No. 23-50633

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SPEECH FIRST, INCORPORATED,
Plaintiff-Appellant,

v.

BRIAN MCCALL, in his official capacity as Chancellor of the Texas State University System; KELLY DAMPHOUSSE, in his official capacity as President of Texas State University; ALEXANDRIA HATCHER, in her official capacity as Director of the Office of Equal Opportunity and Title IX for Texas State University; KEN PIERCE, in his official capacity as Vice President for Information Technology for Texas State University; DANIEL OWEN, in his official capacity as Chief Information Security Officer for Texas State University; EARL C. AUSTIN, in his official capacity as a member of the Texas State University System Board of Regents; GARRY CRAIN, in his official capacity as a member of the Texas State University System Board of Regents; ALAN L. TINSLEY, in his official capacity as a member of the Texas State University System Board of Regents; CHARLIE AMATO, in his official capacity as a member of the Texas State University System Board of Regents; SHELIA FASKE, in her official capacity as a member of the Texas State University System Board of Regents; DIONICIO FLORES, in his official capacity as a member of the Texas State University System Board of Regents; STEPHEN LEE, in his official capacity as a member of the Texas State University System Board of Regents; WILLIAM F. SCOTT, in his official capacity as a member of the Texas State University System Board of Regents; GABRIEL WEBB, in his official capacity as a member of the Texas State University System Board of Regents,
Defendants-Appellees.

On Appeal from the United States District Court for the Western District of Texas, No. 1:23-cv-411 (Ezra, J.)

OPENING BRIEF OF PLAINTIFF-APPELLANT SPEECH FIRST, INC.

J. Michael Connolly
Cameron T. Norris
James F. Hasson
Thomas S. Vaseliou
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
cam@consovoymccarthy.com

Counsel for Appellant

Dated: January 16, 2024

CERTIFICATE REGARDING INTERESTED PERSONS

1. No. 23-50633, *Speech First, Inc. v. McCall*;

2. The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this Court can evaluate possible disqualification or recusal:

Speech First, Inc.*

CONSOVOY MCCARTHY PLLC

J. Michael Connolly

Cameron T. Norris

James F. Hasson

Thomas S. Vaseliou

/s/ *Cameron T. Norris*
Counsel for Speech First, Inc.
Dated: January 16, 2024

* Speech First has no parent corporation, and no corporation owns 10% or more of its stock.

STATEMENT REGARDING ORAL ARGUMENT

Speech First requests oral argument. This appeal presents important and novel questions about the scope of free-speech protections on college campuses. It is the first case to raise the constitutionality of a university's discriminatory-harassment policy in this Court, a tried-and-true method of chilling student speech. This case also raises important questions of voluntary cessation and the application of this Court's precedent in *Speech First, Inc. v. Fenves*, 979 F.3d 319, 327-29 (5th Cir. 2020). To give these important issues the full airing they deserve, Speech First respectfully requests oral argument.

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JURISDICTION

The district court had jurisdiction because Speech First alleged that the University is violating the First and Fourteenth Amendments. 28 U.S.C. §1331. This Court has jurisdiction because Speech First appeals from an order denying injunctive relief. §1292(a)(1). The district court entered that order on September 1, 2023, and Speech First timely appealed five days later. ROA.794-95.

STATEMENT OF ISSUES

I. Texas State University prohibits students from engaging in "harassment" because it is "a form of discrimination." Its policy covers "unwelcome verbal" or "written … conduct," can be violated by an isolated incident, and goes beyond the Supreme Court's authoritative definition of harassment in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). Does the policy likely violate the First Amendment?

II. After suit was filed and the district court stated that the University's policy violates the First Amendment, Texas State amended it. But the University defended the original policy as constitutional, adopted the amended policy only to avoid liability, and introduced no sworn testimony about its future intentions. The amended policy still violates the *Davis* standard in part, and it's likely invalid because it conflicts with superseding systemwide policies. Was the district court correct that this amendment mooted Speech First's request for a preliminary injunction against the original policy?

III. Appellate courts can order the entry of a preliminary injunction when a mere remand would be inefficient or harmful. Here, the equitable factors are easy, the district court already explained how it would weigh them, and some of Speech First's members will soon graduate. Should this Court enter a preliminary injunction now?

STATEMENT OF THE CASE

I. Public universities are supposed to be bastions of free speech, but too often adopt policies that unconstitutionally chill student expression.

The framers designed the Free Speech Clause to "protect the 'freedom to think as you will and to speak as you think.'" *303 Creative LLC v. Elenis*, 600 U.S. 570, 584 (2023). They "saw the freedom of speech 'both as an end and as a means.'" *Id.* "An end because the freedom to think and speak is among our inalienable human rights," and "[a] means because the freedom of thought and speech is indispensable to the discovery and spread of political truth." *Id.* (cleaned up). "[I]f there is any fixed star in our constitutional constellation, it is the principle that the government may not interfere with an uninhibited marketplace of ideas." *Id.* at 584-85 (cleaned up). The First Amendment thus protects "an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply misguided, and likely to cause anguish or incalculable grief." *Id.* at 586 (cleaned up).

The First Amendment is at its apex on college campuses. The "vigilant protection of constitutional freedoms is nowhere more vital than in the community of

American [universities]." *Healy v. James*, 408 U.S. 169, 180 (1972) (cleaned up). "Their chief mission is to equip students to examine arguments critically and, perhaps even more importantly, to prepare young citizens to participate in the civic and political life of our democratic republic." *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1128 (11th Cir. 2022). Because "[i]ndependent thinking" requires "constant questioning" and "the expression of new, untried and heterodox beliefs," universities should be "great bazaars of ideas where the heavy hand of regulation has little place." *Kim v. Coppin State Coll.*, 662 F.2d 1055, 1064 (4th Cir. 1981). "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. N.H. ex rel. Wyman*, 354 U.S. 234, 250 (1957).

All the more for speech on controversial topics that offends others. The "mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973). After all, "the point of all speech protection is … to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995). These principles apply with more force "[i]n our current national condition," not less. *Fenves*, 979 F.3d at 339. It is "imperative that colleges and universities toe the constitutional line when monitoring, supervising, and regulating student expression." *Cartwright*, 32 F.4th at 1129.

But rather than promote the "'robust exchange of ideas,'" *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967), many universities are now more interested in protecting students from ideas that make them uncomfortable. Universities do this by adopting policies that discourage speech by students who dare to disagree with the prevailing campus orthodoxy. One tried-and-true method is the campus speech code. Speech codes, according to the Foundation for Individual Rights and Expression (or FIRE), are "university regulations prohibiting expression that would be constitutionally protected in society at large." ROA.211. 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); *see* ROA.217 & n.50 (collecting more cases).

Texas State is no stranger to First Amendment problems. At the end of 2017, an "independent student newspaper" published a controversial "editorial by [an] opinion columnist." ROA.465-66. Several university officials, including "the university president," denounced the editorial. ROA.466. The University's "Student Government president threatened to attack the paper's funding unless its editor-in-chief, the opinions editor, and [the columnist] all resigned"; and the Director of the University's journalism school "announced that she was forming a committee to review the newspaper's editorial process." ROA.491-94. FIRE intervened, but the University never responded with "any concrete commitment to safe-guarding students' First Amendment rights." ROA.494. As a result, the University made FIRE's annual list of "[t]he 10 worst colleges for free speech." ROA.469-71, 491-94.

The University ran headlong into the First Amendment again in late 2022. It had a policy barring resident assistants and other university "employees from speaking to the media without administrative approval, even in their personal capacity on issues of public concern." ROA.500-01. In late 2022, the University enforced the policy: It "issued written warnings to three of its student-employees because they spoke with … the campus newspaper." ROA.501. "FIRE wrote Texas State urging it to revise this policy to comply with its First Amendment obligations." ROA.501. Only after that threat did Texas State "remov[e] the written warnings from the RAs' personnel files." ROA.501. Texas State thus received, to no one's surprise, another mediocre free-speech ranking this year. *See 2024 College Free Speech Rankings*, FIRE, perma.cc/H6ZM-URDR.

II. Policies on "discriminatory harassment" are an increasingly common way that universities chill students' speech.

Under the guise of "prohibit[ing] discriminatory harassment," unconstitutionally overbroad harassment policies have "proliferated" at universities across the country. ROA.211, 214. To be sure, the First Amendment protects conduct, not speech; so bans on harassment and discrimination pose no constitutional problem when they are crafted carefully to regulate only unprotected conduct. But when these policies reach "pure expression," they "stee[r] into the territory of the First Amendment." *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596 (5th Cir. 1995). And they typically "impos[e] content-based, viewpoint-discriminatory restrictions on [that] speech." *Id.* As then-Judge Alito explained in a famous student-speech case, 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). The government "cannot avoid the strictures of the First Amendment simply by defining certain speech as 'bullying' or 'harassment'" or discrimination. *Parents Defending Educ.* (*PDE*) *v. Linn Mar Cmty. Sch. Dist.*, 83 F.4th 658, 667 (8th Cir. 2023).

The Supreme Court explained in *Davis* how to draw the line between discriminatory harassment that is punishable conduct and discriminatory harassment that is protected speech. *Davis* held that schools can violate Title IX's ban on sex-based discrimination if they are deliberately indifferent to sexual harassment by students. 526 U.S. at 633. At the same time, the Court adopted a narrow definition of actionable "harassment" under Title IX. The harassment must be "so severe, pervasive, *and* objectively offensive that it *denies* its victims the equal access to education." *Id.* at 652 (emphases added). This 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 only harassing conduct.

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 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." *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 harassment that governs the workplace under 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 id.* at 651 (emphases added; distinguishing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)). This Court, too, has insisted on the *Davis* standard when dealing with schools.[1]

Although the Supreme Court gave schools a clear, speech-protective definition of harassment, many universities refused to listen. The subsequent rise of overbroad "harassment" policies has contributed to a parallel rise in the percentage of college students who believe they cannot express controversial opinions on campus. *See* ROA.357.

[1] *See, e.g.*, *I.F. v. Lewisville Indep. Sch. Dist.*, 915 F.3d 360, 373 (5th Cir. 2019) (analyzing Title IX claim under severe-and-pervasive standard); *Bruce v. Wigley*, 273 F.3d 393 (5th Cir. 2001) (same); *Doe v Columbia-Brazoria Indep. Sch. Dist. by & through Bd. of Trustees*, 855 F.3d 681, 689 (5th Cir. 2017) (same); *Roe v. Cypress-Fairbanks Indep. Sch. Dist.*, 53 F.4th 334, 345 (5th Cir. 2022) (same); *Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 409 (5th Cir. 2015) (noting that Title IX applies only to harassment that is "severe, pervasive and objectively offensive" conduct, and applying the 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).

In a 2022 survey, 83 percent of students said they sometimes "could not express [their] opinion on a subject because of how students, a professor, or the administration would respond." ROA.357; *see* ROA.358 (explaining that nearly half of students said it was difficult to openly and honestly discuss on campus critical topics, such as abortion (49%), racial inequality (48%), transgender issues (44%), and gun control (43%)); *2024 College Free Speech Rankings* 34 (similar). That same survey reported that 52 percent of students believe campuses should ban any speaker who promotes the idea that "[t]ransgender people have a mental disorder," and that 48 percent believe campuses should ban any speaker who promotes the idea that "Black Lives Matter is a hate group." ROA.338; *see* ROA.327 ("Opposition to allowing controversial conservative speakers on campus ranged from 59% to 73%.").

In 2020, the Department of Education tried to step in. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026 (May 19, 2020); 34 C.F.R. §106.30(a)(2). Where prior administrations had used guidance to define actionable harassment under Title IX, the Trump administration used a notice-and-comment regulation. That regulation "adopt[ed]" the Supreme Court's definition of sexual harassment from *Davis* "verbatim." 85 Fed. Reg. at 30,036. Any lesser standard, the Department explained, would "weaken" the "protection of free speech and academic freedom" on college campuses. *Id.* at 30,155 n.680. As the Department recognized, the *Davis* standard "ensures that speech … is not peremptorily chilled or restricted" because it applies only when harassment rises to the level of

"serious *conduct* unprotected by the First Amendment." *Id.* at 30,151-52 (emphasis added); *see id.* at 30,162-63. The 2020 rule thus defines "[s]exual harassment" to mean, in relevant part, "[u]nwelcome conduct determined by a reasonable person to be so severe, pervasive, *and* objectively offensive that it effectively *denies* a person equal access to the recipient's education program or activity." 34 C.F.R. §106.30(a)(2) (emphases added). This regulation is still in effect. And all attempts to invalidate it have failed. *E.g.*, *Pennsylvania v. DeVos*, 480 F. Supp. 3d 47, 59-60 & n.11 (D.D.C. 2020).

Unfortunately, the 2020 rule did not settle things. Most universities responded by imposing two *separate* harassment policies: one "Title IX harassment policy" that adopts the *Davis* standard, and another "non-Title IX harassment policy" that is much broader. ROA.227. Texas State did the same thing. *See TSUS Sexual Misconduct Policy* 18, perma.cc/E7RV-AF2Y (separately prohibiting "Non-Title IX Sexual Misconduct" and "Title IX Sexual Harassment").

The Biden administration, moreover, is about to repeal the 2020 rule. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 87 Fed. Reg. 41,390 (July 12, 2022). Its proposed rule, which will be finalized in March 2024, defines "sexual harassment" as "unwelcome sex-based conduct that is sufficiently severe *or* pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies *or limits* a person's ability to participate in or benefit from the recipient's education program or activity." *Id.* at 41,411 (emphases added); Unified Agenda Entry of Nondiscrimination on the Basis of Sex in Education

Programs or Activities Receiving Federal Financial Assistance, OIRA, perma.cc/H9E3-UK73 ("Final Rule" expected March 2024). In other words, it will bless the many schools who have harassment policies broader than *Davis*, and it will force the few schools that have *Davis*-compliant policies to adopt non-compliant ones.

III. Texas State maintains a discriminatory-harassment policy that unconstitutionally chills speech.

A. The Challenged Policy

Texas State "forbids discrimination in any university activity or program." ROA.126. 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] creat[e] a working, learning, program, or activity environment that a reasonable person would find intimidating, offensive, or hostile.

ROA.126-27 (line breaks added). To be prohibited harassment, "the conduct must be both objectively and subjectively harassing in nature." ROA.127. But "[h]arassment does not have to be targeted at a particular individual," "nor must the conduct result in

a tangible injury." ROA.127. "Whether the alleged conduct constitutes prohibited harassment depends on the totality of the particular circumstances." ROA.127.

Anyone—whether affiliated with the University or not—can file a complaint for discriminatory harassment. *See* ROA.126-35; ROA.143-53 (reporting form). The University "encourages its faculty, staff, students, and guests" to report all violations that they "learn of." ROA.128-29. And the University requires "[a]nyone in a supervisory position" to report "a possible instance or allegation of discrimination." ROA.129.

After a complaint of discriminatory harassment is filed, the Director of the Office of Equal Opportunity and Title IX "investigate[s]" the allegations. ROA.130-32. Students found guilty of discriminatory harassment are subject to disciplinary action. *See* ROA.130-33. The University "may impose … sanctions," including "disciplinary action up to and including dismissal from the [U]niversity." ROA.134.

B. The Post-Lawsuit Amendment

After a hearing where the district court said the challenged harassment policy was obviously unconstitutional, the University amended it. The amended policy states that "[h]arassment" is "a form of discrimination consisting of verbal, graphic, or physical conduct that either":

> a. subjects an *employee* on the basis of their membership in a Protected Class to unwelcome conduct that is severe *or* pervasive enough to alter the conditions of the employee's employment and create a hostile or abusive working environment; or
>
> b. subjects a *student* on the basis of their membership in a Protected Class to severe, pervasive, *and* objectively offensive treatment that denies the student equal access to education.

ROA.662 (emphases added). "Protected Class" includes "race, color, sex, pregnancy, gender identity, sexual orientation, gender expression, religion, age, national origin, ethnicity, military or veteran status, disability, genetic information, or any other legally protected basis." ROA.662. The conduct must satisfy the respective standard "from both a subjective and objective perspective." ROA.662. The University will make this determination based on the totality of the circumstances. ROA.662.

The amended policy prohibits harassment differently based on who the *listener* is, not the speaker. When a speaker's "verbal" conduct affects "a *student*," the *Davis* standard applies. ROA.662 (emphasis added). But when a speaker's "verbal" conduct affects "an *employee*," a broader standard applies. ROA.662. In short, the amended policy tracks *Davis* when the victim is a mere *student* but departs from *Davis* when the victim is an *employee* (*e.g.*, professor, resident assistant). *See* ROA.662.

As if this maneuver wasn't already an obvious attempt to avoid liability, the University plucked this amended policy from a settlement that Speech First entered with the University of Houston. *See* ROA.658. But that settlement came *after* the district court entered a preliminary injunction holding that Houston's prior policy likely violated the First Amendment because it exceeded *Davis*. *See Speech First, Inc. v. Khator*, 603 F. Supp. 3d 480, 481-82 & n.6 (S.D. Tex. 2022). That settlement also had Houston's promise, on penalty of contempt and breach of contract, that it would "not reinstate the version of the Policy challenged by Speech First" (and that Houston would "pay Speech First thirty thousand dollars"). ROA.674-76. And that settlement was clear that Speech First

took no position on the amended policy's constitutionality and that it remained free to challenge that policy in the future. ROA.674-76.

Texas State *University* also has never explained how its amended harassment policy interacts with the harassment policies of the Texas State *System*. The System has its own policies on racial and sexual harassment. *See Policies*, Tex. State Univ. Sys. (last archived Jan. 12, 2024), perma.cc/E7RV-AF2Y ("TSUS Rules and Regulations" and "TSUS Sexual Misconduct Policy"); ROA.22-23 (reciting relevant language of System policies). These System policies exceed the *Davis* standard. For example, the System's sexual-harassment policy prohibits "sufficiently severe, persistent, *or* pervasive" conduct that "interferes" with a "student's ability to participate in or benefit from" the university because of the student's sex. *TSUS Sexual Misconduct Policy* 58-59. And the System's racial-harassment policy prohibits "extreme or outrageous … communications that are intended to harass, intimidate, or humiliate students … on account of race" and that "reasonably cause" the student "to suffer severe emotional distress." *TSUS Rules and Regulations* ch. VII, §4.3. The System policies appear to supersede the University policies and have not been amended. *See id.*, ch. X, §5 (university policies are "invalid insofar as they conflict" with system policies and "will be disregarded").

IV. Speech First sues and seeks a preliminary injunction for its members at Texas State.

Plaintiff, Speech First, is a nationwide membership organization dedicated to preserving free speech on college campuses. ROA.103 ¶2. Speech First protects the

rights of students through litigation and other lawful means. *Id.* It has successfully vindicated students' rights against many universities, including Texas, Houston, Virginia Tech, Central Florida, Iowa State, Illinois, and Michigan. *E.g.*, *Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020) (Texas); *Speech First, Inc. v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022) (Central Florida); *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019) (Michigan); *Speech First, Inc. v. Khator*, 603 F. Supp. 3d 480 (S.D. Tex. 2022) (Houston).

Speech First has members who currently attend the University, including Students A, B, and C. *See* ROA.103 ¶¶3-5; ROA.110-21. These students each have "views that are unpopular, controversial, and in the minority on campus." ROA.110 ¶3; ROA.114 ¶3; ROA.118 ¶3. Student A is a junior who believes that, for example, "women should not be allowed to kill innocent babies"; that "[t]he government should not be using tax dollars paid by hard-working Americans to subsidize in-state tuition benefits for illegal aliens"; and that "there is no such thing as a 'gender spectrum.'" ROA.114-15 ¶¶5-7. Student B is a senior who believes that "marriage is only between a man and a woman"; that "it is wrong for two men to use a 'surrogate' to carry a baby"; and that no one should "be forced to affirm that a biological male is actually a female, or vice versa." ROA.114-15 ¶¶4-7. And Student C is a sophomore who believes that "elective abortions should be illegal in all circumstances"; that "human beings are created male or female and … a person cannot 'transition' from one to the other"; and that "'open border' policies are destructive and dangerous." ROA.118-19 ¶¶4-7.

Students A-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." ROA.111 ¶10; ROA.115 ¶10; ROA.119 ¶9. When someone else voices contrary views, Students A-C "want to point out the flaws in their arguments and convince them to change their minds." ROA.111 ¶11; ROA.115 ¶11; ROA.119 ¶10. Students A-C want to "speak directly" and "talk frequently and repeatedly on these issues." ROA.111-12 ¶12; ROA.116 ¶12; ROA.119-20 ¶11.

But the University's policies make them "reluctant to openly express [their] opinions or have these conversations." ROA.112 ¶13; ROA.116 ¶13; ROA.120 ¶12. Students A-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.'" ROA.112 ¶14; ROA.116 ¶14; ROA.120 ¶13. For example, they believe that others on campus will find their views "intimidat[ing]" or "hostile," especially when they share their views passionately and repeatedly. ROA.112 ¶14; ROA.116 ¶14; ROA.120 ¶13.

IV. The district court says the original policy is unconstitutional, but lets the University avoid a preliminary injunction by changing it.

Speech First sued Texas State on behalf of its members, challenging the University's harassment policy (and a separate computer policy not at issue here). The next day, Speech First moved for a preliminary injunction. ROA.75-102. The University

opposed, arguing that Speech First lacked standing to challenge the harassment policy and that the policy was consistent with the First Amendment. ROA.614-35.

In July 2023, the district court held a hearing on the preliminary-injunction motion. ROA.798-832. The court immediately told the University that it has "a real problem with this [harassment] policy." ROA.807. "[R]ight now," the court warned, the challenged policy is not "consistent with Fifth Circuit law." ROA.814. It was "overbroad," ROA.818, and did not "meet constitutional requirements under the First Amendment," ROA.824.

But instead of *granting* Speech First a preliminary injunction against this unconstitutional policy, the district court did something unusual. It told the University's counsel to take "some time to talk to your client" because "you're going to lose, and … if it gets to the Fifth Circuit on the merits, you could really lose, big time." ROA.817-18. The district court "g[a]ve Texas State an opportunity to rewrite its policy." ROA.818. The district court warned that if the University did not "come up with a good policy … within a reasonable amount of time," then it would "have to strike it down." ROA.824. The court then set another hearing for August 30.

Less than two days before the hearing, the University said it planned to adopt the amended discriminatory-harassment policy discussed above. ROA.656-713. The University submitted no evidence, and the court wanted no briefing, on whether this voluntary change mooted Speech First's request for a preliminary injunction.

At the August 30 hearing, Speech First's counsel stressed that "we still would like a ruling on our original motion for a preliminary injunction," ROA.835, relief that would now "stop[the University] from returning to the old policies while this case is pending," ROA.837. Counsel for Speech First tried to argue that *the University*, not Speech First, had the burden to prove mootness through voluntary cessation, and that the University couldn't do so for several reasons. ROA.840; *see* ROA.714 n.1.

The court, however, was not interested. In the court's view, the amended policy clearly made Speech First's motion "moot." ROA.835; *see* ROA.836 ("mooted"). The court asserted that there was no "evidence that [the University is] going to return to the old policy." ROA.837. And it credited a supposed "representation" from the University's counsel that "they are not going back to the old policy." ROA.841.

Two days later, and again without additional briefing, the court denied Speech First's motion for a preliminary injunction on the discriminatory-harassment policy. ROA.757-93. The court "note[d] that Speech First raised the issue of voluntary cessation," but the court rejected the argument because "the University gave no indication they intend to go back to the former policy," "Speech First [did not] present any evidence indicating such," and the court "accept[ed]" as "sincere" that the University "does not intend to return to the original policy." ROA.760 n.1. For this reason, the court proceeded to "rul[e] on the updated" policy only. ROA.759. The court first concluded that Speech First had standing to challenge that policy. ROA.764-70. It then

concluded that the amended policy passed constitutional muster because it "mirrors the *Davis* standard." ROA.774.[2]

SUMMARY OF ARGUMENT

The district court should have preliminarily enjoined the University from enforcing or reinstating the challenged discriminatory-harassment policy. That policy threatens to discipline students for their speech. As the University concedes, the challenged policy exceeds the narrow, speech-protective definition of harassment from *Davis*—a constitutional problem, since the Supreme Court adopted that narrow definition to avoid clashing with the First Amendment. The resulting viewpoint-based, content-based, and overbroad restriction of protected speech violates the First and Fourteenth Amendments. The district court agreed.

Yet the district court refused to enjoin that policy because, after twisting the University's arm, the policy was amended. But that change hardly mooted Speech First's motion. The University's amendment is textbook voluntary cessation: Although *Davis*

[2] The district court preliminary enjoined the computer policy "as it applies to students who are not employees of the University." ROA.775-85. Specifically, it concluded that the policy likely violated the First and Fourteenth Amendments and agreed with Speech First that a First Amendment violation means that the remaining criteria (irreparable harm, balance of equities, and public interest) necessarily favored issuing the preliminary injunction because the "'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,'" "the only harm here is the inability to violate the First Amendment, which is really no harm at all," and "'injunctions protecting First Amendment freedoms are always in the public interest.'" ROA.784 (cleaned up).

has been the law for decades and Speech First had successfully challenged similar harassment policies in many courts, the University never changed its policy before Speech First sued. It then defended its policy for months, changing it only after a hearing where the district court said the University would lose. The University then conveniently chose a policy that it found in a settlement agreement signed by Speech First. And its new policy continues the constitutional violation in part and appears to be ineffective because it contradicts other overriding policies.

Because Speech First's motion is not moot and its constitutional claims are likely to prevail, it necessarily meets the other preliminary-injunction criteria. The likely merits are decisive in First Amendment cases. And the district court already explained how it would weigh every factor, when it warned the University that it would enjoin the original policy and when it did enjoin a separate computer policy. This Court should reverse the district court, issue a preliminary injunction, and remand for further proceedings.

ARGUMENT

This Court "review[s] the district court's ultimate decision to grant or deny a preliminary injunction for abuse of discretion." *City of Dallas v. Delta Air Lines*, 847 F.3d 279, 286 (5th Cir. 2017). Here, however, review is *de novo* because that "'decision [is] grounded in erroneous legal principles.'" *Id.*; *see Speaks v. Kruse*, 445 F.3d 396, 399 (5th Cir. 2006) (same). And this Court review mootness *de novo*. *Tucker v. Gaddis*, 40 F.4th 289, 292 (5th Cir. 2022).

Speech First is entitled to a preliminary injunction if it shows four things: (1) it's "'likely to succeed on the merits'"; (2) it's "'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). 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. *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 succeed on the merits because the challenged harassment policy is facially unconstitutional.

As this Court has noted, a "consistent line of cases" has "uniformly found" campus speech codes like Texas State's "unconstitutiona[l]." *Fenves*, 979 F.3d at 338-39 & n.17 (collecting ten cases); *see, e.g.*, *Cartwright*, 32 F.4th at 1125-28 (enjoining a nearly identical harassment policy as unconstitutionally overbroad, viewpoint-based, and content-based); *Khator*, 603 F. Supp. 3d at 482 & n.6 (same). The University's policy is no different. Even the district court agreed. *E.g.*, ROA.814, 824.

The University's discriminatory-harassment policy is facially unconstitutional for three main reasons. It is overbroad because it exceeds the Supreme Court's standard in *Davis*. It is an impermissible viewpoint-based restriction because it prohibits offensive speech. And it, at a minimum, is a content-based restriction that fails strict scrutiny.

A. The challenged policy is overbroad because it exceeds the Supreme Court's decision in *Davis*.

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 L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). This policy does, as the Eleventh Circuit held in a virtually identical case. *Cartwright*, 32 F.4th at 1125-28.

Texas State cannot argue that "discriminatory harassment" is one of those rare categories of speech that isn't protected by the First Amendment. "From 1791 to the present, the First Amendment has permitted restrictions upon the content of speech in a few limited areas." *Counterman v. Colorado*, 600 U.S. 66, 73 (2023) (cleaned up); *see, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992). These categories include "obscenity, defamation, fraud, incitement, and speech integral to criminal conduct." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (cleaned up); *see Counterman*, 600 U.S. at 73-74 ("true threats"). They "are well-defined and narrowly limited." *Stevens*, 559 U.S. at 468-69 (cleaned up). And the government cannot expand them. "The First Amendment itself reflects a judgment by the American people." *Id.* at 470. That supermajoritarian judgment "stands against any 'freewheeling authority to declare new categories of speech outside the scope of the First Amendment.'" *United States v. Alvarez*, 567 U.S.

709, 722 (2012). "[N]ew categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated." *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 791 (2011).[3]

Absent from these narrow categories are "harassment" or "discrimination." *Saxe*, 240 F.3d at 210; *Matal v. Tam*, 582 U.S. 218, 244-47 (2017). The government "cannot avoid the strictures of the First Amendment simply by defining certain speech as … 'harassment'" or discrimination. *PDE*, 83 F.4th at 667. "'Where pure expression is involved,' anti-discrimination law 'steers into the territory of the First Amendment.'" *Saxe*, 240 F.3d at 206 (quoting *DeAngelis*, 51 F.3d at 596); *accord Wollschlaeger v. Governor*, 848 F.3d 1293, 1307 (11th Cir. 2017) (en banc) ("anti-harassment laws, insofar as they regulate speech …, are subject to First Amendment scrutiny"); *DeJohn v. Temple Univ.*, 537 F.3d 301, 316 (3d Cir. 2008) (same). "'Harassing' or discriminatory speech … may be used to communicate ideas or emotions that … implicate First Amendment protections." *Saxe*, 240 F.3d at 209. "[I]f 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). The "right to provoke, offend and shock lies at the core of the First Amendment." *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703,

[3] And even within these categories, viewpoint discrimination is still banned. *R.A.V.*, 505 U.S. at 383-84; *accord Cartwright*, 32 F.4th at 1127 n.6 ("The Supreme Court has consistently held that the government may not regulate on the basis of viewpoint even within a category of otherwise proscribable speech."). For example, the government "may proscribe libel; but it may not … proscrib[e] *only* libel critical of the government." *R.A.V.*, 505 U.S. at 384.

708 (9th Cir. 2010). Individuals have a "clearly established First Amendment right to engage in speech even when some listeners consider the speech offensive, upsetting, immature, in poor taste, or even dangerous." *Bailey v. Iles*, 87 F.4th 275, 289-90 (5th Cir. 2023).

To prevail, then, Texas State must argue that its policy regulates only "non-expressive, physically harassing *conduct*." *Saxe*, 240 F.3d at 206. The government can generally punish someone for the "noncommunicative impact of his conduct, and for nothing else," but not "because the communication allegedly integral to the conduct is itself thought to be harmful." *United States v. O'Brien*, 391 U.S. 367, 382 (1968); *see* Volokh, *Speech As Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 Cornell L. Rev. 1277, 1314 (2005) ("Speech or expressive conduct may be restricted because of harms flowing from its noncommunicative component (noise, obstruction of traffic, and the like)—which one might view as its 'conduct' element—but not because of harms flowing from its communicative component, the 'speech' element."). That's why "a supervisor's statement 'sleep with me or you're fired' may be proscribed not on the ground of any expressive idea that the statement communicates, but rather because it facilitates the threat of discriminatory conduct." *Saxe*, 240 F.3d at 208. "Despite the purely verbal quality of such a threat, it surely is no more 'speech' for First Amendment purposes than the robber's demand 'your money or your life.'" *Id.*

"While drawing the line between speech and conduct can be difficult," precedent has "long drawn it," *NIFLA v. Becerra*, 138 S.Ct. 2361, 2373 (2018); and in this context, *Davis* gives universities a roadmap. As explained, *Davis* drew a clear line between harassment that is punishable conduct and harassment that is protected speech: The actionable harassment is "so severe, pervasive, *and* objectively offensive that it *denies* its victims the equal access to education." 526 U.S. at 652 (emphases added). This standard intentionally excludes "a single instance of one-on-one peer harassment," even if "sufficiently severe," and harassment that has only negative effects like "a mere 'decline in grades.'" *Id.* at 652-53; *see* ROA.260-87 (skipping class or campus activities insufficient). 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 Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992); *see* ROA.240-58 (FIRE explaining "why the Supreme Court's *Davis* standard is necessary to restore free speech to America's college campuses"); ROA.260-87 (same).

As the University conceded below, its discriminatory-harassment policy flouts *Davis*'s limits. ROA.626-27. It covers "severe *or* pervasive" harassment, so it necessarily reaches a single or isolated incident that the University deems sufficiently "severe." ROA.126-27 (emphasis added); *contra* 526 U.S. at 652-53. It also bans "harassment" that "*interfere[s]* with an individual's … education, academic environment, or participation in institution programs or activities." ROA.126-27 (emphasis added); *contra* 526 U.S. at 652.

These deviations from *Davis* 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*, 537 F.3d at 318. 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). And *Davis* was just about "sex" discrimination under Title IX. Yet the University "prohibits harassment based on personal characteristics that are not protected under federal law." *Saxe*, 240 F.3d at 210; *e.g.*, ROA.126 ("veterans' status" and "age").

These deviations from *Davis* are not minor or technical. 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. AFSCME*, 138 S.Ct. 2448, 2476 (2018) (cleaned up). It also gives university officials wide discretion on what speech to apply it to. It uses several amorphous terms, exacerbating the policy's breadth: speech that is "unwelcome," speech that "interfere[s]," and speech "that a reasonable person would find intimidating, offensive, or hostile." ROA.126-27. These terms are "pretty amorphous" because their "application would

likely vary from one student to another." *Cartwright*, 32 F.4th at 1121; *accord McCauley v. Univ. of V.I.*, 618 F.3d 232, 250-51 (3d Cir. 2010); *DeJohn*, 537 F.3d at 317-20. The policy also uses a "totality of the particular circumstances" test with a non-exhaustive list of factors. ROA.127. This "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] se[e] fit." *Serafine*, 810 F.3d at 368-69 (cleaned up). "Such unfettered discretion is untenable." *Id.* at 369.

B. The challenged policy is viewpoint-discriminatory.

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, e.g.*, *Iancu v. Brunetti*, 139 S.Ct. 2294, 2299 (2019); *Shurtleff v. City of Bos.*, 596 U.S. 243, 258 (2022) (viewpoint discrimination prohibited); *Cartwright*, 32 F.4th at 1126 ("Restrictions … based on viewpoint are prohibited, seemingly as a *per se* matter." (cleaned up)); *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.'"). In this way, "[t]he 'First Amendment is a kind of Equal Protection Clause for ideas.'" *Barr v. Am. Ass'n of Pol. Consultants*, 140 S.Ct. 2335, 2354 (2020). "Viewpoint discrimination is … an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515

U.S. 819, 829 (1995). It's "poison to a free society." *Iancu*, 139 S.Ct. at 2302 (Alito, J., concurring).

The challenged 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). ROA.126-27. 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. It "license[s] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V.*, 505 U.S. at 392.

***Second*,** the policy bars speech that is "unwelcome," "intimidating, offensive, or hostile." ROA.126-27. But "[g]iving offense is a viewpoint." *Matal*, 582 U.S. at 243. Policies that regulate offensive speech, like this one, impose "'viewpoint-discriminatory restrictions.'" *Saxe*, 240 F.3d at 206. Indeed, this Court has long recognized that, when anti-harassment policies reach speech, they necessarily impose "viewpoint-discriminatory restrictions." *DeAngelis*, 51 F.3d at 596-97; *accord Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1184-85 (6th Cir. 1995).

In short, "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 that very thing. It is facially unconstitutional without any further analysis. *See id.* at 2302 (concluding that it is unnecessary to do overbreadth analysis because a "finding of viewpoint bias end[s] the matter").

C. The policy is content-based and fails strict scrutiny.

At the very least, the University's policy discriminates based on content and flunks strict scrutiny. "'Content-based regulations are presumptively invalid,' and the Government bears the burden to rebut that presumption." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 817 (2000). "It is rare that a regulation restricting speech because of its content will ever be permissible." *Id.* at 818. 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 occur 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 (cleaned up; quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994); and *Reed*, 576 U.S. at 163). In other words, to determine whether a student violates the policy, one must know whether the speech was based on one of the listed characteristics.

Plus, the policy's definition of "harassment" hinges on the listener's response—whether the speech is "unwelcome" and "subjectively harassing in nature." ROA.126-27. It is well-established that "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth*, 505 U.S. at 134; *accord 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. L.A. 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.'").

The policy's purpose and justification also prove that it's content based. The "Prohibition of Discrimination" includes "[p]olicy [s]tatements." ROA.126. One policy statement says the University "is committed to an inclusive educational and work environment." ROA.126. The discriminatory-harassment policy is also highlighted in the "Civility Policy and Procedures," because, according to the University, the harassment policy helps "foste[r] a culture that demonstrates the principles of civility, diversity, equity, and inclusion." ROA.179. 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*, 140 S.Ct. at 2346, which it fails. The University cannot "prov[e]" that the policy is "narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163. It has no legitimate interest in drafting its policy to regulate certain viewpoints, let alone a compelling

one. *See 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). Before the district court, the University argued that the policy survives strict scrutiny because it has a compelling interest in "[p]reserving students' equal access to and ability to fully participate in educational programs by preventing discriminatorily hostile education environments." ROA.629. But such generalized statements are insufficient grounds for regulating speech. *See Green v. Miss USA*, 52 F.4th 773, 792 (9th Cir. 2022). And a policy that adopted the *Davis* standard verbatim would solve any legitimate concerns. The policy thus fails strict scrutiny and is facially unconstitutional. *Americans for Prosperity Found.* (*AFPF*) *v. Bonta*, 141 S.Ct. 2373, 2387-89 (2021); *see Sisters for Life v. Louisville-Jefferson Cnty.*, 56 F.4th 400, 407 (6th Cir. 2022) ("[I]f a statute is not narrowly tailored, it cannot be constitutionally applied to *anyone*, even if a more narrowly tailored statute might still capture a plaintiff's conduct.").

II. Speech First's motion to preliminarily enjoin the policy is not moot.

The district court concluded that Speech First's motion was moot, but it was wrong for three interrelated reasons. The University's amendment of its policy is textbook voluntary cessation. The amended policy still suffers from substantially similar infirmities. And the amended policy appears to be invalid because it conflicts with overriding systemwide policies.

A. The University's voluntary cessation is insufficient.

"It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice," *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982), "even in cases in which injunctive relief is sought," *Meza v. Livingston*, 607 F.3d 392, 400 (5th Cir. 2010); *accord Fenves*, 979 F.3d at 328. Otherwise, "courts would be compelled to leave the defendant free to return to his old ways." *City of Mesquite*, 455 U.S. at 289 n.10 (cleaned up). If the government could moot a claim by voluntarily changing a challenged policy, then it "could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where it left off, repeating this cycle until it achieves all its unlawful ends." *United States v. Sanchez-Gomez*, 138 S.Ct. 1532, 1537 n.* (2018) (cleaned up). And it could frustrate "the 'public interest in having the legality of the practices settled.'" *DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974).

Voluntary cessation moots a claim "only if it is *absolutely clear* that the allegedly wrongful behavior could not be reasonably expected to recur." *Fenves*, 979 F.3d at 328 (cleaned up); *accord Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000). This standard is "'stringent,'" *Netflix, Inc. v. Babin*, 88 F.4th 1080, 1089 (5th Cir. 2023), and "'rare[ly]" satisfied, *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 712 (6th Cir. 2016). Even if the defendant's likelihood of resuming the illegal conduct is "'too speculative to support standing,'" a speculative possibility can still "'overcome mootness.'" *Adarand*, 528 U.S. at 224. And it is "the defendant"—not the plaintiff—who "carrie[s]

[the] heavy burden" of showing mootness from voluntary cessation. *Texas v. EEOC*, 933 F.3d 433, 449 (5th Cir. 2019); *accord Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007).

The burden should be even higher for universities. Though courts sometimes give state actors more deference on voluntary cessation, that doctrine is on shaky footing, *Netflix*, 88 F.4th at 1089-90 & n.12, and this Court has rightly refused to extend it to universities, *see Fenves*, 979 F.3d at 328; *Freedom From Religion Found., Inc. v. Abbott*, 58 F.4th 824, 835 n.7 (5th Cir. 2023). For good reasons: University administrators are not elected, not accountable, and not subject to external procedures that constrain their policymaking. And when it comes to free speech, universities have a notoriously bad record of repealing policies when they are sued, only to reinstate them after the litigation ends. *See* Lukianoff & Goldstein, *Speech Code Hokey Pokey*, Volokh Conspiracy (Sept. 12, 2018), perma.cc/Q32F-RPEK; Amicus Br. of FIRE, *Speech First, Inc. v. Sands*, 2023 WL 6161318, *21-25 (SCOTUS) ("Time and time again, FIRE has seen universities revise unconstitutional policies, only to bring them back when there is employee or state government turnover." (discussing examples)); *Fenves*, 979 F.3d at 328 ("This is not the first appeal in which a public university has had a sudden change of heart, during litigation, about the overbreadth and vagueness of its speech code, and then advocated mootness."); *e.g.*, *Christian Legal Soc. v. Martinez*, 561 U.S. 661, 723 n.3 (2010) (Alito, J., dissenting); *Uzuegbunam v. Preczewski*, 592 U.S. 279 (2021). And as the Supreme Court

recently explained, when it comes to constitutional rights, universities are not entitled to special "'deference.'" *SFFA v. Harvard*, 600 U.S. 181, 217 (2023).

The University falls far short of its heavy burden. Its change is flimsy voluntary cessation—something Speech First has encountered in nearly every case it has filed. *E.g.*, *Fenves*, 979 F.3d at 328; *Schlissel*, 939 F.3d at 767; *Speech First, Inc. v. Cartwright*, 2021 WL 3399829, at *2 n.4 (M.D. Fla. July 29), *rev'd in other part*; *Khator*, 603 F. Supp. 3d at 481-82. The voluntary cessation is particularly bad here for three main reasons.

***First*,** "the timing of the University's policy amendments is … suspicious," to put it mildly. *Fenves*, 979 F.3d at 329. There are clear "sign[s] of bad faith or insincerity." *U.S. Navy SEALs 1-26 v. Biden*, 72 F.4th 666, 674 (5th Cir. 2023). Although *Davis* has been the law for decades, the University changed its policy only after Speech First's "complaint was filed." *Schlissel*, 939 F.3d at 769. That switcheroo did not come from "any 'substantial deliberation' that would indicate a sincere change in position" but rather an obvious "attempt to avoid the issuance of an injunction." *Nat'l Ass'n of Boards of Pharmacy v. Bd. of Regents of the Univ. Sys. of Georgia*, 633 F.3d 1297, 1312 (11th Cir. 2011).

Indeed, the University amended its policy at the invitation of the district court precisely because, at the first hearing, that court said the policy was clearly unconstitutional and would be enjoined either by it or this Court. *See, e.g.*, ROA.817-18. "Maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye." *Fenves*, 979 F.3d at 329 (cleaned up). The University's change in policy is

precisely the type of strategic maneuver that the voluntary-cessation doctrine protects against. *See, e.g.*, *Calif. Ins. Guarantee Ass'n v. Burwell*, 227 F. Supp. 3d 1101, 1108 (C.D. Cal. 2017) ("[G]iven the timing of the withdrawals (*i.e.*, immediately after a hearing in which the Court made clear that CMS's practice would not withstand scrutiny), it seems obvious that this is simply a strategic maneuver designed to head off an adverse decision so that CMS can continue its practice in the future"); *Wood v. Kapustin*, 2013 WL 3833983, at *1 n.4 (D. Minn. July 23) ("After the court ordered defendants to respond to the motion for preliminary injunction, the information was removed from the web-site.").

***Second*,** the University has vigorously "defend[ed] the original polic[y]" as constitutional, and even argued that the original policy was *required* by federal law. *Fenves*, 979 F.3d at 329; *Schlissel*, 939 F.3d at 770; *Cartwright*, 2021 WL 3399829, at *2 n.4; *see* ROA.624-29 ("Texas State's Prohibition on Discrimination is modeled on and hues to the definition of harassment and hostile environment established in various state and federal antidiscrimination laws, namely Title VII of the Civil Rights Act of 1964. Title VII obligates Texas State to protect its employees from discriminatory harassment based on race, color, sex, national origin, and religion—including such harassment by third parties, such as students." (footnotes omitted)). The University has never "retracted [its] previous statement[s]." *Freedom From Religion Found. (FFRF) v. Abbott*, 955 F.3d 417, 425 (5th Cir. 2020). Because the University "defended and continues to defend not only the constitutionality of its prior [discriminatory] harassment policy, but

also the need for the former policy," this case is not moot. *DeJohn*, 537 F.3d at 310; *accord Donovan v. Cunningham*, 716 F.2d 1455, 1461 (5th Cir. 1983).

***Third*,** the University's amendment is effectively an "ad hoc regulatory action" that can be undone as easily as it was done. *Schlissel*, 939 F.3d at 769. The University amended its policy within three weeks. And according to the University, all that's required to change this policy is mere "input" from certain administrators and a "[r]ubber stamp" from "the VP for administration and the President." ROA.843.

Nor has the University "issued a controlling statement" that the old policy will never return. *Fenves*, 979 F.3d at 328. Even if it had, the promises of current university administrators are irrelevant because they do not bind the University itself or future administrators. *Schlissel*, 939 F.3d at 769. The "assertions of the [governmental defendant] that there w[ill] be no return to [illegal] practices" is "not … sufficient to render the case moot." *Pullum v. Greene*, 396 F.2d 251, 256 (5th Cir. 1968); *accord Hall v. Bd. of Sch. Comm'rs of Conecuh Cnty.*, 656 F.2d 999, 1001 (5th Cir. 1981) ("[D]efendants must offer more than their mere profession that the conduct has ceased and will not be revived."); *FFRF*, 955 F.3d at 425 (finding insufficient that government officials "only presented arguments through counsel that their behavior will change"). A representation by a lawyer at a hearing, no matter how emphatic, is a far cry from a "signed affidavi[t]" from the University's leadership "pledging future compliance." *Payne Enterprises v. United States*, 837 F.2d 486, 492 (D.C. Cir. 1988); *accord ACLU v. Fla. Bar*, 999 F.2d 1486, 1494 (11th Cir. 1993) (rejecting mootness because "neither [defendant] is bound

by its court statements"); *Schlissel*, 939 F.3d at 769 (sworn testimony insufficient). And regardless, "the word of the present Registrars" is insufficient because it does "not bin[d] those who may hereafter be appointed." *United States v. Atkins*, 323 F.2d 733, 739 (5th Cir. 1963); *accord Fla. Bar*, 999 F.2d at 1494.

The district court reached the opposite conclusion by getting the legal standard backward. It *assumed* the University's changes were permanent and sincere and put the burden *on Speech First* to show that the University "intend[s] to go back." ROA.760 n.1. But "[t]he heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Friends of the Earth v. Laidlaw Env't Servs.*, 528 U.S. 167, 189 (2000) (cleaned up); *accord Adarand*, 528 U.S. at 222 (same); *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) ("'[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.'"). The University is the party asserting mootness and thus has the burden. By putting the burden on Speech First, the district court erred.

B. The amended policy has similar constitutional infirmities.

Another reason why the University has not met its heavy burden under voluntary cessation is that it hasn't fully ceased its unconstitutional conduct. "[W]hen a government repeals the challenged action and replaces it with something substantially similar, the injury remains." *Texas v. Biden* (*MPP*), 20 F.4th 928, 958 (5th Cir. 2021); *see Data*

Mktg. P'ship, LP v. DOL, 45 F.4th 846, 856 n.2 (5th Cir. 2022) (*MPP* "remains binding" on "mootness"); *accord Clarke v. CFTC*, 74 F.4th 627, 636 (5th Cir. 2023) ("A case is not moot when the government rescinds one law only to enact a different version that disadvantages the plaintiffs in the same fundamental way." (cleaned up)); *Big Tyme Invs. v. Edwards*, 985 F.3d 456, 465 (5th Cir. 2021) (deeming the case not moot because "even though the restrictions … may have lessened, the crux of the … equal protection claim remains unchanged"); *Fort Bend Cnty. v. U.S. Army Corps of Engineers*, 59 F.4th 180, 195 (5th Cir. 2023) ("[I]f an agency repeals a challenged directive but then replaces it with a substantially similar one, there is no mootness because the injury remains." (cleaned up)). "In such a case, the court can still grant effectual relief," and the claim "is not mooted." *MPP*, 20 F.4th at 958 (cleaned up). So it is here.

Like the original policy, the amended policy does not fully comply with *Davis*. It prohibits harassment based on who the *listener* is, not the *speaker*. When a speaker's "verbal" conduct affects "a student," the *Davis* standard applies. ROA.662. But when a speaker's "verbal" conduct affects "an employee," a lesser standard applies: the harassment that creates a hostile environment need only be "severe *or* pervasive" and "*alter* the conditions of … employment." ROA.662. The University has repeatedly maintained that this policy bans speech uttered by non-employee students. *E.g.*, ROA.624 ("Title VII obligates Texas State to protect its employees … including such harassment by … students."); ROA.816-17 (similar). Student speech is covered if the person

complaining is a professor (in class), a resident assistant (in the dorms), or another student on work study (anywhere on campus).

The University is essentially employing Title VII's standard against pure expression to nonemployee students, which creates a constitutional problem. "Although the Supreme Court has written extensively on the scope of workplace harassment, it has never squarely addressed whether harassment, when it takes the form of pure speech, is exempt from First Amendment protection." *Saxe*, 240 F.3d at 207; *accord DeAngelis*, 51 F.3d at 597. Unlike *Davis*, which involved student-on-student harassment, courts did not consider the First Amendment when articulating the Title VII standard.

It is no answer to say, as the University probably will, that it's merely following its Title VII obligations. "Title VII harassment law has always had an uneasy coexistence with the First Amendment." *Yelling v. St. Vincent's Health Sys.*, 82 F.4th 1329, 1344 (11th Cir. 2023) (Brasher, J., concurring). "It is no use to deny or minimize this problem." *DeAngelis*, 51 F.3d at 596. This Court has long recognized that "[w]here pure expression is involved, Title VII steers into the territory of the First Amendment." *Id.* When an anti-harassment law and "the Constitution collide," "there can be no question which must prevail": the Constitution. *303 Creative*, 600 U.S. at 592.

Davis refused to adopt the Title VII standard, precisely because applying that standard to college students on campus would be unconstitutional. For starters, it treats the school environment like a traditional workplace, even though they are fundamentally different. "Courts … must bear in mind that schools are unlike the adult

workplace." *Davis*, 526 U.S. at 651. "[S]tudents are still learning how to interact appropriately with [others]." *Id.* Plus, "[t]he classroom is peculiarly the marketplace of ideas." *Keyishian*, 385 U.S. at 603 (cleaned up). "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, perhaps even more importantly, to prepare young citizens to participate in the civic and political life of our democratic republic." *Cartwright*, 32 F.4th at 1128; *see Rosenberger*, 515 U.S. at 835 ("[I]n the University setting, … the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition."). Exporting Title VII standards to the university setting, as the University proposes, would "broade[n] the scope of prohibited speech and expression" and "chill and infringe upon the First Amendment freedoms of students." 85 Fed. Reg. at 30,037.

Employees also have different rights than students. *See UWM Post, Inc. v. Bd. of Regents*, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991). Workplaces can ban lengthy political debates, conversations about sex, and dating peers; but those restrictions are foreign to universities. *See* 85 Fed. Reg. at 30,037. And unlike university employees, students can speak freely even if their speech involves no matter of public concern. "University students' speech deserves the same degree of protection that is afforded generally to citizens in the community, not the curtailed protection afforded government employees." *Garcia v. SUNY Health Scis. Ctr. of Brooklyn*, 280 F.3d 98, 106 (2d Cir. 2001).

It makes no sense for students to have more protection when speaking to other students than to their teachers. *See* ROA.662. If anything, when it comes to student-on-employee speech, the First Amendment should have more force. "The relationship between the harasser and the victim necessarily affects the extent to which" speech can amount to conduct. *Davis*, 526 U.S. at 653. Hence why "[p]eer harassment … is less likely to [be actionable conduct] than is teacher-student harassment." *Id.* For student-on-teacher speech, the power dynamic favors the teacher. So student speech in this context is even less likely to amount to conduct.

Worse, the amended policy has no targeting requirement. A student can be punished if his "verbal" speech "subjects" an employee to a certain reaction. ROA.662. This policy thus sweeps in speech directed to the general campus community. If there are significant "doubt[s] [that] a college professor's [repeated] expression on a matter of public concern, directed to the college community, could ever constitute unlawful harassment" without violating the First Amendment, then there should be no doubt that similar speech by students is fully protected. *See Rodriguez*, 605 F.3d at 710 (finding professor's repeated anti-immigration emails protected). Yet the amended policy covers that speech—even a single instance of it.

In merely three pages, and without any briefing or argument, the district court concluded that the amended policy was constitutional. ROA.773-75. Contra the district court, the policy does not "mirro[r] the *Davis* standard." ROA.774. The policy plainly deviates from *Davis* when it comes to students' speech toward employees. It thus

reaches protected speech and imposes viewpoint-based and contest-based restrictions on it. It was the University's burden to show that its policy is "'the least restrictive means of achieving a compelling state interest.'" *AFPF*, 141 S.Ct. at 2383. Yet the University has no evidence or argument why applying the *Davis* standard to *all* student speech would not solve its concerns. The district court's generalized statement that the University has a "compelling interest in preventing discrimination," ROA.775, is an insufficient justification for regulating speech, *see Green*, 52 F.4th at 792.

At any rate, this Court need not fully resolve the precise line between protected speech and actionable conduct for student-on-teacher harassment. It suffices for purposes of the mootness analysis to conclude that the amended policy is substantially similar to the challenged policy and injures Speech First in the same fundamental way. Speech First's challenge to the original policy thus is not moot. *See, e.g.*, *MPP*, 20 F.4th at 960 (ruling on the lawfulness of the challenged government action, not the new action). That the University "has persisted in its conduct" shows that it is not "'absolutely clear' that the conduct would not recur." *Clarke*, 74 F.4th at 636 n.4 (cleaned up). And an order preliminarily enjoining the challenged policy will protect Speech First's members from the real risk that the policy will be reinstated, providing Speech First "'effectual relief.'" *Knox v. SEIU*, 567 U.S. 298, 307 (2012); *e.g.*, *Cartwright*, 2021 WL 3399829, at *7 (enjoining university from returning to old policy); *Khator*, 603 F. Supp. 3d at 482 & n.6 (same). In short, the University "cannot moot" Speech First's challenge "by

reaffirming and perpetuating the very same injury that brought [Speech First] into court." *MPP*, 20 F.4th at 960.

C. The amended policy is not entirely effective because it either incorporates or conflicts with the System's policies.

Even if the University's voluntary cessation were genuine, and even if its amended policy were constitutional, Speech First's challenge still isn't moot because the amended policy appears to be invalid. The System has other policies on harassment that would supersede the University's amended policy. *See Policies*, Tex. State Univ. Sys., perma.cc/E7RV-AF2Y ("TSUS Rules and Regulations" and "TSUS Sexual Misconduct Policy"); ROA.22-23 (reciting the relevant language). The System has two policies on "sexual harassment" and "racial harassment," both of which deviate from *Davis*.

First, the System's sexual-harassment policy states that sexual harassment includes "unwelcome sex-based verbal or physical conduct that … in the education context, is sufficiently severe, persistent, *or* pervasive that the conduct *interferes* with the *student*'s ability to participate in or benefit from Education Programs or Activities." *TSUS Sexual Misconduct Policy* 58-59 (emphases added). This policy also "supersedes any conflicting Sexual Misconduct procedures and policies set forth in other [University] policies." *Id.* at 2. Hence why the University's amended discriminatory-harassment policy states that "[s]exual misconduct, including sexual harassment, is governed by the TSUS Sexual Misconduct Policy." ROA.661.

Second, the System's racial-harassment policy prohibits "racial harassment" and defines it as "extreme or outrageous acts or communications that are intended to harass, intimidate, or humiliate students, faculty, staff or visitors on account of race, color, or national origin and that reasonably cause them to suffer severe emotional distress." *TSUS Rules and Regulations* ch. VII, §4.3. And again, this policy "control[s]" over any university policy that "differ[s]" from it, and the university's "differing" policy "will be disregarded." *Id.*, ch. 10, §5. This definition deviates from *Davis* because it covers single instances of speech and does not require denial of an educational benefit.

These systemwide policies mean that Speech First's requested relief cannot be moot. The amended discriminatory-harassment policy either expressly incorporates the system policies or conflicts with the System's policies, making it void as to race and sex. And the System definitions are unconstitutional for substantially the same reasons as the original discriminatory-harassment policy: They exceed the *Davis* standard. Even if there are doubts how the system policies affect the university policies, that vagueness cuts heavily against mootness. *See Adarand*, 528 U.S. at 223 (rejecting mootness because, "[g]iven the material differences (not to say incompatibility) between that procedure and the requirements of the DOT regulations, it is not at all clear that CDOT's certification is a 'valid certification,' and hence not at all clear that the Subcontractor Compensation Clause requires its acceptance"). This Court "can still grant effectual relief," so Speech First's challenge to the original policy is not moot. *MPP*, 20 F.4th at 958 (cleaned up).

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

Because Speech First is likely to prevail on its constitutional claims, it meets the other preliminary-injunction criteria. The district court understood as much. It said it would have enjoined the original discriminatory-harassment policy. *E.g.*, ROA.817-18; ROA.824. And it *did* enjoin a separate computer policy, determining that Speech First's likelihood of success on the merits decisively tipped the remaining factors in its favor. ROA.775-84. Had it known that Speech First's challenge to the original policy was not moot, it would have enjoined it too. Appellate courts, once they find likely First Amendment violations, routinely reverse with instructions to simply enter a preliminary injunction. *See, e.g.*, *Byrum*, 566 F.3d at 449; *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 589-90 (7th Cir. 2012); *Bays v. City of Fairborn*, 668 F.3d 814, 825 (6th Cir. 2012). Anything less would waste judicial and party resources. *Boerschig v. Trans-Pecos Pipeline, LLC*, 872 F.3d 701, 706 (5th Cir. 2017). Especially here because Speech First's standing members should get the chance, if possible before they graduate, to experience a campus free from the policies that have been abridging their constitutional rights.

Irreparable Harm. As the district court concluded, and the University effectively conceded below, the "'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" ROA.784 (quoting *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 67 (2020)); *see, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (same); *accord Texans for Free Enter.*, 732 F.3d at 539; *Opulent Life Church v. City*

of Holly Springs, 697 F.3d 279, 295 (5th Cir. 2012). Without a preliminary injunction, Speech First's members 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—"merge." *Mock v. Garland*, 75 F.4th 563, 577 (5th Cir. 2023). As the district court explained about the computer policy, "the only harm here is the inability to violate the First Amendment, which is really no harm at all." ROA.784 (cleaned up); *accord McDonald v. Longley*, 4 F.4th 229, 255 (5th Cir. 2021). And "'injunctions protecting First Amendment freedoms are always in the public interest.'" ROA.784 (quoting *Texans for Free Enter.*, 732 F.3d at 539); *accord Opulent Life Church*, 697 F.3d at 298. These factors heavily favor a preliminary injunction too.

CONCLUSION

This Court should reverse the district court and enter a preliminary injunction prohibiting the University from enforcing or reinstating the discriminatory-harassment policy in place when Speech First sued.

Dated: January 16, 2024

Respectfully submitted,

/s/ Cameron T. Norris

J. Michael Connolly
Cameron T. Norris
James F. Hasson
Thomas S. Vaseliou*
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
cam@consovoymccarthy.com

*Licensed in Texas. Virginia application pending. Supervised by firm's principals.

Counsel for Appellant

CERTIFICATE OF SERVICE

I e-filed this brief with the Court, which will email everyone requiring service.

Dated: January 16, 2024 *s/ Cameron T. Norris*

CERTIFICATE OF COMPLIANCE

The brief complies with Rule 32(a)(7)(B) because it contains 11,534 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 space font using Microsoft Word in 14-point Garamond (for body and footnote text) and 16- and 15-point Helvetica Neue (for headings).

Dated: January 16, 2024 *s/ Cameron T. Norris*