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

REPLY BRIEF OF APPELLANT SPEECH FIRST, INC.

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INTRODUCTION

The University is in denial. It thinks its disrespect for free speech is a "caricature" and "fiction"; yet FIRE (a First Amendment watchdog group) just gave the University its twelfth consecutive red-light rating. *Speech Code Reports*, bit.ly/2Akdcsz. The University thinks it "does not have a 'speech code'"; yet its Statement threatens to *expel* students for "verbally" harassing or bullying. The University says its Bias Response Team is merely a support group; yet the Team receives (anonymous) reports, encourages students to surveil each other, publicly logs "bias incidents," is staffed with disciplinarians, tries to meet and reeducate "offenders," and can refer matters to disciplinary authorities. The entire mechanism sends a clear message to students: if you say the wrong thing, consequences will follow. The University cannot escape scrutiny of these policies by labeling them "educational" or by unilaterally whitewashing them after getting sued.

The University's brief calls Speech First an "advocacy group[] eager to use litigation" and complains—no fewer than 15 times—that its members are anonymous. But the last time the University's vague, overbroad policies were challenged, the plaintiff (identified only as John Doe) used a pseudonym and was represented by another "advocacy group[] eager to use litigation" (the ACLU). *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 854 n.1 (E.D. Mich. 1989). That the University insists students cannot challenge its speech restrictions unless they reveal their identities—students who *fear retribution* for expressing their sincerely held views—starkly reveals its continued disregard for First

Amendment freedoms. An injunction was needed in *Doe*, and an injunction is needed again to remind the University that the First Amendment applies with full force on its campus. This Court should reverse.

ARGUMENT

The question on appeal is whether Speech First has shown a *likelihood* of non-mootness and standing. The University's repeated references to "testimony" and "the record" are thus misplaced; preliminary injunctions are "customarily granted on the basis of procedures that are less formal and evidence that is less complete." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). At this stage, the Court must *predict* who will prevail after all the evidence is collected.

Speech First will likely prevail: Its challenges to the bullying and harassing policies are not moot, it has standing to challenge the bias-incidents policy, and there are no alternative grounds to affirm the district court.

I. Speech First's challenges to the bullying and harassing policies are not moot.

According to the University, Speech First "fail[ed] to cite" two cases—*Mosley* and *Hanrahan*—that require "more solicitude" to voluntary cessation by state actors. Never mind that *the University* never cited those cases in the district court, and never mind that the district court did not base its decision on special "solicitude" to the government. The University now contends (at 16-26) its deletion of the subjective definitions of bullying and harassing from its website moots this case so long as this policy change "appears genuine."

Whatever it means to "appear genuine," this language does not change the answer here. *Every single case* that Speech First cited in its opening brief involved voluntary cessation by a state actor. Thus, unilateral policy changes are not "genuine" if the defendant changes the policy only after being sued, continues to defend the prior policy, or has a history of similar conduct. SF Br. 23-29. That is not surprising. Binding precedent holds—and the University concedes (at 17, 19)—that state actors still bear the "'heavy burden'" of proving that "'it [is] absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2019 n.1 (2017). And "solicitude does not carry much of an official's burden." *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 713 (6th Cir. 2016).

In fact, any "solicitude" disappears altogether when no legal or practical obstacle prevents the state actor from reinstating its former policy. The main concern underlying the strict voluntary-cessation standard is that the defendant will be "free to return to his old ways." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982). "Even assuming [it] ha[s] no intention to alter or abandon the [new policy]," "'a case is not easily mooted where the government is otherwise unconstrained should it later desire to reenact the provision.'" *Bell v. City of Boise*, 709 F.3d 890, 900 (9th Cir. 2013).

The key question is whether the defendant has "the *power* to reenact" the previous policy. *Bd. of Trustees v. Chambers*, 903 F.3d 829, 840 n.6 (9th Cir. 2018). In *Tree of Life Christian School v. City of Upper Arlington*, for example, this Court rejected mootness because the city "*could* amend the [ordinance] once again"—regardless whether it *would*.

823 F.3d 365, 371 n.4 (6th Cir. 2016) (emphasis added). In *Trinity Lutheran*, the Supreme Court's reason for rejecting mootness (as opposed to the parties' reasons) was that Missouri did not prove it "*could* not revert to its [prior] policy." 137 S.Ct. at 2019 n.1 (emphasis added). And, in *Akers v. McGinnis*, this Court rejected mootness because the prison had the "sole[] … discretion" to revert to its former rule. 352 F.3d 1030, 1035 (6th Cir. 2003); *see Carpenter-Barker v. Ohio Dep't of Medicaid*, 2018 WL 4189530, at *6 (6th Cir. Aug. 31, 2018) ("*Akers* … declined to find mootness … because rulemaking authority … lay solely with the defendant.").[1]

This Court's precedents giving "solicitude" to state actors all involved voluntary cessation via legislation or its functional equivalent. *See Mosley v. Hairston*, 920 F.2d 409, 413-15 (6th Cir. 1990) (statute); *Hanrahan v. Mohr*, 905 F.3d 947, 961 (6th Cir. 2018) (regulations "formally promulgated … after a lengthy internal process"); *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 982 (6th Cir. 2012) (ordinance "years in the making"). As this Court has explained, voluntary cessation is less meaningful when it does not occur via "legislative process," since "reversing the cessation" is not "particularly burdensome." *A. Philip Randolph*, 838 F.3d at 713. Notably, the only supposed counterexamples that the University cites (at 18 & n.4) are nonprecedential

[1] *Akers* also held that the new rule did not resolve the plaintiff's request for damages. 352 F.3d at 1035. But *Akers*' holding on voluntary cessation was an alternative holding that equally binds this Court. *See United States v. Title Ins. & Tr. Co.*, 265 U.S. 472, 486 (1924) ("[W]here there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is obiter, but each is the judgment of the court, and of equal validity.'").

decisions.[2] The University (at 22) also quotes seemingly good language from Wright & Miller, but neglects to mention that it comes from the chapter on "Superseding *Legislative* Action." 13C Fed. Prac. & Proc. Juris. §3533.6 (3d ed.) (emphasis added). The next chapter, which covers "Discontinued Official Action" short of legislation, warns that "the tendency to trust public officials" is "not complete" or "invoked automatically." §3553.7.

Importantly, this Court has never given extra "solicitude" to voluntary cessation by *university administrators*. It should not start now. University administrators are not elected officials who can be voted out of office for their decisions.[3] Nor are they somehow more trustworthy. According to two seasoned litigants in this field, universities frequently "revise[] policies under pressure, only to restrict the same type of speech again at a later time." FIRE/ADF Br. 5. The Supreme Court has noticed this problem too. *Christian Legal Soc. v. Martinez*, 561 U.S. 661, 723 n.3 (2010) (Alito, J., dissenting). That might explain why it holds university officials to the same voluntary-

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[2] The only precedential decision it cites, *County of L.A. v. Davis*, is far afield. There, the district court actually *issued* an injunction, and the case became moot because the defendant fully complied. 440 U.S. 625, 629-34 (1979). Of course, no injunction has been issued here.

[3] The University bizarrely asserts (at 17-18) that it is "a co-equal branch of government." But Michigan's founders divided "'the powers of government … among *three* branches of government'"; "'[t]he [Michigan] constitution does not contain any provision that elevates [public universities] to a fourth branch of government.'" *Straus v. Governor*, 592 N.W.2d 53, 58 (Mich. 1999); *accord Federated Publications, Inc. v. Bd. of Trustees of Mich. State Univ.*, 594 N.W.2d 491, 498 (Mich. 1999) ("[A] university is not a separate branch of government.").

cessation standard as private defendants. *See DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974).[4]

At the very least, no court has given "solicitude" to anything like the voluntary cessation here—changes to a website that could be undone anytime by a single University employee. Perhaps this case would be different if the University had changed the *Statement*, which at least requires compliance with codified procedures. SF Br. 5-6. But changes to the website interpreting the Statement cannot moot the case because they are "not subject to any procedures that would typically accompany the enactment of a law" and are not "referenced or incorporated in the [Statement]." *Bell*, 709 F.3d at 900. While the University claims it followed self-imposed procedures when changing the website, the University does not dispute that it can *undo* those changes with "no rules or procedures … 'at any time' with a few clicks of a mouse." SF Br. 22. And it is the risk of *undoing* that counts.

The University contends (at 21 n.6, 23 & n.8) that this case is special because, here, Vice President Harper gave "sworn testimony" that the new definitions "and no others, now will govern." But such testimony could be given in every voluntary-cessation case; after all, a defendant who has *already* adopted a new policy could always

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[4] While it does not bind this Court, the Eleventh Circuit's decision in *Beta Upsilon Chi v. Machen* is distinguishable. Unlike Speech First, the plaintiff there did not "mount a facial challenge to the text of the [challenged policy]." 586 F.3d 908, 917 (11th Cir. 2009). "It merely challenged [the university's] refusal to register [it]," so when the university *did* register it, the case was over. *Id.* Also, the voluntary cessation occurred after the court *enjoined* the university's policy. *Id.* at 914-15. No such injunction (and finding of likely unconstitutionality) constrains the University here.

swear—honestly—that the new policy "and no others, now will govern." What is missing is a promise that the University will never revert to its old policy. *See R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102, 106 (2d Cir. 1989) (rejecting mootness because the defendant's affidavit said it was not currently trying to acquire a company, but never "disavowed any future intention to acquire [it]"); *Rosales-Garcia v. Holland*, 322 F.3d 386, 396-97 (6th Cir. 2003) (en banc) (rejecting mootness because the government said it had released the plaintiff, but "made no … promise" not to detain him again). Regardless, even "sworn testimony" does not moot a case because it cannot bind the declarant's superiors, the declarant's successors, or the declarant in future cases. *See* SF Br. 22-23 (collecting cases); *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 92 (2013) (disagreeing that a "judicially enforceable commitment to avoid the [challenged] conduct" moots the case); *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 342 (6th Cir. 2007) (disagreeing that an official attorney-general opinion mooted the case, since it was "non-binding" on "current" or "future Attorneys General").

If doubts remain, several factors (alone or in combination) make clear that Speech First's challenges to the bullying and harassing policies are still alive:

First, the University changed these policies only after it was sued, in the middle of the briefing schedule. "This fact makes [its] voluntary cessation appear less genuine." *A. Philip Randolph*, 838 F.3d at 713. The University repeats its vague assertion that it "was already reviewing its websites and policies." But that routine, general "review" did not result in any *changes* to the challenged policies until after Speech First sued. SF Br.

25-26. The University was apparently content with its subjective definitions, since it kept them on the website for at least four years. *Id.* at 7. As amici explain, universities often point to "internal reviews" to deflect criticism of their policies, but these reviews rarely lead to pro-student changes absent litigation or pressure from lawmakers. FIRE/ADF Br. 11-14. Here, too, the University's "voluntary cessation only … occurred in response to the present litigation." *Northland*, 487 F.3d at 342-43.

Second, the University has defended its prior policies. The University did not defend its need for *a* policy on harassment and bullying; it defended the need for "[t]he policies and program that Speech First seeks to enjoin." Opp., RE18, PageID#368. In fact, the University is *still* resisting a preliminary injunction that would merely prevent it from using definitions that, it says (at 26), "have been eliminated for good." The University insists (at 24) that it never defended the constitutionality of its subjective definitions. But the University did argue that no student could even *challenge* those definitions because the University promised not to apply them to protected speech. This argument is far worse in terms of voluntary cessation, because it reveals that the University thinks it can adopt whatever vague, overbroad policies it wants so long as it makes boilerplate disclaimers and promises to exercise good judgment in enforcing them. As in *Doe*, this argument "serve[s] only to diminish the [University's] credibility." 721 F. Supp. at 858.

Third, the University has a history of using vague, overbroad harassment policies to restrict speech and then deleting those policies once they are challenged. Strangely,

the University argues (at 24-26) that, in *Doe*, it really "*intended* that speech need only be offensive to be sanctionable" and actually "subject[ed students] to formal disciplinary proceedings for expressing controversial views." It is unclear how this helps the University. Its admitted history of egregious (and, apparently, *intentional*) First Amendment violations—only two University Presidents ago—cuts strongly against leaving it unenjoined. While the University now asserts (at 25) that it never enforced its subjective definitions of bullying and harassing, that assertion is totally unverified. Speech First does not have access to the University's disciplinary records, and all the University could say below is that, in 2016-18, its prosecutions for bullying and harassing did not "involve[] *only* protected speech." Transcript, RE29, PageID#1037 (emphasis added). That is not reassuring, especially because the policies challenged here have the same constitutional flaws and the same generic disclaimers as the policies invalidated in *Doe*.

Finally, the University has not proven that it even ceased its unconstitutional conduct, as it *still* maintains a subjective definition of harassment on its "Expect Respect" website. SF Br. 29. Importantly, the Statement itself contains no definition of "harassing," and nothing on OSCR's website makes those definitions exclusive. A reasonable student could thus conclude that the Expect Respect definition of "harassing" also controls, and the presence of this definition gives the University a ready means to reinstate its unconstitutional policy. *Planned Parenthood v. City of Cincinnati*, 822

F.2d 1390, 1395 (6th Cir. 1987). The University never responds to this argument, even though it carries the burden of proof. SF Br. 29.

II. Speech First has standing to challenge the bias-incidents policy.

According to the University (at 31-32), its "Bias Response Team" is a "thoughtful approach" to a "real challenge," but has an incredibly unfortunate name. It never really "Respon[ds]" to "Bias," and it's not much of a "Team." It is instead a support group for victims. Tellingly, however, everything the University cites to support this characterization was added to its websites *after* Speech First sued (and much of it appears only in declarations that students will never see). This eleventh-hour rebranding is highly implausible. The University's elaborate apparatus for addressing "bias incidents" has both the purpose and effect of chilling unpopular speech. It violates the First Amendment, and Speech First has standing to challenge it.

The University largely agrees with Speech First on the law. If the Bias Response Team crosses the line from government expression to government coercion/intimidation, then it violates the First Amendment. *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230, 235 (7th Cir. 2015); *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000). Unlawful intimidation can be "indirect," "implicit," "informal," or even performed by someone with no regulatory authority. *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 402 (1950); *Levin v. Harleston*, 966 F.2d 85, 90 (2d Cir. 1992); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963); *Okwedy v. Molinari*, 333 F.3d 339, 343 (2d Cir. 2003).

While the University contends (at 39-40) that the government intimidation in the cited cases was worse,[5] the Bias Response Team can be on the wrong side of the constitutional line without being the *most* coercive, *most* intimidating scheme ever. The question is whether it objectively chills Speech First's members. More precisely: Would the bias-incidents regime "chill or silence" a student of "ordinary firmness" who wanted to say things like "President Trump is right on immigration," "#Blacklivesmatter is hateful," or "it is biologically impossible for a person to change their gender"? Of course it would. The *combined effect* of these processes sends a clear message that speech is "not welcome" on campus if someone else deems it "biased."[6]

Threat of Discipline: The whole structure of the Bias Response Team—its name, membership, terminology ("offenders," "reports," "targets," "witnesses"), definitions, and references to disciplinary processes—would make an objective student fear that "bias incidents" can lead to discipline. While the University insists (at 36) that "the BRT does not itself refer incidents to OSCR," the Team's log lists numerous

[5] Not all of the cited cases are worse. *E.g.*, *Levin*, 966 F.2d at 88 (university objectively chilled professor's speech by "stigmatizing" him with "shadow classes"). Regardless, the University's cases are far less on point. The quotations it pulls from *Penthouse Int'l, Ltd. v. Meese* are tentative dicta, as the only question there was whether the law was "clearly established" enough to defeat qualified immunity. 939 F.2d 1011, 1016-17 (D.C. Cir. 1991). The only court to reach the merits in that case ruled for the plaintiffs. 639 F. Supp. 581, 584-85 (D.D.C. 1986). As for *Abbott v. Pastides*, the Fourth Circuit considered the chilling effect of a "single" meeting that was part of a disciplinary investigation and actually cleared the plaintiffs of wrongdoing. 900 F.3d 160, 179 (4th Cir. 2018). It did not consider an elaborate administrative apparatus designed to root out "biased" speech.

[6] Oddly, the University asserts (at 31) that "Plaintiff only challenges the BRT's right to reach out to students." That is not true. *See* SF Br. 39-43; Motion, RE4, PageID#111-12; Compl., RE1, PageID#44-45, 13-21.

"referrals made" to disciplinary bodies, including OSCR, University police, and University housing. Harris Dec., RE4-2, PageID#197-261. And Member Galvan admits that "a BRT member could serve as the complainant in an OSCR proceeding." RE1803, PageID#388-89. While the University suggests (at 36) that its police officers and disciplinarians do not initially contact students, their presence on the Team still sends a signal. The point is not that students *misperceive* the Bias Response Team as disciplinary; it is that this perception is *reasonable*, and thus objectively chills students who fear the consequences of saying something perceived as "biased."

Logging: The University publishes an online log of bias incidents, stigmatizing so-called "offenders" who are labeled guilty of "bias." The log's entries contain dates, locations (down to the residence hall), and other details that make the perpetrator's identity an open secret. The University blinks reality if it thinks these reports remain truly "anonymous" on campus. Nor is it unreasonable for students to fear that bias-incident reports go in their records. The University tells students, cryptically, that informal-disciplinary records "will be maintained as appropriate to meet the needs of disputants and for annual reporting purposes." Harris Decl., RE4-2, PageID#135.

Investigations: Although the University disclaims the word "investigations," that is precisely what the Bias Response Team does. Reports are not automatically logged; each one is reviewed by the Dean of Students. Galvan Decl., RE18-3, PageID#387. When the Team receives a non-anonymous report, it always contacts the reporter(s) and meets to "discuss the experience." *Id.*, PageID#388. The Team collects

enough information to create a plan of action, determine who has jurisdiction over the incident, and assess whether a possible violation of the Statement occurred. *Id.*, PageID#387-88. The plan is then "carried out" with "follow-up." Harris Decl., RE4-2, PageID#174. This process could hang over the "bias offender" for weeks or months.

Meetings: The Bias Response Team meets with "offenders" when the reporter requests it. The idea of being summoned for a face-to-face meeting with a university authority (who represents what looks like a disciplinary body) would surely deter a reasonable student from speaking freely. Galvan contends that these meetings are rare; but she has less than a year of experience, and she cannot account for the students who steer clear of the Team by not discussing controversial subjects. While the University (at 38) says the notion that students feel pressured "sells [them] short," the entire *premise* behind the Bias Response Team is that students might "leave" the University if they hear speech that offends their "feelings." SF Br. 43. If student speech is so powerful, how much more powerful is a request from a *university authority figure* for a "voluntary" meeting about an accusation of "bias"? That the University now contacts students through faculty and the Dean of Students Office (which oversees OSCR) only makes things worse. Galvan Decl., RE18-3, PageID#390.

The University's main defense—that the Bias Response Team merely supports victims of bias—is implausible. Team members do not specialize (or appear to have any training) in counseling or psychology, unlike the University's *separate* office for Counseling & Psychological Services. The Team uses the term "offender," connoting

serious wrongdoing instead of a voluntary, educational program. And if the goal is supporting victims, why can students (and faculty) report bias incidents anonymously? Why can students report bias incidents that they never witnessed? And why maintain a log of incidents, forever *reminding* the victim of the trauma? The University has no answers.

The reality is that the Bias Response Team exists to ensure that "biased" speech never happens in the first place; students of ordinary firmness could readily conclude that, if voicing an unpopular opinion means being reported, logged, investigated, and asked to meet with a representative of a seemingly disciplinary body, it is just not worth it. Speech First's members have been chilled by this regime, and countless others have been similarly chilled at other universities. SF Br. 3-4. While most universities won't admit it, the University of Northern Colorado confessed that its "voluntary" bias-response team made students think certain speech was forbidden. *Id.* at 4 n.1. The University of Iowa surveyed other universities and reached the same conclusion. *Id.* As FIRE's comprehensive study confirms, "Bias Response Teams create—indeed, they are intended to create—a chilling effect on campus expression." *Bias Response Team Report 2017*, at 5.

Finally, if this Court endorses the University's arguments, it will set a dangerous precedent. Based on the University's silence, it apparently agrees that its position would allow universities to create a "Patriotism Response Team"—a group of administrators who report, log, investigate, meet, and reeducate students who commit "anti-American

incidents" on campus. SF Br. 45. It would also allow, say, a "Zionism Response Team" to intervene with students who support Israel's settlements in the West Bank. Or a "Communism Response Team" for students suspected of communist sympathies. It strains credulity to suggest that these policies—which differ from the Bias Response Team only in the speech they disfavor—are so innocuous that they could evade First Amendment scrutiny altogether. This Court should hold that the University's bias-incidents regime likely violates the First Amendment and that Speech First has standing to challenge it.

III. There are no alternative grounds to affirm.

A. Speech First has standing to challenge the bullying and harassing policies.

The University contests Speech First's standing to challenge the bullying and harassing policies, arguing (at 26-29) that there is no "credible threat" these policies could be applied to its members. Importantly, standing is assessed "at the time of the filing of the complaint only." *Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 526 (6th Cir. 2001). The question is thus whether Speech First had standing to challenge the bullying and harassing policies *before* the University changed them. It did—no less than the many other plaintiffs who have brought successful free-speech cases in this posture. *E.g.*, *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 365 (M.D. Pa. 2003); *Saxe v. State Coll. Area Sch. Dist.*, 77 F. Supp. 2d 621, 625 (M.D. Pa. 1999), *rev'd on merits*, 240 F.3d 200 (3d Cir. 2001).

While subjective chill is not enough for Article III standing, "objective chill" is. *McGlone v. Bell*, 681 F.3d 718, 729 (6th Cir. 2012). Objective chill can exist even when the challenged policy "has not yet been applied and may never be applied" to speech like the plaintiff's. *Babbitt v. United Farm Workers*, 442 U.S. 289, 302 (1979). "To show the existence of an objective chill," a plaintiff merely needs to show that "he has an 'intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a [policy], and there exists a credible threat of [enforcement] thereunder.'" *McGlone*, 681 F.3d at 729.

The credible-threat standard is "'quite forgiving.'" *Wollschlaeger v. Governor*, 848 F.3d 1293, 1305 (11th Cir. 2017) (en banc). It is satisfied whenever enforcement is "not 'imaginary or wholly speculative.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 160 (2014). In cases involving "non-moribund[] [policies] that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence." *N.H. Right to Life PAC v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999).

"Compelling contrary evidence" requires "a long institutional history of disuse, bordering on desuetude." *Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir. 2003); *see Doe v. Bolton*, 410 U.S. 179, 188 (1973). Otherwise, the "language of the [policy]" itself "evinces a credible threat of prosecution against [the plaintiff]." *Planned Parenthood*, 822 F.2d at 1394-96; *accord Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003). Indeed,

"[c]ourts have often found" standing in First Amendment cases based solely on the fact that the "plaintiffs' intended behavior is covered by the [policy] and the [policy] is generally enforced." *Seegars v. Gonzales*, 396 F.3d 1248, 1252 (D.C. Cir. 2005); *e.g.*, *Carey v. Wolnitzek*, 614 F.3d 189, 196 (6th Cir. 2010); *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 689-90 (2d Cir. 2013); *Calif. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094-95 (9th Cir. 2003); *Ark. Right to Life PAC v. Butler*, 146 F.3d 558, 560 (8th Cir. 1998); *Justice v. Hosemann*, 771 F.3d 285, 291-92 (5th Cir. 2014).

So too here. As the district court found, the University generally enforces its bullying and harassing policies, with *sixteen* prosecutions in the last two years alone. Order, RE25, PageID#973. And the bullying and harassing policies "on [their] face" cover the intended speech of Speech First's members. *Babbitt*, 442 U.S. at 302.[7] Before Speech First filed this suit, the University provided authoritative definitions of bullying and harassing from the dictionary, University policies, and Michigan law. The dictionary and policy definitions—which were listed *first*—covered speech that the listener "perceive[s] as … demeaning," "bothersome," "hurt[ful]," "unpleasant," "hostile," or "threaten[ing]." Harris Decl., RE4-2, PageID#146. These definitions easily reach protected speech, since they are entirely subjective. At the very least, they '"arguably"'

[7] Contrary to the University's misquote (at 28), the district court did not find that "the University is not likely to punish Students A, B, or C." It found standing "*even if* the University is not likely to punish Students A, B, or C." Order, RE25, PageID#973 (emphasis added).

cover Speech First's members, which is all that is required. *Driehaus*, 573 U.S. at 162; *Majors*, 317 F.3d at 721.[8]

But there is more. The threat of enforcement is heightened here because the University allows "[a]ny student, faculty member, or staff member [to] submit a complaint alleging" bullying and harassing, Harris Decl., RE4-2, PageID#129. *Platt v. Bd. of Comm'rs*, 769 F.3d 447, 452 (6th Cir. 2014). And the threat is further heightened because—as the University now admits (at 24-25)—it has used a similarly subjective harassment policy to prosecute protected speech before. *See Leonardson v. City of E. Lansing*, 896 F.2d 190, 195-96 (6th Cir. 1990) (finding a credible threat where challenged ordinance was "similar" to one "used to regulate political speech" twenty years earlier); *Bolton*, 410 U.S. at 188-89 (finding a credible threat where never-enforced policy was "the successor to another" that was). Lastly, there is a credible threat of enforcement because, as explained, "'[a]ll that remain[s] between the plaintiff and impending harm [i]s the defendant's discretionary decision'" to "change its … interpretation" of bullying and harassing again. *ACLU v. Fla. Bar*, 999 F.2d 1486, 1494-95 (11th Cir. 1993).

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[8] That the University's broad, subjective definitions of bullying and harassing facially apply to the members' speech distinguishes this case from *Morrison v. Board of Education*, 521 F.3d 602 (6th Cir. 2008). There, a student challenged a policy prohibiting speech "sufficiently severe, pervasive, or objectively offensive that it adversely affects a student's education or creates a hostile or abusive educational environment." *Id.* at 605. The *Morrison* Court did not believe that this narrow, *objective* policy even arguably applied to the plaintiff's speech; that is why his alleged chill was merely "subjective" and he needed something "more" in the record suggesting the policy applied to him. *Id.* at 609-10. *Morrison* did not hold that the text of a challenged policy can never objectively chill speech on its own. As the Ninth Circuit explained when rejecting a similar misreading of its precedent, *Morrison* "did not purport to overrule years of [circuit] and Supreme Court precedent" holding the opposite. *Calif. Pro-Life*, 328 F.3d at 1094.

The University contends that it only ever applied the *objective* definitions of bullying and harassing from Michigan law, not the subjective definitions (which were listed first). But the University's "website … d[id] not contain th[is] limiting interpretation," and "no [Michigan] court" ever imposed it. *Majors*, 317 F.3d at 721. Secret limiting interpretations cannot remove a credible threat of enforcement. *Id.* Regardless, the University's power to arbitrarily choose among three sets of definitions is precisely what Speech First challenges as unconstitutionally vague, SF Br. 47—an argument the University never rebuts. This vagueness is an independent basis for standing, "'even if the discretion and power are never actually abused.'" *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 580 (6th Cir. 2012).

The parts of the Statement where the University generically promises to protect free speech also do not defeat standing. This Court "declines to accept" such disclaimers from universities when, as here, "[i]t is clear from the text of the [challenged] policy that [protected speech] can be prohibited upon the initiative of the university." *Dambrot v. Cent. Michigan Univ.*, 55 F.3d 1177, 1183 (6th Cir. 1995). "The broad scope of the policy's language presents a 'realistic danger' the University could compromise the protection afforded by the First Amendment." *Id.* Nor does it matter that the University pledges not to prosecute Speech First's members. Because the subjective definitions give it the "authority" to prosecute protected speech, its "assurance it will elect not to do so is insufficient." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 255 (2012). Courts "would not uphold an unconstitutional [policy] merely because the Government

promised to use it responsibly," *United States v. Stevens*, 559 U.S. 460, 480 (2010)—much less deny standing to challenge it. *N.C. Right to Life*, 168 F.3d at 711.

B. Speech First is currently injured by the bias-incidents policy.

The University contends (at 32-33) that Speech First does not face "imminent" injury from the bias-incidents policy, since its members "have [n]ever been contacted by the BRT or had any interaction with it." But this is a *preenforcement* challenge based on objective *chill*; Speech First's members have not been reported to the Bias Response Team because it deters them from speaking in the first place. Objective chill is not just an "imminent" injury; it is "'a present injury in fact.'" *McGlone*, 681 F.3d at 729; *see also Deja Vu of Nashville, Inc. v. Metro. Gov't*, 274 F.3d 377, 399 (6th Cir. 2001) ("A mere threat to First Amendment interests is a legally cognizable injury.").

Speech First has established objective chill because there is a "'credible threat'" its members will be subjected to the bias-incidents process. *McGlone*, 681 F.3d at 729. According to the University, its definition of "bias incident" is "intentionally broad," turns on the victim's "own feelings," and includes "legally protected speech." Anyone can report a bias incident, even if they did not witness it, and the University receives more than 100 reports each year. While Speech First does not have access to the Team's records, the University admits it receives reports on topics that Speech First's members want to discuss. *See* Jones Decl., RE18-5, PageID#427 (discussing pro- and anti-Trump speech). The mere filing of a report, moreover, ensures that the incident is logged online and investigated by the Bias Response Team. It can also trigger (at the unfettered

discretion of the reporter or Team) "invitations" for a meeting, efforts to "educate" the offender, and referrals to disciplinary authorities. All of this easily satisfies the "'forgiving'" credible-threat standard. *Wollschlaeger*, 848 F.3d at 1305.

C. The bias-incidents policy is unconstitutional.

For the first time on appeal, the University argues (at 42-43) that its bias-incidents policy can survive strict scrutiny. The University did not raise this argument below, and for good reason. If Speech First is correct that the Bias Response Team objectively chills speech, then the *trigger* for its processes—the definition of "bias incident"—must satisfy First Amendment standards. It flunks those standards, badly. The definition is vague and overbroad because it is not anchored to any objective standards. SF Br. 48. It also discriminates on the basis of viewpoint. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992). Policies that are vague, overbroad, and viewpoint-discriminatory are, by definition, not narrowly tailored. "[T]he University receives no deference" on this question. *Fisher v. Univ. of Tex.*, 570 U.S. 297, 311-14 (2013).

D. The other preliminary-injunction factors are satisfied.

The University argues in passing that, even if Speech First will likely prevail on the merits, the district court could deny a preliminary injunction on other grounds. Yet the district court assumed Speech First was *not* likely to succeed on the merits. Thus, if this Court reverses that holding, it must at least vacate and remand. *E.g.*, *A Woman's Friend v. Becerra*, 901 F.3d 1166, 1167-68 (9th Cir. 2018); *see S. Glazer's Distributors of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d 844, 854 (6th Cir. 2017) ("[A] district court

necessarily abuses its discretion when it commits an error of law," especially "on the all-important likelihood-of-success factor.").

Further, unlike the merits (which this Court reviews de novo), the other preliminary-injunction factors are committed to the district court's discretion. *ACLU Fund of Mich. v. Livingston Cty.*, 796 F.3d 636, 642 (6th Cir. 2015). This Court thus "cannot invoke an alternative basis to affirm unless … as a matter of law … 'it would have been an abuse of discretion for the trial court to rule otherwise.'" *Ashby v. McKenna*, 331 F.3d 1148, 1151 (10th Cir. 2003). The University's alternative arguments do not rise to that level; in fact, the district court would abuse its discretion if it *accepted* them.

First, the University contends (at 29-31) that the bullying and harassing policies do not irreparably harm Speech First, after the unconstitutional definitions were deleted. The University relies on the principle that voluntary cessation, while insufficient to moot the case, can affect "whether a court should exercise its power to enjoin the defendant from renewing the practice." *City of Mesquite*, 455 U.S. at 289.

But this principle governs the decision to enter a *permanent* injunction, not a preliminary one. The concern is that voluntary cessation can make a permanent injunction overkill, since permanent injunctions "entail continuing superintendence of the [defendant's] activities by a federal court" after the case ends. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 193 (2000). That concern does not arise with preliminary injunctions, which "merely … preserve the relative positions of the parties" and "automatically dissolve upon final judgment." *Camenisch*, 451 U.S. at 395; *McQueary*

v. Conway, 614 F.3d 591, 600 (6th Cir. 2010). If anything, voluntary cessation makes a preliminary injunction *more* appropriate. The preliminary injunction "prevent[s] the irreparable harm from occurring while the [case] is litigated," "maintain[s] the status quo and gives substantial protection to [the plaintiff]," and "does not harm … or impede" a defendant who "truly intends" not to resume its illegal conduct. *Lopes v. Int'l Rubber Distributors, Inc.*, 309 F. Supp. 2d 972, 983-84 (N.D. Ohio 2004); *accord Jones v. Coleman*, 2017 WL 1397212, at *6 (M.D. Tenn. Apr. 19, 2017).

Even applied to permanent injunctions, a district court's "'power to grant injunctive relief survives discontinuance of the illegal conduct.'" *EEOC v. KarenKim, Inc.*, 698 F.3d 92, 100 (2d Cir. 2012). A district court must grant a permanent injunction if there is "more than a 'mere possibility' that [the] challenged conduct will recur (or is continuing)." *Sherwood v. TVA*, 842 F.3d 400, 407 (6th Cir. 2016). That standard is met here, for all the same reasons this case is not moot.

Second, the University contends (at 43-44) that the balance of equities favors leaving the Bias Response Team unenjoined. But when a plaintiff "is likely to succeed on its constitutional claims, there is 'no issue as to the existence of the remaining preliminary injunction factors.'" *ACLU Fund*, 796 F.3d at 649. This is no less true when the plaintiff brings a preenforcement challenge based on objective chill. *See ACLU of Ky. v. McCreary Cty.*, 354 F.3d 438, 445 (6th Cir. 2003) ("[I]f … a constitutional right is being threatened … a finding of irreparable injury is mandated."); *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1057 (9th Cir. 1995) ("[C[hill to … First

Amendment rights is an irreparable injury.”). The University’s only argument against an injunction—that it would force students to hear “biase[d]” speech—is no argument at all, “for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 578-79 (1995).

CONCLUSION

This Court should reverse and remand with instructions to grant the preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Fed. R. App. P. 32(a)(7)(B) because it contains 6,476 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.

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Dated: December 27, 2018

CERTIFICATE OF SERVICE

I certify that on December 27, 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.

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