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The Supreme Court Declines to Weigh in on Dispute over Campus Speech Policies

Client Alerts

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By: Ishan K. Bhabha, Lauren J. Hartz, Erica Turret

On March 4, 2024, the Supreme Court vacated the Fourth Circuit Court of Appeals' judgment in a case challenging Virginia Tech's bias intervention and response team policy, instructing the court to dismiss the case as moot. The Fourth Circuit decided the case in the university's favor last May,[1] adding to a growing body of law addressing whether Speech First, an advocacy organization that purports to represent student speech on campus, has standing to challenge campus speech policies on behalf of its anonymous student members. Like the Fourth Circuit, the Seventh Circuit Court of Appeals sided with the university in a similar case brought against the University of Illinois at Urbana-Champaign.[2] In contrast, the Fifth,[3] Sixth,[4] and Eleventh[5] Circuits came to the opposite conclusion, holding that the challenged universities' speech policies "objectively chill" student speech to constitute harm sufficient to support standing. The Fifth and Sixth Circuits also specifically rejected the universities' arguments that the challenges were moot due to policy changes, an argument the Supreme Court embraced in its decision to vacate the Fourth Circuit's decision on mootness grounds.

The type of bias policy at issue in the Virginia Tech case has become common at colleges and universities in recent years as campuses confront an increasingly contentious social and political environment. The policy defined a bias incident as an expression against an individual or group on the basis of a protected characteristic. It allowed complainants to anonymously report these bias incidents, which in turn would be funneled to a bias response team made up of various campus stakeholders. The bias response team would review submitted reports and decide whether to invite the complaining and responding students to participate in a voluntary conversation facilitated by an administrator. Students who declined the invitation did not face any consequences. The bias response team's ability to refer student code violations for discipline was no different than the ability of any other member of the campus community.[6] The fundamental question in the Speech First cases is whether the existence of a bias response team objectively chills student speech in violation of the First Amendment.

Justice Thomas, joined by Justice Alito, dissented from the rest of the Court's decision to dispense with the case as moot due to the university's revision of the policy while the litigation was pending.

In doing so, they indicated support for Speech First's position. Justice Thomas wrote: "The scope of Virginia Tech's policy combined with how it is enforced suggests that the university is stifling students' speech, at least enough to provide Speech First standing to pursue its First Amendment claim."[7] In his view, the First Amendment problems with the university's bias policy include (1) that it "appears limitless in scope";[8] (2) that the policy permits anonymous reporting making the "threshold for reporting intentionally low";[9] and (3) that "a report can have weighty consequences" due in part to the ability to refer a student for discipline.[10] These are the arguments that carried the day in the Fifth, Sixth, and Eleventh Circuits.

Key Takeaways:

- This type of challenge is likely to recur. Speech First, or similar organizations, may wish to bring similar cases in other jurisdictions in an effort to obtain favorable rulings in additional circuits.

- Notably, the Supreme Court has decided to stay out of the fray at a pivotal national moment for campus speech. The war in Gaza continues to roil campuses, making issues related to freedom of expression even more front and center. Universities may use bias response teams as one part of their response to these campus tensions. Those that do should keep the features that have attracted scrutiny in the litigation in mind.

Jenner & Block has one of the preeminent higher education practice groups in the nation. We have counseled and represented institutions in numerous areas of the law, including those related to athletics and civil rights. Likewise, the firm has a deep commitment to diversity, equity, and inclusion as well as extensive experience supporting our clients' DEI efforts through litigation, investigations, and strategic counseling. In light of this commitment and experience, the firm has launched a task force—composed of leading lawyers serving a wide variety of industries—to develop creative, strategic, and tailored solutions for clients across industries to accomplish their DEI goals while minimizing legal risk. We are currently working with clients, including institutions of higher education and corporations, on ways to maintain diversity in the evolving legal landscape. If you are interested in learning more about our work in this area, please contact Task Force Co-Chairs Ishan Bhabha (ibhabha@jenner.com), Lauren Hartz (lhartz@jenner.com), Marcus Childress (mchildress@jenner.com), Katie Wynbrandt (kwynbrandt@jenner.com), or Erica Turret (eturret@jenner.com).

Footnotes

[1] *Speech First, Inc. v. Sands*, 69 F.4th 184, 188 (4th Cir. 2023), *cert. granted, judgment vacated*, No. 23-156, 2024 WL 899213 (U.S. Mar. 4, 2024).

[2] *Speech First, Inc. v. Killeen*, 968 F.3d 628, 632 (7th Cir. 2020), *as amended on denial of reh'g and reh'g en banc* (Sept. 4, 2020).

[3] *Speech First, Inc. v. Fenves*, 979 F.3d 319, 322 (5th Cir. 2020), *as revised* (Oct. 30, 2020).

[4] *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 765 (6th Cir. 2019).

[5] *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1113 (11th Cir. 2022).

[6] *Speech First, Inc. v. Sands*, 69 F.4th 184, 188-89, 195 (4th Cir. 2023), *cert. granted, judgment vacated*, No. 23-156, 2024 WL 899213 (U.S. Mar. 4, 2024).

[7] *Speech First, Inc. v. Sands*, No. 23-156, 2024 WL 899213, at *2 (U.S. Mar. 4, 2024) (Thomas, J. dissenting).

[8] *Id.*

[9] *Id.*

[10] *Id.* at *3.

Related Attorneys

Ishan K. Bhabha
Co-Managing Partner
+1 202 639 6000

Lauren J. Hartz
Partner
lhartz@jenner.com
+1 202 637 6363

Erica Turret
Associate
eturret@jenner.com
+1 202 637 6383

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