IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

SPEECH FIRST, INC., *Plaintiff*, v. ALEXANDER CARTWRIGHT, in his official capacity as President of the University of Central Florida, *Defendant*.	Case No. 6:21-cv-00313 **Oral Argument Scheduled May 10, 2021**

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

Two circuits have already considered—and rejected—every argument in the University's response. The Universities of Texas and Michigan also put First Amendment disclaimers in their policies, swore that their policies were never applied to protected speech, and told students that bias-response teams were non-disciplinary and "voluntary." The Fifth and Sixth Circuits rejected these all-too-familiar justifications for chilling students' speech. Because Eleventh Circuit precedent rejects them too, this Court should grant Speech First's motion for a preliminary injunction.

ARGUMENT

The normal test for preliminary injunctions applies here. If Speech First wins this motion, the University will be temporarily barred from "enforcing" the challenged policies. Mot. (Doc. 3) 1. Speech First thus seeks a "prohibitory injunction [that] 'restrains' a party from further action," not a "mandatory injunction [that] orders a party to 'take action.'" *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 n.2 (11th Cir. 1998). The University's suggestion (at 10-11) that any injunction "alter[ing] the *status quo*" is a disfavored mandatory injunction "is incorrect." *Id.* Courts do not apply any heightened standard in cases like this one. *E.g.*, *Otto v. City of Boca Raton*, 981 F.3d 854, 860 (11th Cir. 2020); *St. Paul's Episcopal Sch. v. AHSAA*, 2018 WL 3150356, at *9 n.12 (S.D. Ala. 2018). Under the normal test, Speech First satisfies every factor.

I. Speech First will likely prevail on the merits.

The University contends (at 2-3) that Speech First "lacks standing" and that the challenged policies "are constitutional." Yet the relevant questions are *likely* standing and *likely* unconstitutionality. *Waskul v. Washtenaw Cty. Cmty. Mental Health*, 900 F.3d 250, 256-57 n.4 (6th Cir. 2018). Likely does not mean "positively guarantee[d]." *Noble v. Tooley*, 125 F. Supp. 2d 481, 485 (M.D. Fla. 2000) (Presnell, J.). Speech First clears this bar.[1]

A. Speech First likely has Article III standing.

On standing, the University (at 11-12) gets the basics right. Speech First has standing if one of its members has standing. *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330 & n.5 (5th Cir. 2020). Its members have standing if the University's policies objectively chill speech. *ACLU v. Fla. Bar*, 999 F.2d 1486, 1493-94 (11th Cir. 1993). And the policies objectively chill speech if there's a credible threat of enforcement. *SBA List v. Driehaus*, 573 U.S. 149, 161 (2014).

But the University errs on the specifics. It misses that the credible-threat standard is "'quite forgiving'" and "'most loosely applied'" in free-speech cases. *Wollschlaeger v. Governor*, 848 F.3d 1293, 1305 (11th Cir. 2017) (en banc); *ACLU*, 999 F.2d at 1493. The question is not whether the policies *actually* cover the plaintiff's speech, but whether they "'arguably'" do. *Fenves*, 979

[1] The University (at 11) equates the burden of proving standing at this stage with "'the burden of resisting a summary judgment motion.'" The University mistakenly quotes the *dissent* in *Lujan*, not the majority opinion. Regardless, a plaintiff "resist[s]" summary judgment by raising a genuine dispute of material fact. Speech First easily does that here.

F.3d at 332 n.10. If a policy "arguably covers" the speaker, "there is standing" because reasonable people will not risk negative consequences "only to make a political point." *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003); *accord Wollschlaeger*, 848 F.3d at 1305 n.2 (finding standing because policy was "unclear").

The policies here "at least arguably" cover Speech First's members. *Harrell v. Fla. Bar*, 608 F.3d 1241, 1260 (11th Cir. 2010) (cleaned up). As the Fifth Circuit said about nearly identical policies, the "controversial political topics" that Speech First's members want to discuss are arguably regulated by the University's broad, vague, subjective policies. *Fenves*, 979 F.3d at 332. That's why courts routinely invalidate similar policies. *Id.* at 332 n.9.[2]

Several factors exacerbate the credible threat here. The policies are all "recently enacted" or "revised." *Harrell*, 608 F.3d at 1257. The University is "vigorously defending [them] in court." *Wollschlaeger*, 848 F.3d at 1305. Violations are easy to commit and easy to report. *Id.* at 1323. And the University tells students to read them "broadly." Ex. C at 24. The University did just that with Dr. Negy, using several controversial (but protected) statements to fire him for harassment. *See* Ex. W at 184-85 ("a transgender man is a woman"; "there [i]s no God"; "Islam [i]s not a religion of peace"; "systemic racism and

[2] *E.g.*, *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 203-04 (3d Cir. 2001); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1182 (6th Cir. 1995); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 370-71 (M.D. Pa. 2003); *UWM Post, Inc. v. Bd. of Regents of UW Sys.*, 774 F. Supp. 1163, 1178 (E.D. Wis. 1991).

White privilege d[o] not exist"). If the University will do this to a tenured professor, students don't stand a chance. *See, e.g.*, Student A Decl. ¶20.

The University stresses (at 21, 24) that its policies promise to protect free speech, but these disclaimers do not affect standing. The University cannot draft overbroad policies, chill students' speech, and then escape judicial review by promising to make case-by-case exceptions. *ACLU*, 999 F.2d at 1495; *Dambrot*, 55 F.3d at 1183. The First Amendment does not leave students "at the mercy of *noblesse oblige*." *United States v. Stevens*, 559 U.S. 460, 480 (2010). The JKRT protocol has no disclaimer, moreover, and the other disclaimers disclaim little. *E.g.*, Ex. A at 5 (merely listing free speech as *a factor* the University will consider). If anything, these disclaimers *confirm* that the policies reach protected speech. *Fenves*, 979 F.3d at 337. Faced with a specific rule and an amorphous exception for speech "protected by the First Amendment," reasonable students will follow the rule. *Fenves*, 979 F.3d at 334-35, 337-38; *Coll. Repubs. at SFSU v. Reed*, 523 F. Supp. 2d 1005, 1020-21 (N.D. Cal. 2007).

Similarly unpersuasive are the University's declarations swearing that the policies have never been enforced unconstitutionally. These declarations were "written after this action was filed." *Wollschlaeger*, 848 F.3d at 1306. They do not bind the University. *ACLU*, 999 F.2d at 1494-95. They reflect only the declarants' "personal experience." *Fenves*, 979 F.3d at 336 n.14. And University employees don't know what's protected by the First Amendment. *E.g.*,

Myers Decl. ¶15 (asserting, incorrectly, that "discriminatory harassment" is "unprotected"). Even if they did, their "*noblesse oblige*" does not eliminate the policies' chilling effect. *Wollschlaeger*, 848 F.3d at 1322-23, 1306.

The University assumes (at 2, 13, 21) that Speech First lacks standing unless it can show a history of past enforcement. That position is convenient, since the University's disciplinary records are confidential. *Fenves*, 979 F.3d at 337 n.14. It's also wrong. While past enforcement "can assure standing," its absence does not "doom" standing. *Id.* at 336; *e.g.*, *Epperson v. Arkansas*, 393 U.S. 97, 101-02 (1968); *Bair*, 280 F. Supp. 2d at 367. Because the injury here is chilled speech, past enforcement "misses the point"; there's nothing to enforce when "speech has already been chilled." *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 766 (6th Cir. 2019). And because this is a facial challenge, standing turns on "the challenged rules" themselves. *Harrell*, 608 F.3d at 1260 n.7. The policies are "'recently enacted'" and "'facially restrict expressive activity by [students],'" so this Court can "'assume a credible threat of prosecution'" based on the "policies alone." *Fenves*, 979 F.3d at 335. Past enforcement is beside the point: "'the threat is latent in the existence of the statute.'" *Id.* at 334-36.[3]

Finally, the University's insistence that the JKRT protocol does not chill

[3] Also beside the point is the University's argument (at 19) that other students engage in controversial speech on campus. Universities can "chill [First Amendment] activity" without "freez[ing] it completely." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005). Objective chill does not turn on any particular student's "will to fight." *Id.*; *accord Backpage.com, LLC v. Dart*, 807 F.3d 229, 231 (7th Cir. 2015).

speech is unpersuasive. The University thinks (at 14) that a policy cannot violate the First Amendment unless it imposes "a specific penalty." That is not the law. *See* Mot. 18 (collecting cases); *SBA List*, 573 U.S. at 165 (drains on "time and resources" and "administrative action" count); *Wollschlaeger*, 848 F.3d at 1323 (reputational and career harms and "[e]ven the mere filing of a complaint" count). Bias-response teams objectively chill speech "by way of implicit threat of punishment and intimidation." *Schlissel*, 939 F.3d at 765. The University's observation (at 18-19) that students could file reports even without a JKRT proves the point. If the University could collect reports anyway, why create a separate response team, staff it with authority figures, formally define "bias-related incident," use disciplinary lingo, solicit anonymous complaints, threaten referrals, and request meetings? The only reason is to *prevent* "biased" speech from happening in the first place.

Despite the University's best efforts (at 17), there are no "key factual distinctions" between this case and the cases that Speech First won in the Fifth and Sixth Circuits. Like the University, Texas denied that its team ever "'investigated or punished'" anyone "'for engaging in speech or expression protected by the First Amendment.'" Appellee's Br. 16-17, 2019 WL 5296547. And Texas said it didn't meet with students at all. *Id.* at 38. Also like the University, Michigan insisted its meetings were entirely "voluntary." 333 F. Supp. 3d 700, 710-11 (E.D. Mich. 2018). "[T]he meeting *is* voluntary," the Sixth Circuit held,

but that fact doesn't eliminate the overall chilling effect. 939 F.3d at 765. The University admits (at 19) that its requests would chill speech if they were sent by the JKRT's police officer. Left unexplained is why requests from the JKRT's *administrators* are meaningfully different. *See Schlissel*, 939 F.3d at 765.

This Court should not follow the Seventh Circuit's contrary decision in *Killeen*. Not only is it wrong, but this Court has what the Seventh Circuit thought was missing. The Seventh Circuit faulted Speech First for not "identify[ing] in the record specific statements any students wish to make," "through Doe affidavits or otherwise." *Speech First, Inc. v. Killeen*, 968 F.3d 628, 640, 643 (7th Cir. 2020). *But see Fenves*, 979 F.3d at 331. Here, Speech First's members submitted detailed "Doe" declarations, and the University admits that it's "aware" of the "certain views" they "wish to express." *E.g.*, Andrews Decl. ¶39. Speech First also submitted a verified complaint, which counts as evidence at this stage. *SisterSong Women of Color Reprod. Just. Collective v. Kemp*, 410 F. Supp. 3d 1327, 1343 n.10 (N.D. Ga. 2019). And it presented unrebutted studies and surveys about how students view these kinds of policies. *See* Exs. Y, Z, AA, CC. Accordingly, this Court can find that Speech First likely has standing here without wholesale rejecting the Seventh Circuit's decision.[4]

[4] One more distinction warrants discussion. The Seventh Circuit relied extensively on Illinois' assertion that most students declined its requests to meet. *Killeen*, 968 F.3d at 640, 642, 643. The University makes no such representation here. Given how much it relies on the Seventh Circuit's decision, that omission is glaring.

B. The challenged policies are likely unconstitutional.

The University needs this Court to reject "the consistent line of cases that have uniformly found campus speech codes unconstitutionally overbroad or vague." *Fenves*, 979 F.3d at 338-39 & n.17. The Court should decline.

JKRT: The University does not deny that its definition of "bias-related incident" is vague, overbroad, and viewpoint-based. Mot. 17-18. It merely re-argues (at 26) that the policy's enforcement mechanism—the JKRT protocol—does not chill speech. That argument still fails. *See supra* I.A; Mot. 18-20.

Computer Policy: The University does not contest that the phrase "harassing or hate messages" is vague, overbroad, and viewpoint-based. Mot. 16. It even concedes (at 3) that "hate speech" is protected speech. While the University repeats (at 26-27) its disclaimer that the computer policy "is not intended to abridge" free speech, the text *does* abridge free speech, no matter the University's "inten[t]." This disclaimer does not save the policy, *Coll. Republicans*, 523 F. Supp. 2d at 1020-21, and it only makes the policy *more* vague, *Nat'l People's Action v. City of Blue Island*, 594 F. Supp. 72, 75-80 (N.D. Ill. 1984).[5]

Discriminatory Harassment: The University's insistence (at 22) that its discriminatory-harassment policy "only proscribes unprotected speech" is a

[5] Speech First voluntarily withdraws its request to preliminarily enjoin the ResNet User Agreement. Still, the University's assertion (at 6-7) that this policy is limited to "physical ethernet ports" in "residence halls" is contradicted by the policy's text. *See* Ex. I (policy governs "the UCF Network" and "university computing and telecommunications resources").

nonstarter. When "anti-harassment" policies "regulate speech," they "are subject to First Amendment scrutiny." *Wollschlaeger*, 848 F.3d at 1307; *see DeJohn v. Temple Univ.*, 537 F.3d 301, 316 (3d Cir. 2008) ("[T]here is no 'harassment exception' to the … Free Speech Clause."). And when they target "'[]discrimination,'" they are content and viewpoint based, restricting speech "'precisely because of its sensitive subject matter and because of the odious viewpoint it expresses.'" *Booth v. Pasco Cty.*, 757 F.3d 1198, 1211 n.19 (11th Cir. 2014). The University's policy is no different. *See* Ex. A at 9 (policy covers speech); Ex. W at 183 (discriminatory means "biased, negative, or derogatory").

Equally unpersuasive is the University's suggestion (at 23) that its policy survives strict scrutiny by helping it comply with federal anti-discrimination statutes. No statute can override the Constitution. *UWM Post*, 774 F. Supp. at 1177; *Bair*, 280 F. Supp. 2d at 371-72. And the University's policy does not track the federal statutes. It covers classes that "are not protected under federal law." *Saxe*, 240 F.3d at 210. It also broadens *Davis*'s definition of harassment. Mot. 14-15. While the University claims (at 8 n.2) that its broader definition tracks a 2010 Dear Colleague letter, that letter was superseded by a 2020 rule. 85 Fed. Reg. 30026, 30202 (May 19). The new rule adopts the *Davis* standard verbatim, precisely because the broader definition caused "infringements of … free speech." *Id.* at 30026 & n.88. The University knows this, as it maintains a *separate* harassment policy that complies with the 2020 rule. *See*

Policy 2-012, at 6-7 (Oct. 14, 2020), bit.ly/3dnTwrw. The University has no good reason for layering an overbroad, viewpoint-discriminatory policy on top.

II. The remaining requirements necessarily favor Speech First.

Because Speech First has identified a likely violation of the First Amendment, the "remaining requirements" for a preliminary injunction are "necessar[ily]" satisfied. *Otto*, 981 F.3d at 870; *accord Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010). Any "ongoing violation of the First Amendment constitutes an irreparable injury," *FF Cosms. FL, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1298 (11th Cir. 2017), including violations based on chill, *Scott*, 612 F.3d at 1295. No matter what interests a policy serves, those interests are insignificant if the policy is likely unconstitutional. *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006). The University's contrary arguments (at 29-30) are irrelevant because they all assume it will succeed on the merits. *Scott*, 612 F.3d at 1295. The University cites no case where a court found a likely free-speech violation and then *denied* a preliminary injunction.

CONCLUSION

This Court should enter a preliminary injunction.

Respectfully submitted,

Dated: April 22, 2021

/s/ Cameron T. Norris

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CERTIFICATE OF SERVICE

I filed this reply with the Court via ECF, which will electronically serve everyone who requires service.

Dated: April 22, 2021

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