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

SPEECH FIRST, INC., *Plaintiff*, v. TIMOTHY SANDS, in his individual capacity and official capacity as President of Virginia Polytechnic Institute and State University, *et al.*, *Defendants*.	Case No. 7:21-cv-00203-MFU **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). But Virginia Tech and its officials have created a series of rules and regulations that restrain, deter, suppress, and punish speech about the political and social issues of the day. These restrictions disregard decades of precedent. Four are particularly egregious.

First, the University's discriminatory-harassment policy disciplines students who engage in "oral, written, graphic, electronic or physical" conduct that is based on a person's "age, color, disability, gender (including pregnancy), gender identity, gender expression, national origin, political affiliation, race, religion, sexual orientation, or veteran status" and that "unreasonably interferes with the person's work or academic performance or participation in university activities" or "creates a working or learning environment that a reasonable person would find hostile, threatening or intimidating." According to the University, discriminatory harassment includes "telling unwelcome jokes about someone's identity" and "[u]rging religious beliefs on someone who finds it unwelcome." This vague and overbroad restriction on protected speech violates the First and Fourteenth Amendments.

Second, the University's computer policy forbids students from using its network for "partisan political purposes." It also prohibits students from violating "the rights of others to be free of intimidation, harassment, and unwarranted annoyance." Violations of the computer policy can lead to the loss of computer or network privileges and formal discipline. This policy is a vague, overbroad restriction on protected speech that is incompatible with the First and Fourteenth Amendments.

Third, the University's bias-related incidents policy martials the authority of University administrators to police speech that others believe is motivated by bias. "Bias-related incidents" are

formally defined as "expressions against a person or group because of the person's or group's age, color, disability, gender (including pregnancy), gender identity, gender expression, genetic information, national origin, political affiliation, race, religion, sexual orientation, veteran status, or any other basis protected by law." Bias-related incidents can occur on or off campus, including on social media and other digital platforms. Students accused of "bias-related incidents" can be referred for formal discipline or summoned for "educational interventions" with University officials. Bias-response teams like Virginia Tech's, in effect and by design, are "the clenched fist in the velvet glove of student speech regulation." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 338 (5th Cir. 2020). Their bureaucratic processes—and the vague, overbroad definition of "bias-related incident" that triggers them—violate the First and Fourteenth Amendments.

Fourth, the University's "informational activities" policy forbids students from "distribut[ing] literature and/or petitioning for signatures" on campus without prior written authorization from the University—authorization that is granted only when events are "sponsored by a university-affiliated organization." This policy is an unconstitutional prior restraint and speaker-based regulation that violates the First Amendment.

Speech First will likely prevail on the merits of these constitutional claims. Its members, who are current students at the University, want to engage in speech that is prohibited by the University's policies but refrain from doing so because they fear punishment. Because Speech First readily satisfies the remaining criteria for a preliminary injunction, this Court should grant its motion and preliminarily enjoin the challenged policies.

BACKGROUND

The University regulates its students in several ways. Four of those policies cross the constitutional line: the discriminatory-harassment policy, computer policy, bias-related incidents policy, and information-activities policy.

I. The University's Discriminatory-Harassment Policy

On August 13, 2020, the University Board of Visitors approved a revised version of Policy 1025, titled Policy on Harassment, Discrimination, and Sexual Assault. Norris Decl. Ex. A at 1. According to the University, the purpose of Policy 1025 is to "create consistency across the University in addressing conduct that runs contrary to University values." Ex. B at 5. During an October 2020 meeting, the University stated that the goal of Policy 1025 is to require behavior that aligns with the University's values and prohibit behavior that doesn't. Ex. B at 6. The agenda for the meeting included the following question: "Values: what should Policy 1025 prohibit and require (beyond compliance obligations)?" Ex. B at 6.

Policy 1025 bans "discriminatory harassment." Ex. A at 1. It defines such harassment as "[c]onduct of any type (oral, written, graphic, electronic, or physical) that is based upon a person's age, color, disability, sex (including pregnancy), gender, gender identity, gender expression, genetic information, national origin, political affiliation, race, religion, sexual orientation, or veteran status" and that "unreasonably interferes with the person's work or academic performance or participation in university activities, or creates a working or learning environment that a reasonable person would find hostile, threatening, or intimidating." Ex. A at 4. Examples of "discriminatory harassment" include "mistreating someone," "telling unwelcome jokes," "putting down people," and "urging religious beliefs on someone." Ex. C at 1.

According to the University, discriminatory harassment can occur virtually anywhere, at any time, by any medium. The policy applies to "on-campus incidents and off-campus incidents that cause continuing effects on campus." Ex. A at 1. It authorizes "students or employees, or others on their behalf," to file complaints "alleging discrimination or discriminatory harassment … carried out by faculty, staff, other students, or third parties." Ex. A at 1-2. The Code of Conduct disavows any "time limit" for students to report an alleged violation to the University. Ex. D at 14. University

"[a]dministrators, supervisors, and those with instructional responsibility" have a duty to report incidents of discriminatory harassment "whenever they learn—directly or indirectly—about [them]." Ex. A at 2.

Students can make discriminatory-harassment allegations by filing a complaint with the University's Office of Equity and Accessibility (OEA)—specifically, by using the Equity & Accessibility Complaint Form on the University's website. The form asks complainants to describe the alleged harassment and explain how they want OEA to resolve the complaint. The form allows students to upload "[p]hotos, video, email, and other supporting documentation" for their complaint. Ex. E at 4. After a student files a complaint, OEA reviews the allegations and conducts an investigation. Students who are found guilty of discriminatory harassment are subject to disciplinary action via the student-conduct process outlined in the Code of Conduct. Ex. D at 14-22.

Depending on the nature of the alleged incident, the University can resolve the case through "agreed resolution" or a formal hearing. Ex. D at 15-16. Under agreed resolution, "the respondent meets with a hearing office to discuss an incident and collaborates with the hearing officer to determine whether they violated a policy and, if so, what sanctions may be appropriate." Ex. D at 15. If the student does not agree with the hearing officer's determination or suggested sanctions, the matter proceeds to a formal hearing. Ex. D at 15. Students who are found liable for discriminatory harassment are subject to the full range of formal disciplinary sanctions. *See* Ex. D at 14-22. Even when the University "determines that adjudication is not appropriate," it can invite the students involved "to participate in an educational conversation about the concerns raised in the complaint." Ex. D at 16-17.

On top of forbidding students from engaging in discriminatory harassment, the Code of Conduct penalizes students for being present "during any violation of the Student Code of Conduct and/or other university policies in such a way as to condone, support, or encourage that violation."

Ex. D at 12. The Code of Conduct emphasizes that students who "anticipate or observe a violation of university policy are expected to remove themselves from participation and are encouraged to report the violation" to University authorities. Ex. D at 12.

II. The University's Computer Policy

The University also regulates what students can say on the internet. Students must comply with the University's Acceptable Use Standard to maintain access to the network. The Acceptable Use Standard "applies to the use of any computing or communications device, regardless of ownership, while connected to the University network, and to the use of any information technology service provided by or through the University." Ex. F at 1. The policy states that students "must NOT … use university systems for commercial or partisan political purposes, such as using electronic mail to circulate advertising for products or for political candidates." Ex. F at 1.

Further, in October 2020, the University promulgated a revised version of Policy 7000, titled Acceptable Use and Administration of Computer and Communication Systems. Policy 7000 governs "every individual using … Virginia Tech computer and communication networks, systems, and/or data with any device." Ex. G at 1. Policy 7000 requires students to abide by the Acceptable Use Standard. Ex. G at 1. It also requires students to "demonstrate respect of … the rights of others to be free of intimidation, harassment, and unwarranted annoyance." Ex. G at 1. Policy 7000 does not elaborate on the terms "intimidation" "harassment," or "unwarranted annoyance."

Suspected violations of Policy 7000 can be reported to the University via email. Ex. G at 2. When the University receives a report, it "automatically generates a ticket and follow[s] up on the report. Alleged violations are then referred to the appropriate University office or law enforcement agency for further investigation." Ex. G at 2. The University also reserves the right to suspend a student's network access while it investigates an alleged violation. Ex. G at 2.

The University considers "any violation" of Policy 7000 to be "a serious offense." Ex. G at 2. Students accused of violating the policy are "subject to established university disciplinary policies and procedures." Ex. G at 2. Under the policy, students "who use information technology resources in ways that violate a University policy, law(s), regulations, … or an individual's rights" are "subject to limitation or termination of user privileges/access to services and appropriate disciplinary action, legal action, or both." Ex. G at 2.

III. The University's Bias-Related Incidents Policy

The University also monitors speech through its "bias-related incidents" policy. The University formally defines bias-related incidents as "expressions against a person or group because of the person's or group's age, color, disability, gender (including pregnancy), gender identity, gender expression, genetic information, national origin, political affiliation, race, religion, sexual orientation, veteran status, or any other basis protected by law." Ex. H at 4.

Bias-related incidents can occur on or off campus, including on social media. *See* Ex. I at 4. Examples of bias-related incidents include "words or actions that contradict the spirit of the Principles of Community," "jokes that are demeaning to a particular group of people," "assuming characteristics of a minority group for advertising," and "posting flyers that contain demeaning language or images." Ex. H at 4.

Students can submit complaints about bias incidents on the University's website via a "Bias Incident Reporting Form." Ex. I at 1. Complainants are not required to identify themselves or provide their email addresses or phone numbers. The intake form asks students to specify the date and location of the alleged incident and to "list all involved parties." Ex. I at 2-3. It contains entries for the respondent's name, role in a student organization (if any), email address, and Virginia Tech student ID number. Ex. I at 2-3. It also contains an option to include additional respondents, if applicable. Ex. I at 3.

The form requires complainants to describe the incident and provides an option to include "supporting documentation." Ex. I at 4-5. Complainants can choose from a list of twelve personal characteristics as the alleged basis for the bias-related incident. Ex. I at 3-4. They also have the option to select "other" and elaborate on the basis for their complaint. Ex. I at 4.

The form also asks complainants to select at least one of nineteen options describing "the nature of the incident." Ex. I at 4. The various categories recognized by the University include: "Comment in Class or Assignment"; "Comment in Person"; "Comment in Writing or on Internet"; "Comment via Email/Text"; "Comment via Phone/Voicemail"; "Emotional Attack/Assault"; "Intimidation"; "Verbal Attack/Assault"; and "Written Slur." Ex. I at 4.

University records reveal that the vast majority of bias-incident reports involve protected speech. "Bias-related incidents" reported to the University during the Fall 2018 semester included:

- A report that the words "Saudi Arabia" were written on a whiteboard outside of a student's dorm room. According to the report, the rest of the words on the whiteboard had either been erased or were illegible. Nevertheless, the complainant alleged bias based on "national or ethnic origin." Ex. J at 22.

- A report that a student in a University residence hall overheard several male students privately "talking crap about the women who were 'playing' in [a] snowball fight." The witness "could not remember exact quotations," but stated that "the young men said that the young ladies in the snowball fight were not athletic." The complaint alleged "discrimination" and "harassment" based on "gender." Ex. J at 26.

- A report that a student told a joke that included "Caitlyn Jenner's deadname" during a classroom "lecture about common abnormalities and issues of corn." The complaint alleged "discrimination" on the basis of "gender identity." Ex. J at 29.

The University attempts to "be both proactive and responsive" to allegations of bias-related incidents. Ex. K at 1. It usually responds to complaints "within 24 hours." Ex. W at 3. The "university investigates, adjudicates, and advocates for students" when it receives a complaint about a bias-related incident "so that all parties are aware of their rights, responsibilities, and the expectations of the university community." Ex. H at 3.

Complaints about bias-related incidents are directed to the Office of the Dean of Students (DOS). Ex. H at 5. DOS will "record exactly what was said" and "include bystander names" in its summary of the incident. Ex. H at 7. DOS will then "record the incident within the secure DOS Reporting System" and refer reports to the "Virginia Tech or Blacksburg Police Department," the University "Threat Assessment Team," or the "Student Conduct Office" for an "appropriate response, if needed." Ex. H at 5.

DOS reviews complaints "using the following questions … to determine if the behavior described is bias-related": "Does it seem the incident is bias-motivated? Does it violate university policy? Does it violate the shared values and expectations of university community members? Who is affected by the incident? Are there legal consequences? Might the incident be investigated as a hate crime?" Ex. H at 4.

The University separates bias-related incidents into two categories: "localized" bias incidents and "community" bias incidents. "Localized" bias incidents are seen or heard by few people, do not involve violations of a university policy, do not generate interest from the media, and cannot be investigated as hate crimes. Ex. H at 4. "Community" bias incidents, by contrast, are seen or heard by many people, involve violations of university policies, generate media interest "or interest from outside the university community," and can be investigated as hate crimes. Ex. H at 4.

When DOS determines that a "localized" bias-related incident has occurred, "the administrator closest to the incident will address the issue, facilitate a response that resonates with the student or group of students involved, and issue a community statement if appropriate." Ex. H at 6. In such instances, DOS refers the complaint "to the appropriate offices for follow-up." Ex. K at 1. For example, "[i]f the behavior described is an issue between roommates that would impact their living situation or the experience in our residence halls, it would be referred to Housing and Residence Life." Ex. K at 1.

When DOS determines that a "community" bias-related incident has occurred, it forms a "Core Response Team" to address the issue "as soon as feasible." Ex. H at 6. The Core Response Team can include DOS; officials from the "Virginia Tech or Blacksburg Police Department"; the Student Conduct Office; the Intercultural Engagement Center; the Office of House and Residence Life; "[d]epartments where the incident occurred"; and students or student organizations "targeted" by the incident. Ex. H at 6. The Core Response Team can then act by, among other things, discussing the "process of adjudication with the reporting student," determining "if disciplinary action is appropriate," providing "regular status reports to [the] reporting student(s) until [the] case is closed," and implementing "appropriate restorative justice techniques or methods." Ex. H at 6-7.

According to the University, all students "involved" in a bias-related incident are "given the opportunity to civilly discuss the incident with a trained professional and will be apprised of their options for resolving the incident." Ex. H at 8. Even when bias-related incidents involve protected speech and do not rise to the level of a crime or violate some other University policy, the University still views them as "inconsistent with [its] Principles of Community." Ex. H at 7. The University believes it is "crucial" to respond to bias-incident reports "in a timely and consistent manner." Ex. H at 8. No matter what, the University "is committed to stopping" such incidents. Ex. H at 8.

The University refers to this entire scheme of reporting, investigating, and responding as "the bias-related incident protocol." Ex. H at 1. It brands this protocol "See Something? Say Something!"—borrowing the Department of Homeland Security's famous program regarding terrorism. Ex. K; *see generally If You See Something, Say Something*, DHS, dhs.gov/see-something-say-something (last visited April 12, 2021). The University tells students to "[b]e aware of words, images, and situations that suggest all or most of a group are the same"; to "[a]void qualifiers that reinforce stereotypes"; to "[b]e aware of language that has questionable racial, ethnic, class, or sexual orientation connotations"; to "[a]void patronizing language and tokenism toward any group"; and to "[r]eview

language, images, and other forms of communication to make sure all groups are fairly represented." Ex. H at 8. The protocol also informs students that, "[w]hile a word or phrase may not be personally offensive to you, it may be to others." Ex. H at 8.

The University promotes the bias-related incidents protocol and encourages students and professors to report "bias-related incidents." Ex. K at 1. A DOS webpage "encourage[s]" students "to make a report" if they "hear or see something that feels like a bias incident statement or expression," even if they are "unsure." Ex. K at 1. The webpage adds, "[i]n short, if you see something, say something!" Ex. K at 1. In February 2017, the University's official Twitter account tweeted "[b]ias has no place at Virginia Tech. Help us make sure all #Hokies thrive. See something? Say something." Ex. L. The tweet included a link to the University webpage informing students how to file bias-related incident complaints. Ex. L.

A campus notice in the *Virginia Tech Daily* similarly promoted the "See Something? Say Something" campaign in a release titled "Students encouraged to report incidents of bias." Ex. M at 1. After COVID-19 made the University switch to a remote-learning format in Spring 2020, the University reminded professors that they should report students "via an online reporting form" if they "observe or experience what [they] believe to be bias-related incident[s]." Ex. N at 3. In a similar message addressed to the student body, senior University administrators encouraged students to "contact the Dean of Students with concerns about bias-related incidents." Ex. O at 2.

The University's continuous promotion of its bias-incident reporting system has had an effect. Twenty-nine bias incident complaints were filed in the Spring 2017 semester. Ex. P. That number increased to 35 reports in the Fall 2017 semester, Ex. Q; 37 reports in the Spring 2018 semester, Ex. R; and 52 reports in the Fall 2018 semester, Ex. S.

IV. The University's Informational-Activities Policy

On August 25, 2020, the University issued the latest version of Policy 5215, titled Sales, Solicitation, and Advertising on Campus. Ex. T. Policy 5215 imposes a number of restrictions on students' ability to advertise events, gather petitions, and distribute informational literature. Violations of the policy "are actionable under the Student Code of Conduct" and can lead to "sanction[s]." Ex. H at 13.

Policy 5215 requires students to obtain "prior written authorization" before engaging in "informational activities." Ex. T at 1. It then defines "informational activities" as "the distribution of literature and/or petitioning for signatures where no fee is involved nor donations or contributions sought." Ex. T at 1. When making "[d]ecisions regarding requests" to distribute literature or petition for signatures, University officials "take into account overall campus safety and security, any special circumstances relating to university activities, and the impact such activity may have on the university." Ex. T at 1.

In addition to requiring prior authorization, Policy 5215 prohibits "informational activities" that are not "sponsored by a university-affiliated organization." Ex. T at 3. In other words, students who are not sponsored by a University-affiliated organization cannot distribute literature or petition for signatures on campus.

V. 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. Neily Decl. ¶2. Speech First protects the rights of students at colleges and universities through litigation and other lawful means. Neily Decl. ¶2. Speech First has successfully vindicated students' rights at the University of Michigan, the University of Texas, the University of Illinois, and Iowa State University. *Court Battles*, Speech First, bit.ly/3usoh4s (last accessed on April 12, 2021).

Speech First has several members who currently attend the University, including Students A, B, and C. Neily 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 "Black Lives Matter has had a terrible impact on society" 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. ¶¶6, 9. Student B believes that "a person is either a male or a female" and that "it's terrible that some men are allowed to play women's sports because they claim to be women." Student B. Decl. ¶8. Student C believes "we need a border wall and border security," that "[w]e can't have a country without borders," and that "illegal immigrants" must be stopped from "crossing the border daily and . . . getting welfare without paying taxes." Student C Decl. ¶9.

Students A, B, and C want to "engage in open and robust intellectual debate" with their fellow students and to "speak passionately and repeatedly" about these issues in class, online, and in the broader community. Student A Decl. ¶13; Student B Decl. ¶13; Student C Decl. ¶12. But they do not fully express their beliefs, discuss certain topics, or otherwise engage in protected speech because they know about the University's policies and do not want to face the negative repercussions. Student A Decl. ¶¶15-20; Student B Decl. ¶¶14-19; Student C Decl. ¶¶14-19. 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 appearing to "condone, support, or encourage" it. Student A Decl. ¶17; Student B Decl. ¶17; Student C Decl. ¶16.

Students A, B, and C are not alone. Tellingly, only twenty percent of Virginia Tech students who responded to a recent Gallup survey said they felt comfortable expressing ideas in class that "are probably only held by a minority of people." Ex. Y. Indeed, after Speech First filed this lawsuit, Professor Matthew Gabriele, a Virginia Tech tenured professor and the Chair of the Department of Religion and Culture, publicly called Students A, B, and C "conservative shitbags" who were "suing

the school because they're bigots." Ex. V. The message to students is clear: certain viewpoints are not welcome at Virginia Tech.

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 will 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."

Roe v. Dep't of Def., 947 F.3d 207, 219 (4th Cir. 2020). 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. *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 191 (4th Cir. 2013). 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); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 863 (E.D. Mich. 1989); *Solid Rock*, 478 F. Supp. at 102. 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" such "campus speech codes unconstitutionally overbroad or vague." *Fenves*, 979 F.3d at 338-39 & n.17 (collecting ten cases).

These policies are 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 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). So policies that

regulate this 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).

Further, these policies are often void for vagueness. The Due Process Clause prohibits policies that use terms so vague that individuals of "ordinary intelligence" have "no reasonable opportunity to know what is prohibited," that lack "explicit standards," or that encourage "ad hoc," "subjective" enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). This prohibition is even "more stringent" for policies, like college speech codes, that affect "the right of free speech." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). Speech codes that rely on loose, subjective standards are void for vagueness because students cannot know in advance (and administrators can arbitrarily decide) what's prohibited. *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971); *McCauley v. Univ. of V.I.*, 618 F.3d 232, 250-51 (3d Cir. 2010).

The policies challenged here suffer from these same defects. The University's discriminatory-harassment policy, computer policy, bias-related incidents policy, and informational-activities policy likely violate the First and Fourteenth Amendments.

A. The discriminatory-harassment policy is an overbroad, vague, viewpoint discriminatory restriction on speech.

The University's discriminatory-harassment policy is overbroad. While universities can regulate harassing *conduct*, the University concedes that its policy regulates speech—"oral, written, graphic, [and] electronic" expression. Ex. A. In fact, the policy explicitly targets speech on the most controversial issues of the day, including "race," "politic[s]," "gender identity," and "religion." Ex. A at 4. 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. While the policy imposes a "reasonableness" standard, it remains

overbroad because it does not require the harassment to be severe and pervasive. *DeJohn v. Temple Univ.*, 537 F.3d 301, 320 (3d Cir. 2008).

The discriminatory-harassment policy also discriminates by content and viewpoint. The University's policy does not bar "harassment"; it bars "*discriminatory* harassment." Specifically, it bars only harassment that is "based upon" various "protected classes" (*e.g.*, race, sex, religion, and political affiliation). Ex. A at 4. 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).

Finally, the discriminatory-harassment policy violates the Constitution's ban on vague laws. While the definition of discriminatory harassment might not be vague in a vacuum, two features of the overall policy make it incomprehensible.

First, the University provides "[e]xamples" of discriminatory harassment, including "[m]aking fun" of someone, "[t]elling unwelcome jokes," "[p]utting people down," and "[u]rging religious beliefs on someone who finds it unwelcome." Ex. C at 1. But if these one-off, routine human interactions can "unreasonably interfere[]" with someone's education or create a "hostile, threatening or intimidating" environment, Ex. A at 4, then those limits have no real meaning and impose no real constraint on the University's discretion.

Second, in addition to defining discriminatory harassment, the University states that "[t]his policy does not allow curtailment or censorship of constitutionally protected expression." Ex. A at 2. This statement is either inaccurate and meaningless (because the definition of "discriminatory

harassment" *does* cover protected expression), *Fenves*, 979 F.3d at 334, 337; *Coll. Republicans at San Francisco State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1020–21 (N.D. Cal. 2007), or it creates a carve-out from the definition of discriminatory harassment and makes the whole policy void for vagueness, *see Nat'l People's Action v. City of Blue Island*, 594 F. Supp. 72, 76-80 (N.D. Ill. 1984). The "Constitution does not, in and of itself, provide a bright enough line to guide primary conduct." *Id.* at 79 (cleaned up; quoting L. Tribe, *Am. Constitutional Law* §12-26, at 716 (1978)).

B. The computer policy is an overbroad, vague, content-based restriction on speech.

The University's computer policy similarly violates the First and Fourteenth Amendments. The challenged provisions *only* regulate speech—for example, "electronic mail" messages. Ex. F at 1; Ex. G at 1 (requiring compliance with Acceptable Use Standard). The University's email accounts and internet networks are traditional public forums for students. *See Am. Future Sys., Inc. v. Penn. State Univ.*, 752 F.2d 854, 864 (3d Cir. 1984) (explaining that aspects of a college campus can be a traditional public forum for students, even if it's not for outsiders); *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (explaining that the internet is today's quintessential traditional public forum). In a traditional public forum, "any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest." *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009); *accord United States v. Alvarez*, 567 U.S. 709, 717 (2012); *R.A.V.*, 505 U.S. at 382.

The University's broad bans on messages that are "intimidat[ing]," "harrass[ing]," or "unwarranted" and "annoy[ing]," Ex. G at 1, are thus overbroad. They impose content-based restrictions on a limitless amount of protected speech. *See Dambrot*, 55 F.3d at 1182-85; *DeJohn*, 537 F.3d at 319-20; *McCauley*, 618 F.3d at 251-52. This overbreadth is magnified by the fact that the computer policy turns on "the subjective reaction of the listener," *McCauley*, 618 F.3d at 252, and does not require any minimum amount of severity or pervasiveness, *DeJohn*, 537 F.3d at 320.

The policy on "partisan" emails cannot withstand First Amendment scrutiny either. The University allows students to send emails about any issue of public debate *except* for "partisan political" issues like "advertising … for political candidates." Ex. F at 1. But "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015). For instance, "a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed." *Id.* So too here. If a student can send an email that says "support universal healthcare" but not an email that says "re-elect Delegate Chris Hurst," that is classic content discrimination. The University has no legitimate interest in maintaining such a policy.

Finally, the computer policy is void for vagueness. The University does not define or elaborate the meaning of "intimidate," "harassment," or "unwarranted annoyance"—terms that "are general and elude precise definition." *Doe*, 721 F. Supp. at 867. Worse, each of these terms is "subjective" and turns on the view of the observer or listener, since "different people find different things" intimidating, harassing, unwarranted, and annoying. *Dambrot*, 55 F.3d at 1184. The policy also differentiates between "unwarranted annoyance" and *warranted* annoyance, a distinction that no English speaker could possibly parse. *See Wollschlaeger v. Gov'r*, 848 F.3d 1293, 1305 (11th Cir. 2017) (en banc) (holding that a ban on "unnecessary harassment" was void for vagueness). And the policy's ban on emails with a "partisan political *purpose*[]" is impenetrable. Does it cover *all* emails, even nonpolitical ones, that have the forbidden purpose? Does it cover only emails that advocate for the election or defeat of specific *candidates*? Does it cover emails that discuss political *issues*, if the advocacy is aligned with one political party or candidate? These "vagueness concerns" are fatal. *Fed. Election Comm'n v. GOPAC, Inc.*, 917 F. Supp. 851, 861 (D.D.C. 1996).

C. The bias-related incidents policy is an overbroad, vague, viewpoint discriminatory restriction on speech.

The University's policy on bias-related incidents, as enforced by the bias-related incidents protocol, suffers from similar constitutional infirmities. The definition of bias-related incidents expressly covers speech: It forbids "expressions against a person or group because of the person's or group's age, color, disability, gender (including pregnancy), gender identity, gender expression, genetic information, national origin, political affiliation, race, religion, sexual orientation, veteran status, or any other basis protected by law." Ex. H at 4. Examples of bias-related incidents include "words or actions that contradict the spirit of the [University's] Principles of Community," "jokes that are demeaning to a particular group of people," "assuming characteristics of a minority group for advertising," and "posting flyers that contain demeaning language or images." Ex. H at 4.

By targeting speech that is "biased" "against a person or group" and that is expressed "because of" specific characteristics, Ex. H at 4, the policy is a content-based, viewpoint-based regulation on protected expression. *R.A.V.*, 505 U.S. at 391-93. The definition of "bias-related incident" is also vague. It turns on unpredictable assessments about whether student speech is "demeaning" to the listener or "contradict[s] the spirit of the Principles of Community." Ex. H at 4. The terms "bias" and "demeaning" are undefined and subjective. Ex. H at 4.

While the University might argue that a student cannot be *disciplined* for committing bias-related incidents, that is not the relevant question. Policies that "fall short of a direct prohibition" still violate the First Amendment when they have an objective "chilling" effect on speech. *Laird v. Tatum*, 408 U.S. 1, 11 (1972). Objective chill can occur through "[i]nformal measures" such as "indirect 'discouragements,'" "'threat[s],'" "'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)); *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 402 (1950). Virginia Tech's bias-related incidents policy is enforced by its bias-related incidents protocol, so the question is whether that protocol objectively chills speech. It

does, as two circuits found in similar cases brought by Speech First. *See Fenves*, 979 F.3d at 333 (University of Texas's Campus Climate Response Team); *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 765 (6th Cir. 2019) (University of Michigan's Bias Response Team).

The University's power to refer bias-related incident reports to disciplinary authorities "objectively chills speech." *Schlissel*, 939 F.3d at 765; *accord Fenves*, 979 F.3d at 333. The protocol repeatedly informs students that bias-reports can be referred to "appropriate" University departments for formal disciplinary investigations. *See, e.g.*, Ex. H at 6. In fact, the eight-page protocol references the University police department nearly a dozen times. Ex. H at 5, 6, 7. These 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 (emphasis in original).

More broadly, the bias-related incidents protocol "acts by way of implicit threat of punishment and intimidation to quell speech." *Schlissel*, 939 F.3d at 765. From beginning to end, the policy is designed to send a clear message to students: If you engage in a "bias-related incident," you are in trouble. The very name bias-related incident "suggests that the accused student's actions have been prejudged to be [unjust]" and "could result in far-reaching consequences." *Id.* The policy's terminology—"bias," "incident," "victim," "accused," "perpetrator," "bystander," etc., *see* Ex. H at 7-8—also suggests serious misconduct, *see Schlissel*, 939 F.3d at 765 ("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."). And the University's use of the slogan "See Something, Say Something"—and the analogy that it draws—would not be lost on college students.

Further, the University's practice of "invit[ing] anonymous reports" to DOS "carries particular overtones of intimidation to students whose views are 'outside the mainstream.'" *Fenves*, 979 F.3d at 338. Because bias-related incidents are addressed by high-level university officials, including the University police department, a student "could be forgiven for thinking that inquiries from and

dealings with [University administrators] 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 generally* Ex. U; Ex. X; *see also* Compl. ¶34; *Fenves*, 979 F.3d at 338.

The bias-related incidents protocol also acts as a kind of "'process-is-punishment' mechanism that deters people from speaking out." Ex. U at 28. Committing a "bias-related incident" can get a student "reported," "investigated," "recorded" by DOS and referred for discipline. Ex. H at 3-7. It can also trigger University "interventions," such as a request to meet for "discuss[ion]," "education[]," or "restorative justice techniques." Ex. H at 7-8. Though these meetings are ostensibly "voluntary," students do not see them that way. *Schlissel*, 939 F.3d at 765. Especially not at the University, which prohibits "[f]ailure to comply with a request and directives of university officials acting within the scope of their authority." Ex. D at 11-12.

In sum, the bias-related incidents protocol "is sufficiently proscriptive to objectively chill student speech." *Fenves*, 979 F.3d at 333. Because the protocol is the consequence for committing a "bias-related incident," and because the University's definition of "bias-related incident" is plainly unconstitutional, Speech First is likely to succeed on this claim.

D. The informational-activities policy is an unconstitutional prior restraint and speaker-based regulation of protected activities.

The informational-activities policy violates the First Amendment in two ways. It imposes a prior restraint on protected speech, and it regulates speech based on the identity of the speaker.

As the Fourth Circuit has explained, an unconstitutional prior restraint "preclude[s] expression until certain requirements are met." *Am. Entertainers, LLC v. City of Rocky Mount*, 888 F.3d 707, 720 (4th Cir. 2018). A prior restraint exists when a regulation gives "public officials the power to deny use of a forum in advance of actual expression." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975)); *accord Ward v. Rock Against Racism*, 491 U.S. 781, 795 n.5 (1989) ("The relevant question is whether the

challenged regulation authorizes suppression of speech in advance of its expression."). Prior restraints "upend core First Amendment principles" because "a free society prefers to punish the few who abuse rights of speech after they break the law [rather] than to throttle them and all others beforehand." *In re Murphy-Brown, LLC*, 907 F.3d 788, 797 (4th Cir. 2018) (quoting *Se. Promotions*, 420 U.S. at 559).

Prior restraints thus "bear 'a heavy presumption against their constitutional validity.'" *Id.* (quoting *Bantam Books*, 372 U.S. at 70). Prior restraints cannot overcome this heavy presumption if they either "place[] unbridled discretion in the hands of a government official or agency" or "fail[] to place limits on the time within which the decisionmaker must issue the license." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-26 (1990); *see also Am. Entertainers*, 888 F.3d at 720. Thus, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969).

Here, the informational-activities policy affords the University unbridled discretion to grant or deny requests to "distribut[e] literature and/or petition[] for signatures." Ex. T at 3. The policy also fails to place any limits on the time that the University has to grant or deny permission. The only "standard" that the University provides is whether the student speech implicates "overall campus safety and security," involves "any special circumstances relating to university activities," and what "impact [the speech] may have on the university." Ex. T at 1. Those vague criteria fall woefully short of the "concrete standards" required by the First Amendment. *Am. Entertainers*, 888 F.3d at 720.

The informational-activities policy also imposes speaker-based restrictions. "Speech restrictions based on the identity of the speaker are all too often simply a means to control content" and are therefore "[p]rohibited." *Citizens United v. Fed. Election Com'n*, 558 U.S. 310, 340 (2010). The informational-activities policy explicitly favors some speakers over others. The policy permits students who "are sponsored by a university-affiliated organization" to engage in (approved) informational

activities but threatens to discipline unaffiliated students who do the same. This, the First Amendment forbids. *Turning Point USA at Ark. State Univ. v. Rhodes*, 973 F.3d 868, 879 (8th Cir. 2020).

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 W.V. Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009).

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." *Centro Tepeyac*, 722 F.3d at 191. A state actor "is in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional," and "upholding constitutional rights surely serves the public interest." *Id.*

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

Federal courts have broad "discretion" to "waive the bond requirement" when issuing a preliminary injunction. *Pashby v. Delia*, 709 F.3d 307, 331-32 (4th Cir. 2013). When "the financial impact" on the defendant "is limited and would not create any significant hardship," courts will "waive the security requirement." *Id.*

No bond is needed here. Bonds are usually reserved for situations, unlike this one, where "an improvidently granted injunction" will cause a Defendant to incur "damages." *Doe v. Pittsylvania Cty.*, 84 F. Supp. 2d 927, 937 (W.D. Va. 2012). Waiving the bond requirement is particularly appropriate since Plaintiff is likely to succeed on the merits and Defendants will incur "no monetary damages or other harm" by 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 challenged policies during this litigation.

Respectfully submitted,

Dated: April 12, 2021

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CERTIFICATE OF SERVICE

I certify that on April 12, 2021, 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 and by certified mail, return receipt requested, at the address below:

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