IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

SPEECH FIRST, INC.,
Plaintiff,

v.

TIMOTHY SANDS, in his individual capacity and his official capacity as President of Virginia Polytechnic Institute and State University,
Defendant.

Case No. 7:21-cv-00203-MFU

Oral Hearing Requested

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

RULES

INTRODUCTION

Two circuits have already considered—and rejected—the arguments in the University's opposition. The Universities of Texas and Michigan also tried to change their policies after the litigation began, 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. *See Speech First v. Fenves*, 979 F.3d 319 (5th Cir. 2020); *Speech First v. Schlissel*, 939 F.3d 756 (6th Cir. 2019). This Court should do the same and 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. Doc. 4 at 1. Speech First thus seeks a prohibitory injunction that "restrains" the University from taking further action, not a mandatory injunction that orders it to "take action." *Meghrig v. KFC Western, Inc.,* 516 U.S. 479, 484 (1996). The University's suggestion that any injunction that alters "the *status quo*" is a disfavored mandatory injunction is incorrect. Opp. (Doc. 15) 34; *see Mastrovincenzo v. N.Y.C.*, 435 F.3d 78, 89-90 (2d Cir. 2006); *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 n.2 (11th Cir. 1998). Courts do not apply any heightened standard in cases like this one. *E.g.*, *Legend Night Club v. Miller*, 637 F.3d 291, 296 (4th Cir. 2011) (First Amendment challenge to speech restrictions sought a prohibitory injunction). Under the normal test, Speech First satisfies every factor.

I. Speech First will likely prevail on the merits.

On the merits, the University argues that Speech First's challenge to the computer policy is moot, that Speech First lacks Article III standing, and that the University's policies do not violate the First or Fourteenth Amendments. The University is wrong on each point.

A. Speech First's challenge to the computer policy is not moot.

When Speech First filed its complaint, the University's acceptable use standard prohibited students from using "university systems for commercial or partisan political purposes," including "using electronic mail to circulate advertising for products or for political candidates." Norris Decl. Ex. F at 1. On May 17, 2021, four days before it filed its opposition brief, the University revised that policy to govern only University employees. The policy now reads: "you must NOT . . . *if you are an employee*, use university stems for partisan political purposes, such as using electronic mail to circulate advertising for political candidates." Midkiff Decl. ¶9 (emphasis added).[1]

The University's unilateral decision to modify its policy only after it was sued does not moot Speech First's challenge. "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). If it did, the government could "engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where it left off, repeating this cycle until it achieves all its unlawful ends." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 n.* (2018) (cleaned up). The government also could frustrate "the 'public interest in having the legality of the practices settled.'" *DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974). A governmental defendant that tries to moot a case via voluntary cessation thus "'bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017).

Because nothing stops the University from reinstating its original policy, it is not "absolutely clear" that its illegal conduct "could not reasonably be expected to recur." *Id.* As shown by the speed and ease in which it acted, the University can freely amend the acceptable use standard with only the

[1] The University made no changes to Policy 7000's ban on messages that are perceived by others to be "intimidat[ing]," "harass[ing]," or "unwarranted[ly] annoy[ing]." Norris Decl. Ex. G at 1. Speech First's challenge to that part of the computer policy indisputably remains live.

flick of a single bureaucrat's wrist. Midkiff Decl. ¶¶10-11, 4-5. In fact, the University admits that approval from the Board of Visitors (or anyone besides the Chief Information Officer) "is not required" for it "to implement a change in the Acceptable Use Standard." Midkiff Decl. ¶¶11, 4; *see also* Opp. 9 ("the Acceptable Use Standard is not subject to the full governance process"). A defendant does not carry its heavy burden of proving mootness through voluntary cessation when no practical or legal obstacle prevents it from returning to its prior policy. *See, e.g.*, *Porter v. Clarke*, 852 F.3d 358, 364 (4th Cir. 2017); *Wall v. Wade*, 741 F.3d 492, 497 (4th Cir. 2014); *Pashby v. Delia*, 709 F.3d 307, 316-17 (4th Cir. 2013).

Speech First prevailed on this exact issue in the Fifth and Sixth Circuits. The Sixth Circuit, in particular, examined facts indistinguishable from this case and explained why they cannot moot Speech First's preliminary-injunction motion. Like this case, the university in *Schlissel* repealed a challenged policy "after the complaint was filed" but before it filed its opposition to the preliminary-injunction motion. 939 F.3d at 769-70. Like this case, that university *chose* to get its new policy approved by "'senior University officials, including the University's president,'" but nothing *required* it to do so; no written procedures required it to "go through the same process or some other formal process to change the definitions again." *Id.* And like this case, the university in *Schlissel* continued to defend the old policy by arguing, among other things, that no student had standing to challenge it because the university never would have applied it to protected speech. *Id.* at 770; *accord Fenves*, 979 F.3d at 329 (same).[2]

While one University official declares that he "has no intention" of reinstating the original policy, Midkiff Decl. ¶11, the Sixth Circuit explained why such a declaration would be irrelevant: "[E]ven if [a University official] stated that the University would never reenact the challenged

[2] While Judge White dissented in *Schlissel*, she notably did not disagree with the majority's holding on mootness.

[policies]," that declaration would not cause mootness because it does not bind the University itself and that official could always leave the University. 939 F.3d at 769; *accord Fenves*, 979 F.3d at 329 (same). The Sixth Circuit was right. The University's declaration does not bind the University now or in the future, and "there is no guarantee that a future [official] would take the same stance." *Freedom from Religion Found., Inc. v. Concord Cmty. Sch.*, 885 F.3d 1038, 1052 (7th Cir. 2018); *accord ACLU v. Fla. Bar*, 999 F.2d 1486, 1494 (11th Cir. 1993) (finding no mootness because the defendant's "court statements" were not binding and because "a change in [its] membership could result in a change in [the] policy"); *United States v. Atkins*, 323 F.2d 733, 739 (5th Cir. 1963) (finding no mootness because "the word of the present Registrars [is] not binding on those who may hereafter be appointed").

While Speech First did not prevail on this issue in the Seventh Circuit (over a dissent), this Court cannot follow that decision. Unlike that university, the University here did not go through what the Seventh Circuit described as a preexisting, *mandatory*, legislative-like process for amending the student code. *Speech First v. Killeen*, 968 F.3d 628, 646 (7th Cir. 2020). More broadly, the Seventh Circuit leaned heavily on a "presumption" that governmental defendants act "in good faith" when they moot cases through voluntary cessation. *Id.* But the Fourth Circuit has not adopted a similar "presumption." In this circuit, a governmental defendant "fails to meet its heavy burden that its allegedly wrongful behavior will not recur when the defendant '*retains the authority and capacity to repeat* an alleged harm.'" *Porter*, 852 F.3d at 364; *accord Wall*, 741 F.3d at 497 (same); *Pashby*, 709 F.3d at 316-17 (holding that a governmental entity's change to a challenged policy does not moot an action when the government retains the authority to "reassess at any time" the change and revert to the challenged policy). That's the case here, where the University concededly "retains the authority and capacity" to reinstate the original acceptable use standard.

The Fourth Circuit does not give special treatment to defendants like the University for good reason. Unlike legislators, university administrators are not elected, accountable, or subject to external

procedures that constrain their policymaking. And when it comes to free speech, they have a notoriously bad track record of repealing policies when they are sued, only to reinstate them once the litigation ends. *See* Lukianoff & Goldstein, *Speech Code Hokey Pokey*, Volokh Conspiracy (Sept. 12, 2018), bit.ly/2rFNc9u; *e.g.*, *Christian Legal Soc. v. Martinez*, 561 U.S. 661, 723 n.3 (2010) (Alito, J., dissenting) (noting the university's "practice of changing its announced policies" to moot cases). In fact, in *every case* that Speech First has ever filed, the university tried to moot claims by repealing challenged policies.[3] This Court cannot ignore universities' "track record of 'moving the goalposts.'" *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021). Because the University "retain[s] authority to reinstate [the prior] restrictions at any time" and Speech First's members "'remain under [that] constant threat,'" Speech First "remain[s] entitled" to "emergency injunctive relief." *Id.*[4]

B. Speech First likely has Article III standing.

An association suing on behalf of its members has standing when "its members would otherwise have standing to sue in their own right," the "interests it seeks to protect are germane to the organization's purpose," and "neither the claims asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). The University challenges the first requirement, but not the other two. Opp. 12; *see Fenves*, 979 F.3d at 330 n.5 (finding that Speech First obviously satisfied the second and third *Hunt* requirements). Specifically, the University argues that none of Speech First's members have suffered a cognizable "injury." Opp. 12.

---

[3] *E.g.*, *Speech First v. Wintersteen*, Def.'s Opp. (Doc. 22) 14-16 (S.D. Iowa Feb. 25, 2020); *Speech First v. Cartwright*, Pltf. Ltr. (Doc. 43) (M.D. Fla. May 16, 2021).

[4] In all events, this Court cannot *dismiss* Speech First's challenge to the acceptable use standard as moot. Speech First also seeks nominal damages. Compl. (Doc. 1) 48. That request cannot be moot and indisputably allows Speech First to challenge the constitutionality of the original acceptable use standard. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801-02 (2021).

The University's arguments fail. Because standing "'must be supported ... with the manner and degree of evidence required at the successive stages of the litigation,'" Speech First must show "[a]t the preliminary injunction stage … only that each element of standing is *likely* to obtain in the case at hand." *Fenves*, 979 F.3d at 329-30 (emphasis added; quoting *Lujan v. Def's of Wildlife*, 504 U.S. 555, 561 (1992)); *accord Action N.C. v. Strach*, 216 F. Supp. 3d 597, 630 (M.D.N.C. 2016) (at the preliminary-injunction stage, courts evaluate "the likelihood that plaintiff has standing"). Speech First easily meets this standard for each of the policies it challenges.

1. Speech First likely has standing to challenge the University's speech codes.

Speech First likely has standing to challenge the University's speech codes—the discriminatory-harassment, computer, and informational-activities policies—if those policies objectively chill its members' speech. In the First Amendment context, the injury requirement "is commonly satisfied … when a claimant is chilled from exercising his right to free expression." *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013). A plaintiff suffers an injury-in-fact when the chilling effect is *objective*—when "a person of ordinary firmness" would likely be deterred from engaging in the protected speech. *Id.* at 236. An objective chilling effect exists when there is a "credible threat" that the policy would be applied to the speech in question. *Abbott v. Pastides*, 900 F.3d 160, 176 (4th Cir. 2018); *see SBA List v. Driehaus*, 573 U.S. 149, 161-65 (2014).

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. These cases "'raise unique standing considerations that tilt dramatically toward a finding of standing.'" *Cooksey*, 721 F.3d at 235. The question for standing purposes is not whether the policies *actually* cover the plaintiff's speech, but whether they "'arguably'" do. *Fenves*, 979 F.3d at 332 n.10; *see SBA List*, 573 U.S. at 162 (asking whether the "intended speech is 'arguably proscribed' by the law"). 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 Cooksey*, 721 F.3d at 235.

a. The University's speech codes arguably cover Speech First's members' speech.

The University's speech codes all arguably cover Speech First's members:

Computer Policy (Acceptable Use Standard). Speech First's members want to send "partisan political" emails, Student A Decl. ¶18; Student C Decl. ¶17, but the University's acceptable use standard (as originally enacted) prohibits them from doing so. The University agrees that the text of the original acceptable use standard bars this speech. *See* Midkiff Decl. ¶9.[5]

Informational-Activities Policy. Speech First's members want to "distribute literature about conservative ideas and collect signatures for petitions" on campus, Student A Decl. ¶20; Student C Decl. ¶19, but the informational-activities policy prohibits them from doing so unless they obtain "prior approval" and do so through a "university-affiliated organization," Norris Decl. Ex. T at 3. Because Speech First's members want to engage in this expressive conduct without being burdened with these conditions, the informational-activities policy unambiguously covers them.

Discriminatory-Harassment Policy and Computer Policy (Policy 7000). Speech First's members want to "repeatedly" engage their fellow students "in open and robust intellectual debate" about some of the most controversial issues of the day, Student A Decl. ¶13-14; Student C Decl. ¶12-13, including whether "Black Lives Matter has had a terrible impact on society," Student A Decl. ¶6, and whether "[w]omen should have no right to kill an innocent child" through abortion, Student C Decl. ¶13. But the University's discriminatory-harassment policy and Policy 7000's bar on

[5] That the University "revised" the policy after this suit was filed does not affect Speech First's standing. *See Innes v. Bd. of Regents of the Univ. Sys. of Md.*, 121 F. Supp. 3d 504, 508-09 (D. Md. 2015) (events occurring after the complaint's filing do not implicate standing).

"intimidation, harassment, and unwarranted annoyance" arguably forbid them from doing so. Norris Decl. Exs. A at 4, F at 1.

Courts routinely entertain pre-enforcement challenges to similar campus speech codes because they reach protected speech. *See, 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). Based on similar representations from its members, the Sixth Circuit found that Speech First had standing to challenge a university's policies on "bullying" and "intimidation." *Schlissel*, 939 F.3d at 765-66. And the Fifth Circuit found that Speech First had standing to challenge an almost identically worded policy on "harassment." *See Fenves*, 979 F.3d at 334 & n.12 (explaining that the University defined harassment as "hostile or offensive speech, oral, written or symbolic, that … is sufficiently severe, pervasive, or persistent to create an objectively hostile environment"). Courts recognize that these broad, subjective policies sweep in large swaths of protected speech. The Education Department agrees. *See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026, 30164 & n.738 (Aug. 14, 2020) ("[E]vidence that broadly and loosely worded antiharassment policies have infringed on constitutionally protected speech and academic freedom is widely available." (collecting authorities)).

Indeed, several factors exacerbate the credible threat posed by the University's policies. The discriminatory-harassment policy, computer policy, and informational-activities policy were all "recently enacted" or "revised." *Harrell v. Fla. Bar*, 608 F.3d 1241, 1257 (11th Cir. 2010)—in August and September 2020, Norris Decl. Exs. A, G, T. The University is "vigorously contesting" Speech First's challenges to these policies in court. *Deal v. Mercer Cnty. Bd. of Educ.*, 911 F.3d 183, 192 (4th Cir. 2018). And violations are easy to commit and easy to report. Mot. (Doc. 4-1) 3-5; *see SBA List*, 573 U.S. at 161-65; *Wollschlaeger*, 848 F.3d at 1323.

b. The University's counterarguments have all been roundly rejected.

The University does not meaningfully dispute that its policies, as written, arguably reach protected speech. It instead offers several reasons why this Court should trust that, despite the policies' text, the University uses them responsibly. And the University's assurances, it says, defeat Speech First's standing. The Fifth and Sixth Circuits rejected these same arguments. This Court should too.

First, the University stresses that its policies contain disclaimers expressing the University's "commitment" to free speech. Opp. 2-5, 13, 25, 38. 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 on the back end. *See Legend Night Club*, 637 F.3d at 301 (courts would "not uphold an unconstitutional statute merely because the Government promised to use it responsibly" (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010))); *accord 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*." *Stevens*, 559 U.S. at 480. If anything, these disclaimers *confirm* that the policies reach protected speech. *Fenves*, 979 F.3d at 337. And faced with a specific rule and an amorphous exception for speech "protected by the First Amendment," reasonable students will follow the rule. *Id.* at 334-35, 337-38; *see Coll. Repubs. at SFSU v. Reed*, 423 F. Supp. 2d 1005, 1020-21 (N.D. Cal. 2007). Besides, these disclaimers cannot possibly save the policies or defeat Speech First's standing here because—as Speech First argued with no apparent response from the University—they make the policies unconstitutionally vague. Mot. 15-16; *see Nat'l People's Action v. City of Blue Island*, 594 F. Supp. 72, 79 (N.D. Ill. 1984) (The "Constitution does not, in and of itself, provide a bright enough line to guide primary conduct.").

When "[e]xamined more closely," none of the University's disclaimers "detracts from the likelihood that the University's policies arguably cover Speech First's members' intended speech." *Fenves*, 979 F.3d at 333-34. The code of conduct, for example, states only that "[s]tudents at Virginia

Tech enjoy those rights guaranteed by the Constitutions of the United States and the Commonwealth of Virginia. This includes activities protected under the First Amendment." Norris Decl. Ex. D at 4. The code then immediately qualifies students' "rights" by reminding them that they also have "certain responsibilities," including "understanding and following university policies." Norris Decl. Ex. D at 4-5. The University's generic statement about the First Amendment also "does not appear … anywhere in the chapter on ['Prohibited Conduct']," *Fenves*, 979 F.3d at 334, and is the only time the code of conduct mentions the First Amendment. Put differently, the University assures students of their First Amendment rights, and *then* informs them that violations of the challenged policies are "actionable under the Student Code of Conduct." Norris Decl. Ex. D at 13-14. The policies "clearly delimit freedom of speech by their prohibitions, not the other way around." *Fenves*, 979 F.3d at 334. Policy 1025's disclaimer has the same defects. *See* Norris Decl. Ex. A at 2. And the University's computer policy and informational-activities policy contain no disclaimers at all. *See* Norris Decl. Exs. F, G, T.

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*, 55 F.3d at 1183. "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.* Ultimately, the University's attempt to "wrap[] [itself] in the flag of its policies' paeans to the freedom of speech" does not make the policies themselves constitutional. *Fenves*, 979 F.3d at 333.

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. *See id.* at 334 ("Such a qualified limitation on the scope of the [policy] increases rather than decreases its uncertainty."). Put differently, "[h]ow are college students to be able

to determine (when judges have so much difficulty doing so) whether any particular expressive conduct will be deemed (after the fact) to fall within the protections of the First Amendment?" *Coll. Repubs. at SFSU*, 523 F. Supp. 2d at 1021. "[T]he 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.

Second, the University argues that its policies cannot chill speech because other students have engaged in controversial speech on campus. Opp. 4-5. The universities in *Schlissel* and *Fenves* tried, but failed, to make the same point. *See* Appellee's Br. in *Schlissel*, 2018 WL 6738711, at *9-11; Appellee's Br. in *Fenves*, 2019 WL 5607102, at *5-7. Courts have never required plaintiffs to show that no individual, anywhere, is speaking. To establish chill, a plaintiff must show only that a reasonable individual in her position would refrain from engaging in the kind of controversial speech she is contemplating. 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); *accord Cooksey*, 721 F.3d at 235; *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 461 (4th Cir. 2005). Objective chill does not turn on any particular student's "will to fight." *Constantine*, 411 F.3d at 500; *accord Backpage.com, LLC v. Dart*, 807 F.3d 229, 231 (7th Cir. 2015).

Third, the University promises (in a series of declarations) that it has no history of enforcing its policies against protected speech. This argument is convenient, since the University's disciplinary records are confidential at this stage. *Fenves*, 979 F.3d at 337 n.14. Regardless, the assumption that Speech First lacks standing unless it proves such a history of enforcement is wrong. While past enforcement "can assure standing," its absence does not "doom" standing. *Id.* at 336. Because the injury here is chilled speech, past enforcement "misses the point"; there's nothing to enforce when "speech has already been chilled." *Schlissel*, 939 F.3d at 766. Moreover, the challenged 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. The "threat is latent in the existence of the statute." *Id.* at 336.

In *North Carolina Right to Life, Inc. v. Bartlett*, for example, the Fourth Circuit found that the plaintiff had standing to bring a pre-enforcement challenge to a policy that "appear[ed] by its terms to apply" even though the State claimed that "in the twenty-five years since the statute's enactment, [the State] has never interpreted it to apply to groups engaging" in speech like the plaintiff's. 168 F.3d 705, 710 (4th Cir. 1999). Per the Fourth Circuit, "a non-moribund statute that *facially* restricts expressive activity by the class to which the plaintiff belongs" presents a "credible threat" of enforcement—and thus Article III standing—absent "compelling evidence to the contrary." *Id.* (emphasis added); *see also Cooksey*, 721 F.3d at 237-38 (following *N.C. Right to Life*); *Epperson v. Arkansas*, 393 U.S. 97, 101-02 (1968) (resolving a First Amendment challenge when "[t]here [wa]s no record of any prosecutions … under [the] statute"); *Bair*, 280 F. Supp. 2d at 367 (finding standing to challenge a university speech code that "has not been used, and likely will not ever be used, to punish students for exercising their First Amendment rights"). 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) (emphasis added).[6]

A history of nonenforcement cannot become the kind of "compelling evidence" that defeats the chilling effect from a policy's text until it becomes "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). The University does not even attempt to argue that here. Nor could it, since the challenged policies are all "recently enacted" or "revised." *Harrell*, 608 F.3d at 1257. And

[6] *See also, e.g.*, *Justice v. Hosemann*, 771 F.3d 285, 291-92 (5th Cir. 2014); *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).

the University admits that it generally enforces them. *See* Opp. 14, 19-20, 29, 31-32; McCrery Decl. ¶12.

Even if the University's declarations were legally relevant, they would not remove the policies' objective chilling effect. The declarations were "written after this action was filed." *Wollschlaeger*, 848 F.3d at 1306; *see also U.S. v. Rumely*, 345 U.S. 41, 48 (1953) (describing the "usual infirmity" of "self-serving declarations" written after litigation commenced). And they do not bind the University. *ACLU*, 999 F.2d at 1493-94. The University's nonbinding "litigation position" thus does not "alter [the] analysis" for purposes of standing. *N.C. Right to Life*, 168 F.3d at 710-11. "[L]eft … with nothing more than the State's promise" that it will not "bring its interpretation more in line with the [policies'] plain language," Speech First's members will continue to have their "constitutionally protected speech … chilled." *Id.* at 711. Their "First Amendment rights" cannot be left to "exist only at the sufferance of the [University]." *Id.*

Nor do the declarations even establish a history of nonenforcement. They reflect only the declarants' "personal experience." *Fenves*, 979 F.3d at 336 n.14; *see, e.g.*, McCrery Decl. ¶11 ("I am *not aware of* any case in which a student was charged with violating the policy against harassment in the Student Code of Conduct simply as a result of the views the student expressed."). And the University's employees are not experts about what is and isn't protected by the First Amendment; they have no idea whether their policies have been applied inconsistently with the complex body of First Amendment caselaw. *Cf. Abbott v. Pastides*, 900 F.3d 160, 174 (4th Cir. 2018) ("First Amendment parameters may be especially difficult to discern in the school context"). Even if they were experts, their unilateral decision not to enforce the policies as written could not alter the policies' meaning or eliminate the chilling effect that emanates from their text. *See Legend Night Club*, 637 F.3d at 301; *N.C. Right to Life*, 168 F.3d at 710-11.

The University's arguments find little support in *Abbott*. The Fourth Circuit there did not demand a history of past enforcement. It found no credible threat of enforcement because, prior to the litigation, the University had met with the student about the same speech, "approved and encouraged" that speech, gave him "written notice" that "neither investigation nor sanction was forthcoming," "dismissed student complaints" about that speech, and "made no effort to sanction that speech after the fact." 900 F.3d at 180, 177. Nothing like that happened here. *Abbott*'s highly unusual facts explain why the Fourth Circuit stressed that its decision was "limited to the facts before [it]" and why it denied that its decision should be read to "make it impossible for any student to mount a successful challenge to an overly broad campus harassment policy." *Id.* at 180. *Abbott* was also decided on summary judgment, after the plaintiff would have received discovery on the university's history of enforcement. And the plaintiff in *Abbott* never argued that the disclaimers in the university's policy *themselves* made the policy unconstitutionally vague. Speech First squarely presents that argument here, as well as evidence of chill that was not present in *Abbott*—such as the University's own surveys, its policy on condoning or supporting violations, and its elaborate "bias" apparatus.

2. Speech First likely has standing to challenge the University's bias-related incidents policy.

The University does not contest that its definition of "bias-related incident" arguably covers Speech First's members. Nor could it. Although no history of past enforcement is needed to prove standing, *supra* I.B.1.b, Speech First has that history here. Its members want to share their unpopular views on, for example, transgender issues and illegal immigration. *See* Student A Decl. ¶¶5-11, 14; Student C Decl. ¶¶5-10, 13. But they know that students have been reported for exactly this type of speech. Mot. 7; *see, e.g.,* Norris Decl. Ex. J at 29 (student reported for using "Caitlyn Jenner's deadname" during a classroom lecture); *id.* at 22 (student reported for "bias" based on "national or ethnic origin" for writing the words "Saudi Arabia" on a student whiteboard). Speech like theirs has also been reported to indistinguishable bias-response teams at other universities. *See* Norris Decl. Ex.

U at 15-18 (writing a satirical article about "safe spaces," chalking "Build the Wall," and protesting affirmative action); *id.* at 16 ("newspaper gave less press coverage to trans students and students of color"). Given that the definition of bias-related incident is entirely subjective, the breadth and number of reports is not surprising. Mot. 10; Norris Decl. Exs. P-S.

Instead of denying that its definition of bias-related incidents reaches Speech First's members, the University disputes whether the *consequences* for committing a bias-related incident objectively chill speech. Opp. 27. Again, a policy need not directly prohibit speech to have an objective chilling effect. *See* Mot. 18-19 (collecting cases); *Cooksey*, 721 F.3d at 238 n.5. Consequences short of disciplinary sanctions can objectively chill speech, including coercion, intimidation, threats, investigations, surveillance, reputational harms, and administrative actions. *See, e.g.*, *Cooksey*, 721 F.3d at 235 ("reserv[ing] the right to continue to monitor" the plaintiff's online speech); *SBA List*, 573 U.S. at 165 (drains on "time and resources" and "administrative action"); *Schlissel*, 939 F.3d at 765 ("reputational harm"); *Wollschlaeger*, 848 F.3d at 1323 (career harms from "[e]ven the mere filing of a complaint"). Pointing out that bias-response teams do not prosecute students for biased speech thus misses the point. *Cf.* Opp. 26. Bias-response teams objectively chill speech "by way of implicit threat of punishment and intimidation." *Schlissel*, 939 F.3d at 765; *see* Mot. 19-20.

The University's suggestion that Speech First challenged "the wrong policy" is bizarre. Opp. 24. The University claims that Speech First challenged the "Bias-Related Incident Protocol," which was renamed the "Bias Intervention and Response Team (BIRT)" in 2019. Opp. 24-25. But Speech First *did not* challenge the Bias-Related Incident Protocol. Speech First instead challenged the University's "bias-related incidents policy" and sought a preliminary injunction "barring [the University] from investigating, logging, threatening, referring, or punishing (formally or informally) students for bias-related incidents"—no matter what it calls its mechanism for doing so. Compl. ¶¶54-83; *see also* Mot. 6 ("'bias-related incidents' policy"'); Mot. 14 ("bias-related incidents policy").

That the University might have changed the name of the mechanism it uses to enforce its bias-related incidents policy is irrelevant. For one, no real change appears to have occurred. The University *itself* refers to its current policy as "Virginia Tech's Bias-Related Incident Protocol." Hughes Decl. Exs. B, D. And still today, the Bias-Related Incidents Protocol remains posted on the Dean of Students' website. *See Bias-Related Incident Protocol*, Virginia Tech, Div. of Student Affairs (updated Feb. 2016), https://dos.vt.edu/content/dam/dos_vt_edu/assets/doc/bias_protocol_2_16.pdf (last visited June 11, 2021). This Court should reject the University's attempts to play empty shell games with students' constitutional rights. *Cf. Parkhurst v. Lampert*, 339 Fed. App'x 855, 857-58 (10th Cir. 2018) (rejecting government's nonjusticiability defense where "new" policy enacted before the litigation began was "*materially identical*" to "old" policy); *Deal*, 911 F.3d at 192 (rejecting nonjusticiablity argument where new policy was "materially indistinguishable" from old policy).

More importantly, the University cannot identify a single difference (other than a purported name change) between the procedures it used prior to 2019 and the procedures it uses now. It admits that the BIRT has the same membership, still collects anonymous reports, still evaluates whether something is a "bias-related incident," still uses the same definition and examples of "bias-related incidents," still records the incidents in the Dean of Students Office "reporting system," still refers complaints to the disciplinary authorities, and still asks to meet with students. *See* Opp. 24-25, 29; Hughes Decl. Ex. B at 1, Ex. C at 1, Ex. D. These procedures are what chill students' speech and are what Speech First has always been challenging.

Even though both the Fifth and Sixth Circuits found that indistinguishable bias-response teams objectively chill speech, the University does not try to distinguish these cases (or even *mention* the Fifth Circuit case). The cases are squarely on point. Like the University here, the University of Texas denied that its team ever "investigated or punished" anyone "for engaging in speech or expression protected by the First Amendment." Appellee's Br. in *Fenves*, 2019 WL 5296547, at *16-

17. In fact, it said it didn't meet with students at all. *Id.* at *38. Also like the University here, the University of Michigan insisted that its meetings were entirely "voluntary." *Speech First, Inc. v. Schlissel*, 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, because the invitation to meet with the bias-response team "could carry an implicit threat of consequence should a student decline the invitation." *Schlissel*, 939 F.3d at 765.

The Fourth Circuit's decision in *Abbott* does not hold otherwise. *Abbott* considered student meetings that were part of the university's ordinary (and unchallenged) student-conduct process, not an elaborate bureaucratic regime that is designed to deter "biased" speech. The University's observation that students could file reports even without the BIRT proves the point. Opp. 29. 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. Speech First's unrebutted evidence proves that students receive precisely that message. Norris Decl. Ex. U, Ex. X; *see also* Compl. ¶34; *Fenves*, 979 F.3d at 338.

This Court should not follow the Seventh Circuit's contrary decision in *Killeen*. This Court has in the record what the Seventh Circuit thought was missing. The *Killeen* court faulted Speech First for not "identify[ing] in the record specific statements any students wish to make," "through Doe affidavits or otherwise." *Killeen*, 968 F.3d at 640, 643. Unlike in *Killeen*, Speech First's members have submitted detailed "Doe" declarations here. And Speech First also submitted a *verified* complaint, which counts as evidence at this stage. *E.g.*, *Williams v. Griffin*, 952 F.2d 820, 823 (4th Cir. 1991); *Reynolds v. Middleton*, 779 F.3d 222, 226-27 (4th Cir. 2015). The declarations and the verified complaint explain, in detail, what Speech First's members would like to say. For example:

- Student A is "strongly against illegal immigration and support[s] the border wall." Student A Decl. ¶10. He wants to argue that that "[w]e need to stem the flow of illegal immigration into this country" from the southern border. Student A also "believe[s] that Black Lives Matter has had a terrible impact on society," because "[t]hey've taken tons of donations and have not helped out black communities." Student A Decl. ¶6. He wants to point out to his fellow students that "the organization has caused the destruction of communities and businesses rather than help bring about positive change." Student A Decl. ¶6.

- Student C "believes that there are only two genders: male and female." Student C Decl. ¶7. He doesn't "want to be forced to call someone a 'him' or a 'her' or 'they' or 'them' because that person claims to have a new gender identity." Student C Decl. ¶7. Student C is "strongly against allowing children to 'choose' their gender and have hormones and chemicals pumped into their bodies." Student C Decl. ¶7. He wishes to convince his fellow students that those children "are young and do not know any better." Student C Decl. ¶7. Student C also wants to articulate his "strongly" held view that "[w]omen should have no right to kill an innocent child" through abortion. Student C Decl. ¶6.

See also Student A Decl. ¶¶5, 9; Student C Decl. ¶¶9-10; Compl. ¶¶88-141. Speech First thus carried its burden by submitting evidence of "its members' direct intention to engage in the particular activity"—controversial speech—that "it alleges to be arguably regulated by the challenged provisions." *Fenves*, 979 F.3d at 331 n.7. The University "suggests no grounds to doubt [the] veracity" of its declarations or verified complaint, and these documents are more than sufficient "[f]or purposes of a preliminary injunction." *Id.* at 331.[7]

The Seventh Circuit's decision is also wrong. In *Fenves*, for example, the district court faulted Speech First for not submitting "affidavits from Students A, B, or C" identifying "specific statements they wish to make." *Speech First, Inc. v. Fenves*, 384 F. Supp. 3d 732, 741 (W.D. Tex. 2019). Although Speech First did so here, the Fifth Circuit held that the district court's demands for these affidavits and specific statements were "erroneous." *Fenves*, 979 F.3d at 331. 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

[7] The Seventh Circuit also relied extensively on the university's assertion that most students declined its requests to meet with the bias-response team. *Killeen*, 968 F.3d at 640, 642, 643. The University notably makes no such representation here.

advance; it all depends on the natural give and take of conversation and debate. That is why, in pre-enforcement 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 wanted "'to advance certain controversial theories or ideas regarding any number of political or social issues'"); *Saxe v. State Coll. Area Sch. Dist.*, 77 F. Supp. 2d 621, 622-23, 625 (M.D. Pa. 1999) (students wanted to "'speak out' about the sinful nature and harmful effects of homosexuality and other … moral topics"), *rev'd only on the merits*, 240 F.3d 200; *Center for Individual Freedom v. Carmouche*, 449 F.3d at 660-61 (5th Cir. 2006) (center planned to run future advertisements "point[ing] out the positions of candidates on issues of importance to it"); *281 Care Comm.*, 638 F.3d at 628-30 (group planned to run advertisements that "use political rhetoric, to exaggerate, and to make arguments that are not grounded in facts").[8]

That Speech First's members are currently anonymous changes nothing. Students A and C are standing members, "not … parties to the litigation." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 459 (1958). Speech First is the only plaintiff here, and it is not proceeding anonymously; so the University's loose citation to the "'presumption of openness in judicial proceedings'" is not on point. Opp. 37 (citing *Doe v. Merten*, 219 F.R.D. 387 (E.D. Va. 2004)). Speech First's standing members were anonymous in *Schlissel*, *Killeen*, and *Fenves*; yet none of those courts even suggested that their anonymity was an issue. In fact, the university in *Fenves* moved to strike Speech First's declaration because it did not identify the student members—something the University has not done here—but the district court

[8] Courts are especially unwilling to require hyper-specificity in "overbreadth cases," like this one. *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).

denied the university's motion. 384 F. Supp. 3d at 743. (And the Seventh Circuit *instructed* Speech First to file anonymous declarations. *Killeen*, 968 F.3d at 643.)

The other courts were right to allow Speech First to protect its members' identities. The University offers no reason why it possibly needs the specific names of Speech First's members (other than further chilling their speech). As explained in the sworn declarations and verified complaint, Speech First's standing members are students at the University who want to share their controversial views, but they are chilled by the University's policies. Nothing else matters for purposes of this motion. The students' identities have no bearing on the *substance* of what they want to say, or whether the University's policies arguably cover that speech. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995). The University's speculation that these students might not be "enroll[ed]" at Virginia Tech is baseless. *Cf. Graves v. Harris Corp.*, 800 F.2d 260 (4th Cir. 1986) (explaining that "'wholly speculative assertions'" cannot defeat sworn "affidavits"). True, one of Speech First's members was a senior at Virginia Tech and graduated in May 2021, after Speech First filed its complaint and its motion for a preliminary injunction. *Cf.* Opp. 37. But Speech First's other standing members did not: As their declarations explain, they are rising seniors who completed their junior years after this litigation began and will be enrolled as undergraduates at the University for at least another academic year. *See* Student A Decl. ¶1; Student C Decl. ¶1. Any "one" of these members is sufficient to prove that Speech First likely has standing to obtain a preliminary injunction. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387, 397 (4th Cir. 2011).[9]

Notably, the University cites no case where a court denied a preliminary injunction because a membership association failed to name its standing members. The law is the opposite. Associational

[9] The University's skepticism of anonymous students is not uniform. It solicits, and acts on, anonymous reports of "bias-related incidents." *See* Norris Decl. Ex. I (form asking for "Your full name (or anonymous)").

standing "allows for the member on whose behalf the suit is filed to remain unnamed by the organization." *Disability Rts. Wis., Inc. v. Walworth Cty. Bd. of Supervisors*, 522 F.3d 796, 802 (7th Cir. 2008); *accord Doe v. Stincer*, 175 F.3d 879, 884 (11th Cir. 1999) (association need not "name a specific individual"); *NRDC, Inc. v. Mineta*, 2005 WL 1075355, at *5 (S.D.N.Y. May 3, 2005) (no requirement that "'individual members be identified'"); *FAIR, Inc. v. Rumsfeld*, 291 F. Supp. 2d 269, 287 (D.N.J. 2003) (association can maintain "the secrecy of [its] membership list"), *aff'd*, 446 F.3d 1317 (3d Cir. 2006). As one court explained, "to hold that an association must 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*, 2019 WL 190285, at *74 n.48 (S.D.N.Y. Jan. 15, 2019), *aff'd in relevant part*, 139 S. Ct. 2551 (2019). It requires little imagination to understand why students at the University would fear harm to their grades or career prospects for standing up for their right to express unpopular views on campus. *E.g.*, Student A Decl. ¶21; *see* Mot. 12-13 (quoting a tenured professor at the University calling Speech First's members "bigots" and "conservative shitbags").

Finally, the University's free-speech disclaimer to its bias-related incidents policy is legally irrelevant for the same reason that its speech-code disclaimers are. *Supra*, I.B.1.b. Even if it were relevant, the purported disclaimer does not disclaim anything. The University merely states that "a bias-related incident may not be a crime" in "certain contexts" because "courts have found hate speech to be protected" in some situations. Hughes Decl. Ex. B at 2. Its equation of "bias-related incidents" with "crimes" is the opposite of reassuring. And although the University claims to "examine and review each complaint through the lens of free and protected speech," it reminds students in the very next sentence that "[s]ome bias-related incidents … may be adjudicated through the student conduct process." *Id.* In neither instance does the University specify what speech is protected and what speech isn't. Students are left with the confusing and useless message that sometimes the University will

pursue them for "words or actions that contradict the spirit of the Principles of Community," "jokes that are demeaning to a particular group of people," and "posting flyers that contain demeaning language or images," Mot. 6—and sometimes it won't.

Worse yet, the University informs students that *even when they engage in protected speech*, the University will still summon them for "educational interventions" if their speech is "discriminatory or otherwise hurtful to members of the community." Hughes Decl. Ex. B at 2. In other words, the bias-related incidents policy does not exclude protected speech, it targets protected speech. *Cf. Fenves*, 979 F.3d at 333 (explaining that a university's attempt to describe interventions as "'educational measures'" rather than "'student discipline'" does "not alter reality and does not contradict the proscriptive nature of [a university's] policies.").

C. The challenged policies are likely unconstitutional.

As explained, the policies that Speech First has challenged are all likely unconstitutional. Mot. 14-20. The University's arguments to the contrary miss the mark.

1. Discriminatory-Harassment Policy

The University's discriminatory-harassment policy (Policy 1025) has three main defects: it is content and viewpoint discriminatory, overbroad, and vague. *See* Mot. 14-16. The University does not even *respond* to the first defect. The University concedes that its policy covers "verbal" and "expressive conduct." Opp. 21. But it ignores that, when a harassment policy reaches speech, it "imposes content-based, viewpoint-discriminatory restrictions." *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 597 (5th Cir. 1995); *see* Mot. 15. The University offers no argument for why Policy 1025 could survive strict scrutiny. Its need to comply with Title IX is no justification, since the University does that through a separate, narrower definition of "sexual harassment." *See* Norris Decl. Ex. A at 4. And binding precedent holds that a viewpoint discriminatory policy, like this one, cannot be narrowly tailored to a university's "substantial interest in maintaining an educational environment free of

discrimination." *IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 393 (4th Cir. 1993).

Policy 1025 is also overbroad. As the University's quotations reveal, *see* Opp. 21-22, Policy 1025 does not follow the definition of harassment from *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). *Davis* requires harassment to be "so severe, pervasive, *and* objectively offensive that it *denies* its victims the equal access to education that Title IX is designed to protect." *Davis*, 526 U.S. at 652 (emphases added). Yet the text of Policy 1025 goes much further, requiring only that the harassment "unreasonably interfere[]" with a student's education. Norris Decl. Ex. A at 4; *cf. Doe v. Rector & Visitors of George Mason Univ.*, 149 F. Supp. 3d 602, 626 (E.D. Va. 2016) (university regulation "prohibit[ing], *inter alia*, 'communicating…by electronic communication in a manner likely to cause injury, distress, or emotional or physical discomfort'" penalized "a substantial amount of protected expressive activity, *e.g.*, offensive speech" (cleaned up)).

The University says that Policy 1025 is not overbroad because, in practice, the University evaluates whether the harassment was "severe, persistent, *or* objectively offensive." Blythe Decl. ¶7. As an initial matter, such unwritten, atextual constructions can never save an overbroad policy. *Supra* I.B.1.b. In any event, the University's supposed construction saves nothing because it still turns *Davis*'s "and" into an "or." *Davis* used the word "and" for a reason. Requiring universities to prohibit "severe *or* pervasive" harassment—thus reaching "a single instance of sufficiently severe one-on-one peer harassment"—would ignore "the practical realities of responding to student behavior." *Davis*, 526 U.S. at 652-53. The most important practical reality is the First Amendment's "legal constraints" on universities' "disciplinary authority." *Id.* at 649 (citing *id.* at 667 (Kennedy, J., dissenting)). The U.S. Department of Education agrees. It requires universities to use the *Davis* definition verbatim because looser definitions of harassment (like the University's) cause "infringements of … free speech." 85 Fed. Reg. 30026 & n.88. The Foundation for Individual Rights in Education also agrees. *See* Shibley,

Why the Supreme Court's Davis Standard Is Necessary to Restore Free Speech to America's College Campuses: Part Two, FIRE (Oct. 24, 2019), bit.ly/3pC8cYN.[10]

Lastly, Policy 1025 is void for vagueness. The University's generic platitudes about the vagueness doctrine, *see* Opp. 22-23, are not a response to the two specific vagueness problems that Speech First identified. First, the University wholly ignores its list of "examples" of potential discriminatory harassment, including "[m]aking fun" of someone, "[t]elling unwelcome jokes," "[p]utting people down," and "[u]rging religious beliefs on someone who finds it unwelcome." Norris Decl. Ex. C at 1. If these examples are illustrative of the kind of speech that can constitute discriminatory harassment, then the supposed limits in the University's policy are incomprehensible. Mot. 15. Second, the University does not address the vagueness problem created by its so-called "carve-outs" for "constitutionally protected expression." Opp. 13. Students are not First Amendment scholars. By "allud[ing] to state and federal law and constitutions," this "exception" in the University's policy "refer[s] to a vast and diverse body of law"; "[s]uch a general exemption does not sufficiently inform" students of what is prohibited and what is allowed, "in turn render[ing] the [policy] unconstitutionally vague." *Nat'l People's Action*, 594 F. Supp. at 79-80.

The University's only remaining argument is yet another puzzling suggestion that Speech First has challenged "the wrong policy." Opp. 20. According to the University, "students who engage in harassing behavior are never charged with violating Policy 1025" but are instead "charged with violating the harassment provision in the Student Code of Conduct." Opp. 20. That provision forbids "[u]nwelcome conduct not of a sexual nature that is sufficiently severe, pervasive, or persistent that it could reasonably be expected to create an intimidating, threatening, or hostile environment that limits

[10] *Thorne v. Bailey* cannot save the University's policy. There, the Fourth Circuit upheld a ban on telephone harassment because it governed only "repeated" phone calls, required an "intent to harass," and was viewpoint neutral. *Thorne v. Bailey*, 846 F.2d 241, 242-44 & n.1 (4th Cir. 1988). The University's policy has none of these features.

the ability of an individual to work, study, or participate in the activities of the university." Norris Decl. Ex. D at 9.

This argument fails. As an initial matter, the distinctions the University draws are meaningless. The University admits that it receives "complaint[s] under Policy 1025 alleging that a student engaged in" discriminatory harassment and "refers" those "allegations to Student Conduct." Blythe Decl. ¶8. Then, "Student Conduct determines whether to charge a student with a violation of the Student Code of Conduct." Blythe Decl. ¶8. But there is no meaningful difference between charging a student with violating Policy 1025 and charging a student with violating the Student Code of Conduct. Violations of Policy 1025 *are* violations of the student code of conduct. The code expressly "include[s] other rules, regulations, and policies issued by the university that pertain to students and student organizations." Norris Decl. Ex. D at 13. "Violations of these policies are actionable under the Student Code of Conduct," the code explains, and it explicitly lists Policy 1025 as an example. Norris Decl. Ex. D at 13-14. Policy 1025's reference to the student code of conduct, *see* Norris Decl. A at 2, is nothing more than an acknowledgment that students who violate Policy 1025 are entitled to the disciplinary processes and procedures laid out in the student code of conduct. *See* McCrery Decl. ¶7. The University thus appears to be playing word games. University officials "are entitled to their own definitions, but their nomenclature does not alter reality and does not contradict the proscriptive nature of the policies." *Fenves*, 979 F.3d at 333.

In any event, the University does not deny that students *can* violate Policy 1025 or that the University *could* punish those violations directly. *See* Blythe Decl. ¶8 (stating that, "[t]o [her] knowledge," the University "does not" charge students with violations of Policy 1025, not that it could not); McCrery Decl. ¶9 (similar). In fact, the University admits that Policy 1025 "prohibits harassment" and that it applies "across the entire university," including to students. Opp. 19, 6, McCrery Decl. ¶9; Blythe Decl. ¶8. The University's concessions are necessary, given what Policy 1025 says. Policy 1025

explicitly covers "discriminatory harassment . . . carried out by faculty, staff, *other students*, or third parties." Norris Decl. Ex. A at 1-2 (emphasis added). In the list of "[p]arties" who are "[a]ffected" by the policy, the University lists "[u]ndergraduate" students. *Id.* at 1. Speech First thus challenged exactly the right policy. The University's post-litigation assertion that, despite the text of Policy 1025, the University unilaterally decides not to charge students with violations of Policy 1025 fails for the same reasons its standing arguments fail. *See supra* I.B.1.b.

2. Computer Policy

Speech First challenges two parts of the University's computer policy: the acceptable use standard's ban on "partisan political emails," and Policy 7000's ban on "intimidation, harassment, and unwarranted annoyance." Mot. 5-6. The University does not dispute that, for students, the campus email and internet network are a traditional public forum. Mot. 16. The University offers no developed response to Speech First's arguments why the ban on partisan emails is a content-based restriction on core political speech. Nor could it. *See* Mot. 17.

The University also offers no defense of Policy 7000's ban on "intimidation, harassment, and unwarranted annoyance." Norris Decl. Ex. G at 1. Neither the words "Policy 7000" nor the challenged language even appear in the University's brief. The University merely mentions, in a footnote, an irrelevant provision of the acceptable use standard that Speech First did not challenge. Not can the University cross-apply its defenses of the discriminatory-harassment policy to Policy 7000. While Policy 1025 also falls short of the constitutional minimum, Policy 7000 is much worse because it does not even *attempt* to require objectivity or a minimum level of severity or pervasiveness. Mot. 5, 17. And its open-ended terms—especially "unwarranted annoyance"—present additional vagueness concerns not present in the other challenged policies. The University has thus forfeited any defense of the constitutionality of Policy 7000. *See Fitzgerald v. Alcorn*, No. 5:17-CV-16, 2018 WL 4571878, at *2 (W.D. Va. Sept. 24, 2018) (Urbanski, J.) (finding a likelihood of success on the merits where "defendants

made no attempt to persuade the court of the Act's constitutionality and solely argued about this action's justiciability").

3. Bias-Related Incidents Policy

The University does not dispute that its definition of "bias-related incidents" is vague, overbroad, and viewpoint-based. Mot. 18-20. It merely repeats its challenge to Speech First's standing, insisting that the policy's enforcement mechanisms do not objectively chill speech. Opp. 26-29. These arguments fail, as explained before. *See supra* I.B.2; Mot. 18-20.

A tweak in the facts of this case demonstrates the flaws in the University's overall position. The University compares itself to "'a small city.'" Opp. 2. Imagine that in the wake of the September 11th attacks, the City of Blacksburg established a "Patriotism Assessment Response Team," or PART, to foster a sufficiently patriotic "city climate." If citizens witnessed "anti-American incidents" in Blacksburg, they could file a report and receive counseling and support about how to cope with unpatriotic actions. The PART would also contact the offending citizen and offer to facilitate a "voluntary" conversation about why his anti-American actions were hurtful and how he could be more patriotic in the future. No one could argue with a straight face that the PART did not even implicate the First Amendment, or that no one would have standing to challenge it due to its "voluntary" nature. The PART would instead be roundly criticized—and held unconstitutional—for what it is: a fundamentally coercive policy designed to deter individuals from expressing disfavored views. BIRT is no different.

4. Informational-Activities Policy

The University's informational-activities policy (Policy 5215) prohibits students from distributing pamphlets or gathering signatures in public places unless they obtain prior "approval" from the University and the activity is "sponsored by a university-affiliated organization." Norris Decl. Ex. T at 3. Policy 5215 is unconstitutional for two reasons: it imposes a prior restraint on protected

speech, and it regulates speech based on the identity of the speaker. Mot. 20-21. The University's defenses of the policy miss the mark.

Prior Restraint. The University does not deny that Policy 5215 is a prior restraint on First Amendment activities. Nor could it. A prior restraint exists when a law gives "public officials the power to deny use of a forum in advance of actual expression." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). Although "prior restraints are not per se unconstitutional," they are "highly disfavored and presumed invalid." *Weinberg v. City of Chicago*, 310 F.3d 1029, 1045 (7th Cir. 2002). Prior restraints cannot overcome this heavy presumption of illegality if they either "place[] unbridled discretion in the hands of a government official or agency" or "fail[] to place limits on the time within which the decisionmaker must issue the license." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-26 (1990). Thus, Section 5215 is unconstitutional unless it contains "narrow, objective, and definite standards to guide the [University's] authority." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969).

Section 5215 contains no such standards. The policy simply bans "distribution of literature and/or petitioning for signatures" unless the student receives "prior approval by the designated university scheduling office." Norris Decl. Ex. T at 3. Indeed, far from placing "narrow, objective, and definite standards," *Shuttlesworth*, 394 U.S. at 150-51, Section 5215 warns that such activities are "subject to ... the reasonable guidelines of the authorizing official." *Id.* This carte blanche delegation is a classic unconstitutional prior restraint.

The University defends Policy 5215 by arguing that its reservation system *in practice* is not burdensome and that requests are approved on a "first come, first served basis." Opp. 30-31, 33. But such assurances are irrelevant. This Court "cannot presume that [University] officials will act in good faith and follow standards not explicitly contained in the [policy]." *Weinberg*, 310 F.3d at 1046. "It is insufficient for the government body to claim that it uses set criteria; rather, those standards must be incorporated into the regulation or publicized by binding administrative or judicial construction." *Int'l*

Union of Operating Eng'rs, Local 150 v. Village of Orland Park, 139 F. Supp. 2d 950, 960 (N.D. Ill. 2001); *e.g., Weinberg*, 310 F.3d at 1046 (rejecting the City's contention that its approval was a "mere formality" where university officials "simply determine whether the applicant has conformed to applicable" requirements). Because there is "no language" in Policy 5215 that "curtails the discretion of [the University] officials" to grant approval, Policy 5215 "does not sufficiently curtail the discretion of [University] officials in granting [approval] to [speak] and thus violates the law of prior restraint." *Weinberg*, 310 F.3d at 1046.

Speaker-Based Restriction. Policy 5215 is also an unconstitutional speaker-based restriction. "Speech restrictions based on the identity of the speaker are all too often simply a means to control content" and are therefore "[p]rohibited." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). By favoring some speakers over others—those students who belong to a registered student organizations over those who don't—Policy 5215 is an unconstitutional speaker-based restriction.

The University insists that Policy 5215 is constitutional because the University does not "consider the content of any proposed informational activities" when granting approval. Opp. 32. But even if true, this argument is irrelevant. Policy 5215 undeniably imposes "restrictions distinguishing among different speakers, allowing speech by some but not others." *Citizens United*, 558 U.S. at 340. The First Amendment prohibits such censorship. *Id.* The University believes that its distinction is appropriate because "any group of students may form a new registered student organization" by "satisfy[ing] basic administrative requirements." Opp. 33. But this too is irrelevant; Section 5215 still imposes speaker-based restrictions. The University's argument is nothing more than a confession that it has no "good reason[] for distinguishing between registered student organizations and other members of the university community for purposes of accessing a particular university forum." *Turning Point USA at Ark. State Univ. v. Rhodes*, 973 F.3d 868, 879 (8th Cir. 2020). Policy 5215 is likely unconstitutional.

II. Speech First satisfies the remaining preliminary-injunction criteria.

Because Speech First has identified a likely violation of the First Amendment, the remaining requirements for a preliminary injunction are necessarily satisfied. "[I]n the context of an alleged violation of First Amendment rights, a plaintiff's claimed irreparable harm is inseparably linked to the likelihood of success on the merits of plaintiff's First Amendment claim." *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 190 (4th Cir. 2013). This "inseparabl[e] link[]" flows from courts' recognition that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *accord W.V. Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009). This Court and the Fourth Circuit agree. *See Doe v. Pittsylvania Cty.*, 842 F. Supp. 2d 927, 932 (W.D. Va. 2012) (Urbanski, J.) (collecting cases).

The third and fourth preliminary-injunction factors—balance of the equities and the public interest—are likewise "established when there is a likely First Amendment violation." *Centro Tepeyac*, 722 F.3d at 191. The government "is in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional," and "upholding constitutional rights surely serves the public interest." *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002); *accord Fitzgerald*, 2018 WL 4571878, at *3 ("[P]reliminary injunctions preventing enforcement of unconstitutional restrictions do not cause harm to the enforcing party."); *Doe*, 842 F. Supp. 2d at 936 ("The Fourth Circuit has held that in the context of a request for preliminary injunction, 'upholding constitutional rights surely serves the public interest.'"). The University's contrary arguments are mostly irrelevant because they assume, incorrectly, that it will likely succeed on the merits. *Centro Tepeyac*, 722 F.3d at 190-91. The University cites no case where a court found a likely free-speech violation and then *denied* a preliminary injunction.

Finally, the University asks this Court not to grant the "staggering" "breadth of relief" Speech First seeks, which the University believes will undermine its efforts to "mitigat[e] instances of bias"

on campus. Opp. 38. But Speech First seeks only to preliminarily enjoin the policies that are infringing its members' constitutional rights. This is not unusual in First Amendment cases, especially for facial challenges. *See, e.g., Legend Night Club*, 637 F.3d at 303 (affirming injunction against enforcement of county ordinance that violated the First Amendment and explaining that "[b]ecause the [policy] is facially overbroad, its enforcement is 'totally forbidden'"). Speech First asked this Court to enjoin specific policies—not to stop the University from investigating or punishing "any potential misconduct that might implicate bias." Opp. 38. The day after this Court enters the preliminary injunction, moreover, the University can replace the enjoined policies with similar policies that are "consistent with the [First Amendment]." *Doe*, 842 F. Supp. 2d at 935-36. The summer break gives it "months" to do so. *Fitzgerald*, 2018 WL 4571878, at *3.[11]

CONCLUSION

This Court should enter a preliminary injunction.

Dated: June 11, 2021

Respectfully submitted,

/s/ Cameron T. Norris

J. Michael Connolly (Va. Bar No. 77632)
(application for admission pending)
Cameron T. Norris (Va. Bar No. 91624)
James F. Hasson (*pro hac vice*)
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
(703) 243-9423
mike@consovoymccarthy.com
cam@consovoymccarthy.com
james@consovoymccarthy.com

[11] Even if the University had a point, the solution would be to enter a narrower injunction, not to leave the unconstitutional policies in place. *See, e.g.*, *Westmoreland Coal. Co., Inc. v. Int'l Union, United Mine Workers of Am.*, 910 F.2d 130, 139 (4th Cir. 1990).

CERTIFICATE OF SERVICE

On June 11, 2021, I e-filed this reply with the Clerk via ECF, which will electronically notify everyone requiring notice.

/s/ Cameron T. Norris