No. 21-2061

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SPEECH FIRST, INC.,
Plaintiff-Appellant,

v.

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

On Appeal from the United States District Court
for the Western District of Virginia, No. 7:21-cv-00203 (Urbanski, J.)

REPLY BRIEF OF APPELLANT SPEECH FIRST, INC.

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No. 21-2061, *Speech First, Inc. v. Sands*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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

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2. American Counsel of Trustees and Alumni, *Amicus Curiae for Plaintiff-Appellant*
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44. Towell, Samuel T., *Former Counsel for Defendant-Appellee*

45. Urbanski, Michael F., *Trial Judge*

46. Zeman, Jeffrey D., *Amicus Curiae for Plaintiff-Appellant*

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

/s/ J. Michael Connolly
Counsel for Speech First, Inc.
Dated: April 1, 2022

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The University laments the "unfortunate episodes where '[s]tudents have been reported to bias response teams' for speech protected by the First Amendment" and stresses that "*each* of those episodes occurred outside of Virginia Tech." U-Br. 3. Yet the University's bias-related incidents policy matches almost word-for-word the policies that chilled speech in *Schlissel* and *Fenves*, and the University concedes that students can be—and already have been—reported to its BIRT for "protected speech." U-Br. 5-6. And when it comes to free speech, the University's record is nothing to celebrate. *See* FIRE, *Free Speech Rankings 2021* at 46-51, bit.ly/36KF8c8 (ranking Virginia Tech dead last among universities in Virginia and in the bottom third of all universities).

The University is right, of course, that the BIRT must be "judged on [its] own merits." U-Br. 17. But that observation goes both ways. If the BIRT is unconstitutional on its 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.* U-Br. 7-8, 9-10; JA399-462. And the BIRT is likely unconstitutional, despite the University's attempts to shield it from judicial scrutiny.

The University's defense of its informational-activities policy is even weaker. Despite the University's protestations about how the policy works *in practice*, the policy on *its face* is an unconstitutional prior restraint because it fails to provide narrow, objective, and definite standards as to when students can and cannot speak on their campus. Nor does the University's preference for certain student speakers over others

justify the policy's speaker-based restrictions. This Court should reverse and enter a preliminary injunction.

ARGUMENT

This Court should reverse the denial of Speech First's motion for preliminary injunction, as the Fifth and Sixth Circuits did in *Fenves* and *Schlissel*. Speech First is likely to succeed on its challenges to the bias-related incidents policy and the informational-activities policy. 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, instead of letting the University continue chilling speech and restraining expressive activities.

I. Speech First's challenge to the BIRT will likely succeed.

The University emphasizes that bias-response teams "are not *per se* unconstitutional," U-Br. 17, and it cites FIRE's observation that, in theory, bias-response teams would be permissible if their activities were limited to "prepar[ing] general programming" for the university community or "provid[ing] resources to a complaining student." U-Br. 17 (citing JA258). But as FIRE itself points out, "nowhere in Virginia Tech's bias reporting materials does it suggest BIRT attempts to do any of these things." FIRE-Br. 24. Moreover, the University conveniently ignores the conclusion of FIRE's report: Bias-response teams interfere with protected speech when they "intervene directly with the reported student." JA258. The BIRT does exactly that. *See* JA372 (stating that the BIRT conducts "interventions" with accused students).

The University asks this Court to ignore the vast body of evidence that bias-response teams chill speech, and it insists that *its* bias-response team is somehow different. But because the BIRT is identical to other bias-response teams across the country, evidence that these college students are chilled by similar teams confirms that a reasonable student at the University would be chilled by the BIRT. *Cf.* U-Br. 23 (characterizing Speech First's members as "overly sensitive"); *see also* FIRE-Br. 6-12 (detailing nationwide evidence). Nothing in the record supports the illogical notion that students at Virginia Tech are somehow less intimidated by "interventions" from high-ranking administrators than the average college student.

Moreover, the University's own data shows that one in five Virginia Tech students feels uncomfortable expressing ideas in class that are "probably only held by a minority of people." JA319. 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 who feel the chill and need the First Amendment.

Throughout its brief, the University stresses the district court's "factual findings" that the BIRT does not "proscribe" certain speech or possess inherent "disciplinary authority" over students, and that its meetings with students are purportedly "voluntary." U-Br. 21-22; *e.g.*, U-Br. 15, 18, 24, 26, 28-29. But *everything* a government does that objectively chills speech requires First Amendment scrutiny, even if the policy

or program prohibits nothing and disciplines no one. SF-Br. 20-24. The BIRT is no exception. According to the University's own exhibits, the BIRT's purpose is to "eliminate"—*i.e.*, chill—biased speech through "immediate direct or indirect responses to bias-related incidents." JA369.

As Speech First explained, the BIRT chills speech in two main ways: It deters speech through threats and intimidation, and it burdens speech by imposing administrative and other consequences. SF-Br. 24. Contra the University, the question is not how often the BIRT meets with bias offenders or refers them for formal discipline. The question is whether a reasonable college student, looking at the entire BIRT apparatus, would be deterred from engaging in speech that could be considered a "bias-related incident." In other words, does the BIRT'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 BIRT 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 "support students" and "teach civility and promote peace" among those who hold differing viewpoints. U-Br. 3-4 & n.1. It would not need a formal definition of "bias-related incident" that intentionally resembles a disciplinary rule. SF-Br. 5. It would not prejudge the conversation by tagging one side the "'victim'" and the other the perpetrator of "'bias.'" SF-Br. 25. It would call itself something like

the "Civility Promotion Team" or the "Student Support Team," not a name that already presumes an "intervention" is needed to "respond" to something "biased." It would include faculty and trained counselors, not administrators and a *police officer*. And it certainly wouldn't solicit *anonymous* reports, which facilitate no conversations but carry "'particular overtones of intimidation.'" SF-Br. 25. 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. LJC-Br. 5-11.

The University drastically understates how much the BIRT burdens speech. *E.g.*, U-Br. 23. Foremost, the process creates reputational harm by tagging students as perpetrators of "bias" incidents—a form of "demeaning" speech that the University compares to punishable offenses like "crimes" and "harassment." SF-Br. 25; JA146, 368, 372. As the University grudgingly concedes, its process also creates a formalized system of nonstop surveillance. SF-Br. 8; *see* U-Br. 5 (admitting that "[r]ecords and correspondence associated with BIRT are housed within [the Dean of Students'] office" and can be shared with Student Conduct "on a need-to-know basis"). The University does not dispute or acknowledge these real sources of chill.

The ever-present threats of investigation and disciplinary referral also substantially chill speech. SF-Br. 36-37. The University emphasizes that, while Speech First submitted evidence that protected speech is referred to the BIRT, it submitted no evidence "that Virginia Tech took *any action*—much less *unconstitutional action*—against the speakers involved." U-Br. 5-6 (emphasis original). That argument is convenient

because the University does not publish its disciplinary files. *See Speech First v. Fenves*, 979 F.3d 319, 337 n.14 (5th Cir. 2020). It's also beside the point. While past enforcement "can assure standing," its absence does not "doom" standing. *Id.* at 336; *e.g.*, *Epperson v. Arkansas*, 393 U.S. 97, 101-02 (1968); *Bair v. Shippensburg University*, 280 F. Supp. 2d 357, 367 (M.D. Pa. 2003).

Regardless, the University admits that referrals occur and that students have been reported for expressing the *exact* opinions that Speech First's members wish to express. *See* JA658 (noting the University's admission that the "BIRT has referred protected speech" to Student Conduct, "including an Instagram post expressing 'unpopular opinions about illegal immigration'"); *cf.* JA338 ¶¶10, 19; JA348 ¶¶9, 18 (declarations from Speech First members who hold "unpopular" opinions and want to express their beliefs about illegal immigration but refrain because they are afraid of being reported to the BIRT). As the University publicly warns: "From admission to commencement, a student (undergraduate, graduate, or professional) can be referred for bias-related behavior." JA372.

The frequency of those referrals is not important: The University does not tell students that referrals are infrequent or rare. In fact, it takes every opportunity to suggest the opposite. Its *See Something, Say Something* page directs students to the Student Code of Conduct and informs them that "[p]otential areas of concern" include "Bias-related incidents." *See* JA199-200. The University's "ability to make referrals" thus

"lurks in the background" and chills speech even before it starts. *Speech First v. Schlissel*, 939 F.3d 756, 765 (6th Cir. 2019).

The prospect of being summoned for a meeting with the BIRT is also chilling. SF-Br. 26-27. The University stresses that its meetings are technically "voluntary," U-Br. 5, 18, 22, 28, but the University submitted no evidence about how students perceive or respond to its invitations. The default rule on campus is that dealings with administrators are *not* voluntary. SF-Br. 27. And messages over accusations of bias are naturally chilling for college students. SF-Br. 27. It is therefore likely that "being labeled 'voluntary'" does not "ameliorate[]" the BIRT's "objectively implied threats." *Schlissel*, 939 F.3d at 765; *see also* FIRE-Br. 13. Given all these burdens and threats, students naturally "find it difficult to evaluate whether being invited to meet with an administrator is truly 'voluntary' or a prelude to further disciplinary action," and they self-censor accordingly. ADF-Br. 13.

To the University, the presence of a police officer on a team that conducts "interventions" against "bias[ed]" speech is no big deal. U-Br. 8. The officer's role, the University promises, is limited to "categories of 'speech' [that] are not constitutionally protected." U-Br. 8. None of the BIRT's materials make this distinction. And students still know that the police officer is *on* the BIRT. Regardless, interactions with high-ranking University administrators—senior officials from the Dean of Students office, for instance—are also chilling. *See* SELF-Br. 9 ("[E]ven the mere appearance of authority is enough to chill speech." (citing *Schlissel*, 939 F.3d at 764)).

The University claims that other courts' analyses of bias-response teams are irrelevant because *Abbott* controls. U-Br. 24-27 (citing *Abbott v. Pastides*, 900 F.3d 160, 163, 169 (4th Cir. 2018)). As explained, the University's heavy reliance on *Abbott* doesn't hold up. *See* SF-Br. 27-28. That decision was "limited to the facts before [it]." *Abbott*, 900 F.3d at 180. None of those facts involved a bias-response team. The case concerned the University of South Carolina's *normal* disciplinary process for violations of its bans on discrimination and harassment. And there, "neither party dispute[d] that the University ha[d] a compelling state interest in maintaining a school environment free from *illegal* discrimination and harassment." *Id.* at 170 (emphasis added). The sole issue was whether the challenged University action—a discrete meeting that informed students they were free to engage in controversial speech—satisfied the First's Amendment's narrow-tailoring requirement. *Id.* Here, the BIRT not only refers students for formal discipline, but also "intervenes" against speech that "is neither criminal, nor violative of the Student Code of Conduct" but "merely offends." FIRE-Br. 23.

At bottom, the University of South Carolina's reaction to offensive speech in *Abbott* and Virginia Tech's attempts to "eliminate" offensive speech are fundamentally different. South Carolina told its students that the speech in question "'is free speech'" that cannot be shut down because it makes others "'uncomfortable.'" *Abbott*, 900 F.3d at 165. Virginia Tech tells its students that so-called biased speech must be "eliminate[d] . . . through immediate direct and indirect responses," equates it with unlawful

"harassment[] and discrimination," and instructs students not to use "offensive" and "patronizing" language. JA369, 200, 144.

The University cannot distinguish the BIRT from other policies that courts have found objectively chilling. The University notes that, in *Bantam Books v. Sullivan*, the Rhode Island Commission to Encourage Morality in Youth sent notices that were "reasonably understood" by the plaintiff to be "orders" and thus "stopped the circulation" of "objectionable" expression "*ex proprio vigore*." U-Br. 25-26 (quoting *Bantam Books*, 372 U.S. 58, 69-61, 68 (1963)). Similarly, the University recognizes that the defendant in *Backpage.com v. Dart* sent a letter "on official letterhead" to the Plaintiff, which served as a "thinly-veiled threat[]." U-Br. 26 (citing 807 F.3d 229 (7th Cir. 2015)). Yet the University acts no differently when it labels speech "biased," emails students from an official email account, reminds students that it can refer incidents for formal discipline, and suppresses speech "*ex propio vigore*." *See* JA338, ¶19; JA348, ¶18. And the University makes no effort to distinguish *Levin v. Harleston*, which is directly on point. *See* 966 F.2d 85, 89-90 (2d Cir. 1992) (university committee that sent letter to professor over inflammatory speech violated professor's First Amendment rights, even though the committee was "purely advisory [and] utterly lacking any power to take action"); *see also* SF-Br. 21-22. Whether the chilling effect in these cases was worse than here is of no moment. Bias-response teams were designed, after all, to get as close to the constitutional line as possible. SF-Br. 2-4.

Nothing about the BIRT 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 similarities between the bias-response teams in those cases and the BIRT are remarkable:

- Michigan and Texas also administered their policies through "Response Teams" that consisted of university administrators and a police officer. Like the BIRT, Michigan's "Bias Response Team" had "bias" in its name. And like the BIRT, 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* JA246, 249-51, *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 BIRT, the bias-response teams at Michigan and Texas explicitly warned students that they could 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 University believes that the Sixth Circuit was wrong. U-Br. 28. But the BIRT is, if anything, *worse* than Michigan's bias-response team in *Schlissel*. While Michigan's policy "at least purported to proscribe 'conduct,'" Virginia Tech's policy "expressly defines a 'bias incident' as 'expression'" and "ensure[s] its students know it polices

speech." FIRE-Br. 22. And the University simply ignores the Fifth Circuit's decision in *Fenves*. U-Br. 28

The University's assertion that *Killeen* "supports" the University is incorrect. In all three of Speech First's decided 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." *Cf.* U-Br. 28. While the facts in all these cases are the same, *the record* is different here than it was in *Killeen*. The University recounts the Seventh Circuit's concerns about the single, three-page declaration submitted in *Killeen*, U-Br. 29, but it barely acknowledges that, here, Speech First has submitted detailed declarations from its members, a campus-climate survey commissioned by the University itself, and hundreds of pages of exhibits, SF-Br. 29-30, 13. Moreover, Speech First is the only party who submitted any declarations *from University students* about how they view the BIRT. JA337-41, 347-51.

The University makes only a passing attempt to discuss Speech First's evidence. It notes that none of Speech First's members alleged that they had been reported to the BIRT. But that argument only reinforces what Speech First's members have already declared: they are self-censoring because they fear the consequences of being reported to the BIRT. JA340 ¶18; JA350 ¶18. Because the injury here is chilled speech, past enforcement "misses the point"; there's nothing to enforce when "speech has already been chilled." *Schlissel*, 939 F.3d at 766. To rebut this real chilling effect, the University urges this Court to credit its own self-serving declarations. *See* U-Br. 20-21, 29. But

those declarations were "written after this action was filed," *Wollschlaeger v. Gov'r*, 848 F.3d 1293, 1306 (11th Cir. 2017) (en banc), and therefore are non-binding "litigation positions" that cannot "alter the [Court's] analysis," *N.C. Right to Life v. Bartlett*, 168 F.3d 705, 710-11 (4th Cir. 1999).

In short, this Court will necessarily split with the Fifth and Sixth Circuits if it affirms the district court. 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. *Compare Speech First v. Killeen*, 968 F.3d 628 at 643-44 (7th Cir. 2020), *with 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). SF-Br. 30-31. 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 Blacksburg can have one too. This is a "widespread danger to First Amendment freedoms." LJC-Br. 4.

II. Speech First's challenge to the informational-activities policy will likely succeed.

A. The informational-activities policy is an unconstitutional prior restraint.

The University spills much ink arguing that the public spaces on its campus are a "non-public forum." U-Br. 32-36. That is wrong, as explained below. *Infra* 17-18. But it is also irrelevant. As this Court has explained, "there is broad agreement that, *even in limited public and nonpublic forums*, investing governmental officials with boundless discretion over access to the forum violates the First Amendment." *Child Evangelism Fellowship of MD, Inc. v. Montgomery Cnty. Pub. Schs.*, 457 F.3d 376, 386 (4th Cir. 2006) (emphasis added). Regardless of the forum, a policy "that permits officials to deny access for any reason, or that does not provide sufficient criteria to prevent viewpoint discrimination, generally will not survive constitutional scrutiny." *Id.*; *see Green v. City of Raleigh*, 523 F.3d 293, 300 (4th Cir. 2008) (any policy requiring individuals "'to obtain a permit before engaging in protected speech'" and is unconstitutional unless it contains "'narrow, objective, and definite standards to guide the licensing authority'").

That is precisely why the informational-activities policy violates the First Amendment. The policy contains no "narrow, objective, and definite standards" prescribing when students will or will not be permitted to speak on campus. *Green*, 523 F.3d at 300. Indeed, the policy's standards are contained in a single sentence: "Such [informational] activities require prior approval by the designated university scheduling

office and are subject to university policies and the reasonable guidelines of the authorizing official." JA225. That's it. Because the policy lacks sufficient "safeguards" to constrain the University's officials, *Child Evangelism Fellowship*, 457 F.3d at 387, it cannot withstand constitutional scrutiny.

The University insists that its policy is constitutional because *in practice* students can obtain approval to speak merely by "mak[ing] a reservation." JA420. But this assertion misses the point. What matters is "the plain language of the policy." *Child Evangelism Fellowship*, 457 F.3d at 387; *see Weinberg v. City of Chicago*, 310 F.3d 1029, 1046 (7th Cir. 2002) (refusing to "presume that officials will act in good faith and follow standards not explicitly contained in the ordinance"). "[N]otwithstanding the vehemence of [the University's] protestations, *nothing* in the [informational-activities] policy prohibits viewpoint discrimination, requires viewpoint neutrality, or prevents [withholding permission to speak on campus] based on [the University's] assessment of the viewpoint" to be expressed by the speaker. *Child Evangelism Fellowship*, 457 F.3d at 388.

The University proposes an interpretation of its policy—presented for the first time on appeal—that has no basis in the text. U-Br. 40-41; *see* Opp. to Mot. for Prelim. Inj. at 30-34. The Court should not consider it now. *In re Under Seal*, 749 F.3d 276, 285 (4th Cir. 2014). Regardless, contra the University, nothing in the policy's one-sentence guidelines creates a "reservation system" that is "first come, first served." It flatly warns students that they must receive "prior approval by the designated university scheduling

official." JA225. This provision plainly does not create "narrow, objective, and definite standards to guide the licensing authority." *Green*, 523 F.3d at 300.

Because the policy is unconstitutional on its face, the district court had no need for a "more developed record" about whether the policy's restrictions were "reasonable as a matter of law." JA689-90. Yet even accepting the University's atextual reading of its policy, Speech First should prevail because the policy would remain a prior restraint on speech. If the University believes the policy is "'narrowly tailored to serve a significant governmental interest,'" then it is the *University's burden* to prove this—not Speech First's. *Green*, 523 F.3d at 300; *see* SF-Br. 34-35. The University puts forth new justifications for its policy on appeal, *see* U-Br. 46-49, but it never presented them below, Opp. to Mot. for Prelim. Inj. at 30-34, and so cannot do so here, *see In re Under Seal*, 749 F.3d at 285. In any event, the University never claims that these justifications are strong enough for the policy to survive strict scrutiny. *See Green*, 523 F.3d at 300. Moreover, the district court has already spoken. It found insufficient evidence in the record to determine whether the policy's restrictions were "reasonable as a matter of law." JA689-90. Because there was insufficient "evidence presented at the preliminary injunction stage" justifying the policy, *Newsom ex rel. Newsom v. Albemarle County School Board*, 354 F.3d 249, 259-60 (4th Cir. 2003), the district court should have held that Speech First was likely to succeed on the merits of its challenge, SF-Br. 34-35; *see also McGlone v. Bell*, 681 F.3d 718, 735 (6th Cir. 2012) (reversing denial of preliminary injunction because the university "failed to meet [its] burden in defending" its prior restraint on speech).

In any event, neither of the University's two justifications for its policy is persuasive. The University first says it is "reasonable to prefer those students who, by forming an organization, have shown some likelihood of structure and continuity in their contribution to the marketplace of ideas." U-Br. 46. Why the University thinks "forming an organization" is a good proxy for the "structure and continuity" of speech is never explained, let alone bolstered with evidence. In any event, to the extent the University prefers "better" speakers, that interest is plainly prohibited. The First Amendment has "little to do with the caliber and quality of the speech involved" but is instead "concerned with the broad protection of the speech itself in order to encourage a robust exchange of ideas." *Butler v. Ala. Judicial Inquiry Com'n*, 111 F. Supp. 2d 1224, 1238 (M.D. Ala. 2000). Nor is the University's concern about "tabling" relevant, U-Br. 47, as Speech First's members are not asking to set up tables on campus, JA340-41 ¶20; JA350 ¶19.

At bottom, the University fails to appreciate that the "vigilant protection" of constitutional freedoms is "nowhere more vital than in the community of American schools [of higher education]." *Healy v. James*, 408 U.S. 169, 180 (1972). Speech First's members are students who want to distribute literature and collect signatures in high-traffic areas of the campus that are open to the public. JA340-41, ¶20; JA350, ¶19. This should be celebrated and encouraged, not suppressed through bureaucracy and red tape. Speech First is likely to prevail on the merits of its claim that the informational-activities policy is an unconstitutional prior restraint on speech.

B. The informational-activities policy is an unconstitutional speaker-based regulation.

Contra the University, U-Br. 42-43, Speech First has standing to challenge the policy's sponsorship requirement. Its members "have alleged an intent to engage in protected speech," and their conduct "is clearly proscribed by the informational-activities policy." JA687. This Court's decision in *Gilles v. Torgersen* is inapposite. There, this Court found that the plaintiff lacked standing to challenge a sponsorship requirement because the University had agreed to "act[] as an omnibus sponsor on Gilles' behalf." 71 F.3d 497, 500 (4th Cir. 1995). Thus, although Gilles had not been permitted to preach at his campus venue of choice, "[t]his could not have been as a result of the sponsorship regulation." *Id.* at 501. Here, Speech First's members wish to "*independently* distribute literature about conservative ideas and collect signatures for petitions that support conservative causes," but they "refrain from doing either of those things" because of the University's sponsorship requirement. JA340 ¶20; JA350 ¶19 (emphasis added). Thus, it is precisely "[because] of the sponsorship regulation" that Speech First's members are forced to remain silent. *Gilles*, 71 F.3d at 501.

The University acknowledges that its policy imposes speaker-based restrictions, U-Br. 42, but contends that the policy is not subject to strict scrutiny because the "college campus [is a] non-public forum" for students. U-Br. 32-46, 43. But the University provides no case that supports this proposition. *Id.* This is no surprise, as courts recognize that "the campus of a public university, at least for its students,

possesses many of the characteristic of a public forum." *Widmar v. Vincent*, 454 U.S. 253, 267 n.5 (1981); *e.g., McGlone*, 681 F.3d at 732 (holding that the "open areas on [a public university's] campus are public fora"). Virginia Tech purports to recognize the same. *See* JA552 ("[T]o create a community that nurtures learning and growth for all of its members[,] . . . **[w]e *affirm*** the right of each person to express thoughts and opinions freely" and "[w]e encourage open expression." (emphasis original)). And no one thinks that public universities have "wide latitude to restrict subject matters … of great First Amendment salience"—the consequence of the University's suggestion that its campus is a nonpublic forum. *Archdiocese of Washington v. WMATA*, 897 F.3d 314, 325 (D.C. Cir. 2018).

As the public spaces of the University's campus are designated for all "members of the University community," strict scrutiny applies when a university "excludes a speaker who falls within [this] class.'" *American Civilian Liberties Union v. Mote*, 423 F.3d 438, 444 (4th Cir. 2005); *cf. Christian Legal Society v. Martinez*, 561 U.S. 661, 669, 681-82 (2010) (strict scrutiny inapplicable where the Registered Student Organization program was created specifically for student groups, not the entire student body). By excluding certain students but not others, the University does precisely that.

The University doesn't dispute that its speaker-based restrictions fail strict scrutiny. *See* U-Br. 46-49. And its policy fails even a "reasonableness" standard. Because the district court found insufficient evidence that the policy's restrictions were "reasonable as a matter of law," JA689-90, the University necessarily failed to carry its

burden. Nor are the University's new justifications on appeal "reasonable" on their own terms. *Supra* 15. The policy's speaker-based restrictions are likely unconstitutional.

III. The 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. The remaining factors are fully briefed and can be resolved only one way. The University doesn't dispute that the merits of the bias-related incidents policy rise or fall with the University's standing arguments. *See* SF-Br. 37-38; U-Br. 30. And the district court already weighed the other preliminary-injunction factors in Speech First's favor. *See* JA681-84. If this Court remands, the district court will either repeat itself (wasting time and resources) or weigh the factors differently and abuse its discretion (requiring yet another appeal). SF-Br. 38-39.

Resolving the remaining factors now would not "go too far." U-Br. 30-31. Rather, it would preserve judicial resources and immediately relieve the ongoing irreparable injury to Speech First's members. The University does not dispute this Court's power to enter a preliminary injunction (or to order the district court to enter one). And none of the University's cases found a likely violation of the First Amendment and then *denied* a preliminary injunction. *See, e.g., Bonnell v. Lorenzo*, 241 F.3d 800, 825 (6th Cir. 2001). That is because the remaining factors are "established when there is a likely First Amendment violation." *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 191 (4th Cir. 2013). 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. Enjoining the bias-related incidents policy would not "cripple the [University's] ability to deal with 'speech' that the Constitution does not protect" or "deprive the [University] of the opportunity" to teach students about First Amendment protections. *Cf.* U-Br. 31. It would merely stop the University from using the BIRT to "track[], log[], investigat[e], threaten[], contact[], refer[], or punish[]" the students who are accused of "bias-related incidents." Doc. 4-7. Nor would enjoining the informational activities policy "turn the entire campus into a free-for-all." U-Br. 55. It would merely stop the University from enforcing a prior restraint that lacks "narrow, objective, and definite standards" and prefers certain student speakers over others. *Green*, 523 F.3d at 300.

CONCLUSION

This Court should reverse the district court's denial of Speech First's motion for a preliminary injunction and enter a preliminary injunction barring the University from enforcing its bias-incidents policy and its informational-activities policy until the district court enters final judgment.

Dated: April 1, 2022

Respectfully submitted,

/s/ J. Michael Connolly

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7)(B) because it contains 5,052 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: April 1, 2022 */s/ J. Michael Connolly*

CERTIFICATE OF SERVICE

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

Dated: April 1, 2022 */s/ J. Michael Connolly*