No. 21-2061

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SPEECH FIRST, INC.,

Plaintiff-Appellant,

v.

TIMOTHY SANDS,

in his individual capacity and official capacity as President of Virginia Polytechnic Institute and State University,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Virginia, Honorable Michael F. Urbanski,

Case No. 7:21-cv-00203-MFU

BRIEF OF *AMICUS CURIAE* ALLIANCE DEFENDING FREEDOM IN SUPPORT OF PLAINTIFF-APPELLANT SPEECH FIRST, INC. AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Local Rule 26.1, the undersigned certifies that the name of each person, attorney, association of persons, firm, law firm, partnership, and corporation that has or may have an interest in the outcome of this action—including subsidiaries, conglomerates, affiliates, parent corporations, publicly-traded companies that own 10% or more of a party's stock, and all other identifiable legal entities related to any party in the case, in addition to those set forth in the Initial Brief of Appellant Speech First, Inc., include:

1. Alliance Defending Freedom – Amicus Curiae
2. Bursch, John J. – Counsel for Amicus Curiae
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4. Sidley Austin LLP – Counsel for Amicus Curiae
5. Todd, Gordon D. – Counsel for Amicus Curiae
6. Siebert, Mackenzie J. – Counsel for Amicus Curiae
7. Smith, Robert M. – Counsel for Amicus Curiae

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

/s/ *Gordon D. Todd*
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STATEMENT OF THE ISSUE

Virginia Polytechnic Institute and State University solicits and tracks alleged instances of "bias." If the university's "Bias Intervention and Response Team" determines that a student has acted in a biased manner, it stages an educational intervention, asking the offender to meet with an administrator. Did the district court err in holding that this policy is unlikely to chill protected speech?

Virginia Tech also has an "informational activities" policy that forbids students from "distributing literature" on campus unless they receive prior approval and are affiliated with a university-sponsored organization. Did the district court err in denying an injunction against the policy on the grounds that the record is not sufficiently developed?

More generally, is the widespread adoption of anti-bias and anti-harassment policies by public universities consistent with the First Amendment?

INTEREST OF *AMICUS CURIAE*[1]

Alliance Defending Freedom (ADF) is a not-for-profit public-interest legal organization that protects speech, religious liberty, and the right to life. ADF regularly defends students, adults, and organizations in cases involving the right to free speech. *E.g.*, *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021); *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021); *Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra*, 138 S. Ct. 2361 (2018); *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). ADF relies on the Free Speech Clause to protect individuals and organizations whose speech is wrongly restricted by government. ADF has a strong interest in ensuring that university policies that censor protected speech undergo the strictest scrutiny.

BACKGROUND

Virginia Polytechnic Institute and State University ("Virginia Tech") has a "bias incident" policy that covers protected speech. Bias incidents are defined as "expressions against a person or group because

[1] Pursuant to Fed. R. App. P. 29(a) *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief.

of the person's or group's age, color, disability, gender (including pregnancy), gender identity, gender expression, genetic information, national origin, political affiliation, race, religion, sexual orientation, veteran status, or any other basis protected by law." JA333. Members of the university community who witness an incident involving "bias" are encouraged to notify administrators through an online reporting system. University officials then respond to these reports, logging details of the alleged bias in a case management system and scheduling interventions with students if they determine that "bias exists." JA372.

Student members of Plaintiff Speech First argue that their speech has been chilled due to Virginia Tech's enforcement of its bias incident policy. These students want to "engage in open and robust intellectual debate" with peers, but worry that they will be reported for "bias" and targeted by the university for their political or religious views. JA339, ¶13. They argue that the chilling effect of the bias incident policy constitutes a cognizable constitutional injury conferring standing.

Virginia Tech also enforces an "informational activities" policy that governs the "distribution of literature and/or petitioning for signatures where no fee is involved nor donations or contributions sought." JA225.

Students are forbidden from distributing literature on campus unless they reserve space beforehand and are members of an organization approved by Virginia Tech. Plaintiffs argue that this policy constitutes a prior restraint on protected speech and regulates speech based on the identity of the speaker, in violation of the First Amendment.

The district court declined to preliminarily enjoin both policies. In so doing, the district court short-changed the First Amendment's strong presumption in favor of more speech, not less, particularly in the public university context. Rigorous application of First Amendment rights in the public academy promotes vigorous exchange and truth-seeking, core First Amendment values. The district court also kept in place rules and policies that discourage expression, disadvantage minority viewpoints, and detract from the educational mission of the university.

SUMMARY OF THE ARGUMENT

Universities like Virginia Tech use excessively broad anti-bias policies to suppress speech that they deem to be wrong or of little value. But the First Amendment protects a citizen's right to express deeply held beliefs—even if wrongheaded or offensive—and to contribute to the

marketplace of ideas regardless of viewpoint. It makes no categorical exception for "bias" or subjective offense.

Accordingly, Virginia Tech's enforcement of its overly broad "bias incident" policy—which includes identifying students who have engaged in allegedly biased speech and asking them to participate in educational meetings—chills constitutionally protected expression. No student enjoys being called to the proverbial principal's office, particularly in front of their peers. Students will necessarily self-censor when faced with this prospect. This fear undermines the free exchange of ideas and the shared pursuit of truth: key goals of both public universities and the First Amendment. The mere risk of such chilling runs afoul of the First Amendment.

The Supreme Court outlined a better approach to university student speech in *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, 526 U.S. 629 (1999). There, the Court explained how universities can police harassment while abiding by constitutional protections: universities may only address harassment that is "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access" to educational opportunities. *Id.* at 650. In this case,

the court should clarify that enforcement of overbroad anti-bias or anti-harassment policies that do not meet the *Davis* standard is likely to chill speech—a cognizable constitutional injury.

Unfortunately, Virginia Tech's actions in this case are unexceptional. Universities frequently weaponize their speech policies to censor unpopular—yet protected—speech. ADF has counseled or represented numerous university students who have suffered censorship. For example, Miami University Hamilton required a pro-life student organization to include what amounted to a "trigger warning" for its own display. Georgia Gwinnett College stopped student Chike Uzuegbunam from distributing religious literature, telling him he first needed to obtain a permit. A college in New York banned student Owen Stevens from coursework because he asserted his belief in the immutability of biological sex. And at Florida State University, Jack Denton was removed as president of the student senate (a government-employee position) in retaliation for comments he made on a private group chat. These examples show the inherent problems with expansive university policies regulating speech, such as the one at Virginia Tech.

Simply put, university students must remain free to advance their beliefs in the marketplace of ideas. If public universities censor speech, all of society suffers. Luckily, the First Amendment prohibits public institutions of higher education from adopting loose, overbroad anti-bias or anti-harassment policies that go far beyond *Davis*. In light of the troubling campus trend towards censorship, this court should hold that even limited, supposedly "voluntary" measures to enforce such policies are likely to chill speech.

ARGUMENT

I. Overbroad Policies Chill Protected Speech And Undermine The Shared Pursuit of Truth

A. The First Amendment favors the robust exchange of ideas.

The Founders agreed that free speech is a natural right, but they "often profoundly disagreed about the *legal implications* of the First Amendment." Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 254 (2017). This is because they justified the natural right in different ways and disagreed about "the precise relationship between natural rights and the common law." *Id.* They pointed to various, and at times competing, grounds for ratifying the First Amendment.

The Founders recognized, however, that at the core of the First Amendment is the freedom to express one's deeply held beliefs about what is true. The nation's free speech jurisprudence has, accordingly, emphasized the "marketplace of ideas" as a way of advancing democratic self-governance and the shared pursuit of truth. This "marketplace" concept, premised on truth's ability to emerge through open debate, long predates the First Amendment itself.

In his 1644 polemic *Areopagitica*, John Milton argued that even if "all the winds of doctrine were let loose to play upon the earth," to license or prohibit speech would be to "misdoubt [Truth's] strength." John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing to the Parliament of England* (1644), https://bit.ly/2XoLwBA. It is better to "[l]et her and Falsehood grapple." *Id.* For, "who ever knew Truth put to the worse, in free and open encounter?" *Id.* "[H]indering and cropping the discovery that might be yet further made both in religious and civil wisdom," Milton thought, would "discourage[ ] . . . all learning" and cause "the stop of truth." *Id.*

Milton's thinking influenced the founding generation. Thomas Jefferson believed that "truth is great and will prevail if left to herself[.]"

Thomas Jefferson, *A Bill for Establishing Religious Freedom* (1779), https://bit.ly/3FgeEeg. As "the proper and sufficient antagonist to error," she has "nothing to fear from [] conflict unless by human interposition disarmed of her natural weapons, free argument and debate[.]" *Id.* Lawyer Thomas Erskine, who defended Thomas Paine against the charge of seditious libel, argued that "every man, not intending to mislead, but seeking to enlighten others with what his own reason and conscience, however erroneously, have dictated to him as truth, may address himself to the universal reason of a whole nation[.]" William C. Warren, *Community Security vs. Man's Right to Knowledge*, 54 COLUM. L. REV. 667, 670 (1954) (quoting *The Trial of Thomas Paine*, 22 How. St. Tr. 358, 414–15 (1792)). And James Madison, while recognizing free expression's potential for abuse, agreed that "it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits." James Madison, 6 THE WRITINGS OF JAMES MADISON 389 (Gaillard Hunt ed., 1906) (1799), https://bit.ly/3FFgLZf.

In the early twentieth century, Justices Oliver Wendell Holmes Jr. and Louis Brandeis, who played a particularly influential role in framing

modern First Amendment jurisprudence, adopted this same approach. Acknowledging the human instinct to silence opposition, Justice Holmes explained that "the ultimate good desired is better reached by free trade in ideas" because "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Similarly, Justice Brandeis viewed free speech as a tool leading to truth through "a dialectical process of free debate." Christoph Bezemek, *The Epistemic Neutrality of the "Marketplace of Ideas": Milton, Mill, Brandeis, and Holmes on Falsehood and Freedom of Speech*, 14 FIRST AMEND. L. REV. 159, 174 (2015). According to Brandeis, "[t]hose who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). The founders knew that "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth[.]" *Id.*

Finally, the modern Supreme Court has reiterated that the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.)). This is especially true of the "college classroom with its surrounding environs," which is "peculiarly the marketplace of ideas." *Healy v. James,* 408 U.S. 169, 180 (1972) (citation omitted); *see also Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981).

B. The robust exchange of ideas depends on the willingness to speak.

The "marketplace of ideas" justifies free expression not merely on individual grounds, but in terms of its positive benefits to society. *See* Eugene Volokh, *In Defense of the Marketplace of Ideas/Search for Truth as a Theory of Free Speech Protection*, 97 VA. L. REV. 595, 599–601 (2011). If the public search for truth is a dialectical enterprise, then that search is advanced whenever students engage in protected expression, regardless of its truth or falsity. Conversely, if students are unwilling to speak on important topics, their perspective is lost and the public conversation suffers. More speech is often better.

The First Amendment protects speech not just *post hoc* but also *ex ante* by restricting laws or policies that risk a "chilling effect," which occurs "when, in the course of pursuing legitimate purposes, a law incidentally deters protected expression." Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1673 (2013). "This is an evil of constitutional proportions because free speech is an affirmative value, which the government has a particular obligation to promote, or at least not to deter." *Id.* at 1655. "Hence the chilling effect of an otherwise legitimate law becomes a matter for judicial review and a likely cause for invalidation." *Id.* at 1650; *see, e.g.*, *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995) (striking down a university policy that discriminated against student groups based on their substantive content because of its chilling effect); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988) (striking down a standardless permitting scheme for newsracks for fear of chilling speech); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983) (striking down targeted tax on publications on account of risk of chilling speech); *N.Y. Times Co. v. United States*, 403

U.S. 713, 724 (Douglas, J., concurring) (1971) ("Open debate and discussion of public issues are vital to our national health.").

C. Students are unwilling to speak when schools create uncertainty about whether there will be repercussions for speaking.

Anti-bias policies in particular can create a chilling effect on college campuses. *See, e.g.*, *Dejohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008). Even when anti-bias policies claim to target only unprotected speech, their open-ended language creates great uncertainty about what speech is and is not protected. In light of this uncertainty, students find it difficult to evaluate whether being invited to meet with an educational administrator is truly "voluntary" or a prelude to further disciplinary action. Indeed, "[e]ven if an official lacks actual power to punish, the threat of punishment from a public official who appears to have punitive authority can be enough to produce an objective chill." *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 764 (6th Cir. 2019) (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68 (1963)). Students therefore self-censor, not saying things they otherwise would have.

Whether vague or unclear policies actually disincentive speech is partially an empirical question—one that courts may be ill-equipped to

answer. But it is fair to say that, in light of the ideological ubiquity at many public universities and the discretion involved in deciding which bias incidents to address, anti-bias policies tend have a disparate impact on conservative and religious speakers. As the plaintiffs attest in this case, even seemingly minor responses by a university to reported "bias" can lead to involuntary student self-censorship: a constitutionally cognizable injury. *See Speech First, Inc. v. Fenves*, 979 F.3d 319, 331–32 (5th Cir. 2020); *Schlissel*, 939 F.3d at 763–67.

Students may, of course, be unwilling to speak for any number of other reasons, including societal attitudes about what is and is not acceptable expression. Neither "subjective" chilling due to the speaker's own idiosyncrasies or so-called "objective" chilling due to private action is a constitutional problem. However, the First Amendment *is* implicated when the government sets up an overbroad mechanism for addressing unprotected behavior. University paeans to free speech mean little when there is an overbroad policy on the books.

II. The First Amendment Prohibits Anti-Harassment Policies That Exceed the *Davis* Standard and Censor and Chill Speech

This Court should apply the Supreme Court's carefully balanced approach for limiting harassment under Title IX to this § 1983 speech

claim. In *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, 526 U.S. 629 (1999), the Court crafted a standard in the context of Title IX that allows schools to regulate harassment while safeguarding the First Amendment's free speech guarantee. Under the *Davis* standard, a school can be liable under Title IX if it is (1) deliberately indifferent to sexual harassment, (2) "exercises substantial control over both the harasser and the context in which the known harassment occurs," and (3) the harassment is "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access" to educational opportunities. *Id.* at 645, 650.

A. The *Davis* standard is a common-sense approach to balancing anti-harassment policies with First Amendment interests.

Although it arises in the context of Title IX, *Davis*'s treatment of government limits on harassment is instructive. In *Davis*, the plaintiff alleged that a male classmate of her fifth-grade daughter sexually harassed her daughter over many months. 526 U.S. at 633–34. Each time, the victim reported the incident to her teachers and parent, and her parent would follow up with school authorities. *Id.* Despite the victim's reports to school officials, the school took no disciplinary actions against

the perpetrator. *Id.* at 635. The harassment caused the victim's grades to drop and led her to consider suicide. *Id.* at 634. The victim's parent filed suit against the school, alleging that the perpetrator's actions violated Title IX by "interfer[ing] with [the victim's] ability to attend school and perform her studies and activities," and that the school's indifference to her complaints "created an intimidating, hostile, offensive and abus[ive] school environment[.]" *Id.* at 636 (second alteration in original). In deciding the case, the Court applied a "deliberate indifference" standard, in which liability attaches if the school "has some control over the alleged harassment," but not "where it lacks the authority to take remedial action." *Id.* at 644.

The Supreme Court crafted the *Davis* standard with the First Amendment in mind. In response to the dissent's concerns that policies restricting "harassment" would burden protected speech, *Davis*, 526 U.S. at 667 (Kennedy, J., dissenting), the Court charged that "[t]he dissent fails to appreciate the[ ] very real limitations" on its definition of actionable harassment. *Id.* at 652. That definition imposes liability only when "the alleged persistence and severity of the [harassers'] actions" and the school's "alleged knowledge and deliberate indifference [to the

alleged harassment]" negatively impacts the victim's education. *Id.* Thus, in the Title IX context, a "single instance of sufficiently severe one-on-one peer harassment" likely never triggers liability. *Id.* at 652–53. Accordingly, the Court explained that "it would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional . . . claims." *Id.* at 649.

The *Davis* standard fits well with student speech in an educational setting. *See id.* at 667 (Kennedy, J., dissenting) (recognizing that public schools' power to discipline their students is "circumscribed by the First Amendment"). The Court used the *Davis* standard to articulate the scope of schools' civil liability. But it is equally useful as an outer boundary for educational institutions regulating student harassment. To the extent schools have concerns about their potential liability for harassment, they can regulate it according to the very standard to which they would be held accountable. Indeed, this Court, as well as the Eight Circuit, have already indicated that the *Davis* standard can withstand First Amendment scrutiny as an anti-harassment policy. *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 686–93 (4th Cir. 2018); *Rowles v. Curators of the Univ. of Mo.*, 983 F.3d 345, 358–59 (8th Cir. 2020).

The *Davis* standard is also particularly appropriate for universities because of their function as a marketplace of ideas for adult students. The Court has long rejected the argument that universities are "enclaves immune from the sweep of the First Amendment." *Healy*, 408 U.S. at 180. Indeed, the Court has also rejected the idea that "First Amendment protections should apply with less force on college campuses than in the community at large." *Id.* Nor do universities "exercise custodial and tutelary power over their adult students," like grade schools do. *Davis*, 526 U.S. at 667 (Kennedy, J., dissenting). Rather, universities must comply in full with the First Amendment; they cannot use anti-harassment policies to censor speech with which they disagree.

Davis provides a clear roadmap for regulating harassment within the academic community while simultaneously protecting students' free speech. The three factors for Title IX liability are workable and reliable standards that both protect students' rights to free speech and allow schools to prohibit activity that denies their students equal access to education.

The *Davis* standard also strikes the right constitutional balance. After all, "[t]here is no categorical 'harassment exception' to the First

Amendment's free speech clause." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001) (Alito, J.). This Court should clarify that the First Amendment prohibits universities from enacting excessively broad anti-harassment policies that censor and chill speech, thereby exceeding the *Davis* standard.

B. University policies like Virginia Tech's chill speech, especially for religious students.

Virginia Tech's policies allow government regulations on speech that far exceed those which are permissible under *Davis*. The school's Bias Incident Response Team ("BIRT"), for example, targets even singular verbal incidents, including "words or actions that contradict the spirit of the Principles of Community, jokes, . . . [or] posting flyers[.]" *Speech First, Inc. v. Sands*, 2021 WL 4315459, at *8. Even more egregiously, the anti-bias policy mandates collection of "bystander names" so that the BIRT can include "all students 'involved' in a bias-related incident" in the school's remedial response. *Id.* The school then goes even further, sweeping both on-campus *and* off-campus speech, including statements on social media and other digital platforms, into BIRT's clutches. *Id.* at *9. This one-strike policy strays far afield of

Davis's delicate balance for school officials.[2] The university's ability to target expression that violates the *spirit* of the school's written policies and standards is particularly concerning because it gives school officials nearly limitless discretion to censor.

Furthermore, the examples discussed in Section III demonstrate why Plaintiffs have standing to challenge Virginia Tech's BIRT policy. The district court found that Plaintiffs lack standing because they do not "declare a desire to urge their religious beliefs, if any, on someone." *Sands*, 2021 WL 4315459, at *15. But opposition to abortion, same-sex marriage, or to the use of preferred pronouns—beliefs the Plaintiffs state they hold, *id.* at *2—are *often* grounded in the speaker's religious beliefs about the sanctity of life and God's design for gender and marriage. *See infra* Section III. The BIRT policy thus runs twice afoul of the First Amendment. Not only does it chill the speech of students like Plaintiffs, *see Schlissel*, 939 F.3d at 765, but religious students who wish to share their beliefs are most likely to be silenced. *See Sands*, 2021 WL 4315459,

[2] It also ignores the Supreme Court's admonition that courts ought to be "skeptical of a school's efforts to regulate off-campus speech" and that "[w]hen it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention." *Mahanoy Area School Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038, 2046 (2021).

at *13 (Virginia Tech's "Discriminatory Harassment" policy including "urging religious beliefs on someone who finds it unwelcome"); *but see Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021) (Christian student who "believe[d] that an important part of exercising his religion includes sharing his faith" entitled to damages for his school's violation of his First Amendment rights).

Without the *Davis* framework, polices that vest officials with unfettered discretion to enforce the "spirit" of the rules, *see Sands* 2021 WL 4315459, at *8, and haul students before an administrator give veto power to hecklers, allowing others on campus to shut down students' unpopular views. By contrast, the *Davis* rule safeguards protected student speech from such attacks. *Davis* makes clear that a single incident rarely creates a hostile environment. 526 U.S. at 652–53. Nor is respectful discussion of religious and political topics sufficiently offensive and severe to warrant censorship. Such speech does not deprive anyone of an educational benefit under *Davis*, because it does not stop anyone from attending class or cause grades to drop. Conversely, Virginia Tech's excessively broad anti-speech policies allow administrators to censor this speech.

The *Davis* standard affords students, especially those with religious views to share, with the appropriate constitutional protection. This Court should enjoin Virginia Tech from enforcing an anti-speech policy that goes far beyond what *Davis* envisioned.

III. Universities Frequently Censor Student Speech That Expresses the Speaker's Deeply Held Beliefs

After decades of free speech litigation on behalf of its clients, ADF knows firsthand the perils that arise when universities improperly regulate speech. Religious speech often provokes debate. But that is precisely why it receives First Amendment protection. It expresses the speaker's sincere beliefs and contributes to the marketplace of ideas. Universities serve as institutions dedicated to the pursuit of knowledge and truth and, as such, should be ready to entertain dialogue. Yet today, they are all too quick to clamp down on protected speech for fear that it may create offense, as the following examples illustrate.

A. Miami University of Ohio, Hamilton officials forced a pro-life student group to self-censor by requiring the group to post "trigger warnings" for their pro-life display.

Pro-life students at the Miami University of Ohio, Hamilton ("MUOH") formed a university-recognized organization called Students for Life. The group's core tenet is that human life—from conception until

natural death—is sacred and possesses inherent dignity. The group seeks to promote the sanctity of human life on campus by posting flyers and staging regular peaceful demonstrations, which are intended to "awake consciousness and awareness . . . about the catastrophic effects of abortion." Compl. ¶¶ 12–15, *Students for Life at Miami Univ. of Ohio, Hamilton v. The Trustees of Miami Univ. of Ohio*, No. 1:17-cv-804-TSB (S.D. Ohio Nov. 29, 2017), ECF No. 1. For many of Students for Life's members, their pro-life beliefs are religious in nature. *Id.* ¶ 24.

The centerpiece of Students for Life's campus advocacy is a Cemetery of Innocents display. The display consists of small crosses, which the Students for Life place in the ground in a dedicated area of campus. *Id.* ¶ 135. The crosses are intended to represent lives lost to abortion. *Id.* The Cemetery of Innocents display has provoked debate and discussion on campus. In March 2015, for example, a MUOH professor who disagreed with the display said in one of her classes that, "[i]f they can put it up, we can take it down," and proceeded to lead a group of students in vandalizing the display by removing all crosses from the designated display area. *Id.* ¶ 140–43. Despite the vandalism led by

a MUOH professor, Students for Life continued to regularly construct the Cemetery of Innocents display.

Consistent with campus policy, Students for Life sought permission from MUOH officials before constructing their display. The university's policy is intended only to ensure that the display area is available during the group's preferred display period. On some occasions, however, MUOH officials went beyond the prior approval policy and required the group to post a sign stating that the display is sponsored by Students for Life. *See, e.g.*, *id.* ¶¶ 154–55. The group complied with that instruction. *Id.* ¶ 160.

Things changed for the worse in 2017. That fall, when Students for Life began planning the Cemetery of Innocents display, MUOH officials informed the group of an "additional" requirement: they had to post signs around campus warning viewers that the Cemetery of Innocents display was occurring. *Id.* ¶¶ 181, 194. The university went so far as to propose language that Students for Life should use in these postings. *Id.* ¶ 182. A MUOH official informed Students for Life that this additional requirement was because "a number of folks reach[ed] out . . . to raise their concerns about the display," she thought the display was "quite

polarizing and causes a lot of unrest on campus," and could cause "emotional trauma" to those who saw it. *Id.* ¶¶ 183–84, 188.

In light of the university's requirement that Students for Life post what amounted to a "trigger warning" for their own display, the group decided not to construct the Cemetery of Innocents that semester. *Id.* ¶ 204–09. The group viewed the university's trigger warning requirement as a "message to the campus community that [the] display of crosses was somehow dangerous or harmful." *Id.* ¶ 206. Instead Students for Life filed a § 1983 lawsuit against the school for violating their First Amendment rights. *Id.* ¶¶ 251–320. The parties ultimately settled. MUOH apologized to Students for Life and clarified that the university's policies "do[] not authorize the University to infringe upon the rights of students and student organizations to hold and express disparate beliefs." Settlement Agreement, *Students for Life at Miami Univ. of Ohio, Hamilton v. The Trustees of Miami Univ. of Ohio*, No. 1:17-cv-804-TSB (S.D. Ohio Nov. 29, 2017), ECF No. 4-1 at 2.

B. By enforcing a "freedom of expression policy," Georgia Gwinnett College officials repeatedly silenced Chike Uzuegbunam's religious speech and forced another student to self-censor.

Chike Uzuegbunam was a student at Georgia Gwinnett College. An evangelical Christian, Chike believes that sharing his faith is an important aspect of his religion. *Uzuegbunam*, 141 S. Ct. at 796. Consistent with this belief, Chike distributed religious literature and held discussions with interested students at an outdoor plaza at his school. *Id.* When school officials became aware of Chike's actions, they forced him to stop, informing him that he was permitted to continue sharing his faith only from one of the school's two designated "free speech expression areas," and then only if he obtained a permit. *Id.* at 796–97.

In an effort to comply with the college's requirement, Chike obtained a permit and continued his evangelism, this time within the confines of a free expression area. *Id.* But once again, college officials silenced Chike. *Id.* They told Chike that he was no longer allowed to share his faith because it had led to complaints. *Id.* The college threatened Chike with disciplinary action if he did not comply with the order to stop speaking. *Id.* Not wishing to suffer punishment, Chike complied with the college's edict. *Id.* Seeing how the college treated

Chike, Joseph Bradford—who shares Chike's religious beliefs—decided to self-censor and not speak about religious topics. *Id.*

Chike and Joseph filed a § 1983 action against the college, litigating the case all the way to the Supreme Court. The Court accepted Chike's claims that he "experienced a completed violation of his constitutional rights when [Georgia Gwinnett College] enforced [its] speech policies against him," and rendered judgment in his favor. *Id.* at 802.

C. A New York college punished student Owen Stevens for his speech on the immutability of sex.

State University of New York-Geneseo ("SUNY") officials sanctioned Owen Stevens and chilled his future speech because some students were offended by his Instagram posts. Owen is a Christian, whose faith teaches him that all people are created in the image of God with inherent dignity and value. When he shares his religious beliefs, he strives to never denigrate others, even if he disagrees with their views.

But Owen's university sought to regulate his speech even though he was speaking in good faith on matters of religious and political importance. Owen posted four videos on his private social media accounts, on his own time, while off campus. The posts discussed his religious and political views. In one of them, he asserted that, as a

biological matter, "a man is a man" and "a woman is a woman," and a man cannot become a woman and a woman cannot become a man. In another post, Owen criticized identity-based extracurricular groups for dividing people, rather than uniting them. These videos were not about his university but were statements of Owen's opinions on matters of national debate and concern.

After learning of the videos, the education department's interim director summoned Owen into his (virtual) office to convince him that his views were unacceptable. Owen was happy to discuss his beliefs and listen to the school official's position, but he was unpersuaded. The director then accused Owen of being unwilling to treat all people with respect. Based solely on the four videos, the university banned Owen from student teaching and field work—areas necessary for him to complete his degree—and required his future private social media posts to show respect for diverse personal and cultural values. After Owen appealed the punishment, the provost removed the suspension but continued to impose other sanctions, including a requirement to self-monitor his social media posts.

D. Florida State University officials allowed the student senate to unlawfully punish its president, Jack Denton, because of his religious speech.

A devout Catholic, student Jack Denton was heavily involved in religious groups and student government at Florida State University. *See* Am. Compl., *Denton v. Thrasher*, No. 4:20-cv-00425-AW-MAF (N.D. Fla. Feb. 11, 2021), ECF No. 69 ("Denton Am. Compl."). The student body elected Jack to the student senate, part of the campus student government, *id.* ¶ 60, an entity created by Florida law as part of the state university, and which is subject to school officials' oversight. Fla. Stat. § 1004.26(1); Denton Am. Compl. ¶ 37. Impressed with his work ethic and congeniality, Jack's fellow senators elected him president of the senate. Denton Am. Compl. ¶ 62. During the summer after his election as president, Jack sent messages in a private group chat for members of the Catholic Student Union. *Id.* ¶¶ 63–69. In response to another student sharing a video to raise money for various organizations, Jack expressed a view that some of those organizations advocate for causes that contravene the Catholic Church's beliefs. *Id.* ¶ 69–70. Jack told his fellow students that he knew he was speaking on an "emotional topic" and did not want to anger anyone, but out of love for them and the

Church, he was obligated to share his defense of core Catholic religious beliefs in a Catholic forum. *Id.* ¶ 71.

Some fellow students disagreed with Jack or found his views offensive. One student took a screenshot of the private messages and shared them on various social media platforms. *Id.* ¶ 80. Another student senator brought a motion of no confidence against Jack, which failed but triggered a massive public campaign. *Id.* ¶¶ 83, 89–90. A petition calling for his removal garnered over 6,000 signatures in less than two days. *Id.* ¶ 91. In response, Jack convened a special session of the senate to entertain a second no-confidence motion. *Id.* ¶ 92. Fellow senators called Jack's remarks "abhorrent," "demeaning," and "disgraceful." *Id.* ¶¶ 103, 104, 107. Other senators said they needed to remove Jack to "do right by the LGBTQ+ community" and not "enabl[e] bigotry." *Id.* ¶ 108, 109. The second no-confidence vote passed, removing Jack from office based solely on his religious speech. *Id.* ¶ 119.

The university's student government rules prohibit actions that violate a student's constitutional rights. *Id.* ¶ 39. Although university administrators retain authority to require student government to comply with university policy or state or federal law, they implicitly approved of

the senate's actions punishing Jack for engaging in constitutionally protected religious speech by staying silent. *Id.* ¶¶ 37–39, 126–28. Jack's appeals to the university's vice president for student affairs fell on deaf ears. *Id.* ¶ 125–26. Jack was forced to file a lawsuit against university officials to vindicate his First Amendment freedoms. *See generally id.* Ultimately, the parties reached a settlement agreement under which the university released a statement affirming its commitment "to protecting the rights of its students to hold and practice their religious beliefs free of persecution." *Statement from Florida State University Office of Communications* (May 26, 2021) https://bit.ly/31xpazX (last accessed Jan. 6, 2022).

* * * *

These examples of university overreach in regulating speech confirm that following the *Davis* standard strikes the right balance between banning harassment and preserving students' First Amendment freedoms. Failure to follow *Davis* meant Miami University of Ohio, Hamilton officials could silence the Students for Life. Georgia Gwinnett College officials could stop Chike from discussing his religious beliefs. SUNY campus officials could prohibit Owen from off-campus speech

about the immutability of biological sex. And Florida State University officials could implicitly allow its student senate to punish Jack for expressing his Catholic beliefs.

These real-life situations exemplify the harms caused by broad university speech codes and anti-harassment policies. They show the risks of university anti-harassment policies that rely on the subjective effect of speech on its listener and that farm out "speech policing" to the student body.

In each of these examples, students were silenced because others on campus disagreed with their viewpoints. It is a "bedrock principle" that speech may not be suppressed simply because it expresses ideas some find "offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). In universities—which should serve as vibrant marketplaces of ideas—hecklers drowned out their speech on matters of religious and social concern. This should not be. *E.g.*, *Street v. New York*, 394 U.S. 576, 592 (1969) ("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."); *see also Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038, 2048 (2021)

("[S]ometimes it is necessary to protect the superfluous in order to preserve the necessary.").

CONCLUSION

"Our representative democracy only works if we protect the 'marketplace of ideas.'" *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2046. But rather than protect that market, Virginia Tech has opted to silence ideas and speech with which it disagrees. This Court should hold that *Davis* marks the outer boundary of a public university's speech-regulating authority, and it should enjoin Virginia Tech's speech-suppressing policy.

Respectfully submitted this 18th day of January, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). Exclusive of the sections exempted by Fed. R. App. P. 32(f), the brief contains 6496 words, according to the word count feature of the software (Microsoft Word 365) used to prepare the brief. The brief has been prepared in proportionately spaced typeface using Century Schoolbook 14 point.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically with the Court's CM-ECF system on this 18th day of January, 2022. Service will be effectuated by the Court's electronic notification system upon all parties and counsel of record.

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