No. 19-50529

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SPEECH FIRST, INCORPORATED,
Plaintiff-Appellant,

v.

GREGORY L. FENVES, in his official capacity as President of the University of Texas at Austin,
Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Texas, No. 1:18-cv-1078 (Yeakel, J.)

BRIEF OF APPELLANT SPEECH FIRST, INC.

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CERTIFICATE OF INTERESTED PERSONS

1. No. 19-50529, *Speech First, Inc. v. Fenves*;

2. The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this court can evaluate possible disqualification or recusal:

Speech First, Inc.*

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* Speech First has no parent corporation, and no corporation owns 10% or more of its stock.

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument would be helpful because this appeal presents important and novel questions about the state of free-speech protections on college campuses. It is the first case in this Circuit (and the second case nationwide) to challenge the constitutionality of a "bias response team," an increasingly popular but constitutionally dubious tool that one federal judge has dubbed the campus "civility police." Cabranes, *If Colleges Keep Killing Academic Freedom, Civilization Will Die, Too*, Wash. Post (Jan. 10, 2017), wapo.st/2DwYy4p. The district court, moreover, took the unusual step of dismissing Speech First's entire case with no warning, before any motion to dismiss was filed, and without giving Speech First any opportunity to amend its complaint or supplement the record. To give these important issues the full airing they deserve, Speech First respectfully requests oral argument.

JURISDICTION

The district court had jurisdiction because Speech First alleges violations of the First and Fourteenth Amendments. 28 U.S.C. §§1331; 1343. This Court has jurisdiction because Speech First appeals from a final judgment dismissing the entire case. §1291. The district court entered that judgment on June 4, 2019, and Speech First timely appealed on June 6, 2019.

ISSUES

I. Is Speech First entitled to a preliminary injunction protecting its members from the University of Texas's restrictions on student speech?

A. Speech First's members have deeply held views that are unpopular on campus regarding Israel, affirmative action, President Trump, abortion, the #MeToo movement, Justice Kavanaugh's confirmation, and other controversial topics. The University maintains vague speech codes that broadly prohibit students from saying something a listener subjectively finds "uncivil," "rude," or "harassing." Does Speech First have standing to challenge these speech codes?

B. The University has created a Campus Climate Response Team, a group of university administrators (including disciplinarians and police) who monitor incidents of "bias" on campus. When a student is reported for committing a "bias incident," the Team logs the incident, publishes it online, investigates it, can ask to meet with the perpetrator, and can refer the matter for formal or informal discipline. Does Speech First have standing to challenge this regime?

C. Once Speech First proves standing, the unconstitutionality of the University's policies is straightforward, largely undisputed, and purely legal. When a plaintiff proves a likely First Amendment violation, moreover, courts hold that the other preliminary-injunction factors are satisfied. Should this Court order the district court to grant Speech First a preliminary injunction?

II. If Speech First is not entitled to a preliminary injunction, did the district court still err by sua sponte dismissing the entire case—with no notice to Speech First, no opportunity to amend the complaint, no opportunity to supplement the record, and no motion to dismiss from the University?

STATEMENT OF THE CASE

Fifty years ago, the Supreme Court declared that American universities are "peculiarly the marketplace of ideas," training future leaders "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. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (cleaned up). That was then, this is now. Instead of promoting the "robust exchange of ideas," universities are now more interested in protecting students from ideas that make them uncomfortable. Universities do this by adopting policies and procedures that discourage speech by students who dare to disagree with the prevailing campus orthodoxy.

One tried-and-true method of accomplishing this feat is the campus speech code. Speech codes, according to the Foundation for Individual Rights in Education (FIRE),

are "university regulations prohibiting expression that would be constitutionally protected in society at large." *Spotlight on Speech Codes 2019* at 10, FIRE, bit.ly/2GAyfKJ. Recycled ideas from the 1980s, speech codes punish students for undesirable categories of speech such as "harassment," "bullying," "hate speech," and "incivility." Because they impose vague, overbroad, content-based restrictions on speech, these policies violate the First and Fourteenth Amendments. Federal courts almost always strike them down. *Id.* at 10, 26. Today, more than a quarter of universities have speech codes that earn a "red light" rating from FIRE because they "both clearly and substantially restricts protected speech." *Id.* at 2.

In addition to speech codes, universities are increasingly turning to a new, innovative way to deter disfavored speech—so-called "bias response teams." Living up to their Orwellian name, bias-response teams encourage students to monitor each other's speech and report incidents of "bias" to the University (often anonymously). "Bias" is defined incredibly broadly and covers wide swaths of protected speech; indeed, speech is often labeled "biased" based solely on the *listener's subjective reaction* to it. Students have been reported to bias-response teams for writing a satirical article about "safe spaces," tweeting "#BlackLivesMatter," chalking "Build the Wall" on a sidewalk, and expressing support for Donald Trump. *Bias Response Team Report 2017*, at 15-18, FIRE, bit.ly/2P9iEaj (*BRT Report*). After receiving reports of a bias incident, bias-response teams log the incident, investigate it, meet with the relevant parties, attempt to reeducate the "offender," and can recommend formal or informal discipline.

Although universities claim this process is entirely voluntary, they know that students do not see it that way. According to a comprehensive study by FIRE, bias-response teams "effectively establish a surveillance state on campus where students … must guard their every utterance for fear of being reported to and investigated by the administration." *Id.* at 28. Professors Jeffrey Snyder and Amna Kalid have likewise observed that bias-response teams "result in a troubling silence: Students … [are] afraid to speak their minds, and individuals or groups [are] able to leverage bias reporting policies to shut down unpopular or minority viewpoints." *The Rise of "Bias Response Teams" on Campus*, New Republic (Mar. 30, 2016), bit.ly/1SaAiDB. FIRE estimates that more than 231 universities have bias-response teams, and the number is "growing rapidly." *BRT Report* 4. That number will continue to grow as universities discover that bias-response teams are a way to chill indirectly what they cannot prohibit directly. *Id.* at 9.[2]

Plaintiff Speech First was created to combat these policies. An organization of students and allies, Speech First was launched in early 2018 to restore the protections

[2] While bias-response teams continue to spread nationwide, a few schools have bucked the trend. The University of Northern Colorado shuttered its bias-response team because it had come "at the expense of free speech and academic freedom" and because its supposedly "voluntary" processes "made people feel that we were telling them what they should and shouldn't say." *President Kay Norton's State of the University Address* 3-4, UNC (Sept. 7, 2016), bit.ly/2FdMdE5. The University of Iowa likewise scrapped its plans to create a bias-response team, citing their "high failure rate" and their tendency to "become almost punitive." *University of Iowa Changing Course on Bias Response Team*, Iowa City Press-Citizen (Aug. 18, 2016), bit.ly/2Ph03Ku.

of the First Amendment on college campuses. Several of its members attend the University of Texas at Austin—a school that earns a "red light" rating from FIRE. *University of Texas–Austin*, FIRE, bit.ly/2GvPP2n (last visited Aug. 9, 2019).

Speech First's members have views that are unpopular on campus about many topics, including illegal immigration, Israel, gun rights, affirmative action, the #MeToo movement, abortion, President Trump, and Justice Kavanaugh's confirmation. ROA.181, 42-45. Speech First's members want to freely share their views on campus, but the University has enacted policies that make them too afraid to do so. ROA.182, 42-45. Specifically, the University uses both speech codes and a bias-response team to control student speech on campus and to deter the expression of certain viewpoints.

I. The University's Speech Codes

The University has an elaborate matrix of speech codes that dictate what students can and cannot say both on and off campus. Speech First challenged three of the University's most egregious policies: its global ban on "verbal harassment"; its bans on "incivility," "rudeness," and "harassment" online; and its bans on "incivility" and "harassment" in the dorms.

A. The Institutional Rules' Ban on "Verbal Harassment"

Every two years, the University publishes a General Information Catalog—"the document of authority for all students." *General Information Catalogs*, UT-Austin, bit.ly/2MfR8qW (last visited Aug. 9, 2019). The 2018-19 Catalog includes an appendix titled the Institutional Rules on Student Services and Activities. *General Information 2018-*

2019 app'x C, Office of the Registrar, bit.ly/2OEJMii (*Institutional Rules*). The Institutional Rules prohibit several types of student conduct and outline the procedures for student discipline.

Student discipline is administered by the Dean of Students. *Id.* at 139. Students can be disciplined for violating any of the "rules and regulations of the University," engaging in "berating or otherwise abusive behavior," behaving "in a manner that impedes, interferes with, or disrupts any University … activity," disobeying "specific instructions issued by an administrative official," or "failing to appear for a meeting when summoned." *Id.* at 141-43. Punishments range from a "written warning" to "expulsion." *Id.* at 151. If the violation reflects bias on the basis of "race, color, religion, national origin, gender, age, disability, citizenship, veteran status, sexual orientation, gender identity, or gender expression," the University treats that fact as an "aggravating factor." *Id.*

The Institutional Rules contain a chapter devoted to students' "Speech, Expression, and Assembly." ROA.186. While this chapter states that students "are free to express their views … on any topic," it emphasizes that this freedom is "subject … to rules necessary to preserve the equal rights of others and the other functions of the University" and then lists several forms of "Prohibited Expression." ROA.186-89. One form of prohibited expression is "verbal harassment." ROA.188. The University's ban on verbal harassment applies to "all speech on campus," and violations must be "promptly" referred to the Dean of Students. ROA.186, 188. "The principles of free

inquiry and expression," the University warns, "do not protect … harassment." ROA.296.

The University defines verbal harassment as "hostile or offensive speech, oral, written, or symbolic," that satisfies the following three conditions:

A. The speech "is not necessary to the expression of any [political, religious, philosophical, ideological, or academic] idea";

B. The speech "is sufficiently severe, pervasive, or persistent to create an objectively hostile environment that interferes with or diminishes the victim's ability to participate in or benefit from the services, activities, or privileges provided by the University"; and

C. The speech "personally describes or is personally directed to one or more specific individuals."

ROA.188. The verbal-harassment rule never explains how to determine whether speech is "necessary to the expression of an[] idea," but it asserts that "sexually harassing speech" is "rarely, if ever, necessary." ROA.188. It also elaborates that "[v]erbal harassment may consist of threats, insults, epithets, ridicule, [or] personal attacks" and "is often based on the victim's appearance, personal characteristics, or group membership, including but not limited to race, color, religion, national origin, gender, age, disability, citizenship, veteran status, sexual orientation, gender identity or gender expression, ideology, political views, or political affiliation." ROA.188. Anticipating legal challenges, the verbal-harassment rule asks courts to "interpret[] [it] as narrowly as need be to preserve its constitutionality." ROA.188.

B. The Acceptable Use Policy's Bans on "Incivility," "Rudeness," and "Harassment"

The University has promulgated an Acceptable Use Policy for University Students that governs its "information resources" (internet, email, computers, etc.). ROA.202. The Acceptable Use Policy was last revised in Fall 2015. ROA.216. The Policy dictates what students "can do and cannot do" online, and all students "must … agree to abide by [its] acceptable use requirements." ROA.202-03; *see also* ROA.186 (explaining that the Acceptable Use Policy "regulat[es] speech on University computer networks"). While the Policy promises not to "punish or prevent expression that may be offensive," it clarifies that the expression must "violate[] no specific … university regulation." ROA.204; *see also* ROA.212 ("In general, expressions of opinion by members of the university community that *do not otherwise violate … university rules* are protected as 'free speech.' … We do not … punish people who express views that may be unpopular or offensive, but who break no laws *or University rules* while doing so." (emphases added)).

Those rules and regulations include the "Requirements" spelled out in section 5 of the Acceptable Use Policy. ROA.206-11. Section 5.6, for example, orders students to "Be civil. Do not send rude or harassing correspondence." ROA.208. The terms "civil," "rude," and "harassing" are not defined. The Policy instead tells students that "[i]f you ever feel that you are being harassed, university staff members will assist you in filing a complaint," and that "[i]f someone asks you to stop communicating with him

or her, you should" or else "the person can file a complaint and you can be disciplined." ROA.208. Indeed, the Acceptable Use Policy identifies several "consequences for violating the rules listed in Section V," including "Punishment" via "Verbal warnings," "Revocation of access privileges," "Disciplinary probation," and "Suspension from the university." ROA.211. The Policy warns that "[s]uch suspensions happen to several people each semester." ROA.212.

C. The Residence Hall Manual's Bans on "Incivility" and "Harassment"

The University also regulates students' speech in the dormitories. Its Residence Hall Manual, last promulgated in August 2018, contains several "rules and regulations" that are "binding" on students who live on campus. ROA.219-20. Violations of the Manual's rules and regulations are grounds "to discipline students" under "the Institutional Rules." ROA.220, 249-50. Violations can also "remain in Housing for adjudication" under a special "residence hall conduct process." ROA.250-52. That process can result in "educational sanctions" (such as "on-line educational modules, meetings with University staff members, educational/reflection papers, poster assignments, or presentations at hall meetings") or "administrative sanctions" (such as "Reprimand," "Probation," "Forced room change," "Fine/restititution," or a "Bar on the student's record"). ROA.252-53.

One section of the Residence Hall Manual contains regulations of "Student Conduct," including "Drug Use," "Guests," "Quiet Hours," and "Sexual Assault."

ROA.239-49. One of those regulations, titled "Harassment," prohibits "harassment and intimidation," which are defined as including "acts of racism, sexism, heterosexism, cissexism, ageism, ableism, and any other force that seeks to suppress another individual or group of individuals." ROA.243. "When acts of harassment or intimidation occur in the residence hall environment," the regulation continues, the "community" will "decide … appropriate steps that need to be taken." ROA.243. Another regulation, titled "Incivility," states that "[u]ncivil behaviors and language that interfere with the privacy, health, welfare, individuality, or safety of other persons are not permitted." ROA.243. The incivility rule does not define "uncivil," except to say that students should be "respectful of their community" and "not disrupt academic or residential activity." ROA.243.

II. The University's Policy on "Bias Incidents" and the Campus Climate Response Team

In addition to its bans on harassment, incivility, and rudeness, the University regulates "bias incidents" (or, synonymously, "campus climate incidents"). The University declares that it is "committed to an academic and work environment free from … bias." ROA.296, 315; *see also* ROA.332 (stressing the need to "eliminate bias and hate on campus" because "bias incidents continue to negatively affect The University of Texas at Austin's campus community"). In 2017, the University adopted a new Hate and Bias Incidents Policy to replace its former Student Policy on Race Relations. *Frequently Asked Questions for Students* 1, UT-Austin (Mar. 7, 2017),

bit.ly/2KvYGSI (*FAQs*). Citing "the principles of free inquiry and expression," the Student Policy on Race Relations encouraged students to "adopt *voluntarily* standards of civility that reflect mutual respect, understanding, and sensitivity." *Policy Memo. 4.120*, UT-Austin (Mar. 15, 1999), bit.ly/2OGeGag (emphasis added). The University abandoned this policy after an internal report criticized it as "outdated," too "color blind," and not firm enough on "bias crimes." Gayo et al., *Critical Race Analysis of Student Policy on Race Relations* 2-3, Inst. for Urban Policy Res. & Analysis (Jan. 2016), bit.ly/31o7st1.

The new Hate and Bias Incidents Policy provides, amid a list of several bias-related infractions, a formal definition of "campus climate incident." ROA.296-303. These incidents occur when individuals "believe they have been discriminated against … on the basis of their race, color, religion, national origin, gender, gender identity or gender expression, age, disability, citizenship, veteran status, sexual orientation, ideology, political views, or political affiliation." ROA.300; *see also CCRT Homepage*, UT-Austin, bit.ly/2KtTcIk (last visited Aug. 9, 2019) ("**BIAS INCIDENTS** are offenses against individuals, groups or property, motivated in whole or in part by a person's or groups' perceived identity"). Actionable bias incidents can occur "either on- or off-campus" and can be perpetrated by "[a]ll university students, faculty and staff as well as visitors, applicants for admission … and others conducting business on campus." *FAQs* 3, 1; ROA.325-26. Most of the University's "[e]xamples" of bias incidents involve speech: "hateful comments," "[i]nsulting and insensitive posts on social media

or group chat apps pertaining to race, gender identity, or sexual orientation," "[d]erogatory comments made on a … course Facebook page," and the like. *CCRT Homepage*, bit.ly/2KtTcIk; ROA.343; *2014-2015 Campus Climate Trend Report* 15, CCRT, bit.ly/2YKQ0RJ (*2014-15 CCRT Report*); *2012-2013 Campus Climate Trend Report* 10, CCRT, bit.ly/2OJbYRk (*2012-13 CCRT Report*).

The University's' bias-incidents policy is enforced by the Campus Climate Response Team, or CCRT. The CCRT's members are all university administrators, including representatives from the Office of the Dean of Students and the University Police Department. ROA.311. The CCRT seeks to "minimize campus climate incidents" by "systematically identify[ing] and respond[ing] to such events." ROA.315. It was formed to "handle any outbreaks of hateful or violent speech." ROA.335.

The University implores students to "report[]" bias incidents to the CCRT "as soon as possible after their occurrence." ROA.321. Bias incidents can be reported anonymously, and reports can be submitted by "the victim(s), witness(es) or any third party who was informed of the event but was not present." ROA.316-17, 324-25. Reports can be submitted online, by phone, or in person. ROA.316. The University also "encourage[s]" students to report bias incidents directly to the Dean of Students; indeed, a link to "Report a Bias Incident" appears on the Dean's homepage. ROA.320, 354. Students are instructed to "**Pay close attention** to the date, time and location of the incident, providing the facts of the incident in as much detail as possible"; "**Identify** alleged offender(s) by name and UT Austin affiliation, if known,

or by physical appearance (e.g., age, height, weight, race/ethnicity, clothing, distinguishing characteristics, etc.)"; and "**List** any possible witness(es) by name with contact information, if known, or if unknown, whether there were any witnesses." ROA.321.

Since 2012, the CCRT has received over 1,000 reports of nearly 500 independent bias incidents. ROA.340, 356-95. The incidents generating the most reports were an anti-Israel protest, a "Border Patrol" themed fraternity party, and two events organized by the Young Conservatives of Texas protesting affirmative action and illegal immigration. ROA.331; *2014-15 CCRT Report* 2; *2013-2014 Campus Climate Trend Report* 2-3, CCRT, bit.ly/2ZCIu8I (*2013-14 CCRT Report*). When asked how the CCRT should respond to these events, the most popular request from reporters was "disciplinary action." *2013-14 CCRT Report* 21, 27; ROA.349; *2014-15 CCRT Report* 22.

Once the CCRT receives a bias-incident report, it will "determine whether the situation, as reported, falls within the parameters of a campus climate incident." ROA.316. If it does, the CCRT will log the incident on a public website "to offer transparency regarding campus incidents and actions taken." ROA.306. For each bias incident, the log lists the date, location, incident type (verbal comment, social media post/comment, poster/flyer, written comment, email, etc.), "perceived" bias motive, and CCRT action taken. ROA.356-96, 326. The University cautions students that it "tracks and records … allegations" of "bias or hate incidents," that reports "will be kept confidential" only "to the extent possible," and that "[i]n some cases" the University's

"resolution" of a "hate or bias incident" will "be shared with the campus." *FAQs* 4; ROA.317.

In addition to logging bias incidents, the CCRT takes many other actions to ensure that bias incidents are "swiftly addressed." ROA.335. "[W]ithin two business days," the CCRT makes "one-on-one contact with the person who submitted the report to discuss the incident." ROA.331. After this "initial" contact, "team members offer to speak over the phone or in person to discuss the incident further." ROA.345. The CCRT will also "provid[e] when necessary … [s]upport and information to student(s), staff, or faculty who initiated the incident." ROA.339. For example, team members have initiated "[e]ducational conversations/meetings with those initiating an incident regarding the intent and impact of their actions," "met with student leaders involved with [an] event," and provided "[d]iversity training and education." ROA.345, 350, 346.

Although the CCRT purports to be a "non-adjudicating body," it reviews each bias-incident report to "determine if there is a possible violation of the university's Institutional Rules." ROA.356, 316. If so, the CCRT will "partner" with the University's disciplinarians and "refer" the incident for formal discipline. ROA.316, 339, 346. Indeed, the University warns students that a "[hate or bias] incident may violate a university policy," that "[t]he university may take disciplinary action in response to [hate or bias] incidents," and that "[s]anctions can range from a warning to expulsion." *FAQs* 3. Every year, the CCRT reports that the "[i]nvestigation and resolution of incidents classified as a … university policy violation (coordinated with the Office of

the Dean of Students …)" occurs "directly as a result of CCRT reports." *2014-15 CCRT Report* 17; ROA.346; *2013-14 CCRT Report* 17; *2012-2013 CCRT Report* 12.

III. Proceedings Below

Speech First filed this suit against the University in December 2018. Speech First then moved for a preliminary injunction. Its motion argued that the University's speech codes on "harassment," "incivility," and "rudeness" were impermissibly vague and overbroad under the First and Fourteenth Amendments. ROA.175-77, 481-82. Speech First also argued that the University's policy on "bias incidents," as enforced by the CCRT, was unconstitutionally vague and overbroad. ROA.177-78, 481-82. Speech First supported its motion with over a dozen exhibits, including a declaration from Nicole Neily, the president of Speech First. Ms. Neily attested that she is personally familiar with Speech First's members at the University; that they have controversial views on politics, race, gender identity, abortion, gun rights, immigration, foreign affairs, and other topics; that they want to freely discuss their views on campus, online, and in the dorms; and that they are self-censoring because of the University's speech restrictions. ROA.181-82.

Among Speech First's members who attend the University are Students A, B, and C—current college students who have chosen to remain anonymous at this stage of the litigation. Student A is a rising sophomore who lives on campus. ROA.42. A Tea Party conservative, she strongly supports Israel, believes in a race-blind society, supports President Trump, is pro-life, and supports the border wall. ROA.42. But for

the University's policies, she would freely debate other students about these topics and the merits of open borders, legal protections for illegal immigrants, the BDS movement against Israel, and opposition to President Trump. ROA.42-43. Student B is a rising junior who considers himself a libertarian. ROA.43. The University's policies deter him from discussing his beliefs that affirmative action should be prohibited, that Justice Kavanaugh was innocent of the accusations made against him, and that the "Me Too" movement risks eroding due process. ROA.43-44. Like Student A, Student C is a rising sophomore. ROA.44. He would like to discuss his pro-life views, his strong support for the Second Amendment, his belief that the breakdown of the nuclear family is negatively affecting society, and his belief that Justice Kavanaugh was treated unfairly. ROA.44. But the University's policies chill his speech. ROA.44-45. He and his friends often tell each other to "watch your mouth or you'll get in trouble with the CCRT." ROA.45.

The University opposed Speech First's preliminary-injunction motion. The only policy that the University defended on the merits was its verbal-harassment rule. ROA.454-55. The rest of its brief was spent challenging Speech First's Article III standing. ROA.447-54. The University submitted declarations from its President, Gregory Fenves, and its Dean of Students, Soncia Reagins-Lilly, who asserted that the University has never used its speech codes to "investigate[]" or "sanction[]" a student "for the content of speech protected by the First Amendment." Doc. 20-1 at 4 ¶7; Doc. 20-2 at 3 ¶5. The University also submitted a declaration from Edna Dominguez, a

member of the CCRT, who similarly asserted 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." Doc. 20-5 at 5 ¶7.

In a separate filing, the University lodged nineteen "objections" to Ms. Neily's declaration. Characterizing her declaration as speculative, foundationless, and hearsay, the University complained that Ms. Neily was speaking on behalf of Students A, B, and C, and that these anonymous students had not revealed their identities. ROA.459-66. Speech First responded by pointing out that the Federal Rules of Evidence do not apply to preliminary injunctions; that the University had no basis for challenging the sincerity of Students A, B, or C; that Ms. Neily knows these students personally; and that the students have a right to remain anonymous at this early stage of the litigation. ROA.486-95. The district court overruled the University's objections. ROA.520 n.4.

The University opposed Speech First's preliminary-injunction motion, but it never filed a motion to dismiss. At the preliminary-injunction hearing, however, the district court proposed that "we just consider this the hearing on the merits and get it all done in one sitting." ROA.531. The court lamented that lawyers "are too concerned about what the rules allow them to do," which "in this Court's opinion, are a guide." ROA.535. Speech First objected to the district court's proposal, explaining that it had "submitted enough evidence to carry [its] burden at the preliminary injunction stage" but was "afraid that[,] … if we proceed to final judgment now, … the University will [argue] that we did not submit enough evidence to meet our burden" on the merits.

ROA.534. The district court reluctantly agreed, describing a preliminary-injunction hearing as the "least efficient manner" to proceed. ROA.535. Nevertheless, it stated that it would "proceed today on what I have in front of me," "give the plaintiffs a preliminary injunction hearing," and "then … go to the merits later down the line." ROA.535-36.

But the district court didn't do that. When it issued its opinion, it not only denied Speech First's motion for a preliminary injunction, it also sua sponte dismissed Speech First's entire case. ROA.523. The district court began its opinion by stating that Speech First had "solicited students in a rather unsavory manner" by offering to sue universities on behalf of students who paid a $5 membership fee. ROA.509; *see Membership*, Speech First, bit.ly/2Kf9yFM (last visited Aug. 9, 2019).[3]

The district court then held that Speech First lacked Article III standing to challenge any of the University's policies. Speech First could not challenge the speech codes, according to the district court, because "[t]he topics that [its members] want to discuss … are not prohibited by the language of the Institutional Rules, the Residence

[3] *Cf. Become a Freedom Fighter – Join the ACLU*, Am. Civil Liberties Union, bit.ly/2OGpfdq (last visited Aug. 9, 2019) ("Join the ACLU today. With your help we can: Protect free speech and … Fight relentless attacks on reproductive freedom …. The minimum payment is $5.00."); *Donation FAQs*, Americans United for Separation of Church & State, bit.ly/2MFv8VB (last visited Aug. 9, 2019) (urging members to join "by making a donation at whatever level you can afford," which will "provid[e] much-needed funding for our many legal … efforts"); Alexander, *An Army of Lions: The Civil Rights Struggle Before the NAACP* xv (2012) (explaining that the NAACP "initially set membership dues at one dollar").

Hall Manual, or the Acceptable Use Policy." ROA.521. The district court faulted Speech First for identifying "only broad categories of speech in which Students A, B, and C wish to engage," rather than "specific statements they wish to make." ROA.520-21. The court also credited the declarations from President Fenves and Dean Reagins-Lilly that the University had "no … history of punish[ing]" students for protected speech. ROA.522. As for the University's bias-incidents policy, the district court simply stated that "the Campus Climate Response Team does not engage in investigations or punishment of any sort." ROA.522. While Speech First had explained in detail how the University's speech codes cover its members' speech and how the CCRT chills speech in ways short of formal discipline, the district court characterized Speech First's position as "ask[ing] this court to hold that the mere invocation of the First Amendment will suffice for standing purposes." ROA.517.

Speech First timely appealed.

SUMMARY OF THE ARGUMENT

"[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *United States v. Stevens*, 559 U.S. 460, 480 (2010); *accord FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 255 (2012). Respectfully, that is exactly what the district court did here. It denied Speech First a preliminary injunction—and dismissed its entire case—because the University promised that it never applies its policies inconsistently with the First Amendment. This

is *noblesse oblige* in the extreme. If the University's say-so is enough to get a case dismissed at the outset, universities will have a foolproof way to evade First Amendment scrutiny. At a time when universities are clinging to flagrantly unconstitutional speech codes and experimenting with new methods to suppress unpopular speech, a judicial pass is the *last* thing we need right now. This Court should reverse and order the district court to grant Speech First a preliminary injunction.

I. The district court should have granted Speech First's preliminary-injunction motion.

A. Speech First likely has standing to challenge the University's various speech codes prohibiting "harassment," "incivility," and "rudeness." A plaintiff has standing to bring a preenforcement challenge when a policy objectively chills his speech. Objective chill exists when the plaintiff faces a credible threat of enforcement, which occurs when the policy arguably covers his intended speech. That is certainly the case here. The University's speech codes are subjective, broad, and indecipherably vague prohibitions on speech that makes the listener uncomfortable. They could easily be weaponized against Speech First's members if they expressed their controversial views on campus. That the University swears it does not actually apply these policies against protected speech does not remove the chilling effect that emanates from their text.

B. Speech First likely has standing to challenge the University's policy on "bias incidents," as enforced by the CCRT. The CCRT objectively chills students' speech. By establishing this Team and all its bureaucratic accoutrements, the University

sends students a message: If you want to say something that another student might perceive as "biased," prepare to be reported, logged, investigated, interrogated, stigmatized, and potentially disciplined. The idea that this process can be brushed aside as "supportive" or "educational" ignores the dynamics between college students and university administrators, and ignores the fact that the CCRT is deliberately designed to look and feel like a disciplinary body. As others have recognized, "universities with Bias Response Teams are playing a 'dangerous constitutional game' by not explicitly prohibiting speech but creating a 'process-is-punishment' mechanism that deters people from speaking out." *BRT Report* 28.

C. If this Court agrees with Speech First on standing, then it should reverse (rather than vacate) the district court's decision and remand with instructions to grant a preliminary injunction. Speech First readily satisfies the other criteria for a preliminary injunction. The University's bans on "harassment," "incivility," "rudeness," and "bias incidents" are vague, wildly overbroad restrictions on protected speech. Courts across the country routinely strike down similar measures, which is why the University only weakly defended one of them below. And because these policies are likely unconstitutional, the other preliminary-injunction factors necessarily favor Speech First.

II. At the very least, the district court should not have sua sponte dismissed Speech First's entire case. The court could have dismissed this case only if Speech First's complaint could not possibly survive a motion to dismiss for lack of standing. By the district court's own logic, that's not true. Complaints are not required to plead the

specificities that the district court found lacking, and Speech First could have added those specifics by amending its complaint, submitting new declarations, or conducting limited discovery. But the district court's sua sponte dismissal short-circuited that process and denied Speech First the notice and procedural protections that Rule 12 guarantees. At a minimum, then, this case should be remanded so it can proceed in the normal course.

ARGUMENT

This Court reviews "'the ultimate decision whether to grant or deny a preliminary injunction … for abuse of discretion," but "'a decision grounded in erroneous legal principles is reviewed *de novo*.'" *Speaks v. Kruse*, 445 F.3d 396, 399 (5th Cir. 2006). This Court also reviews Article III standing de novo, giving no deference to the district court. *OCA-Greater Houston v. Texas*, 867 F.3d 604, 610 (5th Cir. 2017).

This Court should reverse and remand with instructions to grant Speech First's motion for a preliminary injunction. Speech First satisfies the criteria for preliminary relief. Even if it didn't, the district court had no grounds to sua sponte dismiss the case.

I. Speech First is entitled to a preliminary injunction.

To win a preliminary injunction, Speech First must prove that it "'is likely to succeed on the merits,'" it "'is likely to suffer irreparable harm in the absence of preliminary relief,'" "'the balance of equities tips in [its] favor,'" and "'an injunction is in the public interest.'" *Pendergest-Holt v. Certain Underwriters at Lloyd's of London*, 600 F.3d 562, 568-69 (5th Cir. 2010). The likely-to-succeed-on-the-merits requirement "'neces-

sarily includes a likelihood of the court's *reaching* the merits, which in turn depends on a likelihood that plaintiff has standing.'" *Waskul v. Washtenaw Cty. Cmty. Mental Health*, 900 F.3d 250, 256 n.4 (6th Cir. 2018). A "likelihood" means that Speech First "need only present a prima facie case, rather than meet the standard for summary judgment." *Daniels Health Scis. v. Vascular Health Scis.*, 710 F.3d 579, 584-85 (5th Cir. 2013).

Speech First easily meets this standard. It likely has Article III standing because the University's policies objectively chill its members' speech. Those policies are likely unconstitutional because they impose vague, overbroad, content- and viewpoint-based restrictions on protected expression. And because the policies likely violate the First Amendment, the other preliminary-injunction factors strongly favor Speech First.

A. Speech First likely has Article III standing.

As a membership association, Speech First has standing if one of its members has standing. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Its members have standing if they can prove injury, causation, and redressability. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). This appeal turns on the injury requirement.

It is well-settled that "'chilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement.'" *Justice v. Hosemann*, 771 F.3d 285, 291 (5th Cir. 2014) (quoting *Houston Chronicle Pub. Co. v. League City*, 488 F.3d 613, 618 (5th Cir. 2007)). The plaintiff's injury is "one of self-censorship"; he keeps quiet because, if he shares his views, he has "an actual and well-founded fear that the law will

be enforced against [him]." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988). The plaintiff's fear must be objectively reasonable, not merely "subjective." *Houston Chronicle*, 488 F.3d at 618-19. Objective chill exists in a preenforcement case when the plaintiff can prove a "credible threat of enforcement." *SBA List*, 573 U.S. at 161; *see Fairchild v. Liberty Indep. Sch. Dist.*, 597 F.3d 747, 754-55 (5th Cir. 2010).

The district court held that Speech First lacked standing for two main reasons. With respect to the speech codes, the court found no credible threat that the University would ever enforce them against Speech First's members. With respect to the bias-incidents policy, the court held that any chilling effect was merely subjective because the CCRT cannot formally investigate or punish students. Both lines of reasoning are incorrect.

i. Speech First has standing to challenge the University's speech codes because they arguably cover students' protected speech.

As explained, Speech First has standing to challenge the University's speech codes if its members face a "credible threat of enforcement." *SBA List*, 573 U.S. at 161. A credible threat exists if Speech First's members (1) "inten[d] to engage in a course of conduct arguably affected with a constitutional interest," (2) their "intended future conduct is arguably [covered] by the [policy] they wish to challenge," and (3) "the threat of future enforcement of the [challenged policy] is substantial." *Id.* The credible-threat standard is "'quite forgiving'" in First Amendment cases. *Wollschlaeger v. Gov'r*, 848 F.3d 1293, 1305 (11th Cir. 2017) (en banc); *Rangra v. Brown*, 566 F.3d 515, 519 (5th Cir.)

(quoting *N.H. Right to Life PAC v. Gardner*, 99 F.3d 8, 14 (1st Cir. 1996)), *on reh'g en banc*, 584 F.3d 206 (5th Cir. 2009). It exists whenever the threat is "not 'imaginary or wholly speculative.'" *SBA List*, 573 U.S. at 160.

"'When dealing with statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence.'" *Rangra*, 566 F.3d at 519 (cleaned up; quoting *N.H. Right to Life*, 99 F.3d at 14); *accord N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999). "Compelling contrary evidence" means "a long institutional history of disuse, bordering on desuetude." *Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir. 2003); *accord 281 Care Comm. v. Arneson*, 638 F.3d 621, 628 (8th Cir. 2011). Indeed, "[c]ourts have often found" standing in First Amendment cases based solely on the fact that the "plaintiffs' intended behavior is covered by the [policy] and the [policy] is generally enforced." *Seegars v. Gonzales*, 396 F.3d 1248, 1252 (D.C. Cir. 2005); *e.g.*, *Justice*, 771 F.3d at 291-92; *Carey v. Wolnitzek*, 614 F.3d 189, 196 (6th Cir. 2010); *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 689-90 (2d Cir. 2013); *Calif. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094-95 (9th Cir. 2003); *Ark. Right to Life PAC v. Butler*, 146 F.3d 558, 560 (8th Cir. 1998).

"[N]o history of past enforcement" against protected speech is required. *Rangra*, 566 F.3d at 519. Objective chill can exist even when the challenged policy "has not yet been applied and may never be applied" to speech like the plaintiff's. *Babbitt v. United Farm Workers*, 442 U.S. 289, 302 (1979); *see Bair v. Shippensburg Univ.*, 280 F. Supp. 2d

357, 367 (2003) ("Certainly … the Speech Code has not been used, and likely will not ever be used, to punish students for exercising their First Amendment rights. However, … our inquiry must assume not the best of intentions, but the worst."). The "'mere existence of an allegedly vague or overbroad statute'" is enough to create the injury. *Doe I v. Landry*, 909 F.3d 99, 114 (5th Cir. 2018) (quoting *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 660 (5th Cir. 2006)). "The 'existence of a statute implies a threat to prosecute.'" *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 591 (7th Cir. 2012). If the statute "arguably covers" the plaintiff, "there is standing" because "most people are afraid of violating [the law] especially when the gains are slight, as they would be for people seeking only to make a political point." *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003).

So too here. These students belong to "the class" that the University's speech codes directly regulate. *Rangra*, 566 F.3d at 519. And the policies are not "moribund"; they were all "recently enacted," and the University generally enforces them. *N.H. Right to Life*, 99 F.3d at 15. Further, the University's speech codes "arguably" cover Speech First's members. In the eyes of many, statements like "build the wall," "cancel government benefits for illegal immigrants," and "end affirmative action" constitute "personal attacks … based on … race [or] national origin," ROA.188, or speech that "seeks to suppress another individual or group of individuals," ROA.243. Similarly, statements like "Justice Kavanaugh was wrongly accused," "abortion is murder," and "the nuclear family is best" could be considered "insults [or] personal attacks … based

on … gender … sexual orientation, gender identity or gender expression," ROA.188, or "sexism, heterosexism, [or] cissexism," ROA.243. And expressing any of these views, especially if done in a small-group setting or with a passionate tone, could easily be considered "rude," "uncivil," or "harassing," ROA.208; "severe," "offensive," and "personal[]," ROA.188; or "interfer[ing] with the … welfare[or] individuality … of other persons," ROA.243.

That the University's speech codes are subjective and use vague, undefined terms only magnifies the credible threat they pose to Speech First's members. *See Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) ("The uncertain meanings of the [challenged policies] require the [would-be speaker] to 'steer far wider of the unlawful zone' … than if the boundaries of the forbidden areas were clearly marked[,] … restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited."); *ACLU of Ill.*, 679 F.3d at 594 n.3 (finding the challenged regime "sufficiently ambiguous for the ACLU to have a credible fear of criminal liability"). As does the fact that any student on campus can report violations of these speech codes. ROA.188, 213-14, 239, 321; *see SBA List*, 573 U.S. at 164; *Platt v. Bd. of Comm'rs*, 769 F.3d 447, 452 (6th Cir. 2014). Again, Speech First's burden here is not high; the University's policies only need to "arguably" apply to its members. *Majors*, 317 F.3d at 721; *SBA List*, 573 U.S. at 162. (And, at the preliminary-injunction stage, they only need to *likely* arguably apply.) They plainly do.

The University's generic disclaimers about students' right to free speech, sprinkled throughout its policies, do not suggest otherwise. These provisions disclaim nothing: they merely promise to protect free speech that does not otherwise violate a university rule, but those rules are precisely what Speech First is challenging. In any event, courts "decline[] to accept" these disclaimers when, as here, "[i]t is clear from the text of the [challenged] policy that [protected speech] can be prohibited upon the initiative of the university." *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1183 (6th Cir. 1995). "The broad scope of the policy's language" still "presents a 'realistic danger' the University could compromise the protection afforded by the First Amendment." *Id.*

Nor could these disclaimers possibly resolve Speech First's vagueness claim. Drafting an overbroad policy and then adding an exception for "speech protected by the First Amendment" makes the policy *more* vague, not less. First Amendment protections "depend upon the various fact situations present in each circumstance" and "'take[] shape only as courts proceed on a retrospective, case-by-case basis.'" *Nat'l People's Action v. City of Blue Island*, 594 F. Supp. 72, 79 (1984) (quoting Tribe, *American Constitutional Law* §12-26, at 715-16 (1978)). Put differently, "[h]ow are college students to be able to determine (when judges have so much difficulty doing so) whether any particular speech or expressive conduct will be deemed (after the fact) to fall within the protections of the First Amendment?" *Coll. Republicans at San Francisco State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1021 (N.D. Cal. 2007). These kinds of disclaimers are too vague because "'the Constitution does not, in and of itself, provide a bright enough line to

guide primary conduct.'" *Nat'l People's Action*, 594 F. Supp. at 79. If it did, the government could pass a law that makes it "'a crime to say anything in public unless the speech is protected by the first and fourteenth amendment.'" *Id.* at 79 n.2.

Instead of the disclaimers in the University's policies, the district court credited the declarations from President Fenves and Dean Reagins-Lilly for the proposition that the University never applies its speech codes inconsistently with the First Amendment. This was error, for at least six reasons:

One, the declarants' assertion that the University has no history of enforcing its policies against protected speech is irrelevant. As just explained, no such history is required because the objective chill stems from the text of the policies themselves. *Rangra*, 566 F.3d at 519.

Two, the declarants' promise that they will apply the University's policies responsibly in the future is likewise irrelevant. Because the text of the speech codes gives the University the "authority" to prosecute protected speech, the University's "assurance it will elect not to do so is insufficient." *Fox Television*, 567 U.S. at 255. Courts will "not uphold an unconstitutional [policy] merely because the Government promised to use it responsibly," *Stevens*, 559 U.S. at 480—much less deny standing to challenge it. *N.C. Right to Life*, 168 F.3d at 711.

Three, the declarations came too late. "[S]tanding is determined as of the date of the filing of the complaint, and subsequent events do not deprive the court of jurisdiction." *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1061 (5th Cir. 1991). The

University's declarations, drafted and submitted *after* Speech First filed this suit, cannot retroactively remove the chill that its members faced when they sued. *See Backpage.com, LLC v. Dart*, 807 F.3d 229, 234 (7th Cir. 2015) ("[Plaintiffs] are unlikely to reconsider [their decision not to speak] on the basis of a lawyer's statement … months after the initial threat.").

Four, the declarations accomplish nothing. They do not amend the text of the University's speech codes, and most students will never read them. *Majors*, 317 F.3d at 721. Neither the University nor the declarants, moreover, "is bound by its court statements" in "future litigation on these issues in federal court or in [student] disciplinary proceedings." *ACLU v. Fla. Bar*, 999 F.2d 1486, 1494 (11th Cir. 1993). And "a change in membership" in the University's leadership "could result in a change in [University] policy regarding the interpretation and enforcement of" the speech codes. *Id.*; *accord 281 Care Comm.*, 638 F.3d at 628 (explaining that a "representation by state officials" in the litigation does "not divest standing … because the state's position was not binding and could change" (citing *United Food & Commercial Workers Int'l Union v. IBP, Inc.*, 857 F.2d 422, 429 (8th Cir. 1988)).

Five, the declarations are not credible. The declarants do not know if the University has applied its policies consistently with the First Amendment. Neither declarant is a lawyer, the limits of the First Amendment are not always clear, and the University has a poor track record on student speech (receiving a "red light" rating from FIRE twelve years in a row). If the University understood the limits of the First

Amendment, it would not have these vague and overbroad speech codes on the books. Nor would it be arguing that students can never challenge its policies so long as it promises to apply them responsibly. These actions and arguments "diminish[] the [University's] credibility … because it appear[s] that it s[eeks] to avoid coming to grips with the constitutionality of [its] [p]olic[ies]." *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 858-59 (E.D. Mich. 1989).

Six, the declarations do nothing to resolve Speech First's vagueness challenge. Because the policies are broad, vague, and subjective enough to reach protected speech, the declarations at most reveal that the University is *choosing* not to apply its policies to protected speech. But the fact that the speech codes give the University unbridled discretion to apply them "on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application," is precisely why Speech First challenges them as vague. *Dallas Ass'n of Cmty. Orgs. for Reform Now v. Dallas Cty. Hosp. Dist.*, 670 F.2d 629, 633 n.5 (5th Cir. 1982); *accord Leonardson v. City of E. Lansing*, 896 F.2d 190, 197-98 (6th Cir. 1990). Speech First has standing to challenge the University's arbitrary-enforcement power "even if the discretion and power are never actually abused." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988).

Though the district court gave near-decisive weight to the University's declarations and filings, it gave virtually no weight to Speech First's. It instead faulted Speech First for identifying only "broad categories of speech" instead of the "specific statements" that its members want to make. ROA.520-21. This was error too.

Speech First *did* identify the "specific statements" that its members want to make. The district court recognized several examples: Student B wants to argue "that 'affirmative action should be prohibited.'" ROA.519. Student C wants to explain how "the breakdown of the nuclear family has had many negative effects." ROA.520. Student B wants to debate whether "Justice Kavanaugh was innocent of the accusations made against him and was properly confirmed to the U.S. Supreme Court." ROA.519-20. Student A, moreover, wants to change the minds of her fellow "students who advocate for open borders and the protection of illegal immigrants, who support the BDS movement to end support for Israel, and who do not support the President." ROA.42. And Students A and B want to give the "Tea Party conservative" and "libertarian" perspective on a host of specific topics. ROA.42-43, 181-82. This is as specific as Speech First could be about speech that has not yet taken place.

To the extent the district court wanted more—specific quotes, draft speeches, precise arguments, etc.—that is not how speech works. Even people with deeply held views do not know exactly how they will voice them or defend them in advance; that all depends on the natural give and take of conversation and debate. That is why, in preenforcement cases like this one, courts do not require plaintiffs to describe their intended speech with hyper-specificity. *See, e.g.*, *Bair*, 280 F. Supp. 2d at 365 (college student who wanted "'to advance certain controversial theories or ideas regarding any number of political or social issues'" could challenge university speech codes); *Saxe v. State Coll. Area Sch. Dist.*, 77 F. Supp. 2d 621, 622-23, 625 (M.D. Pa. 1999) (students

who wanted to "'speak out' about the sinful nature and harmful effects of homosexuality and other … moral topics" could challenge school's harassment policy), *rev'd only on the merits*, 240 F.3d 200 (3d Cir. 2001); *Carmouche*, 449 F.3d at 660-61 (center that planned to run future advertisements "point[ing] out the positions of candidates on issues of importance to it" could challenge election regulation); *281 Care Comm.*, 638 F.3d at 628-30 (group that planned to run advertisements that "use political rhetoric, to exaggerate, and to make arguments that are not grounded in facts" could challenge election regulation, even though they refused to acknowledge that their speech would "actually violate[]" the regulation).

Courts are especially unwilling to require hyper-specificity in "overbreadth cases." *Hill v. City of Houston*, 789 F.2d 1103, 1122 (5th Cir. 1986), *aff'd*, 482 U.S. 451 (1987). Courts "make constitutional decisions" in these cases "without focusing sharply on the identity of the parties whose rights are threatened." *Id.* They instead often rely on "a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from protected speech or expression." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956-57 (1984).

That Students A, B, and C are currently anonymous does not change this analysis. The identity of these students has no bearing on the *substance* of what they want say, or whether the University's policies cover that speech. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995). Indeed, the University conceded below that the students'

speech "is entitled to the protections of the First Amendment," ROA.519 n.2, and the district court overruled the University's objections to their anonymity, ROA.520 n.4.

That was the right call. Students A, B, and C are mere standing members, "not … parties to the litigation." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 459 (1958). This Court has "never held that [an association] suing as a representative must specifically name the [members] on whose behalf the suit is brought." *Doe v. Stincer*, 175 F.3d 879, 884 (11th Cir. 1999) (discussing Fifth Circuit precedent). And "to hold that Article III requires an organization to name those of its members who would have standing would be in tension with one of the fundamental purposes of the associational standing doctrine—namely, protecting individuals who might prefer to remain anonymous." *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 593 n.48 (S.D.N.Y. 2019), *aff'd in relevant part*, 139 S. Ct. 2551 (2019). Here, for example, Speech First's members have good reason to invoke the "shield from the tyranny of the majority" that anonymity provides. *McIntyre*, 514 U.S. at 357. Given the unpopularity of their views, their participation in this lawsuit could prompt backlash, ostracization, and reprisals from the University, their professors, other students, and the public. That risk is only heightened by the emergence of an Antifa-style group in Austin—a group that is specifically dedicated to "doxxing" conservative students at the University. *See* Airaksinen, *More Than 30 UT Students Doxxed for the Crime of Being Conservative*, PJ Media (Jan. 13, 2019), bit.ly/2KmYruw.

* * *

In sum, Speech First's members face a credible threat of enforcement from the University's speech codes. The text of those policies arguably cover their intended speech, which is all the law requires. If this Court affirms the district court's reasoning, *no* student could *ever* bring a preenforcement challenge to a university speech code. Every university has generic disclaimers in their policies that promise to protect free speech. And any university could defeat a lawsuit—at the motion-to-dismiss stage before the plaintiff gets discovery or a chance to look at the university's disciplinary records—by submitting declarations promising that it never applies its policies inconsistently with the First Amendment. That is untenable.

ii. Speech First has standing to challenge the University's "bias incidents" policy because the CCRT objectively chills students' speech.

Unlike the speech codes, there is little dispute that the University's policy on "bias incidents"—as administered by the CCRT—poses a "credible threat" to Speech First's members. According to the University's own reports, it receives hundreds of bias-incident reports every year. ROA.340. Anyone can submit a report, they can do so anonymously over the internet, and the triggering condition for a report (the definition of "bias incident") is largely in the eye of the beholder. Notably, the most-reported incidents in the history of the CCRT concern the *exact* topics that Speech First's members want to discuss: Israel, affirmative action, and illegal immigration. While

Speech First does not need a history of past enforcement to prove standing, it has it for the bias-incidents policy.

The real dispute on appeal is whether the *consequences* that the University imposes on students who commit "bias incidents"—the CCRT and its related bureaucratic procedures—objectively chill students' speech. They do. The entire point of the CCRT is to implicitly threaten students with discipline if they say something "biased." And the regime "give[s] plaintiffs grounds to reasonably fear that, unless they modify their speech, they will be subject to the hassle and expense of administrative proceedings." *281 Care Comm.*, 638 F.3d at 631.

"It is settled that governmental action which falls short of a direct prohibition on speech may violate the First Amendment by chilling the free exercise of speech." *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992). "Informal measures" such as "'threat[s]'" and "'other means of coercion, persuasion, and intimidation,'" can themselves "violate the First Amendment." *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963)). Courts recognize the reality that "indirect 'discouragements'" often "have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions, or taxes." *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 402 (1950). While government officials are free to engage in speech of their own, there is a "difference between government expression and intimidation—the first permitted by the First Amendment, the latter forbidden by it." *Backpage.com*, 807 F.3d at 230. Whatever form it takes, the government

violates the First Amendment when its conduct would "'chill or silence a person of ordinary firmness'" from engaging in protected speech. *White*, 227 F.3d at 1228.

Implicit threats and intimidation by government actors routinely impose an objective chill on speech, even when they are framed as calls for voluntary "dialogue" with an official who lacks direct regulatory authority. For example, in *Okwedy v. Molinari*, the plaintiff rented billboards in Staten Island to post messages denouncing homosexuality. 333 F.3d 339, 341 (2d Cir. 2003). The President of the Staten Island Borough wrote a letter to the billboard company, on official letterhead, stating that the billboards were "unnecessarily confrontational and offensive" and "convey[ed] an atmosphere of intolerance which is not welcome in our Borough." *Id.* at 341-42. The President asked the company to "contact" the "Chair of [the] Anti-Bias Task Force" to "establish a dialogue" and "discuss" these issues. *Id.* He "call[ed] on [the company] as a responsible member of the business community," reminding it that it "owns a number of billboards on Staten Island." *Id.* at 342. But the President had no authority over billboards. *Id.* at 343.

The Second Circuit, in an opinion joined by then-Judge Sotomayor, reversed the dismissal of the plaintiff's First Amendment claim. A jury could find that the President's letter crossed the line "between attempts to convince and attempts to coerce." *Id.* at 344. The letter harkened to the President's "official authority" and "call[ed] on" the billboard company to contact the anti-bias task force. *Id.* "Even though [the President] lacked direct regulatory control over billboards," the company "could reasonably have

feared that [he] would use whatever authority he does have" against it. *Id.* And the fact that the letter called for "dialogue" did not dissipate this "implicit threat." *Id.*

These principles also apply in the university setting. In *Levin*, the plaintiff was a college professor who had written inflammatory articles about race. 966 F.2d at 87 (citing 770 F. Supp. 895, 902-03 (S.D.N.Y. 1991)). In response to his articles, the university took two actions. First, it allowed students assigned to the professor's class to transfer to an "alternative" section. *Id.* at 87-88. Even though the professor was still allowed to teach, the Second Circuit held that the University violated his First Amendment rights by "'stigmatizing'" him with the creation of these "shadow classes." *Id.* at 88. Second, the president of the university created a Committee on Academic Rights and Responsibilities to study "when speech … may go beyond the protection of academic freedom or become conduct unbecoming a member of the faculty." *Id.* at 89. (The words "conduct unbecoming" ominously mirrored the language used in the university's disciplinary code for professors. *Id.*) The Second Circuit held that the creation of this committee independently violated the professor's First Amendment rights. Even though the committee was "purely advisory, utterly lacking the power to take action," and even though the university never "explicitly" threatened disciplinary charges, the court held that the committee's existence was an "implicit threat" that chilled the professor's speech. *Id.* at 89-90. "It is the chilling effect on free speech that violates the First Amendment, and it is plain that an implicit threat can chill as forcibly as an explicit threat." *Id.*

The Supreme Court confronted another scheme to chill speech in *Bantam Books*. Because the First Amendment strictly circumscribes States' power to regulate obscenity, Rhode Island tried to circumvent that limitation by creating a Commission to Encourage Morality in Youth. 372 U.S. at 59. The Commission's mission was to "educate the public" about printed materials that contain "obscene, indecent or impure language, or manifestly tend[] to the corruption of the youth." *Id.* The Commission would circulate "lists of objectionable publications," receive "complaints from outraged parents," "investigate" incidents, and "recommend legislation, prosecution and/or treatment" to address these incidents. *Id.* at 60 n.1. If the Commission concluded that a book was "objectionable," it would send a notice to the publisher stating its conclusion and thanking the publisher for its "cooperation" in preventing its spread. *Id.* at 62-63. A "local police officer" would follow up with the publisher shortly thereafter. *Id.* at 63. Yet the Commission had no power to force publishers to withdraw the materials or punish them if they refused.

The Supreme Court concluded that this regime violated the First Amendment. The Commission's definition of "objectionable" material was unconstitutionally vague and overbroad. *Id.* at 65-66, 71. True, the Commission had no "power to apply formal legal sanctions," *id.* at 66, and the publishers were "'free' to ignore the Commission's notices, in the sense that [their] refusal to cooperate would have violated no law," *id.* at 68. But the Supreme Court "look[ed] through forms to the substance" and emphasized that "[p]eople do not lightly disregard public officers' thinly veiled threats." *Id.* at 67-

68. "The Commission deliberately set out to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim." *Id.* at 67. Because it "acted as an agency not to advise but to suppress," the Commission violated the First Amendment. *Id.* at 72.

The CCRT is the 21st-century version of the Commission to Encourage Morality in Youth. Instead of obscenity, the CCRT takes aim at "bias incidents"—*i.e.*, speech that is "motivated in whole or in part by a person's or groups' perceived identity." *CCRT Homepage*, bit.ly/2KtTcIk. The definition of "bias incident" is wildly overbroad, and the University tells students that its application turns on what the listener "believes" or "perceives." ROA.300, 326. When the CCRT (or any individual student) concludes that speech is "biased," that determination triggers a multi-step administrative process. Though the University contends that the CCRT merely seeks to "educate" and "support" students, the Team's true purpose is to "eliminate" biased speech by preventing it from occurring in the first place. ROA.332. And it achieves that purpose, as Speech First's members and many others attest. *Supra* 4 & n.2, 16. The University has tried to escape First Amendment scrutiny by labeling this process "non-investigatory," "non-adjudicative," and "non-disciplinary," but the Court must "look through forms to the substance" of what is happening. *Bantam Books*, 372 U.S. at 68. The University has committed a First Amendment wrong, and federal law provides a First Amendment remedy.

The CCRT—its structure, its members, its terminology, its procedures, and even its name—is designed to resemble a disciplinary apparatus. The members of the Team are university administrators, including police officers and disciplinarians, and they contact students in that capacity. *Cf. Backpage.com*, 807 F.3d at 231. The University takes pains to define key terms such as "bias incident" to invoke the notion of a formal rule. ROA.300; *CCRT Homepage*, bit.ly/2KtTcIk. It labels bias incidents "offenses," the students who commit them "offenders," the people who experience them "victims," and the students who see them "witnesses." *CCRT Homepage*, bit.ly/2KtTcIk; ROA.321, 338, 316, 325, 330; *cf. Backpage.com*, 807 F.3d at 231-32. Aggrieved students are asked to capture detailed information about the perpetrator and to file formal reports, like they would at the police station. Reports can be filed anonymously by people who were not even there, which makes little sense if the only point is to support the victim. Reports are also formally logged, and the University holds itself accountable by responding within 48 hours and disclosing what responses it took. While the University resists the word "investigation," the CCRT collects reports from witnesses, interviews victims, meets with perpetrators, formally determines whether a bias incident or a disciplinary violation occurred, and refers its conclusions to the appropriate authorities. Even its name reveals its disciplinary bent. It is the Campus Climate *Response* Team, not the Campus Climate *Support* Team (or even the Campus Climate *Education* Team). The resulting message to students is loud and clear: If you commit a "bias incident," you are in trouble.

While the University stresses that the CCRT lacks the power to formally discipline students, that is only half true. The Team certainly *appears* to have that power, which is all that it needs to threaten students and objectively chill their speech. *See Bantam Books*, 372 U.S. at 67-68; *Levin*, 966 F.2d at 89. Further, some members of the CCRT *do* have the power to formally discipline students—namely, the representatives from the Office of the Dean of Students and the University Police Department. A student could be forgiven for thinking that the CCRT and the University's disciplinary arm are one and the same, or that members of the Team will "use whatever authority [they] do[] have, as [university administrators]" to punish the perpetrators of bias incidents. *Okwedy*, 333 F.3d at 344. Students apparently make that mistake all the time, as the number one thing they ask the CCRT to do is take "disciplinary action." *2013-14 CCRT Report* 21, 27; ROA.349; *2014-15 CCRT Report* 22. The CCRT also likes to remind students that bias incidents "may violate a university policy," that discipline is often a "direct[] … result" of bias reports, and that the CCRT is a "partner" with the University's disciplinarians. *FAQs* 3; *2014-15 CCRT Report* 17; ROA.316, 339, 346. In fact, the same conduct that constitutes a "bias incident" is also an aggravating factor under the disciplinary rules. *Institutional Rules* 151. In short, whether or not the CCRT has formal disciplinary authority, a reasonable student would certainly get that impression. Article III does not require "[students], who are looking down the barrel of the [University]'s disciplinary gun, … to guess whether the chamber is loaded." *Wollschlaeger*, 848 F.3d at 1306.

The Team's lack of formal disciplinary authority is also beside the point because it uses other "[i]nformal" means of chilling disfavored speech. *White*, 227 F.3d at 1228. For example, the CCRT logs bias incidents on its website for the world to see, with enough information that anyone who is plugged in to campus gossip could identify the perpetrator. These reports forever label students with the scarlet letter of "bias offender." *Cf. Parsons v. DOJ*, 801 F.3d 701, 712 (6th Cir. 2015) (designating someone a "gang" member impermissibly chilled speech by damaging his reputation); *Rattner v. Netburn*, 930 F.2d 204, 210 (2d Cir. 1991) (creating a list of businesses that criticized the city was "reminiscent of McCarthyism" and impermissibly chilled speech). Students also understandably fear that these reports will be kept in the University's records, potentially limiting their chances of admission to graduate school or fellowships. *FAQs* 4; ROA.317.

Moreover, in all cases, the CCRT investigates bias incidents and can ask to meet with the accused student. When protected expression is involved, such investigations are themselves a "sanction" that "inhibit[s] … the flow of democratic expression and controversy." *Sweezy v. N.H. ex rel. Wyman*, 354 U.S. 234, 248 (1957). Like a call from the Dean of Students or a talk with a police officer, the CCRT's requests for a meeting appear anything but optional, especially from the perspective of a college student. These impressionable 18- to 22-year-olds, many living away from their parents for the first time with tens of thousands of dollars in student loans, are unlikely to treat a request

from a university authority figure to have a meeting over accusations of "bias" as voluntary. Indeed, the University *requires* them to attend. *Institutional Rules* 141-43.

* * *

For all these reasons, Speech First has shown that the CCRT imposes an objective chill on student speech. Again, the question at this stage of the litigation is what is *likely*. Speech First does not need to definitively prove the true nature of the CCRT, and this Court is not being asked to render a final judgment on that question. But looking at the Team's design, its purpose, its operation, the experiences of Speech First's members and of other universities, and common-sense observations about the dynamics between college students and administrators, this Court has more than enough to conclude that the purpose and effect of the CCRT is to purge the campus of "biased" speech.

A slight tweak in the facts of this case demonstrates the flaws in the University's position. Imagine that in the wake of the September 11th attacks, a public university established a Patriotism Response Team, or PRT, to foster a sufficiently patriotic "campus climate." If students witnessed "anti-American incidents" on campus, they could file a report and receive counseling and support about how to cope with unpatriotic actions. The PRT would also contact the offending student and offer to facilitate a "voluntary" conversation about why that student's anti-American actions were hurtful and how the student could be more patriotic in the future. No one could argue with a straight face that the PRT did not even *implicate* the First Amendment and

that no student would have standing to challenge it. The PRT would instead be roundly criticized—and held unconstitutional—for what it is: a fundamentally coercive policy designed to deter students from expressing disfavored views.

B. Speech First satisfies the other preliminary-injunction factors.

If the Court agrees that Speech First likely has standing to challenge the University's policies, then it should resolve the other preliminary-injunction factors itself, instead of remanding them to the district court. This Court reviews the likely merits de novo anyway. *Boerschig v. Trans-Pecos Pipeline, LLC*, 872 F.3d 701, 706 (5th Cir. 2017). And if the Court agrees that Speech First has proven a likely First Amendment violation, then there can be "no dispute" about "the other [preliminary-injunction] criteria." *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009); *accord ACLU Fund of Mich. v. Livingston Cty.*, 796 F.3d 636, 649 (6th Cir. 2015). First Amendment violations are always irreparable, the University has no interest in enforcing unconstitutional policies, and the public interest lies with the First Amendment. *See Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013); *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006); *Child Evangelism Fellowship of Minn. v. Minneapolis Special Sch. Dist. No. 1*, 690 F.3d 996, 1004 (8th Cir. 2012). That is why appellate courts, once they find likely First Amendment violations, routinely reverse with instructions to simply enter a preliminary injunction. *See, e.g.*, *Byrum*, 566 F.3d at 449; *ACLU of Ill.*, 679 F.3d at 589-90; *Bays v. City of Fairborn*, 668 F.3d 814, 825 (6th Cir. 2012). Anything less would waste judicial and party resources. *Boerschig*, 872 F.3d at 706.

The Court should do the same here. Speech First is not just *likely* to succeed on its constitutional claims; the University's policies are flagrantly unconstitutional, which is why it only partially defended one of them below. The University's policies on "harassment," "incivility," "rudeness," and "bias incidents" all "'impose content-based, viewpoint-discriminatory restrictions on speech.'" *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) (Alito, J.) (quoting *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596-97 (5th Cir. 1995)). That alone dooms them. *See Iancu v. Brunetti*, 139 S. Ct. 2294, 2299-302 (2019). The policies also fail because they turn on the subjective reactions of the listener, *Coates v. Cincinnati*, 402 U.S. 611, 611 (1971); *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 250-51 (3d Cir. 2010), and employ undefined terms that are too vague and sweep in too much protected speech, *see Kramer v. Price*, 712 F.2d 174, 176 (5th Cir. 1983) ("harassment"); *Coll. Republicans*, 523 F. Supp. 2d at 1016-21 ("civility"); *Waters v. Churchill*, 511 U.S. 661, 673 (1994) ("rude"). The University did not argue otherwise below.

The one policy that the University did defend—its verbal-harassment rule—fares no better. The University never disputed that the rule, by requiring officials to determine whether harassing speech is "necessary to the expression of an[] idea," ROA.188, is unconstitutionally vague. *See Wollschlaeger*, 848 F.3d at 1319 (holding that a "ban on only *unnecessary* harassment is incomprehensibly vague"). And the notion that the University—i.e., the *government*—could be the arbiter of what is and is not "necessary"

to express an idea is anathema to the First Amendment. *See UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1178 (E.D. Wis. 1991).

While the University did argue that the verbal-harassment rule is not overbroad because it tracks the Supreme Court's definition of harassment in *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, 526 U.S. 629 (1999), this argument is unpersuasive. *Davis* held that "sexual harassment is a form of discrimination" under Title IX when it is "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Id.* at 649-50. But *Davis* involved sexual harassment by "public schoolchildren." *Id.* at 646. Because the free-speech rights of adults at public universities are far broader, universities must "*at least*" scrupulously comply with the *Davis* standard. *DeJohn v. Temple Univ.*, 537 F.3d 301, 315, 318 (3d Cir. 2008); *see also McCauley*, 618 F.3d at 247 ("Public universities have significantly less leeway in regulating student speech than public elementary or high schools.… Any application of free speech doctrine derived from [grade-school] decisions to the university setting should be scrutinized carefully"). The verbal-harassment rule does not: Its text is not limited to harassment that amounts to discrimination against a protected class, to harassment that "effectively denie[s]" access to University programs, or to harassment that is "severe, pervasive, *and* objectively offensive." *Davis*, 526 U.S. at 650-51 (emphasis added). It broadens each element of *Davis* and covers, contrary to *Davis*, "severe one-on-one peer harassment." *Id.* at 652.

For all these reasons, the University's policies likely violate the First and Fourteenth Amendments. Speech First is likely to succeed on the merits of its constitutional claims, putting its entitlement to a preliminary injunction beyond debate.

II. Even if Speech First were not entitled to a preliminary injunction, the district court should not have sua sponte dismissed the entire case.

If the Court concludes that Speech First was not entitled to a preliminary injunction, it should at least reverse and remand for further proceedings. The district court erred by sua sponte converting its denial of a preliminary injunction into a total dismissal on the merits.

As the Supreme Court explained in another case involving the University, "it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Doing so "improperly equates 'likelihood of success' with 'success'" and "ignores the significant procedural differences" between preliminary injunctions and the merits. *Id.* at 394. Preliminary injunctions serve a "limited purpose," are often litigated in "haste," and involve "procedures that are less formal and evidence that is less complete." *Id.* at 395. The district court seemed to appreciate this distinction when it overruled the University's objections to Ms. Neily's declaration, ROA.520 n.4, and when it assured Speech First that it did not need to present more evidence because the court was proceeding solely on its preliminary-injunction motion, ROA.535-36. But this distinction was not honored in the district court's final disposition of the case.

That the district court dismissed for lack of Article III standing—a jurisdictional defense—does not makes its impromptu dismissal any more appropriate. "[A]n inability to establish a substantial likelihood of standing requires denial of the motion for preliminary injunction, not dismissal of the case." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015). That is because "Article III standing 'must be supported … with the manner and degree of evidence required at the successive stages of the litigation.'" *Bennett v. Spear*, 520 U.S. 154, 167-68 (1997). Because Speech First "filed [its] complaint and moved for a preliminary injunction contemporaneously"—when the University "had not yet filed an answer" and "no discovery had occurred"—"standing … should have been evaluated under the motion to dismiss standard." *Food & Water Watch*, 808 F.3d at 913. In other words, Speech First needed to present only "general factual allegations of injury" and had no obligation to "'set forth' by affidavit or other evidence 'specific facts.'" *Bennett*, 520 U.S. at 168.

Speech First easily did that. Its complaint alleges, in detail, that it has members who attend the University, that its members have views that are controversial on campus, that they want to express those views, and that they are chilled from doing so by the challenged policies. ROA.21-45. The district court's analysis about the members' "specific statements," and its analysis about the University's declarations, would not matter at the motion-to-dismiss stage. *Bennett*, 520 U.S. at 168. Even if it mattered, Speech First could easily cure the court's concerns by amending its complaint,

submitting more detailed declarations, or disclosing its members' identities (under seal) to the court.

But the district court never gave Speech First the opportunity. Nor was Speech First on notice that it needed to do anything more, since the University had not yet filed a motion to dismiss. *See Neitzke v. Williams*, 490 U.S. 319, 329-30 (1989) (explaining the dangers of sua sponte dismissals and the important "procedural protections" that motions to dismiss provide). Even when a court is considering a dismissal "on jurisdictional grounds, unless the defect is clearly incurable a district court should grant the plaintiff leave to amend, allow the parties to argue the jurisdictional issue [after notice and a hearing], or provide the plaintiff with the opportunity to discover the facts necessary to establish jurisdiction." *Shockley v. Jones*, 823 F.2d 1068, 1073 (7th Cir. 1987) (citing *Williamson v. Tucker*, 645 F.2d 404, 414 (5th Cir. 1981)). None of that happened here.

At a minimum, then, the district court's impromptu dismissal of this case should be reversed. If this Court does not instruct the district court to enter a preliminary injunction, it should at least instruct the district court to reinstate this case and adjudicate Article III standing *after* the University files a motion to dismiss—or, better yet, after the parties conduct discovery and file motions for summary judgment.

CONCLUSION

This Court should reverse the district court and remand with instructions to grant Speech First a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7)(B) because it contains 12,858 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it has been prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

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Dated: August 9, 2019

CERTIFICATE OF SERVICE

I filed a true and correct copy of this brief with the Clerk of this Court via the CM/ECF system, which will notify all counsel.

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Dated: August 9, 2019