IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 21-12583

SPEECH FIRST, INC.,

Plaintiff-Appellant,

v.

ALEXANDER CARTWRIGHT, in his personal capacity and official capacity as President of the University of Central Florida.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida, No. 6:21-cv-313 (Presnell, J.)

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

In addition to the persons and entities previously identified by the parties, undersigned counsel certifies that the following persons and entities have an interest in the outcome of this case:

A. Cato Institute;

B. Ilya Shapiro, Clark M. Neily III, and Jay R. Schweikert, counsel for *amicus curiae*.

SO CERTIFIED, this 15th day of September, 2021.

/s/ Ilya Shapiro

Counsel for *Amicus Curiae*

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and produces the annual *Cato Supreme Court Review*.

This case is of interest to Cato because it concerns the application of fundamental First Amendment principles to the university context, where protecting the freedom of speech is paramount.

[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in whole or in part. No one other than *amicus* and its members made monetary contributions to its preparation or submission.

SUMMARY OF THE ARGUMENT

The vigorous and principled protection of freedom of speech is "nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). If there is one environment more than any other that exemplifies the concept of the "marketplace of ideas," it is "[t]he college classroom with its surrounding environs." *Healy v. James*, 408 U.S. 169, 180 (1972). And it has long been axiomatic, both to First Amendment doctrine and classical liberal political philosophy, that the flourishing of such an intellectual marketplace depends on the vigorous clash of ideas and the "constant questioning" of accepted truths. *Kim v. Coppin State Coll.*, 662 F.2d 1055, 1064 (4th Cir. 1981); *see* John Stuart Mill, *On Liberty* 98 (1859) ("[S]ince the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions, that the remainder of the truth has any chance of being supplied.").

But the prevailing trend in a troubling number of public universities today is to deny this tradition of academic freedom, both by policing the boundaries of the scope of "acceptable" ideas and restricting their modes of expression. Several policies adopted by the University of Central Florida ("UCF") exemplify this trend. Most notably for purposes of this appeal,[2] UCF has adopted a nominal

[2] Given that UCF has amended its computer policy to eliminate the provision banning "hate or harassing messages," and because the district court did grant Speech First's preliminary injunction with respect to this provision, this brief will not focus on the computer policy.

"discriminatory-harassment" policy that, both as written and as applied in practice, effects content-based and viewpoint-based restrictions on campus speech. The school has also created what it calls a "Just Knights Response Team," which has the authority to investigate and respond to broadly defined "bias-related incidents," and whose membership is drawn from, *inter alia*, the UCF office that oversees student discipline and the UCF Police Department.

In its merits brief, Speech First explains in detail how these policies are inconsistent with both Supreme Court and Eleventh Circuit precedent and, in particular, how they should be analyzed under the "the consistent line of cases that have uniformly found campus speech codes unconstitutionally overbroad or vague." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 338-39 & n.17 (5th Cir. 2020). *See* Br. at 3 (citing cases). *Amicus* will not retread those arguments here.

Rather, *amicus* writes separately to explain more broadly how the district court's decision below is flatly at odds with general First Amendment principles and implicitly reifies the unlawful and unworthy notion that public universities have greater leeway than other government bodies to restrict the freedom of speech. Indeed, if the policies at issue in this case were adopted in equivalent form by any other government body—say, a town regulating the speech of its citizens—there would be little doubt as to their inconsistency with the First and Fourteenth Amendments.

ARGUMENT

I. UCF'S DISCRIMINATORY-HARASSMENT POLICY IS A CONTENT-BASED AND VIEPWOINT-BASED RESTRICTION ON SPEECH.

The First Amendment, made applicable against states under the Fourteenth Amendment, protects the free speech rights of individuals and prevents the state from enacting laws that abridge or restrain that speech. U.S. Const., amend. I. In light of this protection, the state "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chi. v Mosley*, 408 U.S. 92, 95 (1972). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2014).

The Supreme Court's decision in *Reed* provides the most comprehensive analysis of what it means for a regulation to be content-based. Determining whether a restriction on speech is content-neutral requires courts to "consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id*. (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564 (2011)). Facially content-based restrictions include those that "define[] regulated speech by particular subject matter" as well as those that "define[] regulated speech by its function or purpose." *Id.* Even laws that are facially neutral will still be considered

content-based, and thus subject to strict scrutiny, if they "cannot be 'justified without reference to the content of the regulated speech.'" *Id*. at 164 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

Under these basic principles, UCF's discriminatory-harassment policy is plainly a content-based regulation of speech. The policy defines prohibited "discriminatory harassment" as "verbal, physical, electronic, or other conduct based upon" an individual's membership in various protected classes, including "race," "color," "ethnicity," "national origin," "religion," "non-religion," "age," "genetic information," "sex," "parental status," "gender identity or expression," "sexual orientation," "marital status," "physical or mental disability," "political affiliations," or "veteran's status." Br. at 8-9. The policy makes plain that the "conduct" it regulates includes pure speech, noting that "[d]iscriminatory harassment may take many forms, including verbal acts, namecalling, [and] graphic or written statements (via the use of cell phones or the Internet)." *Id.* at 9. Thus, on its face, the statute regulates speech—"verbal . . . conduct," including "verbal acts, namecalling, [and graphic or written statements"—by reference to a specific set of subject matters—membership in the various protected classes.

To further illustrate the manner in which UCF's policy is content-based, consider the Supreme Court's instruction that a restriction is content-based if it requires "'enforcement authorities' to 'examine the content of the message that is

conveyed to determine whether' a violation has occurred." *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)). UCF enforcement authorities would obviously need to examine the content of any particular statement to determine whether a violation of their policy occurred. If the statement concerned, for example, another person's *academic* or *professional* affiliations, the policy would not be implicated. But if it concerned their *political* or *religious* affiliations, it would be.

Moreover, the policy regulates speech based not only on content, but on viewpoint as well. The policy prohibits not simply "harassment," but *discriminatory* harassment, which it defines as "biased, negative or derogatory" with respect to one of the particular protected classes. Thus, *negative* statements about someone else's political affiliations would be covered, but *positive* statements would not be.

The district court nevertheless denied Speech First's request for a preliminary injunction with respect to this policy, not because it concluded the policy could withstand strict scrutiny, but based on its conclusion that the policy does not regulate protected speech at *all*. Br. at 23. The lower court held that because the UCF policy only prohibits "discriminatory harassment" that rises to the level of "Hostile Environment Harassment," which in turn must be "severe or pervasive" and "unreasonably interfere[]" with the rights of other students, the terms of the policy

only cover unprotected *conduct*, and thus need not be subjected to heightened scrutiny in the first place. Doc. 46 at 15-18.

Speech First explains in detail the many related doctrinal problems with the district court's conclusion on this point—specifically, the district court ignored that the UCF policy defines "harassment" far more broadly than the anti-harassment policy upheld in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), Br. at 23-25; that the UCF policy explicitly and repeatedly defines "harassment" with respect to speech itself, Br. at 25-27; and that UCF has previously relied on this policy to fire a professor solely because of "offensive" statements he made concerning gender identity and systemic racism, Br. at 27-28; and it misread this Court's decision in *Doe v. Valencia College*, 903 F.3d 1220 (11th Cir. 2008), to mistakenly conclude that public universities have greater leeway than other public bodies to curtail the freedom of speech, Br. at 28-30.

More generally, however, if the district court's decision stands, it will effectively permit government authorities at all levels to regulate a vast array of protected speech, all in the name of protecting people from a broad and vaguely defined understanding of "harassment." After all, it is well-established in both Supreme Court and Eleventh Circuit case law that the protections of the First Amendment, far from being less robust, are in fact "*heightened* in the university setting." *Gay Lesbian Bisexual All. v. Pryor*, 110 F.3d 1543, 1549-50 (11th Cir.

1997); *see also Healy v. James*, 408 U.S. 169, 180 (1972). Thus, to whatever extent UCF is permitted to regulate protected speech, other public bodies will be able to do likewise.

Suppose, for example, that a city council—frustrated perhaps with the activities and demeanor of a local political agitator—passed a law prohibiting "verbal, physical, electronic or other conduct based upon an individual's race, sex, religion, or political affiliation that is so severe or pervasive that it unreasonably interferes with, limits, deprives, or alters the terms or conditions of municipal employment, participation in any municipal program or activity, or receipt of legitimately-requested municipal services." This hypothetical "anti-harassment law" is nearly identical to the UCF policy, but the breadth of mischief it could cause would be staggering, turning almost entirely on what local enforcement authorities determined to be "unreasonable." After all, read literally, just about any possible conduct could be said to "alter" the "conditions" of someone's employment or participation in an activity. It could, for example, conceivably be applied to any of the following:

- A persistent and long-running newspaper campaign denouncing a local, non-religious elected official, on the ground that "anyone who doesn't believe in God lacks the moral character to serve in public office" (limits or alters the terms or conditions of municipal employment).
- Organizing a petition for a local school to fire its Republican-affiliated counselor, on the ground that "anyone who would vote for Trump can't be

trusted to protect the best interests of students who may be the children of undocumented immigrants" (same).

- Publicly protesting against city athletic programs that allow transgender boys to play on boys' teams, while carrying a sign that says "a transgender boy is a girl—transgender is not a thing" (interferes with or limits participation in a municipal program).
- Posting on social media to harshly criticize a "Karen" who called the police on black children playing exuberantly in her yard, claiming that only an "entitled white lady" would so recklessly endanger the lives of black youths like that, and demanding that she never call the police in such situations (limits or alters the receipt of legitimately-requested municipal services).

Whether or not such exercises of free speech are reasonable or civil, the suggestion that a local government could *punish* its citizens for engaging in them is so ludicrous that such blatant violations of the First Amendments never arise in the first place. But the fact that this precise question *routinely* arises in the context of higher education demonstrates how at odds so many public universities are with the axioms of free speech that are supposed to apply to all government bodies.

II. BIAS-RESPONSE TEAMS, LIKE THOSE EMPLOYED BY UCF, ARE A SIGNIFICANT THREAT TO ACADEMIC FREEDOM AND THE FIRST AMENDMENT.

As Speech First explains in detail, it is a well-settled principle of First Amendment doctrine that government policies and the actions of government officials can unlawfully "chill" protected speech, even without formally regulating anyone. *See* Br. at 30-34; *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 402 (1950); *Dana's R.R. Supply v. Att'y Gen.*, 807 F.3d 1235, 1241 (11th Cir. 2015); *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230-31 (7th Cir. 2015). This principle

has been applied to the public university setting as well, prohibiting for example, creating a committee in response to a professor's inflammatory articles about race that was charged with studying when speech becomes "conduct unbecoming"—even though the committee had no formal disciplinary powers. *See Levin v. Harleston*, 966 F.2d 85, 89-90 (2d Cir. 1992). Nevertheless, the district court mistakenly concluded that Speech First lacks standing to challenge UCF's bias-response teams, relying solely on the notion that "[a] program that has no authority to discipline students and cannot compel students to engage with it does not objectively chill conduct." Doc. 46 at 11.

As a threshold matter, it is crucial to recognize that bias-response teams, far from being unique or rare, are increasingly becoming the norm on college campuses. As of 2016, at least 231 universities, charged with educating more than 2.84 million students, employed bias-response teams to police their student's speech. *See* Foundation for Individual Rights in Education (FIRE), *Bias Response Team Report* (2017).[3] How these Teams define "bias" varies somewhat across institutions, but many explicitly curtail expression of political disagreement: "14% of institutions include 'political affiliation' among their categories of bias. Still others include bias against similar categories such as 'intellectual perspective' (University of Central

[3] https://www.thefire.org/research/publications/bias-response-team-report-2017.

Arkansas), 'political expression' (Dartmouth), or 'political belief' (University of Kentucky)." *Id.* Some schools go even further:

> Many policies include catch-all categories of bias—e.g., "other" biases. In such cases, the definition of a bias incident encompasses not only protected speech, but also any speech that offends anyone for any reason. The net effect is that broad definitions of "bias" invite reports of any offensive speech, whether or not it is tethered to a discernable form of bias, thereby inviting scrutiny of student activists, organizations, and faculty engaged in political advocacy, debate, or academic inquiry.

Id.

Moreover, there is little doubt that, across the country, the authority granted to bias-response teams is regularly employed to check and stifle the express of disfavored viewpoints. At the University of Wisconsin–La Crosse, "bias incidents" have run the gamut from vulgar bathroom graffiti, to common political slogans such as "Trump 2016," to a Christian group's use of a cross on their poster—this most common symbol of the Christian faith ostensibly created an "unsafe" environment for gay and lesbian students.[4] At Emory University, chalk declaring "Trump 2016" was likewise investigated as a "bias" incident, with the President of the University affirming that the culprits would be sought out, and '"If they're students,' he said,

[4] Nathan Hansen, "Students use UW-L bias/hate system to report everything from Christian posters to offensive images," *La Cross Tribune*, September 26, 2016, https://lacrossetribune.com/news/local/students-use-uw-l-bias-hate-system-to-report-everything/article_759c0e01-e64e-5aa4-bb29-4e7236d4f5f8.html.

'they will go through the conduct violation process.'"[5] At Appalachian State University on the other hand, one student filed a bias report because he was "offended by the politically biased slander that is chalked up everywhere reading 'TRUMP IS A RACIST.'" FIRE, *Bias Response Team Report, supra*.

The supposed informality of "bias" policing, which UCF relies on here to defend its policy from First Amendment challenge, is an obfuscation that does not reflect the facts on the ground. One study, which surveyed bias team members at 17 colleges, found that "most of the teams spend relatively little time on their primary stated functions—trying to educate the campus community about bias—and instead devote their efforts mainly to punishing and condemning the perpetrators of specific acts."[6] While they officially disclaimed authority to punish, "many team leaders nonetheless discussed their activities using terms associated with criminal-justice work. They spoke of the 'victim,' the 'perpetrator,' and the 'offender,' and talked about holding individuals accountable for specific actions." *Id.* And far from being a forum for dialog, the "process by which they dealt with complaints often mimicked

[5] Jeffrey Aaron Snyder and Amna Khalid, "The Rise of "Bias Response Teams" on Campus", *The New Republic*, March 30, 2016, https://newrepublic.com/article/132195/rise-bias-response-teams-campus.

[6] Peter Schmidt, "Colleges Respond to Racist Incidents as if Their Chief Worry Is Bad PR, Studies Find," *The Chronicle of Higher Education*, April 21, 2015, https://www.chronicle.com/article/Colleges-Respond-to-Racist/229517/ (reporting a study by Texas academics presented at the 2015 conference of the American Educational Research Association).

the procedures of campus police or judicial bodies, even in the absence of violations of the law or campus policies." *Id.*

The particular features of UCF's Just Knights Response Team ("JKRT") plainly illustrate how the program is quite capable of intimidating students and chilling speech, even without the use of formal discipline. As Speech First explains in more detail, the process and terminology used by the JKRT (i.e., "bias," "incident," "victim," etc.) all suggest serious misconduct, Br. at 35-36; students could easily conclude that JKRT reports may result in disfavor with professors or inhibit future job prospects, *id.* at 36; the JKRT is explicitly authorized to make referrals to both the police department and other university bodies with formal disciplinary power, *id.* at 36-37; and the JKRT can summon students for an "intervention," which, though officially "voluntary," are unlikely to appear that way to impressionable young adults, facing a "request" from university administrators, *id.* at 37-38. But again, perhaps the most vivid way to illustrate the First Amendment threat from UCF's bias-response team is to extrapolate the equivalent policy to a non-university context, where free speech protections should be no weaker.

Imagine, for example, if a city decided to create a similar bias-response team with the same ostensible purpose—to foster dialogue and provide education on sensitive subject matters. But suppose the team consists of members of the local police force, as well as city officials with authority to decide on whether to grant or

deny zoning requests and occupational licenses, how to set the rate of property taxation, how to assign contracts with the city, etc. Suppose also that the team tends to focus especially on "bias" incidents evincing religious or political disagreement with whatever the general consensus in the town happens to be, "requests" participation via a home visit from a police officer, and publishes reports on citizens who decline to participate in their "intervention." The fact that the city stopped just short of legally sanctioning its citizens would be cold comfort to any dissidents, and the First Amendment implications would be obvious.

Once more, the fact that this issue is hotly contested in the public-university context alone is a distressing indication of just how tenuously the First Amendment is honored in that setting. If the district court's decision is allowed to stand, it will not only abet the ongoing violation of these students' First Amendment rights; it will also set a dangerous precedent by which government authorities at every level can intimidate dissidents and chill protected speech.

CONCLUSION

For the foregoing reasons, as well as those presented by Plaintiff-Appellant, the Court should reverse the district court decision.

Respectfully submitted,

DATED: September 15, 2021.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 3,218 words, excluding the parts exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in Times New Roman, 14-point font.

/s/ *Ilya Shapiro*
September 15, 2021

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I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

/s/ *Ilya Shapiro*
September 15, 2021