IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SPEECH FIRST, INC., *Plaintiff*, v. BRIAN MCCALL, in his official capacity as Chancellor of the Texas State University System, *et al.*, *Defendants.*	Case No. 1:23-cv-411

PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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RULE CV-7(I) STATEMENT

On April 13, Plaintiff's counsel conferred with Charmaine Mazzantini, associate general counsel for the Texas State University System, about this motion via email. On April 14, Ms. Mazzantini stated that she cannot take a position on the preliminary-injunction motion until she sees it.

INTRODUCTION

"Colleges and universities serve as the founts of—and the testing grounds for—new ideas. Their chief mission is to equip students to examine arguments critically and … participate in the civic and political life of our democratic republic." *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1128 (11th Cir. 2022). Texas State and its officials are failing this chief mission. They have 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 and violate the First and Fourteenth Amendments.

First, the University's discriminatory-harassment policy disciplines students who engage in speech that is directed at an individual or group based on a long list of protected classes. The policy intentionally deviates from the narrower, speech-protective definition of harassment blessed by the Supreme Court. The resulting viewpoint-based, content-based, and overbroad restriction of protected speech violates the First and Fourteenth Amendments.

Second, the University's computer policy is even less defensible. It sweepingly bars students from using their university email addresses to send messages with a "political purpose" and other "similar activities." This vague, content-based, and overbroad restriction of protected speech violates the First and Fourteenth Amendments.

Plaintiff, Speech First, seeks a preliminary injunction to protect the rights of its members—current students who want to engage in speech that is arguably prohibited by the University's policies but refrain because they fear the repercussions. Speech First will likely prevail on the merits of its constitutional claims. And because Speech First readily satisfies the remaining criteria for a preliminary injunction, this Court should follow the lead of three other courts and grant Speech First's motion.[1]

[1] *E.g.*, *Speech First, Inc. v. Khator*, 603 F. Supp. 3d 480 (S.D. Tex. 2022) (preliminarily enjoining a harassment policy); *Cartwright*, 32 F.4th at 1125-28 (similar); *Speech First, Inc. v. Sands*, 2021 WL 4315459 (W.D. Va. Sept. 22) (preliminarily enjoining a similar computer policy).

BACKGROUND

I. The First Amendment and College Campuses

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 v. James*, 408 U.S. 169, 180 (1972); *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 Found. v. Ohio State Univ.*, 478 F. Supp. 96, 102 (S.D. Ohio 1979). Universities that try to police speech that is "harassing" or "discriminatory" have a poor record in court. A "consistent line of cases" has "uniformly found" such "campus speech codes unconstitutionally overbroad or vague." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 338-39 & n.17 (5th Cir. 2020) (collecting ten cases).

These types of 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) (Alito, J.); *Matal v. Tam*, 528 U.S. 218, 244-47 (2017). So policies that regulate this speech impose "'content-based, viewpoint-discriminatory restrictions.'" *Saxe*, 240 F.3d at 206 (citing *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596-97 (5th Cir. 1995)). 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).

Campus speech codes are also 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" or "subjective" enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). This prohibition is even "more stringent" for policies, like speech codes, that affect "the right of free speech." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). Policies restricting speech that

rely on loose, subjective standards are void for vagueness because students cannot know in advance (and administrators can arbitrarily decide) what's prohibited. *See Coates v. Cincinnati*, 402 U.S. 611, 614 (1971); *McCauley v. Univ. of V.I.*, 618 F.3d 232, 250-51 (3d Cir. 2010).

II. The University's Discriminatory-Harassment Policy

The University "forbids discrimination in any university activity or program." Ex. A at 1. This discrimination policy specifies that "[h]arassment" is "a form of discrimination consisting of unwelcome verbal, written, graphic, or physical conduct that" does two things:

> a. is directed at an individual or group of individuals because of their race, color, national origin, age, sex, religion, disability, veterans' status, sexual orientation, gender identity, or gender expression; and
>
> b. is sufficiently severe or pervasive so as to[:]
>
> > [i] interfere with an individual's employment, education, academic environment, or participation in institution programs or activities; and
> >
> > [ii] create[] a working, learning, program, or activity environment that a reasonable person would find intimidating, offensive, or hostile.

Ex. A at 1-2 (line breaks added). To be prohibited harassment, "the conduct must be both objectively and subjectively harassing in nature." Ex. A at 2. But "[h]arassment does not have to be targeted at a particular individual in order to create a harassing environment, nor must the conduct result in a tangible injury to be considered a violation of this policy." Ex. A at 2. "Whether the alleged conduct constitutes prohibited harassment depends on the totality of the particular circumstances, including the nature, frequency, and duration of the conduct in question, the location and context in which it occurs, and the status of the individuals involved." Ex. A at 2.

Anyone—whether affiliated with the University or not—can file a complaint against a student for discriminatory harassment. *See generally* Ex. A; Ex. C (reporting form). The University "encourages its faculty, staff, students, and guests" to report all violations that they "learn of." Ex. A at 3-4. And the University requires "[a]nyone in a supervisory position (*i.e.*, vice presidents, deans, directors, chairs, department heads, and supervisors" to report "a possible instance or allegation of discrimination."

Ex. A at 4. The University also "train[s] … all full-time regular employees" about the discriminatory-harassment policy. Ex. A at 8.

As a general matter, after a complaint of discriminatory harassment is filed, the Director of the Office of Equal Opportunity and Title IX "investigate[s]" the allegations. Ex. A at 5-7. Students found guilty of discriminatory harassment are subject to disciplinary action via the process outlined in the policy. *See* Ex. A at 5-9. The University "may impose … sanctions," including "disciplinary action up to and including dismissal from the [U]niversity." Ex. A at 9. The discriminatory-harassment policy also makes clear that it "take[s] precedence" over other policies. *See* Ex. A at 9 ("If this policy conflicts with any policy, rule, or regulation at the university including procedures and policies found in the Faculty Handbook and the grievance and appeals policy in the Staff Handbook, this discrimination prohibition policy shall take precedence.").

III. The University's Computer Policy

In July 2022, the University approved University Policy No. 04.01.07, titled "Appropriate Use of Information Resources." *See* Ex. F. This computer policy defines "[i]nformation resources" to include "any device that connects to or communicates electronically via the institutional network, including computers, printers, and communication devices." Ex. F at 2. "[E]mail" counts. Ex. F at 4. The policy lists "activities [that] exemplify inappropriate use of the university's information resources" and states that the listed activities "and similar [ones] are strictly prohibited for all users." Ex. F at 5. One such prohibited activity is "using Texas State's information resources to affect the result of a local, state, or national election or to achieve any other political purpose (consistent with Texas Government Code §556.004)." Ex. F at 7.

Failure to follow this policy can result in serious consequences. Specifically, "[f]ailure to adhere to this policy may lead to the revocation of a user's Texas State [account], suspension of elevated

access privileges, suspension, dismissal, or other disciplinary action by the university, as well as referral to legal and law enforcement agencies." Ex. F at 8.

IV. Speech First and This Litigation

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. *Id.* Speech First has brought similar (and successful) challenges against speech codes at other universities, including the University of Texas, the University of Houston, the University of Central Florida, and the University of Michigan. *Court Battles*, Speech First, perma.cc/7NST-B84H (last accessed Dec. 2, 2022).

Speech First has members who currently attend the University, including Students A, B, and C. *See* Trump Decl. ¶¶3-5. These students each have "views that are unpopular, controversial, and in the minority on campus." Student A Decl. ¶3; Student B Decl. ¶3; Student C Decl. ¶3. For example, Student A believes that "women should not be allowed to kill innocent babies"; "[t]he government should not be using tax dollars paid by hard-working Americans to subsidize in-state tuition benefits for illegal aliens"; "there is no such thing as a 'gender spectrum'"; and "minors are too young to make decisions about their gender identity and their sexual orientation" in any event. Student A Decl. ¶¶5-8. Student B believes that "marriage is only between a man and a woman and that children are healthiest when they are raised as part of a nuclear family"; "it is wrong for two men to use a 'surrogate' to carry a baby"; "biological sex is immutable and cannot change based on someone's internal feelings or how they 'identify'"; "abortion is a grave evil"; and no one should "be forced to affirm that a biological male is actually a female, or vice versa, simply because someone will be offended." Student B Decl. ¶¶4-8. And Student C believes that "abortion kills a defenseless baby and that elective abortions should be illegal in all circumstances"; "human beings are created male or female and … a person

cannot 'transition' from one to the other"; and "'open border' policies are destructive and dangerous." Student C Decl. ¶¶4-8.

Students A, B, and C want to "[e]ngage in open and robust intellectual debate with [their] fellow students about these topics in the classroom, in other areas of campus, online, and in the City of San Macros." Student A Decl. ¶10; Student B Decl. ¶10; Student C Decl. ¶9. When someone else voices contrary views, Students A, B, and C "want to point out the flaws in their arguments and convince them to change their minds." Student A Decl. ¶11; Student B Decl. ¶11; Student C Decl. ¶10. 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. ¶12; Student B Decl. ¶12; Student C Decl. ¶11.

But the University's policies make them "reluctant to openly express [their] opinions or have these conversations." Student A Decl. ¶13; Student B Decl. ¶13; Student C Decl. ¶12. Students A, B, and C "do not fully express [themselves] in certain circumstances or talk about certain issues because [they] believe that sharing [their] beliefs will be considered 'harassment.'" Student A Decl. ¶14; Student B Decl. ¶14; Student C Decl. ¶13. For example, they believe that others on campus will find their views "intimidat[ing]" or "hostile" especially if they share their views passionately and repeatedly. *Id.* Student A also wants "to send politically oriented emails—including emails regarding controversial political issues—to [her] fellow students from [her] university email address." Student A Decl. ¶15. Similarly, Students B and C "want to send politically oriented emails—including emails regarding local, state, or national elections and particular candidates in those elections—to [their] fellow students from [their] university email address[es]." Student B Decl. ¶15; Student C Decl. ¶15. Students A-C, however, refrain from doing so because they are afraid that they will be punished under the computer policy. *Id.*

Speech First brought this suit to ensure that its members and other students can freely speak and express their views without fearing discipline, investigation, or any other negative repercussions from the University. Trump Decl. ¶9.

ARGUMENT

Speech First is entitled to a preliminary injunction if it shows four things: (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 is in [its] favor"; and (4) "an injunction is in the public interest." *Pendergest-Holt v. Certain Underwriters at Lloyd's of London*, 600 F.3d 562, 568-69 (5th Cir. 2010) (internal quotation marks omitted). In free-speech cases, the first factor is decisive. When a policy likely violates the First and Fourteenth Amendments, the remaining factors necessarily favor a preliminary injunction. *See, e.g.*, *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). All four factors are satisfied here.

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

The University's discriminatory-harassment policy likely violates the First and Fourteenth Amendments. The First Amendment "reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Snyder*, 562 U.S. at 452. Its protections are strongest on the campuses of public colleges and universities. *See Healy*, 408 U.S. at 180; *Sweezy*, 354 U.S. at 250. Universities that try to police speech that is "biased," "hateful," "harassing," or "discriminatory" thus have a poor 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). The University's discriminatory-harassment policy is no different. This Court should conclude that the policy is likely facially unconstitutional.

Likewise with the University's computer policy. That policy sweepingly bars students from using their university email addresses to send messages with a "political purpose" and other "similar

activities." This Court should conclude that the policy is likely content-based, overbroad, and void for vagueness in violation of the First and Fourteenth Amendments.

A. The discriminatory-harassment policy is facially unconstitutional.

The University's discriminatory-harassment policy is an overbroad, viewpoint-based, and content-based restriction on speech that violates the First Amendment on its face.

1. The policy is overbroad.

The University's discriminatory-harassment policy is overbroad. A policy is overbroad when "a substantial number of its applications are unconstitutional, judged in relation to the [policy's] plainly legitimate sweep." *Serafine v. Branaman*, 810 F.3d 354, 364 (5th Cir. 2016) (cleaned up). The key question is whether "the [policy] itself" poses a "realistic danger" of chilling constitutionally protected speech. *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984); *see also Serafine*, 810 F.3d at 364 ("[T]he constitutional defect of an overbroad restraint on speech lies in the risk that the wide sweep of the restraint may chill protected expression." (cleaned up)).

Here, the University restricts a broad swath of *protected speech*—not just *prohibitable conduct*. In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), the Supreme Court drew a clear line between harassment that is *punishable conduct* and harassment that is *protected speech*. There, the Court held that schools can violate Title IX's ban on sex-based discrimination if they are deliberately indifferent to sexual harassment by students. *Id.* 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). The Court's standard intentionally excludes "a single instance of one-on-one peer harassment," even if "sufficiently severe." *Id.* at 652-53. By imposing this stringent definition, the *Davis* standard ensures that schools regulate harassing *conduct*, not *protected 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. *See Davis*, 526 U.S. at 651 (distinguishing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)). The Education Department in 2020 reached the same conclusion when it adopted a notice-and-comment rule that defines harassment under Title IX. Title IX's 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 adopted the *Davis* standard when dealing with schools.[2]

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*, 505 U.S. at 130. There is no First Amendment exception for "harassing" or "discriminatory" speech. *Saxe*, 240 F.3d at 210; *Matal*, 528 U.S. at 244-47. "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 itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 579 (1995) ("The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis."). Put differently, "if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978). Thus, harassment policies that regulate speech instead of conduct violate the First Amendment.

The University, however, ignores *Davis*'s limits. The University defines "[h]arassment" as "a form of discrimination consisting of unwelcome verbal, written, graphic, or physical conduct that" (a) is "directed at an individual or group of individuals because of [a listed class]"; and (b) "is sufficiently severe or pervasive so as to interfere with an individual's … education …; and creates a …

[2] *See, e.g.*, *I.F. v. Lewisville Indep. Sch. Dist.*, 915 F.3d 360, 373 (5th Cir. 2019) (analyzing Title IV 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).

learning … environment that a reasonable person would find intimidating, offensive, or hostile." Ex. A at 1-2. That definition conflicts with *Davis*'s standard in several ways. First, the policy covers "severe *or* pervasive" harassment, so it necessarily reaches a single or isolated incident that the University deems sufficiently "severe." *Id.* (emphasis added). But *Davis* intentionally excluded single or isolated incidents. *See* 526 U.S. at 652-53 ("so severe, pervasive, *and* objectively offensive" (emphasis added)). Second, the University bans "harassment" that "*interfere[s]* with an individual's … education, academic environment, or participation in institution programs or activities." Ex. A at 1-2 (emphasis added). But *Davis* made clear that prohibitable harassment must turn on whether the harassment *denies* someone's access to education. *See* 526 U.S. at 652 ("so severe, pervasive, and objectively offensive that it *denies* its victims … equal access to education" (emphasis added)).

These differences between the University's discriminatory-harassment policy and the *Davis* standard are fatal. *See Khator*, 603 F. Supp. 3d at 482 & n.6 ("Speech First will likely succeed on the merits because the original policy does not comport with the standard adopted by the Supreme Court [in *Davis*]."). The University has no legitimate basis to go beyond *Davis*'s limits. *See Fenves*, 979 F.3d at 337 n.16; *DeJohn v. Temple Univ.*, 537 F.3d 301, 318 (3d Cir. 2008). And given that the University's policy covers single or isolated incidents, the policy is "susceptible of regular application to protected expression," reaching vast amounts of protected speech uttered daily. *City of Houston v. Hill*, 482 U.S. 451, 466-67 (1987). This alone is enough to conclude the policy is overbroad.

But the deviation from *Davis* here is particularly damning. For one, the University's policy "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 policy reaches "speech occup[ying] the highest rung of the hierarchy of First Amendment values and merits special protection." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2476 (2018) (cleaned up). For another, the policy gives university officials wide discretion on

what speech to apply the policy to. The policy uses several amorphous terms, exacerbating the policy's breadth. The policy bars speech that is "unwelcome," speech that "interfere[s]," and speech "that a reasonable person would find intimidating, offensive, or hostile." Ex. A at 1-2. These terms are "pretty amorphous" because their "application would likely vary from one student to another." *Cartwright*, 32 F.4th at 1121; *see also McCauley*, 618 F.3d at 250-51; *DeJohn*, 537 F.3d at 317-20; *Coates*, 402 U.S. at 614. The policy also uses a "totality of the particular circumstances" test with a non-exhaustive list of factors to determine whether particular speech is prohibited. Ex. A at 2. This "totality-of-known-circumstances approach … only makes matters worse." *Cartwright*, 32 F.4th at 1121. The University's officials "alone ha[ve] the power to decide in the first instance whether a given activity" is prohibited and "then enforce the [policy] as [they] see[] fit." *Serafine*, 810 F.3d at 368-69 (cleaned up). "Such unfettered discretion is untenable." *Id.* at 369.

2. The policy is an impermissible viewpoint-based restriction.

The discriminatory-harassment policy is a viewpoint-based restriction. The Supreme Court has made clear that restrictions "based on viewpoint are prohibited." *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018); *see also, e.g.*, *Iancu*, 139 S. Ct. at 2299 ("The government may not discriminate against speech based on the ideas or opinions it conveys."); *Shurtleff v. City of Bos.*, 142 S. Ct. 1583, 1593 (2022) (viewpoint discrimination prohibited); *Cartwright*, 32 F.4th at 1126 ("Restrictions … based on viewpoint are prohibited, seemingly as a *per se* matter." (cleaned up)); *Ison v. Madison Loc. Sch. Dist. Bd. of Educ.*, 3 F.4th 887, 894 (6th Cir. 2021) ("[T]he government may not censor speech merely because it is 'offensive to some.'"); *Robinson v. Hunt Cnty.*, 921 F.3d 440, 447 (5th Cir. 2019) ("'It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'"). This alone dooms the policy.

The discriminatory-harassment policy discriminates based on viewpoint for at least two reasons. First, the policy does not bar "harassment" alone; it bars "harassment" "on the basis of" various

"protected class[es]" (*e.g.*, race, sex, religion, and veteran's status). Ex. A at 1-2. By barring speech based on some classes and not others, the University "disapprov[es] of a subset of messages it finds offensive." *Iancu*, 139 S. Ct. at 2299 (cleaned up). This is particularly true where, as here, the policy "prohibits harassment based on personal characteristics that are not protected under federal law." *Saxe*, 240 F.3d at 210; Ex. A at 1 (*e.g.*, "veterans' status" and "age"). Second, the policy bars speech that is "unwelcome," "intimidating, offensive, or hostile." Ex. A at 1-2. But "[g]iving offense is a viewpoint." *Matal*, 528 U.S. at 243. So policies that regulate offensive speech impose "'viewpoint-discriminatory restrictions.'" *Saxe*, 240 F.3d at 206; *see also DeJohn*, 537 F.3d at 316 (When antiharassment regulations "attempt to regulate oral or written expression," they "steer[] into the territory of the First Amendment." (internal quotation marks omitted)). Indeed, the Fifth Circuit has long held that when anti-harassment policies reach speech, they impose "viewpoint-discriminatory restrictions." *DeAngelis*, 51 F.3d at 596-97; *cf. also Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1184-85 (6th Cir. 1995).

The bottom line is that "a [policy] disfavoring 'ideas that offend' discriminates based on viewpoint, in violation of the First Amendment." *Iancu*, 139 S. Ct. at 2301. The University's policy does. It is thus facially unconstitutional for that reason alone. *See id.* at 2302 (concluding that it is unnecessary to do overbreadth analysis to facially hold unconstitutional a provision because a court's "finding of viewpoint bias end[s] the matter").

3. The policy is a content-based restriction that fails strict scrutiny.

At the very least, the discriminatory-harassment policy discriminates based on content. A policy "is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). A policy can be content-based "on its face" or because of its "purpose and justification." *Id.* at 166. Both are true here.

The policy is facially content-based. "It is content-based because the University 'imposes differential burdens upon speech' on account of the topics discussed, and draws 'facial distinctions

defining regulated speech by particular subject matter,' when it prohibits speech about any of a long list of characteristics." *Cartwright*, 32 F.4th at 1126 (alterations omitted) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994); *Reed*, 576 U.S. at 163). In other words, to determine whether one violates the policy, one must know whether the speech was based on one of the listed characteristics.

Plus, the policy's definition of "harassment" also hinges on the listener's response to the speech—whether the speech is "unwelcome" and "subjectively harassing in nature." Ex. A at 1-2. It's well-established that "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth*, 505 U.S. at 134; *see also, e.g.*, *Saxe*, 240 F.3d at 209 ("The Supreme Court has made it clear, however, that the government may not prohibit speech under a 'secondary effects' rationale based solely on the emotive impact that its offensive content may have on a listener."); *Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles Cnty. Sheriff Dep't*, 533 F.3d 780, 787 (9th Cir. 2008) ("If the statute … would allow or disallow speech depending on the reaction of the audience, then the ordinance would run afoul of an independent species of prohibitions on content-restrictive regulations, often described as a First Amendment-based ban on the 'heckler's veto.'").

The policy's purpose and justification also prove that it's content-based. The "Prohibition of Discrimination" includes "[p]olicy [s]tatements." Ex. A at 1. One policy statement is that the University "is committed to an *inclusive* educational and work environment." Ex. A at 1 (emphasis added). The discriminatory-harassment policy is also highlighted in the "Civility Policy and Procedures," because, according to the University, the harassment policy helps "foster[] a culture that demonstrates the principles of civility, diversity, equity, and inclusion." Ex. E at 1. The policy's purpose and justification are thus to "singl[e] out specific subject matter for differential treatment," namely, "exclusive" speech. *Reed*, 576 U.S. at 169. So the policy is content-based, regardless whether it "target[s] viewpoints within that subject matter," *id.*, and "regardless of the government's benign motive," *id.* at 165.

As a result, the discriminatory-harassment policy is subject to strict scrutiny. *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2346 (2020). The University must "prov[e]" that the policy is "narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163. It cannot. The University has no legitimate interest in drafting its policy to regulate certain viewpoints, let alone a compelling one. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 395-96 (1992); *IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 393 (4th Cir. 1993). Even if the University had a compelling interest, the policy is not narrowly tailored. 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. The policy thus fails strict scrutiny.

B. The computer policy is facially unconstitutional.

The University's computer policy fares no better. Besides violating the First Amendment, this policy is also void for vagueness.

1. The policy is an overbroad, content-based restriction on speech.

The challenged provision of the computer policy regulates speech—for example, electronic mail messages. Ex. F; *see also* Ex. F at 4 ("Texas State considers email a significant information resource."). 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*, 582 U.S. 98, 204-05 (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." *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 computer policy is content-based. The University lets students "us[e] Texas State's information resources" to send speech about many issues, except ones that could "affect the result of a

local, state, or national election" or "achieve any other political purpose." Ex. F at 7. But "the First Amendment's hostility to content-based regulation extends … to prohibition of public discussion of an entire topic." *Reed*, 576 U.S. at 169 (cleaned up). For example, "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. A student cannot send an email that says "universal healthcare is a human right" or an email that says "re-elect Governor Greg Abbott." That is classic content discrimination. *See Barr*, 140 S. Ct. at 2346 ("Because the law favors speech made for collecting government debt over political and other speech, the law is a content-based restriction on speech.").

The University has no legitimate interest in this policy. "'Discussion of public issues and debate on the qualifications of candidates are integral to the operation' of our system of government." *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011). For this reason, "the First Amendment has its fullest and most urgent application to speech uttered during [and for] a campaign for political office." *Id.* (cleaned up); *see also Citizens United v. FEC*, 558 U.S. 310, 339-40 (2010); *Cartwright*, 32 F.4th at 1125.

Moreover, the policy's ban on "political purpose" emails (and the like) is overbroad. From its face, the policy bans emails advocating for the election or defeat of specific candidates *and* emails advocating for issues that are typically aligned with a certain party. Plus, the policy provides only examples of prohibited conduct and thus is merely illustrative. *See* Ex. F at 5 ("These *and similar activities* are strictly prohibited for all user" (emphasis added)). The computer policy is thus "'susceptible of regular application to protected expression,' reaching vast amounts of protected speech uttered daily." *United States v. Hernandez-Calvillo*, 39 F.4th 1297, 1313 (10th Cir. 2022). That is, it "restricts political advocacy and covers substantially more speech than the First Amendment permits." *Cartwright*, 32 F.4th at 1125. It is unconstitutional.

2. The policy is also void for vagueness.

"A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (citing *City of Chicago v. Morales*, 527 U.S. 41, 56-57 (1999)). The computer policy does both.

The University's computer policy prohibits speech that "affect[s] the result of a local, state, or national election or … achieve[s] any other political purpose." Ex. F at 7. But the policy does not define "political," even though "the word can be expansive." *Mansky*, 138 S. Ct. at 1888. The University provides no meaningful guidance about whether the ban only covers emails advocating for the election or defeat of specific candidates, whether it also applies to issue advocacy that is typically aligned with a certain party, whether it prohibits only student government campaigning, or whether it covers anything that anyone could deem political. Worse, the policy "strictly" prohibits "similar activities" and thus does not even state the full list of the already vague prohibited activities. Ex. F at 5.

These defects are fatal. "It is self-evident that an indeterminate prohibition carries with it the opportunity for abuse." *Mansky*, 138 S. Ct. at 1891 (cleaned up). And here the policy's vagueness "go[es] beyond close calls on borderline or fanciful cases." *Id.*; *see also id.* (calling the vagueness in a similarly worded law "a serious matter"). Several courts have concluded that the term "political" has rendered a policy or law unconstitutionally vague. *See, e.g.*, *Am. Freedom Def. Initiative v. Suburban Mobility Auth. For Reg'l Transportation*, 978 F.3d 481, 498 (6th Cir. 2020) (concluding that a "political" restriction was unconstitutionally vague); *Ctr. For Investigative Reporting v. Se. Pa. Transp. Auth.*, 975 F.3d 300, 316-17 (3d Cir. 2020); *White Coat Waste Project v. Greater Richmond Transit Co.*, 35 F.4th 179, 203 (4th Cir. 2022); *Zukerman v. USPS*, 961 F.3d 431, 447-52 (D.C. Cir. 2020). Because the policy deprives the

average student of "a reasonable opportunity to understand what conduct [the policy] prohibits," *Hill*, 530 U.S. at 732, this Court should do the same.

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

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

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. Without a preliminary injunction, Speech First will suffer ongoing First Amendment violations and thus irreparable harm. *See Cartwright*, 32 F.4th at 1128 ("[I]n the absence of a preliminary injunction, Speech First would undoubtedly suffer irreparable harm.").

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) (cleaned up); *accord Texans for Free Enter.*, 732 F.3d at 539. And "'injunctions protecting First Amendment freedoms are always in the public interest.'" *Id.* These factors "heavily" favor a preliminary injunction. *McDonald*, 4 F.4th at 255.

III. The Court should not 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); *see also RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1215 (10th Cir. 2009) (District courts have "have wide discretion under Rule 65(c) in determining whether to require security." (cleaned up)). When "there is no risk of monetary loss to the defendants as a result of [a] preliminary injunction," courts often grant "request[s] that the bond be waived." *Gordon v. City of Houston*, 79 F. Supp. 3d 676, 695 (S.D. Tex. 2015); *see also*

Texans for Free Enter. v. Tex. Ethics Comm'n, 2012 WL 12874899, at *7 (W.D. Tex. Dec. 6) ("Where the district court determines that the risk of harm is remote, the court has discretion to require only a nominal bond or no bond at all.").

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) (cleaned up). 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 because 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.*; *see also Winnebago Tribe of Nebraska v. Stovall*, 341 F.3d 1202, 1206 (10th Cir. 2003); *Coquina Oil Corp. v. Transwestern Pipeline Co.*, 825 F.2d 1461, 1462 (10th Cir. 1987). So the Court should not require a bond. *See, e.g.*, *Speech First, Inc. v. Cartwright*, 2021 WL 3399829, at *7 n.11 (M.D. Fla. July 29) (waiving bond); *Khator*, 603 F. Supp. 3d at 482 (not ordering a bond).

CONCLUSION

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

Date: April 14, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 14, 2023, I e-filed this document and its attachments via ECF, which will automatically email all counsel of record. I am also serving this document and its attachments by email and by certified mail, return receipt requested, to the following:

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