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.)

REPLY BRIEF OF APPELLANT SPEECH FIRST, INC.

J. Michael Connolly
Cameron T. Norris
James F. Hasson
Daniel Shapiro
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
(703) 243-9423
mike@consovoymccarthy.com
cam@consovoymccarthy.com
james@consovoymccarthy.com
daniel@consovoymccarthy.com

Counsel for Appellant Speech First, Inc.

TABLE OF CONTENTS

TABLE OF CITATIONS

*Primary authority

Cases

Statutes

Other Authorities

INTRODUCTION & SUMMARY OF ARGUMENT

The University claims that "other universities" use speech codes and bias-response teams to chill speech, but not it. UCF-Br. 19, 3-5. Never mind that its policies match almost word-for-word the policies that chilled speech in *Fenves* and *Schlissel*. When it comes to free speech, the University doesn't even compare favorably to schools in its own State. Florida State recently eliminated its policy on "bias" incidents, helping it earn FIRE's highest rating. *See Florida State Dumps Policies on Bias, 'Offensive' Language, 'Demeaning' Behavior, 'Inappropriate' Email*, College Fix (2020), bit.ly/3vPj4FP. And the University of Florida earned that rating in 2014 by "eliminat[ing] all of its speech codes." *University of Florida Earns FIRE's Highest Rating for Free Speech*, FIRE (2014), bit.ly/3bgi1oX. Meanwhile, when Speech First sued in 2021, the University here was banning students from sending "hate" messages. And just days ago, the University banned playing any "offensive video" during events at the student union. *UCF Policies Face Challenges Under First Amendment*, Knight News (Oct. 24, 2021), bit.ly/3BmiXTa.

The University is right, of course, that the two policies challenged here must be "'judged on [their] own merits.'" UCF-Br. 4. But that observation goes both ways. If the policies are unconstitutional on their face, then it doesn't matter that the University invites speakers on campus, tolerates conservative organizations, or vaguely promises to uphold the First Amendment. *Cf.* UCF-Br. 7-8, 14-15. And the policies are likely unconstitutional, despite the University's attempts to shield them from judicial scrutiny. This Court should reverse the district court and enter a preliminarily injunction.

ARGUMENT

This Court should reverse the denial of Speech First's motion for a preliminary injunction, as the Fifth and Sixth Circuits did in *Fenves* and *Schlissel*. Speech First will likely succeed on its challenges to the discriminatory-harassment policy and the bias-related incidents policy, including on standing. And that conclusion means the remaining factors are necessarily satisfied. This Court should enter a preliminary injunction now, or at least order the district court to enter one, rather than allowing the University to continue chilling speech.

I. Speech First's challenge to the discriminatory-harassment policy will likely succeed.

The University defends the district court's conclusion that the discriminatory-harassment policy is likely constitutional, though not its reasoning. The University then attacks the district court's conclusion that Speech First likely has standing. The University is wrong on both points.[1]

A. The policy is likely unconstitutional.

While the University disagrees with Speech First about the district court's reasoning, UCF-Br. 43-44, none of that matters because the University largely agrees with Speech First about what *the law* is here. The University agrees that, unlike grade-schoolers, college students enjoy full First Amendment rights. UCF-Br. 49 n.6; Br. 29-30. The

[1] The University's rhetoric about Speech First's supposed motives and candor is unfortunate. The University can disagree with Speech First's legal arguments without caricaturing it as a sham organization whose "advocacy and policy goals" are furthering "insidious harassment." UCF-Br. 3, 6, 15-16.

University also agrees that the policy upheld in *Doe v. Valencia College* was fundamentally different from the policy here, and so the constitutionality of that stalking policy does not dictate the constitutionality of this harassment policy. UCF-Br. 48; Br. 28-29. And most importantly, the University emphatically "agree[s]" with Speech First that its discriminatory-harassment policy reaches "speech." UCF-Br. 43; Br. 23-28. The notion that the policy is limited to conduct, the University says, would be a "misapprehension." UCF-Br. 43.

Despite that (devastating) concession, the University still claims that its harassment policy is constitutional. It argues that "discriminatory harassment" is one of those rare categories of speech that the First Amendment doesn't protect (like defamation and fighting words). UCF-Br. 44-45. That argument is flatly wrong. And even if it were right, it wouldn't save the policy because regulations of unprotected speech also must be viewpoint neutral.

To start, discriminatory harassment is not one of the "'well-defined and narrowly limited classes of speech'" that fall outside the First Amendment. *United States v. Stevens*, 559 U.S. 460, 468-69 (2010). The Supreme Court identified those classes in *United States v. Alvarez*, and discriminatory harassment was "[a]bsent" from its list. 567 U.S. 709, 717-18 (2012) (plurality). "[A]dd[ing] to the list" is nearly impossible. *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 791 (2011). Courts have no "freewheeling authority" to recognize new categories of unprotected speech. *Stevens*, 559 U.S. at 470-72. They must have "persuasive evidence" that the new category comes from "a long (if heretofore

unrecognized) tradition of proscription." *Ent. Merchants*, 564 U.S. at 792. Yet the University cites no evidence of any tradition, or even a single case suggesting that discriminatory harassment is categorically unprotected. Speech First cited a "'uniform[]'" line of cases holding the opposite. Br. 3-4; *see also, e.g.*, *Meriwether v. Hartop*, 992 F.3d 492, 501, 511-12 (6th Cir. 2021) (discriminatory hostile-environment harassment policy violated the First Amendment).

Though the University doesn't cite it, the full Court's decision in *Wollschlaeger v. Governor* resolves this issue. Br. 22, 4. That case involved a law that banned doctors from "discriminat[ing]" against patients based on gun ownership. 848 F.3d 1293, 1303 (11th Cir. 2017) (en banc). It also involved a law that banned doctors from "harassing a patient about firearm ownership"—in essence, a discriminatory harassment law. *Id.* This Court stressed that "'anti-discrimination laws are not categorically immune from First Amendment challenges.'" *Id.* at 1317 (cleaned up). It also held that "anti-harassment laws" that "regulate speech" are "subject to First Amendment scrutiny." *Id.* at 1307. One of the cases it cited was *DeJohn v. Temple University*, which found "no categorical rule that divests 'harassing' speech, as defined by federal anti-discrimination statutes, of First Amendment protection." 537 F.3d 301, 316 (3d Cir. 2008). Case closed.

Because the discriminatory-harassment policy reaches protected speech, it must satisfy "First Amendment scrutiny." *Wollschlaeger*, 848 F.3d at 1307. The policy fails because it's fatally overbroad. The University agrees that its policy goes well beyond the Supreme Court's definition of harassment in *Davis*. The University says that's by design:

Contra *Davis*, it wants to prohibit students from making a "severe discriminatory comment one time" and a "series of [discriminatory] statements" that are "not severe." UCF-Br. 46-47. While the University might have honorable reasons for banning more speech, public universities simply cannot exceed *Davis*. "To be sure, [*Davis*] addressed institutional liability for third-party harassment," but "first … it 'defined the scope of the behavior that Title IX proscribes' in a constitutionally permissible manner." FIRE-Br. 18 (quoting *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 639 (1999)). *Davis* thus "provide[s] a roadmap to universities to regulate truly problematic harassment while abiding by constitutional protections." ADF-Br. 4. The University cannot chart its own path.[2]

No matter what *Davis* held, its definition of harassment *correctly* marks the line between protected speech and unprotected conduct in this setting. The University claims that Title VII uses a broader definition, reaching employee-on-employee harassment that is "severe *or* pervasive." UCF-Br. 44-45. But even if that definition satisfies the First Amendment in Title VII cases, universities are not workplaces and students

[2] The University doesn't need to violate *Davis* to reach the two hypotheticals in its brief. UCF-Br. 46-47. "Screaming a racist epithet in the face of a Black student in class and telling that student that as an [epithet] they should never come to class again" is *actually* a form of unprotected speech. *See Boyle v. Evanchick*, 2020 WL 1330712, at *6 (E.D. Pa. Mar. 19) (holding that a student's "use of the word n****r" in "a confrontational face-to-face encounter constitutes fighting words"). As for the hypothetical involving the "teacher," the First Amendment gives universities more power to regulate the speech of employees than the speech of students. *Gay Lesbian Bisexual All. v. Pryor*, 110 F.3d 1543, 1549-50 (11th Cir. 1997).

are not employees. *UWM Post, Inc. v. Bd. of Regents*, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991). The constraints of the First Amendment are "heightened" in "the college context." LJC-Br. 2; *accord Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967) ("'nowhere more vital'"). Workplaces can ban lengthy political debates, conversations about sex, and dating peers; but those restrictions are foreign to universities. *See* 85 Fed. Reg. 30,026, 30,037 (May 19, 2020).

The University's attempt to apply the Title VII standard to students at universities has been rejected by all three branches. The Education Department rejected that standard for Title IX because it "would equate workplaces with educational environments, whereas both the Supreme Court and Congress have noted the unique differences." *Id.* (citing *Davis* and the Higher Education Act). It found that the Title VII standard would "broaden[] the scope of prohibited speech and expression" and thus allow universities to "chill and infringe upon the First Amendment freedoms of students." *Id.* In *Davis*, it noted, the Supreme Court "acknowledged the 'severe or pervasive' formulation [from] *Meritor*"—the same Title VII case that the University invokes here. *Id.* at 30,149; *see* UCF-Br. 45. Yet *Davis* deliberately adopted the higher "'severe and pervasive' formulation." 85 Fed. Reg. at 30,149. In short, *Davis* is "the only Supreme Court ruling defining discriminatory harassment in the education context," and so its

"standard—no more and no less—is the only permissible standard for public universit[ies]." FIRE-Br. 19.[3]

By going beyond *Davis* and sweeping in speech, the University's policy imposes content-based restrictions that fail strict scrutiny. Br. 22-23. The University does not deny that administrators "'must examine the content of the message … to know whether the [policy] has been violated." *Otto v. City of Boca Raton*, 981 F.3d 854, 862 (11th Cir. 2020). For example, speech about "another person's academic or professional affiliations" could not be covered but speech about "their political or religious affiliations" could be. Cato-Br. 6. The policy is therefore "presumptively unconstitutional" and fails unless the University satisfies strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2014). Because the University carries the burden but makes no arguments, its policy fails. The *Davis* standard is a narrower alternative that would satisfy any legitimate interest the University could have. In fact, it already uses that standard under Title IX. Br. 11.

Separately, the University's harassment policy is viewpoint discriminatory. The University does not deny that, *if* the policy reaches protected speech, then it

[3] This Court also refuses to conflate workplaces and universities. The University cites Title VII cases where this Court defined harassment using the "severe or pervasive" formulation. But in Title IX cases, this Court insists that harassment must be "'severe, pervasive, *and* objectively offensive,'" that a "single incident" doesn't count, and that the effects must "touch the whole or entirety" of an educational program. *Williams v. Bd. of Regents*, 477 F.3d 1282, 1293 (11th Cir. 2007) (emphasis added); *GP ex rel. JP v. Lee Cty. Sch. Bd.*, 737 F. App'x 910, 915 (11th Cir. 2018); *Hawkins v. Sarasota Cty. Sch. Bd.*, 322 F.3d 1279, 1289 (11th Cir. 2003).

discriminates based on viewpoint. It does. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 392-93 (1992); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206-07 & n.6 (3d Cir. 2001). As explained, the policy bans harassing speech that is "biased" or "derogatory" based on a protected class, but allows harassing speech that is not based on one of those classes or that is positive toward them. Br. 22-23. In other words, harassment that does not "invoke race, color, creed, religion, or gender—aspersions upon a person's mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents." *R.A.V.*, 505 U.S. at 391. That's classic viewpoint discrimination. *Id.* at 392. The policy thus fails strict scrutiny because a ban on harassment that was "not limited to the favored topics" would accomplish "precisely" the same goals. *Id.* at 395-96.

The University is correct that most anti-discrimination statutes do not violate the First Amendment's ban on viewpoint discrimination, UCF-Br. 49-50, but it misunderstands why. Although anti-discrimination laws usually cover certain classes (race, sex, etc.), they present no First Amendment problem because they are "directed not against speech but against conduct." *R.A.V.*, 505 U.S. at 389. Bans on discriminatory conduct cannot be viewpoint discriminatory because only speech can express a viewpoint. *Id.* at 389-90.

But when anti-discrimination laws go beyond conduct and start regulating speech (as the University concedes its policy does), then they are subject to the rule against viewpoint discrimination. *See DeJohn*, 537 F.3d at 316; *DeAngelis v. El Paso Mun. Police*

Officers Ass'n, 51 F.3d 591, 596-97 & n.7 (5th Cir. 1995). That's the holding of *R.A.V.*—a precedent that the University doesn't even discuss. 505 U.S. at 383-86. Under *R.A.V.*, the government can regulate, for example:

- libel, but not "only libel critical of the government";
- commercial speech, but not only commercial speech that "depicts men in a demeaning fashion"; and
- fighting words, but not only fighting words that "communicate messages of racial, gender, or religious intolerance." *Id.* at 384, 388-89, 392-94.

So too here. Even if the University were correct that discriminatory harassment is "one of the categories of unprotected speech," UCF-Br. 44, that conclusion would not justify its decision to adopt a viewpoint-discriminatory regulation.

The University tries to justify its viewpoint discrimination by pointing to various federal anti-discrimination statutes. Because those statutes protect only certain classes, the University reasons, then it must be okay to write their classifications into its speech codes. UCF-Br. 49-50. This argument has three major flaws.

First, the Constitution controls statutes, not the other way around. If Congress passed a statute requiring universities to ban criticisms of the government, no one thinks the universities' bans would be constitutional. As a state actor, the University must side with the Constitution over Congress. *UWM Post*, 774 F. Supp. at 1177; *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 371-72 (M.D. Pa. 2003).

Second, no federal statute requires the University to adopt viewpoint-discriminatory regulations of speech. A harassment policy that adopted the *Davis* standard (and

thus reached only conduct) or that covered all forms of harassment (and thus was viewpoint neutral) would satisfy all federal obligations.

Third, the University's policy uses classifications that "are not protected under federal law." *Saxe*, 240 F.3d at 210. The University cites a smattering of federal statutes, UCF-Br. 2-3, some of which do not even plausibly require universities to regulate speech. *E.g.*, 38 U.S.C. §4212 (ordering contractors to "take affirmative action to employ" certain veterans); 42 U.S.C. §1981(a) (prohibiting racial discrimination in contracts). And the University identifies no federal statute that justifies its decision to ban student-on-student harassment based on "genetic information," "marital status," "non-religion," or "political affiliations." Doc. 3-1 at 18. The notion that universities are free to impose viewpoint-discriminatory restrictions on speech about politics and religion is "self-evidently dubious." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 337 n.16 (5th Cir. 2020).

For all these reasons, the discriminatory-harassment policy is likely unconstitutional. The policy is illegally viewpoint discriminatory, whether or not discriminatory harassment is "unprotected speech." UCF-Br. 2. But that speech is clearly protected, per the precedent of this Court and every other, so the policy is fatally overbroad.

B. Speech First likely has standing to challenge the policy.

The University asks this Court to affirm the district court's ruling on the "alternative ground" that Speech First lacks standing. UCF-Br. 42. By "alternative ground," the University means that it disagrees with the district court's finding that Speech First

has standing. Doc. 46 at 9-10. But the district court was right. And holding otherwise would split with the Fifth Circuit.

On standing, the University gets the law mostly right. Speech First has standing if the discriminatory-harassment policy "objectively" chills one of its member's speech. UCF-Br. 22; *see ACLU v. Fla. Bar*, 999 F.2d 1486, 1493-94 (11th Cir. 1993). Objective chill exists if there's a "'credible threat'" of enforcement. UCF-Br. 22; *see SBA List v. Driehaus*, 573 U.S. 149, 161 (2014).

The credible-threat standard is "'quite forgiving'" in First Amendment cases. *Wollschlaeger*, 848 F.3d at 1305. No history of past enforcement is needed. UCF-Br. 5; *accord Epperson v. Arkansas*, 393 U.S. 97, 101-02 (1968); *Clean Up '84 v. Heinrich*, 759 F.2d 1511, 1514 (11th Cir. 1985). So long as it's not "'[m]oribund,'" "'courts will assume a credible threat of enforcement'" when the policy "'facially restrict[s] expressive activity by the class to which the plaintiff belongs.'" *Fenves*, 979 F.3d at 335. Requiring a history of past enforcement "misses the point" because enforcement is unlikely when "speech has already been chilled." *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 766 (6th Cir. 2019). And importantly, the question is not whether the policy *actually* applies to protected speech, but whether it "arguably" does. UCF-Br. 22; *accord Fenves*, 979 F.3d at 332 n.10; *Wollschlaeger*, 848 F.3d at 1305 n.2. If a policy "arguably covers" the speaker, "there is standing" because reasonable people will not take risks "only to make a political point." *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003).

After stating the law correctly, the University misapplies it. It claims that the harassment policy doesn't even "'arguably'" apply to Speech First's members based on the text, various disclaimers, and its employees' declarations. UCF-Br. 39-41. These arguments are unpersuasive.

The text of the discriminatory-harassment policy covers Speech First's members, both arguably and actually. The Fifth Circuit held that a materially indistinguishable policy chilled materially indistinguishable speech. *Fenves*, 979 F.3d at 329-38. The Education Department, too, has determined that these policies chill speech. 85 Fed. Reg. at 30,164-65. Removing all doubt, the University concedes that its policy reaches speech, including a "comment [made] one time." UCF-Br. 46. Though a one-off comment must be "'severe,'" the University treats "'sporadic'" controversial comments and "'name-calling'" as severe. Br. 23, 27, 25. And nothing in the policy requires the speech to be *directed at* a particular person. *See* Doc. 3-1 at 14 (listing "[w]hether the conduct was directed at more than one person" as one factor without explaining which way it cuts); *id.* at 18 (merely requiring the harassment to affect an individual). Worst of all, the University tells students to read its policies "'broadly'" and cautions that their terms are "'not … exhaustive.'" Br. 10. Students "simply cannot predict" whether their controversial, but protected speech is banned or not. SLF-Br. 8.

Several factors exacerbate this credible threat. The policies are all "recently enacted" or "revised." *Harrell v. Fla. Bar*, 608 F.3d 1241, 1257 (11th Cir. 2010). The University is "vigorously defending [them]." *Wollschlaeger*, 848 F.3d at 1305. Violations are

easy to commit (including by merely condoning or failing to stop them) and easy to report (including through the JKRT). *Id.* at 1323; Br. 10. The University did just that with Dr. Negy, using several controversial (but protected) statements to fire him for harassment. *See* Doc. 3-1 at 423-24 ("a transgender man is a woman"; "there [i]s no God"; "Islam [i]s not a religion of peace"; "systemic racism and White privilege d[o] not exist"). If the University will do this to a tenured professor, students don't stand a chance. *E.g.*, Doc. 3-3 at 5 ¶20.

The University highlights its disclaimers that promise to protect speech, but disclaimers cannot "defeat standing." Doc. 46 at 10. The University cannot draft overbroad policies, chill students' speech, and then escape judicial review by promising to make case-by-case exceptions. *ACLU*, 999 F.2d at 1495; *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1183 (6th Cir. 1995). The First Amendment does not leave students "at the mercy of *noblesse oblige*." *Stevens*, 559 U.S. at 480. These disclaimers do not remove the chilling effect because, faced with a specific rule and an amorphous exception for "protected speech," reasonable students will follow the rule. *Fenves*, 979 F.3d at 334-35, 337-38; *Coll. Repubs. at SFSU v. Reed*, 523 F. Supp. 2d 1005, 1020-21 (N.D. Cal. 2007). The University's disclaimers, moreover, disclaim nothing. One lists "protected speech" as merely a factor to consider. Doc. 3-1 at 14. Another claims that discipline will not be imposed for "the lawful expression of ideas," *id.* at 92, but the University claims that discriminatory harassment is "unlawful" and something "[t]he First Amendment … does not protect," *id.* at 16; Doc. 36-3 at 12.

Even less relevant are the University's declarations. These declarations were "written after this action was filed." *Wollschlaeger*, 848 F.3d at 1306. They do not bind the University. *ACLU*, 999 F.2d at 1494-95. They reflect only the declarants' "personal experience." *Fenves*, 979 F.3d at 336 n.14. And University employees don't know what's protected by the First Amendment. *E.g.*, Doc. 3-10 at 3 ¶15 (asserting, incorrectly, that "discriminatory harassment" is "unprotected"). Even if they did, their "*noblesse oblige*" does not eliminate the policies' chilling effect. *Wollschlaeger*, 848 F.3d at 1322-23, 1306. College students, "who are looking down the barrel of the [University's] disciplinary gun, are not required to guess whether the chamber is loaded." *Id.* at 1306.

Also beside the point is the University's observation that other students engage in controversial speech on campus. UCF-Br. 6-8. Universities can "chill [First Amendment] activity" without "freez[ing] it completely." *Constantine v. Rectors & Visitors*, 411 F.3d 474, 500 (4th Cir. 2005). Objective chill does not turn on any particular student's "will to fight." *Id.*; *accord Backpage.com, LLC v. Dart*, 807 F.3d 229, 231 (7th Cir. 2015). The universities in *Schlissel* and *Fenves* submitted this same kind of evidence, *see* Fenves Br., 2019 WL 5296547, at *7; Schlissel Br., 2018 WL 6738711, at *9-10, but the Fifth and Sixth Circuits held that Speech First had standing. This Court should do the same.

II. Speech First's challenge to the bias-related incidents policy, as enforced by the JKRT, will likely succeed.

The University wonders why Speech First doesn't find bias-response teams "laudable"—a way to "encourage *more* speech" among students. UCF-Br. 35. Speech

First wonders why, if the University wants to *encourage* speech, it maintains a formal policy on "bias-related incidents"; compares them to crimes and warns students that they can lead to disciplinary referrals; encourages students to monitor each other and anonymously report bias; maintains a "Team" of disciplinarians and police to "Respon[d]"; collects, reviews, and investigates reports; and asks to meet with students accused of bias. That's a regime designed to *chill* disfavored speech, not facilitate it. Speech First likely has standing to challenge it.[4]

The University admits that a policy can unlawfully "chill speech without punishing someone." UCF-Br. 36. But throughout its brief, the University stresses that the JKRT does not "discipline" students—as if that fact establishes something. *E.g.*, UCF-Br. 31, 29, 8, 10. The University was right the first time: The law is clear that *everything* a government does that objectively chills speech requires First Amendment scrutiny, even if the policy or program prohibits nothing and disciplines no one. Br. 30-31.

As Speech First explained, the JKRT chills speech in two main ways: It deters speech through threats and intimidation, and it burdens speech by imposing administrative and other consequences. Br. 35. The University pushes back on the second point,

[4] Because Speech First seeks a preliminary injunction, the question is whether it "'likely'" has standing. Br. 20-21. In *Speech First, Inc. v. Killeen*, the Seventh Circuit equated this burden with "'the burden of resisting a summary judgment motion.'" 968 F.3d 628, 638 (7th Cir. 2020). The Seventh Circuit mistakenly quoted Justice Blackmun's dissent in *Lujan* as if it were the majority—a mistake the University repeats. UCF-Br. 21. Regardless, Justice Blackmun's standard would only lower Speech First's burden. Resisting a summary-judgment motion is "significantly" easier than proving a likelihood of success. *IBM v. BancTec, Inc.*, 459 F.3d 1186, 1192 (11th Cir. 2006).

but it ignores the first. Both are important. The question is not how often the JKRT meets with bias offenders or refers them for formal discipline. The question is whether a reasonable college student, looking at the entire JKRT apparatus, would be deterred from engaging in speech that could be considered a "bias-related incident." In other words, does the JKRT's "'very existence'" chill speech because a student would rather stay silent than risk being reported, called biased, investigated, contacted, invited to a meeting, and potentially referred for discipline? *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988). Likely so.

The JKRT is designed to chill disfavored speech through threats and intimidation. Consider what the policy would look like if it were actually designed, as the University claims, to provide students "an opportunity to engage in discussions relating to varying viewpoints." UCF-Br. 53. It would not need a formal definition of "bias-related incident" that intentionally resembles a disciplinary rule. Br. 35-36. It would not prejudge the conversation by tagging one side the "'victim'" and the other the perpetrator of "'bias.'" Br. 35. It would call itself something like the "Just Knights Discussion Team" or the "Just Knights Forum," not a name that already presumes a "response" is needed to something "unjust." It would include faculty and trained counselors, not administrators or *a police officer*. And it certainly wouldn't solicit *anonymous* reports, which facilitate no conversations but carry "'particular overtones of intimidation.'" Br. 36. These features reflect an apparatus that is designed to chill disfavored speech, not to

encourage free-ranging discussions. And that is how these teams see themselves in practice. LCJ-Br. 5.

The University also drastically understates how much the JKRT burdens speech. Foremost, the process creates reputational harm by tagging students as perpetrators of "bias" incidents—"unsafe, negative, unwelcoming" speech that the University compares to hate "crimes" and "hostile environment" harassment. Br. 36; Doc. 3-1 at 191. It also creates a formalized system of nonstop surveillance. Br. 37. The University does not dispute or acknowledge these real sources of chill.

The ever-present threat of investigation and disciplinary referral also substantially chills speech. Br. 36-37. Coyly, the University notes that Speech First has no evidence "the JKRT has ever referred matters to the student conduct office"—information that of course only the University has at this stage. UCF-Br. 30. Regardless, the University admits that referrals occur. It says that disciplinary referrals are "unusual" (meaning they *do* happen), and that its chief disciplinarian who has been there since 2014 knows of no referrals since April 2018 (meaning one *did* happen right before then). Doc. 36-1 at 1 ¶1, 6 ¶¶19, 21. But the frequency is not important: The University does not tell students that referrals are infrequent or rare. It warns them that referrals can occur on its homepage, Doc. 3-1 at 200, and in its emails, Doc. 36-8 at 15. And the University certainly doesn't *disclaim* its referral power. *See* Doc. 38-8 at 6 ¶29 (JKRT can refer); UCF-Br. 10 ("JKRT has broad latitude"). Its "ability to make referrals" thus "lurks in the background" and chills speech even before it starts. *Schlissel*, 939 F.3d at 765.

The prospect of being summoned for a meeting with the JKRT is also chilling. Br. 37. The University stresses that the meetings are "voluntary," quoting from a sample email that it put in the record. UCF-Br. 10-11. But the University's excerpt curiously omits the first two sentences, where the email identifies the sender as a "University employee" from "the Just Knights Response Team" and informs the student that the University is "committed to tracking patterns of bias." Doc. 36-8 at 15. The email goes on to tell the student that the University received a "report" of an "incident" that the student "may have been involved in" and that the JKRT has opened a "case." *Id.* And it warns that the JKRT "must disclose" information about disciplinary violations and crimes. *Id.* Though it notes that the "JKRT case" will "close out" if the student doesn't respond, the student is never assured that closing his case without a meeting carries no consequences—for example, that the University won't conclude in the case file that the student likely did commit the bias incident.

Notably, the University concedes that these messages would be chilling if they came from the JKRT's police officer. UCF-Br. 28 n.5. But students still know that the police officer is *on* the JKRT, and emails from a high-ranking University administrator (say, the vice president of the agency over student discipline) are also chilling. Doc. 3-1 at 184, 186. The University submitted no evidence about how students perceive or respond to its invitations. Br. 14. The default rule on campus is that dealings with administrators are *not* voluntary. Br. 37. And messages over accusations of bias are naturally chilling for college students. Br. 37. It is therefore likely that "being labeled 'voluntary'"

does not "ameliorate[]" the JKRT's "objectively implied threats." *Schlissel*, 939 F.3d at 765. Given all these burdens and threats, "objectively reasonable students" would "behave in ways that mitigate their exposure to the kind of accusation that could trigger" a run-in with the JKRT. ICWA-Br. 24.

The University tries to distinguish the JKRT from other policies that courts have found objectively chilling, but its attempts mostly backfire. The University notes that the committee who reviewed the professor's speech in *Levin* lacked formal disciplinary power, but then stresses—without a hint of self-awareness—that the committee chilled speech because the official who convened it did have that authority. UCF-Br. 33. So too with the JKRT, whose member *are* disciplinarians even if they take that hat off briefly for the JKRT. Br. 12. Similarly, the University explains *Bantam Books* as a case where the pornography commission designated certain works "objectionable," sent letters "on its official letterhead," and "remind[ed]" everyone that it could "recommend prosecution." UCF-Br. 33-34. The University apparently misses the obvious analogy to an official university entity that labels speech "biased," emails students from an official account, and reminds students that it can refer incidents for formal discipline.

More broadly, the University's assumption that the chilling effect in these cases was worse is irrelevant, even if it were true. That the JKRT is not the most unconstitutional scheme ever is not a defense. Bias-response teams were designed, after all, to get as close to the constitutional line as possible. Br. 8. The JKRT likely steps over it.

The obvious chilling effect of these teams has been recognized by professors, students, universities, experts, Speech First's amici, and two federal circuits. The University claims that Speech First's evidence about bias-response teams generally says little about the JKRT specifically. UCF-Br. 3-4, 30. But evidence about how college students view these teams across the country is certainly relevant to how a *reasonable* student would view the JKRT at the University. And Speech First is the only party who submitted any declarations *from University students* about how they view the JKRT. Docs. 3-3–3-5. It also submitted a survey that the University published (and now, bizarrely, tries to impugn as unreliable, UCF-Br. 4). The survey found that nearly one in five University students cannot "openly express [their] political views/worldviews on campus." Doc. 3-1 at 547. While one in five is a minority, it's those students with minority views, like Speech First's members, who feel the brunt of the University's policies. Students with popular views don't need protection; it's the students who challenge the prevailing campus orthodoxy that feel the chill and need the First Amendment to step in.

Nothing about the JKRT is creative or unique; it's a carbon copy of the bias-response teams popping up across the country, including the ones that used to operate at Michigan and Texas. The distinctions that the University tries to draw between this case and those cases don't exist. UCF-Br. 28-29 & n.4.

- Michigan and Texas also administered their policies through "Response Teams" that consisted of university administrators and a police officer. While Michigan's "Bias Response Team" had "bias" in its name, Texas's "Campus Climate Response Team" did not. And like the JKRT, each "team" was charged with "responding" to "bias" incidents. *See Fenves*

Appellant's Br., 2019 WL 3776335 at *1; *Schlissel* Appellants' Br., 2018 WL 6011322, at *8-9.

- Michigan and Texas formally defined the term "bias" incident, using definitions that are indistinguishable from the University's. *Compare* Doc. 3-1 at 191, *with Fenves* Appellant's Br., 2019 WL 3776335 at *11, *and Schlissel* Appellant's Br., 2018 WL 6011322, at *9.
- Like the University, Michigan explicitly told students that meetings with the bias-response team were voluntary. 2018 WL 6738711, at *38. (And Texas claimed that its bias-response team never met with students accused of bias incidents. 2019 WL 5296547, at *38.)
- Like the JKRT, the bias-response teams at Michigan and Texas explicitly warned students that they had the power to refer students for formal discipline. *See Schlissel*, 939 F.3d at 765; *Fenves*, 979 F.3d at 333. Michigan denied that it ever used that authority. 2018 WL 6738711, at *36. And like the University here, Texas insisted that "no student … has been investigated or punished by the CCRT for engaging in speech or expression protected by the First Amendment." 2019 WL 5296547, at *49 n.20.

The bias-response team in *Killeen* was no different either. The University's assertion that this case is closer to "the facts" of *Killeen* is incorrect: In all three cases, the universities said that "being reported" to the team has no consequence, that interactions with the team are "voluntary," and that the team had "no authority to impose sanctions." UCF-Br. 30. While the facts in all these cases are the same, *the record* is different here than it was in *Killeen*. As Speech First explained, with no response from the University, the record here is much more robust because it includes a detailed *verified* complaint, declarations from students, lengthy exhibits, and several reports and studies. Br. 38, 15. The University's complaints about the record are thus unpersuasive, *see* UCF-Br. 30-31, especially since its declarants testified that they understand specifically what Speech First's members want to say, *see* Br. 38.

The University ultimately relents, though, and admits that the circuits "are split" on bias-response teams. UCF-Br. 30, 27. That's mostly right. If this Court affirms the district court, it will necessarily split with the Fifth and Sixth Circuits. But if this Court reverses the district court, it will not necessarily split with the Seventh Circuit, since that court relied so heavily on record issues not present here. *See Killeen*, 968 F.3d at 643-44 (faulting Speech First for relying on "a three-page, bareboned declaration" from its president and stressing that the court's analysis turned on "Speech First's evidentiary showing"). *But see Fenves*, 979 F.3d at 331 (deeming the same record more than sufficient).

No matter what this Court decides about bias-response teams, its decision will have significant consequences. Given the University's silence, it must agree that its position would allow universities to create a "Patriotism Response Team" for "anti-American incidents" (or a "Zionism Response Team" for "pro-Israel incidents," or a "Socialism Response Team" for "anti-capitalist incidents," and so on). And if the University can have a bias-response team patrolling a college campus, where the First Amendment is at its apex, then the City of Orlando can have one too. "[A] dangerous precedent" indeed. Cato-Br. 14.

III. This Court should enter a preliminary injunction.

If this Court disagrees with the district court on either policy, it should reverse and preliminarily enjoin the policy itself. The remaining factors are fully briefed and can only be resolved one way. The University *asks* the Court to resolve the merits of its

bias-related incidents policy, agreeing with Speech First that the merits of that policy rise or fall with the University's standing arguments. *See* Br. 40-41; UCF-Br. 36-38. And the district court already weighed the other preliminary-injunction factors in Speech First's favor. If this Court remands, the district court will either repeat itself (wasting everyone's time and resources) or weigh the factors differently and abuse its discretion (requiring yet another appeal). Br. 40-42.

There's nothing "improper" about resolving the remaining factors now. *Cf.* UCF-Br. 52. The University does not dispute this Court's power to enter a preliminary injunction (or to order the district court to enter one), and this Court has done so in the past. Br. 40. True, the Fifth and Sixth Circuits did not order this relief. UCF-Br. 52. But unlike here, the district courts there had not already weighed the preliminary-injunction factors in Speech First's favor, and the universities there had already repealed some of the challenged policies. *See Schlissel*, 939 F.3d at 770; *Fenves*, 979 F.3d at 338. A remand in those cases was thus not entirely pointless, as it would be here. And neither appeal was expedited, as this one is.

The University's arguments on the remaining preliminary-injunction factors prove the futility of a remand. None of the University's cases found a likely violation of the First Amendment and then *denied* a preliminary injunction. *See Bonnell v. Lorenzo*, 241 F.3d 800, 825 (6th Cir. 2001) ("Plaintiff has failed to show a substantial likelihood of succeeding on the merits of his First Amendment claim"). In this Circuit, the remaining factors follow "as a necessary legal consequence" from a meritorious First

Amendment claim. *Otto*, 981 F.3d at 870. Universities have no right to enforce unconstitutional policies anyway, so their justifications for continuing to chill speech before final judgment are outweighed by students' right to speak. *Id.*

The equities in this case balance, per usual, in favor of free speech. If the University's harassment policy is enjoined, it can adopt a constitutional one the next day. Speech First did not challenge the University's separate ban on Title IX harassment, which both satisfies the University's obligations under federal law and provides a template for other harassment policies. Br. 23, 11. And enjoining the bias-related incidents policy would not stop the University from "connect[ing] students with important resources" or "provid[ing] them an opportunity to engage in discussions." *Cf.* UCF-Br. 53. It would merely stop the University from using the JKRT to "track, log, investigate, threaten, contact, refer, or punish" the students who are accused of "bias-related incidents." Doc. 3-6. And time is of the essence for Students A, B, and C, despite the University's attempts to relitigate the motion to expedite. *Cf.* UCF-Br. 52. Even ignoring their impending graduation, the University offers no reason why *any* students at the University should "continue holding their First Amendment rights in abeyance" any longer than absolutely necessary. *Otto*, 981 F.3d at 871.

CONCLUSION

This Court should reverse the district court and enter a preliminary injunction barring the University from enforcing its discriminatory-harassment policy and its bias-related incidents policy.

Dated: October 29, 2021

Respectfully submitted,

/s/ Cameron T. Norris

J. Michael Connolly
Cameron T. Norris
James F. Hasson
Daniel Shapiro
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
(703) 243-9423
mike@consovoymccarthy.com
cam@consovoymccarthy.com
james@consovoymccarthy.com
daniel@consovoymccarthy.com

Counsel for Speech First, Inc.

CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7)(B) because it contains 6,402 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: October 29, 2021 */s/ Cameron T. Norris*

CERTIFICATE OF SERVICE

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

Dated: October 29, 2021 */s/ Cameron T. Norris*