No. 23-156

In The Supreme Court of the United States

SPEECH FIRST, INC.,
Petitioner,

v.

TIMOTHY SANDS,
in his individual capacity and official capacity as President of Virginia Polytechnic Institute and State University,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN RESPONSE TO PETITION AND SUGGESTION OF MOOTNESS

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QUESTION PRESENTED

As defined by Speech First for purposes of its petition, a "bias-response team" is "an official [university] entity that solicits reports of bias, tracks them, investigates them, asks to meet with the perpetrators, and threatens to refer students for formal discipline."

As framed by the petition, the question presented is:

Whether bias-response teams objectively chill student speech.

PARTIES TO THE PROCEEDING

Petitioner, and plaintiff below, is Speech First, Inc., which asserts associational standing based on the putative individual standing of anonymous members.

Respondent, and defendant below, is Timothy Sands, in his individual capacity and official capacity as President of Virginia Polytechnic Institute and State University ("Virginia Tech"). Virginia Tech is a state institution of higher education in the Commonwealth of Virginia.

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INTRODUCTION

Virginia Tech[1] recognizes that serious questions have been raised in the media and the courts about the right of free speech at some universities around the country. But Virginia Tech stands apart. Virginia Tech values its role in the marketplace of ideas and carefully adheres to the First Amendment.

The overall mission of Speech First may be laudable, but when it sued Virginia Tech, it stumbled. Surely, the "bias response" name is not dispositive. And, whatever superficial similarities Speech First may cobble together, Virginia Tech's now-defunct "bias-incident response protocol" and "bias incident response team" or "BIRT" (collectively, the "bias protocol") did not fit the profile that the petition asks this Court to condemn. Rather, Virginia Tech ensured that its bias protocol was always subordinated to the First Amendment.

Moreover, the dispute is moot at Virginia Tech. The bias protocol was discontinued earlier in 2023, following changes in university leadership. The Virginia Tech president, respondent Timothy Sands, expressly approved the move. He has explained why the bias protocol was discontinued and provided a sworn assurance that it will not be reinstated.

While the underlying litigation did not prompt the change, Speech First should be content that the change has been made and those assurances given, especially since Virginia Tech is willing to take an additional step. Accepting the suggestion originally

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[1] Unless the context indicates otherwise, "Virginia Tech" shall be used to refer to the university and its president, Timothy Sands, in his official capacity.

made by Speech First's counsel, Virginia Tech asks the Court to follow the procedures for handling moot cases outlined in *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). The Court should grant the petition, but only to (i) vacate the Fourth Circuit's judgment regarding the bias protocol, and (ii) remand with instructions to dismiss that claim as moot. At a minimum, the Court should order Speech First's motion for a preliminary injunction to be dismissed as moot. With the protocol ended, Speech First cannot plausibly claim harm during the pendency of this litigation. Alternatively, the petition should be denied for the reasons explained below.

Speech First and its *amici* are zealous advocates, committed to their cause. It is understandable that they wish to pursue their First Amendment agenda before this Court. But their zeal does not save this case from mootness, nor can it overcome the fact that this case is not a good candidate for certiorari to address the issue of free speech on college campuses.

STATEMENT OF THE CASE

A. The District Court

Speech First sued Virginia Tech in April 2021, alleging various First Amendment violations. Among its claims was a challenge to Virginia Tech's bias protocol. Speech First did not allege that its own rights were violated. Instead, it alleged that the rights of its anonymous student members at Virginia Tech were violated, and it asserted associational standing based on the putative standing of three unnamed members, Students A, B, and C (the "Original Students"), whose identities remain unknown to Vir-

ginia Tech and the courts. A few days later, Speech First moved for a preliminary injunction, asking the district court to prohibit Virginia Tech from "enforcing" the bias protocol during the pendency of the lawsuit, and it supported that motion with a variety of Virginia Tech documents as well as declarations from the Original Students, each claiming that the bias protocol chilled his/her speech. JA.337-51.

Virginia Tech responded with its own array of documents as well as declarations from university officials, refuting the claim that the bias protocol objectively chilled speech. That evidence established, for example:

- "BIRT *regularly* declines to pursue complaints of bias because the underlying conduct in volved speech protected by the First Amendment." JA.358 (emphasis added).
- In the Spring of 2021, for example, BIRT received thirty-three bias incident complaints but sent meeting invitations to only two complaint subjects. JA.360.[2]
- "Where BIRT determines that a report involves constitutionally protected speech, the Dean of Students Office typically attempts to follow up with the *reporting* student…" JA.395 (emphasis added).
- When BIRT received a complaint about a Gadsden flag (increasingly a conservative symbol) displayed in a student's Zoom back-

[2] The record does not show the details of those two instances, and Speech First does not appear to claim that a dean's request for a private chat is categorically unconstitutional.

ground for all the class to see, BIRT's only action was to inform the complaining professor that displaying the flag was protected speech. JA.358.

- "BIRT [does not] make any adjudication or responsibility finding ... [and] does not have the power to impose discipline on any student for any reason." JA.361.

- "Nothing about BIRT's interaction with a student—as either a complaining party or a responding party—would ever appear on either a student's academic transcripts or disciplinary record." *Ibid.*

- "Records and correspondence associated with BIRT are housed within [the Dean of Students'] office and may only be shared with [the] Student Conduct [Office] on a need-to-know basis." *Ibid.*

Speech First relied heavily on the fact that the bias protocol allows for voluntary meetings between students and university officials. According to Speech First, students would not perceive such meetings as truly voluntary, and the prospect of being asked to attend such a meeting chilled speech. But, as the district court pointed out, "Speech First has put on no evidence that students feel obligated to come to these voluntary meetings, nor do [the Original Students] declare that they would feel obligated to attend such a meeting if invited." Pet.App.111. Virginia Tech's evidence was unequivocal: "If a student fails to respond to this message [inviting him/her to a meeting], or declines to meet with our Office, *no further action* is taken, and the student

faces no consequences of any kind." JA.360-61 (emphasis added).

Speech First complains that BIRT included a police representative, but referral to law enforcement could be warranted. For example, "BIRT … received and responded to reports of political signs for former President Donald Trump being torn down around campus. Because those complaints alleged the criminal destruction of property, the complaints were referred to [campus police] for follow-up and resolution." JA.362-63.[3]

After hearing the evidence, the district court declined to issue a preliminary injunction against the bias protocol, a decision Speech First appealed to the Fourth Circuit. Similarly, the district court declined to issue preliminary injunctions against (i) the informational activities policy, a decision Speech First also appealed, and (ii) the discriminatory harassment policy, a decision Speech First chose *not* to appeal. By pursuing an appeal on the bias protocol, but not the discriminatory harassment policy, Speech First split apart two allegedly related issues. The fact that petitioner's challenge to the discriminatory harassment policy lies dormant in the district court is one reason this petition is premature. *See infra* at 31-32.

The district court proceedings never progressed beyond the preliminary injunction stage. No motion to dismiss or answer has yet been filed because the deadline was repeatedly pushed back pending appeal and now awaits disposition of the petition.

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[3] Other examples of bias potentially warranting police involvement would include violations of state laws banning intimidation by cross-burning, vandalizing with swastikas, and display of nooses. Va. Code §§ 18.2-423, 423.1 & 423.2.

D.Ct.Dkt.51 (staying case). Thus, no final order has been entered.

B. The Court of Appeals

While the case was pending in the Fourth Circuit, all the Original Students graduated, thereby eliminating their standing and, hence, the standing of Speech First. *Bd. of Sch. Comm'rs of Indianapolis v. Jacobs*, 420 U.S. 128, 129 (1975) (per curiam) ("[Once] all of the named plaintiffs in the action had graduated ... a case or controversy no longer exists."). Anticipating that graduation – and Virginia Tech's mootness argument – Speech First asked the Fourth Circuit to let it "supplement the record" with declarations from four more unnamed students – Students D, E, F, and G (the "New Students"). *See* CA4.Dkt.67. Those declarations were essentially copycats of the ones filed by the Original Students. (Speech First conceded they were "similar." *Ibid.*) The declarations failed to address any of the facts about (and distinctive characteristics of) the bias protocol that Virginia Tech submitted as part of the district court record. Similarly, the New Students failed to plug the evidentiary hole highlighted by the district court. Like the Original Students, the New Students did not say they would feel obligated to attend a meeting with university officials if invited to do so.

Virginia Tech opposed adding the New Students and objected to their anonymity. *See* CA4.Dkt.69 Virginia Tech also moved twice to dismiss the appeal as moot. CA4.Dkt.69, 73. The Fourth Circuit de-

clined to dismiss and granted Speech First's motion to supplement the record. CA4.Dkt.76.[4]

On May 31, 2023, the Fourth Circuit affirmed the decision of the district court on both policies challenged by Speech First on appeal: the bias protocol and the informational activities policy. In ruling for Virginia Tech, the panel majority (Judges Motz and Diaz) noted the fact-specific nature of the case, pointing out that "Speech First does not challenge any of [the] facts" recounted by the district court. Pet.App.4, 8. "And those findings more than adequately support the court's legal conclusion that Speech First's student members have not demonstrated an injury in fact. Therefore, Speech First is without standing to challenge the Bias Policy." Pet.App.25.

The Fourth Circuit also carefully dissected the two arguments made by Speech First in claiming standing:

First, Speech First asserted that Virginia Tech used implicit threats to deter disfavored speech. Pet.App.13. But as the Fourth Circuit recognized, the record shows that "BIRT lacks any authority to

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[4] Two New Students, Students D and E, who joined the case as seniors, apparently have graduated because Speech First reports that only "two [New Students] are still enrolled at Virginia Tech[.]" Pet.12, n. 1. Student G is apparently scheduled to graduate in the Spring of 2024, leaving only Student F, who will remain a student until the Spring of 2025. *Ibid.*

According to his/her declaration, Student F was a sophomore in the Fall of 2022 (CA4.Dkt.67-4), and, thus, a freshman in the Fall of 2021 and not yet a Virginia Tech student when the case began in April 2021. Student G was a junior in the Fall of 2022 (CA4.Dkt.67-5) and, thus, a freshman when the case began, but there is no record evidence that he/she was then a member of Speech First.

discipline or otherwise punish students for anything", and that "Virginia Tech does not and cannot adjudicate matters involving protected speech." Pet.App.14,15 (citing Pet.App.104,107).

As for to Speech First's complaint about BIRT's "referral power", the Fourth Circuit concluded that Speech First "did not offer any evidence that BIRT referrals occur with any frequency, or that they are more likely to result in discipline than referrals from other members of the University community." Pet.App.18.

Second, Speech First argued that Virginia Tech has imposed a burdensome administrative regime that would cause an objectively reasonable student to refrain from engaging in politically charged speech. Pet.App.13-14. The Fourth Circuit disagreed: "BIRT does not even extend an invitation for a voluntary conversation in response to every complaint it receives" and "even when the BIRT does extend an invitation to meet, there is 'no evidence that students feel obligated to come to these voluntary meetings' with the Dean of Students." Pet.App.16-17. Thus, the BIRT process was not "so burdensome that an objectively reasonable student would self-censor to avoid encountering it." Pet.App.22.

In sum, as the Fourth Circuit concluded, "Speech First's members have not demonstrated the injury in fact necessary to establish standing." Pet.App.22.

Judge Wilkinson's lengthy dissent is largely based on a hypothetical in which a Virginia Tech student elects not to make a comment in class because of what she "vaguely remembers" but "cannot recollect" about the bias protocol. Pet.App.37-38. To say that someone can be "objectively chilled" because of a faulty memory seems questionable, and it cer-

tainly has no application to Students F and G, who had the benefit of the knowledge about the bias protocol gained during the litigation. When they signed their October 2022 declarations during the pendency of the Fourth Circuit proceedings, they should have known, objectively, that they had nothing to fear from Virginia Tech for exercising their rights to free speech.

C. Virginia Tech Has Ended the Bias Protocol.

Shortly after its Fourth Circuit win – and in a move not prompted by the litigation – Virginia Tech discontinued the bias protocol. The pertinent facts are explained by President Sands in his sworn declaration,[5] attached at App.1-6.

The bias protocol was developed and implemented by the dean of students who served in that post from 2018 to 2022 (when he left Virginia Tech). App.2, JA-353, 355. In early 2023, the new dean of students and new vice-president of student affairs concluded that the bias protocol should be discontinued. App.2. President Sands agreed. *Ibid.*

Experience showed that complaints under the bias protocol "rarely called for any communication to the student who was the subject of the complaint (or any other action by the Office of the Dean of Students), especially given BIRT's use of the First Amendment to evaluate any complaint." App.3. Complaints involving allegations of discriminatory harassment could be handled by other means, and "there is no need for BIRT to continue acting as an intermediary." *Ibid.*

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[5] Virginia Tech has requested leave to lodge the original signed declaration with the Clerk's office. Rule 32.3.

The discontinuance of the bias protocol "took effect during the summer [of 2023]. The summer between two regular academic years is frequently used to implement changes in procedures because it causes less disruption than if implemented in the midst of an academic year." App.3 "All references to the bias-incident response policy and BIRT have been removed from the public-facing website of the University." App.3-4.

As for the future, President Sands has provided strong assurances:

- "Virginia Tech has not replaced the bias-incident response protocol and BIRT with anything similar."
- "I have instructed the Vice-President of Student Affairs and the Dean of Students not to reinstate the bias-incident response protocol or BIRT, and not to implement anything similar."
- "To the full extent of my authority as President of Virginia Tech, I shall ensure that, going forward, the University shall not (a) re-instate the now-discontinued bias-incident response protocol or BIRT, or (b) adopt or implement any protocol or policy that encourages (or requires) anyone to report to University authorities any instances of student speech based on the content or viewpoint of that speech."[6]

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[6] As explained, "[t]he University obviously retains the option to implement such policies as may be appropriate to address acts of misconduct, such as violations of criminal law (including true threats); violations of University rules regarding harass-

- "Consistent with its obligations under state law, Virginia Tech maintains – and will continue to maintain – a policy of support for freedom of speech." App.4.

When Speech First learned the bias protocol was terminated, its counsel suggested that the Fourth Circuit's decision be vacated using *Munsingwear*. The suggestion came in a July 26, 2023 email to Virginia Tech's counsel, asking: "If Virginia Tech thinks this voluntary change moots our challenge to BIRT, does it oppose vacating the Fourth Circuit's decision under U.S. v. Munsingwear?"[7] Discussions about the mechanics of *Munsingwear* ended, however, when Speech First filed its petition for certiorari two weeks ahead of the deadline.

D. Speech First Misreads the Record.

The petition misreads the record on several points, which Virginia Tech must correct. Rule 15.2.

- Citing a Virginia Tech document, the petition claims that "BIRT's purpose" is "'to eliminate' biased *speech*." Pet.8 (citing JA.369) (emphasis added). But the document does not say that. Instead, it talks about the "desire ... to eliminate *acts* of bias." JA.369 (emphasis added). And the same page stresses the First

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ment, discrimination, and sexual misconduct (currently Policy 1025 and corresponding provisions in the Student Code of Conduct); and violations of First Amendment rights."

[7] Virginia Tech's counsel are not accustomed to citing discussions with opposing counsel in their briefs; however, Speech First opened the door by its own incomplete reference to those discussions (Pet.16), leaving Virginia Tech with no option but to correct any misunderstanding the petition may have created.

Amendment's paramount importance: "Effective and appropriate response to bias incidents must honor legal and constitutional standards, especially those that protect freedom of expression." *Ibid.*

- According to the petition, "only 20% of Hokies [Virginia Tech students] said they felt comfortable expressing minority views in class." Pet.21 (citing JA.319). The petition is mistaken. The cited Gallup survey asked students to respond on a scale of "1" to "5" to this statement: "I feel *very* comfortable sharing ideas or opinions in class that are probably only held by a minority of people." JA.315 (emphasis added). Under the scale, "5" meant "strongly agree" and "1" meant "strongly disagree." *Ibid.*

  At Virginia Tech, twenty percent responded with a "5," thirty percent said "4," twenty-eight percent said "3," sixteen percent said "2," and seven percent said "1." *Ibid.* Thus, fully *half* of the students (5 + 4) expressed some agreement that they were "very comfortable" expressing minority viewpoints in class, while less than a quarter (1 + 2) expressed some disagreement.

  While *any* discomfort among students in expressing themselves is unfortunate, the petition mistakenly insinuates that this discomfort stems from Virginia Tech's bias protocol. *That* question was never asked, and nothing in the Gallup survey justifies that insinuation. Moreover, the Virginia Tech figures track the

national figures for large institutions of higher education. *See ibid.*[8]

- Speech First uses the term "enforce" to refer to Virginia Tech's administration of its bias protocol. *E.g.,* Pet.8. That term erroneously suggests that the protocol contains prohibitions that are punishable if violated. As the district court found: "Nothing in the Student Code, the protocol, or the BIRT procedures document indicates that the protocol or BIRT procedures document are policies that can be violated and punished under the Code." Pet.App.94. The Fourth Circuit agreed:

> It is undisputed that the Bias Policy itself does not set forth or contemplate sanctions and that the *BIRT has no power to impose any sanctions*. Nor is there any evidence that the BIRT makes threats suggesting that it can punish students.

Id. at 22-23 (emphasis added).[9]

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[8] Similarly, the College Pulse study cited by Speech First (Pet.21) reports significant self-censorship by college students nationwide, but it does not differentiate among the reasons. Youthful peer pressure is lumped together with potential worries about college officials. And there is no indication whether Virginia Tech students participated or how they responded. The petition likewise misses the mark in citing other sources that fail to focus on Virginia Tech and the First Amendment safeguards that Virginia Tech included in its bias protocol.

[9] Thus, it is misleading for the petition to say (at 8), without more, that "BIRT is staffed with ... administrators with disciplinary power."

- Speech First and its *amici* focus on episodes that allegedly occurred at other universities, but none of those incidents has anything to do with Virginia Tech, and nowhere has Speech First or its *amici* shown that anything similar ever happened at Virginia Tech. Instead, the best that Speech First can do is point to some complaints that Virginia Tech received, such as "writing 'Saudi Arabia' on a whiteboard," "describing female students as unathletic[,]" and "telling a joke that included 'Caitlyn Jenner's deadname.'" Pet.10-11.

  As these examples show, people will complain about all manner of things; however, the First Amendment right to petition for redress of grievances is not limited to grievances that are meritorious. What matters is not whether someone filed a complaint about protected speech; what matters is what Virginia Tech did about it. And Virginia Tech's approach to such matters is to respect the First Amendment, as the bias protocol publicly explained:

  > *Freedom of speech in the United States is protected by the First Amendment* … Free speech provisions protect many forms of intolerant statements, expressions, and conduct.
  >
  > * * * * *
  >
  > BIRT will examine and review each complaint through *the lens of free and protected speech.* … Virginia

> Tech cannot adjudicate matters that are deemed protected speech.

JA.370 (emphasis added).

Thus, it is not surprising that, in response to the complaints listed by the petition, there is no evidence that Virginia Tech took any action at all – not even an invitation to a voluntary meeting. While other universities cited by the petitioner and *amici* may violate the First Amendment, Virginia Tech does not. Rather, Virginia Tech takes particular care to safeguard the First Amendment rights of its students and should not be called to answer for unconstitutional conduct at other colleges and universities.

- Finally, the petition fails to mention Virginia Tech's long-existing "website to facilitate reporting incidents affecting the freedom of expression." JA.363; *see* https://policies.vt.edu/speechoncampus. The website affirms Virginia Tech's support for the First Amendment and provides a form for reporting "incident[s] of disruption of constitutionally protected speech." JA.374. When submitted, the forms are "forwarded directly to the Dean of Students Office to take action and respond…." JA.363. This is not the hallmark of a university that runs roughshod over First Amendment rights in the name of some politically correct agenda, as Speech First and its *amici* mistakenly suggest.

REASONS FOR VACATING THE DECISION BELOW AND DISMISSING THE CASE AS MOOT

The petition is moot. The Court should dispose of it using *Munsingwear*. While this would technically mean granting certiorari, this would be for the limited purposes of (i) vacating the Fourth Circuit's decision insofar as it addressed Virginia Tech's bias protocol, and (ii) remanding the case with directions to dismiss as moot the entirety of Speech First's challenge to that protocol. Alternatively, the Fourth Circuit should be directed to dismiss as moot Speech First's motion for a preliminary injunction (the only part of that challenge adjudicated below), leaving Speech First free to show, if it can, on a full record why it should prevail on the merits.

A. Petitioner's Claims Are Moot.

Suing under 42 U.S.C. §1983, Speech First sought preliminary and permanent injunctions barring President Sands from "enforcing" Virginia Tech's bias protocol. JA.56. But Virginia Tech has abandoned that protocol. *See supra* at 9-11. The requests for injunctive relief are moot because, given the Sands declaration, "it is absolutely clear" that the bias protocol "could not reasonably be expected to recur." *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022) (citing *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U. S. 701, 719 (2007)) (emphasis added).

The complaint also seeks nominal damages of one dollar. JA.56. Such a request can sometimes save a case from Article III mootness, even where

injunctive relief is moot. *See Uzuegbunam v. Preczewski,* 141 S. Ct. 792 (2021). But it cannot save this case because nominal damages are not available against the sole defendant, Timothy Sands, in either his official capacity as university president or his individual capacity.

Nominal damages against Sands in his *official* capacity are barred because "[s]tate officers in their official capacities, like States themselves, are not amenable to suit for damages under [42 U.S.C.] §1983." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 n. 24 (1997). A claim against a state official for nominal damages cannot prevent mootness because "§1983 creates no remedy against a State." *Id.* at 69.

Nominal damages against Sands in his *individual* capacity are barred by qualified immunity. *E.g., Walker v. Schult*, 45 F.4th 598, 617 (2d Cir. 2022) ("[E]ven an award of nominal damages would be foreclosed if Defendants are entitled to qualified immunity.").[10] To defeat qualified immunity, a plaintiff must show (i) that the defendant official engaged in unconstitutional conduct, and (ii) that the unconstitutionality of that conduct was "clearly established" when the conduct occurred. *Pearson v. Callahan,* 555 U.S. 223, 232 (2009).[11] Under the second

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[10] *Accord, Lefemine v. Wideman*, 758 F.3d 551, 556 (4th Cir. 2014); *Hopkins v. Saunders*, 199 F.3d 968, 978 (8th Cir. 1999); *Ruvalcaba v. City of L.A.*, 167 F.3d 514, 524 (9th Cir. 1999); *Cummins v. Campbell*, 44 F.3d 847, 849 (10th Cir. 1994); *Hicks v. Feeney*, 850 F.2d 152, 155 n.4 (3d Cir. 1988); *Rheuark v. Shaw*, 628 F.2d 297, 299 (5th Cir. 1980).

[11] Courts may recognize qualified immunity by deciding the "clearly established" prong in a defendant's favor without deciding whether the challenged conduct constituted a constitutional violation. *Pearson,* 555 U.S. at 239.

prong, Speech First must show that the alleged unconstitutionality of the bias protocol was "clearly established" when the protocol was in effect. But its own petition precludes such a showing. The announced goals of the petition are (i) to reverse a decision by Virginia Tech's home circuit rejecting Speech First's position, and (ii) to *establish* the law on the exact constitutional point that must be *already* established if qualified immunity is to be defeated. Thus, Sands is entitled to qualified immunity, and Speech First's claim for nominal damages cannot save the case from mootness.

Even if Speech First's challenge to the bias protocol is not entirely moot, the request for a *preliminary* injunction certainly is. "[This Court's] frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008) (emphasis in original) (citing cases). In other words, "[an] applicant must demonstrate [among other things] that in the absence of a preliminary injunction, the applicant is likely to suffer irreparable harm *before a decision on the merits can be rendered*." *Ibid.* (emphasis added) (cleaned up). This standard cannot be met. Even if the Court were to credit the unfounded speculation of some *amici* that Virginia Tech might *someday* reinstitute its now-defunct bias protocol, that protocol is not in effect *now*. This is critical because "[a] preliminary injunction will not be issued simply to prevent the possibility of some remote *future* injury." *Ibid.* (emphasis added) (cleaned up). At a minimum, Speech First's motion for a preliminary injunction is moot. And because that was the only

bias protocol issue adjudicated below, the petition is moot, too.

Recognizing that the bias protocol no longer exists – and anticipating a mootness argument – the petition claims that "[a]ny such argument would be a blatant attempt to manipulate this Court's jurisdiction." Pet.16. The claim has no merit. Obviously, the Court has "[an] interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000). But that concern arises where a litigant seeks to *preserve* the judgment below by claiming that mootness forecloses review, and Virginia Tech has no such intention. Instead, Virginia Tech supports granting the petition for purposes of *vacating* that judgment using *Munsingwear*. Indeed, Speech First's claim of "manipulation" rings hollow given that it was counsel for Speech First who first suggested using *Munsingwear*. *See supra* at 11. The *Munsingwear* procedure made sense when Speech First suggested it, and it makes sense now.

In its reply, Speech First may suggest – as some overzealous *amici* already have – that Virginia Tech should not be trusted, and that a new bias protocol, similar to the old one, could be implemented in the future. But that is not something to worry about. The Court has a declaration from the president of a major public university which convincingly explains why and how the bias protocol was discontinued. In that declaration, he swears before this Court that he shall not allow anything like it.[12] Does anyone really

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[12] Nor can there be any doubt about the authority of President Sands. As Speech First has alleged: "Defendant Timothy Sands is President of the University. Sands is responsible for

think that President Sands executed that declaration with his fingers crossed behind his back? Of course not. "The University is a public entity and an arm of the state government of [Virginia], and therefore receives the presumption that it acts in good faith." *Speech First, Inc. v. Killeen*, 968 F.3d 628, 646 (7th Cir. 2020).

Besides, even if the claim for a *permanent* injunction still has a spark of life buried somewhere in the ashes, the claim for a *preliminary* injunction is surely dead. *See supra* at 18-19. Thus, the real question is not whether to use *Munsingwear*, but whether, in doing so, the Court should direct the Fourth Circuit to dismiss (i) the *entire* claim against the bias protocol, as Virginia Tech suggests, or (ii) *only* the request for a preliminary injunction, leaving the rest of the claim to be worked out in the district court and any subsequent appeals. In any event, the Court should not hear the case on the merits.

Speech First has also suggested that the timing of Virginia Tech's change (coming after a petition for certiorari appeared likely) should weigh against a finding of mootness. But this is wrong, too.

First, the change was initiated by the new dean of students, who took office in January 2023, and the new vice-president of student affairs, who took office on an interim basis in July 2022 and on a permanent basis in March 2023. App.2. There is nothing suspicious or surprising in the fact that the change occurred shortly after a change in leadership.

Second, Virginia Tech announced the change after it had *already won twice* – first in district court

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the enactment and enforcement of University policies, including the policies challenged here." JA.13 (complaint).

and again in the Fourth Circuit. Coming in the wake of such success, the change cannot be credibly portrayed as driven by a fear of losing the case.

Third, so-called "suspicious" timing is not part of this Court's test for determining whether a change by defendants moots a case. *See West Virginia v. EPA*, *supra*. And, if the "timing" argument is carried to its logical conclusion, a policy change could never give rise to mootness if announced during litigation. Surely, such an approach goes too far.

Given its arguments in other cases, Speech First may also theorize that the case is not moot because Virginia Tech is still defending the constitutionality of its now-defunct bias protocol. But mootness does not require a defendant to confess error. Virginia Tech will defend its reputation if forced to do so. It will not sit silent if accused of violating the First Amendment. But there is no need for such controversy. The issue is moot, and the decision below should be vacated using *Munsingwear* – just as Speech First previously suggested.

B. This Court Should Vacate the Judgment Below on the Bias Policy and Remand with Directions to Dismiss That Claim as Moot.

"The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending [this Court's] decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *Munsingwear,* 340 U.S. at 39. This practice "prevent[s] a judgment, unreviewable because of mootness, from spawning any legal consequences." *Id.* at 40-41. Moreover, "[v]acatur

[not reversal] is in order when [as here] mootness occurs through … unilateral action of the party who prevailed in the lower court." *Arizonans for Official English*, 520 U.S. at 71-72 (cleaned up).[13]

Far from being unusual, the *Munsingwear* procedure has been used multiple times over the years and as recently as last term. *See Chapman v. Doe*, 143 S. Ct. 857 (2023). When only some of the claims addressed by the judgment below are moot, the practice is to vacate the judgment with respect to the moot claims, leaving intact other portions of the judgment. *See Selig v. Pediatric Specialty Care, Inc.*, 551 U.S. 1142 (2007); *United States Dep't of Treasury v. Galioto*, 477 U.S. 556 (1986). Here, the court of appeals affirmed the district court's ruling on the bias policy and the informational activities policy. The petition only takes issue with the first ruling; only the first ruling is moot; and only the first ruling should be vacated.

REASONS TO DENY THE PETITION

If this Court elects not to apply *Munsingwear*, it should simply deny the petition. There are at least four reasons why the case is a poor candidate to be heard on the merits: (i) the case presents an issue of subject matter jurisdiction not litigated below; (ii) the question presented is an improper hypothetical, (iii) the petition is premature; and (iv) the circuit split advanced by the petition is illusory.

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[13] *See Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (describing mootness caused by the unilateral action of a prevailing party as a "clear example" for when "[v]acatur is in order").

A. The Case Presents an Issue of Subject Matter Jurisdiction Not Litigated Below.

When Speech First filed its lawsuit, it claimed associational standing based on the alleged individual standing of three anonymous students. Virginia Tech informally (and unsuccessfully) sought disclosure of their identities, but did not challenge that anonymity in court. There were other ample grounds to challenge standing, and only the preliminary injunction was at issue. But in any proceeding on the merits or on certiorari, Virginia Tech will challenge Speech First's claim of standing based on anonymous members.

While some of elements of associational standing may not implicate Article III, the first element does. "[T]he test's first requirement, that at least one of the organization's members would have standing to sue on his own, is grounded on Article III as an element of the constitutional requirement of a case or controversy." *United Food & Commer. Workers Union Local 751 v. Brown Group*, 517 U.S. 544, 554-55 (1996) (cleaned up). Several circuit courts have ruled that this requirement cannot be met without *naming* the members on which the association relies. *See infra* at 25-26. If these courts are right, then Speech First's failure to name any member with standing means there is no associational standing and no subject matter jurisdiction.

It does not matter that this specific objection to standing was not raised below. "Subject-matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt." *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009) (citing cases). "Moreover, courts, including this Court, have an independ-

ent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006). "[S]ubject-matter jurisdiction assumes a special importance when a constitutional question is presented." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541-42 (1986). Given this standing issue, certiorari is inappropriate for three reasons.

First, there is ample authority that Speech First cannot claim associational standing, given that it did not name any members who would have standing to sue in their own right. *See FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 235 (1990) (noting that an affidavit provided to establish standing was insufficient because "it fails to identify the individuals" who were harmed by the challenged program).[14]

Moreover, the omission cannot be cured by Speech First's misplaced statistical allegation about the allegedly small percentage of students who feel comfortable expressing minority viewpoints in class. *See* JA.42 (complaint); *supra* at 12. Even if the misread survey figures applied to Speech First's members, such statistical allegations cannot establish standing. *See Summers v. Earth Island Inst.,* 555 U.S. 488, 498-99 (2009) ("This requirement of *naming* the affected members has never been dispensed with in light of statistical probabilities, but only where *all* the members of the *organization* are af-

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[14] It is now too late for Speech First to disclose the names of its anonymous students "because it [would be] evidence first introduced to this Court and ... not in the record of the proceedings below." *Id.* at 235 (cleaned up).

fected by the challenged activity.") (first and third emphases added, second in original).[15]

Second, at least two other cases on the anonymity issue are making their way through the courts (both involve the same counsel representing Speech First here). In one case, a New York federal district court held that, "[b]ecause Plaintiff does not identify *by name* any member with standing or advance a theory that all of its members have standing, Plaintiff lacks Article III standing." *Do No Harm v. Pfizer Inc.*, No. 1:22-cv-07908, 2022 U.S. Dist. LEXIS 227006, at *26 (S.D.N.Y. Dec. 16, 2022) (emphasis added) (citing *Summers*, 555 U.S. at 498-99). The ruling was appealed, and oral argument was heard by the Second Circuit on October 3, 2023. CA2.Dkt.111.

The second case is another Speech First lawsuit. In *Speech First, Inc. v. Shrum*, No. CIV-23-29-J, 2023 U.S. Dist. LEXIS 66250 (W.D. Okla. April 10, 2023), Speech First sued the president of Oklahoma State University ("OSU"), alleging that several OSU speech-related policies are unconstitutional. As here, Speech First did not name any individual members, but used pseudonyms. The district court

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[15] *Summers* recognizes an exception to the naming requirement where *all* members of an association are affected by the challenged policy, but Speech First cannot use that exception – and has not tried to do so. Speech First is "a nationwide membership organization of students, alumni, and others...." Pet.11. Thus, many members are not even subject to the bias protocol, much less chilled by it. Under *Summers*, it would not be enough for Speech First to claim that some complete *subset* of its membership (such as all Virginia Tech members) is chilled by the bias protocol. Besides, Speech First has made no such claim, and there is no evidence in the record to support such a claim.

ruled this was inadequate: "Because Plaintiff has failed to name the members on behalf of whom it brings suit, it lacks standing to press the claims asserted here." *Id.* at * 5. Speech First appealed to the Tenth Circuit and the case is calendared for oral argument on November 17, 2023. *See Speech First v. Schrum*, Case No. 23-6054. CA10.Dkt. 9/14/23.

The district court rulings in *Do No Harm* and *Schrum* echo multiple circuit courts that have reached the same conclusion: associational standing requires the *naming* of a member who would have standing to sue in his/her own right. *See Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 601-02 (8th Cir. 2022); *Ga. Republican Party v. SEC*, 888 F.3d 1198, 1204 (11th Cir. 2018); *Tenn. Republican Party (16-3360) v. SEC*, 863 F.3d 507, 520 (6th Cir. 2017); *Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016); *Associated Gen. Contractors of Am. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1195 (9th Cir. 2013).

However the courts of appeals may rule in *Do No Harm* and *Schrum,* the losing party may well seek certiorari. If there is any doubt about the naming requirement, the Court should resolve the issue using one of *those* cases (or another case) where the Court would have the benefit of an analysis from a district court and a court of appeals. Here, this Court would not have any such analysis by the courts below. That would be inconsistent with this Court's role as "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U. S. 709, 718, n. 7 (2005).

In *Frank v. Gaos*, 139 S. Ct. 1041 (2019) (*per curiam*), when confronted with a previously unlitigated standing issue, this Court explained that "[r]esolution of the standing question should take place in the District Court or the [court of appeals] in

the first instance. We therefore vacate and remand for further proceedings." *Id.* at 1046. If the Court does not employ *Munsingwear* and does not flatly deny the petition, it should vacate the decision of the Fourth Circuit and remand the case to the district court to consider whether Speech First lacks associational standing because of its failure to name any member with standing to sue in his/her own right.

B. The Question Presented Is an Improper Hypothetical.

The question presented by Speech First is: "Whether *bias-response teams* objectively chill *students'* speech." Pet.i (emphasis added). This is problematic for at least three reasons.

First, the key term – "bias response team" – has no established legal meaning, and the definition offered by Speech First does not fit the facts at Virginia Tech, thus making the question entirely hypothetical. Under Speech First's definition, a "bias response team" is "an official [university] entity that solicits reports of bias, tracks them, investigates them, *asks* to meet with the perpetrators, *and threatens* to refer students for formal discipline." Pet.i (emphasis added). An entity must meet all these criteria to qualify as a "bias response team." The record does not show that Virginia Tech has – or ever had – an entity fairly meeting that description.

Under the Speech First definition, asking to meet with "perpetrators" of bias would appear to be routine for bias response teams, even when constitutionally protected speech is involved. But that was not the case at Virginia Tech. As the Fourth Circuit noted: "The record establishes that the BIRT does

not even extend an invitation for a voluntary conversation in response to every complaint it receives." Pet.App.16-17. *See also supra* at 3 (Spring 2021 figures, two out of thirty-three). Furthermore, "BIRT often dismisses complaints because they involve constitutionally protected activity." Pet.App.16-17.

Similarly, a "bias response team" "threatens to refer students for formal discipline," presumably for having said or done something "biased." But, again, the definition does not fit Virginia Tech, where the now-defunct BIRT did *not* make disciplinary referrals merely because some statement or action seemed "biased." The only formal disciplinary referrals that BIRT made – or "threatened" to make – were for actions that appeared to violate the law or the Code of Student Conduct. There could, of course, still be a problem if the law or Code prohibited constitutionally protected speech, but the petition makes no such claim.

Thus, while Virginia Tech once had an official entity with the *name* "bias-incident response team," the name is not dispositive. The Virginia Tech entity did not meet critical components of the definition of "bias-response teams" in the question presented here by Speech First. Thus, the question presented is an improper hypothetical that is inapplicable to Virginia Tech, and the petition should be denied.

Second, to compound the problem, the question presented asks about the speech of "students" in the abstract, rather than the speech of Students F and G. If Students F and G are not objectively (and actually) chilled by the Virginia Tech protocol, then they suffer no harm and have no standing, *even if* a "typical" student would be chilled by a "typical" bias response team. As already explained, the Virginia

Tech bias response team was not "typical," and Students F and G are not typical, either. They came to the case only after the appeal was underway and, thus, they had the benefit of all the record evidence presented by Virginia Tech in district court – not just what Speech First calls the "outward facing materials." Pet.23-24.[16] Speech First seeks to avoid facts specific to this case by asking about "students" in general. In so doing, it makes the question so abstract as not to warrant certiorari.

Third, the shortcomings in the question presented go to the heart of Article III jurisdiction. Specifically, this Court will not give "an advisory opinion on an abstract or hypothetical question." *Benton v. Maryland*, 395 U.S. 784, 788 (1969); *Massachusetts v. Mellon,* 262 U.S. 447, 478 (1923) (reaffirming that the Court will not answer "an abstract question of constitutional law"). By framing its question in the abstract, rather than tying it to Virginia Tech, Speech First is apparently trying to avoid those facts that distinguish this case from some composite, generic profile of "bias response teams." But, in doing so, Speech First runs afoul of the limitations imposed by Article III.

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[16] Speech First may theorize that the standing of Students F and G somehow relates back to when the complaint was originally filed in April 2021. But any such theory would fail because, among other reasons, Student F was not a Virginia Tech student when the complaint was filed. And, while Student G was a Virginia Tech student then, there is no evidence that he was then a member of Speech First. *See supra* at n. 4.

Besides, even if the Court were to limit itself to "outward facing materials," it would not change the result. At Virginia Tech, such materials include the repeated embrace of First Amendment values detailed above. *See supra* 14-15.

C. The Petition Is Premature.

Granting certiorari is premature because: (i) no final order has been entered; (ii) no discovery has been taken, so the factual record is incomplete; and (iii) Speech First imprudently split apart its case when it failed to include an appeal of its loss on Virginia Tech's allegedly related discriminatory harassment policy.

First, Speech First failed to obtain a preliminary injunction against the bias protocol because, given its failure to show standing, Speech First was not likely to prevail on the merits. But that is not the end of the bias protocol claim in the district court. No motion to dismiss or motion for summary judgment has been adjudicated – or even filed. Although Virginia Tech would be optimistic about the outcome of any such motion, the initial decision on standing would not be conclusive, nor would the parties be limited to the current factual record. This Court should not review the standing issue before a complete record has been developed and a final order entered by the district court. *See, e. g., Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967) (*per curiam*) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court."); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ [of certiorari] is not issued until final decree."); *Am. Constr. Co. v. Jacksonville, T & K. W. R. Co.*, 148 U.S. 372, 384 (1893) ("[T]his court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordi-

nary inconvenience and embarrassment in the conduct of the cause.").[17]

Second, Speech First does not want discovery, saying that "[f]urther discovery into [Virginia Tech's] unwritten policies and practices would serve little purpose." Pet.24. But Virginia Tech *does* want discovery, including discovery of facts related to the claim that Students F and G are (or were) chilled by the bias protocol. Their October 2022 declarations are essentially copycats of the declarations signed by the Original Students when the case began in 2021. This warrants curiosity – and depositions – especially because their declarations utterly fail to address the additional facts learned by Speech First through the district court record. And, have Students F and G really sat silently, as they claim? Virginia Tech students are active in an array of groups from across the political spectrum, including groups espousing conservative views like those held by Students F and G. *See* JA.405-08. If these groups have spoken out on similar issues, how do Students F and G claim to be chilled, when their peers are not? Perhaps, discovery will confirm that there really is no chill at all, not even a subjective one. In any event, this Court should not decide the issue without a full factual record, which does not now exist and which only discovery can provide. Certiorari is premature.

Third, when Speech First filed its lawsuit, it did not just challenge the bias protocol. Alleging similar concerns about chilling speech, Speech First also

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[17] Denying certiorari now would, of course, not preclude the Court from granting it following the court of appeals' review of the district court's final order in the case. *See, e.g., Hughes Tool Co. v. Trans World Airlines, Inc*., 409 U.S. 363, 365-66, n.1 (1973); *Hamilton-Brown Shoe*, 240 U.S. at 257-59.

sought a preliminary injunction against the discriminatory harassment policy. The district court declined to issue an injunction against that policy because, given its failure to show standing, Speech First was not likely to prevail on the merits. Speech First chose not to appeal that decision; however, by all accounts, Speech First intends to pursue its challenge on the merits when district court proceedings resume. So, this case may come before this Court again. If the Court is going to consider Speech First's claims of chilled speech at Virginia Tech, it should do so once and not piecemeal. By uncoupling its challenge to the discriminatory harassment policy from its challenge to the bias protocol, Speech First has again made certiorari premature.

D. The Circuit Split Is Illusory.

Speech First bases its request for certiorari on a putative split among courts of appeal. On one hand, the Fifth, Sixth, and Eleventh Circuits ruled that Speech First had standing to seek a preliminary injunction against campus "bias response teams" at specific universities, and they remanded those cases to the district courts for further proceedings. (No circuit ruled that Speech First was entitled to an injunction on that issue.) On the other hand, the Fourth Circuit ruled that the Speech First lacked standing to seek such an injunction against Virginia Tech. Superficially, this may look like a circuit split, but a close examination shows that the split is illusory.[18]

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[18] Speech First also claims that the Seventh Circuit splits from the three circuits where it prevailed. *See* Pet.i (citing *Speech First, Inc. v. Killeen*, 968 F.3d 628 (7th Cir. 2020). If

Contrary to the petition (at 17), the Fourth Circuit did not "acknowledge[]" that "[t]he five cases are materially indistinguishable." Instead, the Fourth Circuit noted that the circuits ruling for Speech First "seemingly ignor[ed] the factual findings of the respective district courts." App.24. Examining what those circuits said further dispels the illusion.

In *Speech First v. Schlissel*, 939 F.3d 756 (2019), the Sixth Circuit ruled that Speech First had standing to challenge the University of Michigan bias response team. According to the Sixth Circuit, "[t]he Response Team's ability to make referrals – *i.e.*, to inform [the Office of Student Conflict Resolution] or the police about reported conduct – is a real consequence that objectively chills speech." *Id.* at 765. "Additionally, the invitation from the Response Team to meet could carry an implicit threat of consequence should a student decline the invitation." *Ibid.*

Thus, the Sixth Circuit concluded that "Speech First has standing to challenge the Response Team." *Ibid.* But the Sixth Circuit included a disclaimer:

> We note that our determination of standing rests on the *preliminary posture* of the case. We do not foreclose the possibility that the University could introduce facts which, if unrebutted, would demonstrate that Speech First lacks standing. The University [of Michigan] has simply *failed to do so here*.

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true, that might have justified certiorari in some *other* case, but it cannot take the place of a genuine split involving the Fourth Circuit, which does not exist.

Id. at n. 1 (emphasis added).

Virginia Tech did what the University of Michigan failed to do; it introduced facts showing that its bias protocol *does not* objectively chill student speech. *See supra* at 3-4. The Sixth Circuit gave no indication how it would have ruled if it had facts like those available to Fourth Circuit. Thus, there is no genuine split between these two circuits.

In *Speech First v. Fenves*, 979 F.3d 319 (5th Cir. 2020), the Fifth Circuit ruled that Speech First had standing to challenge "*several policies* that intend to regulate speech at the University of Texas at Austin." *Id.* at 322 (emphasis added). The challenged policies extended well beyond that university's bias incidents policy. *See id.* at 322-25. Reversing the district court, the Fifth Circuit found that Speech First had standing because of "[t]he chilling effect of *allegedly vague regulations*, coupled with a range of *potential penalties* for violating the regulations...." *Id.* at 322 (emphasis added).

By contrast, the petition does not challenge *any* regulation prohibiting *any* student conduct at Virginia Tech, whether on vagueness grounds or otherwise. It challenges only the bias protocol, which does not prohibit anything or punish anyone. *See supra* at 13. Any perceived split between the Fourth and Fifth Circuits is illusory.

Finally, in *Speech First v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022), the Eleventh Circuit held that Speech First had standing to challenge the constitutionality of "two speech-related policies" at the University of Central Florida: "one that prohibits multiple forms of expression that are deemed to constitute 'discriminatory harassment' and another that aims

to address so-called 'bias-related incidents.'" *Id.* at 1113. The Eleventh Circuit reserved its strongest criticism for the discriminatory harassment policy, ruling that Speech First was entitled to an injunction against it. *Id.* at 1128. There is no conflict on that point because Speech First did not challenge Virginia Tech's discriminatory harassment policy on appeal.

As for the bias policy, *Cartwright* resembles *Schlissel*. The Eleventh Circuit prefaced its standing analysis by explaining: "Because this case hasn't progressed past the pleading stage, general factual allegations of injury may suffice so long as they plausibly and clearly allege a concrete injury." 32 F.4th at 1119 (cleaned up). In the instant case, however, the courts below were not limited to the pleadings. There was substantial evidence in the record, and that evidence dispelled any concern that reading the bare complaint might have engendered. *See, e.g., supra* at 13-15. Thus, the two cases are not comparable. Again, there is no genuine circuit split.

In sum, superficial similarities, such as the name, are not enough. The different rulings reflect different records. There is no genuine circuit split.

CONCLUSION

The Court should grant the petition, but only to vacate the Fourth Circuit's judgment regarding Virginia Tech's bias protocol, and remand with instructions to dismiss the entire bias protocol claim as moot or, at a minimum, to dismiss as moot the claim for a preliminary injunction against the protocol. Alternatively, the petition should be denied.

October 18, 2023

Respectfully submitted,

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APPENDIX

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IN THE
SUPREME COURT OF THE UNITED STATES

NO. 23-156

SPEECH FIRST, INC.,
Petitioner,
v.
TIMOTHY SANDS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS PRESIDENT OF VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY,

Respondent.

DECLARATION OF TIMOTHY SANDS

1. My name is Timothy Sands. I am President of Virginia Polytechnic Institute and State University ("Virginia Tech" or the "University") and the Defendant in this lawsuit brought by Speech First, Inc. ("Speech First").

2. I make this declaration under penalty of perjury. The statements set forth herein reflect the testimony I would provide in open court if called to testify.

3. Having served as President of Virginia Tech since June 1, 2014, I am familiar with the various policies in effect at the University as well as the now-discontinued bias-incident response protocol and the bias incident response team ("BIRT"). While the protocol and team are sometimes loosely referred to as part of a "policy," they did not prohibit anything or authorize any new punishment for

already-prohibited student misconduct. Thus, the protocol was not adopted through the university governance structure ("University Governance"), including the Board of Visitors ("Board"), as is required for formally adopted "policies" of Virginia Tech. In other words, the Board did not adopt (or need to adopt) the protocol. Rather, this was a process implemented by the Dean of Students Office.

4. The bias-incident response protocol and BIRT were developed and implemented by the Dean of Students, Byron Hughes, who served in that capacity from October 2018 until June 2022, at which time he left the University. The bias-incident response protocol and BIRT took effect in 2019.

5. The current Dean of Students, Mark Sikes, assumed that position in January 2023.

6. The current Vice President of Student Affairs, Frances Keene, began serving in that position on an interim basis in July 2022, and on a permanent basis in March 2023.

7. Among the tasks undertaken by Vice President Keene and Dean Sikes was a review of the bias-incident response protocol and BIRT.

8. In early 2023, Vice President Keene and Dean Sykes concluded that the bias-incident response protocol and BIRT should be discontinued, and they began to work with their colleagues at the University to build consensus for that change.

9. As President of Virginia Tech, I approved the discontinuance of the bias-incident response protocol and BIRT in June 2023. Because the bias-incident response protocol and BIRT were not adopted through University Governance, no action by University Governance, such as a

resolution from the Board, was necessary to implement this discontinuance.

10. The decision by Virginia Tech to discontinue the bias-incident response protocol and BIRT was not prompted by the Speech First lawsuit (including but not limited to its decision to seek certiorari).

11. The discontinuance of the bias-incident response protocol and BIRT was based on reviewing student-related protocols and processes to promote efficiency in Virginia Tech's support for all students. For example: (i) incidents involving an allegation of harassment, discrimination or sexual misconduct can be handled through Virginia Tech's separate "Policy on Harassment, Discrimination, and Sexual Assault" (Policy 1025) and related provisions of the Student Code of Conduct, so there is no need for BIRT to continue acting as an intermediary, and (ii) the complaints made to BIRT under the bias-incident response protocol rarely called for any communication to the student who was the subject of the complaint (or any other action by the Office of the Dean of Students), especially given BIRT's use of the First Amendment to evaluate any complaint.

12. The updated process which discontinued the bias-incident response protocol and BIRT took effect during the summer between the end of the 2022-23 regular academic year and the beginning of the 2023-24 regular academic year. The summer between two regular academic years is frequently used to implement changes in procedures because it causes less disruption than if implemented in the midst of an academic year.

13. All references to the bias-incident response policy and BIRT have been removed from

the public-facing website of the University. This removal included removal of the "See Something, Say Something" slogan that had been used in connection with the protocol and BIRT.

14. To be clear, Virginia Tech has not replaced the bias-incident response protocol and BIRT with anything similar. Between the commencement of this lawsuit by Speech First and the present, Virginia Tech has not adopted or implemented any new protocols or policies that would encourage (or require) students or other members of the University community to report to the University any instances of student speech based on the content or viewpoint of that speech. Thus, Virginia Tech has no such protocol or policy (except insofar as speech and related conduct was already subject to the University's separate "Policy on Harassment, Discrimination, and Sexual Assault" (Policy 1025) and related provisions of the Student Code of Conduct).

15. Consistent with its obligations under Title IX and other federal or state law, Virginia Tech maintains – and will continue to maintain – a policy against harassment, discrimination, and sexual misconduct. The current version of that policy (Policy 1025) is the same version that Speech First is challenging in Counts I and II of its Complaint. Although Speech First sought a preliminary injunction against the enforcement of Policy 1025, the district court denied the requested injunction based on a failure by Speech First to show standing at that stage (Pet.App. 116, 119-20, 124, 148), and Speech First did not appeal that decision.

16. Virginia law provides explicit protection for freedom of speech at state colleges and universities, including the following:

> Each public institution of higher education shall establish and include in its student handbook, on its website, and in its student orientation programs policies regarding speech that is constitutionally protected under the First Amendment to the United States Constitution and the ***process to report incidents of disruption of such constitutionally protected speech.***

Va. Code § 23.1-401.1(B) (emphasis added).

17. Consistent with its obligations under state law, Virginia Tech maintains – and will continue to maintain – a policy of support for freedom of speech. For example, the University maintains a website to facilitate reporting incidents affecting freedom of speech. *See* https://policies.vt.edu/speechoncampus; JA-363, 374 (Fourth Circuit Dkt. No. 32). These reports are also received by the Dean of Students Office.

18. As President of Virginia Tech, I have instructed the Vice-President of Student Affairs and the Dean of Students not to reinstate the bias-incident response protocol or BIRT, and not to implement anything similar.

19. To the full extent of my authority as President of Virginia Tech, I shall ensure that, going forward, the University shall not (a) re-instate the now-discontinued bias-incident response protocol or BIRT, or (b) adopt or implement any protocol or

policy that encourages (or requires) anyone to report to University authorities any instances of student speech based on the content or viewpoint of that speech.[1]

20. As President of Virginia Tech, I have full authority to provide the assurance set forth in the foregoing paragraph.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 12, 2023.

TIMOTHY SANDS

[Original signed by Timothy D. Sands]

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[1] The University obviously retains the option to implement such policies as may be appropriate to address acts of misconduct, such as violations of criminal law (including true threats); violations of University rules regarding harassment, discrimination, and sexual misconduct (currently Policy 1025 and corresponding provisions in the Student Code of Conduct); and violations of First Amendment rights.