No. 19-50529

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SPEECH FIRST, INCORPORATED,
Plaintiff-Appellant,

v.

GREGORY L. FENVES, in his official capacity as President of the University of Texas at Austin,
Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Texas, No. 1:18-cv-1078 (Yeakel, J.)

REPLY BRIEF OF APPELLANT SPEECH FIRST, INC.

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INTRODUCTION

The University's brief amounts to finger pointing. It blames the campus's well-known problems with free speech, ROA.39-42, on the fact that high schoolers do not understand First Amendment freedoms. UT-Br. 1. But culture starts at the top, and the campus environment will never improve if University administrators remain eager to write their students' short-sighted views into policy. Cabranes, *Higher Education's Enemy Within*, WSJ (Nov. 8, 2019), on.wsj.com/331JAf7. The University blames its attempt to partially moot this appeal on the fact that the Texas Legislature recently passed Senate Bill 18. But that legislation has nothing to do with the policies the University abandoned—policies Speech First challenged, the University still defends, and the University could reinstate at any time. The University blames Speech First for somehow thinking that the CCRT is a coercive process that chills disfavored speech. But that is how students understand it, how the University's own publications describe it, and why colleges across the nation created these Orwellian "response teams" to begin with.

The blame does not lie with high schoolers, the legislature, or Speech First. It lies with the University's plainly unconstitutional policies. A different university recently made the same buck-passing arguments in *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019). The Sixth Circuit rejected them in a thorough, persuasive opinion. Instead of creating a circuit split with the Sixth Circuit, this Court should reject the University's arguments and reverse the district court.

ARGUMENT

The University's brief offers no basis for affirming the decision below. Speech First's claims are not moot, Speech First has Article III standing, and Speech First meets all the criteria for preliminary relief.

I. The University's voluntary cessation does not moot any part of this case.

The University has now deleted the policies that Speech First challenged from the Residence Hall Manual and the Acceptable Use Policy, and amended the policy that Speech First challenged from the Institutional Rules. The University unveiled these changes in its appellate brief; it did not notify Speech First before then, and it never highlighted the changes in an announcement to students. These eleventh-hour, ad-hoc changes do not moot any aspect of this case.

The University tries to create the impression that Senate Bill 18 forced it to make these changes. UT-Br. 21-25. That is false. As the University's President explained in a campuswide email, the only change that Senate Bill 18 required the University to make was opening its "outdoor areas" for speech and expression by "the general public." Fenves, *Speech and Expression on Campus* (Aug. 30, 2019), bit.ly/2XivBAn. Previously, the University's outdoor areas were "limited forums" for the general public; but they were always traditional public forums for students. ROA.186. So even after Senate Bill 18, the President explained, "students … continue to have the rights of free expression they have always held" and "existing policies will remain in place." Fenves Email.

The President's email also linked to an FAQs page, which tells the same story. The page answers the question "How does this law affect UT?" by stating only that Senate Bill 18 "converts the university's common outdoor area[s] to traditional public forums." *Frequently Asked Questions Regarding Public Forums at The University of Texas at Austin*, UT-Austin, bit.ly/2KurThT (last visited Nov. 20, 2019). "The new law applies only to common outdoor areas," the FAQs page explains—not "university buildings" or anything outside the University's formal definition of "common outdoor area." *Id.* As to students' rights, the page denies that "the new UT Austin rules" provide "stronger protections for freedom of speech"; the protections for students "remain[] the same" (but now "extend to members of the general public" in "common outdoor spaces"). *Id.* "All previous university 'time, place and manner' rules remain in place." *Id.*

In short, Senate Bill 18 merely required the University to change its common outdoor areas from limited forums to "traditional public forums." Tex. Educ. Code Ann. §51.9315. And that is the only change the University told its students it was making—not changes to its residence-hall policies, technology policies, or its campuswide ban on verbal harassment. The University's changes to *those* policies were entirely voluntary. Perhaps that is why the University never mentions Senate Bill 18 in the *argument* section of its brief, and why the University cites cases involving *voluntary* cessation by defendants. UT-Br. 26-29.

"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), "even in cases in which injunctive relief is sought." *Meza v. Livingston*, 607 F.3d 392, 400 (5th Cir. 2010). Otherwise, "courts would be compelled to leave the defendant free to return to his old ways." *City of Mesquite*, 455 U.S. at 289 n.10 (cleaned up). If the government could moot a case by voluntarily changing a challenged policy, then it "could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where it left off, repeating this cycle until it achieves all its unlawful ends." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 n.* (2018) (cleaned up). And the government could frustrate "the 'public interest in having the legality of the practices settled.'" *DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974).

Courts have recognized a "narrow exception" to the "general rule" that voluntary cessation does not moot a case. *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 712 (6th Cir. 2016), *rev'd in other part*, 138 S. Ct. 1833 (2018). Voluntary cessation moots a case "only if it is '*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000). Because this standard "'is a stringent one,'" *City of Mesquite*, 455 U.S. at 289 n.10, it is "'rare[ly]" satisfied, *A. Philip Randolph*, 838 F.3d at 712. Even if the defendant's likelihood of resuming the illegal conduct is "'too speculative to support standing,'" a speculative possibility can still "'overcome mootness.'" *Adarand*, 528 U.S. at 224. And it is "the defendant"—not the plaintiff—who "carrie[s] [the] heavy burden" of showing

mootness from voluntary cessation. *Texas v. EEOC*, 933 F.3d 433, 449 (5th Cir. 2019); *accord Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007).

A defendant does not carry its heavy burden when no practical or legal obstacle prevents it from returning to its prior policy. The "form the governmental action takes is critical"; actions that are "'easily abandoned or altered in the future'" or that are "'not governed by any clear or codified procedures'" simply "'cannot moot a claim.'" *Fikre v. FBI*, 904 F.3d 1033, 1038 (9th Cir. 2018); *accord Schlissel*, 939 F.3d at 768. In *Trinity Lutheran*, for example, a church challenged a Missouri agency's policy of excluding churches from a grant program. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2017 (2017). One week before oral argument, the Governor "announced that he had directed" the agency to end the policy. *Id.* at 2019 n.1. The Supreme Court held that this voluntary cessation did not moot the case. Absent a decision finding the challenged practice unlawful, Missouri remained free to "revert to its policy of excluding religious organizations." *Id.* This Court has similar precedents. *E.g.*, *Hernandez v. Cremer*, 913 F.2d 230, 235 (5th Cir. 1990) (rejecting mootness based on an "oral directive" from a regional INS director because the directive was "absolutely subject to withdrawal at the [director's] discretion").

Here, the University could easily undo its unilateral changes at any time. The Residence Hall Manual is published by University Housing and Dining and contains no procedures on when or how it can be amended. ROA.129. The Acceptable Use Policy can be changed at any time by the University's Chief Information Officer. ROA.214-

16. And the University "reserves the right to change the requirements" in the General Information Catalog (which contains the Institutional Rules) "at any time" without any notice or procedures. *General Information Catalogs*, UT-Austin, bit.ly/2MfR8qW (last visited Nov. 20, 2019). The University does not claim that the Board of Regents has approved these changes, will ever approve these changes, or would need to approve a reversion to the old policies. Nothing in Senate Bill 18 prohibits the University from returning to the old procedures: again, the "law applies only to common outdoor areas," FAQs, and does not regulate "other campus locations," §51.9315(e)(1).[1]

While the University asserts through counsel (in a footnote of its brief) that it "has no plans to, and will not, reenact the former policies," UT-Br. 29 n.11, the "assertions of the [governmental defendant] that there w[ill] be no return to [illegal] practices" is "not … sufficient to render the case moot." *Pullum v. Greene*, 396 F.2d 251, 256 (5th Cir. 1968); *accord Hall v. Bd. of Sch. Comm'rs of Conecuh Cty.*, 656 F.2d 999, 1001 (5th Cir. 1981) ("[D]efendants must offer more than their mere profession that the conduct has ceased and will not be revived."). The University's assertion carries even less weight than that. A representation in an appellate brief, no matter how emphatic, is a far cry from a "signed affidavit[]" from the University's leadership "pledging future

[1] Senate Bill 18 requires universities to "adopt a policy detailing students' rights and responsibilities," §51.9315(f), but that provision does not regulate the policy's *content* and, thus, does not bind the University. Even for "common outdoor areas," the Bill allows the University to impose "reasonable restrictions." §51.9315(d), (f). The University does not believe its former policies were unreasonable. UT-Br. 7, 21 n.6.

compliance." *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 492 (D.C. Cir. 1988); *accord ACLU v. Fla. Bar*, 999 F.2d 1486, 1494 (11th Cir. 1993) (rejecting mootness because "neither [defendant] is bound by its court statements"). And "the word of the present Registrars" is insufficient because it does "not bind[] those who may hereafter be appointed." *United States v. Atkins*, 323 F.2d 733, 739 (5th Cir. 1963); *accord Fla. Bar*, 999 F.2d at 1494.

The University also asserts (again, in a footnote) that its voluntary cessation deserves "special solicitude" because it is a "government entit[y]." UT-Br. 26 n.10 (citing *Sossamon v. Texas*, 560 F.3d 316, 325 (5th Cir. 2009)). True, this Court has given "some solicitude" to voluntary cessation by certain government actors, on the ground that "government actors in their sovereign capacity … are public servants, not self-interested private parties." *Sossamon*, 560 F.3d at 325. But the Supreme Court has never recognized this "solicitude" doctrine. And the doctrine rests on a "somewhat contrary intuition." *Fontenot v. McCraw*, 777 F.3d 741, 748 (5th Cir. 2015).[2]

Nor has this Court given "special solicitude" to a public university. In its one case involving voluntary cessation by a public university, this Court described the

[2] The idea that state actors are inherently less likely to resume constitutional violations turns §1983 on its head. *Cf. Mitchum v. Foster*, 407 U.S. 225, 240-42 (1972). And the identity of the defendant has nothing to do with the fundamental question posed by Article III—whether there is a live controversy for the court to resolve. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 536 (2007) (Roberts, C.J., dissenting). Were this Court to hold part of this case moot based on "special solicitude" to the University, Speech First reserves the right to challenge the solicitude doctrine on rehearing en banc or certiorari.

university's burden as "'heavy'" and never gave it any "solicitude." *Pederson v. LSU*, 213 F.3d 858, 874-75 (5th Cir. 2000); *accord DeFunis*, 416 U.S. at 318 (stating that precedents involving private defendants would be "quite relevant" to a university's "'voluntary cessation' of [challenged] admissions practices" and would "prevent mootness"). The Court shouldn't break new ground here.[3]

But even if the University receives "some solicitude," *Sossamon*, 560 F.3d at 325, it still cannot prove mootness. "[S]ignificantly more" than "solicitude" is needed when, as here, "the discretion to effect the change lies with one agency or individual, or there are no formal processes required." *Schlissel*, 939 F.3d at 768. Indeed, every precedent that Speech First cited above involved a *government* defendant. And even when the government uses formal procedures to moot a case, solicitude is merely "a presumption" that can be overcome by "evidence to the contrary." *Sossamon*, 560 F.3d at 325. Contrary evidence abounds here.

For one, the University changed its policies only after Speech First filed this suit, lost in the district court, filed its appellate brief, and gained the support of nine amici. "Changes made by defendants after a suit is filed"—much less after an *appeal* is filed—

[3] Public universities are particularly undeserving of solicitude. Their administrators are not elected, not accountable, and not subject to external procedures that constrain policymaking. And when it comes to free speech, universities have a notoriously bad track record of repealing policies when they are sued, only to reinstate them once the litigation ends. *See* Lukianoff & Goldstein, *Speech Code Hokey Pokey*, Volokh Conspiracy (Sept. 12, 2018), bit.ly/2rFNc9u; *e.g.*, *Christian Legal Soc. v. Martinez*, 561 U.S. 661, 723 n.3 (2010) (Alito, J., dissenting) (noting the university's "practice of changing its announced policies" to moot cases).

"do not remove the necessity for injunctive relief." *Jones v. Diamond*, 636 F.2d 1364, 1375 (5th Cir. 1981) (en banc), *overruled in other part*, *AFL-CIO v. Champion Int'l Corp.*, 790 F.2d 1174 (5th Cir. 1986) (en banc); *accord Knox v. SEIU*, 567 U.S. 298, 307 (2012) ("[M]aneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye."). Voluntary cessation "in the face of litigation" is too "equivocal in purpose, motive and permanence" to moot a case. *Jenkins v. United Gas Corp.*, 400 F.2d 28, 33 (5th Cir. 1968).

For another, the University "continues to defend the legality" of its now-repealed policies. *Knox*, 567 U.S. at 307; *accord Hall*, 656 F.2d at 1000-01 (rejecting mootness because the school "disputed the constitutionality of the practice up to the day of trial"). The University boasts that it "defended" the "merits" of the "verbal harassment policy," "Acceptable Use Policy," and "Residence Hall Manual" in the district court. UT-Br. 21 n.6. While Speech First disagrees that the University made *developed* arguments below, the University's insistence that it did defeats mootness. *DeJohn v. Temple Univ.*, 537 F.3d 301, 310 (3d Cir. 2008). And the University certainly argues that students lack standing to challenge the constitutionality of its policies—the most sweeping defense imaginable. *Schlissel*, 939 F.3d at 770. Because of the University's "continuing insistence that [its] discontinued activities were legal and [its] continued occupation of positions that would enable resumption of [those] activities," it cannot prove mootness by voluntary cessation. *Donovan v. Cunningham*, 716 F.2d 1455, 1461 (5th Cir. 1983).

The Sixth Circuit correctly applied these principles in *Schlissel*—a case that, if anything, presented a closer question of mootness than this one. In *Schlissel*, the university repealed its speech codes after Speech First filed the complaint (not on appeal) and submitted an affidavit from a senior official (not a lawyer's statement in an appellate brief) that swore the new policies "'and no others' will govern." 939 F.3d at 769. This voluntary cessation did not moot the case because the changes were "ad hoc," "regulatory," and could be undone without any "formal process" constraining the university. *Id.* Nor was there "evidence" that the testifying official had "control over whether the University will reimplement the challenged definitions," now or in the "future." *Id.* Further, the "expedient timing" of the university's voluntary cessation—changing the policies "after the complaint was filed"—"raise[d] suspicions that [it was] not genuine." *Id.* at 769-70. Most "[s]ignificantly," the university "continue[d] to defend" the old policies by raising merits arguments in the district court and standing arguments on appeal. *Id.* at 770. For all these reasons, the Sixth Circuit found that the university did not prove its "'wrongful behavior could not reasonably be expected to recur.'" *Id.* So too here.

II. Speech First has Article III standing.

This Court should reverse the district court's dismissal for lack of standing. The University's voluntary cessation is irrelevant to this question; the issue is whether Speech First had standing to challenge the University's *original* policies. *Carr v. Alta Verde Indus.*, 931 F.2d 1055, 1061 (5th Cir. 1991). It did. The speech codes objectively chill

speech, the CCRT apparatus objectively chills speech, and the district court erred by sua sponte dismissing the entire case.

A. The University's speech codes objectively chill students' speech.

The University agrees with Speech First on the basic standard for Article III standing. An "objective chilling of speech" is "sufficient," it concedes, and objective chill is present when there is "'a credible threat of enforcement.'" UT-Br. 31. But the agreement ends there. The University advances two legal points that it believes defeat Speech First's standing. Both are mistaken.

First, the University puts near-decisive weight on whether Speech First identified a "history of past enforcement" against protected speech. UT-Br. 32-34. This argument is convenient, since the University's disciplinary records are in its sole possession. *See United States v. Miami Univ.*, 294 F.3d 797, 812 (6th Cir. 2002) (explaining that disciplinary records are confidential under FERPA). It is also wrong: "no history of past enforcement" is needed to prove a "credible threat" of enforcement. *Rangra v. Brown*, 566 F.3d 515, 519 (5th Cir. 2009) (citing *Doe v. Bolton*, 410 U.S. 179, 188 (1973)).[4]

[4] *Rangra* is good law. It relies on precedents from the Supreme Court and other circuits, all of which remain good law. Though the panel's opinion was vacated when this Court voted to rehear it en banc, 5 Cir. R. 41.3, the rehearing petition challenged only the *merits* of the panel's decision, not its holding on standing. Appellees' Pet'n for Rehearing En Banc, No. 06-51587 (May 8, 2009). And the full Court never reviewed (much less rejected) the panel's standing analysis because the case became moot before oral argument. 584 F.3d 206 (5th Cir. 2009). Accordingly, *Rangra* "continues to have precedential weight, and in the absence of contrary authority, [this Court should] not disturb it." *United States v. Adewani*, 467 F.3d 1340, 1342 (D.C. Cir. 2006) (cleaned up).

Because the injury is largely "'one of self-censorship,'" *id.* (quoting *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392 (1988)), the fact that "there is no evidence in the record" of a history of enforcement "misses the point." *Schlissel*, 939 F.3d at 766. "The lack of discipline against students could just as well indicate that speech has already been chilled." *Id.* While a history of enforcement can help prove standing, it is not necessary: "Controlling precedent … establishes that a chilling of speech because of the mere existence of an allegedly vague or overbroad [law] can be sufficient injury to support standing." *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 660 (5th Cir. 2006); *see* Br. 25-26.

Past enforcement is not necessary when the challenged policy is non-moribund and "'facially restrict[s] expressive activity by the class to which the plaintiff belongs.'" *Rangra*, 566 F.3d at 519 (quoting *N.H. Right to Life PAC v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996)). When these conditions are satisfied, courts "'assume a credible threat of enforcement'" because "the threat is latent in the existence of the statute." *Id.*; *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003); *see* Br. 24-26. These conditions are plainly satisfied here, and the threat posed by the University's policies is further magnified by their vagueness and how easy the University makes it to report violations. Br. 26-27.[5]

[5] Of course, when these conditions are *not* satisfied, courts may require plaintiffs to prove a history of enforcement. *E.g.*, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411 (2013) (U.S.-citizen respondents were not in the class of foreigners targeted by the challenged statute); *Blum v. Holder*, 744 F.3d 790 (1st Cir. 2014) (challenged statute did not facially restrict expressive activity).

The University identifies no "'compelling contrary evidence'" that could dispel this credible threat. *Rangra*, 566 F.3d at 519. While its administrators believe they've never enforced the policies against "'speech protected by the First Amendment,'" UT-Br. 34 n.13, they do not say the policies are not "'generally enforced'" or have fallen into "'desuetude,'" which is what matters. Br. 25 (quoting *Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir. 2003); *Seegars v. Gonzales*, 396 F.3d 1248, 1252 (D.C. Cir. 2005)). Nor is the administrators' say-so a question of fact or "credibility", UT-Br. 47; it is a *legal* conclusion, no better than a declaration promising that the University "never violates the law." And this legal conclusion must be taken with a grain of salt, coming from the same University that drafted these policies and has a long-running red-light rating from FIRE. Br. 30-31.

Second, the University wrongly asserts that Speech First must prove its members' intended speech "*is* prohibited" by the University's policies. UT-Br. 31 (emphasis added). The law only requires Speech First to prove its members' "intended speech is '*arguably* proscribed' by the [challenged policies]." *SBA List v. Driehaus*, 573 U.S. 149, 162 (2014) (emphasis added). That is because, when a rule "arguably covers" a person's speech, it "may deter constitutionally protected expression because most people are frightened of violating [disciplinary rules] especially when the gains are slight,

as they would be for people seeking only to make a political point and not themselves political operatives." *Majors*, 317 F.3d at 721.[6]

These policies cover protected speech—both arguably and actually. Indeed, the University does not dispute that the challenged policies *themselves* apply to the topics Speech First's members want to discuss. Br. 26-27. How could it? The policies' vague, open-ended bans on speech that is "uncivil," "rude," "harassing," "offensive," and the like are entirely subjective. Interpreting them to cover deeply unpopular (but protected) speech would be objectively reasonable, not "mistaken[]." UT-Br. 50. Even the University admits that, when Speech First filed its complaint, the verbal-harassment rule covered "isolated" speech that is "subjectively offensive." UT-Br. 29.

Instead of addressing the text of its policies, the University points to its disclaimers that generally promise to protect First Amendment rights. UT-Br. 47-48. But these general disclaimers do not narrow the University's specific policies or alleviate their chilling effect. Br. 28. By using the First Amendment as a baseline, moreover, these disclaimers make the challenged policies *more* vague—an argument the University never refutes. Br. 28-29. If the University were right that these disclaimers defeat standing, then so long as it has them in place, it could ban "all speech that the University doesn't like." Br. 29. That is untenable. Even more untenable is the University's assertion that

[6] Because the plaintiff's injury in these cases is "self-censorship," First Amendment claims present "unique standing issues." *Carmouche*, 449 F.3d at 660. Thus, the University's many citations to *Cruz v. Abbott*, 849 F.3d 594 (5th Cir. 2017)—a case that involved neither the First Amendment nor self-censorship—are unpersuasive.

it does not *punish* students for violating the Acceptable Use Policy or Residence Hall Manual. UT-Br. 49. The policies say otherwise—both actually and arguably. Br. 8-10.[7]

B. The CCRT objectively chills students' speech.

Unlike its speech codes, the University does not dispute that the CCRT poses a "credible threat" to Speech First's members. That's because the University knows protected speech is frequently reported as a "bias incident"—a history of enforcement that satisfies even the University's crabbed theory of standing. Br. 35-36. Instead, the University denies that the procedures triggered by bias-incident reports objectively chill students' speech. And it insists those procedures are the only way the CCRT could violate the First Amendment. UT-Br. 36-37 & n.15.

Not so. One way that bias-response teams chill speech—perhaps the primary way—is by "implicitly threaten[ing] students with discipline if they say something 'biased.'" Br. 36. The structure of the CCRT—its name, membership, definitions, terminology ("offenders," "reports," "victims," "witnesses"), and references to disciplinary processes—would make an objective student fear that "bias incidents" can lead to discipline. Br. 41-42. Though the University insists that the CCRT is "quite

[7] In *Abbott v. Pastides*, the Fourth Circuit found that a university's harassment policy did not even "appear[] … to apply" to the plaintiffs' intended speech and, thus, did not itself pose a credible threat. 900 F.3d 160, 178 n.9 (2018). Speech First doubts that the Fourth Circuit correctly applied the law to the policy at issue in *Abbott*. Regardless, unlike the policies challenged here, the policy in *Abbott* did not appear to rely on subjective and undefined terms or include vague provisos about "necessary" harassment.

clear" that it is not "a disciplinary process," the only evidence it cites are declarations and briefs filed *in this litigation*. UT-Br. 42 & n.20. The University's actual policies—the ones students see and use to guide their behavior—describe the CCRT as a "'partner'" that can "'refer'" bias incidents to disciplinarians and "'directly'" cause discipline. Br. 14-15, 42.

The CCRT's "ability to make referrals is a real consequence that objectively chills speech." *Schlissel*, 939 F.3d at 765. Referrals obviously risk formal punishment, which chills speech. *Id.* But they also "initiate[] the formal investigative process, which itself is chilling even if it does not result in a finding of responsibility or criminality." *Id.* (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68 (1963)). Whether or not the CCRT "lacks any formal disciplinary power" and whether or not bias incidents are "directly punishable" under the Institutional Rules, the CCRT "acts by way of implicit threat of punishment and intimidation to quell speech." *Id.* A "bias incident" certainly sounds like a charge of misconduct. *Id.* ("Nobody would choose to be considered biased"). And because the CCRT is staffed by administrators, disciplinarians, and police officers, a student "could be forgiven for thinking that inquiries from and dealings with [it] could have dramatic effects such as currying disfavor with a professor, or impacting future job prospects." *Id.* In fact, students at the University undoubtedly view the CCRT as a disciplinary body, as "discipline" is the most popular thing they ask the CCRT to do to students accused of bias incidents. Br. 13.

"Additionally," bias-response teams "objectively chill speech" by asking the so-called perpetrator to "meet" with a team member to discuss the bias incident. *Schlissel*, 939 F.3d at 765. Contacts with the CCRT are not plausibly voluntary: requests "carry the threat: 'meet or we will refer your case,'" and the name "*Response* Team" suggests that "the accused student's actions have been prejudged to be biased." *Id.* The University also tells students they can be disciplined for disobeying "specific instructions issued by an administrative official" or "failing to appear for a meeting when summoned," such as a request from the CCRT. Br. 6. Rather than sit down for one of these not-so-voluntary meetings with a university authority over accusations of "bias," a reasonable college student would simply keep his mouth shut.

The University's assertion that it doesn't meet with students accused of bias incidents, UT-Br. 38-39, is mystifying. As Speech First pointed out, with no discernible response from the University, the CCRT's reports (which are posted on the University's website) state that the CCRT conducts "[e]ducational conversations/meetings with those *initiating an incident* regarding the intent and impact of their actions." Br. 14 (emphasis added); *see* ROA.339, 345, 346, 350. If there is a conflict between the University's policies and the declarations it submitted in this litigation, the policies control. Br. 29-30.

While "[b]oth the referral power and the invitation to meet with students" independently "chill speech," *Schlissel*, 939 F.3d at 765, the CCRT's other processes exacerbate the problem. For instance, the University publishes an online log of bias

incidents. Br. 13-14. By formally logging them by "Incident Number," ROA.356, the CCRT reinforces the notion that bias incidents are punishable offenses, and leads a reasonable student to believe that these incidents appear on his record, harming his prospects both before and after graduation. Br. 43. The CCRT also conducts investigations. It receives a detailed report, contacts the reporter for an interview, collects as much information as possible, decides whether a "bias incident" or a disciplinary violation has occurred, and then partners with the appropriate department to find a solution. Br. 12-15. If this is not an "investigation[]," UT-Br. 38-39, it is unclear what would be.[8]

The University's counter-explanation—that the CCRT merely "support[s]" victims of bias—is implausible. UT-Br. 42. CCRT members do not specialize (or appear to have training) in counseling or psychology, unlike the University's *separate* Counseling and Mental Health Center. The CCRT also uses the term "offender," connoting serious wrongdoing instead of a voluntary, educational program. And if the goal is supporting victims, why can students (and nonstudents) report bias incidents anonymously? Why can students report bias incidents that they never witnessed? And why maintain a log of incidents, forever *reminding* the victim of the trauma? The University has no answers. The reality is that the CCRT exists to ensure that "biased" speech never happens in the

[8] *Abbott*, which held that a "single, non-intrusive meeting" that cleared the plaintiffs of wrongdoing did not objectively chill speech, 900 F.3d at 179, did not consider an elaborate administrative apparatus designed to root out "biased" speech, like the one at issue here and in *Schlissel*.

first place. As FIRE's comprehensive study confirms, "Bias Response Teams create—indeed, they are intended to create—a chilling effect on campus expression." *Bias Response Team Report 2017*, at 5, bit.ly/2P9iEaj.

If this Court blesses the CCRT, it will set a dangerous precedent. Given the University's silence, it must agree that universities can create a "Patriotism Response Team"—a group of administrators who report, log, investigate, meet, and reeducate students who commit "anti-American incidents" on campus. Br. 44-45. They could also create, say, a "Zionism Response Team" to intervene with students who support Israel's settlements. Or a "Communism Response Team" for students suspected of communist sympathies. It strains credulity to suggest that these policies—which differ from the CCRT only in the speech they disfavor—are so innocuous that they could evade First Amendment scrutiny altogether.

C. The district court should not have sua sponte dismissed the case.

Because Speech First has alleged Article III standing, the district court should not have sua sponte dismissed this entire case. As explained, the district court dismissed the case without warning, before the University filed a motion to dismiss, and without allowing Speech First to amend the complaint or supplement the record. Br. 48-50. The University agrees that this was improper unless Speech First's complaint has legal defects that are "'clearly incurable.'" UT-Br. 51, 24, 26. Many of the arguments raised in this litigation cannot meet that standard.

The University's complaint that Speech First's members are anonymous is not incurable. Their identities could be revealed to the district court (under seal) if that was somehow necessary. But it's not, Br. 33-34, and the University no longer advances this argument (or challenges the district court's rejection of its objections to Ms. Neily's declaration).

The district court's suggestion that Speech First did not identify "'specific statements'" its members want to make is also not incurable. Speech First could add more statements to its complaint. But its complaint is specific enough already, and the district court erred by insisting on more. Br. 32-33. The University apparently agrees, since it does not respond to Speech First's arguments on this point, does not defend the district court's reasoning, and simply restates the district court's conclusion in a footnote. UT-Br. 31 n.12.

Nor is the University's demand that Speech First produce a "history of past enforcement" incurable. That information would appear in the University's disciplinary records, which are currently confidential. While the University believes Speech First could not discover these records *before* the district court adjudicates standing, UT-Br. 54 n.28, courts can "refuse[] to grant such a motion [to dismiss] before a plaintiff has had a chance to discover the facts necessary to establish jurisdiction." *Williamson v. Tucker*, 645 F.2d 404, 414 (5th Cir. 1981); *e.g.*, *In re MPF Holdings US LLC*, 701 F.3d 449, 457 (5th Cir. 2012); *NRDC v. Pena*, 147 F.3d 1012, 1024 (D.C. Cir. 1998). Limited jurisdictional discovery on the University's past enforcement would be entirely

appropriate. But Speech First never got to ask because the district court dismissed this case on its own initiative.

III. The Court should order the district court to enter a preliminary injunction.

After reversing the district court's dismissal, this Court should remand with instructions to grant Speech First a preliminary injunction. As explained, Speech First has shown a likelihood of Article III standing.[9] While Speech First also explained why the challenged policies are vague and overbroad, Br. 46-47, the University makes little effort to defend their constitutionality. And while Speech First explained why the irreparable-harm, balance-of-equities, and public-interest factors favor it, Br. 45, the University offers no response. The University instead says, in a footnote, that this Court should let the district court decide "whether Speech First is likely to succeed on the merits of its claims." UT-Br. 51 n.26.

It should not. Although the "'general practice' is to remand the case when [the Court] reverse[s] the district court's denial of standing," *AICPA v. IRS*, 746 F. App'x 1, 8 (D.C. Cir. 2018), deviations from this practice are left "'to the discretion of the courts of appeals … on the facts of individual cases.'" *Glass v. Paxton*, 900 F.3d 233, 243 (5th

[9] Because "Article III standing 'must be supported … with the manner and degree of evidence required at the successive stages of the litigation,'" *Bennett v. Spear*, 520 U.S. 154, 167-68 (1997), the question at the preliminary-injunction stage is whether the plaintiff has shown "a 'substantial likelihood' of standing." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015). There is no difference between a "likelihood" of standing and a "'clear showing'" of standing, despite the University's efforts to distinguish them. UT-Br. 30 (quoting *Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017)). The terms are synonyms, and no case differentiates the two.

Cir. 2018). When "the only remaining issues are purely legal questions that were briefed below," remand would be "a waste of judicial resources." *Id.* That's the case here.

The issue the University wants remanded—"whether [Speech First] can show a substantial likelihood of success on the merits"—presents "purely legal issues" and "is something [this Court] evaluate[s] de novo." *Boerschig v. Trans-Pecos Pipeline, LLC*, 872 F.3d 701, 706 (5th Cir. 2017). "[E]fficiency supports … doing so now, lest [the Court] remand on the question only to face another appeal of the injunction ruling down the road." *Id.* Although the University "did not take the opportunity to address the merits" in its appellate brief, Speech First did—which gave the University "full notice" that the merits were at issue and that, if the University did not brief them, it would be stuck with its "briefing in the trial court." *Id.* at 706 n.3.

While the other preliminary-injunction factors are normally committed to the district court's discretion, they are not here. Those factors are necessarily satisfied when the plaintiff proves a likely violation of the First Amendment, so a remand would be pointless because the district court could not legitimately find them lacking. Br. 45; *see Glass v. Kemper Corp.*, 133 F.3d 999, 1004 (7th Cir. 1998) ("It would be pointless to remand for consideration of an issue that can be resolved only one way."). The University does not argue otherwise.

The only responsive argument that the University makes is its insistence that the verbal-harassment rule is not unconstitutionally vague. UT-Br. 48 n.23. But the

University forfeited this argument by not raising it below, and by raising it here only in a footnote. *United States v. House*, 872 F.3d 748, 752 (6th Cir. 2017).

The argument is also unpersuasive. The phrase "'necessary to the expression of [an idea]'" is not "coherent," UT-Br. 48 n.23—either on its own[10] or as situated in the verbal-harassment rule. Because of that phrase, the verbal-harassment rule states that speech can be "personal[]" and "severe," "create an objectively hostile environment," and "diminish the victim's ability to participate" in university life, but *not* be harassment because the speech is "necessary to the expression of [an idea]." ROA.188. This is the "necessary harassment" oxymoron that the Eleventh Circuit found unconstitutionally vague in *Wollschlaeger v. Governor*, 848 F.3d 1293, 1303 (11th Cir. 2017) (en banc). Even apart from this linguistic puzzle, the rule makes *the University* the arbiter of what is and is not "necessary" to express an idea—an arbitrary enforcement power that presents independent constitutional problems. Br. 46-47. The rule is also overbroad because it, for example, is not limited to harassment amounting to discrimination against a protected class that effectively denies access to University programs. Br. 47.

Finally, the University's voluntary cessation does not affect Speech First's right to preliminary relief (and the University does not argue otherwise). While the University briefly asserts that "a court cannot enjoin the enforcement of policies that no longer

[10] The University's explanation for why this phrase is coherent is, itself, incoherent: "[T]he exclusion applies to speech that conveys the substance of an idea, but not to any speech on unrelated topics that might happen to occur at the same time." UT-Br. 48 n.23. What this means is anyone's guess.

exist," UT-Br. 26, "[c]hanges made by defendants after suit is filed do not remove the necessity for injunctive relief." *Gates v. Collier*, 501 F.2d 1291, 1321 (5th Cir. 1974); *accord Anderson v. City of Albany*, 321 F.2d 649, 657 (5th Cir. 1963). Courts can enter declaratory relief against the old policies, and can "enjoin[] future violations" by barring the defendant from reinstating them—something courts have done "[i]n numerous cases." *KFC v. Diversified Packaging Corp.*, 549 F.2d 368, 390 n.29 (5th Cir. 1977). Courts also can grant preliminary injunctions to protect the plaintiff from the risk that the defendant will "'reinstitut[e]'" the unconstitutional policies before final judgment. *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 (5th Cir. 1993); *e.g.*, *Lopes v. Int'l Rubber Distributors, Inc.*, 309 F. Supp. 2d 972, 983-84 (N.D. Ohio 2004). The strong likelihood that the University would do so here, *supra* I, is an "irreparable injury." *Duncanville Indep.*, 994 F.2d at 166. And the University cannot possibly argue that the equities or the public interest favor leaving these policies in place, since it has *repealed* them. *Lopes*, 309 F. Supp. 2d at 983.

In sum, Speech First is plainly entitled to a preliminary injunction. A remand would waste judicial resources because the district court would abuse its discretion if it denied this relief. There is no need for two interlocutory appeals in this case.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I filed a true and correct copy of this brief with the Clerk of this Court via the CM/ECF system, which will notify all counsel.

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Dated: November 20, 2019

CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7)(B) because it contains 6,476 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it has been prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

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