No. 21-12583

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SPEECH FIRST, INC.,
Plaintiff-Appellant,

v.

ALEXANDER CARTWRIGHT, in his personal capacity and official capacity as President of the University of Central Florida,
Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida, No. 6:21-cv-313 (Presnell, J.)

BRIEF OF APPELLANT SPEECH FIRST, INC.

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Per Rule 26.1 and Circuit Rule 26.1, Appellant certifies that the following have an interest in the outcome of this appeal:

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8. Presnell, Gregory A., *Trial Judge*
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11. Shapiro, Daniel, *Counsel for Plaintiff-Appellant*
12. Speech First, Inc., *Plaintiff-Appellant*

Speech First, Inc. has no parent corporation, and no corporation owns 10% or more of its stock. No publicly traded company or corporation has an interest in the outcome of this case or appeal.

/s/ Cameron T. Norris
Counsel for Speech First, Inc.
Dated: September 8, 2021

STATEMENT REGARDING ORAL ARGUMENT

Speech First requests oral argument. This appeal presents important and novel questions about the scope of free-speech protections on college campuses. It is the first case in this Circuit to challenge the constitutionality of a "bias response team." As the district court recognized, whether those teams implicate the First Amendment has "split" three "[o]ther circuit courts of appeals." Doc. 46 at 10; *see Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019) (ruling for Speech First); *Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020) (ruling for Speech First); *Speech First, Inc. v. Killeen*, 968 F.3d 628 (7th Cir. 2020) (ruling against Speech First). The Fifth, Sixth, and Seventh Circuits granted Speech First oral argument in those other appeals, and the district court heard oral argument below. Oral argument will similarly assist this Court as it evaluates the important issues raised in this case—issues that will profoundly affect the constitutional rights of college students across Alabama, Georgia, and Florida.

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JURISDICTIONAL STATEMENT

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 an order denying injunctive relief. §1292(a)(1). The district court entered that order on July 29, 2021, and Speech First appealed that same day. Doc. 49.

STATEMENT OF THE ISSUES

I. The University of Central Florida prohibits students from engaging in "discriminatory hostile environment harassment." Its policy covers "verbal acts" and "written statements," can be violated by "a single or isolated incident," and goes beyond the Supreme Court's authoritative definition of harassment. Was the district court correct that this policy is likely constitutional because it regulates only unprotected conduct?

II. The University maintains a "bias-response team"—a group of authority figures who solicit reports of "bias," track them, investigate them, ask to meet with the perpetrators, and threaten to refer students for formal discipline. The Fifth and Sixth Circuits held that virtually identical teams objectively chill students' speech. Was the district court correct that the University's team likely does not chill speech?

III. Appellate courts can order the entry of a preliminary injunction when a mere remand would be pointless or harmful. Here, the equitable factors are easy, the district court already explained how it would weigh them, and some of Speech First's members will soon graduate. Should this Court enter a preliminary injunction now?

STATEMENT OF THE CASE

I. The State of Free Speech on College Campuses

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). Because "independent thinking" requires "constant questioning" and "the expression of new, untried and heterodox beliefs," universities would be "great bazaars of ideas where the heavy hand of regulation has little place." *Kim v. Coppin State Coll.*, 662 F.2d 1055, 1064 (4th Cir. 1981).

That was then, this is now. Instead of allowing free-ranging debate, 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 reject the prevailing campus orthodoxy. Speech codes are their tried-and-true method. But in recent years, universities have introduced so-called "bias response teams" to chill even more disfavored speech.

A. Speech Codes

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 2021* at 10, bit.ly/3kTGN2A (*Spotlight*). These policies exploded in popularity in the mid-eighties; by 1992, nearly

two-thirds of postsecondary schools had speech codes that banned various forms of offensive speech. *See* Majeed, *Defying the Constitution the Rise, Persistence, and Prevalence of Campus Speech Codes*, 7 Geo. J.L. & Pub. Pol'y 481, 486-88 (2009); Mitchell, *The Political Correctness Doctrine: Redefining Speech on College Campuses*, 13 Whittier L. Rev. 805, 818 (1992). Still today, speech codes punish students for undesirable categories of speech like "hate speech," "incivility," "bullying," and "intolerance." *Spotlight* 17-20.

Because they impose vague, overbroad, and content-based restrictions on speech, these policies violate the First and Fourteenth Amendments. A "consistent line of cases … have uniformly found campus speech codes unconstitutionally overbroad or vague." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 338-39 & n.17 (5th Cir. 2020); *see Spotlight* 10 & n.13, 24; *e.g.*, *McCauley v. Univ. of V.I.*, 618 F.3d 232 (3d Cir. 2010) ("emotional distress"); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) ("sexual harassment"); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) ("racial harassment"); *Smith v. Tarrant Cty. Coll. Dist.*, 694 F. Supp. 2d 610 (N.D. Tex. 2010); *Coll. Republicans at SFSU v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) ("civility"); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) ("insults," "epithets," "ridicule," "personal attacks," "sexually harassing speech"); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) ("intolerance," "harassment," "intimidation"); *Booher v. N. Ky. Univ. Bd. of Regents*, 1998 WL 35867183 (E.D. Ky. July 21) ("sexual harassment"); *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968 (9th Cir. 1996) ("sexual harassment"); *Silva v. Univ. of N.H.*, 888 F. Supp. 293 (D.N.H. 1994) ("sexual harassment"); *IOTA XI Chapter of Sigma Chi*

Fraternity v. George Mason Univ., 993 F.2d 386 (4th Cir. 1993) ("hostile learning environment" based on race and sex); *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis.*, 774 F. Supp. 1163 (E.D. Wisc. 1991) ("racist or discriminatory" speech); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) ("discrimination" and "discriminatory harassment").

Policies against "harassment" are one of the most common types of speech code—and one of the most common ways that universities cross constitutional lines. *See Spotlight* 16, 25. Contrary to popular belief, "there is no 'harassment exception' to the First Amendment's Free Speech Clause." *DeJohn*, 537 F.3d at 316 (quoting *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204, 210 (3d Cir. 2001)). When bans on "'harassment'" cover speech, they impose "'content-based'" and often "'viewpoint-discriminatory'" restrictions on that speech. *Saxe*, 240 F.3d at 206 (quoting *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596-97 (5th Cir. 1995)).

Universities with overbroad harassment policies often point to Title IX as a defense. *See Spotlight* 25. In *Davis v. Monroe County Board of Education*, the Supreme Court held that schools can violate Title IX's ban on sex-based discrimination if they are deliberately indifferent to sexual harassment by students. 526 U.S. 629, 633 (1999). But *Davis*, recognizing that public schools are constrained by the First Amendment, adopted a narrow definition of sexual harassment: Actionable harassment under Title IX must be "behavior [that] is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education." *Id.* at 652. Despite this clear guidance from the

Supreme Court, many universities define "harassment" more broadly than *Davis*. *See Spotlight* 25. Years of conflicting guidance from the U.S. Department of Education encouraged this overreach. *See id.*; Am. Ass'n of Univ. Profs., *The History, Uses, and Abuses of Title IX* 14-17 (Mar. 24, 2016), perma.cc/88SM-EVB3; Gersen & Suk, *The Sex Bureaucracy*, 104 Cal. L. Rev. 881, 898-904 (2016).

The Education Department formally addressed this issue in 2020. Instead of issuing still more guidance, the Department promulgated a regulation via notice-and-comment rulemaking. The 2020 rule "adopts" the Supreme Court's definition of sexual harassment from *Davis* "verbatim." *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026, 30,036 (May 19, 2020). Broader definitions of harassment, the Department found, have "infringed on constitutionally protected speech" and have led "'many potential speakers to conclude that it is better to stay silent.'" *Id.* at 30,164-65 & nn.738-39. The *Davis* standard "ensures that speech … is not peremptorily chilled or restricted" because it applies only when harassment rises to the level of "serious *conduct* unprotected by the First Amendment." *Id.* at 30,151-52 (emphasis added); *see also id.* at 30,162-63. The 2020 rule thus defines "[s]exual harassment" to mean, in relevant part, "[u]nwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity." 34 C.F.R. §106.30(a).

Unfortunately, the Department's 2020 rule did not settle things. Most universities responded to it by imposing two separate harassment policies: one "Title IX harassment policy" that adopts the *Davis* standard, and another "non-Title IX harassment policy" that is much broader. *See Spotlight* 26. The Department of Education recently announced that it "plans to propose to amend its regulations implementing Title IX." OIRA, RIN: 1870-AA16, bit.ly/3yJgwZC. The Department has yet to release a proposed rule or start the notice-and-comment process.

B. Bias-Response Teams

In addition to speech codes, universities are turning to a new, innovative way to deter disfavored speech: bias-response teams. Living up to their Orwellian name, these teams encourage students to monitor each other's speech and to report incidents of "bias" to the University. "Bias" is defined incredibly broadly and covers wide swaths of protected speech; in fact, whether speech is "biased" often turns on the *listener's subjective reaction* to it. *See* Doc. 3-1 at 495, 498-500. 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, defending Justice Kavanaugh, watching a video of Ben Shapiro, and much more. *See id.* at 501-04; Schneider, *'Bias Teams' Welcome the Class of 1984*, Wall St. J. (Aug. 5, 2019), on.wsj.com/38JCDob.

After receiving reports of a bias incident, the bias-response team can log the incident, investigate it, meet with the relevant parties, attempt to reeducate the "offender," and recommend formal or informal discipline. *E.g.*, *Fenves*, 979 F.3d at 325-26;

Speech First, Inc. v. Schlissel, 939 F.3d 756, 762-63 (6th Cir. 2019). Bias-response teams are usually staffed not by students or professors, but by university administrators, disciplinarians, and even police officers—a literal "speech police." Doc. 3-1 at 494, 505; *see* Cabranes, *For Freedom of Expression, For Due Process, and For Yale: The Emerging Threat to Academic Freedom at a Great University*, 35 Yale L. & Pol. Rev. 345, 360 (2017).

Although universities say 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." Doc. 3-1 at 514. As soon as these teams began to catch on, professors recognized that they "result in a troubling silence": They leave students "afraid to speak their minds," and empower virtually anyone to "leverage bias reporting policies to shut down unpopular or minority viewpoints." *Id.* at 566. Notably, the University of Northern Colorado shuttered its bias-response team because it had come "at the expense of free speech and academic freedom"; its supposedly "voluntary" processes "made people feel that we were telling them what they should and shouldn't say." Doc. 30 at 9 ¶26 (quoting *President Kay Norton's State of the University Address* (Sept. 7, 2016), bit.ly/3zUF57l). 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." Doc. 3-1 at 523-25.

Yet bias-response teams continue to proliferate. FIRE estimates that more than 200 universities have bias-response teams, and the number is "growing rapidly." *Id.* at 490. The rise of bias-response teams follows the long string of defeats that university speech codes suffered in federal court; in fact, some bias-response teams "have cited the unconstitutionality of speech codes as a reason for their existence." *Id.* at 495. The number of these teams will continue to grow if courts allow them to chill indirectly what universities cannot prohibit directly.

II. The University of Central Florida's Restrictions on Student Speech

The University of Central Florida claims that, "[a]s a public institution, [it] is well aware of its obligation to adhere to the First Amendment." Doc. 36 at 9. It even claims that students' right to free speech is "fully recognized" on campus. Doc. 3-1 at 68. Yet the University has long maintained speech codes, a bias-response team, and even a ban on "hate" speech. No wonder, then, that nearly one in five University students say that they can't "openly express [their] political views/worldviews," and nearly half say that the University does not treat their views "with respect." *Id.* at 547.

A. The Discriminatory-Harassment Policy & Other Speech Codes

The University bans what it calls "discriminatory hostile environment harassment." This discriminatory-harassment policy—which appears in Policy 2-004.2, Prohibition of Discrimination, Harassment, and Related Interpersonal Violence—became effective in October 2020. *Id.* at 10. The policy defines discriminatory harassment as "verbal, physical, electronic, or other conduct based upon" an individual's membership

in a "protected class," including "race," "color," "ethnicity," "national origin," "religion," "non-religion," "age," "genetic information," "sex," "parental status," "gender identity or expression," "sexual orientation," "marital status," "physical or mental disability," "political affiliations," or "veteran's status." *Id.* at 18. A hostile environment, in turn, is harassment that is "so severe or pervasive" that, "when viewed from both a subjective and objective perspective," it "unreasonably interferes with, limits, deprives, or alters" the "terms or conditions of education," "employment," or "participation in a university program or activity." *Id.* at 14.

The discriminatory-harassment policy is meant to be broad. The policy warns that "[d]iscriminatory harassment may take many forms, including verbal acts, name-calling, graphic or written statements (via the use of cell phones or the Internet), or other conduct that may be humiliating." *Id.* at 18. And because the policy bans harassment that is "severe *or* pervasive," it cautions that "[a] hostile environment can be created by pervasive conduct or by a single or isolated incident, if sufficiently severe." *Id.* at 14 (emphasis added). The "more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the conduct is physical." *Id.* The University can also consider a nonexhaustive list of factors to determine whether a hostile environment exists, including "[w]hether the conduct implicates concerns related to … protected speech." *Id.* Elsewhere, though, the University describes discriminatory harassment as "unlawful" and insists that "[t]he First Amendment … does not protect" it. Doc. 3-1 at 41; Doc. 36-3 at 12.

Discriminatory harassment that violates Policy 2-004.2 also violates the student code of conduct. Doc. 3-1 at 70. A violation of the code of conduct subjects a student to discipline. *Id.* at 68. The University tells students that disciplinary rules like the discriminatory-harassment policy "should be read broadly and are not designed to define prohibited conduct in extensive terms." *Id.* There is no "time limit for a complainant to report" violations to the University. *Id.* at 29. And the University prohibits not just violations, but also "condoning or encouraging" violations, "failing to intervene" to stop violations, and "aiding, facilitating, promoting, or encouraging" violations. *Id.* at 70, 76, 23.

Recent events illustrate how the University interprets and applies the discriminatory-harassment policy. In June 2020, hundreds of students called for tenured professor Dr. Charles Negy to be fired, after he posted controversial opinions about systemic racism on social media. University officials, including President Cartwright, urged students to file discriminatory-harassment complaints against Dr. Negy. *See id.* at 152-58. Based on those complaints, Dr. Negy was investigated, was found to have "repeatedly" violated the discriminatory-harassment policy, and was terminated on January 25, 2021. *Id.* at 159, 161. The alleged violations were based on what the University called "derogatory protected-class statements that were outside the protections of [the First Amendment]." *Id.* at 424. Such statements, according to the University, included Dr. Negy's controversial comments about transgender people, systemic racism, and the word "Latinx." *Id.* at 418-24.

Notably, the University maintains a separate ban on "Title IX sexual harassment." *Id.* at 19; *see* UCF Policy 2-012, Title IX Grievance Policy (Oct. 14, 2020), bit.ly/3heTow2. This policy, which the University enacted in response to the Education Department's 2020 rule, adopts *Davis*'s definition of "harassment" verbatim. *See* Policy 2-012, at 3, 6-7; Doc. 3-1 at 19. The University thus cannot argue that its discriminatory-harassment policy is needed to comply with Title IX, or that it could not easily amend the discriminatory-harassment policy to comply with *Davis*.

When Speech First filed this suit, the University also had a computer policy that regulated students' speech online. One provision banned students from emailing "harassing or hate messages." Doc. 3-1 at 173. Students who violated this provision faced the loss of network privileges and "disciplinary action." *Id.* at 169.

B. The Bias-Related Incidents Policy & Just Knights Response Team

The University has another set of policies to deal with "bias-related incidents." Bias-related incidents are formally defined as "any behavior or action directed towards an individual group based upon actual or perceived identity characteristics or background." *Id.* at 191. "Bias," in turn, is an "offensive" action based on personal characteristics, including "race," "color," "national origin," "sex," "gender identity/expression," "sexual orientation," "religion," "age," "disability," or "veteran status." *Id.* To "constitute a bias-related incident," the University stresses, "sufficient objective facts must be present to lead a reasonable person to conclude that the behavior or actions in

question may be motivated by bias towards the status of a targeted individual or group." *Id.* at 192.

Bias-related incidents can be virtually anything. They "occur without regard to whether the act is legal, illegal, intentional, or unintentional." *Id.* at 191. They can "include (but are not limited to)" "verbal harassment," "slurs," "gestures," "bullying," or "on-line harassment." *Id.* at 192-93. The University also compares them to "crimes." *Id.* at 192. It wants to get rid of bias-related incidents because they can "creat[e] a hostile environment"; "have a negative psychological, emotional, or physical impact on an individual, group, and/or community"; and "contribute to creating an unsafe, negative, unwelcoming environment of the victim, or anyone who shares the same social identity as the victim." *Id.* at 191.

Bias-related incidents are "addressed by the Just Knight Response Team (JKRT) protocol. *Id.* at 192. The JKRT is the "clearinghouse for any bias-related incidents." *Id.* at 181. It is "an inter-divisional team that assesses bias inciden[ts]" to, among other things, create "effective interventions." *Id.* at 182. As part of that mission, the JKRT "receive[s], monitor[s], refer[s], and as necessary, coordinate[s] university resources to these incidents." *Id.* at 181. The JKRT is made up of senior representatives from the University's offices of Student Development and Enrollment Services (the agency over student discipline), Housing and Residence Life, Social Justice and Advocacy, and Faculty Relations. *Id.* at 184-88. An officer from the UCF Police Department is also a member. *Id.* at 184.

The University heavily promotes the JKRT and encourages students to report bias-related incidents to it. *E.g.*, *id.* at 204, 206-07, 209, 216-17, 301. Students report bias-related incidents through a JKRT complaint form on the University's website. *Id.* at 195. The form asks students to specify the date and location of the alleged incident and "list the individuals involved." *Id.* at 196. It contains entries for the accused student's name, student organization (if any), phone number, email address, and University Personal Identification Number. *Id.* at 196-97. The form instructs complainants to describe the incident, specify their "desired outcome," and provide "supporting documentation" as appropriate. *Id.* at 197. The form does not require complainants to identify themselves; the reporter can remain anonymous. *See id.* at 195-96; Doc. 36-8 at 4 ¶15. On the JKRT's homepage, a "disclaimer" headlined in bold font warns complainants that, "[b]y submitting your report, this information may be shared with the Office of Student Conduct," "Office of Student Rights and Responsibility," or the "UCF Police Department." Doc. 3-1 at 200.

If the JKRT determines that a student has committed a bias-related incident, it "creates timely interventions" with both "the persons involved in and impacted by bias inciden[ts]," while remaining "sensitive to the rights of all parties involved." *Id.* at 182. Interventions include "discussion, mediation, training, counseling and consensus building," and they begin with the JKRT requesting a meeting with the alleged bias offender. *Id.*; Doc. 36-8 at 15. An "invitation" to meet comes from the JKRT's official email account. Doc. 36-8 at 15. The email tells the accused student, "We have received a

report of an incident you may have been involved in," and "I would like the opportunity to speak with you regarding this matter." *Id.* The email also informs the accused student that the University is "committed to tracking patterns of bias." *Id.* And it warns the student that "there is certain information that we must disclose to other university officers." *Id.* If the student "does not respond," then "the JKRT member handling the case will reach out a second time." *Id.* at 4-5 ¶21. While the JKRT tells students that the meetings are "voluntary," the University submitted no evidence about how students perceive it or how often its "invitations" to meet are declined.

* * *

Plaintiff, Speech First, was created to combat these kinds of policies. A 501(c)(3) voluntary membership association, Speech First was launched in 2018 to restore the First Amendment on college campuses. Its members include students who attend colleges and universities across the country, including the University of Central Florida. *See* Doc. 3-2 at 1-2.

Speech First files suits on behalf of its members to combat speech codes, bias-response teams, and other policies that violate students' constitutional rights. In its first case, the University of Michigan agreed to end its Bias Response Team, after the Sixth Circuit held that such teams use the "implicit threat of punishment and intimidation to quell speech." *Schlissel*, 939 F.3d at 765; *see* Doc. 35-1 at 1, No. 4:18-cv-11451 (E.D. Mich. Oct. 28, 2019). In Speech First's second case, the University of Texas agreed to disband its Campus Climate Response Team, after the Fifth Circuit described such

teams as "the clenched fist in the velvet glove of student speech regulation." *Fenves*, 979 F.3d at 338; *see* Doc. 39 at 3, No. 1:18-cv-1078 (W.D. Tex. Dec. 22, 2020). Texas also agreed to rewrite its harassment policy, after the Fifth Circuit noted that its decision to define harassment more broadly than Title IX was "self-evidently dubious." *Fenves*, 979 F.3d at 337 n.16; *see* Doc. 39 at 2, No. 1:18-cv-1078 (W.D. Tex.).

III. Proceedings Below

Speech First filed this case in early 2021. Doc. 1. It quickly moved for a preliminary injunction. Doc. 3. Speech First's motion argued that the University's discriminatory-harassment policy was an overbroad restriction on protected speech. *See* Doc. 3 at 15-17; Doc. 39 at 9-11. It argued that the University's policy on "bias-related incidents," as enforced by the JKRT, was unconstitutionally vague and overbroad. *See* Doc. 3 at 17-20; Doc. 39 at 9. And it argued that the University's computer policy was vague and overbroad. *See* Doc. 3 at 17; Doc. 39 at 9. Speech First supported its preliminary-injunction motion with a verified complaint, Doc. 30; over two dozen exhibits, Doc. 3-1; a declaration from its president, Doc. 3-2; and Doe declarations from three of its members, Doc. 3-3; Doc. 3-4; Doc. 3-5.

The members of Speech First who filed declarations—Students A, B, and C—are current students at the University. They are proceeding under pseudonyms because they fear reprisal from the University, their professors, their fellow students, and others. *E.g.*, Doc. 3-5 at 4 ¶16. These students attested that they have controversial views on politics, race, gender identity, abortion, gun rights, immigration. *See* Doc. 3-3 at 1-2 ¶¶4-

11; Doc. 3-4 at 1-2 ¶¶4-10; Doc. 3-5 at 1-2 ¶¶4-7. Student A believes, for example, that "affirmative action is deeply unfair," because "it helps … African Americans … by harming … whites and Asian Americans." Doc. 3-3 at 1 ¶5. Student B does not believe anyone should be "forced to use certain pronouns." Doc. 3-4 at 2 ¶7. And Student C is believes that he "should be allowed to say that certain people are 'illegal' immigrants—because they are." Doc. 3-5 at 1-2 ¶5.

Students A, B, and C "want to engage in open and robust intellectual debate" and to "speak passionately and repeatedly" about these issues on campus, online, and in the broader community. *E.g.*, Doc. 3-3 at 3 ¶14. They currently self-censor, however, because they know about the University's speech restrictions and do not want to face the negative repercussions. *E.g.*, Doc. 3-4 at 3-5 ¶¶18. Their fears were confirmed when they saw the University fire Dr. Negy—a *tenured professor*—for his unpopular speech. Doc. 3-3 at 5 ¶20; Doc. 3-4 at 5 ¶19. And their reluctance to speak is magnified by the fact that the code of conduct says they can be disciplined not just for their own violations, but for "condoning," "encouraging," "failing to intervene against," or "[c]omplicity" in someone else's violations. *E.g.*, Doc. 3-5 at 3 ¶13.

The University opposed Speech First's motion for a preliminary injunction. It argued that Speech First lacked standing to challenge its speech codes because they do not reach protected speech and, at least according to its declarants, had not been applied to protected speech. *See* Doc. 36 at 28-32. (Because no discovery has occurred, Speech First couldn't test the declarants' assertions against the University's confidential

disciplinary records.) The University also defended its speech codes on the merits. *See* Doc. 36 at 34-37. As for the JKRT, the University made only one argument: The policy is constitutional, and Speech First lacks standing to challenge it, because the JKRT "proscribes nothing and can punish no one." Doc. 36 at 34, 13-19.

Shortly before the oral hearing, and without notifying Speech First or the district court, the University quietly amended its computer policy by deleting the provision that banned "hate or harassing messages." Doc. 43. But the University never argued that this change mooted Speech First's motion. Doc. 46 at 5 n.4. And it continued defending "the old policy" as "constitutional." Doc. 47 at 26. So the University could not prove mootness through voluntary cessation, and the district court considered the original computer policy on the merits. *See* Doc. 46 at 5 n.4.

Ultimately, the district court partially granted and partially denied Speech First's motion for a preliminary injunction. Doc. 46 at 19. On the JKRT, the district court acknowledged the "circuit … split" on whether bias-response teams objectively chill speech. *Id.* at 10. But it deemed the Seventh Circuit's decision more "persuasive" than the Fifth's or the Sixth's. *Id.* at 11. The court stressed the JKRT's lack of disciplinary authority and the "voluntary" nature of its requests. *Id.* at 11-12. It thought the JKRT's requests were no more chilling than "any communication from a university official or department," and it cited a declaration attesting that "the JKRT has not referred a student to the conduct office in three years." *Id.* at 12 (citing Doc. 36-1 at 6 ¶21). Because

the district court disagreed that the JKRT objectively chills speech, it found that Speech First lacked standing to challenge the University's policy on bias-related incidents. *Id.*

As for the University's speech codes, the district court agreed that Speech First had standing to challenge those policies. *See id.* at 9-10. It then held that Speech First was unlikely to succeed on its challenge to the discriminatory-harassment policy. That policy, it reasoned, did not even implicate the First Amendment because it regulates only "conduct that unreasonably invades the rights of other students," which is "unprotected … under *Tinker*." *Id.* at 16. The district court relied heavily on this Court's decision in *Doe v. Valencia College*, 903 F.3d 1220 (11th Cir. 2008), and it faulted Speech First for "mistakenly reason[ing] that Justice Kennedy's dissent in *Davis* provides the controlling rationale." Doc. 46 at 13-17 & n.10.

The district court held that Speech First was likely to succeed, however, on its challenge to the computer policy. That policy was "plainly vague and overbroad." *Id.* at 18. A likely First Amendment violation "is a 'per se irreparable injury,'" moreover, and "neither UCF nor the public have 'any legitimate interest in enforcing an unconstitutional ordinance.'" *Id.* at 19 (quoting *Otto v. City of Boca Raton*, 981 F.3d 854, 870 (11th Cir. 2020)). The court thus enjoined the computer policy "until further order of the Court." *Id.*

Speech First timely appealed the partial denial of its motion. *See* Doc. 49. The University did not cross-appeal the partial grant of Speech First's motion (and the time to do so has expired). Because Students A, B, and C are now seniors, Speech First

moved to expedite this appeal, explaining that a normal schedule risked denying these students the chance to benefit from a decision in their favor. *See* Mot. to Expedite, No. 21-12583 (11th Cir. Aug. 2, 2021); Reply i/s/o Mot. to Expedite, No. 21-12583 (11th Cir. Aug. 10, 2021). The Court granted Speech First's motion and expedited this appeal. *See* Order, No. 21-12583 (11th Cir. Aug. 16, 2021) (Brasher, J.).

STANDARD OF REVIEW

Generally speaking, this Court reviews denials of preliminary injunctions for an abuse of discretion. *Scott v. Roberts*, 612 F.3d 1279, 1289 (11th Cir. 2010). But because legal errors *are* abuses of discretion, this Court reviews the district court's legal conclusions de novo. *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1266 (11th Cir. 2006). And while this Court ordinarily reviews factual findings for clear error, "First Amendment issues are not ordinary." *ACLU of Fla., Inc. v. Miami-Dade Cty. Sch. Bd.*, 557 F.3d 1177, 1203 (11th Cir. 2009). This Court reviews the "core facts that determine a First Amendment free speech issue" de novo. *Id.* at 1205.

SUMMARY OF ARGUMENT

The district court should have granted Speech First's motion in full. The court held that the University's discriminatory-harassment policy doesn't regulate speech at all—even though the University's definition of "harassment" is far broader than the standard the Supreme Court announced in *Davis*, the regulation promulgated by the Department of Education, and the definitions in the University's other "harassment" policy. The district court also held that Speech First lacks standing to challenge the

University's "bias-related incidents" policy because bias-response teams don't objectively chill speech—even though two circuits have held precisely the opposite. But the Supreme Court, the Department of Education, and the Fifth and Sixth Circuits are not wrong. The University is. The University's overbroad, vague, content-based, and viewpoint-discriminatory policies are likely unconstitutional. And because the other preliminary-injunction factors all follow from that conclusion, this Court should simply enter a preliminary injunction. Speech First's standing members should get the chance, if possible before they graduate, to experience a campus free from the policies that have been abridging their constitutional rights.

ARGUMENT

Preliminary injunctions turn on four factors:

1. Whether the movant will likely succeed on the merits.
2. Whether the movant will suffer irreparable harm without an injunction.
3. Whether the harm to the movant outweighs any harm to the nonmovant.
4. And the public interest.

Scott, 612 F.3d at 1290.

The district court partially denied Speech First's motion based on the first factor—a question of law that this Court reviews de novo. *Burk v. Augusta-Richmond Cty.*, 365 F.3d 1247, 1250 (11th Cir. 2004). Speech First's likelihood of success on the merits includes "'not only substantive theories but also … standing.'" *Waskul v. Washtenaw Cty. Cmty. Mental Health*, 900 F.3d 250, 256 n.4 (6th Cir. 2018) (quoting *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015)). 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." *Fenves*, 979 F.3d at 329-30 (quoting *Lujan v. Def's of Wildlife*, 504 U.S. 555, 561 (1992)). Likely does not mean guaranteed. *Levi Strauss & Co. v. Sunrise Int'l Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995). And even at this stage, the University has the burden of proving the constitutionality of its speech restrictions. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

The University's policies on discriminatory harassment and bias-related incidents should be preliminarily enjoined. The discriminatory-harassment policy is facially unconstitutional. So is the bias-related incidents policy (as enforced by the JKRT), which Speech First has standing to challenge. Because these policies likely violate the freedom of speech, the remaining preliminary-injunction factors are necessarily satisfied. This Court should enter a preliminary injunction itself, or at least reverse and remand with instructions for the district court to grant that relief.

I. The discriminatory-harassment policy likely violates the First and Fourteenth Amendments.

"In the First Amendment context," courts recognize a special kind of facial challenge based on overbreadth. *Ams. for Prosperity Found. v. Bonta* (*AFPF*), 141 S. Ct. 2373, 2387 (2021). Namely, a regulation is facially invalid if "'a substantial number of its applications are unconstitutional'" under the Free Speech Clause. *Id.* The key question is whether "'the statute itself'" poses a "'realistic danger'" of chilling constitutionally

protected speech. *Clean Up '84 v. Heinrich*, 759 F.2d 1511, 1513 (11th Cir. 1985). The "risk of a chilling effect" is enough "because First Amendment freedoms need breathing space to survive." *AFPF*, 141 S. Ct. at 2389 (cleaned up). The overbreadth doctrine requires regulations to be drafted narrowly so they are not "susceptible of application to protected expression." *Gooding v. Wilson*, 405 U.S. 518, 522 (1972).

The University's discriminatory-harassment policy is overbroad. As the en banc Court explained in *Wollschlaeger* (citing cases from the Third and Fifth Circuits), "anti-harassment laws, insofar as they regulate speech based on content, are subject to First Amendment scrutiny." *Wollschlaeger v. Gov'r*, 848 F.3d 1293, 1307 (11th Cir. 2017) (en banc) (citing *DeJohn*, 537 F.3d at 316; *Saxe*, 240 F.3d at 207; *DeAngelis*, 51 F.3d at 596-97). The cited cases explain that anti-harassment regulations reach protected speech when they "'attempt to regulate oral or written expression,'" that these regulations "'impose[] content-based, viewpoint-discriminatory restrictions on speech,'" and that content-based restrictions receive "the most exacting First Amendment scrutiny." *DeJohn*, 537 F.3d at 316; *DeAngelis*, 51 F.3d at 596-97; *Saxe*, 240 F.3d at 207.

So too here. The University's policy does not prohibit harassment, but *discriminatory* harassment. "Discriminatory," according to the University and the policy's plain text, means "biased, negative or derogatory" regarding one of the policy's "protected class[es]." Doc. 3-1 at 422. The policy thus discriminates based on content and viewpoint. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992); *Otto*, 981 F.3d at 862-63. Such discrimination is either outright banned, *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302

(2019), or cannot survive strict scrutiny, *R.A.V.*, 505 U.S. at 395-96. Either way, the discriminatory-harassment policy is "facially unconstitutional, because it fails [the applicable] scrutiny in 'a substantial number of applications.'" *AFPF*, 141 S. Ct. at 2389; *see McCauley*, 618 F.3d at 252.

The district court did not disagree that, *if* the discriminatory-harassment policy regulates speech, then it's a content-based and viewpoint-discriminatory restriction. *See* Doc. 46 at 14-15. Instead, the district court denied that the policy regulates speech at all. Its conclusion that the policy "is clearly aimed at regulating unprotected conduct under *Tinker*," *id.* at 16, is wrong for at least four reasons.

First, the University's policy goes beyond the Supreme Court's definition of harassment in *Davis*. While the Supreme Court requires harassment to be "severe, pervasive, *and* objectively offensive," the University requires harassment to be "severe *or* pervasive." *Davis*, 526 U.S. at 652 (emphasis added); Doc. 3-1 at 14 (emphasis added). And while the Supreme Court asks whether harassment "*denies* its victims the equal access to education," the University asks whether harassment "*interferes with*, *limits*, deprives, *or alters* the terms or conditions of education." *Davis*, 526 U.S. at 652 (emphasis added); Doc. 3-1 at 14 (emphases added).

These deviations from *Davis* are not accidental. The University has a *separate* policy on sexual harassment that tracks *Davis* verbatim, *see* Doc. 3-1 at 19, so its decision to use broader language in the discriminatory-harassment policy (which also covers "sex," *id.* at 18) must be intentional. *See United States v. Newman*, 614 F.3d 1232, 1239

(11th Cir. 2010). The University also admits that its discriminatory-harassment policy covers "a single or isolated incident, if sufficiently severe." Doc. 3-1 at 14. This concession flouts *Davis*, which adopted a narrower definition of harassment to screen out "a single incidence," even if "sufficiently severe." 526 U.S. at 652-53.

By defining harassment more broadly than *Davis*, the discriminatory-harassment policy sweeps in protected speech. The *Davis* standard marks the line where verbal harassment crosses from speech into conduct. Though *Davis* was not a First Amendment case, *cf.* Doc. 46 at 16-17 n.10, the Court had the First Amendment in mind when it defined harassment under Title IX. The Court "repeated the 'severe and pervasive' formulation five times." 85 Fed. Reg. at 30,149. It stressed "these very real limitations" on Title IX in direct response to "the dissent" from Justice Kennedy, which raised First Amendment concerns. 526 U.S. at 652-53 (citing the dissent four times).

The point is not that Justice Kennedy's dissent is "controlling," *cf.* Doc. 46 at 17 n.10, but that his dissent raised First Amendment concerns that *the Court* accepted and actively avoided. Justice Kennedy argued that, if universities are liable for student-on-student harassment, then they will adopt "campus speech codes" that "may infringe students' First Amendment rights." 526 U.S. at 682; *see also id.* at 667 (noting that universities' power to discipline students for harassment is "circumscribed by the First Amendment"). In response, the Court explained that its narrow definition of harassment accounts for "the practical realities of responding to student behavior, realities that Congress could not have meant to be ignored." *Id.* at 652-53 (citing the dissent).

Those "practical realities," the Court agreed, include the need to comply with the First Amendment. *See id.* at 649 (agreeing with the dissent that schools face "legal constraints on their disciplinary authority" and explaining that its interpretation of Title IX would not require universities to risk "liability" via "constitutional … claims").

Second, even if *Davis* didn't resolve the matter, the discriminatory-harassment policy reaches speech on its face. The policy couldn't be clearer: It reaches "verbal" conduct—*i.e.*, speech—as well as "electronic" and "other" unspecified conduct. Doc. 3-1 at 18; *see Doe*, 721 F. Supp. at 853 (harassment code that regulated "verbal conduct" and "verbal behavior" reached speech); *Hill v. City of Houston*, 789 F.2d 1103, 1109 (5th Cir. 1986) (en banc) (policy that banned "mere verbal as well as physical conduct" reached speech); *McCauley*, 618 F.3d at 250 ("Speech protected by the First Amendment is a type of 'conduct'"). Lest there be any doubt, the University clarifies that discriminatory harassment can "take many forms" and then lists several categories of speech: "verbal acts, name-calling, [and] graphic or written statements (via the use of cell phones or the Internet)." Doc. 3-1 at 18. The University elsewhere warns students that its disciplinary rules, including its discriminatory-harassment policy, should be read "broadly." *Id.* at 68.

The discriminatory-harassment policy thus goes out of its way to regulate speech. By concluding otherwise, the district court did not heed this Court's warning that the "enterprise of labeling certain verbal or written communications 'speech' and others 'conduct' is unprincipled and susceptible to manipulation." *Wollschlaeger*, 848 F.3d at

1308 (cleaned up). "Saying that restrictions on writing and speaking are merely incidental to speech is like saying that limitations on walking and running are merely incidental to ambulation." *Id.* "Speech is speech, and it must be analyzed as such for purposes of the First Amendment." *Id.* at 1307 (cleaned up).

Other parts of the discriminatory-harassment policy confirm that it regulates speech:

- The policy covers harassment that merely "interferes with, limits, … or alters" another student's education. Doc. 3-1 at 14. Those vague, capacious terms could easily be triggered by speech alone. *See Doe*, 721 F. Supp. at 867 (barring harassment that "interfer[es] with" or "threat[ens]" education is vague and chills protected speech).

- The policy warns that, when applying it, administrators should consider "[w]hether the conduct implicates concerns related to … protected speech." Doc. 3-1 at 14. This disclaimer is "compatible with, and simply reinforce[s], the open-ended language" of the policy and the fact that it reaches protected speech. *Fenves*, 979 F.3d at 337.

- The policy covers "a single or isolated incident" of harassment, "*particularly* if the conduct is physical." Doc. 3-1 at 14 (emphasis added). "Particularly" does not mean "only." The policy thus contemplates that a single instance of *speech* that is "sufficiently serious" could be discriminatory harassment. Doc. 3-1 at 14. Covering isolated statements is covering speech.

- The policy requires the harassment to be "discriminatory"—meaning it is "based upon" a long list of classifications that include "non-religion" and "political affiliations." Doc. 3-1 at 18. These topics are not traditionally covered by antidiscrimination laws, since they implicate "'core' political and religious speech." *DeJohn*, 537 F.3d at 317; *accord Saxe*, 240 F.3d at 210. The policy also covers "verbal" conduct concerning the most controversial topics of the day, including "gender identity," "race," "religion," and "national origin." Doc. 3-1 at 18. This Court "reject[s] the practice of relabeling" such "controversial speech as conduct." *Otto*, 981 F.3d at 861.

Notably, in Speech First's case against the University of Texas, the Fifth Circuit found that a similar harassment policy chilled protected speech. Texas's policy covered "verbal" harassment, which was defined to include speech that is "sufficiently severe, pervasive, or persistent to create an objectively hostile environment that interferes with or diminishes" someone's education. *Fenves*, 979 F.3d at 323. Harassment included "insults, epithets, ridicule, and personal attacks," and was "often based on the victim's … 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." *Id.* This "broad" ban on verbal harassment, the Fifth Circuit explained, is not sufficiently "cabin[ed]" by the other limitations in the policy. *Id.* at 333-34. Not only did Texas's policy "arguably cover … speech," but "[s]imilar" policies at other universities "have *in fact* been declared overbroad and vague." *Id.* at 332 & n.9 (emphasis added).

Third, history confirms that the discriminatory-harassment policy reaches protected speech. To use one high-profile example, the University recently fired Professor Negy for "repeatedly" violating the discriminatory-harassment policy. Doc. 3-1 at 159. Some of the University's findings are jaw-dropping. For example, the University found that Professor Negy created a hostile environment based on gender identity by "sporadically" making "offensive comments," such as "a transgender man is a woman," "transgender is not a thing," and "transgender individuals should learn to be the sex they were born with." *Id.* at 423. The University also found that other "statements" by

Professor Negy were not protected by the First Amendment and thus counted against him under the discriminatory-harassment policy. *Id.* at 418-20. For instance, Professor Negy criticized the term "Latinx," *id.* at 420, 283, and denied the existence of "systemic racism," *id.* at 420, 372.

Comments like these are clearly speech—and clearly protected by the First Amendment. That the University reads the discriminatory-harassment policy to cover them proves that the policy regulates and chills speech. And it confirms the Education Department's finding that harassment policies worded more broadly than *Davis* can be and have been "applied to protected speech." 85 Fed. Reg. at 30,164-65.

Fourth, the district court, in concluding that the discriminatory-harassment policy regulates only "unprotected conduct under *Tinker*," overread this Court's decision in *Valencia College*. Doc. 46 at 16. Although sexual harassment was one of the policies that the student in *Valencia College* allegedly violated, this Court did not address whether that policy was facially overbroad. *See* 903 F.3d at 1227-28, 1231-32. It analyzed only the college's policy on "stalking." *Id.* at 1232; *see also id.* at 1233 ("We need not and do not address the constitutionality of any of the other provisions"). That policy banned "[s]talking behavior in which an individual willfully, maliciously, and repeatedly engages in a knowing course of conduct directed at a specific person which reasonably and seriously alarms, torments, or terrorizes the person, and which serves no legitimate purpose." *Id.* at 1232.

The stalking policy in *Valencia College* bears little resemblance to the University's discriminatory-harassment policy here. Among other differences, that policy regulated "stalking" (not the far more capacious term "harassment"), discussed "conduct" and "behavior" (not "verbal acts" or "statements"), required "repeated" conduct (not "isolated" incidents), and applied when the victim was "seriously alarm[ed], torment[ed], or terrorize[d]" (not "interfere[d] with" or "alter[ed]"). *Compare id.*, *with* Doc. 3-1 at 14, 18. That this Court rejected an overbreadth challenge to an entirely different policy says little about the right answer here.

Any broader reading of *Valencia College* would be erroneous. At times, the district court seemed to suggest that *Tinker* (as interpreted by *Valencia College*) gives universities *more* leeway than other state actors to treat speech as conduct. *See* Doc. 46 at 14 & n.9. Not so. Rather than "apply[ing] a lower level of scrutiny," this Court has long treated First Amendment concerns as "*heightened* in the university setting." *Gay Lesbian Bisexual All. v. Pryor*, 110 F.3d 1543, 1549-50 (11th Cir. 1997). Supreme Court precedents likewise "leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large." *Healy v. James*, 408 U.S. 169, 180 (1972); *see McCauley*, 618 F.3d at 242-47 (explaining the differences between the rights of children in grade school and adults in college).

Valencia College observes, correctly, that universities can freely regulate "*conduct* invading the rights of others," including the "persistent misconduct" at issue there. 903

F.3d at 1230 (emphasis added). But it does not allow universities to misclassify speech as conduct. And it does not allow universities to disfavor certain speech in the name of "the rights of others." Rights are not invaded when "'speech is merely offensive to some listener.'" *McCauley*, 618 F.3d at 251; *see also id.* at 248 ("The desire to protect the listener cannot be convincingly trumpeted as a basis for censoring speech for university students."). "'Many are those who must endure speech they do not like, but that is a necessary cost of freedom.'" *Wollschlaeger*, 848 F.3d at 1315-16.

II. Speech First likely has standing to challenge the bias-related incidents policy, as enforced by the Just Knights Response Team.

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). If the existence of a policy chills their willingness to speak, and the chilling effect is "'objectively reasonable,'" then they have suffered the injury of "'self-censorship.'" *Pittman v. Cole*, 267 F.3d 1269, 1284 (11th Cir. 2001); *Harrell v. Fla. Bar*, 608 F.3d 1241, 1254, 1257, 1260 (11th Cir. 2010). And because the policy causes the self-censorship, invalidating it obviously redresses that injury. *Harrell*, 608 F.3d at 1257.

"It is settled" that a policy can objectively chill speech, and thus violate the First Amendment, without punishing anyone or directly prohibiting anything. *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992); *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 402

(1950); *see also Dana's R.R. Supply v. Att'y Gen.*, 807 F.3d 1235, 1241 (11th Cir. 2015) (explaining that "chilling" is a discrete harm "independent of enforcement"). For one thing, the government can violate the First Amendment through "'threat[s]'" and "'other means of coercion, persuasion, and intimidation.'" *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963)). 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, LLC v. Dart*, 807 F.3d 229, 230 (7th Cir. 2015). Threats can violate the First Amendment "even if it turns out to be empty" and even if the relevant actor "'lacks direct regulatory or decisionmaking authority over [the] plaintiff.'" *Id.* at 230-31 (quoting *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003)).

For example, in *Okwedy*, the plaintiff rented billboards in Staten Island to denounce homosexuality. 333 F.3d at 341. The Borough President 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." *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 appealed to 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, held that the President's letter plausibly 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 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. In response, 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 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" 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.

In addition to threats, the government can objectively chill speech by unnecessarily burdening it. "Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011). In other words, "[t]he distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000). Burdens that can objectively chill speech include "reputational harm," career harms from "[e]ven the mere filing of a complaint," drains on "time and resources" and "administrative action," investigations, and more. *Schlissel*, 939 F.3d at 765; *Wollschlaeger*, 848 F.3d at 1323; *SBA List*, 573 U.S. at 165; *White*, 227 F.3d at 1228. For example, in *Levin*, the university responded to the professor's speech not only by creating a committee, but also by allowing students assigned to his class to transfer to an "alternative" section. 966 F.2d at 87-88. Even though the professor was still allowed to teach, the Second Circuit held that the University independently violated his First Amendment rights by "'stigmatizing'" him with the creation of these "shadow classes." *Id.* at 88.

Bias-response teams use both of these methods—implicit threats and unnecessary burdens—to objectively chill speech. The entire point of the JKRT is to implicitly threaten students with discipline if they say something "biased." And this bureaucratic apparatus gives students "grounds to reasonably fear that, unless they modify their speech, they will be subject to … hassle and expense." *281 Care Comm. v. Arneson*, 638 F.3d 621, 631 (8th Cir. 2011). Like other bias-response teams, the JKRT represents "the clenched fist in the velvet glove of student speech regulation." *Fenves*, 979 F.3d at 338.

The JKRT "acts by way of implicit threat of punishment and intimidation to quell speech." *Schlissel*, 939 F.3d at 765. From beginning to end, the JKRT is designed to send a clear message to students: If you engage in a "bias-related incident," you are in trouble. Unlike an ordinary division of the University, *cf.* Doc. 46 at 12, the very name Just Knights Response Team "suggests that the accused student's actions have been prejudged to be [unjust]" and "could result in far-reaching consequences." *Schlissel*, 939 F.3d at 765. The JKRT's terminology—"bias," "incident," "victim," "targets," "witnesses," etc.—also suggests serious misconduct. *See id.* ("Nobody would choose to be considered biased"); *Fenves*, 979 F.3d at 338 ("The CCRT describes its work, judgmentally, in terms of 'targets' and 'initiators' of incidents."); *Speech First, Inc. v. Killeen*, 968 F.3d 628, 652 (7th Cir. 2020) (Brennan, J., concurring in part and dissenting in part) (similar). The University also equates bias-related incidents to punishable offenses like "crimes" and "hostile environment" harassment. Doc. 3-1 at 191-92; *see Fenves*, 979 F.3d

at 335 (explaining that similar cross-references bolstered Speech First's standing by suggesting that the policies were "intertwined" and "overlapping").

That the University "invites anonymous reports" to the JKRT likewise "carries particular overtones of intimidation to students whose views are 'outside the mainstream.'" *Fenves*, 979 F.3d at 338. It also carries "reputational damage" that can "impair a student's prospects for academic and professional success." *Killeen*, 968 F.3d at 652 (Brennan, J., concurring/dissenting). Because the JKRT is comprised of high-level university administrators, a student "could be forgiven for thinking that inquiries from and dealings with the [JKRT] could have dramatic effects such as currying disfavor with a professor, or impacting future job prospects." *Schlissel*, 939 F.3d at 765. Experts thus agree that these teams objectively chill students' speech. *See, e.g.*, Doc. 3-1 at 491, 523-25, 552, 566; *Fenves*, 979 F.3d at 338.

The JKRT's "ability to make referrals" is one particular way that it "objectively chills speech." *Schlissel*, 939 F.3d at 765; *accord Fenves*, 979 F.3d at 333. Right on the homepage, the JKRT has a "[d]isclaimer" warning students that it can "share[]" reports of bias incidents to the University's disciplinary bodies: "the Office of Student Conduct," "Office of Student Rights and Responsibility," or "the UCF Police Department." Doc. 3-1 at 200. Referrals, in turn, can "lead to" formal discipline and, at a minimum, "initiate[] the formal investigative process, which itself is chilling." *Schlissel*, 939 F.3d at 765. The JKRT admits that it has referred students for formal discipline before, *see* Doc. 36-1 at 6 ¶¶19, 21, but the district court's focus on the number of actual referrals was

misplaced. *Cf.* Doc. 46 at 12. This frequency and likelihood of referral does not appear on the JKRT's website. All students see are the University's repeated warnings that it can refer bias-related incidents to the authorities—which, for some of the JKRT's members, means referring the matter to themselves.

The JKRT also chills speech with its so-called "protocol"—a kind of "'process-is-punishment' mechanism that deters people from speaking out." Doc. 3-1 at 192, 514. Committing a "bias-related incident" can get a student "report[ed]," "track[ed]," "monitor[ed]," investigated, and referred for discipline. *Id.* at 180-81, 200; Doc. 36-8 at 15. Many students might "not speak at all if they fear that University officials are monitoring them for biased speech." *Killeen*, 968 F.3d at 652 (Brennan, J., concurring/dissenting). And "[r]easonably risk-averse students generally avoid a burdensome investigative process." *Id.*

Saying something "biased" can also trigger a JKRT "intervention," such as a request to meet for "discussion," "mediation," "training," "counseling," or "consensus building." Doc. 3-1 at 182. Though these meetings are ostensibly "voluntary," a reasonable college student would not see them that way. *See Schlissel*, 939 F.3d at 765. 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. Especially not at the University, which prohibits any "[f]ailure to comply with oral or written instruction from duly authorized University officials." Doc. 3-1 at 69.

More likely, "objectively reasonable students" will "mitigate their exposure to any allegation that might trigger a bias investigation" by simply staying quiet. *Killeen*, 968 F.3d at 652 (Brennan, J., concurring/dissenting). As Judge Brennan recently put it, "'[p]rocess is punishment' is not a platitude; a University-controlled clearinghouse for speech can deter students from speaking out." *Id.*

The district court should not have followed the Seventh Circuit's contrary decision in *Killeen*. The Seventh Circuit mainly faulted Speech First for the state of the record. The Seventh Circuit was mistaken: The Fifth and Sixth Circuits ruled for Speech First on virtually identical records. But regardless, this Court has in the record 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." *Id.* at 640, 643 (majority op.). Here, Speech First's members submitted detailed Doe declarations, *see* Doc. 3-3; Doc. 3-4; Doc. 3-5, and the University admits that it's "aware" of the "certain views" they "wish to express," Doc. 36-1 at 6 ¶16; Doc. 36-2 at 6 ¶32; Doc. 36-4 at 3 ¶11; Doc. 36-5 at 4 ¶15; Doc. 36-6 at 4 ¶14; Doc. 36-8 at 7 ¶39; Doc. 36-9 at 4 ¶23; Doc. 36-12 at 4 ¶15. Speech First also submitted a verified complaint, *see* Doc. 30, which counts as evidence at this stage. *See SisterSong Women of Color Reprod. Just. Collective v. Kemp*, 410 F. Supp. 3d 1327, 1343 n.10 (N.D. Ga. 2019); *Killeen*, 968 F.3d at 653 n.5 (Brennan, J., concurring/dissenting) (noting that the complaint's allegations would have been evidence had Speech First's

complaint been "verified"). And Speech First presented unrebutted studies and surveys about how students view these kinds of policies. *See* Doc. 3-1 at 486-548, 551-66.

* * *

For all these reasons, Speech First has shown that the JKRT "is sufficiently proscriptive to objectively chill student speech." *Fenves*, 979 F.3d at 333. 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 JKRT, 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 JKRT 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.

III. If this Court agrees with Speech First on the likely merits, then it should grant a preliminary injunction.

As just explained, the district court erred when it held that Speech First was unlikely to succeed. In some cases, that conclusion might lead this Court to simply vacate and remand, letting the district court assess any remaining preliminary-injunction factors. But this Court can also assess those factors. *E.g.*, *Hisp. Int. Coal. of Ala. v. Gov'r of Ala.,* 691 F.3d 1236, 1243-49 (11th Cir. 2012); *KH Outdoor*, 458 F.3d at 1271-72. If they are satisfied, then this Court can enter a preliminary injunction itself, *e.g.*, *Scott*, 612 F.3d at 1298; *Cate v. Oldham*, 707 F.2d 1176, 1185, 1190 (11th Cir. 1983), or reverse with instructions to enter a preliminary injunction, *e.g.*, *Otto*, 981 F.3d at 872. This Court should do more than simply vacate here for three main reasons.

First, the preliminary-injunction factors can be resolved only one way. This appeal will resolve Speech First's likely success on the merits: The likely constitutionality of the discriminatory-harassment policy is before this Court, and the University offered no defense of the JKRT apart from the standing argument that is before this Court, *see* Doc. 36 at 34. No defense exists. If the JKRT chills speech, then the policy it enforces is subject to First Amendment scrutiny. The University did not dispute below that its

policy on "bias-related incidents" is vague, overbroad, and viewpoint-discriminatory. *See* Doc. 3 at 18-19; Doc. 39 at 9.

Because the University's policies likely violate the First Amendment, the remaining preliminary-injunction factors follow "as a necessary legal consequence." *Otto*, 981 F.3d at 870; *accord id.* (reiterating that likely "First Amendment" violations are "dispositive" and "necessarily resolve the other three factors"). Chilled speech is an injury that's "obviously irreparable," and "[i]t is clear that neither the [University] nor the public has any legitimate interest in enforcing an unconstitutional [policy]." *Scott*, 612 F.3d at 1295; *Otto*, 981 F.3d at 870; *accord FF Cosms. FL, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1298 (11th Cir. 2017). As in most First Amendment cases, the likely merits of Speech First's claims are "dispositive" here. *Scott*, 612 F.3d at 1297. A "remand to allow the district court to weight the preliminary-injunction factors in the first instance" would only waste resources because any denial of Speech First's motion would be an abuse of discretion. *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 589-90 (7th Cir. 2012).

Second, the district court already explained how it would resolve the remaining preliminary-injunction factors. When it enjoined the University's computer policy, the court agreed that the merits are decisive: It is "well accepted" that constitutional injuries are "'per se irreparable,'" it explained, and "neither UCF nor the public have 'any legitimate interest'" in enforcing unconstitutional policies. Doc. 46 at 19 (quoting *Otto*, 981 F.3d at 870). That reasoning is unequivocal and applies equally to Speech First's other claims. Making the district court say it a second time serves no purpose. *Cf., e.g.*, *Scott*,

612 F.3d at 1289, 1297 (entering a preliminary injunction where the district court had already signaled how it would rule, if its merits analysis were reversed, on the other factors).

Third, time is of the essence. This appeal is expedited because, as Speech First explained in its motion, Students A, B, and C expect to graduate in May 2022. *See* Mot. to Expedite 2-3. A lengthy remand process would mean that no injunction could be entered while they are still on campus. Though their graduation will not moot this case, *see Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No.* 1, 551 U.S. 701, 718 (2007), it would prevent them from seeing the benefits of their efforts. And a remand for more litigation would allow the University's constitutional violations to persist that much longer. "Relief is definitionally incomplete if it forces the plaintiffs to continue holding their First Amendment rights in abeyance." *Otto*, 981 F.3d at 871. Requiring students to "suffer the delay of further proceedings" would do little but "'effect the impermissible chilling of the very constitutional right' they seek to protect." *Id.*

For all these reasons, the Court should enter a preliminary injunction itself. At a minimum, it should reverse with instructions for the district court to enter a preliminary injunction. The remaining factors are "easily satisfied in this case," any balancing "weighs heavily in favor of" Speech First, and the harm from waiting "clearly outweighs" whatever interest the University has in delay. *KH Outdoor*, 458 F.3d at 1271-73; *Cate*, 707 F.2d at 1189.

CONCLUSION

This Court should reverse the district court's partial denial of Speech First's motion for a preliminary injunction. This Court should enter a preliminary injunction barring the University from enforcing its discriminatory-harassment policy and its bias-related incidents policy until the district court enters final judgment. At a minimum, this Court should remand with instructions to enter a preliminary injunction.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7)(B) because it contains 10,997 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.

Dated: September 8, 2021 */s/ Cameron T. Norris*

CERTIFICATE OF SERVICE

I filed this brief with the Court via ECF, which will email everyone requiring notice.

Dated: September 8, 2021 */s/ Cameron T. Norris*