No. 19-2807

In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT

SPEECH FIRST, INC.,
PLAINTIFF-APPELLANT,

v.

TIMOTHY L. KILLEEN, ET. AL,
DEFENDANTS-APPELLEES

On Appeal From The United States District Court
For The Central District Of Illinois
Case No. 3:19-cv-3142
The Honorable Colin S. Bruce, Judge

AMICUS BRIEF OF THE WISCONSIN INSTITUTE FOR LAW & LIBERTY SUPPORTING APPELLANT AND REVERSAL

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Appellate Court No: 19-2807

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INTEREST OF AMICUS[1]

The Wisconsin Institute for Law & Liberty ("WILL") is a non-profit, public-interest law firm dedicated to free speech, the rule of law, individual liberty, and constitutional government, among other things. WILL has litigated and won multiple cases involving free speech on campus. *McAdams v. Marquette Univ.*, 2018 WI 88, 383 Wis. 2d 358, 914 N.W.2d 708; *Olsen v. Rafn*, No. 18-C-1366, 2019 WL 4393147 (E.D. Wis. Sept. 13, 2019). WILL is interested in this case because it has significant implications for Wisconsin—like the University of Illinois, many Wisconsin schools have some form of bias response team, *see* Argument Part III, *infra*. All parties have consented to the filing of this amicus brief.

INTRODUCTION

The heart of this case is whether an official university task force dedicated to monitoring, investigating, recording, and reporting incidents of allegedly "biased" speech has a sufficient chilling effect on protected speech to support standing for a First Amendment challenge. *See* RSA 30; Opening Br. 25–44. The district court held that students subject to this surveillance program cannot challenge it because "being reported to [this task force] results in essentially no consequences." RSA 31. This significantly downplays the consequences, as Speech First demonstrates, *see* Opening Brief 30–37, but even accepting that characterization, the district court failed to

[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

recognize the power that surveillance has, on its own, to intimidate and inhibit protected speech. WILL files this amicus brief for three reasons: first, to call this Court's attention to an analogous line of cases recognizing that surveillance of a protected activity by a direct authority opposed to that activity is inherently coercive; second, to note two recent examples showing that students have good reason to fear retaliation from a team of university officials dedicated to monitoring speech they oppose; and third, to show the prevalence of bias response teams in Wisconsin.

ARGUMENT

I. This Court and Other Circuits Have Already Held, in Another Context, That Surveillance of a Protected Activity by a Direct Authority is Inherently Chilling

A series of union-related cases provide a useful analogy for the main issue in this case. Courts have held that the National Labor Relations Act prohibits employers from creating an "impression of surveillance" of union activity, like by photographing a picket line. These cases are relevant because the NLRA does not directly prohibit surveillance, but only acts that "interfere with" or "coerce" employees engaged in union activity. *See* 29 U.S.C. § 158(a)(1). Thus, to conclude that picket-line photography (and the like) violates the Act, courts have relied on the sensible intuition that monitoring by an employer is inherently intimidating and tends to discourage employees from exercising protected rights. The University of Illinois's Bias Assessment and Response Team creates a similar "impression of surveillance," and students, like unionizing employees, will naturally avoid protected speech if they feel like they are being watched by a university task force opposed to such speech,

even one that lacks formal enforcement authority, *but see* Opening Br. 30–37 (outlining BART's implied enforcement authority).

A. Employers Who Photograph or Monitor Their Employees' Union Activity Violate the NLRA's Prohibition on "Coercing" or "Interfering with" Collective Bargaining Rights

The National Labor Relations Act gives employees certain collective bargaining rights—"to self-organization, to form, join, or assist labor organizations, to bargain collectively … and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. To protect these rights, the Act prohibits employers from attempting "to interfere with, restrain, or coerce employees in the exercise of the[se] rights." *Id*. § 158(a)(1).

The National Labor Relations Board, which is charged with enforcing the Act, *see id*. § 160(a), has long maintained that employers can violate this prohibition—on coercive interference with collective bargaining rights—by creating "an impression of surveillance" of employees' union activities. *See*, *e.g.*, *Flexsteel Indus.*, 311 NLRB 257, 257 (1993); *Preston Feed Corp.*, 134 NLRB 629, 643 & n.30 (1961). "The idea," the Board has explained, "is that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Flexsteel Indus.*, 311 NLRB at 257; *see Caterpillar Logistics, Inc. v. NLRB*, 835 F.3d 536, 544 (6th Cir. 2016) (quoting and endorsing this portion of *Flexsteel Industries*).

To give just one example, the Board has repeatedly found improper coercion where an employer photographed or even pretended to photograph union activities such as picketing, leafletting, and the like. *E.g.*, *Famous-Barr Co.*, 59 NLRB 976, 1011 (1944); *Radio Indus., Inc.*, 101 NLRB 912, 925 (1952); *Tennessee Packers, Inc.*, 124 NLRB 1117, 1123 (1959) (cease and desist order against "[p]hotographing employees while engaged in such union activity as accepting union leaflets"); *Faulhaber Co.*, 129 NLRB 561, 567–68 (1960) (same); *Gen. Eng'g Inc.*, 131 NLRB 901, 906–09 (1961) (same). Awareness that one's employer is recording an act "know[n] to be displeasing to the employer" "has a normal and natural tendency to create fear" that the employer plans "some present or future course of action involving him," and therefore "tends to interfere, restrain, and coerce the employees into abandoning their rights." *Tennessee Packers*, 124 NLRB at 1123.

This Court has upheld the Board's view that photographing employees' union activities can be sufficiently coercive to violate section 158(a)(1). In *NLRB v. Colonial Haven Nursing Home, Inc.*, 542 F.2d 691 (7th Cir. 1976), this Court affirmed a cease and desist order against an employer for "photograph[ing] employees carrying picket signs" during the first two days of a strike, *see Colonial Haven Nursing Home, Inc.*, 218 NLRB 1007, 1012 (1975). While "photographing picket line activities may sometimes be a proper means of recording occurrences" given the frequency of legal disputes over picketing, "[s]till," this Court emphasized, "there can be little question that, under certain circumstances, picket-line photography can have a tendency to interfere with, restrain, and coerce employees in their efforts to engage in concerted

activities." *Id*. at 702. And it does not matter whether there is "evidence of actually coercive statements" because monitoring has its own "tendency to interfere or coerce." *Id*. at 701. Thus, the Board could "properly require a company to provide a solid justification for its resort to anticipatory photographing." *Id*. at 701. There was no evidence that the picketing was anything but peaceful, so the Court affirmed the Board's finding that "the company's picture-taking created the appearance of coercive surveillance for purposes of future reprisal and as such violated s. 8(a)(1) of the Act," *id*. at 703.[2]

Many other circuits have endorsed the basic premise that photographing union activity tends to intimidate employees in the exercise of protected rights. *See*, *e.g.*, *Rd. Sprinkler Fitters Local Union No. 669 v. NLRB*, 681 F.2d 11, 19 (D.C. Cir. 1982) ("[P]icket line photography has the tendency to interfere with, restrain, or coerce employees engaged in protected concerted activity."); *Kallmann v. NLRB*, 640 F.2d 1094, 1098 (9th Cir. 1981) ("[T]he photographing of pickets … has a tendency to intimidate."); *NLRB v. Associated Naval Architects, Inc.*, 355 F.2d 788, 791 (4th Cir. 1966) ("[T]he act of photographing itself [ ] ha[s] the tendency in these circumstances to intimidate."). And many more cases have upheld enforcement actions against

[2] This Court affirmed another cease and desist order against photographing union activity in *Flambeau Plastics Corp. v. NLRB*, 401 F.2d 128 (7th Cir. 1968). The Board found that an employer violated Section 158(a)(1) by photographing a peaceful picket line and ordered the employer to stop "engaging in surveillance of employees' union activities." *Flambeau Plastics Corp.*, 167 NLRB 735, 742–43, 751 (1967) (recommended findings of fact and order); *id*. at 735 (Board order adopting recommendation). This Court "d[id] not think any elaboration or discussion [wa]s necessary to dispose of the routine questions arising from the section [158(a)(1)] violations." *Flambeau Plastics Corp.*, 401 F.2d at 136.

employers for photographing union activity. *See NLRB v. Serv. Employees Int'l Union, Local 254, AFL-CIO*, 535 F.2d 1335, 1337 (1st Cir. 1976); *Larand Leisurelies, Inc. v. NLRB*, 523 F.2d 814, 819 (6th Cir. 1975); *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. NLRB*, 455 F.2d 1357, 1368 (D.C. Cir. 1971); *NLRB v. Rybold Heater Co.*, 408 F.2d 888, 891 (6th Cir. 1969); *NLRB v. Frick Co.*, 397 F.2d 956, 961 (3d Cir. 1968); *NLRB v. Preston Feed Corp.*, 309 F.2d 346, 351 (4th Cir. 1962).

Importantly, circuit courts have recognized that "the *impression* of surveillance … can be as coercive as actual surveillance." *NLRB v. Anchorage Times Pub. Co.*, 637 F.2d 1359, 1366 (9th Cir. 1981) (emphasis added). The sense of surveillance "indicates an employer's opposition to unionization" and can easily lead employees to believe "they are under the threat of economic coercion, retaliation, etc." *Hendrix Mfg. Co. v. NLRB*, 321 F.2d 100, 104 n.7 (5th Cir. 1963). As a result, the mere feeling of being watched "ha[s] a natural, if not presumptive, tendency to discourage [union] activity." *Belcher Towing Co. v. NLRB*, 726 F.2d 705, 708 (11th Cir. 1984).

B. A University Task Force Devoted to Monitoring Speech Is Like An Employer Photographing Its Employees' Union Activities

The University of Illinois's Bias Assessment and Response Team ("BART") is to students what an employer with a camera is to picketing employees: It communicates that "members of [university] management are peering over their shoulders, taking note of [their] activities," *Caterpillar Logistics*, 835 F.3d at 544 (quoting *Flexsteel Indus.*, 311 NLRB 257). BART creates an "impression of surveillance" by actively soliciting and collecting reports of allegedly "biased" speech,

investigating those reports, contacting the alleged offender for a "discussion," *see* RSA 14, and then keeping records of all reported incidents of "bias" to produce an annual report. RSA 7–9; Opening Br. 30–37. In many ways, BART's surveillance program generates more anxiety than an employer with a camera because BART actively encourages all students and staff to monitor and report each other's "biased" speech, effectively turning everyone on campus into a potential "camera" for bias.

This sense that BART and its informants are watching "ha[s] a natural, if not presumptive, tendency to discourage" free speech, just like an employer with a camera tends to discourage union activity. *Belcher Towing Co.*, 726 F.2d at 708; *Colonial Haven Nursing Home*, 542 F.2d at 702; *Rd. Sprinkler Fitters*, 681 F.2d at 19; *Kallmann*, 640 F.2d at 1098; *Associated Naval Architects*, 355 F.2d at 791. The very existence of a "Bias Assessment and Response Team" strongly conveys that the University opposes allegedly "biased" speech, much of which is constitutionally protected. And BART's monitoring of speech "know[n] to be displeasing to the [university]" "has a normal and natural tendency to create fear" among students that "they are under the threat of economic coercion, retaliation, etc.," especially if they come within BART's radar. *See Tennessee Packers*, 124 NLRB at 1123; *Hendrix Mfg.*, 321 F.2d at 104 n.7.

BART may not have any legitimate authority to retaliate against students for First-Amendment-protected speech, but neither do employers have any legitimate authority to retaliate against employees for NLRA-protected union activities. What mattered in the union cases was not *authority* to retaliate, but *power* and *opportunity*.

Employers *can* retaliate against employees for collective bargaining, even if unlawfully, and so the sense that the employer is watching naturally induces fear and causes employees to abandon their rights. The same is true here. BART is comprised of university employees in positions of power who are committed to combatting "bias"—some BART members are in the University's Office for Student Conflict Resolution, which enforces the Student Code, and another is a detective for the university police department. Opening Br. 8. Even if students are aware that BART has no formal enforcement authority, *but see* Opening Br. 32–33, they may naturally fear that BART could abuse its authority and retaliate against them. Rather than face that risk, many students may rationally choose silence instead.

Just like employees "should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders," *Flexsteel Indus.*, 311 NLRB at 257, the Supreme Court has recognized that "First Amendment freedoms need breathing space to survive," *NAACP v. Button*, 371 U.S. 415, 433 (1963). BART's surveillance of "biased" speech does not give students the breathing space they need to discuss and work through potentially controversial topics.

II. Students Rightfully Fear that University Officials Monitoring Them for "Biased" Speech May Disregard the First Amendment

One might attempt to distinguish the union cases above on the ground that employers have a long history of retaliating against employees for unionizing, making an employer's surveillance that much more threatening. Sadly, universities are developing the same reputation. There are too many recent examples of the

breakdown of First Amendment convictions on campus, but just two recent cases that WILL litigated provide a good illustration. Examples like these make it entirely reasonable for students to be intimidated by an official university task force dedicated to monitoring allegedly "biased" speech.

Polly Olsen, a Christian student at Northeast Wisconsin Technical College, on Valentine's Day handed out heart-shaped Valentines with a short message and corresponding Bible reference, such as, "Jesus Loves You! Rom 5:8," "You are Loved! 1 John 4:19," and "You are never alone! 1 Peter 2:21." *Olsen*, 2019 WL 4393147, at *1. When someone complained, a school security officer tracked Polly down, escorted her to the security office, and then told her she was "disturbing the learning environment" and violating the school's solicitation policy. *Id.* at *2. Polly responded that her activity was protected by the First Amendment, but the school refused to back down, so WILL became involved and eventually filed a lawsuit. A little over a month ago, the Eastern District of Wisconsin held unequivocally that the school violated Polly's First Amendment rights. *Id.* at *4–*7.

At Marquette University, during an ethics discussion, a university instructor told the class that there was "no need to discuss" "gay rights" because "everybody agrees on this." *McAdams*, 914 N.W.2d at 713–14. When a student objected after class, the instructor responded that "some opinions are not appropriate," that the student did not "have a right in this class to make homophobic comments," and that such comments "will not be tolerated," and then "invited the student to drop the class." *Id.* at 369. The student told another professor, John McAdams, about this

incident, who then blogged about it, criticizing the instructor for attempting to silence unpopular speech. The school responded by suspending Professor McAdams (a tenured professor) for his blog post until he acknowledged fault for naming the instructor in his post. *Id*. at 370–75. Professor McAdams refused to do so, and WILL represented him in a lawsuit. The Wisconsin Supreme Court held that Marquette violated its contractual promise of academic freedom, *id*. at 729–35, and ordered Marquette to reinstate Professor McAdams with back pay, *id*. at 739–40.

Examples like these show that retaliation for disfavored speech is a very real threat on campus today, even despite the First Amendment (or similar protections). Thus, the fact that Illinois's bias response team does not have enforcement authority on paper, *see* RSA 30, is somewhat beside the point. Bias response teams chill speech through the "impression of surveillance" by university officials who are in positions of power directly over students and who have staked out their opposition to such speech.

III. Bias Response Teams Are Widespread

Finally, WILL wishes to draw this Court's attention to the prevalence of bias response teams in this circuit. WILL is aware of at least 18 schools in Wisconsin alone with some form of bias reporting program: Alverno College,[3] Edgewood College,[4]

[3] *See* Alverno College Student Handbook at pp. 50–55, https://www.alverno.edu/campuslife/studentaffairs/civility/Student%20Handbook%202018-2019.pdf

[4] https://cm.maxient.com/reportingform.php?EdgewoodCollege&layout_id=4

Marquette University,[5] Ripon College,[6] St. Norbert College,[7] UW Eau Claire,[8] UW Green Bay,[9] UW Lacrosse,[10] UW Madison,[11] UW Milwaukee,[12] UW Oshkosh,[13] UW Platteville,[14] UW River Falls,[15] UW Stevens Point,[16] UW Stout,[17] UW Superior,[18] UW Whitewater,[19] and Western Technical College.[20]

Like at the University of Illinois, many bias response teams at Wisconsin schools include law enforcement personnel and university officials in positions of power over students. UW Madison's "Bias Response Advisory Board," for example,

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[5] https://www.marquette.edu/student-affairs/bias-incidents.php

[6] *See* Ripon College Student Handbook at pp. 37–39, https://www.ripon.edu/wp-content/uploads/2019/07/Student-Handbook.docx

[7] https://www.snc.edu/diversityaffairs/biasincidents/

[8] https://www.uwec.edu/diversity/bias-incident-response/

[9] https://www.uwgb.edu/inclusive-excellence/bias-incident-hate-crime-report/

[10] https://www.uwlax.edu/campus-climate/hatebias-response/hate-response-team/

[11] https://doso.students.wisc.edu/bias-or-hate-reporting/

[12] https://uwm.edu/lgbtrc/resources/on-campus-resources/hate-bias-incident-reporting/

[13] https://uwosh.edu/lgbtqcenter/resources/bias-incident/

[14] https://www.uwplatt.edu/reporting

[15] https://www.uwrf.edu/StudentConductAndCommunityStandards/Reporting Concerns.cfm

[16] https://www.uwsp.edu/dos/Pages/Bias-Hate-Incident.aspx

[17] http://www.uwstout.edu/life-stout/student-services/dean-students/bias-incident-reporting

[18] https://www.uwsuper.edu/edi/bias-incident-reporting/index.cfm#faq_2423141_2423144

[19] https://www.uww.edu/equity-diversity-and-inclusion/hate-bias-reporting-form

[20] *See* Western Technical College Student Handbook at p. 156, https://www.westerntcedu/sites/default/files/student-rights/documents/StudentHandbook.pdf

includes members from the Dean of Students Office and the university police department. *Supra* n.11. UW Lacrosse's "Hate Response Team" includes a police detective and multiple professors, who might have grading authority over students in their classes who are reported for "biased" speech. *Supra* n.10. And UW Stout's "Bias Incident Response Team" includes *the* Dean of Students and the Chief of Police. *See supra* n.21.

And many Wisconsin schools, like the University of Illinois, define "biased" speech so broadly to sweep in a great deal of speech protected by the First Amendment. Marquette University defines a "bias incident" as "any discriminatory or hurtful act that *appears to be motivated or is perceived by the victim or victims to be motivated by* race, ethnicity, religion, age, national origin, sex, ability, gender identity or expression, sexual orientation, veteran status, socioeconomic status or language." *Supra* n.5. At UW Stevens Point, a "bias/hate incident" is "an act of conduct, speech, or expression to which *a bias motive is evident as a contributing factor*." *Supra* n.16. And UW Eau Claire's definition is, "Something a person does, says, or otherwise expresses that is *motivated by bias* related to age, race, [etc.]" *Supra* n.8. This emphasis on the *perceived motive* of the speaker is both vague and overbroad, as Appellant Speech First amply demonstrates. Opening Br. 55–58.

CONCLUSION

This Court should reverse the judgment of the District Court.

Dated: November 5, 2019

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

This brief complies with the type-volume limitation of Circuit Rule 29 because this brief contains 3,024 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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Dated: November 5, 2019

/s/ Luke N. Berg

LUKE N. BERG

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2019, I filed the foregoing Amicus Brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: November 5, 2019

/s/ Luke N. Berg
LUKE N. BERG