IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SPEECH FIRST, INC., *Plaintiff*, v. RENU KHATOR, *et al.*, *Defendants*.	Case No. 4:22-cv-582 **Oral Hearing Requested**

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

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INTRODUCTION

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Healy v. James*, 408 U.S. 169, 180 (1972). "The college campus" is supposed to "serve as a marketplace of ideas and a forum for the robust exchange of different viewpoints." *Solid Rock Found. v. Ohio State Univ.*, 478 F. Supp. 96, 102 (S.D. Ohio 1979).

Yet the University of Houston recently adopted a policy against "harassment" that punishes students for speech that addresses some of the most important political and social issues of the day. The University's harassment policy disciplines students whose speech concerns controversial subjects like "race," "gender identity or status," and "religion" if the speech "unreasonably interferes" with a person's education or creates an "intimidating, hostile, or abusive" environment. Students can engage in harassment through "negative stereotyping," "denigrating jokes," and even "microaggressions" if "they keep happening over time."

Plaintiff Speech First seeks a preliminary injunction to protect the First Amendment rights of its members, who are current students at the University. Speech First is likely to prevail on the merits of its constitutional challenge because the harassment policy's overbroad, content-based, and viewpoint-based restrictions violate the First Amendment. Because Speech First readily satisfies the remaining criteria for a preliminary injunction, the Court should grant its motion and preliminarily enjoin the University from enforcing the policy.

BACKGROUND

I. The University's Harassment Policy

On December 27, 2021, the University issued Policy No. 01.D.07, titled "Anti-Discrimination." *See* Hasson Decl., Ex. A. The policy prohibits students from engaging in "harassment." *Id.* at 3-5. The policy defines "harassment" as "[s]ubjecting an individual on the basis of their membership in a Protected Class to unlawful severe, pervasive, or persistent treatment that is:

- Humiliating, abusive, or threatening conduct or behavior that denigrates or shows hostility or aversion toward an individual or group;
- An intimidating, hostile, or abusive learning, living, or working environment, or an environment that alters the conditions of learning, living, or working; or
- An unreasonable interference with an individual's academic or work performance."

Id. at 3. The policy defines "Protected Class" as a class of persons who are protected "on the basis of race, color, sex (including pregnancy), genetic information, religion, age (over 40), national origin, disability, veteran status, sexual orientation, gender identity or status, gender expression, or any other legally protected status." *Id.*

The policy's "[e]xamples of harassment" include pure speech. The examples "include but are not limited to: epithets or slurs, negative stereotyping, threatening, intimidating, or hostile acts, denigrating jokes[,] and display or circulation (including through email or virtual platforms) of written or graphic material in the learning, living, or working environment." *Id.* at 6. Under the policy, even "[m]inor verbal and

nonverbal slights, snubs, annoyances, insults, or isolated incidents including, but not limited to microaggressions," can constitute harassment if "such incidents keep happening over time and are targeting a Protected Class." *Id.* at 6. The Policy warns that "academic freedom and freedom of expression will not excuse behavior that constitutes a violation of the law or this Policy." *Id.* at 1.

The University claims broad "jurisdiction" to punish harassment. *Id.* at 4. Students can commit harassment "on the University's Premises, at University-Affiliated Activities, and ... off University Premises [if the speech occurs] between two University-Affiliated individuals." *Id.* at 4. Both students and "bystanders" can file reports of alleged harassment. *Id.* at 2. These complaints can be submitted anonymously. *Id.* at 8. And a University employee who "fails" to report suspected violations of the harassment policy "may be found to have violated [the] Policy, even if the underlying event does not constitute ... Harassment." *Id.* at 7.

The policy imposes disciplinary procedures and sanctions on students who are accused or found guilty of harassment. *Id.* at 12-24. If a student is found to have violated the policy, he will receive sanctions from the Dean of Student's office, with punishments ranging from disciplinary probation to suspension or expulsion. *Id.* at 22. Further, the University reserves the right to take "appropriate action(s) to resolve" complaints of harassment in "addition to sanctions that may be imposed pursuant to" the policy. *Id.* at 23.

The Student Code of Conduct confirms that violating the Policy is "prohibited conduct." Hasson Decl., Ex. B at 2-3, 6 (§§1.6, 3.32). The Student Code of Conduct also prohibits "complicity," meaning students cannot "through act or omission, assist another student, individual, or group in committing or attempting to commit a violation" of the policy. *Id.* at 3. Any student who has "knowledge of another committing or attempting to commit" harassment must "remove themselves from the situation" or face discipline. *Id.*

The University acknowledges that the policy prohibits a broad swath of protected speech. In April 2021, the University's Deputy General Counsel, Jeffrey Palmer, spoke to a group of students about the policy. Hasson Decl., ¶7. Despite acknowledging that "hate speech" is protected by the Constitution, Palmer stated:

> So, you might say to yourself, well, does that mean I can go out and say anything I want against any race, gender or religion? And the answer is no with regards to the University, right? Because we have policies, we have an anti-discrimination policy and anti-harassment policy so, presumably if you're saying something about a race, a religion, a gender, you're probably violating that policy. You're probably also violating the code of conduct. So that's where, even though it's protected under free speech, it actually ... isn't permitted by the University.

Id. Palmer's speech is available on the University's intranet system and can be accessed by any student, faculty member, or University employee. *Id.* Speech First's members, like other students at the University, have watched it. Trump Decl. ¶8.

II. Speech First and This Litigation

Plaintiff, Speech First, is a nationwide membership organization dedicated to preserving human and civil rights secured by law, including the freedom of speech.

Trump Decl. ¶2. Speech First protects the rights of students at colleges and universities through litigation and other lawful means. Trump Decl. ¶2. Speech First has successfully vindicated students' rights at the University of Michigan, the University of Texas, the University of Illinois, Iowa State, the University of Central Florida, and Virginia Tech. *Court Battles*, Speech First, bit.ly/3usoh4s; *see, e.g., Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020); *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019).

Speech First has members who currently attend the University, including Students A, B, and C. Trump Decl. ¶¶3-4. These students' views are "unpopular, controversial, and in the minority on campus." *E.g.*, Student A Decl. ¶4. For example, Student A believes that "affirmative action in college admissions is racist and fundamentally un-American" and that gay marriage is a "slippery slope" that could "lead to society being forced to accept marriages among multiple people or something even worse." Student A Decl. ¶¶5, 9. Student B is strongly opposed to illegal immigration and believes that "no one has the 'right' to come to this country illegally and take jobs from American citizens," that "[i]llegal immigrants should not be eligible for government benefits and in-state tuition," and that "we need to deport those who are living in the country illegally." Student B. Decl. ¶5. Student C opposes "allowing biologically male athletes who identify as female to compete in women's sports" because "[m]en and women have innate physiological differences." Student C Decl. ¶5. For the same reason, Student C does "not want to be forced to 'affirm' that a man is really a 'woman' just because he decides to identify as one." *Id.* at ¶6.

Students A, B, and C want to "engage in open and robust intellectual debate" with their fellow students in class, online, and in the broader community. Student A Decl. ¶12; Student B Decl. ¶10; Student C Decl. ¶11. When other students express opposing views on topics like affirmative action, immigration, or gender identity, Students A, B, and C want to "point out the flaws" in their arguments and convince them to change their minds. Student A Decl. ¶13; Student B Decl. ¶11; Student C Decl. ¶12. Students A, B, and C "want to speak directly to [their] classmates about these topics" and "talk frequently and repeatedly on these issues." Student A Decl. ¶14; Student B Decl. ¶13; Student C Decl. ¶13. Given their views, Students A, B, and C "know that many of these conversations will be heated and passionate," but they "want to have these conversations" anyway "because [they] feel strongly about these issues." Student A Decl. ¶14; Student B Decl. ¶13; Student C Decl. ¶13.

But Speech First's members do not fully express their beliefs, discuss certain topics, or otherwise engage in protected speech because they know about the harassment policy and do not want to face the negative repercussions. Student A Decl. ¶¶15-16; Student B Decl. ¶¶12-13; Student C Decl. ¶¶13-14. Their reluctance to speak is further magnified by the fact that they can be punished just for being present during another student's misconduct and "fail[ing]" to "remove" themselves from the situation while it occurs. Student A Decl. ¶16; Student B Decl. ¶14; Student C Decl. ¶15.

ARGUMENT

Speech First is entitled to a preliminary injunction if four things are true:

1. It is "likely to succeed on the merits."
2. It is "likely to suffer irreparable harm in the absence of preliminary relief."
3. The "balance of equities tips in [its] favor."
4. And an injunction "is in the public interest."

Pendergest-Holt v. Certain Underwriters at Lloyd's of London, 600 F.3d 562, 568 (5th Cir. 2010). In free-speech cases, the first factor is decisive. When a policy likely violates the First Amendment, the remaining factors necessarily favor a preliminary injunction. *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013); *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009). That's the case here.

I. Speech First is likely to prevail on the merits.

The First Amendment "reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). Its protections are strongest on the campuses of public colleges and universities. *See Healy*, 408 U.S. at 180; *Sweezy v. N.H. ex rel. Wyman*, 354 U.S. 234, 250 (1957). Universities that try to police speech that is "biased," "hateful," "harassing," or "discriminatory" thus have a poor track record in court. A "consistent line of cases" has "uniformly found" these "campus speech codes unconstitutionally overbroad or vague." *Fenves*, 979 F.3d at 338-39 & n.17 (collecting ten cases); *see also* Hasson Decl., Ex. C at 19 & n.50 (collecting cases). The University's harassment policy is no different.

The Supreme Court instructed universities how to regulate discriminatory harassment in *Davis v. Monroe County Board of Education*. There, 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. at 633. At the same time, the Court adopted a narrow definition of actionable "harassment" under Title IX. The harassment must be "so severe, pervasive, *and* objectively offensive that it *denies* its victims the equal access to education." *Id.* at 652 (emphases added). By imposing this stringent definition, the *Davis* standard ensures that schools regulate harassing conduct, not speech.

The *Davis* standard was deliberately crafted to protect free speech. Writing for the dissent, 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." *Id.* 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 majority 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").

Notably, *Davis* refused to adopt the definition of workplace harassment from Title VII. While actionable harassment under Title VII can be "severe *or* pervasive," students are not employees and Title IX's "severe *and* pervasive" standard reflects the greater First Amendment concerns on campus. *Davis*, 526 U.S. at 631 (distinguishing *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)). The Education Department recently reached the same conclusion when it adopted a notice-and-comment rule that defines harassment under Title IX. The definition of harassment, the rule explains, must track *Davis* "verbatim" because any lesser standard "weaken[s]" the "protection of free speech and academic freedom" on college campuses. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026, 30,155 n.680 (May 19, 2020); *see also id.* at 30,149 (noting that the Court "repeated the 'severe and pervasive' formulation five times"). The Fifth Circuit, too, has recognized this distinction.[1]

Policies that fail to honor the line drawn by *Davis* are unconstitutionally overbroad because they sweep in "a substantial amount of speech that is constitutionally protected." *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). There is no

[1] *See, e.g.*, *I.F. v. Lewisville Indep. Sch. Dist.*, 915 F.3d 360, 373 (5th Cir. 2019) (analyzing Title IX claim under severe *and* pervasive standard); *Bruce v. Wigley*, 273 F.3d 393 (5th Cir. 2001) (same); *Doe v. Columbia-Brazoria Indep. Sch. Dist. by & through Bd. of Trustees*, 855 F.3d 681, 689 (5th Cir. 2017) (same); *Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 409 (5th Cir. 2015) (noting that harassment under Title IX only applies to "severe, pervasive and objectively offensive" conduct, and applying same standard to claims under Title VI); *Sewell v. Monroe City Sch. Bd.*, 974 F.3d 577, 584 (5th Cir. 2020) (applying severe *and* pervasive standard to both Title VI and Title IX claims).

First Amendment exception for "harassing" or "discriminatory" speech. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 210 (3d Cir. 2001); *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017). Thus, harassment policies that regulate *speech* instead of *conduct* run afoul of the First Amendment.

Moreover, policies that regulate offensive speech impose "'content-based, viewpoint-discriminatory restrictions.'" *Saxe*, 240 F.3d at 206. It is "a core postulate of free speech law" that the government cannot punish speech "based on the ideas or opinions it conveys." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019). "Where pure expression is involved," anti-discrimination law "steers into the territory of the First Amendment." *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596 (5th Cir. 1995). That principle applies to polite and offensive speech alike. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.").

The University's harassment policy suffers from these defects and likely violates the First and Fourteenth Amendments. While universities can regulate harassing *conduct*, the University concedes that its policy regulates speech—including, but "not limited to" "negative stereotyping," "denigrating jokes," and "display or circulation (including through e-mail or virtual platforms) of written or graphic material." Ex. A at 6. In fact, the policy explicitly targets speech on the most controversial issues of the day, including "race," "sex," "gender identity," "political affiliation," and "religion." Ex. A at 3. The

policy thus "strikes at the heart of moral and political discourse—the lifeblood of constitutional self-government (and democratic education) and the core concern of the First Amendment." *Saxe*, 240 F.3d at 210.

The University also makes no pretense of complying with *Davis*. Instead of prohibiting "severe *and* pervasive" harassment, it prohibits "severe *or* pervasive" harassment; and instead of requiring the harassment to *deny* someone's education, it requires that the harassment merely "alter[]" someone's education, "interfer[e] with someone's education," or "sho[w] … aversion" to some person or group. *Compare Davis*, 526 U.S. at 652, *with* Ex. A at 3. These deviations are intentional. The University tells students that "[m]inor verbal and nonverbal slights, snubs, annoyances, [or] insults ... including, but not limited to microaggressions" can be punishable if they "keep happening over time." Ex. A at 6. Likewise, by subjecting students to discipline for an isolated expression, if sufficiently "severe," *see* Ex. A at 3, the University ignores the Court's admonition that a "single instance" of offensive speech cannot constitute punishable harassment. *See Davis*, 526 U.S. at 652-53.

By defining harassment more broadly than *Davis*, the University's policy sweeps in protected speech and then imposes content- and viewpoint-based restrictions on that speech. The Fifth Circuit has long held that when anti-harassment policies reach speech, they "impose[] content-based, viewpoint-discriminatory restrictions." *DeAngelis*, 596 F.3d at 59-97. So too here. The University's policy does not bar "harassment" alone; it bars "harassment" conducted "on the basis of" various "protected class[es]" (*e.g.*, race,

sex, religion, and political affiliation). Ex. A at 3. This is content discrimination because the University allows harassment that is not "addressed to one of the specified disfavored topics." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992). And it is viewpoint discrimination because the University is targeting speech on these topics that discriminates or offends. *Id.* at 391-93; *Iancu*, 139 S. Ct. at 2300; *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1184-85 (6th Cir. 1995).

The University has no legitimate interest in drafting its policy this way. *R.A.V.*, 505 U.S. at 395-96; *IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 393 (4th Cir. 1993). A policy that adopted the *Davis* standard verbatim, or a policy that banned harassment writ large (rather than only the protected classes), would be narrower and solve all of the University's legitimate concerns. In fact, the University already has a *separate* policy on Title IX harassment that adopts the *Davis* standard verbatim. Hasson Decl., Ex. D at 32.

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

Because Speech First is likely to prevail on its constitutional claims, the other criteria for a preliminary injunction are necessarily satisfied.

Irreparable Harm: The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *accord Texans for Free Enter.*, 732 F.3d at 539.

Balance of Harms and Public Interest: Because the University is a state actor, the third and fourth requirements for a preliminary injunction—damage to the

opposing party and public interest—are established when there is a likely First Amendment violation. In such cases, "the only harm" to the State "is the inability to ... violat[e] the First Amendment, which is really no harm at all." *McDonald v. Longley*, 4 F.4th 229, 255 (5th Cir. 2021). And "injunctions protecting First Amendment freedoms are always in the public interest." *Texans for Free Enter.*, 732 F.3d at 539.

III. The Court should decline to require an injunction bond.

Federal courts have broad "discretion" to "elect to require no security at all" when issuing a preliminary injunction. *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996). When "there is no risk of monetary loss to the defendants as a result of [a] preliminary injunction," courts frequently grant "request[s] that the bond be waived." *Gordon v. City of Houston, Tex.*, 79 F. Supp. 3d 676, 695 (S.D. Tex. 2015). No bond is needed here. "Courts often waive the security requirement when the plaintiff [is] vindicating constitutional rights." *Thomas v. Varnado*, 511 F. Supp. 3d 761, 766 n.1 (E.D. La. 2020). Bonds are usually reserved for situations, unlike this one, where a "wrongfully enjoined" party will incur "damages." *Id.* at 766. Waiving the bond requirement is particularly appropriate since Speech First is likely to succeed on the merits and Defendants will incur no harm from an injunction that stops them from violating the Constitution. *Id.*

CONCLUSION

The Court should grant Speech First's motion and preliminarily enjoin Defendants from enforcing the harassment policy during this litigation.

Dated: February 28, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 28, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will automatically send e-mail notification to all counsel of record.

Because Defendants have not yet entered an appearance, I am also serving the foregoing by email on Dona Hamilton Cornell, the Vice President for Legal Affairs and General Counsel for the University of Houston System.

/s/ James F. Hasson
James F. Hasson

CERTIFICATE OF CONFERENCE

I certify that on February 28, 2022, Plaintiff's counsel conferred with counsel for Defendants, who represented that Defendants are opposed to this motion.

/s/ James F. Hasson
James F. Hasson