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.)

REPLY BRIEF OF PLAINTIFF-APPELLANT SPEECH FIRST, INC.

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INTRODUCTION & SUMMARY OF ARGUMENT

This Court has already considered every argument that the University makes to avoid the merits. In *Speech First v. Fenves*, the University of Texas also swore that its policies were never applied to protected speech, amended its policy to evade review, and claimed that Supreme Court precedent didn't prohibit its original harassment policy. 979 F.3d 319 (5th Cir. 2020). This Court saw through these justifications for chilling student speech. It found that Speech First had standing to challenge the constitutionality of a nearly identical harassment policy, rejected the University's virtually identical attempts to moot Speech First's claim, and warned that courts have "uniformly" found these "campus speech codes unconstitutiona[l]." *Id.* at 338-39 & n.17 (listing cases).

The Eleventh Circuit, two years later in *Speech First v. Cartwright*, followed through on *Fenves* and held that a university's materially similar harassment policy should be enjoined on the merits. 32 F.4th 1110 (11th Cir. 2022). This Court's prior warnings in *Fenves*, and the Eleventh Circuit's application in *Cartwright*, should control here. The University concedes that its harassment policy deviates from the ceiling that the Supreme Court imposed in *Davis v. Monroe County Board of Education*, and thus reaches pure speech—even a single instance of speech. 526 U.S. 629 (1999). Its resulting viewpoint-based, content-based, and overbroad restriction of that speech violates the First Amendment. Blue-Br.20-30; FFML-Br.2-9.

The University's only response is a well-worn—yet ever-failing—path: relabel speech as conduct and insist that its policy doesn't implicate the First Amendment. If that were true, the University would've adopted the *Davis* standard and not specified any protected classes. It's not true: The policy restricts "unwelcome verbal" or "written … conduct." ROA.126-27. It would take a serious "rewrite" of the challenged policy to conclude that it doesn't directly restrict speech. *United States v. Stevens*, 559 U.S. 460, 481 (2010). There's "a real difference between laws directed at conduct sweeping up incidental speech on the one hand and laws that directly regulate speech on the other." *Otto v. Boca Raton*, 981 F.3d 854, 865 (11th Cir. 2020). "[H]iding speech restrictions in conduct rules is … a losing constitutional strategy." *Honeyfund.com Inc. v. Governor*, 94 F.4th 1272, 1278 (11th Cir. 2024). The challenged harassment policy is likely unconstitutional.

This Court should reverse the district court and either enter a preliminarily injunction or remand with instructions for the district court to enter one.

ARGUMENT

Speech First still needs a preliminary injunction because the University's changes to its harassment policy are incomplete, ineffective, and insincere. Speech First is entitled to that relief because it satisfies every preliminary-injunction factor.

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

A. The challenged policy is facially unconstitutional.

1. The challenged policy is viewpoint-discriminatory.

The University barely counters Speech First's claim of viewpoint discrimination. Red-Br.46-47. It doesn't dispute that, if the policy discriminates based on viewpoint, then it's facially unconstitutional. Blue-Br.26-27. Though the University says a policy can't be viewpoint-based if it "prohibits conduct," Red-Br.47, the policy here prohibits speech because it offends—and does so for *pure speech*, Blue-Br.21-26. The University cites no case suggesting that a policy can evade the bar on viewpoint-discrimination just because it also prohibits conduct. That rule would split with the Eleventh Circuit, which held that a materially identical harassment policy discriminated based on viewpoint, even though that policy also prohibited "conduct." *Cartwright*, 32 F.4th at 1125-26.

The University insists that prohibiting harassment based on "protected classes" is not viewpoint discrimination, Red-Br.46, but it misses the point. The policy bans harassing speech that is *negative* toward a protected class while allowing harassing speech not based on one of those classes or that is positive. In other words, harassment that does not "invoke [the listed classes]—aspersions upon a person's mother, for example—would seemingly be usable ad libitum in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents." *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992). That's classic viewpoint discrimination. *Id.* at 392. Viewpoint discrimination is per se unconstitutional. Blue-Br.26-27.

And this policy would also fail strict scrutiny because a ban on harassment that was "not limited to the favored topics" would accomplish "precisely" the same goals in a less First Amendment-offensive way. *R.A.V.*, 505 U.S. at 396.

The University argues that "given the closeness of the policy to federal law, accepting Speech First's argument here would render all federal civil-rights laws that prohibit harassment … unconstitutional." Red-Br.46. Not so. No federal statute requires the University to adopt viewpoint-discriminatory regulations of speech. A harassment policy that adopted the *Davis* standard (and thus reached only conduct) or that covered all forms of harassment (and thus was viewpoint-neutral) would satisfy all federal obligations. Blue-Br.6-10, 21-26.

2. The challenged policy is overbroad.

Overbreadth also dooms the policy. The University concedes that its harassment policy deviates from *Davis*. It says it didn't have to use the *Davis* standard. And it says the policy mirrors other antidiscrimination laws that are not facially unconstitutional. Both arguments fail.

1. The University tries to minimize its deviations from *Davis* in three ways. It says *Davis* does not constrain it. It says *Davis* should not constrain it. And it says its policy gets close enough to *Davis*. These arguments don't work.

a. The University asserts that *Davis* is not "a First Amendment ruling." Red-Br.41. But *Davis* had the First Amendment in mind when it defined "harassment" under Title IX. In response to "the dissent" from Justice Kennedy, which raised First

Amendment concerns about campus speech codes, the Court expressly "acknowledge[d]" that universities face "legal constraints on their disciplinary authority." 526 U.S. at 649. Citing the dissent four times, the Court insisted that "it would be entirely reasonable for a [university] to refrain from a form of disciplinary action that would expose it to *constitutional* … claims." *Id.* at 648-49 (emphasis added). And the Court "repeated the 'severe and pervasive' formulation five times" to make clear the speech-protective line it was drawing. 85 Fed. Reg. 30,026, 30,149 (May 19, 2020). *Davis* deliberately avoided First Amendment concerns by adopting a stringent definition of actionable harassment under Title IX, one that would honor the line between discriminatory harassment that is *punishable conduct* and discriminatory harassment that is *protected speech*.

b. The University complains that the *Davis* standard is unworkable because it "would leave schools powerless to discipline severe acts of harassment merely because the conduct was not yet pervasive." Red-Br.42. But that complaint rings hollow because the University System already does precisely that, with its separate Title IX harassment policy that adopts the *Davis* standard verbatim. Blue-Br.13. The University does not explain why it does one thing for purposes of Title IX and another thing for purposes of other harassment. More importantly, the University misunderstands its legal obligations. Universities, not students, are subject to Title IX; harassing speech by students does not violate any federal statute. What violates Title IX is when universities "ac[t] with deliberate indifference to known acts" of student-on-student harassment. *Davis*,

526 U.S. at 633. Nothing in *Davis* or Title IX authorizes, much less requires, universities to preemptively "regulat[e]" students' speech. *Fenves*, 979 F.3d at 337 & n.16.

The University also tries to give examples to show why the *Davis* standard is unworkable, but both examples miss. Per the University, adopting *Davis* means the University would be helpless to punish "the first instance of harassment [that] involved an attempted assault along with vulgar comments" or a circumstance where "male students physically threaten their female peers." Red-Br.42-43. It would not. The University can punish "'non-expressive, physically harassing *conduct*.'" Blue-Br.23 (quoting *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001)). It can also "generally punish someone for the 'noncommunicative impact of his conduct.'" Blue-Br.23 (quoting *United States v. O'Brien*, 391 U.S. 367, 382 (1968)). And it can punish the "few limited areas" of unprotected speech, such as true threats and fighting words, so long as it acts viewpoint neutrally. Blue-Br.21. So the University can punish "attempted assault[s]" and "physica[l] threat[s]" without showing pervasiveness. Red-Br.42-43. The University already prohibits that conduct through other policies. *See, e.g.*, ROA.158-62 (prohibitions on "committing … criminal offense[s]," "threatening … to take unlawful action," and "life-threatening gestures that endanger others"). But what it can't do is punish, under the guide of regulating "harassment," pure *speech* because of its communicative impact.

The University also says this Court's decision in *Fennell v. Marion Independent School District* "appears to have approved suspending students for single acts of harassment,"

thus deviating from *Davis*. Red-Br.43-44 (citing 804 F.3d 398, 410 (5th Cir. 2015)). *Fennell* is irrelevant for two reasons.

First, *Fennell* is a K-12 case. The University has (rightly) abandoned the argument that *Tinker*, or any other K-12 precedent, applies in the university context. *See Cartwright*, 32 F.4th at 1127 n.6 (explaining why "*Tinker*'s more lenient standard" doesn't apply "in the university … setting"); *DeJohn v. Temple Univ.*, 537 F.3d 301, 316 (3d Cir. 2008) (same).

Second, the activity at issue in *Fennell* radically differs from the speech prohibited by this policy. In *Fennell*, the school suspended one student "for using the N-word" and another student "for using the N-word combined with hitting the victim." Red-Br.44. Obviously physical conduct ("hitting the victim") has nothing to do with the First Amendment. And even if the other student were suspended for the N-word only, that speech can be unprotected fighting words in certain contexts. *Boyle v. Evanchick*, 2020 WL 1330712, at *6 (E.D. Pa.).

c. The University thinks its deviations from *Davis* are no big deal. The University concedes that its policy uses the severe-*or*-pervasive formulation rather than *Davis*'s severe-*and*-pervasive formulation, which is fatal on its own. And it's a deviation that the State of Texas agrees would "rollback constitutional safeguards" and "overregulate" protected speech. Texas's Comment on Proposed Title IX Rule, 1-3 (Sept. 12, 2022), perma.cc/62NJ-UN9U. The University, however, does dispute whether it deviates from *Davis*'s "denial" component. Per the University, "any gap" between "interfere"

and "deny" "does not create a First Amendment violation." Red-Br.45. Supreme Court opinions are not suggestions, however, and the University's noncompliance matters. "Interfere" is vague, "amorphous," and a low bar. *Cartwright*, 32 F.4th at 1121. The challenged policy confirms as much by stressing that "[h]arassment does not have to … result in a tangible injury." ROA.127. *Davis* requires far more. Even in the K-12 context, there must be "*substantial* interference"—a modifier that the University, who has much higher First Amendment obligations than a middle school, leaves out. *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S.Ct. 2038, 2044 (2021) (emphasis added).

The University also claims that FIRE agrees harassment policies can use "interfere" instead of "deny." But more recently, FIRE has explained why anything but the *Davis* standard (including its denial component) is constitutionally inadequate. *See* FIRE-Amicus-Br. in *Cartwright*, 2021 WL 4726904, at *23 ("By deviating from the *Davis* standard—substituting 'or' for 'and,' and prohibiting not just conduct that deprives another student of access to educational opportunities or benefits, but simply 'interferes with' or 'alters' the 'terms or conditions of education'—UCF's harassment policy reaches speech beyond *Davis*' scope and is overly broad."); ROA.273-75 (FIRE explaining significance of "deny").

The University urges this Court to follow the Eighth Circuit's decision in *Rowles v. Curators of University of Missouri*, which supposedly held that a university's *Davis*-noncompliant policy did not raise a First Amendment overbreadth problem. Red-Br.45-46 (citing 983 F.3d 345, 352, 358-59 (8th Cir. 2020)). But *Rowles* is crucially different

because it involved a *graduate* student, which raises unique First Amendment issues not present here. 983 F.3d at 351. Graduate students are arguably more like employees of the university, rather than mere students, so a lower standard might be justified for regulating their speech. *See, e.g.*, *Keefe v. Adams*, 840 F.3d 523, 529-33 (8th Cir. 2016); *Hunt v. Univ. of New Mexico*, 792 F. App'x 595, 601-06 (10th Cir. 2019). But regardless, the Eighth Circuit is clearly wrong that a severe-*or*-pervasive policy "tracks nearly verbatim" the *Davis* standard. *Rowles*, 983 F.3d at 358.

2. The University tries to tie itself to antidiscrimination statutes, suggesting that its policy can't be unconstitutional unless those statutes are too. Red-Br.37-41. This argument has repeatedly failed. *See, e.g.*, *Cartwright*, 32 F.4th at 1125-28; *DeJohn*, 537 F.3d at 316; *Saxe*, 240 F.3d at 210. It should fail here too: The University misunderstands why the cited antidiscrimination laws have not been found to facially violate the First Amendment; the University is wrong that its policy hews to them; and in any event, statutes can't trump the Constitution.

a. The University is correct that most federal antidiscrimination statutes do not facially violate the First Amendment, Red-Br.37-41, but it misunderstands why. Although antidiscrimination laws usually cover certain classes (race, sex, etc.), they do not present a First Amendment problem because they are "directed not against speech but against conduct." *R.A.V.*, 505 U.S. at 389. Bans on discriminatory non-expressive *conduct* cannot be viewpoint-discriminatory or content-based because only *speech* can express a viewpoint. *Id.* at 389-90. But when, as here, antidiscrimination laws go beyond

conduct and start directly regulating speech, they are subject to the rule against viewpoint and content discrimination. That's the holding of *R.A.V.*—a precedent that the University doesn't even cite. *Id.* at 383-86. And it's rooted in this Court's decision in *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596 (5th Cir. 1995).

The University claims its policy deals only with "conduct, not speech." Red-Br.37. But courts reject "the practice of relabeling controversial speech as conduct"—or lumping direct speech restrictions with conduct restrictions. *Otto*, 981 F.3d at 861. It would take an incredible amount of interpretive jiu-jitsu to argue that a policy prohibiting "unwelcome verbal" or "written … conduct" is not a direct restriction of speech. ROA.126-27; *see Stevens*, 559 U.S. at 481 (courts can't "impose a limiting construction" unless law "is readily susceptible to such a construction" (cleaned up)); *Hill v. Houston*, 789 F.2d 1103, 1109-10 (5th Cir. 1986) (en banc) (policy that banned "mere verbal as well as physical conduct" reached speech and was subject to an "'overbreadth attack'"); *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 250 (3d Cir. 2010) ("Speech protected by the First Amendment is a type of 'conduct.'").

The University also forgets that this case is an overbreadth challenge—an exception to the normal rules governing facial challenges. By directly regulating speech, including a single instance, the policy is "susceptible of regular application to protected expression," reaching vast amounts of protected speech uttered daily. *Houston v. Hill*, 482 U.S. 451, 466-67 (1987); Blue-Br.24-26. The State of Texas concedes that policies deviating from *Davis*, like the policy challenged here, chill speech, cover controversial

(but protected) speech, and "pressur[e]" universities "into hyper-policing controversial speech." Texas's Comment on Proposed Title IX Rule, 1-2 (Sept. 12, 2022), perma.cc/62NJ-UN9U. "Logic," it says, "dictates that given [universities'] poor track record," policies deviating from *Davis* result in universities "target[ing] unpopular viewpoints" and "overregulat[ing] anything deemed offensive." *Id.* at 3. It doesn't matter that the policy here also covers conduct. On college campuses, protected speech happens far more than physically harassing conduct. That conduct is already prohibited by other laws and policies. And speech is what's most likely to be *chilled* by harassment policies like this one. *See Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003). The policy's unconstitutional applications to protected speech dwarf any legitimate application to conduct. And as the State of Texas concedes, policies that deviate from *Davis* are "susceptible of regular application to protected expression." *Hill*, 482 U.S. at 467. The policy challenged here is thus overbroad.

b. Even putting aside *Davis*, which authoritatively interpreted Title IX, the University's policy deviates from federal and state antidiscrimination laws. The challenged policy uses classifications that "are not protected under federal law." *Saxe*, 240 F.3d at 210. The University cites a smattering of statutes, Red-Br.3-7, but it identifies no federal (or state) statute that justifies its decision to ban student-on-student harassment based

on "veterans' status," "age," or "religion," ROA.126-27.[1] To the extent the University gets close, it cites statutes or precedent about *employment* discrimination, not *student-on-student* harassment. *E.g.*, Red-Br.6 (veterans' status only protected for "hostile-work-environment claims"); *id.* (discussing only state law on "employment discrimination" and Title VII for religion and age). Employment laws like Title VII differ crucially from laws regulating speech on college campuses, which is why the University's attempt to apply the Title VII standard to students at universities has been rejected by all three branches. Blue-Br.8-9, 38-40; 85 Fed. Reg. at 30,037.[2]

c. Finally, even if the challenged policy mirrored federal and state antidiscrimination statutes, the University's argument still wouldn't persuade. As a state actor, the University has an overriding constitutional obligation to respect students' free-speech rights. If the two are in conflict, it must side with the Constitution—not Congress. *See 303 Creative v. Elenis*, 600 U.S. 570, 592 (2023).

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[1] The University also concedes that its policy deviates from Title IX by covering harassment based on "gender identity," "gender expression," and "sexual orientation." The State of Texas's position in other litigation is that Title IX unambiguously excludes "discrimination" based on "homosexual" or "transgender status." Red-Br.5 n.1 (citing *Texas v. Cardona*, No. 4:23-cv-00604-O (N.D. Tex.)).

[2] The University notes that the Department's current Title IX rule says "conduct that did not meet the definition of sexual harassment could still be addressed through the entity's code of conduct." Red-Br.43 (citing 34 C.F.R. §106.45(b)(3)(i)). True, but irrelevant. While the Department has authority to create rules under Title IX, it lacks authority to create rules for universities generally. It was not, by noting this limit on the scope of its rulemaking authority, giving public universities permission to violate the First Amendment.

3. The challenged policy is content-based and fails strict scrutiny.

The University doesn't dispute that if the challenged policy flunks strict scrutiny, then it's facially unconstitutional. Blue-Br.30. The University first says the policy isn't content-based because it doesn't *only* focus on the listener's subjective reaction *but also* requires the speech to be "objectively harassing." Red-Br.47. No case draws that line, and drawing it would split with the Eleventh Circuit. *Cartwright*, 32 F.4th at 1125-27. What matters is that administrators "must examine the content of the message … to know whether the [policy] has been violated." *Otto*, 981 F.3d at 862 (cleaned up).

The University next asks this Court to ignore the policy's content-based purpose. Red-Br.48. But even if "the policy's stated purpose has no independent effect," Red-Br.48, the policy's purpose is relevant: A policy can be content-based "on its face" *or because of its* "*purpose and justification.*" *Reed v. Gilbert*, 576 U.S. 155, 166 (2015) (emphasis added). The policy's express purpose is to single out "'exclusive'" views. Blue-Br.29. That content-based purpose independently triggers strict scrutiny.

The University's backup argument is that its policy survives strict scrutiny. But this policy isn't one of those "'rare'" policies that surmounts this stringent review. Blue-Br.28-29. The University claims its policy is "narrowly tailored" because "it uses language taken directly from this Court and the Supreme Court." Red-Br.48. But it's not because it doesn't, as explained above about *Davis*. The University doesn't explain why "a policy that adopted the *Davis* standard verbatim would [not] solve [all] legitimate

concerns." Blue-Br.30. It would certainly solve the University's interest in "'preventing discrimination'" in "'the schools.'" Red-Br.47. If that interest somehow required banning pure speech, and not just the discriminatory conduct itself, then the University has failed to carry its burden of explaining why that's the case. *See SFFA v. Harvard Coll.*, 600 U.S. 181, 217 (2023); *Green v. Miss USA*, 52 F.4th 773, 792 (9th Cir. 2022).

B. Speech First likely has standing.

On standing, the University disputes only whether one of Speech First's "'members would otherwise have standing to sue in their own right.'" *Fenves*, 979 F.3d at 330. Standing is "not hard to sustain" in this context. *Id.* at 331. As the district court recognized for the amended discriminatory-harassment policy—which is narrower than the challenged policy—Speech First easily met its burden. ROA.762-70.

The University's standing argument is foreclosed by *Fenves*. The University says the policy challenged here "differs in significant ways from the ones challenged in *Fenves*." Red-Br.35. Not even a little bit. The Court held that a materially indistinguishable harassment policy chilled materially indistinguishable speech.[3]

In *Fenves*, Speech First sued UT over four policies, one of which was a harassment policy. 979 F.3d at 323-34. As here, Speech First sought a preliminary injunction and provided evidence about the speech its members wished to express. *Id.* at 323, 331.

[3] The same arguments were also raised, and rejected, in two other cases where Speech First challenged harassment policies. *See Cartwright*, 32 F.4th at 1121-22; *Speech First v. Khator*, 603 F.Supp.3d 480, 481 (S.D. Tex. 2022).

And as here, UT argued that Speech First lacked standing because Speech First had not established a history of past enforcement, because the University would never punish protected speech, and because the policies did not prohibit the members' intended speech. *See id.* at 332-34, 336. This Court disagreed, concluding that Speech First had standing to challenge all four policies—including UT's harassment policy. *Id.* at 338.

Harassment Definition Here	**Harassment Definition in *Fenves***
a form of discrimination consisting of unwelcome verbal, written, graphic, or physical conduct that:	Hostile or offensive speech, oral, written, or symbolic, that: A. is not necessary to the expression of any idea described in the following subsection ['an argument for or against the substance of any political, religious, philosophical, ideological, or academic idea is not verbal harassment even if some listeners are offended by the argument or idea'];
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	C. personally describes or is personally directed to one or more specific individuals.
b. is sufficiently severe or pervasive so as to interfere with an individual's employment, education, academic environment, or participation in institution programs or activities; and creates a working, learning, program or activity environment that a reasonable person would find intimidating, offensive, or hostile.	B. is sufficiently severe, pervasive, or persistent to create an objectively hostile environment that interferes with or diminishes the victim's ability to participate in or benefit from the services, activities, or privileges provided by the University; and

Compare Fenves, 979 F.3d at 323, *with* ROA.126-27 (breaks added; reordered).

To the extent the policies differ, the policy here is broader. Unlike UT, Texas State does not require the harassing speech to be "not necessary to the expression" of an argument. Unlike UT, Texas State does not require the speech to "*personally* describ[e]" or be "*personally* directed" at a "*specific* individua[l]," but merely to be "directed at an individual or group of individuals." And unlike UT, Texas State does not require the speech to "create an objectively hostile environment," but merely an "environment" that "a reasonable person would find … offensive." Because Speech First had standing to challenge UT's narrower policy, it necessarily has standing to challenge the University's broader one.

In arguing otherwise, the University misunderstands the facts of *Fenves*. It claims that UT's harassment policy included "broad" language like "'incivility.'" Red-Br.35-36. But that term appeared in a different policy that Speech First challenged: a residence-hall manual. *See Fenves*, 979 F.3d at 332. The University mentions UT's "Hate and Bias Incidents policy" that prohibited "discrimination based on ideology, political views, and political affiliation." Red-Br.35. But as the district court noted here, that separate bias policy was not UT's harassment policy, which did not contain those terms. ROA.769 n.4. Regardless, this Court held that Speech First likely had standing to challenge *each* of the four challenged policies. *Fenves*, 979 F.3d at 338.

The University insists that the members' speech here is not even *arguably* proscribed by the policy. Red-Br.30-33. But as in *Fenves*, the policy's text covers their desired speech, both arguably and actually. The "categories of speech arguably covered"

by the challenged policy are incredibly "broad." 979 F.3d at 332. The members' speech on gender identity, same-sex marriage, affirmative action, and more would be "directed at [a] … group of individuals because of their" protected status ("race," "sexual orientation," "gender identity"). *E.g.*, ROA.114-15 ¶¶3-7. And contra the University, Red-Br.31-32, the "[h]arassment does not have to be targeted at a particular individual" to violate the policy, ROA.127. Even if it did, the speech here is targeted. *E.g.*, ROA.111-12 ¶12 (desire "to speak directly to my classmates" in a way that would seem "heated, passionate, and targeted"). This controversial speech is also a "severe" interference that a reasonable person would find "offensive" or "hostile"—as the district court concluded. ROA.126-27; *cf.* ROA.767-68 (finding standing even under the changed policy).

C. Speech First's claim is not moot.

A defendant's post-filing intervention cannot moot a claim unless the defendant shows that it's "impossible for a court to grant effectual relief." *Abbott v. Biden*, 70 F.4th 817, 824 (5th Cir. 2023) (cleaned up). Effectual relief remains possible when the "wrongful behavior" is "reasonably expected to recur," or when the modified policy still "disadvantages the plaintiffs in the same fundamental way." *Fenves*, 979 F.3d at 328; *Clarke v. CFTC*, 74 F.4th 627, 636 (5th Cir. 2023) (cleaned up). Though the University had to negate both, it negated neither.

Going for the Hail Mary pass, the University says Speech First's claim was not moot below, but is moot now, because of the Supreme Court's summary order in *Speech First v. Sands*, 144 S.Ct. 675 (2024). Here's the entire order: "The petition for a writ of

certiorari is granted. The judgment with respect to the Bias Policy claims is vacated, and the case is remanded to the United States Court of Appeals for the Fourth Circuit with instructions to dismiss those claims as moot." *Id.* According to the University, this two-sentence order abrogated a host of Fifth Circuit precedent on mootness, including *Fenves*, and requires dismissing Speech First's claim here as moot. The University is wrong.

Under this Court's rule of orderliness, *Sands* cannot abrogate Fifth Circuit precedent. Panels must "follow existing circuit precedent unless the Supreme Court 'unequivocally' overrules it." *United States v. Jones*, 88 F.4th 571, 573 (5th Cir. 2023). "That standard sets a high bar." *Ruiz-Perez v. Garland*, 49 F.4th 972, 976 (5th Cir. 2022). Yet the University never even mentions this extraordinary burden. If anything, even more recent Supreme Court precedent reaffirms this Court's precedent and Speech First's position. *See FBI v. Fikre*, 144 S.Ct. 771, 777 (2024) (voluntary-cessation burden "for governmental defendants [is] no less than for private ones").

Sands does not overrule circuit precedent; nor does it control this case at all. It differs in at least three critical ways.

First, *Sands* didn't involve an amendment to a policy; Virginia Tech completely "abandoned" the challenged policy. *Sands*-BIO, 2023 WL 6974282, at *16. That bias policy was fully repealed. Here, the amended policy has similar constitutional infirmities and is not entirely in effect. Blue-Br.36-43.

Second, Virginia Tech submitted a declaration from its president "swear[ing]" that the revoked policy would never return. *See Sands*-BIO, 2023 WL 6974282, at *19.

But Texas State produced no evidence, let alone a controlling statement, that the challenged policy will not be readopted. In fact, Texas State acknowledges that it will probably need to (re)amend its policy soon. Red-Br.19.

Third, Virginia Tech changed its policy after it won in the district court and on appeal and swore that the policy's complete repeal had nothing to do with the litigation. *See Sands*-BIO, 2023 WL 6974282, at *20-21; *Sands*-App.3 ¶10, perma.cc/8EPE-SUNW ("The decision by Virginia Tech to discontinue the bias-incident response protocol and BIRT was not prompted by the Speech First lawsuit."). Here, the University amended its policy because Speech First sued, the district court said it would enter a preliminary injunction, and the University wanted to escape an adverse decision. Blue-Br.15-18.

II. Speech First satisfies the irreparable-harm factor.

The University wants this Court to take the unusual step of deciding only irreparable harm—to affirm the district court on the alternative ground that Speech First lacks irreparable harm, without first addressing the merits. Red-Br.19. This Court should decline.

In terms of sequencing, this Court should first decide whether the University's harassment policy is constitutional. In a free-speech case like this one, after this Court decides it has jurisdiction, the "next step" is "to consider whether Speech First is likely to succeed on the merits." *Fenves*, 979 F.3d at 338. The merits are generally the "only" question that "matters" in "First Amendment cases." *Fischer v. Thomas*, 52 F.4th 303, 307 (6th Cir. 2022); *see N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir.

2013) ("virtually indispensable"). Because violations of constitutional rights are themselves irreparable, "irreparable injury entirely depend[s] on whether the [challenged policy is] constitutional." *Bays v. Fairborn*, 668 F.3d 814, 819 (6th Cir. 2012). If a district court did what the University is asking—"ski[p]" the merits and go straight to irreparable harm—it would "necessarily abus[e] its discretion." *Baird v. Bonta*, 81 F.4th 1036, 1041 (9th Cir. 2023). This Court shouldn't either, especially since even the University agrees that it "needs clarity on what the law is" here. Red-Br.21.

After deciding the merits, this Court should—at worst—*remand* the remaining preliminary-injunction factors to the district court, including irreparable harm. *See, e.g.*, *Abbott*, 70 F.4th at 846 (deciding likelihood of success even after the government's intervening act and remanding for the district court to decide "the other three [criteria] in the first instance"). The district court did not consider irreparable harm for the challenged harassment policy; it treated the question solely as one of mootness (and then analyzed that mootness question incorrectly). *See* Blue-Br.17. Because the district court made no findings about irreparable harm in particular, the University is wrong to suggest that its decision gets any sort of deference. Red-Br.22; *see Int'l Energy Ventures Mgmt. v. United Energy Grp.*, 999 F.3d 257, 268 (5th Cir. 2021). But if the University is right that this question (when actually analyzed) is normally committed to the district court's "'discretion,'" Red-Br.22, then this Court *cannot* affirm on the alternative ground that the district court should have found no irreparable harm. "[W]ith respect to a matter committed to the district court's discretion, [appellate courts] cannot invoke an alternative

basis to affirm unless [they] can say as a matter of law that 'it would have been an abuse of discretion for the trial court to rule otherwise.'" *Ashby v. McKenna*, 331 F.3d 1148, 1151 (10th Cir. 2003). Here, the district court would have been well within its discretion to find irreparable harm, even after the University changed the policy.

In fact, irreparable harm is clear enough that this Court should resolve it now in *Speech First's* favor. As Speech First has explained and the district court found, First Amendment violations are themselves irreparable. Blue-Br.44-45. Even after the University amended the harassment policy, that irreparable harm did not disappear—either because the constitutional violation is ongoing, or because the threat that it will recur is substantial.

Speech First's constitutional injury is ongoing. "[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). The University's amended harassment policy "has similar constitutional infirmities" as the challenged policy. Blue-Br.36-42. Speech First's constitutional injury thus continues, so its constitutional injuries are irreparable injuries. The University makes no structured argument that the amended policy or System policies do not cause the same constitutional harms, thus forfeiting the argument.

The University contends that the amended policy and the System policies are irrelevant to irreparable harm. Red-Br.25-26. Supreme Court precedent says otherwise. Relevant considerations include "the effectiveness of the discontinuance." *United States*

v. W.T. Grant, 345 U.S. 629, 633 (1953). Because the amended policy and System policies have the same fundamental constitutional infirmities as the challenged policy, the University's discontinuance was hardly "effectiv[e]." *Id.*

It is no answer to point out that, at this time, Speech First is not asking this Court to enjoin the amended policy or the System policies. Here, the requested preliminary injunction prevents the enforcement or reinstatement of an unconstitutional policy, and this Court's reasoning will govern those other policies too. *Cf. Hollis v. Lynch*, 827 F.3d 436, 442 (5th Cir. 2016) (injury likely redressable because holding a law unconstitutional means that a materially similar law "would also be unconstitutional"). Speech First did, after all, challenge those other policies in its complaint. *See* ROA.36 ¶108; ROA.40. And contra the University, Speech First's requested injunction needn't "completely prevent the irreparable harm" to be appropriate. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 823 (9th Cir. 2018). Courts can "enjoi[n] future violations" by barring the defendant from reinstating prior policies, and have done so "[i]n numerous cases." *KFC v. Diversified Packaging Corp.*, 549 F.2d 368, 390 n.29 (5th Cir. 1977); *e.g.*, *Lopes v. Int'l Rubber Distributors*, 309 F.Supp.2d 972, 983-84 (N.D. Ohio 2004).

But even if irreparable harm were not ongoing, Speech First has shown that it's likely to recur. "First Amendment interests" need only be "threatened *or* impaired." *Missouri v. Biden*, 83 F.4th 350, 393 (5th Cir. 2023) (emphasis added). There need only be "some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *W.T.*, 345 U.S. at 633.

The University responds that voluntary cessation defeats irreparable harm and that Speech First "confuse[s] the irreparable-harm requirement with mootness." Red-Br.19. Neither response is right. "It is well settled in the Fifth Circuit that a defendant's 'mere voluntary cessation' of a challenged practice does not preclude a finding of irreparable injury." *Prison Legal News v. Lindsey*, 2007 WL 9717318, at *3 (N.D. Tex.) (quoting *Doe v. Duncanville ISD*, 994 F.2d 160, 166 (5th Cir. 1993)); *accord Gates v. Collier*, 501 F.2d 1291, 1321 (5th Cir. 1974) (same). Courts are "right to be skeptical of the officials' claims that they had stopped all challenged conduct." *Missouri*, 83 F.4th at 393. It's their "duty." *United States v. Ore. State Med. Soc.*, 343 U.S. 326, 333 (1952). When deciding whether to enjoin a defendant who claims voluntary cessation, moreover, the mootness analysis "is immediately relevant." *Rouser v. White*, 707 F.Supp.2d 1055, 1071 (E.D. Cal. 2010).

And here, the mootness analysis is not a close call; so for the same reasons Speech First's claim is not moot, a cognizable danger of recurrence exists and the irreparable-harm factor is met. *See* Blue-Br.30-44. Specifically, a defendant "that takes curative actions only after it has been sued fails to provide sufficient assurances that it will not repeat the violation to justify denying an injunction." *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1544 (9th Cir. 1987); *accord Howe v. Akron*, 801 F.3d 718, 754 (6th Cir. 2015). Especially so here: Universities notoriously reinstate unconstitutional policies, Texas State has clashed with the First Amendment before, and a "defendant who merely modifies her injurious behavior *obviously* can't show 'the allegedly wrongful

behavior could not reasonably be expected to recur.'" *MPP*, 20 F.4th at 959 n.7 (emphasis added); *see* Blue-Br.4-5, 32-33; ROA.18-19; ADF-Br.4-13.[4] And rather than provide evidence that the University won't reinstate the challenged policy, the University essentially does the opposite: It acknowledges that it may need to amend its policies soon. Red-Br.19. Taking everything together, irreparable harm is likely.

Far lower threats of recurrence have resulted in injunctions. *See FTC v. Accusearch Inc.*, 570 F.3d 1187, 1202 (10th Cir. 2009) (upholding issuance of an injunction even though defendant "ceased" the unlawful conduct "before litigation commenced" because defendant "remained" in the same business area and "had the capacity to engage in similar unfair acts or practices in the future" (cleaned up)); *EEOC v. KarenKim, Inc.*, 698 F.3d 92, 101 (2d Cir. 2012) (issuing an injunction in part because "[a]bsent an injunction, nothing prevents" defendant from reverting to its unlawful conduct); *Cisco Sys. v. Huawei Techs.*, 266 F.Supp.2d 551, 554 (E.D. Tex. 2003) (finding irreparable harm and rejecting defendants' argument that "their voluntary cessation" negated irreparable harm); *Lutrario v. City of Hollywood*, 2023 WL 9423845, at *7 (S.D. Fla.) (finding irreparable harm because "Defendant did not take steps to cease its conduct until after

[4] The University contends that its other clashes with the First Amendment are irrelevant because it doesn't "involve the discriminatory-harassment policy at issue here." Red-Br.26. Precedent again says otherwise. Courts consider "the character of the past violations," *W.T.*, 345 U.S. at 633, and it makes sense that if a university violated the First Amendment before, then it will again. Especially since universities often reinstate unconstitutional policies after litigation ends. Blue-Br.32-33.

Plaintiff sought injunctive relief and following multiple alleged violations over the past three years"). This context—public universities with well-known propensities for strategic behavior and unlawful speech codes—should not be the exception. *See Fenves*, 979 F.3d at 328, 338-39 & n.17; Blue-Br.32-33.

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

The University doesn't dispute that the public interest and equities merge. Blue-Br.45. It cannot argue that those factors favor leaving the challenged harassment policy in place, while also arguing that the policy is gone. *Lopes*, 309 F.Supp.2d at 983. And "neither the State nor the public has any interest in enforcing a regulation that violates" the Constitution. *Book People, Inc. v. Wong*, 91 F.4th 318, 341 (5th Cir. 2024) (cleaned up).

In a last-ditch effort, the University claims that Speech First cannot get a preliminary injunction because it got a few extensions on its *appellate* briefs. The University does not argue that Speech First waited too long to seek a preliminary injunction, and it cites no case denying a preliminary injunction because the losing movant got modest extensions on appeal. The University consented to those extensions. The University got two extensions below and one here. ROA.6-7; ROA.592-93; ROA.600-01. One of Speech First's extensions was over the holidays—when most students aren't even on campus—and the University said it "would have sought" the same extension "anyway." CA5-Doc.28 at 2.

Despite its gripes about professional courtesies between busy lawyers, the University cannot deny that time is of the essence for Students A-C. Two might graduate without ever getting relief, if this case is remanded to the district court without instructions. And none of them should have to "continue holding their First Amendment rights in abeyance" any longer than necessary. *Otto*, 981 F.3d at 871.

Speech First's entitlement to a preliminary injunction is clear. This Court should issue the preliminary injunction itself. *E.g.*, *McDonald v. Longley*, 4 F.4th 229, 255 (5th Cir. 2021). Or, as the Eleventh Circuit did in an identical case, this Court should instruct the district court to issue the preliminary injunction. *Cartwright*, 32 F.4th at 1128.

CONCLUSION

This Court should reverse and either enter or direct the entry of a preliminary injunction.

Dated: April 8, 2024

Respectfully submitted,

/s/ Cameron T. Norris

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CERTIFICATE OF SERVICE

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

Dated: April 8, 2024 *s/ Cameron T. Norris*

CERTIFICATE OF COMPLIANCE

The brief complies with Rule 32(a)(7)(B) because it contains 6,492 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: April 8, 2024 *s/ Cameron T. Norris*