirmative action, and having children outside of marriage; and  
(c) criticism of the Black Lives Matter and “gender identity” movements, welfare, affirmative action, and Title IX. According to the Complaint, these students “credibly fear” that they will be reported to the BRT or OSCR if they attempt to discuss or debate these topics.”
- District court: “Speech First, however, fails to demonstrate that the BRT poses anything but a ‘subjective chill’ on students’ free speech rights.”
- After policy change, challenge to harassment ban is moot



# *Speech First, Inc. v. Schlissel*

939 F. 3d 756 (6th Cir. 2019)

- On appeal, Sixth Circuit **reverses** in 2-1 ruling.
- Voluntary cessation re: harassment policy doesn't moot claim because of post-filing timing, continued defense of policy.
- "Speech First has standing to challenge the Response Team here because its members face an objective chill based on the functions of the Response Team. Speech First recognizes that the Response Team lacks any formal disciplinary power and that bias incidents are not directly punishable under the Statement, but maintains that the Response Team acts by way of implicit threat of punishment and intimidation to quell speech. **We agree.**"



# ***Speech First, Inc. v. Schlissel***

939 F. 3d 756 (6th Cir. 2019)

“Additionally, the invitation from the Response Team to meet could carry an implicit threat of consequence should a student decline the invitation. Although there is no indication that the invitation to meet contains overt threats, the referral power lurks in the background of the invitation. **It is possible that, for example, a student who knows that reported conduct might be referred to police or OSCR could understand the invitation to carry the threat: ‘meet or we will refer your case.’”**



# ***Speech First, Inc. v. Schlissel***

939 F. 3d 756 (6th Cir. 2019)

“Additionally, the very name ‘Bias Response Team’ suggests that the accused student’s actions have been prejudged to be biased. The name is not the ‘Alleged Bias Response Team’ or ‘Possible Bias Investigatory Team.’ It is the ‘Bias Response Team.’ **And as such, the name intimates that failure to meet could result in far-reaching consequences, including reputational harm or administrative action.**”

“Nobody would choose to be considered biased, and an individual could be forgiven for thinking that inquiries from and dealings with the Bias Response Team could have dramatic effects such as currying disfavor with a professor, or impacting future job prospects. Attending the meeting is voluntary. But the record is silent as to whether being labeled ‘voluntary’ ameliorates any of these objectively implied threats.”



# ***Speech First, Inc. v. Fenves***

384 F. Supp. 3d 732 (W.D. Tex. 2019)

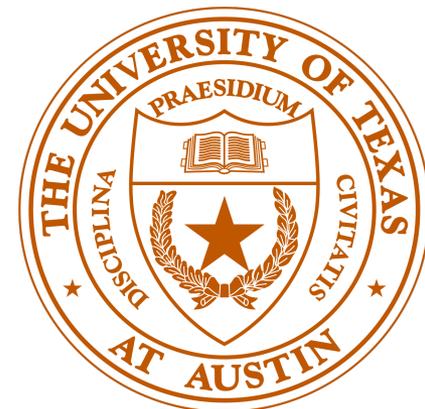
- Anonymous student plaintiffs challenge “prohibitions on ‘verbal harassment,’ ‘incivility,’ ‘harassment,’ ‘intimidation,’ or ‘rudeness’ found in the Institutional Rules, the Residence Hall Manual, and the Acceptable Use Policy”
- Also challenge Campus Climate Response Team
- District court finds that students do not have standing to sue: “Speech First presents no evidence that any University students—much less any of Speech First's student members—have been disciplined, sanctioned, or investigated for their speech.”



# Speech First, Inc. v. Fenves

979 F.3d 319 (5th Cir. 2020)

- University changes policies after notice of appeal filed.
- Fifth Circuit finds policy change does not moot challenge, relying on *Schlissel*.
- Fifth Circuit reverses district court on standing.
- “[T]he existence of the University's policies, which the University plans to maintain as far as a federal court will allow it, suffices to establish that the threat of future enforcement, against those in a class whose speech is arguably restricted, is likely substantial. And such likelihood is all that is necessary to establish the final prong of injury-in-fact for standing to seek a preliminary injunction in this kind of case. Speech First has established an injury in fact.”



# ***Speech First, Inc. v. Fenves***

979 F.3d 319 (5th Cir. 2020)

**“Even more to the point, if there is no history of inappropriate or unconstitutional past enforcement, and no intention to pursue discipline against students under these policies for speech that is protected by the First Amendment, then why maintain the policies at all? At least, why maintain the plethora of potential sanctions?”**

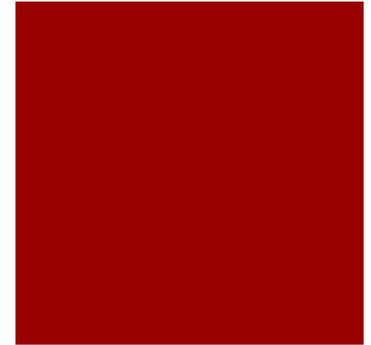
“After all, the University regulatory policy for speech, including the Acceptable Use Policy, could have stated succinctly that students will be disciplined, up to and including academic punishment and criminal referral, for speech that is outside the protection of the First Amendment and, perhaps, Title IX, which covers sexual harassment in institutions receiving federal funds. A reasonable observer must deduce that the University meant to expand its regulatory authority beyond the First Amendment; consequently, a reasonable student must act on the same assumption and self-censor her speech in accord with the perceived policies.”



# ***Speech First, Inc. v. Killeen***

968 F.3d 628 (7th Cir. 2020)

- Anonymous students challenge Bias Assessment and Response Team, bar on distributing material for non-campus political candidates without prior approval, and issuance of “no contact directives” to separate students.
- District court ruled against PI motion: (1) found prior approval rule – abandoned by the university – to be moot; (2) found Speech First lacked standing to challenge BART.
- Seventh Circuit panel affirms district court’s decision in 2-1 ruling, explicitly rejecting *Schlissel*.

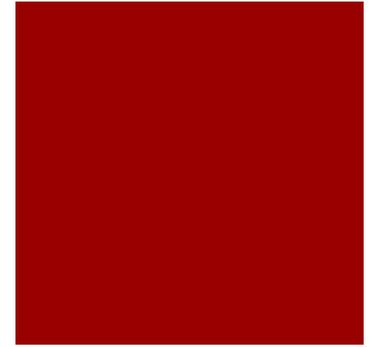


# ***Speech First, Inc. v. Killeen***

968 F.3d 628 (7th Cir. 2020)

“Whereas Speech First produced a three-page, bareboned declaration from someone lacking first-hand knowledge of BART and how it operates on campus, the University put forth multiple, detailed affidavits, consistently describing BART's operations.

**Speech First's sparse submission failed to demonstrate that any of its members face a credible threat of any enforcement on the basis of their speech or that BART's or BIP's responses to reports of bias-motivated incidents have an objective chilling effect.** The district court therefore correctly determined that Speech First failed to demonstrate standing to challenge BART's and BIP's processes.”



# Speech First, Inc. v. Wintersteen

- In January 2020, Speech First challenges Iowa State's chalking ban, "acceptable use" policy governing political speech, and Campus Climate Response System
- Standard Speech First *modus operandi*: Motion for preliminary injunction, anonymous student plaintiffs alleging chill on conservative political speech
- University folds quickly, abandons chalking policy, settles in March 2020
- "To lock in these reforms, Speech First negotiated a settlement agreement with the University. Iowa State now agrees to never reinstate the political email policy or the chalking ban; in addition, the school's Campus Climate Reporting System will not contact or meet with students accused of 'biased' speech."
- "We will continue to monitor Iowa State and its approach to students' freedom of expression. The settlement reserves our right to challenge the CCRS again in the future, and to challenge the new chalking policy if it effectively chills speech."



# ***Speech First, Inc. v. Cartwright***

No. 21-12583 (11th Cir. Apr. 21, 2022)



- Speech First challenges University of Central Florida's bias-response team policy, harassment policy, and computer use policy.
- District court strikes down computer use policy, but upholds harassment policy and finds lack of standing to challenge BRT
- On appeal, Eleventh Circuit reverses last month.



# ***Speech First, Inc. v. Cartwright***

No. 21-12583 (11th Cir. Apr. 21, 2022)

- The discriminatory-harassment policy is almost certainly unconstitutionally overbroad.... [T]he policy (1) prohibits a wide range of "verbal, physical, electronic, and other" expression concerning any of (depending on how you count) some 25 or so characteristics; (2) states that prohibited speech "may take many forms, including verbal acts, name-calling, graphic or written statements" and even "other conduct that *may* be humiliating"; (3) employs a gestaltish "totality of known circumstances" approach to determine whether particular speech, for instance, "unreasonably alters" another student's educational experience; and (4) reaches not only a student's own speech, but also her conduct "encouraging," "condoning," or "failing to intervene" to stop another student's speech.



# ***Speech First, Inc. v. Cartwright***

No. 21-12583 (11th Cir. Apr. 21, 2022)

- The policy, in short, is staggeringly broad, and any number of statements—some of which are undoubtedly protected by the First Amendment—could qualify for prohibition under its sweeping standards. To take a few obvious examples, the policy targets "verbal, physical, electronic or other conduct" based on "race," "ethnicity," "religion [or] non-religion," "sex," and "political affiliation." Among the views that Speech First's members have said they want to advocate are that "abortion is immoral," that the government "should not be able to force religious organizations to recognize marriages with which they disagree," that "affirmative action is deeply unfair," that "a man cannot become a woman because he 'feels' like one," that "illegal immigration is dangerous," and that "the Palestinian movement is anti-Semitic."
- Whatever the merits or demerits of those sorts of statements, they seem to us to constitute "core political speech," with respect to which "First Amendment protection is 'at its zenith.'" Because the discriminatory-harassment policy restricts political advocacy and covers substantially more speech than the First Amendment permits, it is fatally overbroad....

# ***Speech First, Inc. v. Cartwright***

No. 21-12583 (11th Cir. Apr. 21, 2022)

- So again, to sum up: The bias-related-incidents policy creates a mechanism by which a UCF student can be anonymously accused of an act of "hate or bias" – *i.e.*, an "offensive" act, even if "legal" and "unintentional," that is directed toward another based on any of a number characteristics that echo (but do not precisely mirror) those listed in the discriminatory-harassment policy. The JKRT "monitor[s]" and "track[s]" bias-related incidents, "coordinate[s] university resources," marshals a "comprehensive response[]," and, where necessary, coordinates "interventions" among affected parties.



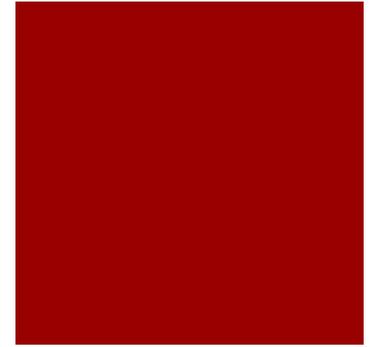
# ***Speech First, Inc. v. Cartwright***

No. 21-12583 (11th Cir. Apr. 21, 2022)

- The district court held that Speech First lacked standing to challenge the bias-related-incidents policy because, the court said, the JKRT couldn't punish students itself but, rather, could only refer them to other university actors for discipline. We hold that the district court erred in focusing so singularly on the JKRT's power to punish. The reason, already explained, is that a government actor can objectively chill speech-through its implementation of a policy-even without formally sanctioning it. Punishment is no doubt relevant to the objective-chill analysis, and may well be sufficient to prove the requisite chill, but analogous precedent makes clear that it is not decisive and, in any event, is not uniformly necessary.



# Speech First: Ongoing Litigation

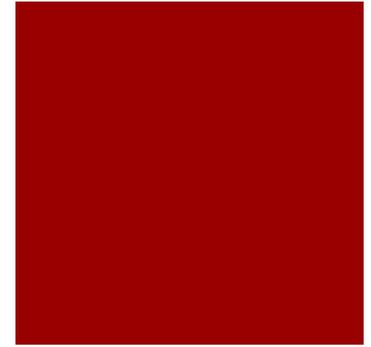


- ***Speech First v. Sands*** (on appeal to CA4)

September 2020 loss in district court on bias-related incidents policy, discriminatory harassment policy, and informational activities policy; successful challenge to computer use policy.

- ***Speech First v. Khator*** (filed 2-22-2022)

# Speech First: Ongoing Litigation

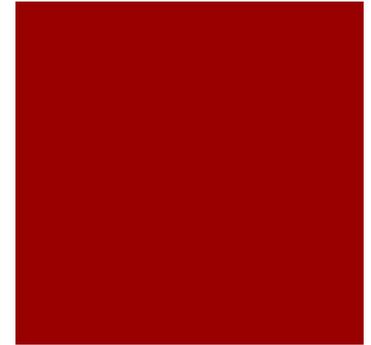


The FIRE Report argues that, in general, the goal of bias response teams is "to chill speech that the institution or its constituents find offensive or unkind," but it explains that "[t]o the extent that Bias Response Teams are used to better understand students' perspectives, to prepare general programming to constituents of the institution, or to provide resources to a complaining student, these goals are unobjectionable on First Amendment grounds." In short, Virginia Tech's bias response team should be judged on its own merits.

**Here, Speech First has not made a clear showing that the protocol and BIRT objectively chill speech at Virginia Tech because they do not proscribe anything.** Speech First has put on no evidence that students feel obligated to come to these voluntary meetings, nor do Students A and C (or Student B, for that matter) declare that they would feel obligated to attend such a meeting if invited.

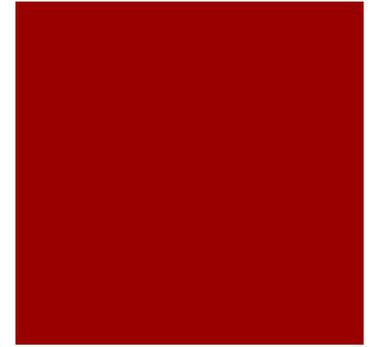
***Speech First, Inc. v. Sands*, No. 7:21-cv-00203, 2021 U.S. Dist. LEXIS 181057, at \*35-36 (W.D. Va. Sep. 21, 2021) (citation omitted).**

# Speech First: Current State of Play



- **Cases filed** in Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits.
- **Cases presumably still to come** in First, Second, Third, Ninth, and Tenth Circuits.
- **CA5, CA6, CA11 split with CA7** with regard to (1) standing to challenge BRT policies and (2) mootness following voluntary cessation.
- **Supreme Court in play? Stay tuned.**

# Thanks for attending!



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