RECENT CASES

FIRST AMENDMENT — CHILLING EFFECTS — FOURTH CIRCUIT UPHOLDS UNIVERSITY BIAS RESPONSE TEAM POLICIES. — *Speech First, Inc. v. Sands*, 69 F.4th 184 (4th Cir. 2023).

It is a longstanding constitutional principle that the First Amendment must be robustly enforced at colleges and universities, given their unique role in fostering learning and debate.[1] Moreover, because "the freedoms of expression . . . are vulnerable to gravely damaging yet barely visible encroachments,"[2] the Supreme Court has construed the First Amendment to prohibit informal sanctions that chill protected speech.[3] Recently, in *Speech First, Inc. v. Sands*,[4] the Fourth Circuit held that an organization representing students lacked standing to challenge Virginia Tech's bias response team policy because it had not shown that the policy objectively chilled students' speech.[5] In doing so, the court misapplied the Supreme Court's test from *Bantam Books, Inc. v. Sullivan*[6] for assessing whether informal censorship violates the First Amendment. As a result, the court gave universities a green light to informally target disfavored speech, undermining decades of precedent safeguarding First Amendment rights on campus.

Like many universities, Virginia Tech maintains a Student Code of Conduct, which, among other provisions, restricts the advertisement of events, gathering of petitions, and distribution of informational materials on campus (the "informational activities policy").[7] Virginia Tech also operates a Bias Intervention and Response Team (BIRT), which responds to bias-related incidents (the "bias policy").[8] Speech First sued Timothy Sands — the President of Virginia Tech — to challenge these policies on behalf of three of its student members.[9] The organization alleged that both policies violate students' First Amendment rights and moved for a preliminary injunction to enjoin their enforcement.[10]

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[1] *See* Healy v. James, 408 U.S. 169, 180–81 (1972); *see also* Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801, 1829 (2017).

[2] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963).

[3] *E.g.*, *id.* at 66–67.

[4] 69 F.4th 184 (4th Cir. 2023).

[5] *Id.* at 194–96.

[6] 372 U.S. 58.

[7] Speech First, Inc. v. Sands, No. 21-cv-00203, 2021 WL 4315459, at *4–5 (W.D. Va. Sept. 22, 2021).

[8] *Id.* at *5, *8. The bias policy defines bias-related incidents as "expressions against a person or group because of the person's or group's age, color, disability, gender (including pregnancy), gender identity, gender expression, genetic information, national origin, political affiliation, race, religion, sexual orientation, veteran status, or any other basis protected by law." *Id.* at *8.

[9] *Id.* at *1. Speech First is a national organization that aims to expand student speech rights. *See id.*

[10] *Id.*

The district court declined to enjoin the two policies.[11] It concluded that Speech First did not have standing to challenge the bias policy because the policy did not proscribe conduct that Speech First's student members wanted to engage in, and Speech First had not clearly shown that the policy objectively chilled speech.[12] Although the court determined that Speech First had standing to challenge the informational activities policy,[13] it held that the organization had not "clearly show[n] that it [was] likely to succeed on the merits" and therefore was not entitled to a preliminary injunction.[14]

The Fourth Circuit affirmed.[15] Writing for the panel, Senior Judge Motz[16] first considered the bias policy. She began by laying out the relevant standing requirements.[17] For purposes of Article III standing, plaintiffs suffer a "concrete injury even when the state has simply 'chilled' the right to engage in free speech and expression."[18] To assess whether speech is chilled, courts ask whether "the asserted chill 'would likely deter a person of ordinary firmness from the exercise of First Amendment rights.'"[19] Applying this test, Judge Motz concluded that the bias policy did not objectively chill speech.[20] First, she asserted that the policy's purpose was not to implicitly threaten students with punishment if they expressed an allegedly biased view.[21] She distinguished Virginia Tech's policy from the government action at issue in *Bantam Books*, concluding that the governmental authority in *Bantam Books* "wielded great coercive authority," whereas the BIRT did not.[22] She also concluded that the BIRT's power to refer violations of the Code of Conduct or the law to campus administrators or the police did not threaten students, as this referral power was no greater than that of any other member of the Virginia Tech community.[23] Second, Judge Motz considered Speech First's alternative argument that the bias response process itself constituted an elaborate bureaucratic regime that

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[11] *Id.*
[12] *Id.* at *10, *12.
[13] *Id.* at *22.
[14] *Id.* at *24.
[15] *Speech First*, 69 F.4th at 188.
[16] Judge Motz was joined by Judge Diaz.
[17] *Speech First*, 69 F.4th at 192 (citing Wikimedia Found. v. NSA, 857 F.3d 193, 207 (4th Cir. 2017)).
[18] *Id.* (citing Cooksey v. Futrell, 721 F.3d 226, 235 (4th Cir. 2013)).
[19] *Id.* (quoting Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 500 (4th Cir. 2005)).
[20] *See id.* at 194–96.
[21] *See id.* at 193–94.
[22] *Id*. Judge Motz highlighted that the district court found that the bias policy "does not proscribe 'anything at all,'" *id.* at 192 (quoting Speech First, Inc. v. Sands, No. 21-cv-00203, 2021 WL 4315459, at *10 (W.D. Va. Sept. 22, 2021)), and only the BIRT "has the authority to . . . 'invite' students to participate in a 'voluntary conversation' about the alleged bias or refer reports elsewhere," *id.* at 194 (quoting *Speech First*, 2021 WL 4315459, at *10).
[23] *Id.* at 195.

burdened student speech.[24] Relying on the Fourth Circuit's decision in *Abbott v. Pastides*,[25] she concluded that an invitation to an optional meeting was inadequate to constitute a First Amendment injury.[26]

Judge Motz next observed that Speech First had brought similar challenges to university bias policies in the Fifth, Sixth, Seventh, and Eleventh Circuits.[27] She argued that the Seventh Circuit, in affirming the denial of a preliminary injunction, "followed . . . the only appropriate approach": basing its standing analysis on factual findings by the district court.[28] She contended that the other courts, which vacated denials of injunctions, failed to give proper weight to the district courts' findings of fact.[29] Judge Motz concluded by asserting that the bias policy amounted to permissible government speech that advanced Virginia Tech's legitimate goal of "promot[ing] civility and a sense of belonging among the student body."[30]

Judge Motz next turned to the informational activities policy.[31] First, she held that the policy was not an impermissible prior restraint because it did not confer discretion on Virginia Tech to control speech.[32] Additionally, she determined that Speech First had failed to demonstrate that it was likely to succeed on the merits of its argument that the policy was an impermissible prior restraint even if it was only a time, place, and manner restriction.[33] Lastly, Judge Motz held that Speech First had also failed to show a likelihood of success on the merits as to its claim that the policy was an unconstitutional speaker-based restriction.[34]

Judge Wilkinson dissented.[35] First, he concluded that Speech First had standing to challenge the bias policy because it had shown that the policy caused students to self-censor and thereby objectively chilled speech.[36] Judge Wilkinson first looked to the purpose and composition of the BIRT, concluding that a reasonable student would perceive that it was created to root out dissenting views.[37] Second, he argued that the

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[24] *Id.*

[25] 900 F.3d 160 (4th Cir. 2018).

[26] *See Speech First*, 69 F.4th at 196.

[27] *Id.* at 197.

[28] *Id.*

[29] *Id.* at 197–98.

[30] *Id.* at 198–99.

[31] *Id.* at 199.

[32] *Id.* at 200.

[33] *Id.*

[34] *Id.* at 201. Judge Motz determined that, based on the existing record, it was "too early to tell," *id.*, whether Virginia Tech had offered an adequate rationale for distinguishing between students who had secured the sponsorship of a Registered Student Organization and those who had not, and therefore a preliminary injunction was inappropriate, *id.* at 201–02.

[35] *Id.* at 203 (Wilkinson, J., dissenting).

[36] *Id.* at 206. In doing so, Judge Wilkinson chastised the majority for "confin[ing the] 'credible threat of enforcement' [standard from *Abbott*] to direct punishment" and "gloss[ing] over the [bias] policy's practical consequences." *Id.*

[37] *See id.* at 206–07.

bias policy's language was capacious enough to characterize almost anything as a bias incident and explicitly covered protected speech.[38] Third, he observed that Virginia Tech vociferously encouraged students to report other members of the university community to the BIRT, "even if they [were] 'unsure' that an incident qualifie[d] as biased."[39] Because bias-related incidents could occur on or off campus and online, Judge Wilkinson concluded that "Virginia Tech establishe[d] a regime of comprehensive surveillance" of student speech.[40]

Judge Wilkinson next disputed the majority's conclusion that the bias policy could not chill speech because the BIRT itself lacked authority to impose formal sanctions.[41] First, he argued that a referral from the BIRT "carrie[d] its own administrative imprimatur," and reasonable students could fear that this referral would spur punishment from other university offices.[42] Second, students may reasonably feel pressured to attend meetings with BIRT representatives.[43] Third, the university's "nebulous assurance" of its commitment to free speech would reasonably be "cold comfort" to students.[44] Fourth, students may reasonably fear reputational harm if word got out that they had been reported for bias.[45] Accordingly, Judge Wilkinson concluded that while the bias policy did not impose formal punishment, these "collateral consequences" were sufficient to chill the speech of a reasonable student.[46]

Next, Judge Wilkinson argued that the informational activities policy was an unreasonable restraint on speech.[47] First, he determined that tabling locations constituted limited public fora and therefore, for restrictions on First Amendment activity to be upheld, "substantial alternative channels" must remain open for speakers.[48] Virginia Tech's policy failed to do so and therefore was an unreasonable speech restraint.[49] He also disagreed with the majority that the policy did not provide administrators with broad, unreviewable discretion, noting that student requests to pamphlet or collect signatures could be denied under the vague premise of "university policies."[50]

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[38] *Id.* at 207–08.

[39] *Id.* at 209 (quoting Joint Appendix at 200, *Speech First*, 69 F.4th 184 (No. 21-2061)).

[40] *Id.*

[41] *Id.* at 209–10.

[42] *Id.* at 210.

[43] *See id.* at 210–11. Judge Wilkinson argued that this is especially true given the vast power differential between the Dean of Students and students. *Id.*

[44] *Id.* at 212.

[45] *Id.*

[46] *See id.* at 213.

[47] *Id.* at 214. Judge Wilkinson argued that the informational activities policy was an unconstitutional *prior* restraint on speech, giving Speech First a particularly high likelihood of success on the merits. *Id.* at 217.

[48] *Id.* at 215 (quoting Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 54 (1983)).

[49] *See id.*

[50] *Id.* at 218.

Judge Wilkinson concluded by noting the circuit split on the constitutionality of bias policies — which he suggested creates an unfortunate "patchwork of First Amendment jurisprudence"[51] — and lamenting the impact that the bias policy would have on students' ability to freely express opinions, especially those that are unpopular or heterodox.[52]

In concluding that Virginia Tech's bias policy would not chill a reasonable student's speech, the court misapplied *Bantam Books* in three ways. First, it erroneously construed *Bantam Books* as a constitutional floor. Second, and relatedly, in concluding that the BIRT did not wield significant coercive power, it drew specious distinctions between the BIRT and the *Bantam Books* Commission. Third, it required the BIRT to have a special power to refer incidents for disciplinary action, conjuring a hurdle for plaintiffs to clear that is nowhere in the *Bantam Books* opinion. This faulty analysis enables universities to indirectly target disfavored speech, contravening decades of First Amendment precedent.

Bantam Books established the principle that informal sanctions that chill a reasonable person's speech run afoul of the First Amendment.[53] In *Bantam Books*, Rhode Island created the Commission to Encourage Morality in Youth to shield children from obscenity.[54] The Commission contacted distributors of magazines and books that it deemed to be "objectionable for sale, distribution or display to youths," thanked them in advance for their cooperation, and reminded them of the Commission's duty to recommend prosecutions of obscenity to the Attorney General.[55] The Supreme Court held that this scheme violated the First Amendment, observing that "though the Commission [was] limited to informal sanctions," it sought to, and did, chill speech.[56]

The Fourth Circuit first erred by construing *Bantam Books* as a constitutional floor.[57] *Bantam Books* itself invoked the risk posed by subtle censorship,[58] and lower courts have noted that "it is rare that coercion is so black and white" as in *Bantam Books*,[59] that "it can sometimes be difficult to distinguish between [persuasion and coercion] in practice,"[60] and that differentiating between the two sometimes "require[s] courts to draw fine lines."[61] In response, the chilling effects doctrine acts as a

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[51] *Id.* at 219.

[52] *Id.* at 219–21.

[53] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66–67 (1963).

[54] *Id.* at 59–60.

[55] *Id.* at 61–62.

[56] *Id.* at 67.

[57] *See Speech First*, 69 F.4th at 193–95 (concluding that the BIRT did not wield significant coercive authority because it "share[d] little common ground" with the *Bantam Books* Commission, *id.* at 193).

[58] *See Bantam Books*, 372 U.S. at 66.

[59] Missouri v. Biden, 83 F.4th 350, 378 (5th Cir. 2023), *cert. granted sub nom.* Murthy v. Missouri, No. 23-411, 2023 WL 6935337 (U.S. Oct. 20, 2023) (mem.).

[60] Kennedy v. Warren, 66 F.4th 1199, 1207 (9th Cir. 2023).

[61] Hammerhead Enters., Inc. v. Brezenoff, 707 F.2d 33, 39 (2d Cir. 1983).

"prophylactic" that "giv[es] the benefit of the doubt to the speaker, rather than to the state."[62] Accordingly, despite the fact that the BIRT likely lacked the *Bantam Books* Commission's extreme coerciveness,[63] it nonetheless violated the First Amendment if it crossed from an "attempt[] to convince" into an "attempt[] to coerce."[64]

Next, the Fourth Circuit erroneously diminished the coerciveness of the BIRT by drawing specious comparisons to the *Bantam Books* Commission. First, Judge Motz appeared to apply different definitions of "coercive" to each of the two administrative bodies — focusing on the *Bantam Books* Commission's de facto coercive power while homing in on the BIRT's lack of de jure coercive authority.[65] In reality, the *Bantam Books* Commission, like the BIRT, wielded no formal authority to impose punishment. The Commission "[did] not regulate or suppress obscenity" and had "no power to apply formal legal sanctions."[66] On the contrary, it "simply exhort[ed] booksellers and advise[d] them of their legal rights."[67] Under *Bantam Books*, the ability to impose formal sanctions is emphatically not a requirement for a finding that an administrative body impermissibly chills speech.[68]

But what about informal coercive pressure? Judge Motz eschewed any comparison to the BIRT, emphasizing that the trial court in *Bantam Books* determined that cooperation with the Commission was involuntary.[69] She underscored that the Commission sent police to visit disfavored publishers and wrote letters reminding publishers of the Commission's duty to refer obscenity cases for prosecution.[70] However, the *Bantam Books* trial court clearly used "voluntary" in a practical sense, intimating that the Commission exerted enough pressure that publishers had little choice but to submit to its authority.[71] Accordingly, the *Speech First* district court's finding that "the BIRT does not mandate involuntary compliance" does not provide the grounds for distinguishing *Bantam Books* that Judge Motz suggests.[72] Second, in practice, the BIRT's actions are not categorically different from the *Bantam*

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[62] Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1479 (2013); *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 278–79 (1964).

[63] *See Speech First*, 69 F.4th at 193–94. After all, the BIRT did not send police to students' doors, and it did not explicitly invoke the threat of prosecution. *See id.* at 194.

[64] Okwedy v. Molinari, 333 F.3d 339, 344 (2d Cir. 2003).

[65] *See Speech First*, 69 F.4th at 194.

[66] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963).

[67] *Id.*

[68] Applying *Bantam Books*, multiple circuit courts have likewise concluded that the power to punish is not a prerequisite to a finding of unlawful coercion. *See Okwedy*, 333 F.3d at 344; Kennedy v. Warren, 66 F.4th 1199, 1210 (9th Cir. 2023).

[69] *Speech First*, 69 F.4th at 193–94.

[70] *Id.* at 194.

[71] *Bantam Books*, 372 U.S. at 68. Indeed, the Supreme Court noted that the bookseller was "'free' to ignore the Commission's notices, in the sense that his refusal to 'cooperate' would have violated no law." *Id.*

[72] *Speech First*, 69 F.4th at 194.

Books Commission's. Just as the Commission sent officers to visit publishers, the BIRT — which included representatives from the Virginia Tech police department — individually contacted students accused of bias.[73] And just as the Commission reminded publishers of its power to refer cases for prosecution, Virginia Tech advised students of the BIRT's ability to refer bias incidents to disciplinary bodies that included local police, the Title IX Office, and the Student Conduct Office.[74]

Moreover, Judge Motz at times grounded her argument against the coerciveness of the bias policy in the wrong facts. In particular, she emphasized the district court's finding that there was no evidence that students felt pressured to attend a meeting with the BIRT.[75] But Speech First alleged that its members' speech was objectively chilled, not that its members were coerced into attending a meeting,[76] and the record shows that there were at least some students who self-censored because of the bias policy.[77] To be sure, that self-censorship must also be objectively reasonable to confer standing. However, the fact that students did not feel obligated to sit down with the BIRT does not mean that the bias policy failed to chill a reasonable student's speech, as students could also reasonably fear disciplinary referrals, reputational harm, and entanglement in a university recordkeeping system.[78]

Third, the court misapplied *Bantam Books* by requiring the BIRT to have a special power to refer incidents for disciplinary action. Judge Motz concluded that "the BIRT's ability to refer matters is neither special nor much of a power," in part because the "BIRT may report a Student Code violation *just like any other member of the Virginia Tech community*."[79] True, but the *Bantam Books* Commission likewise did not possess a unique power to refer obscenity cases to law enforcement.[80] Judge Motz also highlighted the fact that the BIRT had the power to refer only "conduct that is not constitutionally protected."[81] Again, this structure does not distinguish the BIRT from the *Bantam Books* Commission, which specifically referred purveyors of obscenity — constitutionally unprotected material — for prosecution.[82] Under a faithful

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[73] *Id.* at 189.

[74] Joint Appendix, *supra* note 39, at 368.

[75] *Speech First*, 69 F.4th at 194 (citing Speech First, Inc. v. Sands, No. 21-cv-00203, 2021 WL 4315459, at *12 (W.D. Va. Sept. 22, 2021)).

[76] *Id.* at 192.

[77] Brief of Appellant Speech First, Inc. at 11–12, *Speech First*, 69 F.4th 184 (No. 21-2061).

[78] *Id.* at 12.

[79] *Speech First*, 69 F.4th at 195 (quoting *Speech First*, 2021 WL 4315459, at *12 (emphasis added)).

[80] Anyone in Rhode Island could have called the police or contacted the Attorney General's office to report the sale of obscene books or magazines. Then, as now, governmental bodies did not have a monopoly on reporting crime.

[81] *Speech First*, 69 F.4th at 195.

[82] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 62 (1963).

application of *Bantam Books*, the fact that the BIRT lacked a unique referral power should not undermine its coerciveness.

By misapplying *Bantam Books*, the majority's analysis empowers universities to indirectly punish disfavored speech, contravening decades of First Amendment jurisprudence. Courts have consistently struck down university speech codes as violations of students' First Amendment rights,[83] and by sanctioning the type of policy that "often amount[s] to [a] speech code[] in disguise,"[84] the Fourth Circuit undermined doctrine that has long protected students from censorious campus administrators. The court's holding is particularly concerning given increasing efforts by politicians across the political spectrum to weaponize state power to target disfavored speech at colleges and universities.[85] For example, the president of West Texas A&M University recently banned a student drag show, calling it "derisive, divisive, and demoralizing misogyny."[86] That almost certainly violates the First Amendment,[87] but, applying the Fourth Circuit's logic, the university could indirectly coerce the students into cancelling the performance. Assuming that at least one person reported the performance organizers, the university could investigate those students and tarnish their reputations with charges of misogyny under the guise of "eliminat[ing] acts of bias" based on gender.[88] By sanctioning such viewpoint discrimination, the Fourth Circuit dimmed the "fixed star in our constitutional constellation . . . that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[89]

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[83] *See, e.g.*, DeJohn v. Temple Univ., 537 F.3d 301, 320 (3d Cir. 2008); Doe v. Univ. of Mich., 721 F. Supp. 852, 866 (E.D. Mich. 1989). *See generally* Azhar Majeed, *Defying the Constitution: The Rise, Persistence, and Prevalence of Campus Speech Codes*, 7 GEO. J.L. & PUB. POL'Y 481 (2009).

[84] Donald Downs, *The Good, The Less-Good, and the Path Forward: Thoughts on FIRE's Annual Report*, OPEN INQUIRY PROJECT (Jan. 4, 2017), https://web.archive.org/web/20190427040719/https://openinquiryproject.org/blog/thoughts-on-fires-annual-report [https://perma.cc/7U2N-B57Y].

[85] *See, e.g.*, Flores v. Bennett, 635 F. Supp. 3d 1020, 1027 (E.D. Cal. 2022) (discussing censorship of "anti-leftist and anti-communist" flyers); Patricia Mazzei, *DeSantis's Latest Target: A Small College of "Free Thinkers*,*"* N.Y. TIMES (Feb. 14, 2023), https://www.nytimes.com/2023/02/14/us/ron-desantis-new-college-florida.html [https://perma.cc/3GTB-4SR6] (discussing Florida Governor Ron DeSantis's efforts to "transform New College . . . into a beacon of conservatism").

[86] Spectrum WT v. Wendler, No. 23-CV-048, 2023 WL 6166779, at *1 (N.D. Tex. Sept. 21, 2023).

[87] Although the district court declined to enjoin the university's policy, *id.* at *15, commentators have criticized the court's analysis as divorced from black-letter First Amendment law, *see, e.g.*, Advisory Opinions, *The Grievances Podcast*, DISPATCH, at 33:59 (Sept. 26, 2023), https://thedispatch.com/podcast/advisoryopinions/the-grievances-podcast [https://perma.cc/EYR2-JVWW]. *Cf.* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("Content-based laws . . . are presumptively unconstitutional.").

[88] *Speech First*, 69 F.4th at 206 (Wilkinson, J., dissenting) (quoting Joint Appendix, *supra* note 39, at 369).

[89] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).