No. 19-2807

In the
United States Court of Appeals
for the Seventh Circuit

SPEECH FIRST, INC.,

Plaintiff-Appellant,

v.

TIMOTHY L. KILLEEN, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois, No. 3:19-cv-03142-CSB-EIL.
The Honorable **Colin S. Bruce**, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLANT SPEECH FIRST, INC.

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-2807

Short Caption: Speech First, Inc. v. Timothy Killeen, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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Speech First, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Consovoy McCarthy PLLC

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ John Michael Connolly Date: September 23, 2019

Attorney's Printed Name: John Michael Connolly

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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Cameron T. Norris

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N/A

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N/A

Attorney's Signature: s/ William S. Consovoy Date: 10/29/2019

Attorney's Printed Name: William S. Consovoy

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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N/A

Attorney's Signature: s/ Cameron T. Norris Date: 10/29/2019

Attorney's Printed Name: Cameron T. Norris

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§1331, 1343 because Speech First alleges violations of the First and Fourteenth Amendments. Plaintiff brought claims pursuant to 42 U.S.C. §§ 1983 and 1988. This Court has jurisdiction under 28 U.S.C. §1292(a)(1) because Speech First appeals from the denial of a motion for a preliminary injunction. This appeal is timely because the district court denied Speech First's motion on September 17, 2019, and Speech First appealed the same day.

STATEMENT OF ISSUES

I. Did the district court improperly deny Speech First a preliminary injunction protecting its members from the University of Illinois' restrictions on student speech?

A. The University has created a Bias Assessment Response Team ("BART"), which is a group of university administrators (including disciplinarians and police) who monitor incidents of "bias" on campus. When a student is reported for committing a "bias incident," BART logs the incident, publishes it online, investigates it, may ask to meet with the offender, and can refer the matter for formal discipline. Does Speech First, whose members at the University wish to

engage in controversial speech but fear being reported to BART, have standing to challenge this regime?

B. The University claims the authority to issue "No Contact Directives"—which prohibit all "oral, written, or third-party communication" between a student and the complaining party—whenever an official concludes "that a No Contact Directive is warranted." Engaging in speech or expression that is fully protected under the First Amendment can be (and has been) a justification for imposing a No Contact Directive. Does Speech First, whose members at the University wish to engage in controversial speech but fear receiving a No Contact Directive, have standing to challenge this regime?

C. Speech First moved to preliminarily enjoin the University of Illinois' policy prohibiting any person from posting or distributing materials about candidates for non-campus elections unless the person receives "prior approval" from the University. To avoid a ruling on the merits, the University unilaterally eliminated this policy, but nothing prevents the University from readopting it. Did the University's voluntary cessation moot Speech First's claim?

II. If Speech First proves standing and a lack of mootness, the unconstitutionality of the University's policies is straightforward and there is no

dispute that the loss of First Amendment freedoms constitutes irreparably injury. Should this Court order the district court to grant Speech First a preliminary injunction?

STATEMENT OF THE CASE

I. College Campuses and the First Amendment

"The First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United v. FEC*, 558 U.S. 310, 339 (2010).

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools [of higher education]." *Healy v. James*, 408 U.S. 169, 180 (1972). 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). "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 v. N.H. ex rel. Wyman*, 354 U.S. 234, 250 (1957). Put simply, "First Amendment protections [do not] apply with less force on college campuses than in the community at large," *Healy*, 408 U.S. at 180, and the "mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency,'" *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973).

II. The University of Illinois' Prohibition on "Bias-Motivated" Speech and the Bias Assessment and Response Team

A. The Movement to Prohibit and Punish "Biased" Speech on College Campuses

In recent years, colleges and universities across the country have created "bias response teams" charged with documenting, investigating, and punishing students who engage in "bias." Universities cast a wide net when defining "bias." A276.[1] Almost all use categories widely found in discrimination statutes (race, sex, sexual orientation, etc.), while others investigate bias against categories like "smoker status," "shape," "intellectual perspective," and "political affiliation." *Id.*

[1] Citations to the Required Short Appendix and Joint Appendix appear as "RSA__" and "A__," respectively. Citations to the record on appeal are signified by "Dkt. _," referencing the document number on the District Court's docket.

"Bias" is almost always in the eyes of the beholder. As one university's bias response team put it, "the most important indication of bias is your own feelings." Kay, *University Sued Over Constitutionality of Bias Response Team*, Michigan Daily, May 8, 2018, https://bit.ly/2WCFE5i.

Bias response teams typically claim that their goal is to foster "a safe and inclusive environment" by providing "advocacy and support to anyone on campus who has experienced, or been a witness of, an incident of bias or discrimination." Snyder & Khalid, *The Rise of "Bias Response Teams" on Campus*, The New Republic, Mar. 30, 2016, https://bit.ly/1SaAiDB. But in reality, as one study found, these teams frequently lead to "a surveillance state on campus where students and faculty must guard their every utterance for fear of being reported to and investigated by the administration." A300. Speech on issues of public policy, social issues, and politics dealing with, among other things, race, religion, gender, immigration, and sexual orientation are often deemed "biased" and then reported to the bias response team. *See* A276-A279.

As two Carlton College professors have explained, bias response teams often "result in a troubling silence: Students, staff, and faculty [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, *supra*. "While universities should certainly be listening to their students and offering resources to those who encounter meaningful difficulties in their lives on campus, the posture taken by many Bias Response Teams is all too likely to create profound risks to freedom of expression, freedom of association, and academic freedom on campus." A277.

This chilling effect has led a few universities to shut down their bias response teams. The University of Northern Colorado, for example, shuttered its bias response team in 2016, explaining that its so-called "voluntary" processes "made people feel that we were telling them what they should and shouldn't say." Full Text of Univ. of N. Colo. President Kay Norton's State of the University Speech, Sept. 7, 2016, https://bit.ly/2WgBjFv. Similarly, the University of Iowa scrapped its plans to create a bias response team because of the "high failure rate in the BARTs at other institutions" and their tendency to "become almost punitive." Charis-Carlson, *University of Iowa Changing Course on Bias Response Team,* Iowa City Press-Citizen, Aug. 18, 2016, https://bit.ly/2JQOiai.

B. The University of Illinois' Definition of "Bias-Motivated" Speech

Similar to other schools, the University of Illinois defines a "bias-motivated incident" as "action or expressions" that are "motivated, at least in part, by

prejudice against or hostility toward a person (or group) because of that person's (or group's) actual or perceived age, disability/ability status, ethnicity, gender, gender identity/expression, national origin, race, religion/spirituality, sexual orientation, socioeconomic class, etc." A180. This definition of "bias-motivated incident" encompasses speech that is fully protected under the First Amendment.

Unsurprisingly, students' protected speech has been reported as a "bias-motivated incident" at the University. Examples include:

- students who planned a "Meeting with the Chief" program in support of bringing back Chief Illiniwek as the University's mascot;
- a student who posted a meme on Facebook complaining that women are automatically admitted into engineering programs;
- students who planned to host a program entitled "Build that Wall" where they would use blocks to build a wall outside of the Illini Union to show their support for stricter immigration policies;
- two students who expressed "anti-theistic perspectives," claimed religions were "lies," and said people would have to be stupid to be religious; and

- students who planned an "affirmative action bake sale" where they would charge different prices based on race to protest race-based policies.

A190-A191, A199-A200, A208.

C. The University's Enforcement of the Prohibition on "Bias-Motivated" Speech

The University enforces the prohibition on "bias-motivated" speech through its bias response team, which it calls the Bias Assessment and Response Team or "BART." BART is housed within the Office for Student Conflict Resolution ("OSCR"), which is the University office charged with enforcing violations of the Student Code. A212. BART and OSCR have the same address, same phone number, and many of the same personnel. A212-A214, A216, A218-A219. For example, January Boten and Debra Imel are BART's co-chairs, as well as Assistant Deans of Students within OSCR. *Id.* Law-enforcement officers also serve on BART. A212. BART is thus, quite literally, a speech police.

BART strongly encourages students, faculty, and others associated with the University to report any incident that the viewer believes is "biased." BART encourages this reporting through signs on campus, emails, University websites, and elsewhere. *E.g.*, A270-71. The University Police Department also encourages

students to report incidents of "bias" to BART. The police department recently tweeted: "Acts of intolerance create an unsafe and unwelcoming environment for campus community members. Remember that you can always report acts of intolerance to the Bias Assessment and Response Team at bart.illinois.edu." A264. The police regularly report bias incidents to BART. *E.g.*, A183.

BART collects reports of "bias-motivated incidents" via a University website. A221-A226. This website allows individuals to report "bias" to BART anonymously. A221. BART's website asks the reporter to identify, among other things, when the bias incident occurred; where it occurred (e.g., a "classroom," "residence hall," or "off-campus"); and the "perceived bias" of the action or expression, such as "race/ethnicity, sexual orientation, age, national origin, religion, ability/disability status, gender/gender identity, socioeconomic class, [or] other." A223-A224. BART also asks the reporter to identify how the bias was demonstrated (e.g., through "offensive language," "social media," "spoken communication," "written communication," or "other"). A224. BART finally asks for the "name of the offender" (if known) and the offender's affiliation with the University. A226. The "vast majority" of reports made to BART are submitted anonymously. A312-A313, ¶19.

After BART collects this information, it will undertake an investigation into the "bias incident" to determine the events that occurred and, in particular, the type of "bias" that was expressed. BART first contacts the reporter to determine what "bias" the "offender" committed. A313, ¶23; A226; A002, ¶12. BART will then reach out to the "offender" and attempt to schedule a "voluntary" meeting to discuss the event. A313-14, ¶24; A226. Through these interviews, BART may "attempt to confirm the information [the reporter] provided, [but] such confirmation is not always possible." A184. BART will investigate "bias-motivated incidents" whether they occur on campus or off campus. A224.[2]

[2] Curiously, the University claims that BART "does not conduct 'investigations' into incidents allegedly motivated by bias." A311, ¶14. But the record flatly refutes this. There is no dispute that BART will attempt to interview both the complaining student and the "offender" to determine what happened and what type of "bias" occurred. A313-A314, ¶¶23-24; A182, A184. And BART itself has repeatedly referred to its responses to bias incidents as an "investigation." *See* A182 ("If a specific type of bias is indiscernible on the basis of the report *or investigation*, the incident is listed as 'unclassified.'"); A195 (same); A231 (same); A255 (same); A184 ("Please note that the descriptions provided below are based on the information provided by the reporting party, independent of any *subsequent investigation*. Although team members may attempt to confirm the information provided, such confirmation is not always possible."); A198 (same); A257 (same); A221 ("[P]rovid[ing] names or contact information … can be very helpful in following up *during the investigation*.").

When a BART official contacts the offender, the official tells the student that BART has received a bias report and that BART needs to speak with the student to discuss the allegations. A002, ¶12. The BART official will not identify the person who has accused the student of "bias" or inform the student of any rights he or she may have. *Id.*; *see generally* A312-A315, ¶¶19-29. If BART determines that a bias incident has occurred, it will attempt to impose various "voluntary" corrective measures on the "offender." A226; A228. Such measures include, but are not limited to, "educational conversations," "mediation [and] facilitated dialogue," "resolution agreements," "referrals to other offices and/or programs," and "educational referrals." A228.

If BART believes that a provision of the Student Code may have been violated, it will refer the case to OSCR for further investigation and potential punishment. A228. Because BART is housed within OSCR and their staff overlap, some individuals within OSCR will already be familiar with the case. A212-A214, A216, A218-A219. If BART believes that the law may have been violated, it may notify the police department.[3] *E.g.*, A258, A198. As with OSCR, because a police detective serves on BART, the police may already be familiar with the case. A213.

[3] In a carefully worded statement, January Boten, the co-chair of BART, stated that "[r]eports are not 'referred' from BART to the University Police, nor do

If BART determines the identity of the student who committed the "bias," it will record the details of the incident in BART's internal files. A313, ¶20. Individuals from OSCR—the disciplinary body of the University—also have access to these records because BART is housed within OSCR and the two departments share many of the same staff. A212-A214, A216, A218-A219. Although the University disputes that officials outside of BART or OSCR could access this information, one student's academic advisor could tell from the student's file that he had met with someone from BART. A003, ¶¶13-14.

Each year, BART issues a report describing the complaints it received and its response. A315, ¶29; *see, e.g.*, A195-A210. BART categorizes reports of bias by "using the FBI Uniform Crime Reporting Program's Hate Crime categories in order to … break down the individual(s)/group(s) that were targets of bias incidents/reports." A232. Although BART does not specifically identify the names

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the police ever investigate an incident reported to BART unless that incident independently was reported to the Police for law enforcement reasons." A310. But that assertion is contradicted by the record. *See, e.g.*, A258 ("Team members participated in reporting [an offensive] page to Facebook and consulted with police, who were unable to identify those responsible for the page."); A198 ("A staff member from the Counseling Center received emails that were sexually explicit and targeting Asian women. The staff member was given information on resources and information about the person who sent the emails was given to the police.").

of students involved, its detailed descriptions make some of the "offenders" easily identifiable. *E.g.*, A257-A262.

D. University Housing's Prohibitions on "Bias" and "Offensive Acts"

The University imposes additional procedures for "bias" committed within University housing. According to the University, it is "committed to fostering an inclusive, safe and respectful environment for its residents and staff." A246. Therefore, "University Housing does not tolerate any acts of bias or discrimination within its communities." *Id*. In the event of a bias incident, University Housing will initiate a "bias incident protocol" ("BIP") to "address and implement corrective action for any offensive acts committed within its facilities." *Id*. Through the BIP, the University will convene a "bias response meeting" of various University officials that will review the allegations, investigate whether a "bias-motivated incident" has occurred, and then implement "corrective action" if a student is found to have engaged in such an incident. *Id.*

The BIP is implemented whenever any student engages in "any acts of bias," "acts of intolerance," or "any offensive acts" that are "committed within [University Housing] facilities." A246. Speech protected by the First Amendment has been reported as a "bias-motivated incident" to University Housing. Examples include:

- a student displaying a confederate flag in the window of his residence hall;
- a student making "microaggressive comments" regarding race/ethnicity; and
- a student hanging a Chief Illiniwek poster on the student's door.

A260-A261.

III. The University's Use of "No Contact Directives" to Silence Speech

Under the University's rules, disciplinary officers have the power to order students "to have no contact with one or more other persons." A157, §4.06(a). The University refers to these orders as "No Contact Directives." *Id.* Under its rules, a disciplinary officer can issue a No Contact Directive simply because the officer concludes "that a No Contact Directive is warranted." A158, §4.06(d). Disciplinary officers thus can issue a No Contact Directive even if there is no allegation that the student has violated the Student Code.

Students who are subject to a No Contact Directive have their freedoms of movement, association, and speech severely inhibited. A157-58. Among other things, the No Contact Directives prohibit students from having any "oral, written, or third party communication" with the complaining party; prohibit students from taking "deliberate nonverbal acts" that are "intended to provoke" the complaining

party; and warn students that they must "leave the vicinity if they encounter one of the other parties." *Id.*, §4.06(b). These prohibitions apply whether the parties are on or off campus. *Id.* No Contact Directives last indefinitely—*i.e.*, until the student graduates—unless the disciplinary officer specifies an end date or otherwise terminates the directive. A158, §4.06(d). The recommended punishment for violating a No Contact Directive is "dismissal from the university." *Id.*, §4.06(c).

Engaging in speech that is fully protected under the First Amendment, whether on or off campus, can provide a justification for a No Contact Directive. *Id.*, §4.06(d); *e.g.*, A401-02, ¶¶7, 9. In a well-publicized incident, the University issued a No Contact Directive against a student in part for writing an article. A401-02; *see* Lauren Cooley, *Student Journalists Punished for Reporting on Violent Anti-Trump Rally: Lawsuit*, Wash. Examiner, Apr. 12, 2018, https://washex.am/2HPq3Hq. In November 2017, a graduate assistant, Tariq Khan, got in a shouting match with two students at an "anti-Trump" rally and subsequently broke one student's phone. Two days later, another student, Andrew Minik—who was not at the event—wrote an article about the incident for the online publication Campus Reform. The article shared a video of the incident and

described what had occurred. *See* Andrew Minik, *Instructor Arrested for Attacking Conservative Students*, Campus Reform, Nov. 18, 2017, https://bit.ly/2JXdpbN.

Shortly after the article was published, Khan sought a No Contact Directive against Minik. The University issued the directive—even though Minik was not present when the dispute occurred and merely wrote an article about it. The No Contact Directive against Minik stated: "The Office for Student Conflict Resolution has become aware of a problem involving you and another student …. Therefore, I am directing you to have NO CONTACT with Tariq Kahn (oral or written, directly or through any third party) until further notice." A266. The order warned that "[a]ny violation of this directive may result in charges before the appropriate Subcommittee on Student Conduct. **Violations of no contact directives are taken very seriously and can have very significant consequences, including dismissal from the university**." *Id*. (emphasis in original). The University informed Minik that the No Contact Directive was issued against him because of the Campus Reform article, and that it was a "probationary measure" to ensure that he would not contact Khan. A268. Minik was told that if he wanted "the situation to improve" he should "not write about [Khan] anymore." *Id*.; *see also* A401-402, ¶¶7-9.

IV. The University's Restraint on Speech Concerning "Non-Campus Elections"

Before this lawsuit was filed, the University's student code prohibited students from "post[ing] and distribut[ing] leaflets, handbills, and any other types of materials" about "candidates for non-campus elections" without "prior approval." A068, §2-407. A student who violated this rule would be subject to disciplinary action, including reprimand, censure, probation, suspension, and dismissal from the University. A149-A150, §2.04(a)(iii), (b)-(d).

On July 18, 2019, four days before it filed its opposition to Speech First's preliminary-injunction motion, the University revised its code to eliminate this policy. The change became effective, the University says, after a University committee recommended the change and the Chancellor approved the amendment. A414-A415, ¶16. Because the change is not binding on current or future University officials, the University is free to reimpose the prior-approval requirement at any time.

V. Speech First and Its Members at the University of Illinois

Plaintiff Speech First is a nationwide membership organization of students, alumni, and others that is dedicated to preserving civil rights secured by law, including the freedom of speech guaranteed by the First Amendment. A001, ¶2.

In particular, Speech First seeks to protect the rights of students and others at colleges and universities, through litigation and other lawful means. *Id*.

Speech First has several members who are current students at the University, including Students A, B, C, and D. A001, ¶¶4-5. Speech First's members hold views that are deeply controversial on campus. For example, Students A and C want to advocate for stronger immigration policies, including building a wall along the U.S. southern border. A002, ¶9. Student B wants to advocate for policies that would lead to the "deradicalization of Islam." *Id.* And Student D wants to voice confusion and ask questions about LGBT issues he does not understand. *Id*.; *see also id.* ¶8 & Dkt. 1, Compl. ¶¶96-97, 105-06, 115-16, 124-25 (additional examples of statements Students A-D want to make). These students are aware of the University's ban on "bias-motivated incidents" and credibly fear that expressing their views could result in being reported, investigated, and punished by BART for engaging in a "bias-motivated incident," as some will interpret their statements as "prejudice" or "hostility" on, *inter alia*, the basis of ethnicity, gender, gender identity/expression, national origin, race, religion/spirituality, or sexual orientation. A180.

Speech First's members also are aware that the University has imposed No Contact Directives on students for engaging in protected speech. They understand that violating a No Contact Directive can lead to severe penalties (including expulsion), and credibly fear that expressing their views could result in such a directive. A003, ¶¶16-17. Finally, Speech First's members want to freely distribute literature in support of President Trump's reelection and, before the elimination of the policy, credibly feared that doing so without prior authorization from the University would result in punishment. *Id.* ¶¶18-19.

VI. Proceedings Below

On May 30, 2019, Speech First filed this suit and soon thereafter moved for a preliminary injunction. Speech First asked the district court to enjoin the University from (1) using BART, the BIP, or any other University officials to investigate, log, threaten, or punish students (including informal punishments) for bias-motivated incidents; (2) issuing "No Contact Directives" without clear, objective procedures that ensure the directives are issued consistently with the First Amendment; and (3) enforcing the University's prior restraint on speech concerning non-campus elections.

On September 17, the district court denied Speech First's motion. First, the court found that Speech First had failed to demonstrate an injury-in-fact sufficient

to confer standing because the court could not determine "whether the Students have an intention to engage in speech that would result in any actual interactions with BART or BIP" and there was "no evidence the Students would ever even be contacted by BART or BIP as a result of a report, if made." RSA034. The court also concluded that BART's meetings with students were "voluntary" and so BART had no "sufficiently coercive effect." RSA036. The court relied heavily on *Speech First v. Schlissel*, 333 F. Supp. 3d 700 (E.D. Mich. 2018), which has since been reversed on appeal, *Speech First v. Schlissel*, 939 F.3d 756 (6th Cir. 2019).[4]

Second, the district court concluded that Speech First could not show an injury-in-fact to challenge the University's policy authorizing No Contact Directives because such directives are "never issued based on any student speaking about any of the topics the Students wish to speak upon (or any other topics)." RSA039. The district court drew this conclusion even though the

[4] On October 28, Speech First voluntarily dismissed its complaint against the University of Michigan after the parties reached a settlement agreement. In the fall of 2019, after Speech First had sued, the University of Michigan disbanded its bias response team. As part of the settlement agreement, the university agreed, *inter alia*, to never reinstate its bias response team. *See Speech First, Inc. v. Schlissel*, No. 18-cv-11451 (C.D. Ill.) (Dkt. 35-1).

University had conceded that a student's speech could be *one* of the justifications for issuing a No Contact Directive. Dkt. 18-11, Die Decl. ¶7.

Third, the district court found that Speech First's challenge to the University's prior-approval requirement was moot because it had been repealed and there was "no substantial likelihood that the offending policy will be reinstated." RSA025. The district court reached this conclusion despite the fact that the University amended the policy only because it had been sued and nothing prevents the University from reenacting this policy once this litigation ends.

SUMMARY OF ARGUMENT

"[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *United States v. Stevens*, 559 U.S. 460, 480 (2010). Yet that is exactly what the district court did here. It denied Speech First a preliminary injunction based on the University's promises that it respects the free-speech rights of its students. The First Amendment demands far more scrutiny. This Court should reverse the decision below and order the district court to grant Speech First a preliminary injunction.

First, the district court improperly found that Speech First lacks standing to challenge the University's bias-incident policies. BART is a group of university

administrators (including disciplinarians and police) who encourage anonymous reporting of "bias" on campus; maintain University records of the allegation against the student and BART's response; contact the student to seek "voluntary" dialogue and potentially "corrective actions"; may refer the matter to OSCR or notify the police; and publicize the allegations and BART's response. As the Sixth Circuit recently recognized, these are "real consequence[s] that objectively chill[] speech." *Speech First*, 939 F.3d at 765. Speech First has standing to challenge this apparatus.

Second, the district court erred in finding that Speech First lacked standing to challenge the University's policy of issuing "No Contact Directives." A plain reading of the relevant policy gives the University blanket authority to issue a No Contact Directive whenever an official believes it is "warranted," with no exceptions for protected speech. But even under the University's interpretation of its policy, the First Amendment problems remain. A policy allowing No Contact Directives to enforce or prevent *any* provision of the Student Code is overbroad, and the University concedes that a student's speech can be one of the justifications for a directive. Because Speech First's members want to engage in speech that

could subject them to a No Contact Directive, Speech First has standing to challenge this policy.

Third, the district court erroneously concluded that the University's elimination of its policy requiring prior approval for speech on non-campus elections mooted this issue. A defendant can establish mootness based on voluntary cessation only if it "bears the formidable burden of showing that it is *absolutely* clear 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). The University cannot show that. Its amendment is not binding on current or future University officials; reinstating the former policy requires nothing more than a recommendation from a University committee and approval by the Chancellor; and the University made this change only in response to Speech First's lawsuit, which "increases the University's burden to prove that its change is genuine," *Speech First*, 939 F.3d at 769. This issue is not moot.

Finally, if Speech First proves standing and a lack of mootness, the Court should instruct the district court to issue a preliminary injunction. The unconstitutionality of the University's policies is straightforward. The University's definition of "bias incident" is overbroad and vague, as it encompasses fully

protected speech and gives no guidance to students on how to avoid committing a "bias incident." The University's policy on No Contact Directives is overbroad because, even under the University's own interpretation, the policy authorizes a University official to issue a No Contact Directive if there is the *potential* to violate *any provision* of the Student Code. And the policy requiring prior approval for non-campus speech is both a prior restraint, as it improperly requires government approval in advance of expression, and an improper content-based restriction on speech, as the policy applies *only* to certain types of speech. Because "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" and "injunctions protecting First Amendment freedoms are always in the public interest," *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 589-90 (7th Cir. 2012), Speech First satisfies the remaining factors and is entitled to a preliminary injunction.

ARGUMENT

In reviewing a denial of a preliminary injunction, the Court reviews the district court's findings of fact for clear error, its balancing of the factors for a preliminary injunction under the abuse-of-discretion standard, and its legal conclusions de novo. *Kiel v. City of Kenosha*, 236 F.3d 814, 816 (7th Cir. 2000). In assessing whether a preliminary injunction is warranted, a court must consider

whether the party seeking the injunction has demonstrated that: (1) it has a reasonable likelihood of success on the merits of the underlying claim; (2) no adequate remedy at law exists; (3) it will suffer irreparable harm if the preliminary injunction is denied; (4) the irreparable harm the party will suffer without injunctive relief is greater than the harm the opposing party will suffer if the preliminary injunction is granted; and (5) the preliminary injunction will not harm the public interest. *Id*. Because Speech First satisfies these factors, it is entitled to a preliminary injunction.

I. The District Court Improperly Denied a Preliminary Injunction on Standing and Mootness Grounds.

A. Speech First has standing to challenge the University's prohibition on bias-motivated incidents.

To establish Article III standing, a plaintiff must show injury, causation, and redressability. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58 (2014). An association suing on behalf of its members has standing when "its members would otherwise have standing to sue in their own right." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Here, the district court found that Speech First could not show an "injury in fact." RSA030. That was error.

There are two ways an individual can establish an ongoing injury from a policy that violates First Amendment rights. *See Six Star Holdings, LLC v. City of*

Milwaukee, 821 F.3d 795, 802-03 (7th Cir. 2016). First, an individual can show that his speech is being chilled by a policy, though not expressly prohibited by it. That is because "[c]hilled speech is, unquestionably, an injury supporting standing," *Bell v. Keating*, 697 F.3d 445, 453 (7th Cir. 2012), "even without an actual prosecution," *Ctr. for Indiv. Freedom v. Madigan*, 697 F.3d 464, 474 (7th Cir. 2012). A plaintiff thus has suffered an injury-in-fact when, as an objective matter, "the alleged conduct by the defendants would likely deter a person of ordinary firmness" from engaging in protected speech. *Surita v. Hyde*, 665 F.3d 860, 878 (7th Cir. 2011). Second, an individual can show a cognizable injury-in-fact when he faces a "credible threat of enforcement." *SBA List*, 573 U.S. at 161-65. The person faces such a threat when (1) he "inten[ds] to engage in a course of conduct arguably affected with a constitutional interest,"(2) his "intended future conduct is arguably proscribed by the [challenged policy]," and (3) "the threat of future enforcement of the [challenged policy] is substantial." *Id*. (cleaned up).

Speech First satisfies both tests. Its members' speech is being chilled because they reasonably fear the consequences of engaging in speech that is deemed "biased." As explained above, if the Students engage in "biased" speech, it is likely that (1) they will be reported to the University; (2) BART will maintain University

records of the allegation against the student and BART's response; (3) BART will reach out to seek "voluntary" dialogue and potentially "corrective actions"; (4) BART could refer the matter to OSCR or notify the police; and (5) BART will publicize details about the allegations and BART's response on the University's website for all to see. *Supra* 6-13. These are "real consequence[s] that objectively chill[] speech." *Speech First*, 939 F.3d at 765.

Speech First's members also face a "credible threat of enforcement." Speech First's members intend to express themselves on a host of issues of public policy, *supra* 17-19, which are obviously "affected with a constitutional interest"; their expression could be deemed a "bias incident" (which the University has never disputed), *see* A180; and the threat of being reported to BART is "substantial," as bias incidents are easy to report and the University receives and addresses hundreds of reports each year, many of which cover these precise topics, *see, e.g.*, A182-A193; *see SBA List*, 573 U.S. at 161-65.

The district court's conclusions to the contrary were wrong. The district court first found that the members did not "describe[] any statements they wish to make with any particularity, so it is unclear whether they would even be likely to be reported to BART or BIP" or whether BART or BIP would "actually contact[]

them even if someone did report such statements." RSA031. The University's definition of "bias incident" and past record of complaints and enforcement plainly refute this analysis.

For example, Students A and C want to advocate for stronger immigration policies, including building a wall along the U.S. southern border. A002, ¶9. This expression *regularly* is reported to BART as a bias incident and consistently triggers responses from BART. As BART described one event:

> There were eight reports regarding an RSO [Registered Student Organization] event titled "Building the Wall: A Memorial for Victims of Illegal Immigration". Each brick used to build the wall included a description of violent behavior committed by undocumented individuals. Members of the team reached out to all identified reporting parties and the leadership of the RSO. One member of the RSO's leadership met with a member of the team prior to the event. The conversation included the fact that multiple reports had been received.

A209. BART received five complaints the year before about a similar event, which again caused the offending students to receive a visit from BART. A191; *see also* A196 (investigating expressions deemed to be "Anti-Hispanic"); A257 (having an "educational conversation" with a student who tweeted statements about immigrants that another person "believed to be racist and offensive"); *cf.* A261 (investigating "microaggressive comments" regarding race/ethnicity).

Similarly, Student B wants to advocate for policies that would lead to the "deradicalization of Islam." A002, ¶9. BART regularly confronts (after receiving a complaint) students who have made expressions deemed to be "Anti-Islamic." A196; A200, A204; A259 (having an "educational conversation" with a student who said in class that most terrorists are Arabic). And Student D wants to question what he is told about LGBT rights and voice his confusion on these issues. A002, ¶9. BART again regularly confronts (after receiving a complaint) students who make statements deemed to be "Anti-Lesbian/Gay/Bisexual/Transgender." A197; A203; *see also, e.g.,* A258 (having an "educational conversation" with a student who "made statements [in a University workshop] about gender identity being a matter of choice"). These are just a few of the statements that could cause Speech First's members to be visited by BART. *See* A002, ¶8 & Dkt. 1, Compl. ¶¶96-97, 105-06, 115-16, 124-25. Indeed, that is why the University has *never* disputed that the speech the Students wish to make could be reported to BART or that BART would contact the offender to discuss these complaints.

The district court next found that the Students' First Amendment rights were not implicated because being reported to BART "results in essentially no consequences," as conversations with BART are supposedly "optional" and BART

has "no authority to impose sanctions." RSA031. According to the district court, BART merely "supports students affected by [bias-motivated] incidents, promotes education and awareness about the impact of actions motivated by prejudice, provides opportunities for educational conversation and dialogue, and publishes data … on reported incidents." RSA07.

The evidence disproves this rosy picture. Consider a student who, like Students A and C, wants to advocate for building a border wall along the country's southern border to stop illegal immigration. The following string of events will occur.

First, the student almost certainly will be reported to the University for engaging in "bias" on the basis of race, ethnicity, and/or national origin, as the student's speech will be deemed by someone to exhibit "hostility" towards Hispanics and individuals from Mexico and other Central American countries. A180; *supra* 28-29.

The University's response to these complaints will be handled by BART, which is designed to resemble a disciplinary body. BART is housed in the office of OSCR (which enforces violations of the student code), its leadership overlaps with those of OSCR, and it even has a *police officer* on the team. A212-A214, A216, A218-

A219. BART defines key terms such as "bias incident" to invoke the notion of a formal rule. A180. It labels students who express "bias" as "offenders." A226; *e.g.*, A183. Aggrieved students file "reports," like they would at the police station. A221-A226. BART categorizes reports of bias by "using the FBI Uniform Crime Reporting Program's Hate Crime categories." A232. Even BART's name shows its disciplinary purpose. It is the Bias *Assessment* & *Response* Team, not the Bias *Support* Team (or even the Bias *Education* Team). "Response Teams" typically are not passive entities offering mediation. *See, e.g.*, *Tactical Response Team*, City of Dixon, Illinois, bit.ly/2JZtPz9 (the City of Dixon's "TRT" specializes in "hostage rescue, downed officer retrieval, and close quarter battle techniques").

Most telling, reports to BART can be filed anonymously, just as any law-enforcement office allows anonymous "tips" about criminal activity. A221. Indeed, the "vast majority of reports made to BART are submitted anonymously." A312-A313, ¶19. If the primary purpose of BART is, as the district court found, to support students affected by bias and facilitate educational conversations and dialogue, RSA07, BART would have no need for such anonymous information. Anonymous allegations are useful only if BART's purpose is to target the *speaker*.

Second, BART will maintain University records of the complaint made against the student, BART's subsequent communications and interactions with the reporter and the student, and whether the student engaged in any "corrective action." *Supra* 11. The district court found that "BART interactions with students are private, not recorded in academic or disciplinary records, and not disclosed outside of OSCR without permission." RSA011. But all that means is that the *Registrar's office* does not keep records of these incidents; the University still keeps these records at BART and OSCR offices. A313, ¶20; A315, ¶29. Moreover, there is no evidence that students are ever told how their information is kept, *see* A312-A315, ¶¶19-29; A002, ¶12, so a student could reasonably assume that if he expresses "bias" the allegations against him will be made available to others—both inside and outside the University. And a promise that this information will be shared only with OSCR—the campus's *disciplinary body*—provides little comfort to a student contemplating speech that could be interpreted as "biased."

Third, BART will reach out to the student to seek "voluntary" dialogue and potentially "corrective actions," such as "educational conversations," "mediation [and] facilitated dialogue," "resolution agreements," and "educational referrals." A228. The district court emphasized that the University cannot compel those who

commit bias to speak with BART or undertake these "corrective actions." RSA031-32. But even if true, students are never told this. As Speech First explained, "when a BART official contacts the offender, the official tells the student that the BART has received a bias report about the student and that the BART needs to speak with the student to discuss the allegations." A002, ¶12. The BART official "will not identify the person who has accused the student of 'bias' or inform the student of any rights he or she may have." *Id*. Critically, the University *never disputed* these facts. Indeed, nowhere in any of the hundreds of pages of declarations or exhibits is there any evidence that students are ever informed of their supposed rights when dealing with BART. *See, e.g.*, A312-A315, ¶¶19-29.

No student would see these requests from BART as voluntary. 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 official to have a meeting over accusations of "bias" as voluntary. Indeed, under the Student Code, students are *required* "to comply with the reasonable directions of a University or other law enforcement official acting in the performance of her or his duty." A033, §1-302(h). Moreover, common sense suggests the average college student is unlikely to *want* to meet with a University

official to discuss the appropriateness of his speech, or to accept a "resolution agreement" or "educational referral" to address his alleged bias. Yet students do this, and they do so only because BART is making that "request." *Backpage.com, LLC v. Dart*, 807 F.3d 229, 235-36 (7th Cir. 2015).

That some students have ignored BART's instructions to speak with them, as the district court noted, RSA035, does not show that no problem exists. 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). Informal coercion "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, LLC*, 807 F.3d at 231. Further, the brunt of the harm caused by BART falls on the silent majority of students who, like Speech First's members, self-censor their speech to avoid BART altogether. BART has no experience with these students—precisely *because* its existence chills speech on campus. *See Speech First*, 939 F.3d at 766 ("The lack of discipline against students could just as well indicate that speech has already been chilled.").

The BIP suffers similar defects. University Housing receives complaints of bias about its residents (half of which are anonymous), and it then asks students to "voluntarily" accept "corrective action" for the "bias-motivated incident." *Supra* 13-14; A537-A538, ¶¶11-12, 15. Although the district court found that these interactions are also voluntary, there is no evidence that students are ever informed of their supposed rights. *See id.* Like interactions with BART, students are unlikely to ignore "requests" from those who control whether they can continue to live in their residence.

Fourth, if there might be a student-code violation, BART will refer the matter to OSCR, and if there might be a violation of the law, BART may discuss the matter with the police. *Supra* 11-12 & n.3. These too are real consequences that objectively chill speech. Although the referral itself does not punish speech, it "subjects students to processes which could *lead* to those punishments" and thus to "consequences that [the student] otherwise would not face." *Speech First*, 939 F.3d at 765. A student "who knows that reported conduct might be referred to police or OSCR could understand the invitation to carry the threat: 'meet or we will refer your case.'" *Id*.

Finally, BART will publicize the allegations and BART's response on the University's website for all to see. Although BART does not specifically identify the names of students involved, many are easily identifiable given the level of detail the University provides. *See, e.g.*, A257-A262.

This coordinated response from the University leads to real consequences to students who engage in "biased" speech. The district court's focus on whether the University's actions with students were "voluntary" thus misses the point. Courts do not ignore First Amendment problems simply because state defendants promise that their interactions are "voluntary." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67-68 (1963); *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003). The University can chill speech even if it does not "directly threaten the [students] with an investigation or prosecution." *Backpage.com, LLC*, 807 F.3d at 236. Moreover, a public official can violate the First Amendment even if he "ha[s] no authority to take any official action." *Id.*; *Penny Saver Publications Inc. v. Village of Hazel Crest*, 905 F.2d 150, 154 (7th Cir. 1990); *Speech First*, 939 F.3d at 764. "Indirect 'discouragements'" can "undoubtedly 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). Nor can such assurances in

lawyer-drafted declarations eliminate the problem, as they amount to nothing more than "promises to use [the University's policies] responsibly." *United States v. Stevens*, 559 U.S. 460, 480 (2010).

Even if BART lacks the power to *formally* discipline students for their "biased" speech, it certainly "implies" that it can. *Backpage.com*, 807 F.3d at 234; *see Bantam Books*, 372 U.S. at 67-68; *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992). Given the significant overlap between BART and OSCR, a student could reasonably think that they are one and the same, or that members of BART will "use whatever authority [they] do[] have, as [university administrators]" to punish them. *Okwedy*, 333 F.3d at 344. Indeed, BART officers do not even need to "pull strings to get [a student] investigated and even [punished] by" another officer; as members of OSCR, they can just do it themselves. *Backpage.com, LLC*, 807 F.3d at 233. Students "who are looking down the barrel of the [University]'s disciplinary gun" need not "guess whether the chamber is loaded." *Wollschlaeger v. Gov'r of Fla.*, 848 F.3d 1293, 1306 (11th Cir. 2017) (*en banc*).

The Sixth Circuit's recent decision in *Speech First v. Schlissel* is directly on point. Like the University of Illinois, the University of Michigan had a bias response team that responded to student-reported "bias incidents." 939 F.3d at

762. Like Illinois, a "bias incident" could encompass expression that "discriminates" or "stereotypes" on the basis of "identity," such as race, national origin, gender identity, and a host of other categories. *Id*. Shortly after filing its complaint, Speech First moved for a preliminary injunction asking the district court to enjoin the University from using the Response Team to investigate, threaten, or punish students for bias incidents. *Id.* at 763. The district court denied the motion on standing grounds, but the Sixth Circuit reversed.

According to the Sixth Circuit, Speech First had standing to challenge the Response Team because "its members face an objective chill based on the functions of the Response Team." *Id*. at 765. Although the Response Team "lack[ed] any formal disciplinary power" and "bias incidents [were] not directly punishable under the [student code]," the Response Team still chilled speech "by way of implicit threat of punishment and intimidation to quell speech." *Id*. In particular, the Response Team's "ability to make referrals—*i.e*., to inform OSCR or the police about reported conduct—[was] a real consequence that objectively chills speech." *Id*. Although the referral itself did not punish a student, the referral "subjects students to processes which could *lead* to those punishments." *Id*. "By instituting a mechanism that provides for referrals, even where the reporting student does

not wish the matter to be referred, the University can subject individuals to consequences that they otherwise would not face." *Id*.

Additionally, the Sixth Circuit found that the invitation from the Response Team to meet "could carry an implicit threat of consequence should a student decline the invitation." *Id*. Even though there was "no indication that the invitation to meet contains overt threats, the referral power lurks in the background of the invitation." *Id*. It was possible that "a student who knows that reported conduct might be referred to police or OSCR could understand the invitation to carry the threat: 'meet or we will refer your case.'" *Id*. Even the name itself "suggests that the accused student's actions have been prejudged to be biased." *Id*. It is the "Bias Response Team," not the "Alleged Bias Response Team" or "Possible Bias Investigatory Team." *Id*. And, as such, "the name intimates that failure to meet could result in far-reaching consequences, including reputational harm or administrative action." *Id*. "Nobody would choose to be considered biased, and an individual could be forgiven for thinking that inquiries from and dealings with the Bias Response Team could have dramatic effects such as currying disfavor with a professor, or impacting future job prospects." *Id*.

The same result is required here. Illinois' BART is nearly identical to Michigan's bias response team. *Compare supra* 6-13, *with Speech First*, 939 F.3d at 762; *see* RSA032 (noting that Michigan and Illinois have "similar university bias response policies"). Like Michigan, BART will refer reports of bias-motivated incidents that may violate the Student Code to OSCR and may notify the police. *Supra* 11-12 & n.3. And, as explained above, BART's "voluntary" invitation for "dialogue" carries the same "implicit threat of consequence should a student decline the invitation." *Speech First*, 939 F.3d at 765. Speech First has standing to challenge Illinois' policy for the same reasons it had standing to challenge Michigan's. *Id*.

Other cases, too, are instructive. In *Bantam Books*, the Supreme Court confronted Rhode Island's 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.* To that end, 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 then 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. *See id*. at 66-67.

The Supreme Court held 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 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. "[T]he 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.

Similarly, in *Backpage.com*, the Sheriff of Cook County sought to shut down Backpage.com, which provided an online forum for "adult" classified ads. 807 F.3d at 230. Given that the Sheriff could not prohibit Backpage from posting the adult ads online (because of the First Amendment), he instead tried to deprive the company of ad revenues. *Id.* To do so, the Sheriff sent letters to Mastercard and Visa "requesting" that the credit-card companies stop allowing their customers to buy ads on the website. *Id*. at 236-37. Although Sheriff Dart did not threaten the companies with punishment, he "implied" as much, as his letter was on the sheriff's letterhead, criticized the credit-card companies' actions, and referenced criminal statutes. *Id.* at 231, 236. This Court reversed the denial of Backpage's preliminary-injunction motion.

As this Court recognized, "[a] public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights, regardless of whether the threatened punishment comes in the form of the use (or, misuse) of the defendant's direct regulatory or decisionmaking authority over the plaintiff, or in some less direct form." *Id.* at 230-31. It was irrelevant that "Sheriff Dart did not directly threaten the companies with an investigation or prosecution." *Id.* The letter "could reasonably be interpreted as an

implied threat to take, or cause to be taken, some official action against the companies if they declined his 'request.'" *Id*. at 236. Nor was it relevant that "his department had no authority to take any official action with respect to Visa and MasterCard." *Id*. Sheriff Dart violated the First Amendment because he "could reasonably be seen as implying that the companies would face some government sanction." *Id.* This Court ordered the Sheriff to "take no actions, formal or *informal*, to *coerce* or threaten credit card companies … to ban … services from being provided to Backpage.com." *Id*. at 239 (emphasis added).

The district court, relying on the now-reversed opinion in *Speech First v. Schlissel*, distinguished these cases (as well as *Okwedy*, 333 F.3d 339, and *Levin*, 966 F.2d 85) by concluding that those officials made "thinly veiled threat[s]." RSA036-38. But so too does BART. The request from BART to meet "could carry an implicit threat of consequence should a student decline the invitation." *Speech First*, 939 F.3d at 765. It could be "meet or we will refer your case." *Id*. Or it could be "meet or we will record the allegations of bias in our University records without your side of the story," potentially "impacting future job prospects." *Id*.

A 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, the University

established a "Patriotism Assessment Response Team," or "PART," 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 PART 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 PART did not even *implicate* the First Amendment, and that no student would have standing to challenge it due to its "voluntary" nature. The PART would instead be roundly criticized—and held unconstitutional—for what it is: a fundamentally coercive policy designed to deter students from expressing disfavored views. BART is no different. Speech First has standing to challenge this unconstitutional apparatus.

B. Speech First has standing to challenge the University's use of "No Contact Directives" to silence speech.

For similar reasons, Speech First has standing to challenge the University's No Contact Directive policy. Speech First's members intend to engage in a course of conduct "arguably affected with a constitutional interest," *SBA List*, 573 U.S. at 161-65—namely, speech on issues of public concern, *supra* 17-19. The students' "intended future conduct is arguably proscribed by the [policy] they wish to

challenge," *SBA List*, 573 U.S. at 161-65 (cleaned up), as the policy on No Contact Directives is so broad that it authorizes disciplinary officers to issue No Contact Directives in response to fully protected speech, *supra* 14-16. And the students face a credible "threat of future enforcement" because the students' views are controversial on campus, *supra* 17-19, 28-29, a No Contact Directive is easily and frequently issued, *see infra* 46-47, and the University previously has issued them in response to speech protected under the First Amendment, *supra* 15-16; *see SBA List*, 573 U.S. at 161-65. Whether Speech First's members have been threatened with a No Contact Directive themselves is of no moment. *See Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2000) ("A plaintiff who mounts a pre-enforcement challenge to a statute that he claims violates his freedom of speech need not show that the authorities have threatened to prosecute him; the threat is latent in the existence of the statute.").

The district court, however, found that Speech First has no cognizable injury-in-fact because a No Contact Directive "can only be imposed to enforce the behavioral standards in the Student Code and prevent violations of the Student Code." RSA040. The district court based this interpretation on Section 4.06(a), which states that "University disciplinary officers are among those responsible for

the enforcement of student behavioral standards and, when possible, the prevention of violations of the Student Code," RSA040 (quoting A157), and the two University officials' statements about how they interpreted their authority, *id*.

The district court's reading of Section 4.06 is incorrect. Section 4.06(d) plainly states that disciplinary officers may issue a No Contact Directive whenever the officer concludes "that a No Contact Directive is warranted," A158, and Section 4.06(a) does nothing more than describe the responsibilities of disciplinary officers. If the policy contained any actual limits on the issuance of a No Contact Directive, it would not hide them in such a provision. Nor does the University's "promise" that it interprets its policy in this manner alter the meaning of the provision or defeat Speech First's standing. Speech First has standing to challenge the policy as it is written because there is "no guarantee that the [University] might not tomorrow bring its interpretation more in line with the provision's plain language." *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710-11 (4th Cir. 1999).

The University relied on a declaration from Justin Brown, the Director of OSCR, to argue that, in practice, the University uses its power rarely and only when needed, and so Speech First's members have nothing to fear. But his declaration shows nothing of the kind. During the 2018-19 school year, the

University issued *over one hundred* No Contact Directives, each prohibiting at least two students (and sometimes "groups" of students) from having any oral, written, or third-party communications (whether on campus or off campus) for an indefinite period of time. A334-A335, ¶¶22-23. Although some of these directives appear to have addressed cases of physical violence or sexual misconduct, others were for nothing more than incidents that "suggested that a violation of the Student Code … was likely in the near future." A335, ¶23. Which provisions of the Student Code warranted a No Contact Directive, the University does not say.

The district court also concluded that "the evidence shows that No Contact Directives have not been and would never be issued for speaking on the topics the Students wish to discuss." RSA039. As an initial matter, even if there were no evidence of the University using this statute in response to protected speech, *but see supra* 15-16, a promise that the University has used and will continue to use its authority responsibly does not resolve the issue. This Court cannot "uphold an unconstitutional statute merely because the Government promise[s] to use it responsibly." *Stevens*, 559 U.S. at 480; *Dambrot v. Central Michigan University*, 55 F.3d 1177, 1183 (6th Cir. 1995) (finding a university policy unconstitutionally broad, despite the university's promise to not enforce the policy "to interfere

impermissibly with individuals' right to free speech"). As long as the policy "*arguably* prohibits certain protected speech, a reasonable fear of prosecution can provide standing for a First Amendment challenge." *Schirmer v. Nagode*, 621 F.3d 581, 586 (7th Cir. 2010) (emphasis added). Speech First has made that showing.

Moreover, the evidence shows that the University *has* issued a No Contact Directive in the past based on a student's speech. *Supra* 15-16. Although the University disputes some of the details that have been publicly reported about the event, it nevertheless *conceded* that it was Mr. Minik's article that caused OSCR to issue the No Contact Directive. *See* Dkt. 18-11, Die Decl. ¶7 (noting that the article was "the latest incident" that caused the issuance of the No Contact Directive). Nor did Mr. Die deny that he told Mr. Minik that "if he wished the hostile relations between himself and Mr. Khan to improve, he might consider not writing about Mr. Khan online." *Id*. ¶8. Mr. Die also does not dispute that the No Contact Directive was indefinite, which undermines his explanation that the directive was designed merely to "diffuse tension." *Id*. ¶7.

The Students have every reason to believe they could be subject to a similar order. The Students want to engage in controversial speech, such as building a border wall, that frequently results in heated exchanges and complaints. *Supra* 17-

19, 28-29. Indeed, Students A, B, and C want to advocate in support of President Trump's reelection, which is the exact topic that led to the Minik-Khan dispute and the subsequent No Contact Directive. *Supra* 15-16, 19. It is objectively reasonable for Speech First's members to fear that their speech will lead to similar consequences.

C. The University's voluntary cessation did not moot Speech First's challenge to the University's restraint on speech concerning non-campus elections.

Before this lawsuit was filed, the University prohibited students from "post[ing] and distribut[ing] leaflets, handbills, and any other types of materials" about "candidates for non-campus elections" without "prior approval." A068, §2-407. A student who violated this rule was subject to disciplinary action, including reprimand, censure, probation, suspension, and expulsion. A149-A150, § 2.04(a)(iii), (b). On July 18, 2019, four days before it filed its opposition, the University revised its code to eliminate this policy. The district court's conclusion that this voluntary cessation mooted the issue was error.

"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). If it did, the government 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). The government also could frustrate "the 'public interest in having the legality of the practices settled.'" *DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974). A government defendant can establish mootness based on voluntary cessation only if it "'bears the formidable burden of showing that it is *absolutely* clear 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).

In *Trinity Lutheran*, for example, the Governor announced that the state had changed its policy to "allow[] religious organizations to compete for and receive Department grants on the same terms as secular organizations." *Id.* This voluntary cessation did not moot the Supreme Court case, however, because the State could simply "revert to its policy of excluding religious organizations." *Id*. The mere *possibility* that the government could readopt the policy rendered the case not moot.

So too here. Because the University can easily amend its Student Code to bring back its leafletting policy, it is not "*absolutely* clear the allegedly wrongful behavior could not reasonably be expected to recur." *Id*. As shown by the speed in

which it acted, amending the Student Code requires nothing more than a committee vote and the Chancellor's signature. A414-15, ¶16. A defendant does not carry its heavy burden when no practical or legal obstacle prevents it from returning to its prior policy. *See, e.g., Tree of Life Christian Sch. v. City of Upper Arlington*, 823 F.3d 365, 371 n.4 (6th Cir. 2016) (case not moot because "absent an injunction …, [the city] always could amend the [ordinance] once again" and could do so "at any time").

The district court relied on *Ozinga v. Price* to conclude that, because the University is a government actor, its voluntary cessation moots this issue unless there is a "substantial likelihood that the offending policy will be reinstated if the suit is terminated." 855 F.3d 730, 734 (7th Cir. 2017). But "not all [government] action enjoys the same degree of solicitude." *Speech First*, 939 F.3d at 768. The case-mooting conduct in *Ozinga*, for example, was the enactment of new regulations that made it through the procedures for notice-and-comment rulemaking. *See* 855 F.3d at 732. The University's amendment of the Student Code contains none of the formality that comes with notice-and-comment rulemaking or the elimination of a statute, which requires a vote of often hundreds of legislators in two branches and a signature from the governor. *See id.*; *see, e.g., Thomas v. Fiedler*, 884 F.2d 990, 994

(7th Cir. 1989). A recommendation from a University committee and approval by the Chancellor of the University is not the type of "legislative-like procedures" that will presumptively moot the case. *Speech First*, 939 F.3d at 768.[5]

The district court also likened this case to *Wisconsin Right to Life, Inc. v. Schober*, 366 F.3d 485, 492 (7th Cir. 2004), where "a challenge to a statute … had never been enforced" and the state agency "acknowledged that the law was unconstitutional and would not be enforced." RSA026. But neither rationale applies here. The University's only evidence on the rule's history of enforcement was the declaration from one University official who stated that she had "never seen or heard" of this happening. A414, ¶ 15. That is not definitive evidence of non-enforcement. And even if the rule had never been enforced, that would not be entirely surprising, as most students do not openly violate the University's rules, especially given the possible punishments for doing so. *Supra* 17; *see Speech First*,

[5] This Court's decision in *Freedom from Religion Found., Inc. v. Concord Cmty. Sch.*, 885 F.3d 1038 (7th Cir. 2018) is not to the contrary. There, this Court—in finding that voluntary cessation did *not* moot the case—merely recognized that, if a government actor sincerely self-corrects the practice at issue, "a court will give this effort weight in its mootness determination." *Id*. at 1051. This "weight" does not reflect the extraordinary deference given by the district court.

939 F.3d at 766 ("The lack of discipline against students could just as well indicate that speech has already been chilled.").

In addition, unlike in *Wisconsin Right to Life*, the University has never acknowledged that its rule was unconstitutional; it merely amended the rule after being sued. That the voluntary cessation in this case occurred only "once this lawsuit was filed" undermines the University's assurances that it will never reinstate the rule, *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 343 (6th Cir. 2007), and "increases the University's burden to prove that its change is genuine," *Speech First*, 939 F.3d at 769.

The district court asserted that the University "has no intention of restoring the eliminated provision or adopting a similar provision." RSA025. But the only evidence on this point was from one person, the Associate Dean of Students, Rhonda Kirts, who stated that "the University has no intention of restoring" the old rule. A415, ¶ 16. Ms. Kirts cannot "speak for her superiors" or the other members of the University's Conference for Conduct Governance, who have not "signed affidavits pledging future compliance." *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 492 (D.C. Cir. 1988). And even if her superiors had signed affidavits, "the word of the present [officials]" is "not sufficient to make the case

moot" because it is "not binding on those who may hereafter be appointed." *United States v. Atkins*, 323 F.2d 733, 739 (5th Cir. 1963). Nor would it moot the case even if she could speak for the whole University. *See 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" cannot moot the case) (citation omitted); *ACLU v. Fla. Bar*, 999 F.2d 1486, 1494-95 (11th Cir. 1993) (same).

If the University truly intends to never adopt this rule again, then it should have no problem "agree[ing] to a judgment declaring [it] unconstitutional." *Assoc. 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. *See, e.g.*, *Lopes v. Int'l Rubber Distributors, Inc.*, 309 F. Supp. 2d 972, 983-84 (N.D. Ohio 2004). This issue is not moot.

II. The Court Should Instruct the District Court to Issue a Preliminary Injunction

If the Court agrees that this case is likely justiciable, then the Court should resolve the other preliminary-injunction factors itself. In First Amendment cases like this one, "it makes sense for [this Court] to address whether preliminary injunctive relief is warranted" rather than remanding to the district court. *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 589-90 (7th Cir. 2012); *Wis. Right to Life State PAC v.*

Barland, 664 F.3d 139, 151 (7th Cir. 2011) (same). That is because "the likelihood of success on the merits will often be the determinative factor"; the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" and "injunctions protecting First Amendment freedoms are always in the public interest." *ACLU of Ill.*, 679 F.3d 583 at 589-90 (citations omitted). This Court thus is well suited to resolve Speech First's entitlement to a preliminary injunction. Because Speech First satisfies the preliminary-injunction factors, the Court should instruct the district court to enter Speech First's requested preliminary injunction.

A. The University's policies are likely unconstitutional.

1. The University's prohibition on "bias-motivated incidents" violates the First Amendment.

The University's prohibition on "bias-motivated incidents" violates the First Amendment for two reasons. *First*, it is overbroad. The First Amendment prohibits public universities from adopting regulations that are "so broad as to chill the exercise of free speech and expression." *Dambrot*, 55 F.3d at 1182. "Because First Amendment freedoms need breathing space to survive, a state may regulate in the area only with narrow specificity." *Gooding v. Wilson*, 405 U.S. 518, 522 (1972). "[A]

law may be invalidated as overbroad if a substantial number of its applications are unconstitutional." *Stevens*, 559 U.S. at 473 (cleaned up).

Here, the University defines "bias-motivated incident" as an "action or expression" that is "motivated, at least in part, by prejudice against or hostility toward a person (or group) because of that person's (or group's) actual or perceived age, disability/ability status, ethnicity, gender, gender identity/expression, national origin, race, religion/spirituality, sexual orientation, socioeconomic class, etc." A180. This definition encompasses speech that is fully protected by the First Amendment. The type of speech that Speech First's members want to express (e.g., advocating for building a border wall or the "deradicalization of Islam") is fully protected by the First Amendment, and these categories of speech all have been the subject of complaints to and responses from BART and BIP. *See supra* 7-8, 13-14, 17-19, 28-29. The University thus threatens to subject students to investigations and punishment based *solely* on the content of their speech. This is unconstitutional.

Second, the University's prohibition on "bias-motivated incidents" is void for vagueness. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*,

408 U.S. 104, 108 (1972). "[T]he vagueness doctrine has two primary goals: (1) to ensure fair notice to the citizenry and (2) to provide standards for enforcement [by officials]." *Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 551 (6th Cir. 2007). "With respect to the first goal, … '[a] statute which either forbids or requires the doing of an act in terms so vague that [individuals] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" *Id*. (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1925)). "With respect to the second goal, … 'if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to [officials] for resolution on an ad hoc and subjective basis.'" *Id*. (quoting *Grayned*, 408 U.S. at 108-09).

This principle of clarity is especially demanding when First Amendment freedoms are at stake. If the challenged law "interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). "Certainty is all the more essential when vagueness might induce individuals to forego their rights of

speech, press, and association for fear of violating an unclear law." *Scull v. Va. ex rel. Comm. on Law Reform & Racial Activities*, 359 U.S. 344, 353 (1959).

Here, even though "bias-motivated incidents" can subject students to serious consequences, the University has offered no guidance about the meaning of that term or how students can avoid committing a violation. A "bias-motivated incident" appears to simply be whatever speech a reporter or BART "perceive[s]" as "offensive," "bias[ed]," or "intoleran[t]." A224, A246. The absence of a clear standard creates a serious risk that this prohibition will be enforced in an arbitrary or discriminatory manner, or will be used to target speech based on the viewpoint expressed. The University's prohibition on "bias-motivated incidents" is thus void for vagueness.

2. The University's inclusion of protected speech in the "No Contact Directive" policy violates the First Amendment.

The University's authorization of No Contact Directives is unconstitutionally overbroad. As explained, the First Amendment prohibits the University from adopting regulations that are "so broad as to 'chill' the exercise of free speech and expression," *Dambrot*, 55 F.3d at 1182, and requires universities to "regulate … only with narrow specificity," *Gooding*, 405 U.S. at 522. Here, the University's policy on No Contact Directives is incredibly broad. A No Contact

Directive can be issued whenever an official concludes "that a No Contact Directive is warranted." A158, § 4.06(d). Engaging in speech that is fully protected under the First Amendment thus can provide the sole justification for a No Contact Directive.

Even accepting the district court's interpretation of Section 4.06—that the University can issue a No Contact Directive only "to enforce the behavioral standards in the Student Code and prevent violations of the Student Code," RSA040—the overbreadth problem remains. Under the University's interpretation of the provision, a disciplinary officer has the right to issue a No Contact Directive if he believes a student might "potentially" violate *any* provision of the Student Code—a document spanning more than 100 pages and prohibiting a wide range of conduct, from violence and sexual assault to plagiarism and disruptive shouting. *See* A009-A135. Moreover, the disciplinary officer can issue a No Contact Directive against a student even if he does not believe the student will potentially violate the Student Code—all the disciplinary officer needs is an indication that *someone* (it could be the *listener*) could violate the Student Code. *See* A333, ¶ 17 (No Contact Directives are always issued against both students). This is not a "tailored" approach to campus problems.

That Section 4.06 is unconstitutionally overbroad becomes apparent when compared to similar statutes. For example, Illinois' Stalking No Contact Order Act creates a civil remedy allowing stalking victims to force offenders to "stay away from the victims and third parties." 740 ILCS 21/5. Not surprisingly, the state law does not authorize a no-contact order merely because there is a "potential or reported" violation of any law. Instead, a no-contact order can issue only if the offender is "engaging in a course of conduct directed at a specific person, and [the offender] knows or should know that this course of conduct would cause a reasonable person to fear for his or her safety or the safety of a third person or suffer emotional distress." *Id*. §10.

The First Amendment does not permit the University's blunderbuss approach. "Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily 'sacrific[ing] speech for efficiency.'" *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). The University's policy on No Contact Directives unquestionably "burden[s] substantially more speech than necessary to achieve" the University's interests and is unconstitutionally overbroad. *Id.* at 490.

Although the University could properly issue No Contact Directives in certain circumstances (e.g., to protect the health and safety of students), its current policy is "so broad as to 'chill' the exercise of free speech and expression," *Dambrot*, 55 F.3d at 1182, and does not "regulate … only with narrow specificity," *Gooding*, 405 U.S. at 522. It is likely unconstitutional.

3. The University's prior restraint on speech concerning "non-campus elections" violates the First Amendment.

The University's (now eliminated) prohibition on "post[ing] and distribut[ing] leaflets, handbills, and any other types of materials" about "candidates for non-campus elections" without "prior approval" is unconstitutional.

First, the University's policy is a prior restraint. "[A] prior restraint exists when a regulation gives public officials the power to deny use of a forum in advance of actual expression." *Stokes v. City of Madison*, 930 F.2d 1163, 1168 (7th Cir. 1991) (citation omitted). "The relevant question is whether the challenged regulation *authorizes* suppression of speech in advance of its expression." *Ward v. Rock Against Racism*, 491 U.S. 781, 795 n.5 (1989) (emphasis in original). "[A]ny system of prior restraint comes to [court] bearing a heavy presumption against its constitutional validity." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990)

(cleaned up). Prior restraints cannot overcome this heavy presumption if they either "place[] unbridled discretion in the hands of a government official or agency" or "fail[] to place limits on the time within which the decisionmaker must issue the license." *Id.* at 225-26. Thus, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969).

Here, the University's prior restraint affords the University unbridled discretion to grant or deny requests to engage in speech concerning "non-campus elections." A068, §2-407. The policy also fails to place any limits on the time that the University has to grant or deny permission. *See id*. This prior restraint is a "quintessential first-amendment violation." *Fairley v. Andrews*, 578 F.3d 518, 525 (7th Cir. 2009).

Second, the University's prior restraint is a content-based restriction on protected speech. The Supreme Court has consistently recognized the "substantial and expansive threats to free expression posed by content-based restrictions." *United States v. Alvarez*, 567 U.S. 709, 717 (2012). "Content-based regulations are" thus "presumptively invalid." *R.A.V. v. City of St. Paul, Minn.*,

505 U.S. 377, 382 (1992). Accordingly, "any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest." *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009).

Here, the University expressly authorizes the distribution of all materials concerning any "sociopolitical or educational issue[]" *except* for the "promotional materials of candidates for non-campus elections." A068, § 2-407. This is a classic content-based regulation. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015). For example, the University's policy allows a student to pass out a flyer that says "Medicare for All" but requires prior approval to pass out a flyer that says "Sanders 2020." That is indefensible. For both of these reasons, the University's prior restraint on speech is likely unconstitutional.

B. Speech First satisfies the remaining preliminary-injunction criteria.

In "a free speech case, ... the likelihood of success on the merits will often be the determinative factor. That is because even short deprivations of First Amendment rights constitute irreparable harm, and the balance of harms normally favors granting preliminary injunctive relief because the public interest is not harmed by preliminarily enjoining the enforcement of a statute that is probably unconstitutional." *Higher Society of Ind. v. Tippecanoe Cty.*, 858 F.3d 1113,

1116 (7th Cir. 2017) (cleaned up). In short, "'the analysis begins and ends with the likelihood of success on the merits of the [First Amendment] claim.'" *Id*. Because Speech First is likely to prevail on its First Amendment claims, the Court should grant the preliminary injunction. In any event, Speech First independently satisfies the equitable criteria for a preliminary injunction.

First, Speech First will suffer irreparable harm without interim relief because Speech First's members will be deprived of their free-speech rights, and the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) ("The loss of First Amendment freedoms is presumed to constitute an irreparable injury for which money damages are not adequate."); *ACLU of Ill.*, 679 F.3d at 589 (same).

Second, the balance of harms overwhelmingly favors a preliminary injunction. Speech First has a powerful interest in ensuring the protection of open and vigorous discourse at the University without prior restraints or threats of investigation or punishment. In contrast, the University has no interest in restraining, banning, or chilling speech protected by the First Amendment, even

if such speech is "particularly hurtful to many." *Snyder*, 562 U.S. at 456. Further, even if the Court awards Speech First a preliminary injunction, the University remains "free to enact new regulations that are tailored so as to conform to First Amendment jurisprudence." *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 373 (M.D. Pa. 2003).

Third, a preliminary injunction is in the public interest. As this Court has explained, "injunctions protecting First Amendment freedoms are always in the public interest." *Christian Legal Soc'y*, 453 F.3d at 859. The public undoubtedly has a strong interest in ensuring free expression at state-funded universities. *See Lawson v. City of Kankakee*, 81 F. Supp. 2d 930, 936 (C.D. Ill. 2000); *Personal PAC v. McGuffage*, 858 F. Supp. 2d 963, 969 (N.D. Ill. 2012). Speech First has satisfied the requirements for a preliminary injunction.

CONCLUSION

This Court should reverse the district court and remand with instructions to grant Speech First a preliminary injunction.

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Respectfully submitted,

/s/ J. Michael Connolly

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32 because this document contains 13,754 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

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Dated: October 29, 2019

/s/ J. Michael Connolly
J. Michael Connolly
One of the Attorneys for Appellant

CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included in the Appendix.

/s/ J. Michael Connolly
J. Michael Connolly

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2019 the Brief of Appellant was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ J. Michael Connolly
J. Michael Connolly

APPENDIX

TABLE OF CONTENTS TO SHORT APPENDIX

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

SPEECH FIRST, INC.,	)	
	)	
Plaintiff,	)	
v.	)	**Case No. 19-cv-3142**
	)	
TIMOTHY L. KILLEEN, et al.,	)	
	)	
Defendants.	)	

ORDER

On June 6, 2019, Plaintiff filed a Motion for Preliminary Injunction (#4) and a Memorandum in Support (#5) with attached Exhibits. Defendants filed a Response (#18), with numerous attached Exhibits, on July 22, 2019. Plaintiff filed a Reply (#22) on August 5, 2019. For the reasons that follow, the court DENIES the Motion for Preliminary Injunction.

I. BACKGROUND

On May 30, 2019, Plaintiff Speech First filed a Complaint (#1) against Defendants, twenty-nine people who hold positions at the University of Illinois ("University"). Plaintiff challenges the constitutionality of three university policies: (1) a rule prohibiting the posting and distributing of materials about candidates for non-campus elections unless an individual receives "prior approval" from the University ("prior approval requirement"); (2) a policy against "bias-motivated incidents"; and (3) a policy governing the issuance of "No Contact Directives."

Plaintiff's Motion for Preliminary Injunction seeks an order enjoining Defendants from (1) enforcing the prior approval requirement; (2) using the Bias Assessment and Response Team, University Housing, or any other University officials to investigate, log, threaten, or punish students (including informal punishments) for bias-motivated incidents; and (3) issuing No Contact Directives without clear, objective procedures ensuring the directives are issued consistent with the First Amendment.

A. The Parties

1. *Speech First and Its Members*

In the Complaint, Plaintiff Speech First describes itself as "a nationwide membership organization of students, alumni, and concerned citizens . . . dedicated to preserving civil rights secured by law, including the freedom of speech guaranteed by the First Amendment."

Speech First filed suit on behalf of four anonymous students at the University. Those students, referred to in the Complaint as Students A, B, C, and D (collectively, "Students"), are either "rising sophomores" (Students A and C) or "rising seniors" (Students B and D). The Students wish to express a wide variety of "political, social, and policy viewpoints that are unpopular on campus." The Complaint lists examples of such viewpoints, including opposition to abortion, support for President Trump, belief in traditional marriage, support for strong immigration and border policies, support for "deradicalization of Islam," support for Israel, support for First Amendment coverage for "hate speech," opposition to gun control, and support for LGBT rights. The

Students wish to engage in "open, robust, and civil discourse" with other students, including those who disagree with them.

The Complaint alleges the University's ban on "bias-motivated incidents" and its issuance of No Contact Directives for engaging in protected speech chills the Students' speech, deterring them from speaking openly about issues of public concern. The Complaint states that the Students believe expressing their views "could result in being reported, investigated, and punished by the University's Bias Assessment and Response Team (BART) for engaging in a 'bias motivated incident.'" It further alleges that Students A, B, and C want to distribute literature about non-campus elections, but the rule requiring prior authorization to do so chills their speech, and that Student C (who lives in the University's residential housing) fears expressing his views could result in "being reported, investigated, and punished by" University housing in addition to BART.

2. *The University and Its Personnel*

Defendants are all sued in their official capacities, due to their positions within the University. The University is a public university governed by a Board of Trustees. Defendants Ramón Cepeda, Kareem Dale, Donald J. Edwards, Ricardo Estrada, Patricia Brown Holmes, Naomi D. Jakobsson, Stuart C. King, Edward L. McMillan, Jill B. Smart, Trayshawn M.W. Mitchell, Darius M. Newsome, Shaina Humphrey, and Governor J.B. Pritzker are the thirteen members of the Board of Trustees.

The Complaint states that the Board is responsible for the adoption and authorization of the challenged policies that govern University students, and that the Board "delegated certain authority and responsibilities to others, including the Defendants in this case." It describes the remaining Defendants as follows.

Defendant Timothy L. Killeen, President of the University, is responsible for enacting and enforcing the policies challenged by Speech First.

Defendant Robert J. Jones, Vice President for the University, oversees the departments under Student Affairs and is allegedly responsible for the policies challenged by Speech First.

Defendant Danita M. Brown Young, Vice Chancellor for Student Affairs, also oversees departments within Student Affairs. Those departments include the Office of the Dean of Students, the Office for Student Conflict Resolution (OSCR), BART, and University Housing.

Defendant Rhonda Kirts, Acting Dean of Students, oversees OSCR and BART. Defendant Justin Brown, Director of OSCR, oversees and is an ex officio member of BART. Defendants January Boten, Debra Imel, Rachael Ahart, Matthew Pinner, Arianna Holterman, Dementro Powell, Jamie Singson, and Kimberly Soumar are members of BART.

Defendant Lowa Mwilambwe, an Associate Vice Chancellor for Student Affairs, oversees seven departments within Student Affairs, including University Housing.

Defendant Alma R. Sealine, Director of University Housing, is responsible for leading, planning, and directing University Housing, including its bias incident protocol. Defendant Patricia K. Anton, Associate Director of University Housing, is also responsible for that protocol.

B. University Departments and Policies

Plaintiff's Motion concerns the prior approval requirement, bias-motivated incident policies within BART and University Housing, and No Contact Directives.

1. *Prior Approval Requirement*

Prior to July 18, 2019, Section 2-407 of the Student Code provided that an individual needed "prior approval" to "post and distribute leaflets, handbills, and other types of materials" when such materials were "the promotional materials of candidates for non-campus elections." Other promotional materials did not require "prior approval." Section 2-407 stated:

> Any individual may post and distribute leaflets, handbills, and other types of materials intended to provide information about sociopolitical or educational issues and events, without prior approval under the following conditions:
>
> (a) Such materials must not advertise the availability of alcohol, information associated with solicitation for profit (i.e., coupons, discounts, commercial advertisements), or the promotional materials of candidates for non-campus elections. . . .

The University has since amended the Student Code, pursuant to the "Procedure for Amending the Student Code," to remove the prior approval requirement for promotional materials of candidates for non-campus elections. The Conference on Conduct Governance, a standing committee of the Urbana Champaign Senate

composed of faulty members, administrators, and students, reviews and recommends changes to the Student Code. The Conference on Conduct Governance voted to recommend the elimination of the prior approval requirement for promotional materials of candidates from non-campus elections. The amendment became effective on July 18, 2019, upon approval by the Chancellor.

Section 2-407 now states:

> Any individual may post and distribute leaflets, handbills, and other types of materials intended to provide information about sociopolitical or educational issues and events, without prior approval, under the following conditions:
>
> (a) Such materials must not advertise the availability of alcohol, or include information associated with solicitation for profit (i.e., coupons, discounts, commercial advertisements). . . .

According to the Declaration of Rhonda Kirts, the Associate Dean of Students and a part of the University's Conference for Conduct Governance, the University never enforced the now-eliminated provision of § 2-407, and the University has no intention of restoring the eliminated provision or adopting a similar provision.

The Student Code website reflects the amendment. See Article 2, Part 4 - University Property and Facilities—In General, https://studentcode.illinois.edu/article2/part4/2-407/ (last visited September 13, 2019). Plaintiff included as an Exhibit a printout of the "Policies and Guidelines" page of the Illini Union website that still referred to the pre-amendment version of Section 2-407. However, that website now also reflects the amendment. Posting Policy, Policies and Guidelines,

https://union.illinois.edu/get-involved/rso-handbook/policies-and-guidelines (last visited September 13, 2019).

2. *Bias-Motivated Incident Policies*

a. BART

BART collects and responds to reports of "bias-motivated incidents." BART's website describes "bias-motivated incidents" as "actions or expressions that are motivated, at least in part, by prejudice against or hostility toward a person (or group) because of that person's (or group's) actual or perceived age, disability/ability status, ethnicity, gender, gender identity/expression, national origin, race, religion/spirituality, sexual orientation, socioeconomic class, etc."

According to its website, BART supports students affected by such incidents, promotes education and awareness about the impact of actions motivated by prejudice, provides opportunities for educational conversation and dialogue, and publishes data (without personally identifiable information) on reported incidents.

January Boten, an Assistant Dean of Students and one of two Co-Chairs of BART, further described the purpose and structure of BART in a Declaration, as follows.

BART provides a forum for students to engage in voluntary and private discussions about incidents alleged to be motivated by bias. BART members are University staff drawn from OSCR, the University Housing Office, the Office of Student Affairs, the Office of Diversity, Equity, and Inclusion, the Student Assistance Center, the Illini Union, and a law enforcement liaison from the University Police Department. The law enforcement liaison has no law enforcement function as part of her service on

BART. BART does not refer reports to the University Police. Police do not investigate incidents reported to BART unless the incidents are independently reported to the police for law enforcement reasons.[1]

Students can report incidents alleged to be motivated by bias to BART via email or an online form describing when and where the incident occurred, the perceived bias and how it was demonstrated, and the name or organization of involved parties.[2] Incidents are often reported anonymously.

BART's members meet periodically to review reports. If the reporting party wishes to meet, a BART staff member will discuss the report and provide support. If a report identified by name students who allegedly engaged in bias-motivated conduct, BART members decide whether to invite the students to participate in an optional conversation about the incident.

Most students contacted by BART do not respond at all, or decline the offer of a meeting. Meeting with BART is entirely voluntary, so if a student declines to meet with BART, she will face no consequences and BART's involvement with the incident is deemed complete.

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[1]Plaintiff includes as an exhibit a printout of a University Police Department tweet that states that acts of intolerance "create an unsafe and unwelcoming environment for campus community members"and can be reported to BART.

[2]The online form previously requested "Information About the Offender (if known)." It now asks for the name of the "Person or Organization Responsible" in a section for information about "Involved Parties." Bias-Motivated Incident Reporting Form, https://cm.maxient.com/reportingform.php?UnivofIllinois&layout_id=1 (last visited September 13, 2019).

If a student agrees to meet with BART, staff give the student the opportunity to reflect on her behavior and its effect on other students. However, BART does not require any student to change her behavior. BART has no authority to impose any sanctions if the student chooses to engage in the same behavior. BART staff explain to students that they are not being charged with any Student Code violation, and they are not "in trouble." If a student desires to continue the behavior that led to a report, BART staff offer to discuss plans to consider in cases of confrontation and escalation with a goal of ensuring the safety of the student and others.

BART does not disclose any student meetings to any other office or department without permission from the student. Plaintiff's Motion alleges that a student who was the subject of a BART report claimed that his academic advisor told him "that he could see from the student's files that the student had met with someone from BART," but Boten states that an individual outside of BART would only know a student met with BART if the student disclosed the meeting or gave BART permission to do so.

BART is administratively housed within OSCR, but it operates completely distinctly from the student disciplinary process dealing with Student Code violations. BART does not conduct "investigations" into reported incidents. BART has no power to compel responses to requests for information, or to sanction, discipline, or punish a student. BART does not make findings of facts regarding incidents. Expressing the views the Students wish to express would not violate the Student Code. The Students would not face discipline solely as a result of expressing those opinions.

Some behavior, such as bias-motivated physical violence, stalking, true threats, or sexual harassment, may be motivated by bias and also violate the Student Code, but bias-motivated conduct alone is not a Student Code violation. For example, assaulting another student while yelling about her national origin would subject a student to the disciplinary process. But, simply engaging in the speech the Students wish to engage in is not a Student Code violation, and no student has ever been charged with a violation of the Student Code for simply expressing those views.

From 2011 to 2015, Justin Brown was a conduct investigator within OSCR and chair of BART, which was then called the Tolerance Program. He became Director of OSCR and an Associate Dean of Students in 2015. In a Declaration, Brown described the student disciplinary system, including No Contact Directives, and how that system differs from BART, as follows.

Enforcement of the Student Code (sometimes referred to as the "student conduct process") is a formal process that follows the Student Disciplinary Procedures. Disciplinary officers investigate and adjudicate potential Student Code violations. A disciplinary officer sends a respondent a charge notice, including the allegation, the formal charge, and the respondent's rights. The respondent has five days to schedule an appointment with the officer, who conducts an investigation, makes a formal finding, determines whether any Student Code violations occurred, and assigns any resulting sanction. Cases involving suspensions or dismissals are decided by a subcommittee of the Senate Committee on Student Discipline.

According to Brown, student participation in BART is voluntary. Discipline can only be imposed where reported conduct also violates the Student Code. OSCR enforces the Student Code, but BART is a separate subsection of OSCR that is not a part of Student Code enforcement. BART involves no disciplinary consequences and is an entirely voluntary process, in contrast to the formal notification, required participation, and potential sanctions involved in enforcement of the Student Code. BART interactions with students are private, not recorded in academic or disciplinary records, and not disclosed outside of OSCR without permission.

Like Bowen, Brown reaffirmed that the Student Code does not contain any sections penalizing students for engaging in bias-motivated speech. Bias-motivated speech alone is not a Student Code violation. It is not treated as such. The Students could never be charged with a violation of the Student Code for expressing their views. No student has ever been so charged.

BART annual reports summarize reported incidents. Reports include students referring to other students using offensive slurs, graffiti on campus that is racist, homophobic, or anti-Semitic, a student complaining that women are automatically admitted into engineering programs, students saying religion is "lies" that people would have to be stupid to believe, a student equating the Black Lives Matter movement to the KKK, people accusing Muslims on campus of being terrorists, a student in a bar being told to go back to Korea, a man being beaten by someone yelling racial slurs and saying "go back to your country" and "stop taking our jobs," and events such as a "Build that Wall" event involving a wall of blocks, a "Meeting with

the Chief" program and other Chief Illiniwek-related activities, and an "Affirmative Action Bake Sale" charging different prices based on race and ethnicity.

Nicole Neily, President of Speech First, Inc., also submitted a Declaration. She states that she is "personally familiar with several of Speech First's members at the University," including the Students. She states that she is "aware of how BART operates" through her "discussion with Speech First members and other students who attend and have attended the University." Neily states that BART contacts "offenders" to tell them that BART received a bias report about them and BART needs to speak with them, not identifying the person accusing them of bias or informing them of "any rights he or she may have." She states that details of reported incidents are recorded on students' permanent records and made available to others outside of BART, as one student was told by his advisor "that he could see from the student's files that the student had met with someone from the BART."

b. University Housing

Similar to BART but in the campus housing context, University Housing has a Bias Incident Protocol (BIP). The University website states that the BIP was implemented "to address and implement corrective action for any offensive acts committed within its facilities."

Alma Sealine, Executive Director of University Housing, submitted a Declaration concerning University Housing's policies, including the BIP, stating as follows.

The BIP is entirely voluntary. Students are not required to report incidents, and they need not engage with members of University Housing staff if they do not wish to do so. There are no sanctions, punishments, or discipline of any kind associated with a reported incident. By contrast, a separate, formal disciplinary process (the Conduct Process) exists by which students may face disciplinary consequences (from reprimands to dismissal) for breaching their housing contracts or University policies.

The Students would not face any consequences from University housing for expressing their views. Expressing their views would not violate any housing contracts or University policies. Sanctions available through the Conduct Process could not be applied to the Students for expressing their views because the Conduct Process does not apply to students expressing those or any other opinions.[3]

Residents in University Housing can report incidents alleged to be motivated by bias by email, through a web form, or by speaking to University Housing staff including Resident Advisors and Resident Directors who live in their buildings. About half of BIP reports are made anonymously, and about half do not name the student whose behavior is being reported.

University Housing staff meet to discuss reports of bias-motivated incidents. As many as five staff may meet: a Resident Director, the Resident Director's Supervisor, an Assistant Director of Residential Life, the Program Director of Social Justice & Leadership Education, and the Program Director for Community Standards. The staff

[3] Without pointing to any supporting University protocol, Neily's Declaration claims that the sanctions available in the Conduct Process can be imposed on a student who commits a "bias-motivated incident."

discuss: the report, appropriate responses to a reporting student, and who will reach out to make voluntary contact with the involved parties (if identified). University Housing staff may have voluntary discussions with reporting students, but it does not conduct an "investigation" or make a "finding" as to whether a bias incident has occurred.

If staff reach out to try to engage in a conversation with a student who is the subject of a report, the student can choose not to participate. Refusal to discuss a report with staff has no consequences to the student.

If staff speak with a reporting student, in a voluntary and informal one-on-one discussion, the staff member will acknowledge that every student enjoys a First Amendment right to freedom of speech within University Housing, and that offensive speech or conduct alone cannot subject the speaker to formal sanctions. The voluntary conversation alerts the student to the possibly unintended impact his or her behavior had on fellow students.

If a student chooses to persist in his conduct, staff will do nothing. For example, a student who displayed a Confederate flag in a residence hall window was not instructed to take it down. Sanctions cannot be imposed as a result of reports of incidents alleged to be motivated by bias.

Students may post materials within their own residence hall rooms, on residence hall windows, and on their doors. Posting about the views that the Students wish to express does not violate the Student Code or housing contracts. Students are free to

post such material, and have done so, including posting material supporting policies that are anti-immigration, pro-life, pro-choice, pro-Israel, pro-Palestine, and pro-gun rights.

Events sponsored by University groups or offices may be posted on bulletin boards after submission to the University Housing Residential Life office, if the events are open to all students and alcohol/drugs are not available at the events. Requests to post materials for such events are never denied. If materials are posted without following the submission process, they will be taken down, but no other consequence will follow.

3. *No Contact Directives*

No Contact Directives are issued pursuant to § 4.06 of the Student Disciplinary Procedures. That section states:

> a. **Authority.** University disciplinary officers are among those responsible for the enforcement of student behavioral standards and, when possible, the prevention of violations of the Student Code. In addition, students are expected to comply with the reasonable directions of university officials acting in the performance of their duties. For these reasons, the Senate Committee on Student Discipline recognizes the right of disciplinary officers to direct an individual subject to student discipline, as described in §1-301(c) of the Student Code, to have no contact with one or more other persons.
>
> b. **Expectations of Recipients.** A university No Contact Directive prohibits all oral, written, or third party communication between the identified parties. In addition, the issuing disciplinary officer will evaluate deliberate nonverbal acts intended to provoke or intimidate a protected party as possible violations of the directive. Furthermore, although there is no specific physical distance requirement that must be maintained, all parties are advised to leave the vicinity if they encounter one of the other parties. Repeatedly failing to do so will be

evaluated as a possible violation. The disciplinary officer may modify these expectations on a case-by-case basis.

c. **Violations.** If a No Contact Directive recipient fails to comply with the directive, they will face disciplinary action for violating §1-302(g) of the Student Code. The Senate Committee on Student Discipline recommends dismissal from the university in such cases. Please note that students who request No Contact Directives against other students thereby agree to be held to the same stipulations and will also face disciplinary action for initiating contact with the other party.

d. **Procedures.**
   i. **Notice.** If, based upon a report received or a direct request from a member of the university community, a disciplinary officer believes that a No Contact Directive is warranted, the disciplinary officer will notify all recipients in writing, typically by email. The directive will be effective when the notification is sent and will last until further notice if no end date is specified. The University of Illinois Police Department is also notified of all No Contact Directives for informational purposes only.
   ii. **Meeting.** The issuing disciplinary officer will attempt to meet with all recipients. At this meeting, the disciplinary officer will explain their expectations in detail as well as the consequences for noncompliance. The recipient will also be given an opportunity to explain to the issuing disciplinary officer why the No Contact Directive should not be continued.
   iii. **Modifications.** If the issuing disciplinary officer decides that modifications or exceptions to the No Contact Directive are necessary, they will communicate these changes to all parties in writing, typically by email.
   iv. **Rescission.** A No Contact Directive may only be rescinded by the issuing disciplinary officer, the issuing disciplinary officer's supervisor, the Executive Director, or, if the directive has been issued as part of an investigation, by the hearing body responsible for deciding the case.

e. **Status of Record.** Unless issued as a sanction in a disciplinary case, a No Contact Directive does not, on its own, constitute a disciplinary finding against the student and is not part of the student's official disciplinary record. As such, it would not be reported as part of a routine disciplinary background check. A No Contact Directive issued

> as a sanction in a disciplinary case is subject to release according to the retention policies dictated by the controlling formal sanction as outlined in Section 2.04 above.

Brown also described in his Declaration how No Contact Directives are issued. Disciplinary officers may issue No Contact Directives, which direct a student to have no contact with one or more other persons, in order to enforce student behavior standards and prevent Student Code violations. No Contact Directives prohibit contact between parties, requiring *both* parties to make reasonable attempts not to contact each other directly or through a third party, orally or in writing. Violating a No Contact Directive can result in discipline, up to dismissal from the University.

While prohibiting direct interaction, No Contact Directives do not prevent parties from being present in the same public space. Nor do they prohibit parties from talking or writing about the other party, publicly or privately. No Contact Directives do not limit any other statements a student might wish to make on any subject; the student simply cannot make statements to the other student named in the No Contact Directive.

While No Contact Directives are usually issued when OSCR is investigating pending Student Code violations (such as sexual misconduct against another student), they can be issued to prevent escalation of pre-existing conflict likely to result in a Student Code violation or to jeopardize student safety. No Contact Directives are not issued for bias-motivated conduct alone. Expressing the views the Students wis-h to express, without more, could not form and has never formed the basis for a No Contact Directive.

Plaintiff alleges that the University issued a No Contact Directive to a student, Andrew Minik, solely because of an article he wrote about another student, Tarik Khan, published on the website "Campus Reform."[4] Rony Die, Associate Director of OSCR and an Assistant Dean of Students, submitted a Declaration concerning the Minik-Khan No Contact Directive.

Die was the one who issued that No Contact Directive. He states that the Plaintiff's description of the events surrounding it is "simply incorrect." No Contact Directives are not and never have been imposed because of a student expressing views about a topic, controversial or not. They are issued when two students with a history of interpersonal conflict continue to interact in a way that could lead to a Student Code violation, in order to promote de-escalation and ensure student safety.

A No Contact Directive does not prohibit a student from writing about another student or from expressing views that may offend others. Die recently declined a student's request to issue a No Contact Directive in order to prevent another student from talking about her online, because a No Contact Directive does not prevent such conduct.

Die did not issue the Minik-Khan No Contact Directive just because Minik wrote about Khan online. Rather, he issued it based on an extensive history of hostile and escalating interactions that started before the article (including a direct confrontation and shouting match) and continued after it (when Khan received death threats and

[4]The court is familiar with Minik and this No Contact Directive, as Minik was a Plaintiff in another lawsuit concerning the No Contact Directive. *Minik, et al. v. Board of Trustees of the University of Illinois, et al.*, Case No. 18-2101.

observed strangers taking pictures outside of his house). Khan perceived Minik to have jeopardized Khan's safety, causing Khan to be extremely angry, but Khan did not want Die to attempt to mediate. Worried about potential physical violence and Student Code Violations, Die issued the No Contact Directive to try to diffuse tension by preventing contact between Minik and Khan. Die was not punishing Minik for writing about Khan, and never would have issued the No Contact Directive without the extensive history of escalation between the two.

In an email to Die in which Minik summarized his understanding of an earlier meeting, Minik stated that the no contact order was "not a direct disciplinary charge, rather a probationary measure" to ensure he would not contact Khan, and that the order did not pertain to public events or prevent Minik from writing journalistic stories related to Khan. Minik wrote that Die recommended the second person to arrive at a public event should leave, or they should avoid each other, and that Die suggested that Minik not write about Khan if Minik hoped "for the situation to improve."

In his Declaration, Die states that Minik asked him whether he could continue publishing articles on Khan and other topics, and Die told Minik the only limitation placed on Minik by the No Contact Directive was directly contacting Khan. Die notes that Minik's email confirmed that understanding. Die emphasizes that while he indicated Minik could choose to stop writing about Khan if he wanted to improve the hostile relationship between them, Die never indicated to Minik that he must stop writing about Khan or that doing so would be a violation of the No Contact Directive.

4. *Other University Policies*

The Student Code opens with some broad statements. The Preamble of the Student Code provides: "A student at the University of Illinois at the Urbana Champaign campus is a member of a University community of which all members have at least the rights and responsibilities common to all citizens, free from institutional censorship."

The next section, "In the Classroom," opens: "The instructor, in the classroom and in conference, should encourage free discussion, inquiry, and expression. Student performance should not be evaluated on opinions or conduct in matters unrelated to academic standards."

The following section is titled "Campus Expression" and it states: "Discussion and expression of all views is permitted within the University subject only to requirements for the maintenance of order." It further states that University members "may invite and hear any persons of their own choosing," campus press shall not be censored, and "[t]he right of peaceful protest is recognized within the University community."

The University has "Guiding Principles," including a commitment to freedom of speech, stating: "An unyielding allegiance to freedom of speech - even controversial, contentious, and unpopular speech - is indispensable to developing the analytical and communication skills of our students and empowering all members of our university communities to be active and informed citizens."

The University has over 1,800 registered student organizations. Such groups include groups devoted to advocacy across the political and social spectrum, including some of the positions Students A through D state a desire to profess. All registered student groups receive financial and logistical support for their programming from the University. With University support, student groups in recent years have put on events in line with some of the Students' stated views, including events hosting conservative media personalities, a pro-life television display on the University's Main Quad, and an event with an Immigrations and Customs Enforcement official. Campus publications have also featured pieces and letters to the editor expressing views held by the Students, such as support for a border wall, opposition to a University referendum to divest from Israel, and support for a right to engage in hate speech.

II. ANALYSIS

A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). As a threshold matter, a party seeking a preliminary injunction must demonstrate: (1) a reasonable likelihood of success on the merits of the underlying claim; (2) the absence of an adequate remedy at law; and (3) the suffering of irreparable harm if the injunction is not granted. *Coronado v. Valleyview Pub. Sch. Dist. 365-U*, 537 F.3d 791, 794-95 (7th Cir. 2008).

If the moving party establishes the above factors, this court then considers (1) the irreparable harm the non-moving party will suffer if the injunction is granted and (2) the public interest in granting or denying the injunction. *Abbot Lab. v. Mead Johnson & Co.*, 971 F.2d 6, 11-12 (7th Cir. 1992).

Plaintiff argues that it is entitled to a preliminary injunction because it is likely to prevail on the merits and it satisfies the other preliminary injunction criteria. Defendants respond that the prior approval requirement claim is moot, and that Plaintiff lacks standing to bring the bias-motivated conduct and No Contact Directive claims, which are also meritless.

A. Plaintiff's Challenge to the Prior Approval Requirement is Moot

Plaintiff seeks an order enjoining Defendants from enforcing the prior approval requirement. However, as of July 18, 2019, the prior approval requirement is no longer part of the Student Code.

Defendants argue that the removal of the prior approval requirement means Plaintiff's first claim is now moot, while Plaintiff argues that claim is not moot because the University could change the language back to its former version.

The Seventh Circuit recently discussed the mootness doctrine in the context of a governmental party having removed a complained-of defect from a rule, in *Ozinga v. Price*, 855 F.3d 730, 734 (7th Cir. 2017).

> Our jurisdiction as a federal court is limited by Article III to live cases and controversies, U.S. Const. art. III, § 2, and "an actual controversy must exist not only at the time the complaint is filed, but through all stages of the litigation." *Kingdomware Technologies, Inc. v. United States*, ––– U.S. ––––, 136 S.Ct. 1969, 1975, 195 L.Ed.2d 334 (2016) (quoting *Already, LLC v.*

> *Nike, Inc.*, 568 U.S. 85, 133 S.Ct. 721, 726, 184 L.Ed.2d 553 (2013)); *see also Campbell-Ewald Co. v. Gomez*, ––– U.S. ––––, 136 S.Ct. 663, 669, 193 L.Ed.2d 571 (2016). When a plaintiff's complaint is focused on a particular statute, regulation, or rule and seeks only prospective relief, the case becomes moot when the government repeals, revises, or replaces the challenged law and thereby removes the complained-of defect. *See, e.g., Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 474, 478, 110 S.Ct. 1249, 1252, 1254, 108 L.Ed.2d 400 (1990) (amendments to statute); *Princeton Univ. v. Schmid*, 455 U.S. 100, 103, 102 S.Ct. 867, 869, 70 L.Ed.2d 855 (1982) (per curiam) (amendment of regulations). At that point, there is no longer an ongoing controversy: the source of the plaintiff's prospective injury has been removed, and there is no "effectual relief whatever" that the court can order. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12, 113 S.Ct. 447, 449, 121 L.Ed.2d 313 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293 (1895)); *see, e.g., Fed'n of Adver. Indus. Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 930 (7th Cir. 2003) (repeal of challenged statute) (collecting cases); *City of Milwaukee v. Block*, 823 F.2d 1158, 1163–64 (7th Cir. 1987) (repeal of regulations that plaintiff alleged defendants were ignoring). Only when there is a substantial likelihood that the offending policy will be reinstated if the suit is terminated will a court recognize that the controversy remains live. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 & n.11, 102 S.Ct. 1070, 1074–75 & n.11, 71 L.Ed.2d 152 (1982) (case not moot despite repeal of challenged statute where city had announced its intent to reenact the statute if district court's judgment were vacated). Otherwise, we presume that government officials have acted in good faith in repealing the challenged law or policy. *See, e.g., Fed'n of Adver. Indus. Representatives*, 326 F.3d at 929.

Ozinga, 855 F.3d at 734.

Plaintiff suggests that Seventh Circuit cases examining state actors' acts of self-correction are no longer good law after *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2019 n.1 (2017). The court disagrees that *Comer* overruled Seventh Circuit case law on mootness in the single footnote it devoted to discussing the issue of mootness. Instead, *Comer* cited and applied case law noting that voluntary cessation *can* moot a case.

The *Comer* court stated:

> We have said that such voluntary cessation of a challenged practice does not moot a case unless "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (internal quotation marks omitted).

Comer, 137 S. Ct. at 2019 n.1.

The *Comer* Court found that the Missouri Governor's announcement that he directed the state's Department of Natural Resources to change how it enforced a grant policy did not moot a challenge to the policy as it had originally been enforced. The Department viewed its interpretation of the grant policy as being compelled by the Missouri Constitution. The parties agreed that no barrier prevented the Department from resuming the challenged behavior, with the petitioner noting that the original interpretation of the policy stemmed from the Missouri Supreme Court's interpretation of the Missouri Constitution and the policy change did not remedy that source. The *Comer* Court found that the Governor's announcement did not make clear that the Department could not revert to its prior policy. *Comer*, 137 S. Ct. at 2019 n.1.

After *Comer*, the Seventh Circuit has continued to find that a government actor's act of self-correction can render a case moot. *Freedom From Religion Found., Inc. v. Concord Cmty. Sch.*, 885 F.3d 1038, 1051 (7th Cir. 2018) ("A defendant's voluntary cessation of challenged conduct does not necessarily render a case moot. . . . But if a government actor sincerely self-corrects the practice at issue, a court will give this effort weight in its mootness determination.").

Here, the University amended the Student Code to remove the prior approval requirement for promotional materials of candidates for non-campus elections, following the formal procedures for doing so. The Conference on Conduct Governance voted to recommend the elimination of that provision. The amendment became effective on July 18, 2019, upon approval by the Chancellor. According to the Declaration of Rhonda Kirts, the Associate Dean of Students and a part of the University's Conference for Conduct Governance, the University never enforced the now-eliminated provision of § 2-407 and the University has no intention of restoring the eliminated provision or adopting a similar provision. The court finds that Defendants have established that there is no substantial likelihood that the offending policy will be reinstated if this suit is terminated; it is clear that the allegedly wrongful behavior could not reasonably be expected to recur.

The formality of a change to a policy is significant in determining whether a policy is reasonably likely to be reinstated. Assurances based only on informal discussions resulting in "what appeared to be a consensus . . . that the changes should

be made permanent," with no actual documentation of the decision to make changes permanent, did not moot a challenge to a policy that a party claimed to have changed. *Concord*, 885 F.3d at 1041.

On the other hand, "a case is moot when a state agency acknowledges that it will not enforce a statute because it is plainly unconstitutional." *Wisconsin Right to Life, Inc. v. Schober*, 366 F.3d 485, 492 (7th Cir. 2004). So, a challenge to a statute that had never been enforced, and that was held unconstitutional by a district court, was moot where a state agency acknowledged that the law was unconstitutional and would not be enforced. *Id.*

Finding that a case was "like *Wisconsin Right to Life* and unlike *Concord*," the court in *Cooper v. Vaught*, 2019 WL 3556885, at *3 (S.D. Ind. Aug. 5, 2019), found a challenge to a rule moot where the rule had been formally changed. The court explained: "Three formal steps have culminated in the Board's decision not to readopt the challenged rule: (1) the Rules Committee's vote to submit its proposed revision to the Board, (2) the Board's vote to begin the rulemaking process, and (3) the Board's ultimate vote not to readopt [the challenged rule]." *Id.*

This case is like *Cooper*, and not like *Comer*. In this case, the University took all of the formal steps necessary to officially change the requirement at issue. The requirement had never been enforced, and there is no evidence that the elimination of the provision was insincere. The University here followed its formal policy to officially

amend its Student Code, marking a change far more formal and definite than the Governor's announcement in *Comer*.

Plaintiff points to the "Policies and Guidelines" page of the Illini Union website to suggest that the prior version of the policy is still having an effect. However, that website has now been updated to include the amended version of Section 2-407. The Illini Union website's prior inclusion of the pre-amendment language did not change the Student Code back to the old version; it simply showed that the Illini Union website had not yet been updated.

It is theoretically possible that the University could reverse course. The Conference on Conduct Governance could vote to recommend the re-adoption of the prior approval requirement for promotional materials of candidates from non-campus elections. The Chancellor could approve that change. But there is no evidence tending to show that such a theoretical possibility is even remotely likely, especially given the history of non-enforcement of the requirement. Because the allegedly wrongful behavior could not reasonably be expected to recur, and there is no substantial likelihood that the offending policy will be reinstated, Plaintiff's challenge to the Prior Approval Requirement is moot.

B. Plaintiff Lacks Standing on Its Remaining Claims

Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014), quoting U.S. Const., Art. III, § 2. "The doctrine of standing gives meaning to these constitutional limits by 'identify[ing] those disputes which are appropriately resolved through the judicial process.'" *Id.*, quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A plaintiff must have standing to seek a preliminary injunction. *Shaw v. Wall*, 2013 WL 6498238, at *2 (W.D. Wis. Dec. 11, 2013).

Speech First is the only Plaintiff in this case, and it relies on associational standing. It brings suit on behalf of four anonymous University students, Students A, B, C, and D, who the Complaint alleges are members of Speech First affected by the policies at issue.

Associational standing is governed by the test set forth in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). *Keep Chicago Livable v. City of Chicago*, 913 F.3d 618, 622 (7th Cir. 2019). To sue in a representative capacity, *Hunt* requires Speech First to show that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in their lawsuit." *Keep Chicago Livable*, 913 F.3d at 625, quoting *Hunt*, 432 U.S. at 343.

"Standing requires a threefold demonstration of (1) an injury in-fact; (2) fairly traceable to the defendant's action; and (3) capable of being redressed by a favorable decision from the court. The alleged injury must be not just concrete and particularized, but also actual and imminent, not conjectural or hypothetical." *Keep Chicago Livable*, 913 F.3d at 622-23 (internal quotations and citations omitted).

The injury-in-fact requirement helps to ensure that the plaintiff has a "personal stake in the outcome of the controversy." *Driehaus*, 573 U.S. at 158 (citation omitted). The plaintiff bears the burden "of demonstrating the requisite injury to invoke federal jurisdiction." *Keep Chicago Livable*, 913 F.3d at 622-23.

"[T]he burden of establishing irreparable harm to support a request for a preliminary injunction is, if anything, at least as great as the burden of resisting a summary judgment motion on the ground that the plaintiff cannot demonstrate 'injury-in-fact.'" *Lujan v. Nat. Wildlife Fed'n*, 497 U.S. 871, 907 at n.8 (1990), quoting *Nat. Wildlife Fed'n v. Burford*, 878 F.2d 422, 432 (D.C. Cir. 1989).

None of the Students have been investigated or punished pursuant to any of the challenged University policies. Rather, Plaintiff alleges that the University's policies are injuring the Students by chilling their speech, because the Students fear that speaking as they wish to speak will lead them to be investigated or punished under those policies.

"An allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Driehaus*, 573 U.S. at 158 (internal quotations and citations omitted). In the chilled speech context, an

individual need not expose himself to an enforcement action before challenging a threatened government action so long as the threatened enforcement is "sufficiently imminent." *Id.* "A plaintiff satisfies the injury-in-fact requirement where he alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Id.* (internal quotations and citations omitted).

"Chilled speech is, unquestionably, an injury supporting standing . . . but a plaintiff's notional or subjective fear of chilling is insufficient to sustain a court's jurisdiction under Article III." *Bell v. Keating*, 697 F.3d 445, 453-54 (7th Cir. 2012). "The plaintiff must substantiate a concrete and particularized chilling effect on his protected speech or expressive conduct to pursue prospective relief." *Id.* at 454.

1. *Bias-Motivated Incidents*

Defendants argue that Plaintiff fails to satisfy the injury-in-fact requirement concerning the University's bias-motivated incident policies because those policies do not pose a credible threat to any student and the allegations of chilled speech are unsupported or based on subjective fears only. The court agrees with Defendants.

In a conclusory statement based on it's national association's president's "familiarity with" anonymous students, Plaintiff alleges that the Students' expressing their views on (very generally-described) topics could result in their being reported, investigated, and punished by BART for engaging in a bias-motivated incident. The

court finds more informative the detailed statements about BART from University staff that are personally involved with BART, consistently describing how BART operates.

The court finds that there is no evidence that any University policy concerning bias-motivated incidents constitutes a credible threat to speech protected by the First Amendment. The Students have not described any statements they wish to make with any particularity, so it is unclear whether they would even be likely to be reported to BART or BIP. It is also not clear that the Students making their desired statements would result in BART or BIP actually contacting them even if someone did report such statements along with the name of the person who made the statements.

Moreover, being reported to BART or BIP results in essentially no consequences. The disciplinary processes do not apply to students expressing the views the Students wish to express or any other opinions. Bias-motivated speech alone is not a Student Code violation.

While some BART staff are drawn from departments with disciplinary or law enforcement functions, BART has no such functions. Conversations with BART are optional. Most students contacted by BART do not respond at all, or decline the offer of a meeting, and no consequences occur if a student declines to meet with BART. If a student does meet with BART, staff explain that the student is not "in trouble" and not being charged with a Student Code violation. BART has no authority to impose sanctions, and BART does not require any student to change his behavior. BART does not list reports on any students records. BART does not make findings. The Students

profess a desire to engage others in discussions on certain topics, and all BART can do is provide a forum for students to do exactly that: engage in voluntary discussions.

BIP likewise engages in voluntary discussions with students about the impact of their behavior on fellow students, but the students can refuse to discuss the reports without any consequences, as BIP has no power to sanction anyone.

The court also finds unsupported Plaintiff's allegations that the bias-motivated policies impermissibly chill the Students' speech. It is a possibility that the Students' desired speech could result in someone making a report, that report could identify the speaker, and BART or BIP could decide to contact the speaker based on the report. But, even if all of those events did occur, the only result would be a voluntary conversation without any possibility of discipline. The allegations of subjective chill are insufficient to establish an injury-in-fact, as they fail to substantiate a concrete and particularized chilling effect. See *Bell*, 697 F.3d at 454.

The court finds instructive the rulings of two other federal district courts that denied preliminary injunctive relief to Speech First: *Speech First, Inc. v. Fenves*, 384 F. Supp. 3d 732, 738 (W.D. Tex. 2019) and *Speech First, Inc. v. Schlissel*, 333 F. Supp. 3d 700, 707 (E.D. Mich. 2018).[5] Those cases both involved challenges to similar university bias response policies, and in both cases the courts found Speech First lacked standing to challenge the policies.

[5]Speech First has appealed in both cases, and the appeals remain pending.

In *Fenves*, Plaintiff challenged portions of the University of Texas at Austin's Residence Hall Manual, and a Campus Climate Response Team. That manual stated that residents were expected to "behave in a civil manner," and that Residence Life staff were committed to addressing "acts of racism, sexism, heterosexism, cissexism, ageism, ableism, and any other force that seeks to suppress another individual or group of individuals," including through floor and hall meetings to discuss incidents and steps to take in response to incidents. The Campus Climate Response Team responded to "perceived bias incidents impacting the University community" by fielding reports, gathering information, supporting involved individuals, and providing education.

The *Fenves* court found Speech First "offers no more than generalized declarations of broad categories of speech in which Students A, B, and C wish to engage" and "[w]ithout such evidence, this court cannot determine whether Students A, B, and C have an intention to engage in speech that is prohibited or arguably covered by the challenged policies." The court further noted a lack of evidence that students had been punished for violating the policies at issue. The court concluded:

> In sum, Speech First presents no evidence that any University students—much less any of Speech First's student members—have been disciplined, sanctioned, or investigated for their speech. And without any evidence of a credible threat of enforcement of the challenged policies—much less the "clear showing" required to support standing at the preliminary-injunction stage—this court concludes that the students' self-censorship is not based on a well-founded threat of punishment under the University policies that is not "imaginary or wholly speculative." *Barber* [*v. Bryant*], 860 F.3d [345,] 352 [(5th Cir. 2017)]. Because Speech First's student members have not made a clear showing that they "have

> standing to sue in their own right," Speech First likewise does not have standing to sue. *Hunt*, 432 U.S. at 343, 97 S.Ct. 2434.

Fenves, 384 F. Supp. 3d at 743.

In *Schlissel*, Speech First challenged the University of Michigan's Bias Response Team ("BRT"), a non-disciplinary entity to "support students who believe they have been affected by incidents of bias, to report them to other campus resources as appropriate, and to educate the University community regarding bias issues." *Schlissel*, 333 F. Supp. 3d at 705. Speech First asserted that anonymous students feared being reported to the BRT if they discussed political and social issues, but the *Schlissel* court found that Speech First had "presented no evidence to support" its allegations that the BRT investigated and punished students in response to reports of bias. *Id.* at 710.

Here, like in *Fenves* and *Schlissel*, Plaintiff has failed to demonstrate an injury-in-fact sufficient to confer standing. With the generalized description of the desired speech, this court cannot determine whether the Students have an intention to engage in speech that would result in any actual interactions with BART or BIP. The speech could possibly be reported, as it appears students can report anything, but there is no evidence the Students would ever even be contacted by BART or BIP as a result of a report, if made. There is no evidence any student has ever been punished for a report of bias-motivated conduct. Instead, neither BART nor BIP has any power to issue any sanctions. Their only available action is asking for a voluntary conversation.

Plaintiff argues that "indirect discouragements" to speech can have "the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes" and that the bias-motivated conduct policies have such an effect. Plaintiff argues that there is no evidence that students are told that they can choose not to speak with BART, and that without such warnings, the meetings would be viewed as mandatory.

The burden is on Plaintiff to establish standing. The only evidence Plaintiff points to concerning the mandatory nature of BART meetings is the national president of the organization's statement that BART officials will tell a student "that the BART needs to speak with the student to discuss the allegations." This statement is based on a "familiarity with" anonymous students. The court does not find that Plaintiff has established that students are told that meeting with BART is mandatory. There is evidence that *most* of the students contacted by BART either do not respond to BART at all, or decline to meet with BART. That fact suggests most students view BART requests as voluntary, casting doubt on any suggestion that BART requests are presented as mandatory. Defendants also presented evidence from a BART Co-Chair who stated that BART staff explain to students that they are not "in trouble" and that they are not being charged with any Student Code violation. All that ever happens is an informal discussion, where students are even informed that they can continue in their behavior and staff will assist with plans for them to do so safely. Plaintiff has failed to

establish that BART has a sufficiently coercive effect to substantiate a concrete and particularized chill of the Students' protected speech.

The same conclusion applies to University Housing's BIP. There is no evidence that BIP ever tells students that they must meet with BIP; Neilly's Declaration says nothing about BIP. The Executive Director of University Housing described how bias-motivated incidents are handled, describing contact and discussions between students and housing staff as voluntary and informal. If speaking with a student, staff members acknowledge that every student enjoys a First Amendment right to freedom of speech within University Housing, and that offensive speech or conduct alone cannot result in sanctions. Students can choose not to have a discussion with housing staff, without any consequences. Nothing happens if students wish to persist in their conduct.

In its Reply, Plaintiff argues that this case is like other cases in which government actions violated the First Amendment: *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), *Okwedy v. Molinari*, 333 F.3d 339 (2d Cir. 2003), *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230 (7th Cir. 2015), and *Levin v. Harleston*, 966 F.2d 85, 87 (2nd Cir. 1992). The court disagrees.

Schlissel discussed similar arguments by Speech First about *Bantam Books* and *Okwedy*, distinguishing those cases on the basis that "the courts in the cases cited by Speech First found implicit threats of sanctions or retaliation if there was a refusal to engage in the voluntary and informal resolution mechanisms offered." *Schlissel*, 333 F. Supp. 3d 700, 711. That discussion applies here:

In *Okwedy v. Molinari*, 333 F.3d 339 (2d Cir. 2003), the court concluded that a reasonable juror could find a city borough president's letter to a billboard company to be threatening some form of punishment or adverse regulatory action and therefore an unconstitutional infringement of the plaintiff's free speech rights. *Id.* at 344. In *Okwedy*, a religious organization contracted with the billboard company to post billboards denouncing homosexuality in or near neighborhoods containing a significant number of gay and lesbian residents. *Id.* at 340. The billboards did not identify the sponsor of the message. *Id.* at 341.

When controversy ensued concerning the message on the billboards, the borough's president sent a letter to the billboard company, on city letterhead, requesting "a dialogue with [the company] and the sponsor as quickly as possible" and stating that "many members of the Staten Island community, myself included, find this message unnecessarily confrontational and offensive." The borough president concluded the letter, writing:

> [The billboard company] owns a number of billboards on Staten Island and derives substantial economic benefits from them. I call on you as a responsible member of the business community to please contact Daniel L. Master, my legal counsel and Chair of my Anti-Bias Task Force ... to discuss further the issues I have raised in this letter.

Id. at 342. Later that day, the billboard company removed the plaintiff's signs. The Second Circuit concluded that the letter could be interpreted as containing an implicit threat of retaliation if the billboard company did not remove the plaintiff's signs, even if the borough president lacked direct regulatory or decisionmaking authority. *Id.* at 344.

Similarly, the Supreme Court concluded that the plaintiff had standing in *Bantam Books v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963), based on the lower court's finding that vendors complied with the Rhode Island Commission to Encourage Morality out of fear of criminal prosecution. *Id.* at 68-69, 83 S.Ct. 631. The Court wrote:

> People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around, and [one distributor]'s reaction [i.e., stopping further circulation of the books the Commission

> found "objectionable"], according to uncontroverted testimony, was no exception to this general rule. The Commission's notices, phrased virtually as orders, reasonably understood to be such by the distributor, invariably followed up by police visitations, in fact stopped the circulation of the listed publications ex proprio vigore. It would be naïve to credit the State's assertion that these blacklists are in the nature of mere legal advice, when they plainly serve as instruments of regulation independent of the laws against obscenity.

Id. (footnote omitted). In the present matter, in comparison, there is no evidence of any "thinly veiled threat[ ]" from the BRT to individuals reported to have engaged in "biased" conduct.

Schlissel, 333 F. Supp. 3d at 711-12 (E.D. Mich. 2018).

Here, like in *Schlissel*, there is no evidence of any thinly veiled threat, distinguishing *Bantam Books* and *Okwedy*.

Backpage.com and *Levin* are similarly distinguishable. *Backpage.com* concerned a sheriff's implied threat of official action against credit card companies if they did not cease providing services to a website that provided an online forum for "adult" classified ads. *Backpage.com*, 807 F.3d at 231-35. *Levin* concerned a professor implicitly threatened with discipline for publishing articles. *Levin*, 966 F.2d at 89. Here, there is no threat rising to the level of those in *Backpage.com* or *Levin*.

Having failed to establish that the bias-motivated incident policies impose an objective chill on their protected speech, the Students do not have standing to challenge those policies. Thus, Speech First lacks associational standing, and cannot challenge the bias-motivated incident policies.

2. *No Contact Directives*

Defendants argue that Plaintiff fails to satisfy the injury-in-fact requirement concerning the issuance of No Contact Directives, because the evidence shows that such Directives are never issued based on any student speaking about any of the topics the Students wish to speak upon (or any other topics) so there is no credible threat of any enforcement action to justify the Students' purported self-censorship. The court again agrees with Defendants.

Plaintiff alleges that the Students fear being issued No Contact Directives for speaking on sensitive and controversial topics. However, the evidence shows that No Contract Directives have not been and would never be issued for speaking on the topics the Students wish to discuss, and a No Contact Directive does not prevent a student from expressing any views, it just prevents the student from contacting another person.

Plaintiff argues that circumstances surrounding the No Contact Order issued to Andrew Minik and Tarik Khan prove otherwise. The court disagrees. Minik confirmed in an email that he understood that he could continue publishing articles about Khan. Dean Die's suggestion that not doing so could improve the tense situation is just a commonsense observation. It carried no threat of discipline. Minik acknowledged that Die told him "[t]his is not a direct disciplinary charge" and that "the no contact order does not prevent me from writing journalistic stories related to Khan." Die described the history of escalation between Minik and Khan, including Khan receiving death threats which he believed were caused by Minik, and Khan's anger towards Minik over

the same, and Die stated that the No Contact Directive would not have been issued absent that history. At this point, the court cannot conclude that the Minik-Khan No Contact Directive shows that students are punished for their speech. The existence of that No Contact Directive would not lead a student to reasonably believe that speaking about controversial issues will result in the issuance of a No Contact Directive, or violate a No Contact Directive if issued.

Plaintiff also argues that Section 4.06 of the Student Disciplinary Procedures authorizes disciplinary officers to issue No Contact Directives if they believe a No Contact Directive is "warranted," meaning there are no limits on when one can be issued. The court reads the "warranted" language in light of Section 4.06's "Authority" section, which states: "University disciplinary officers are among those responsible for the enforcement of student behavioral standards and, when possible, the prevention of violations of the Student Code." This reading is consistent with Brown and Dies' statements that No Contact Directives can only be imposed to enforce the behavioral standards in the Student Code and prevent violations of the Student Code.

Fenves involved an analogous provision. In *Fenves*, Speech First challenged a university's internet technology Acceptable Use Policy, which encouraged civility and stated "if someone asks you to stop communicating with him or her, you should. If you fail to do so, the person can file a complaint and you can be disciplined." *Fenves*, 384 F. Supp. 3d 732, 737. The *Fenves* court found Speech First failed to meet its burden to establish standing where there was no evidence that the university had punished

students for violating the Acceptable Use Policy (or other policies at issue), and no evidence that any students had been disciplined, sanctioned, or investigated for their speech. Here, the court likewise finds no evidence that the University uses No Contact Directives to punish students for exercising their First Amendment rights. Plaintiff has failed to meet its burden to establish standing.

III. CONCLUSION

Plaintiff's claim concerning the Prior Approval Rule is moot. Plaintiff lacks standing to pursue its remaining claims. Accordingly, Plaintiff's Motion for Preliminary Injunction is DENIED.

IT IS THEREFORE ORDERED THAT:

(1) Plaintiff's Motion for Preliminary Injunction (#4) is DENIED.

(2) The hearing set for September 23, 2019 at 1:30 PM is vacated.

(3) This case is referred to Magistrate Judge Eric I. Long for further proceedings.

ENTERED this 17th day of September, 2019.

s/COLIN S. BRUCE
U.S. DISTRICT JUDGE