No. 18-1917

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SPEECH FIRST, INC.,
Plaintiff-Appellant,

v.

MARK SCHLISSEL, *et al.*
Defendants-Appellees.

On Interlocutory Appeal from the United States District Court
for the Eastern District of Michigan

BRIEF OF APPELLANT SPEECH FIRST, INC.

William S. Consovoy
Jeffrey M. Harris
Cameron T. Norris
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423
will@consovoymccarthy.com

Counsel for Appellant Speech First, Inc.

CORPORATE DISCLOSURE STATEMENT

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

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case presents important and novel questions about the state of free-speech protections on college campuses. It is the first case to challenge the constitutionality of a "bias response team," an increasingly popular but constitutionally dubious tool that one federal judge has dubbed the campus "civility police." José A. Cabranes, *If Colleges Keep Killing Academic Freedom, Civilization Will Die, Too*, Wash. Post (Jan. 10, 2017), wapo.st/2DwYy4p. The issues in this case are so important that the United States Department of Justice took the rare step of filing a statement of interest. Invoking its authority under 28 U.S.C. §517, the United States told the district court that "[i]n the United States' view, Plaintiff Speech First, Inc., has established that it is likely to succeed on the merits of its claim that the University of Michigan's Statement of Student Rights and Responsibilities … and Bias Response Policy are facially unconstitutional under the First and Fourteenth Amendments." Statement, RE14, PageID#307. To give these important constitutional issues the full airing they deserve, Speech First respectfully requests oral argument.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§1331 & 1343. This Court has jurisdiction under 28 U.S.C. §1292(a)(1).

STATEMENT OF ISSUES

1. Speech First moved to preliminarily enjoin the University of Michigan's prohibitions on "harassment" and "bullying." In a transparent effort to defeat Speech First's motion and avoid a ruling on the merits, the University unilaterally changed its policies. Nothing prevents the University from readopting its unconstitutional policies, the University did not change them until after Speech First brought suit, the University has defended the original policies, and the University has engaged in similar conduct before. Did its voluntary cessation moot Speech First's claims?

2. Speech First moved to preliminarily enjoin the University's policy on "bias incidents." Students who commit bias incidents are reported to an entity called the "Bias Response Team," a group of university administrators who log the incident online, investigate it, ask to meet with the perpetrator, and can refer the incident for formal or informal discipline. This regime has both the purpose and effect of deterring the expression of views that the University deems "biased." Does Speech First have standing to challenge it?

3. The University's prohibitions on harassment, bullying, and bias incidents violate the First and Fourteenth Amendments by prohibiting protected speech based on the listener's subjective feelings. When a policy likely violates the Constitution, the

plaintiff is irreparably harmed and the defendant has no legitimate interest in its enforcement. Is Speech First entitled to a preliminary injunction?

STATEMENT OF THE CASE

Fifty years ago, the Supreme Court declared that American universities are "peculiarly the marketplace of ideas," training future leaders "through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (cleaned up). That was then, this is now. Instead of promoting the "robust exchange of ideas," universities are now more interested in protecting students from ideas that make them uncomfortable. Universities do this by adopting policies and procedures that discourage speech by students who dare to disagree with the prevailing campus orthodoxy.

One tried-and-true method of accomplishing this feat is the campus speech code. Speech codes, according to the Foundation for Individual Rights in Education (FIRE), are "university regulations prohibiting expression that would be constitutionally protected in society at large." *Spotlight on Speech Codes 2018* at 8, FIRE, bit.ly/2OunZ8t. Recycled ideas from the 1980s, speech codes punish students for undesirable categories of speech such as "harassment," "bullying," "hate speech," and "incivility." Because they impose vague, overbroad, content-based restrictions on speech, these policies flagrantly violate the First and Fourteenth Amendments. Federal courts uniformly strike them down when they actually reach the merits. But courts do not always get the chance

to pass on their constitutionality, because universities inevitably seek to settle or drop individual cases while keeping their speech codes on the books. Today, one in three universities has a speech code that earns a "red light" rating from FIRE because it "clearly and substantially prohibit[s] constitutionally protected speech." *Id.* at 4.

In addition to their speech codes, universities are increasingly turning to a new, innovative way to deter disfavored speech—so-called "bias response teams." Living up to their Orwellian name, bias response teams encourage students to monitor each other's speech and report any incidents of "bias" to the University (often anonymously). "Bias" is defined incredibly broadly and covers wide swaths of protected speech; indeed, speech is often labeled as "biased" based solely on a *listener's subjective reaction* to it. After receiving reports of a bias incident, the bias response team will investigate, meet with the relevant parties, and potentially recommend formal or informal discipline. *See generally Bias Response Team Report 2017*, FIRE, bit.ly/2P9iEaj.

Although universities claim that this process is entirely voluntary, they know that students do not see it that way. According to a recent study from FIRE, bias-response teams "effectively establish a surveillance state on campus where students … must guard their every utterance for fear of being reported to and investigated by the administration." *Id.* at 28. Professors Jeffrey Snyder and Amna Kalid have likewise observed that bias-response teams "result in a troubling silence: Students … [are] afraid to speak their minds, and individuals or groups [are] able to leverage bias reporting policies to shut down unpopular or minority viewpoints." Snyder & Khalid, *The Rise of*

"Bias Response Teams" on Campus, New Republic (Mar. 30, 2016), bit.ly/1SaAiDB. FIRE estimates that more than 231 universities have bias response teams, and the number is "growing rapidly." *Bias Response Team Report*, *supra*, at 4. That number will surely continue to grow as universities discover that bias response teams allow them to chill indirectly what they cannot prohibit directly. *Id.* at 9.[1]

Plaintiff Speech First was created to combat these kinds of policies. An organization of students and allies, Speech First was launched in early 2018 to restore the protections of the First Amendment on college campuses. Several of its members attend the University of Michigan at Ann Arbor—a school that FIRE gives a "red light" rating. *University of Michigan–Ann Arbor*, FIRE, bit.ly/2SUkuLl (last visited Nov. 13, 2018). Speech First's members have views that are unpopular at the University about President Trump, abortion, illegal immigration, gun rights, Black Lives Matter, gender identity, and many other topics. *See* Compl., RE1, PageID#27-35. They want to freely express themselves on campus, but the University has put policies in place that make them fear retribution for voicing their deeply held views. *See* Neily Decl., RE4-1, PageID#118.

[1] As bias response teams continue to spread, some schools are bucking the trend. The University of Northern Colorado, for example, shuttered its bias response team, explaining that it had come "at the expense of free speech and academic freedom" and that its so-called "voluntary" processes "made people feel that we were telling them what they should and shouldn't say." *President Kay Norton's State of the University Address* 3-4, UNC (Sept. 7, 2016), bit.ly/2FdMdE5. The University of Iowa likewise scrapped its plans to create a bias response team, citing their "high failure rate" and their tendency to "become almost punitive." *University of Iowa Changing Course on Bias Response Team*, Iowa City Press-Citizen (Aug. 18, 2016), bit.ly/2Ph03Ku.

The University is the flagship institution of higher education in Michigan, enrolling nearly 30,000 undergraduate students. As a public school, its policies must comply with the First and Fourteenth Amendments. Yet the University uses both speech codes and a bias response team to control student speech on campus and deter the expression of certain viewpoints. Its speech code threatens to sanction students for the amorphously defined offenses of "harassing" and "bullying," while its bias response team investigates alleged "bias incidents" and conducts interventions with the accused students (who the University labels "offenders").

I. The University's Prohibitions on Harassment and Bullying

The University has promulgated a Statement of Student Rights & Responsibilities, which identifies "behaviors [that] are inconsistent with the values of the University community." Harris Decl., RE4-2, PageID#125. The Statement identifies a number of "violations" that can subject a student to discipline. *Id.*, PageID#127. If a student commits one of these violations, he can either plead guilty; attend "adaptable conflict resolution" such as "mediation, facilitated dialogue, and restorative justice circles"; or request a hearing. *Id.*, PageID#130. Possible sanctions include reprimand, probation, mandatory education, removal from courses and activities, suspension, and expulsion. *Id.*, PageID#133-34. The University maintains records reflecting the actions it took. *Id.*, PageID#135.

The Statement is "open for amendments every three years," when the entire University community can comment on proposals. *Id.*, PageID#137. The Statement

also can be amended "off-cycle," but only if the Vice President for Student Life, Chair of the Student Relations Advisory Committee, and President of the Central Student Government "unanimously agree." *Id.* The Vice President for Student Life (currently, E. Royster Harper) is responsible for all "procedural and interpretative questions" regarding the Statement. *Id.*, PageID#135. She also oversees the Office of Student Conflict Resolution (OSCR), which administers student discipline. Harper Decl., RE18-4, PageID#393; Wessel Decl., RE18-8, PageID#920.

One way to violate the Statement is by "[h]arassing or bullying another person—physically, verbally, or through other means." Harris Decl., RE4-2, PageID#127. The terms "harassing" and "bullying" are undefined in the Statement itself. To inform students about the meaning of these terms, OSCR maintains a "Definitions" page on its website. *See id.*, PageID#141. These definitions are authoritative interpretations of the Statement, though the University has no rules governing their promulgation or amendment. *See* Harper Decl., RE18-4, PageID#396-97.

At the time Speech First filed this lawsuit, the University provided several definitions of "harassing" and "bullying"—some from dictionaries, some from University policies, some from Michigan law. *See* Harris Decl., RE4-2, PageID#146-47. The dictionary definitions were from Merriam-Webster Dictionary and defined the terms as follows:

> Harassing: (1)[ ]to annoy persistently (2) to create an unpleasant or hostile situation for, especially by uninvited and unwelcome verbal or physical conduct

> Bullying: (1) to frighten, hurt, or threaten (a smaller weaker person), (2) to act like a bully toward (someone), (3) to cause (someone) to do something by making threats or insults or by using force, (4) to treat abusively, (5) to affect by means of force or coercion

Id., PageID#146. The University began using these definitions no later than 2014. *See Definitions*, Univ. of Mich., bit.ly/2OBZAx2 (captured by the Wayback Machine on Aug. 1, 2014).

These definitions of "harassing" and "bullying" are wholly subjective and—by their plain terms—encompass speech protected by the First Amendment. They are violated if *the listener* finds the speech "annoy[ing]," "unpleasant," "frighten[ing]," or "hurt[ful]." They do not require the speech to be evaluated from the perspective of an objective listener, much less require that the speech reach a certain level of severity or pervasiveness.

This is not the first time that the University has enacted such a policy. An earlier version of its harassment policy was struck down as unconstitutionally vague and overbroad in *Doe v. University of Michigan*, 721 F. Supp. 852, 864-67 (E.D. Mich. 1989), which is considered a landmark case on university speech codes. In *Doe*, an anonymous student (represented by the ACLU) challenged the University's prohibition on behavior that "stigmatizes or victimizes" individuals based on a protected classification and "[c]reates an intimidating, hostile, or demeaning environment." *Id.* at 854 n.1, 856. The University also maintained an "interpretive guide" that "purported to be an authoritative interpretation of the Policy." *Id.* at 857-58. When the plaintiff challenged

the policy, the University first tried to withdraw the interpretative guide. *See id.* at 858. That effort failed, because the withdrawal "had not been announced to the general University community at the time th[e] lawsuit was filed." *Id.* at 860. The University next tried to argue that the harassment provision could never cover protected speech, since the University included a general disclaimer that said it respected the First Amendment. *Id.* at 868. That failed too, because the *text* of the harassment policy clearly covered protected speech. *See id.* The *Doe* court concluded that the University "sought to avoid coming to grips with the constitutionality of the Policy," "had no idea what the limits of the Policy were," and "was essentially making up the rules as it went along." *Id.* at 859, 868.

II. The University's Policy on Bias Incidents and the Bias Response Team

The University has emphatically declared that so-called "[b]ias" is "not welcome" on its campus. Harris Decl., RE4-2, PageID#157. The University amorphously defines "bias" as "a preconceived negative opinion or attitude about a group of people who possess common physical characteristics or cultural experiences." *Id.*, PageID#187. According to the University, "[w]hen one person engages in acts of bias, many of us suffer the effects." *Id.*, PageID#160.

To address allegations of "bias," the University created the Bias Response Team, which assumed its current form around 2015. Jones Decl., RE18-5, PageID#424. The members of the Bias Response Team are university administrators, including disciplinarians from OSCR and police officers from the Division of Public Safety and

Security. *See* Harris Decl., RE4-2, PageID#169. The Bias Response Team is charged with "the response and management of bias incidents." *Id.*

The University defines bias incidents as "conduct that discriminates, stereotypes, excludes, harasses, or harms anyone in our community based on their identity (such as race, color, ethnicity, national origin, sex, gender identity or expression, sexual orientation, disability, age or religion)." *Id.*; *see also id.*, PageID#164-66 (defining "bias incident" and several related terms). While bias incidents "may violate" other laws or University policies, "this is not necessary." *Id.*, PageID#193, 171, 182. Nevertheless, the University describes bias incidents as "[s]imilar to hate crimes," *id.*, PageID#178, labels the students who commit them "offenders," *id.*, PageID#164, 174, 237-40, 257, and labels the other students involved "targets" and "witnesses," *id.*, PageID#169-70, 243, 254. A bias incident can even "involve speech that is protected by the First Amendment." Jones Decl., RE18-5 PageID#456. "Bias comes in many forms," the University adds, and "may be intentional or unintentional." Harris Decl., RE4-2, PageID#193, 169. "The most important indication of bias is *your own feelings*." *Id.*, PageID#193 (emphasis added).

The University implores students to "report" bias incidents and to "encourage others to report" them too. *Id.*, PageID#170. Reports can be submitted online, by phone (call 734-615-BIAS), or in person at various "safe spaces." *Id.*, PageID#170-71. "Someone from the Bias Response Team reviews submitted reports every day and after business hours." *Id.*, PageID#188. Reporters can remain completely anonymous. *Id.*,

PageID#189. To maximize reports, the University prints flyers explaining the reporting process and offers workshops to student groups on "How to Report a Bias Incident." *See id.*, PageID#174; *Get Involved*, Univ. of Mich., bit.ly/2RLY25M (last visited Nov. 13, 2018).

The Bias Response Team also maintains an online log of bias incidents. *See* Harris Decl., RE4-2, PageID#197-261. The log "provide[s] the U-M community with information on the types of incidents that are happening" and "summarize[s] … situations where reported harm has been caused." *Id.*, PageID#171, 197. While the log omits the names of the students involved, it reveals the date of the incident, the type of alleged bias, how the bias was expressed (verbal, written, online, etc.), the location of the incident, and what actions the Bias Response Team took in response. *See id.* at 197. The Dean of Students (currently, Laura Blake Jones) "review[s] every entry added to the Bias Response Log before it is published." Jones Decl., RE18-5, PageID#425.

When a student reports a bias incident, the University takes it "very seriously." Harris Decl., RE4-2, PageID#188. Within a day, the Team will get in touch with the reporting student and set up a meeting. *Id.*, PageID#188, 171, 174. With the reporter's permission, the Bias Response Team "typically" will "contact[]" the perpetrator and "invite[]" him "to voluntarily meet with a member of the BRT." Galvan Decl., RE18-3, PageID#389; Jones Decl., RE18-5, PageID#456. The Bias Response Team will then "create[]" a "plan of action" and "implement[] [it] with follow-up." Harris Decl., RE4-2, PageID#171, 174. That plan can include a referral to the University's conflict-

resolution mechanisms, such as "restorative justice" and "facilitated dialogue." *Id.*, PageID#202, 193; Galvan Decl., RE18-3, PageID#388. The Bias Response Team can also refer bias incidents to the police or OSCR. *E.g.*, Harris Decl., RE4-2, PageID#202, 212, 223-24, 232, 259. When bias incidents "violate University policies or community standards," the Team warns that the University "will pursue a range of remedies that may include disciplinary action as well as community education and dialogue." *Id.*, PageID#182. The Bias Response Team can also enlist "other university representatives as needed, including … faculty." *Id.*, PageID#170.

Before Speech First brought this case, the University addressed whether students who engage in bias incidents can "be arrested or disciplined by the University." *Expect Respect FAQ*, Univ. of Mich., bit.ly/2F7T2qo (captured by the Wayback Machine on June 27, 2017). The University would only say, "It depends." *Id.* The University cautioned that it had to "balance" the "freedom of speech" against "ensuring equal and fair treatment of all"—values that "may sometimes be in conflict." *Id.* More recently, the University amended the Statement to make "[b]ias-motivated misconduct" a "separate violation," "ensur[ing] that the Statement governs … misconduct based upon bias." Harris Decl., RE4-2, PageID#263.

III. Speech First's Suit and the University's Attempts to Avoid a Ruling on the Merits

Speech First brought suit against the University on May 8, 2018. Three days later, it moved for a preliminary injunction. Speech First's motion argued that the University's

definitions of "harassing" and "bullying" were impermissibly vague and overbroad under the First and Fourteenth Amendments. *See* Mot., RE4, PageID#103-08. Speech First likewise argued that the University's policy on "bias incidents," as enforced by the Bias Response Team, was unconstitutionally vague and overbroad. *See id.*, PageID#108-12. On June 11, the United States filed a statement of interest supporting Speech First's claims.

The same day that the United States filed its statement, the University announced that it was changing its definitions of "harassing" and "bullying." It deleted the dictionary definitions and replaced all of the definitions with ones of its own creation. *See* Harper Decl., RE18-4, PageID#395-96, 412-13. In a press release announcing the new definitions, the University admitted that "[t]he definitions are being clarified as U-M prepares to respond to a lawsuit from Speech First." *Id.*, PageID#403. But Vice President Harper has also represented—in cagey language that only a lawyer would draft—that "[p]rior to … [Speech First's] lawsuit, the University was already reviewing its websites and policies to ensure they complied with our First Amendment principles and legal obligations." *Id.*, PageID#395. Harper has also represented that the new definitions of "harassing" and "bullying" were approved by the President and other University leaders, though nothing required the University to go through that process. *Id.*, PageID#396. "These definitions, and no others," Harper avers, "now will govern

the initiation and conduct of disciplinary proceedings involving harassing or bullying." *Id.*, PageID#397. [2]

Like it did with the definitions of "bullying" and "harassing," the University also responded to Speech First's challenge to the Bias Response Team by frantically sanitizing its websites and policies to make them appear less unconstitutional:

- The University deleted the webpage titled "What to Report." That webpage told students that "[t]he most important indication of bias is your own feelings." Harris Decl., RE4-2, PageID#193.

- The University changed its website to state, for the first time, that the Bias Response Team "is not a disciplinary body," that it "cannot impose discipline," that "no one is required to participate in any aspect of its work," that "participation in [its meetings] is entirely voluntary," and that its "sole purpose is to assist those who feel aggrieved by incidents of bias and to promote respect and understanding." *Compare id.*, PageID#169-72, *with* Jones Decl., RE18-5, PageID#454-57.

- The Bias Response Team stopped tracking bias incidents online. After listing more than 100 incidents in 2017 and early 2018, its log contains no entries after May 2018 (when Speech First filed this lawsuit). *See Bias Incident Report Log*, Univ. of Mich., bit.ly/2QuqdpF (last visited Nov. 13, 2018).

- The University also changed its description of the bias incident report log. Instead of stating that the log provides information about bias "incidents that *are* happening on campus," the website now states that the log provides information about "the type of conduct that is *being reported*." *Compare* Harris Decl., RE4-2, PageID#171 (emphasis added), *with* Jones Decl., RE18-5, PageID#456 (emphasis added). The website also states, for the first time, that "the BRT does

[2] When Speech First filed suit, the University also included a definition of "harassment" from the University's Expect Respect initiative. *See* Harris Decl., RE4-2, PageID#146 ("unwanted negative attention *perceived as* intimidating, demeaning or bothersome to an individual" (emphasis added)). That definition remains on the University's website. *See Expect Respect Definitions*, Univ. of Mich., bit.ly/2DrjsSD (last visited Nov. 13, 2018).

not make determinations or judgments about whether bias occurred." Jones Decl., RE18-5, PageID#456.

- According to a declaration filed in this case, the Bias Response Team no longer has its members meet with the perpetrators of bias incidents. It instead directs "someone outside" the Team, like "a faculty member," to meet with them. Galvan Decl., RE18-3, PageID#390. The University's website, however, still tells students that the perpetrators will "meet with a member of the BRT." Jones Decl., RE18-5, PageID#456.

Despite all these eleventh-hour changes, the University has vigorously defended both the necessity and legality of its original policies. Before making the changes, the University requested an extension of time to file its opposition to Speech First's motion for a preliminary injunction. In that request, the University did not inform the court that it was working to change its policies; instead, it stated that "[t]he policies and programs at issue here are of *fundamental importance* to the University and its students." Mot. for Extension, RE9, PageID#287 (emphasis added). Even after the University overhauled its definitions of "harassing" and "bullying," it insisted that its original policy "easily met constitutional standards." Opp., RE18, PageID#363; *see also id.*, PageID#364 ("[E]ven if Plaintiff's claims based upon the discarded definitions were not moot, they would lack merit."); *id.*, PageID#358 (similar).

IV. The District Court's Decision

The district court denied Speech First's motion for a preliminary injunction. While it agreed that Speech First had standing to challenge the University's harassment and bullying policies, *see* Order, RE25, PageID#972-73, the court concluded that any controversy became moot once the University deleted the challenged interpretations of

those policies. The district court recognized that a defendant's voluntary cessation ordinarily does not moot a case, but concluded that "[n]othing suggests … the University will resume using the challenged definitions." *Id.*, PageID#986. The district court was not persuaded by the fact that the University had engaged in similar misconduct in the past, noting that *Doe* was "*thirty years ago*." *Id.*

The district court next concluded that Speech First lacked Article III standing to challenge the University's policy on bias incidents. *See id.*, PageID#975-83. To prove standing, the district court reasoned, Speech First needed to show that the Bias Response Team objectively chills student speech, and with the same amount of evidence that it would need to defeat a summary-judgment motion. *Id.*, PageID#975-76. The district court concluded that Speech First had not made that showing. Quoting the information that the University added to its website *after* Speech First challenged the constitutionality of the Bias Response Team, the district court noted that the Team "cannot impose discipline" and that its processes are "voluntary." *Id.*, PageID#976-77. The district court also cited a declaration from a member of the Bias Response Team, which stated that "in most cases" she does not contact the students accused of bias incidents and that most students decline to meet with her. *Id.*, Page#977.

Speech First timely appealed.

SUMMARY OF ARGUMENT

For years, the University of Michigan has chilled unpopular speech on campus with harassment and bullying policies that could not withstand even a whiff of

constitutional scrutiny, and an elaborate administrative apparatus that roots out "bias incidents" based on a definition that turns on offended students' "own feelings." When Speech First turned a spotlight on these First Amendment violations, the University rushed to rewrite its unconstitutional policies in a transparent effort to avoid a ruling on the merits. That maneuver failed when the University tried it in *Doe*, and it should fare no better this time around. Speech First is likely to succeed on the merits of its claims and meets all the criteria for entry of a preliminary injunction.

I. The University cannot moot Speech First's challenge to its harassment and bullying policies merely by deleting those definitions after getting sued. A defendant's voluntary cessation does not moot a case unless it is "absolutely clear" that the illegal conduct will not recur. That standard cannot be met when no legal or practical obstacle prevents the defendant from switching back to its earlier policy. That is precisely the case here, where the University could revert to its old policies with a few clicks of a mouse. Further undermining the University's mootness argument is the fact that it changed its policies only *after* being sued, has never recognized the obvious constitutional flaws with its now-deleted policies, and has engaged in similar conduct before. This Court should reject the University's efforts to evade constitutional scrutiny of its speech code.

II. Speech First has standing to challenge the University's policy on "bias incidents," which is enforced through the Bias Response Team. The district court correctly noted that the key question is whether the Bias Response Team objectively

chills students' speech. But the court was wrong to suggest that the Bias Response Team does not do that. By establishing the Bias Response Team and all its bureaucratic accoutrements, the University sends students a message: If you want to say something "biased" that might hurt another student's "feelings," prepare to be reported, logged, investigated, interrogated, stigmatized, and potentially disciplined. The idea that this process can be brushed aside as "voluntary" ignores the dynamics between college students and university administrators, and ignores the fact that the Bias Response Team is deliberately designed to look and feel like a disciplinary body. As others have recognized, "universities with Bias Response Teams are playing a 'dangerous constitutional game' by not explicitly prohibiting protected speech but creating a 'process-is-punishment' mechanism that deters people from speaking out." *Bias Response Team Report*, *supra*, at 28.

III. If this Court agrees with Speech First on mootness and standing, it should also hold that Speech First readily satisfies each of the other criteria for a preliminary injunction. As Speech First and the United States have explained, the University's definitions of "harassing," "bullying," and "bias incidents" are vague and wildly overbroad restrictions on protected speech. Courts in and out of this Circuit routinely strike down similar restrictions, which is why the University spent more time trying to erase these policies than defending them in court. Because these policies are likely unconstitutional, the other preliminary-injunction factors necessarily favor Speech

First. This Court should thus reverse (rather than vacate) the district court's decision and remand with instructions to grant the preliminary injunction.

ARGUMENT

Speech First is entitled to a preliminary injunction if it identifies a likely violation of the First Amendment. When a plaintiff proves a likely First Amendment violation, there is "'no issue as to the existence of the remaining preliminary injunction factors.'" *ACLU Fund of Mich. v. Livingston Cty.*, 796 F.3d 636, 649 (6th Cir. 2015). That is because even a "'minimal'" deprivation of First Amendment rights "'irreparabl[y]'" harms the plaintiff, and neither the defendant nor the public has an interest in enforcing an unconstitutional policy. *Bays v. City of Fairborn*, 668 F.3d 814 (6th Cir. 2012). This Court reviews the likelihood of a First Amendment violation de novo. *Id.* at 819.[3]

Given the district court's reasoning, the two questions for this Court's review are (1) whether Speech First's challenge to the Statement is moot and (2) whether Speech First has standing to challenge the Bias Response Team. Again, Speech First must show only a *likelihood* of non-mootness and standing. A likelihood means a "'prima facie case'"—not a "certainty," or a right that is "'wholly without doubt." *Issa v. Sch. Dist. of Lancaster*, 847 F.3d 121, 131 (3d Cir. 2017); *accord Blount v. Societe Anonyme du Filtre*

[3] After considering the merits, the district court also considered the other preliminary-injunction factors. But its rulings on those factors turned entirely on its assumption that Speech First was not likely to succeed on the merits. *See* Order, RE25, PageID#987-88. Elsewhere, the district court acknowledged that the merits are usually "determinative" when the plaintiff seeks a preliminary injunction in a constitutional case. *Id.*, PageID#969 (quoting *Bailey v. Callaghan*, 715 F.3d 956, 958 (6th Cir. 2013)).

Chamberland Systeme Pasteur, 53 F. 98, 101 (6th Cir. 1892) (Jackson, joined by Taft, JJ.). Speech First has made that showing on both questions.

I. The University's voluntary cessation did not moot Speech First's challenges to the policies on harassment and bullying.

In the district court, Speech First argued that the Statement's policies on harassment and bullying are unconstitutional because the University had adopted subjective definitions of those prohibitions that, by their plain terms, reached protected speech. *See* Motion, RE4, PageID#103-08. After Speech First filed its complaint, however, the University deleted these definitions. The district court concluded that this unilateral change likely mooted Speech First's claims. It did not. Voluntary cessation of illegal conduct ordinarily does not moot a case. The ordinary rule governs here because no practical or legal impediment prevents the University from reverting to the unconstitutional definitions. That risk is particularly high given the timing of the University's actions, its continued defense of the original definitions, and its history of engaging in similar conduct in the past. The fact that the University is a state actor does not change this analysis.

"It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Otherwise, "courts would be compelled to leave the defendant free to return to his old ways." *Id.* at 289 n.10 (cleaned up). If the government could moot a case by voluntarily changing a

challenged policy, then it "could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where it left off, repeating this cycle until it achieves all its unlawful ends." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 n.* (2018) (cleaned up). And the government could frustrate "the 'public interest in having the legality of the practices settled.'" *DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974).

Courts have recognized a "narrow exception" to the "general rule" that voluntary cessation does not moot a case. *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 712 (6th Cir. 2016), *rev'd on other grounds*, 138 S. Ct. 1833 (2018). Voluntary cessation can moot a case "only if it is '*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000). Because this standard "is a stringent one," *City of Mesquite*, 455 U.S. at 289 n.10, it is a "'rare instance'" in which it will be satisfied, *A. Philip Randolph*, 838 F.3d at 712 (quoting *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 473 (6th Cir. 2008)). Even if the defendant's likelihood of resuming its illegal conduct is "'too speculative to support standing,'" a speculative possibility can still "'overcome mootness.'" *Adarand*, 528 U.S. at 224. Further, it is "the defendant"—not the plaintiff—who "bears 'the formidable burden of showing'" mootness from voluntary cessation. *Tree of Life Christian Sch. v. City of Upper Arlington*, 823 F.3d 365, 371 n.4 (6th Cir. 2016); *accord A. Philip Randolph*, 838 F.3d at 713. This burden is "heavy." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007).

A defendant does not carry its heavy burden when no practical or legal obstacle prevents it from returning to its prior policy. The following cases illustrate this principle:

- In *Akers v. McGinnis*, the plaintiffs challenged the constitutionality of a rule promulgated by the Michigan Department of Corrections, which barred prison employees from contacting certain people outside of work. 352 F.3d 1030, 1033-34 (6th Cir. 2003). After the plaintiffs sued, the Department relaxed its rule. *Id.* at 1034. This voluntary cessation did not moot the case, according to this Court, because "the promulgation of work rules appears to be solely within the discretion of the [Department]." *Id.* at 1035. Thus, there was "no guarantee that [the Department] will not change back to its older, stricter Rule as soon as this action terminates." *Id.*

- In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, a church challenged a Missouri agency's policy of excluding churches from a grant program. 137 S. Ct. 2012, 2017 (2017). One week before oral argument, the Governor directed the agency to end the policy. *Id.* at 2019 n.1. The Supreme Court held that this voluntary cessation did not moot the case. Absent a decision finding the challenged practice unlawful, Missouri remained free to "revert to its policy of excluding religious organizations." *Id.*

- In *Tree of Life*, the plaintiffs challenged a city's zoning ordinance as discriminatory because it barred religious schools from a certain area but allowed nonreligious daycares. 823 F.3d at 371. While the litigation was pending, the city amended the ordinance to bar daycares as well. *Id.* at 371 n.4. This voluntary cessation did not moot the case because "absent an injunction …, [the city] always could amend the [ordinance] once again to allow daycares." *Id.* And it could do so "at any time." *Id.*

As the Ninth Circuit recently explained, the lesson of these cases is that "the form the governmental action takes is critical"; actions that are "'easily abandoned or altered in the future'" or that are "'not governed by any clear or codified procedures'" simply "'cannot moot a claim.'" *Fikre v. FBI*, 904 F.3d 1033, 1038 (9th Cir. 2018).

Here, the University could easily undo its unilateral changes to the definitions of "harassing" and "bullying." While the Statement itself cannot be amended except

through a formal amendment process, *see* Harris Decl., RE4-2, PageID#137, the definitions *interpreting* the prohibitions in the Statement can be changed unilaterally by University employees. The definitions are maintained on OSCR's website, and the University has no clear procedures limiting what definitions can be included, who can change them, or when. In fact, Harper admits that the initial definitions were adopted without the "consider[ation] and approv[al]" of University leadership. Decl., RE18-4, PageID#396. While the more recent definitions were approved by the President and emailed to students and faculty, *see id.*, PageID#395-96, no rules or procedures required the University to do that. And no rules or procedures require the University to do it again in the future. Changing the website thus cannot moot this case because it "appears to be solely within the discretion of the [University]," *Akers*, 352 F.3d at 1035, and can be undone "at any time" with a few clicks of a mouse, *Tree of Life*, 823 F.3d at 371 n.4.

The only reason to believe that the University will not resume its illegal conduct is Harper's assertion that the new "definitions, and no others, now will govern," Harper Decl., RE18-4, PageID#397, but that is plainly insufficient under governing law. Notably, Harper states that the new definitions "now" govern, but does not state that the University will never use the illegal definitions again. Even if she had "'told the court that the [challenged definitions] no longer existed and disclaimed any intention to revive them,'" "'[s]uch a profession does not suffice to make a case moot.'" *United States v. Atkins*, 323 F.2d 733, 739 (5th Cir. 1963) (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953)); *accord Rosemere Neighborhood Ass'n v. EPA*, 581 F.3d 1169, 1174

(9th Cir. 2009) ("The bare assertion by the [government] that this situation will not recur is not sufficient to [moot] this case." (cleaned up)); *ACLU v. The Fla. Bar*, 999 F.2d 1486, 1494-95 (11th Cir. 1993) ("[B]ecause neither the [defendant] nor [its agent] is bound by its court statements," "a reasonable expectation exists that this wrong will be repeated."). Harper's declaration is especially inadequate because she cannot "speak for her superiors, nor have they signed affidavits pledging future compliance." *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 491-92 (D.C. Cir. 1988). And even if her superiors had signed affidavits, "the word of the present Registrars" is "not sufficient to make the case moot" because it is "not binding on those who may hereafter be appointed." *Atkins*, 323 F.2d at 739.

In short, there is no meaningful constraint on the University's ability to return to its prior, unconstitutional interpretations of "harassing" and "bullying." That fact alone is sufficient to defeat a finding of mootness. Courts required no more in *Akers*, *Trinity Lutheran*, and *Tree of Life*, and this Court should require no more here.

But there is more. For starters, the voluntary cessation in this case occurred only "once this lawsuit was filed." *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 343 (6th Cir. 2007). "Changes made by defendants after suit is filed do not remove the necessity for injunctive relief," *Gates v. Collier*, 501 F.2d 1291, 1321 (5th Cir. 1974), because "the fact that the voluntary cessation only appears to have occurred in response to the present litigation … shows a greater likelihood that it could be resumed," *Northland Family Planning*, 487 F.3d at 342-43. The University did not remove the illegal

definitions of "bullying" and "harassing" from its website until June 11—a month after Speech First filed its complaint, after Speech First had already filed its opening brief regarding the preliminary injunction, a few days before the University's opposition was due, and the same day that the United States filed a statement of interest supporting Speech First's case against the University.

The course of this litigation is remarkably similar to what happened in *A. Philip Randolph*. There, the plaintiffs argued that Ohio's change-of-residence notice required too much information from voters and "did not adequately inform [them] of the consequences of failing to respond." 838 F.3d at 703. Two months after the complaint was filed and one day before the parties' final briefs on the preliminary injunction were due, the Ohio Secretary of State amended the notice to resolve these challenges. *Id.* at 703-04. This Court held that the Secretary's voluntary cessation did not moot the plaintiffs' challenges to the old notice. *Id.* at 713-14. First, the new notice "was issued pursuant to the Secretary's 'directive,' rather than any legislative process"; "[t]hus, this is not a case in which reversing the cessation would be particularly burdensome." *Id.* at 713. Second, "because the Ohio Secretary of State is an elected official, there remains a distinct possibility that a future Secretary will be less inclined to maintain the confirmation notice in its current form." *Id.* Third, the Secretary issued the new notice "on the same day as the parties' final merits briefs were due before the district court,"

which "makes the Secretary's voluntary cessation appear less genuine" and "do[es] not inspire confidence in his assurances regarding the likelihood of recurrence." *Id.*[4]

This Court could practically copy-and-paste the analysis from *A. Philip Randolph* to resolve this case. Just like the Ohio Secretary of State, the University made the relevant changes only after being sued, could easily renege on its voluntary cessation, and could not stop future officials from doing so. Although Harper's declaration asserts that "[p]rior to … this lawsuit, the University was already reviewing its websites and policies to ensure they complied with our … legal obligations," Harper Decl., PageID#395, this vague, self-serving assertion adds nothing. Universities and their general counsel should *always* be "reviewing [their] policies to ensure they compl[y] with [their] legal obligations"; if this kind of routine review could justify voluntary cessation, then universities would have an unchecked power to moot lawsuits and evade constitutional scrutiny of their policies.

Importantly, Harper does not say that the University was reviewing *its definitions of "harassing" and "bullying"* before this lawsuit—definitions it had maintained for years.

[4] In addition to the contents of the notice, the plaintiffs in *A. Phillip Randolph* challenged the process by which Ohio removed voters from the rolls. *See* 838 F.3d, at 702-03. This Court invalidated that process, but the Supreme Court granted certiorari on that question and reversed this Court's judgment. 138 S. Ct. at 1848. Importantly, the Supreme Court did not review the plaintiffs' challenges to the contents of the notice, much less reverse this Court's holding that those challenges were not moot. Thus, the mootness holding in *A. Philip Randolph* is still good law and continues to bind panels of this Court. *See Joseph v. Coyle*, 469 F.3d 441, 458 (6th Cir. 2006) (treating as precedential a panel opinion that was reversed by the Supreme Court because the "reversal was in response to [a different] holding" and "[t]he Supreme Court did *not* disturb" the relevant holding); *accord Cent. Pines Land Co. v. United States*, 274 F.3d 881, 894 (5th Cir. 2001); *NAACP, W. Region v. City of Richmond*, 743 F.2d 1346, 1354 n.7 (9th Cir. 1984).

See Chaffin v. Kan. State Fair Bd., 348 F.3d 850, 865 (10th Cir. 2003) (rejecting mootness when the defendant enacted its new plan "two weeks after summary judgment papers were filed" because it "should have performed its self evaluation … years ago" (emphasis omitted)). Nor does Harper say that the University decided to *change* its definitions before this lawsuit. *See Porter v. Clarke*, 852 F.3d 358, 364 n.3 (4th Cir. 2017) (rejecting mootness because, "regardless of when the policy changes were first *considered*, the changes were *made* only after this case was initiated" (emphases added)); *Doe*, 721 F. Supp. at 860 (similar). All that Harper says in her declaration is that the University was generally reviewing the legality of *all* its websites and policies. Even if this vague ipse dixit is true, it "cannot overcome a court's wariness of applying mootness … 'when abandonment seems timed to anticipate suit.'" *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015).

Nor can the University overcome the fact that it has continued to "defend[] the constitutionality of its [original policy]." *Parents Involved*, 551 U.S. at 719. Consider *DeJohn v. Temple University*, where the plaintiff argued that Temple University's harassment policy violated the First Amendment. "[L]ess than three weeks before the deadline for filing dispositive motions," Temple changed its harassment policy in an attempt to moot the plaintiff's claims. 537 F.3d 301, 306 (3d Cir. 2008). The Third Circuit held that this voluntary cessation did not moot the case, even though Temple "never stated that it only changed its policy pending the outcome of this litigation," because Temple

had defended both "the constitutionality of its prior sexual harassment policy" and "the *need* for the former policy." *Id.* at 310.

The University did the same thing here. In opposing the preliminary injunction, the University repeatedly described its challenged policies as "critical" and "fundamental." *E.g.*, Opp., RE18, PageID#368; Mot. for Extension, RE9, PageID#287. And it argued that its definitions of "bullying" and "harassing" "easily met constitutional standards" "[e]ven before the University [changed them]." Opp., RE18, PageID#363; *accord id.*, PageID#364, 358.

The University defended its prior definitions on the ground that, however broad and subjective they might be, the Statement is constitutional because it promises not to discipline students for their constitutionally protected expression. *See id.*, PageID#364, 354-55. But this Court has squarely rejected the suggestion that a boilerplate invocation of the First Amendment can salvage an otherwise unconstitutional policy. *See Dambrot v. Cent. Michigan Univ.*, 55 F.3d 1177, 1183 (6th Cir. 1995). Still, the University continues to assert that it can adopt whatever vague, subjective, or overbroad speech restrictions it wants, so long as it includes a disclaimer that it will comply with the First Amendment. That breathtaking assertion should make this Court pessimistic about the University's assurances that it will not backslide on the recent changes to its interpretation of the Statement.[5]

[5] At times, the University framed its arguments about what the Statement prohibits in terms of Article III standing. *See, e.g.*, Opp., RE18, PageID#354-55 (challenging the students' standing

This Court should be doubly pessimistic about the University's eleventh-hour changes to its policies because it took these same actions and made these same arguments in *Doe*. *See City of Mesquite*, 455 U.S. at 289 (rejecting mootness where the defendant had attempted voluntary cessation in the past); *Gluth v. Kangas*, 951 F.2d 1504, 1507 (9th Cir. 1991) (rejecting mootness where the defendant had a "history" of past violations). Both here and there, the University adopted vague, subjective "harassment" policies that violated its students' First and Fourteenth Amendment rights. *See Doe*, 721 F. Supp. at 858-69. And both here and there, the University tried to repeal its policies after it got caught and the policies were challenged in court. *See id.* at 856, 858, 868. The *Doe* court—after witnessing the University's flagrantly unconstitutional policies, its "eleventh hour" procedural tactics, and its attempts to avoid "coming to grips" with the merits—concluded that "the University had no idea" about the limits of its own policy or the First Amendment, and "was essentially making up the rules as it went along." *Id.* at 868, 859. The similarities between this case and *Doe* reveal that, while the University's personnel might have changed, its philosophy toward free speech (and its eagerness to evade judicial review) have not.

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because "[t]here is no credible threat that the University would … seek to punish students for speaking publicly about politics and policy"). The University made the same move in *Doe*. *See* 721 F. Supp. at 858 ("The University … questioned Doe's standing to challenge the Policy, saying that it has never been applied to sanction … legitimate ideas and that Doe did not demonstrate a credible threat of enforcement"). As the court explained there, the University's insistence that students cannot even *challenge* its policies only demonstrates the need for injunctive relief. "These arguments serve[] only to diminish the credibility of the University's argument on the merits because it appear[s] that it sought to avoid coming to grips with the constitutionality of the Policy." *Id.* at 858-59.

The district court emphasized that the events in *Doe* took place "*thirty years ago*." Order, RE25, PageID#986. But the University has not submitted any evidence that the actions described in *Doe* were isolated events or that its recent changes to its website have eliminated the chill that it imposed on Speech First's members—factual questions on which the University, not Speech First, has the burden of proof. *See Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 531-33 (6th Cir. 2001); *A. Philip Randolph*, 838 F.3d at 713. In fact, the University *still* has a subjective definition of "harassment" on its website. *See Expect Respect Definitions*, *supra* ("**Harassment** – unwanted negative attention perceived as intimidating, demeaning or bothersome to an individual.").

Nor is thirty years very long in the life of a University. Not counting interims, only two University Presidents separate the President in charge when *Doe* was decided and the President in charge now. *See Past Presidents*, Univ. of Mich., bit.ly/2AOH94v (last visited Nov. 13, 2018). This fact underscores how easy it is for a change in administration to lead to the revival of previously abandoned policies. *See Atkins*, 323 F.2d at 739; *A. Philip Randolph*, 838 F.3d at 713. At the very least, the fact that the University's illegal conduct *has* recurred at least once should make it very hard for the University to prove that it is "absolutely clear that [its] allegedly wrongful behavior could not reasonably be expected to recur." *City of Mesquite*, 455 U.S. at 289 n.10.

Finally, the district court suggested (but did not decide) that the "*Friends of the Earth* standard"[6] might not apply here because courts give "'more solicitude'" to voluntary cessation by state actors than by private defendants. Order, RE25, PageID#984-85. This Court should not adopt that suggestion. The Supreme Court recently applied the *Friends of the Earth* standard to voluntary cessation by a state actor. *See Trinity Lutheran*, 137 S. Ct. at 2019 n.1 (quoting *Friends of the Earth*, 528 U.S. at 189). And the Supreme Court has never held that state actors should receive "more solicitude" when they attempt to voluntarily moot a case. This Court has endorsed such a rule, but only in cases involving *legislative* changes—which makes sense, because legislation binds future actors and is "particularly burdensome" to undo. *A. Philip Randolph*, 838 F.3d at 713. This Court has never given special "solicitude" to unilateral policy changes by public universities, and the Supreme Court has stated that the ordinary standard should govern in this context. *See DeFunis*, 416 U.S. at 318.[7]

[6] The "*Friends of the Earth* standard" is the standard that requires defendants to prove it is "'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 981-82 (6th Cir. 2012) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)).

[7] If this Court disagrees and concludes that its precedents *always* give "more solicitude" to *all* state actors, then Speech First reserves the right to challenge those precedents via rehearing en banc or certiorari. The identity of the parties should have nothing to do with the question posed by Article III—*i.e.*, whether there is a live case or controversy for the court to resolve. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 536 (2007) (Roberts, C.J., dissenting). And the idea that state actors are inherently more trustworthy—or inherently less likely to resume illegal conduct—turns 42 U.S.C. §1983 on its head. *Cf. Mitchum v. Foster*, 407 U.S. 225, 240-42 (1972).

In any event, giving "more solicitude" to the University would not change the outcome here. As this Court has explained, a state actor "still bears a heavy burden" to prove mootness by voluntary cessation, *Northland Family Planning*, 487 F.3d at 342, and the "solicitude" that courts give it "does not carry much of [its] burden," *A. Philip Randolph*, 838 F.3d at 713. So "solicitude" notwithstanding, a state actor cannot prove mootness when nothing prevents it from reverting to its old policy. *See supra* at 21-23. And a state actor does not come close to proving mootness when its changes came only after it was sued, when it continued to defend its old policies, or when it has a history of similar policies and tactics. *See supra* at 23-29.

In short, this Court should hold that the University's voluntary changes to its interpretations of the Statement did not moot Speech First's challenges to the subjective and expansive definitions of "bullying" and "harassing." If the University truly intended to never use those definitions again, then it should have no problem "agree[ing] to a judgment declaring [them] unconstitutional." *Associated Gen. Contractors of Am. v. City of Columbus*, 172 F.3d 411, 420 (6th Cir. 1999). But without an injunction, there is no guarantee that the University will not revert to its old ways. Blessing the University's conduct in this case, and allowing it to escape an injunction here, would give all universities in this Circuit "'a powerful weapon against public law enforcement.'" *Weaver v. Univ. of Cincinnati*, 942 F.2d 1039, 1042 (6th Cir. 1991).

II. Speech First has standing to challenge the University's policy on bias incidents because the Bias Response Team objectively chills speech.

In the district court, Speech First argued that the University's policy on "bias incidents," as enforced by the Bias Response Team, is unconstitutionally vague and overbroad. *See* Motion, RE4, PageID#108-12. Yet the district court concluded that Speech First lacked Article III standing to challenge this policy because the Bias Response Team does not chill the average student's speech. In support of that holding, the court quoted the recent revisions to the University's website, which now state that the Bias Response Team is "not a disciplinary body" and that its processes are "voluntary."

The district court erred. The government violates the First Amendment whenever it objectively chills speech, even if it does not directly regulate the plaintiff and uses purportedly "voluntary" methods. "'What matters is the distinction between attempts to convince and attempts to coerce'"—between "government expression and [government] intimidation." *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230 (7th Cir. 2015). The Bias Response Team falls on the coercion/intimidation side of the line.

Before diving into that question, it is important to note that Speech First easily satisfies the general requirements for Article III standing. The district court did not dispute that, *if* the University's policy on bias incidents chills students' speech, then Speech First has standing to challenge it. Nor could it. It is "well-settled" that a "chilling effect" on First Amendment freedoms "constitutes a present injury in fact." *G&V*

Lounge, Inc. v. Mich. Liquor Control Comm'n, 23 F.3d 1071, 1076 (6th Cir. 1994); *accord Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988); *N.H. Right to Life PAC v. Gardner*, 99 F.3d 8, 13-14 (1st Cir. 1996). To vindicate this injury in a preenforcement challenge, Speech First must establish that (1) its members "inten[d] to engage in a course of conduct arguably affected with a constitutional interest," (2) their "intended future conduct is arguably [covered] by the [policy] they wish to challenge," and (3) "the threat of future enforcement of the [challenged policy] is substantial." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2343-45 (2014) (cleaned up).

All three requirements are satisfied here. First, Speech First's members want to express their views on a host of topics including immigration, race relations, abortion, gun rights, and gender identity, but the presence of the Bias Response Team deters them from engaging in this core protected speech. *See* Neily Decl., RE4-1, PageID#118; Compl., RE1, PageID#27-35. Second, someone at the University could easily conclude that the students' speech on these topics constitutes a "bias incident," given the breadth and subjectivity of the University's definition of that term and its warning that "[a] bias incident may involve speech that is protected by the First Amendment." Jones Decl., RE18-5, PageID#456; *see also id.*, PageID#427 (admitting that "political speech has been reported"). Third, the students face a credible threat of being subjected to the Bias Response Team and its processes for dealing with bias incidents. The students' views are controversial on campus, bias incidents are easy to report, and the University receives and addresses more than 100 such incidents a year. *See Susan B. Anthony List*,

134 S. Ct. at 2345. Accordingly, Speech First has standing to challenge the University's regulation of bias incidents, even though its members have not yet been accused of committing one.

The University has argued that it does not even *regulate* students who commit bias incidents—that it merely supports students who claim to be victims of bias. Opp., RE18, PageID#366-67. That is demonstrably false. The University maintains formal definitions of "bias incident" and related terms. Harris Decl., RE4-2, PageID#164-66. If a student commits a bias incident under this definition, that action can trigger a cascade of administrative processes and consequences. The Bias Response Team logs the incident on a public website. *Id.*, PageID#197-261. It investigates what happened, creates a plan of action, and implements that plan with follow-up. *Id.*, PageID#171, 174. If the reporting student agrees, the Bias Response Team will request a meeting with the perpetrator. Jones Decl., RE18-5, PageID#456. The Bias Response Team can also refer the matter to the police, university disciplinary authorities, faculty members, and others for formal or informal discipline. *See supra* at 11. These are real consequences, and they attach to students who commit "bias incidents" under the University's amorphous definition of that term. The University blinks reality by suggesting that this scheme is not a "regulation" at all. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68-72 (1963).

Accordingly, the question in this case is not whether the University regulates bias incidents. It does. The real question is whether the *consequences* that result from conduct being labeled a bias incident amount to a cognizable First Amendment injury. They do.

"It is settled that governmental action which falls short of a direct prohibition on speech may violate the First Amendment by chilling the free exercise of speech." *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992). "Informal measures" such as "'threat[s]'" and "'other means of coercion, persuasion, and intimidation,'" can themselves "violate the First Amendment." *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) (quoting *Bantam Books*, 372 U.S. at 67). Courts recognize the reality that "indirect 'discouragements'" often "have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions, or taxes." *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 402 (1950). While government officials are free to engage in speech of their own, there is a "difference between government expression and intimidation—the first permitted by the First Amendment, the latter forbidden by it." *Backpage.com*, 807 F.3d at 230. Whatever form it takes, the government violates the First Amendment when its conduct would "'chill or silence a person of ordinary firmness'" from engaging in the protected speech. *White*, 227 F.3d at 1228.

Implicit threats and intimidation by government actors routinely satisfy this standard, even when they are framed as calls for voluntary "dialogue" with an official who lacks direct regulatory authority. For example, in *Okwedy v. Molinari*, the plaintiff rented billboards in Staten Island to post messages denouncing homosexuality. 333 F.3d

339, 341 (2d Cir. 2003). The President of the Staten Island Borough wrote a letter to the billboard company, on official letterhead, stating that the billboards were "unnecessarily confrontational and offensive" and "convey[ed] an atmosphere of intolerance which is not welcome in our Borough." *Id.* at 341-42. The President asked the company to "contact" the "Chair of [the] Anti-Bias Task Force" to "establish a dialogue" and "discuss" these issues. *Id.* He "call[ed] on [the company] as a responsible member of the business community," reminding it that it "owns a number of billboards on Staten Island." *Id.* at 342. But the President had no authority over billboards. *Id.* at 343.

The Second Circuit, in an opinion joined by then-Judge Sotomayor, reversed the dismissal of the plaintiff's First Amendment claim. A jury could find that the President's letter crossed the line "between attempts to convince and attempts to coerce." *Id.* at 344. The letter harkened to the President's "official authority" and "call[ed] on" the billboard company to contact his anti-bias task force. *Id.* "Even though [the President] lacked direct regulatory control over billboards," the company "could reasonably have feared that [he] would use whatever authority he does have" against it. *Id.* And the fact that the letter called for "dialogue" did not necessarily dissipate this "implicit threat." *Id.*

These principles also apply in the university setting. In *Levin*, the plaintiff was a college professor who had written inflammatory articles about race. 966 F.2d at 87 (citing 770 F. Supp. 895, 902-03 (S.D.N.Y. 1991)). In response to his articles, the

University took two actions. First, it allowed students assigned to the professor's class to transfer to an "alternative" section. *Id.* at 87-88. Even though the professor was still allowed to teach, the Second Circuit held that the University violated his First Amendment rights by "'stigmatizing'" him with the creation of these "shadow classes." *Id.* at 88. Second, the President of the University created a Committee on Academic Rights and Responsibilities to study "when speech … may go beyond the protection of academic freedom or become conduct unbecoming a member of the faculty, or some other misconduct." *Id.* at 89. (The words "conduct unbecoming" ominously mirrored the language used in the University's disciplinary code for professors. *Id.*) The Second Circuit held that the creation of this committee independently violated the professor's First Amendment rights. Even though the committee was "purely advisory, utterly lacking the power to take action," and even though the President never "explicitly" threatened disciplinary charges, the court held that the committee's existence was an "implicit threat" that chilled the professor's speech. *Id.* at 89-90. "It is the chilling effect on free speech that violates the First Amendment, and it is plain that an implicit threat can chill as forcibly as an explicit threat." *Id.*

The Supreme Court confronted another scheme to chill speech in *Bantam Books*. Because the First Amendment strictly circumscribes States' power to regulate obscenity, Rhode Island tried to circumvent that limitation by creating a Commission to Encourage Morality in Youth. 372 U.S. at 59. The Commission's mission was to "educate the public" about printed materials that contain "obscene, indecent or impure

language, or manifestly tend[ed] to the corruption of the youth." *Id.* The Commission would circulate "lists of objectionable publications," receive "complaints from outraged parents," "investigate" incidents, and "recommend legislation, prosecution and/or treatment" to address these incidents. *Id.* at 60 n.1. If the Commission concluded that a book was "objectionable," it would send a notice to the publisher stating its conclusion and thanking the publisher for its "cooperation" in preventing its spread. *Id.* at 62-63. A "local police officer" would follow up with the publisher shortly thereafter. *Id.* at 63. Yet the Commission had no power to force publishers to withdraw the materials or sanction them if they refused.

The Supreme Court concluded that this regime violated the First Amendment. The Commission's definition of "objectionable" material was unconstitutionally vague and overbroad. *Id.* at 65-66, 71. True, the Commission had no "power to apply formal legal sanctions," *id.* at 66, and the publishers were "'free' to ignore the Commission's notices, in the sense that [their] refusal to cooperate would have violated no law," *id.* at 68. But the Supreme Court "look[ed] through forms to the substance" and noted that "[p]eople do not lightly disregard public officers' thinly veiled threats." *Id.* at 67-68. "The Commission deliberately set out to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim." *Id.* at 67. Because it "acted as an agency not to advise but to suppress," the Commission violated the First Amendment. *Id.* at 72.

The Bias Response Team is the 21st-century version of the Commission to Encourage Morality in Youth. Instead of obscenity, the Bias Response Team takes aim at "bias incidents"—*i.e.*, speech that "discriminates, stereotypes, excludes, harasses, or harms anyone … based on their identity." Harris Decl., RE4-2, PageID#169. The definition of "bias incident" is wildly overbroad, and the University tells students that its application turns on the listener's "own feelings." *Id.*, PageID#193. When the Bias Response Team (or any individual student) concludes that speech is "biased," that determination triggers a multi-step administrative process. Although the University (now) frames that process as "voluntary" and contends that the Bias Response Team merely seeks to "educate" students, the Team's true purpose is to *prevent* "biased" speech from occurring in the first place. And it has achieved that purpose, as Speech First's members and countless others have attested. The University has attached a "voluntary" label to this process in an attempt to escape First Amendment scrutiny, but this Court must "look through forms to the substance" of what is happening. *Bantam Books*, 372 U.S. at 68. The University has committed a First Amendment wrong, and federal law provides a First Amendment remedy.

The Bias Response Team—its structure, its members, its terminology, its procedures, and even its name—is unquestionably designed to resemble a disciplinary apparatus. The members of the Team are university administrators, including police officers and disciplinarians, and they contact students in that capacity. *Cf. Backpage.com*, 807 F.3d at 231. The University takes pains to define key terms such as "bias incident"

to invoke the notion of a formal rule. It even tells students that bias incidents are "[s]imilar to hate crimes," and labels the students who commit them "offenders." *Cf. id.* at 231-32. Aggrieved students file "reports," like they would at the police station, and administrators stay after hours to make sure they receive them. Reports can be filed anonymously, which makes little sense if the only point is to support the victim. Reports are also formally logged, and the University holds itself accountable to reporters by disclosing what responses it took. While the University resists the word "investigation," the Bias Response Team collects reports from witnesses, meets with the offended student(s), attempts to meet with the perpetrator, and refers its conclusions to the appropriate authority. Its focus on "facilitated dialogue" and "restorative justice" harken back, ominously, to the University's disciplinary code. *See* Harris Decl., RE4-2, PageID#130. Even its name reveals its disciplinary bent. It is the Bias *Response* Team, not the Bias *Support* Team (or even the Bias *Education* Team). The resulting message to students is loud and clear: If you commit a "bias incident," you are in trouble.

While the district court emphasized that the Bias Response Team lacks the power to *formally* discipline students, that is only half true. The Team certainly *appears* to have that power, which is all that it needs to threaten students and objectively chill their speech. *See Bantam Books*, 372 U.S. at 67-68; *Levin*, 966 F.2d at 89. Further, some members of the Bias Response Team *do* have the power to formally discipline students—namely, the police officers and OSCR members. A student could be forgiven for thinking that the Bias Response Team and the University's disciplinary arm are one

and the same, or that members of the Team will "use whatever authority [they] do[] have, as [university administrators]." *Okwedy*, 333 F.3d at 344. The Bias Response Team also likes to remind students that bias incidents "may violate laws and/or U-M policies." Harris Decl., RE4-2, PageID#193, 171, 182. In fact, the University recently amended the Statement to make "bias" an element of a disciplinary violation. *See id.*, PageID#263-64. In short, whether or not the Bias Response Team has formal disciplinary authority, a reasonable student would certainly get that impression. Article III does not require "[students], who are looking down the barrel of the [University]'s disciplinary gun, … to guess whether the chamber is loaded." *Wollschlaeger v. Gov'r of Fla.*, 848 F.3d 1293, 1306 (11th Cir. 2017) (en banc).

The Team's lack of formal disciplinary authority is also beside the point because it uses other, "[i]nformal" means of chilling and deterring disfavored speech. *White*, 227 F.3d at 1228. For example, the Bias Response Team can rope in faculty members to speak with a student who is accused of a bias incident—teachers that the student relies on for grades, research opportunities, and letters of recommendation. The Bias Response Team also logs bias incidents on its website for the world to see, with enough information that anyone who is plugged in to campus gossip could identify the perpetrator. These reports forever label students with the scarlet letter of "bias"—something that is "[s]imilar to a hate crime," according to the University, and that makes a student "not welcome" on campus. *Cf. Parsons v. DOJ*, 801 F.3d 701, 712 (6th Cir. 2015) (designating someone a "gang" member impermissibly chilled speech by

damaging his reputation); *Rattner v. Netburn*, 930 F.2d 204, 210 (2d Cir. 1991) (creating a list of businesses that criticized the city was "reminiscent of McCarthyism" and impermissibly chilled speech). Students also understandably fear that these reports will be kept in the University's records, potentially limiting their chances of admission to graduate school or fellowships. Moreover, in all cases, the Bias Response Team will investigate bias incidents and, with the victim's permission, conduct interviews with the accused student. When protected expression is involved, such investigations are themselves a "sanction" that "inhibit[s] … the flow of democratic expression and controversy." *Sweezy v. New Hampshire by Wyman*, 354 U.S. 234, 248 (1957).

The University promises that the Bias Response Team is entirely "voluntary," and (after being sued) amended its website to say so. But this Court should disregard the University's late-breaking attempts to sanitize its websites and policies, since "the court must determine whether standing exists at the time of the filing of the complaint only." *City of Parma*, 263 F.3d at 526; *accord Doe*, 721 F. Supp. at 860. In any event, even "voluntary" processes can objectively chill First Amendment rights when, as here, the government implicitly suggests that there will be consequences for noncompliance. *See Bantam Books*, 372 U.S. at 67-68; *Okwedy*, 333 F.3d at 344. Like a call from OSCR or a talk with a police officer, requests from the Bias Response Team appear anything but optional, especially from the perspective of a college student. These impressionable 18- to 22-year-olds, many living away from their parents for the first time with tens of thousands of dollars in tuition at stake, are unlikely to treat a request from a university

authority figure to have a meeting over accusations of "bias" as "voluntary." In fact, the whole premise behind the Bias Response Team is that college students are so sensitive that unpleasant speech might make them "stop contributing unique perspectives" or "lose all commitment to the community and leave." Harris Decl., RE4-2, PageID#160. The University cannot have it both ways when it comes to student sensitivity.

True, a member of the Bias Response Team stated that, in her first six months on the job, she often did not ask to meet with perpetrators of bias incidents and many perpetrators refused her invitations. Galvan Decl., RE18-3, PageID#389. But these meetings are just one of the ways that the Bias Response Team deters and chills protected expression. *See supra* at 39-42. And regardless, the assurances in this individual's declaration—which were made months after this lawsuit was filed—could not possibly eliminate the chill that gave Speech First standing to file this lawsuit. *See Backpage.com*, 807 F.3d at 234 ("[Plaintiffs] are unlikely to reconsider [their decision not to speak] on the basis of a lawyer's statement … months after the initial threat."). Nor could they eliminate the chill that students will experience going forward, since these assurances do not appear in the University's policies or websites. The member's declaration amounts to little more than a "promise[] to use [the University's policies] responsibly." *United States v. Stevens*, 559 U.S. 460, 480 (2010). "But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." *Id.*

Even if some students declined to meet with this member of the Bias Response Team, that fact proves nothing. An unconstitutional system of coercion and intimidation "is actionable and thus can be enjoined even if it turns out to be empty—the victim ignores it, and the threatener folds his tent." *Backpage.com*, 807 F.3d at 231. The First Amendment "targets conduct that tends to *chill* [speech], not just conduct that *freezes* it completely," and the constitutionality of a particular course of action cannot turn on "the plaintiff's will to fight." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005). Further, the brunt of the harm caused by the Bias Response Team falls on the silent majority of students who, like Speech First's members, self-censor their speech to avoid the Bias Response Team altogether. The Team has no experience with these students—precisely *because* its existence chills speech on campus.

None of this is to say that biased speech by college students is a good thing, or that universities are powerless to address it. "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (opinion of Alito, J.). Universities respect this freedom when they counter hateful speech with speech of their own. But what they cannot do is summon the might of the administrative bureaucracy to make it costly for students to speak their minds in the first place. The stakes could not be higher: Universities "cannot flourish in an

atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy*, 354 U.S. at 250.

A slight tweak in the facts of this case demonstrates the flaws in the University's position. Imagine that in the wake of the September 11th attacks, a public university established a "Patriotism Response Team" to foster a sufficiently patriotic "campus climate." If students witnessed "anti-American incidents" on campus, they could file a report and receive counseling and support about how to cope with unpatriotic actions. The Patriotism Response Team would also contact the offending student and offer to facilitate a "voluntary" conversation about why that student's anti-American actions were hurtful and how the student could be more patriotic in the future. No one could argue with a straight face that the Patriotism Response Team did not even *implicate* the First Amendment and that no student would have standing to challenge it due to its "voluntary" nature. The Patriotism Response Team would instead be roundly criticized—and held unconstitutional—for what it is: a fundamentally coercive policy designed to deter students from expressing disfavored views.

* * *

For all these reasons, Speech First has shown that the Bias Response Team likely imposes an objective chill on student speech. Again, the question at this stage of the litigation is what is *likely*; Speech First does not need to definitively prove the true nature of the Bias Response Team, and this Court is not being asked to render a final judgment

on that question. But looking at the statements from Speech First's members, the Team's design, its purpose, its operation, and common-sense observations about the dynamics between college students and administrators, this Court has more than enough to conclude that the purpose and effect of the Bias Response Team is to purge the campus of "biased" speech. Below, the district court compared the standard for proving a likelihood of standing for a preliminary injunction with the standard for defeating a summary-judgment motion. *See* Order, RE25, PageID#976. If this were summary judgment, there would be no question that Speech First has identified a "genuine dispute of material fact" about the true nature of the Bias Response Team. It has thus demonstrated a likelihood of standing.

III. The University's policies on harassment, bullying, and bias incidents are likely unconstitutional and should be preliminarily enjoined.

If the Court agrees with Speech First on mootness and standing, then Speech First readily satisfies each of the remaining criteria for a preliminary injunction. The merits are straightforward and largely undisputed. The University's definitions of "harassing," "bullying," and "bias incident" are flagrantly unconstitutional—which is probably why the University rushed to change them. Remanding these questions to the district court would thus be wasteful and inefficient.

The University's (now-deleted) definitions of "harassing" and "bullying" are unconstitutionally vague and overbroad. *See* Motion, RE4, PageID#103-08; Statement, RE14, PageID#320-27. According to the Statement, both harassment and bullying can

involve "verbal[]" conduct—*i.e.,* speech. Harris Decl., RE4-2, PageID#127. And the University defines those terms to include speech that the victim *subjectively* finds "harassing" or "bullying." *See id.*, PageID#146 (defining "harassing" to mean "annoy persistently" or "create an unpleasant or hostile situation for"); *id.* (defining "bullying" to mean "frighten, hurt, or threaten" and to include "making … insults"). No level of severity or pervasiveness is required. These features are unacceptable in a university speech code. *See Dambrot*, 55 F.3d at 1184; *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 250-51 (3d Cir. 2010); *DeJohn v. Temple Univ.*, 537 F.3d 301, 317-18 (3d Cir. 2008). The University did not argue otherwise in the district court.

Instead, it defended the dictionary definitions on the grounds that its website included other, more formal definitions and that the Statement disclaimed any intent to punish protected speech. *See* Opp., RE18, PageID#363-64. These arguments are unpersuasive. The University listed the dictionary definitions *first*, and its website never suggested that only some of the definitions were enforceable. *See* Harris Decl., RE4-2, PageID#146, 141. And the fact that the University listed multiple, contradictory definitions is *itself* a reason why its policies are unconstitutionally vague because it leaves too much discretion to OSCR. *See Leonardson v. City of E. Lansing*, 896 F.2d 190, 198 (6th Cir. 1990). Nor could the University's generic disclaimer about the First Amendment override the specific prohibitions in the Statement or eliminate the chill that those policies create. *See Dambrot*, 55 F.3d at 1183.

For the same reasons, the University's definition of "bias incident"—which serves as the trigger for the administrative apparatus of the Bias Response Team—is likewise unconstitutional. *See* Motion, RE4, PageID#108-12; Statement, RE14, PageID#327-30. The University defines a bias incident as "conduct that discriminates, stereotypes, excludes, harasses, or harms anyone in our community based on their identity." Harris Decl., RE4-2, PageID#169. It admits that bias incidents can "involve speech that is protected by the First Amendment." Jones Decl., RE18-5 PageID#456. Compared to the University's definitions of "harassing" and "bullying," its definition of "bias incidents" is even broader, more subjective, more vague, and less tailored. It is unconstitutional too. *See Dambrot*, 55 F.3d at 1184; *McCauley*, 618 F.3d at 250-51; *DeJohn*, 537 F.3d at 317-18. The University did not argue otherwise in the district court. It merely rephrased its standing argument (that the Bias Response Team is not "disciplinary") as a merits argument. *See* Opp., RE18, PageID#366-67. Thus, if the Court agrees with Speech First on standing, then it necessarily agrees with Speech First on the merits.

Accordingly, Speech First is likely to succeed on the merits of each of its claims. Because these claims are constitutional in nature, the other preliminary-injunction factors are satisfied as well. *See supra* at 18. The district court could not conclude otherwise without abusing its discretion. Thus, for the sake of judicial economy, this Court should simply reverse the district court's decision and remand with instructions to grant the preliminary injunction. *See, e.g.*, *Bays*, 668 F.3d at 825 (reversing the district

court's finding of no First Amendment violation, explaining that the other preliminary-injunction factors were thus satisfied, and remanding "with instructions to grant the preliminary injunction").

CONCLUSION

For all these reasons, the Court should reverse the district court and remand with instructions to grant the preliminary injunction.

Respectfully submitted,

/s/ William S. Consovoy

William S. Consovoy
Jeffrey M. Harris
Cameron T. Norris
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423
will@consovoymccarthy.com
Counsel for Speech First, Inc.

CERTIFICATE OF COMPLIANCE

This brief complies with Fed. R. App. P. 32(a)(7)(B) because it contains 12,935 words, excluding the parts exempted by Fed. R. App. P. 32(f) and 6 Cir. R. 32(b)(1). This brief also complies with Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

/s/ William S. Consovoy
Counsel for Speech First, Inc.
Dated: November 13, 2018

CERTIFICATE OF SERVICE

I certify that on November 13, 2018, a true and correct copy of this brief was filed with the Clerk of this Court via the CM/ECF system, which will notify all counsel who are registered CM/ECF users.

/s/ William S. Consovoy
Counsel for Speech First, Inc.
Dated: November 13, 2018

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