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.

REPLY BRIEF OF PLAINTIFF-APPELLANT SPEECH FIRST, INC.

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INTRODUCTION

The University claims that it diligently protects student speech and always upholds the First Amendment. But, like many universities today, the University is unable to maintain "a distinction that lies at the core of the liberal democratic project": "the distinction between … speech and conduct." Josè A. Cabranes, *Higher Education's Enemy Within*, WSJ (Nov. 8, 2019), on.wsj.com/3880yv3. Throughout its brief, the University frets that students will not "express themselves safely," or will feel "victimized" by speech "they perceive as biased against them." U-Br. 51-52 & n.16, 1, 23, 32 n.7. This fundamental misunderstanding of the First Amendment pervades not just the University's brief, but its policies and actions in this litigation.

The University insists that BART's purpose is merely to help those affected by bias and to facilitate dialogue among students, not to squelch unpopular speech. But if true, the University would not gather information on students through anonymous reporting, contact "offenders" to offer "corrective actions," keep students in the dark about their rights, refer the information it discovers to the police and OSCR (the University's disciplinary body), or maintain records on the information BART gathers. These are methods designed to discourage unwanted speech, not to help victims or encourage dialogue.

The University says it does not intend to reimpose prior restraints on political speech. But if true, the University would admit that its policy was unconstitutional and promise to never reenact it; it would not eliminate the policy without explanation, three days before its brief was due, or continue to defend its importance.

The University claims it would never use NCDs to impose restrictions on students who engage in protected speech. But if true, the University would rewrite its policy to impose meaningful restraints on disciplinary officers' authority. That it has doubled down on its capacious policy shows it is uninterested in cabining its ability to squelch speech.

Speech First has standing to challenge these policies, no part of this case is moot, and a preliminary injunction is needed to hold the University accountable. This Court should reverse.

ARGUMENT

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

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

The University agrees that Speech First has standing to challenge its policy on "bias-motivated incidents" if BART, BIP, and their bureaucratic accoutrements

objectively chill students' speech. U-Br. 30. The University also acknowledges that the only appellate court to address this issue found that an identical bias response team objectively chilled students' speech. The University describes the Sixth Circuit's decision in *Schlissel* as "flawed" and urges this Court to create a circuit split. U-Br. 38. But it should not, because the Sixth Circuit was correct. Bias response teams like BART and BIP[1] objectively chill speech in two main ways.

First, these teams use "implicit threat of punishment and intimidation to quell speech." *Schlissel*, 939 F.3d at 765. BART is deliberately designed to look and feel like a disciplinary body. *See* SF-Br. 30-31. The University formally defines "bias incidents" like it would a rule of conduct. BART is housed within the University's disciplinary office, and is staffed with disciplinarians and police officers. It uses the lingo of law enforcement, including "reports," "offenders," "witnesses," and "victims." A221-226, 246. And it has the power to log students' behavior,

[1] The University suggests, in passing, that Speech First's members are not chilled by BIP, only BART. U-Br. 31. But the University does not dispute that BIP and BART are functionally indistinguishable; the only difference is that the University uses BIP to police "bias-motivated incidents" in the dormitories, while BART polices "bias-motivated incidents" everywhere. SF-Br. 13-14. As explained in the Neily declaration, Speech First's members also want to speak freely "in their dormitories" without fear that their speech will be reported as "bias-motivated." A003.

investigate their actions, and refer them for formal discipline. "[T]he very name 'Bias Response Team' suggests that the accused student's actions have been prejudged to be biased." *Schlissel*, 939 F.3d at 765. Because "[n]obody would choose to be considered biased," that label suggests serious wrongdoing. *Id.* A reasonable student "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.* As the Foundation of Individual Rights in Education has found, "Bias Response Teams create—indeed, they are intended to create—a chilling effect on campus expression." A277.

The University claims that BART cannot be all that threatening because "[a] majority of students who are contacted by BART either do not respond at all or decline the offer of a meeting." A314, ¶24; U-Br. 32. The University of Michigan made the same argument. *See* Doc. 18-3 at 4 ¶11, *Schlissel*, No. 18-cv-1145 (E.D. Mich.) ("BRT has no authority to require anyone to do anything…. [I]n my experience, many of the people to whom I do reach out decline to meet."). But the Sixth Circuit rightly rejected it. Informal coercion "can be enjoined even if it turns out to be empty—the victim ignores it, and the threatener folds his tent."

Backpage.com, LLC v. Dart, 807 F.3d 229, 231 (7th Cir. 2015). The University's argument does not account for students, like Speech First's members, who are never contacted by BART because the University's policies deterred them from speaking in the first place. SF-Br. 34.

Indeed, BART and BIP send every student on campus a clear message—the University is watching. The analogy to employer surveillance of its employees is fitting. *See Amicus* Br. of the Wis. Inst. for Law & Liberty at 2-8. The National Labor Relations Board has long held that employers violate their employees' rights when they create "an impression of surveillance" of employees' union activities. *Flexsteel Indus.*, 311 NLRB 257, 257 (1993). Awareness that one's employee is recording an act "know[n] to be displeasing to the employer" has a "normal and natural tendency to create fear" that the employer plans "some present or future course of action involving him" and "tends to interfere, restrain, and coerce the employees into abandoning their rights." *Tenn. Packers*, 124 NLRB 1117, 1123 (1959); *see Hendrix Mfg. Co. v. NLRB*, 321 F.2d 100, 104 n.7 (5th Cir. 1963) (employer surveillance causes employees to believe "they are under the threat of economic coercion, retaliation, etc.").

BART creates this same "normal and natural" fear among students. *Tenn. Packers*, 124 NLRB at 1123. As Judge Cabranes has remarked, bias reporting mechanisms are "reminiscent of the neighborhood watches that serve as the eyes and ears of totalitarian regimes, much like the *Comites de Defensa de la Revolución* in Castro's Cuba." José A. Cabranes, *For Freedom of Expression, For Due Process, and For Yale*, 35 Yale Law & Policy Review 23, 37 (Spring 2017). "Despite claims that bias committees merely foster 'safe' and 'inclusive' campus environments, the entire purpose of such reporting structures is to deter expression that some members of the community consider offensive." Amicus Br. of Independent Women's Law Center & American Council of Trustees & Alumni at 13-17.; *accord Amicus* Br. of Liberty Justice Center at 5-10.

Second, beyond threatening and intimidating students, BART and BIP objectively chill speech by creating "a 'process-is-punishment' mechanism that deters people from speaking out." A300. Students contemplating speech that someone might deem "biased" know that, if they speak, a cascade of administrative consequences will befall them. The University will collect anonymous reports of the speech; maintain University records of the allegations and BART's response; contact the student to seek "voluntary" dialogue and

potentially "corrective actions"; potentially refer the matter to OSCR or notify the police; and publicize the allegations and BART's response. SF-Br. 8-13. The University also apparently meets with students accused of bias and, in truly Orwellian fashion, gives them "an action plan for ensuring the speaker can continue to express herself safely in the future." U-Br. 32 n.7.

These are certainly "disciplinary or investigative functions," U-Br. 33, no matter what label the University attaches to them. As explained, BART will undertake an "investigation" into bias incidents to "determine the events that occurred and, in particular, the type of 'bias' that was expressed." SF-Br. 10. Although the University tries to minimize the scope of its fact-finding, U-Br. 11 n.1, it does not dispute that "BART itself has repeatedly referred to its response to bias incidents as an 'investigation.'" SF-Br. 10 n.2. The University also concedes that BART maintains records detailing the reports and accusations made against students (along with any subsequent interactions between BART and the offending student), and that this information is kept at "the same office that houses the student disciplinary body." U-Br. 34; *see* SF-Br. 11. The University's claim that no one could determine which students were accused of "bias" due to the reports' "high level of generality," U-Br. 34, is specious. *See* SF-Br. 36; *compare, e.g.,* A209

(noting the complaints received and BART's response for the event "Building the Wall: A Memorial for Victims of Illegal Immigration"), *with* Christian Schneider, *At University of Illinois, 265 Bias Complaints Enforced by Literal 'Speech Police,'* The College Fix (June 7, 2019), bit.ly/2uEHc2r (using BART's annual report to identify the group behind the planned event). Whether or not these processes would chill the speech of a reasonable college student in isolation, their *combined effect* certainly does.[2]

BART's "ability to make referrals—*i.e.*, to inform OSCR or the police about reported conduct—is" one concrete way it "objectively chills speech." *Schlissel*, 939 F.3d at 765. The University concedes that BART, like Michigan's bias response team, can refer bias-motivated incidents to OSCR and the police. U-Br. 38.[3]

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[2] *Abbott v. Pastides*, 900 F.3d 160 (4th Cir. 2018) is not "directly on point." U-Br. 36. *Abbott* held that a "single, non-intrusive meeting" that cleared the plaintiffs of wrongdoing did not objectively chill speech. 900 F.3d at 17. It did not consider an elaborate administrative apparatus designed to root out "biased" speech. *Schlissel*—brought by the same plaintiff against an identical bias response team—is the only circuit decision "directly on point."

[3] The University claims that BART "does not refer *reports* to the University Police," but only "refer[s] *information* to … law enforcement officials." U-Br. 38-39 (emphases added). Even if that were true, *but see* SF-Br. 11-12 n.3, the distinction cannot possibly matter. BART gets the information that it refers to the police from its bias-incident reports. And the chilling effect stems, not from the precise piece of paper that BART refers to the police, but from the referral itself, which "subjects

Whether or not a particular referral would fall within the University's "legal authority," U-Br. 40, is beside the point. The "referral power lurks in the background" of everything BART does, including its "invitation to meet" with so-called bias "offenders." *Schlissel*, 939 F.3d at 765. A student who knows that his or her bias-motivated speech might be referred to police or OSCR could "understand the invitation [to meet] to carry the threat: 'meet or we will refer your case.'" *Id.* And coerced meetings with university authority figures deter reasonable students from speaking. Indeed, the University does not dispute that BART "will not identify the person who has accused the student of 'bias' or inform the student of any rights he or she may have." SF-Br. 33; *see* A002, ¶12. Except for promises made in this litigation, there is no document, public notice, or website that identifies students' rights when dealing with BART. Instead, the University's disciplinary rules tell students that "failure to obey" University officials is "[c]onduct for which students are subject to discipline." A032-33, §1-302(o).

The University claims this is of no moment because it has concluded, based on its own crabbed reading of the Neily declaration, that Speech First's members are afraid of being "punished *by the BART*," not by the police or OSCR through

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students to processes" and "consequences that [the student] otherwise would not face." *Schlissel*, 939 F.3d at 765.

BART's "referral authority." U-Br. 38-39. Not so. The Students also "credibly fear" being "investigated" by the University more broadly. A002, ¶10; *see id.* ¶¶11-15. The University's attempt to distinguish between BART, OSCR, and the police rings hollow, since many of the officers who serve in these roles are the *same people*. Also, referrals aside, students are "punished by the BART" when they are reported, logged, stigmatized, called in for meetings, reeducated, and given "action plans." A14, ¶26.

In any event, referral to another disciplinary agency *is* a form of "punishment" by BART. SF-Br. 35. As the Sixth Circuit explained, referral by BART is "a real consequence" because it "subjects students to processes which could *lead* to [criminal conviction or expulsion]" and because it "initiates the formal investigative process, which itself is chilling even if it does not result in a finding of responsibility or criminality." 939 F.3d at 765.

The University next contends—for the first time on appeal—that there "is no basis to assume a report [to BART or BIP] would be made in response to the expression contemplated" by the Students. U-Br. 32. There is a reason the University never made this argument below—it is baseless. Nowhere in the University's declarations is there a suggestion that the Students' speech would

likely go unreported, or that BART would not contact them once a complaint was received. *See generally* A309-16 (Boten describing BART and the Students' speech). In fact, the University boasts that reports of bias incidents "originate from a wide range of individuals and concern speech across the ideological spectrum," including speech about Israel, religion, and race. U-Br. 9, 52 n.16.

Speech First does not rely on merely a "handful" of prior reports. U-Br. 32. As explained, Students A and C want to advocate for building a wall along the U.S. southern border. SF-Br. 28. This same speech regularly leads to numerous complaints to BART and the speakers being contacted by BART. *Id*. Student B wants to advocate for "deradicalization of Islam," and Student D wants to question what he is told about LGBT rights and voice his confusion on these issues. SF-Br. 29. These expressions, too, regularly lead to similar consequences. *Id*.

That the Students will be reported to, and potentially contacted by, BART or BIP is not surprising. A "bias-motivated incident" is described broadly to encompass countless forms of expression, SF-Br. 6-8, including speech that someone subjectively "perceive[s] as biased." U-Br. 52 n.16. Students are easily reported for their speech, as the University provides an online service that allows anonymous reports and actively encourages students to report on one another.

SF-Br. 8-9. Indeed, BART received 93 reports in 2016, 176 reports in 2017, and 265 reports in 2018. A182, A195, A255. And BART makes every effort to contact the "offender." SF-Br. 10. That the Students credibly fear they will be swept up in this machinery is not debatable. *See Schlissel*, 939 F.3d at 765 (finding standing on a similar record); *SBA List v. Dreihaus*, 573 U.S. 149, 164-65 (2014) (same).

Lastly, the University urges the Court to give "substantial deference" to the district court's findings. U-Br. 31. But the parties do not have a "factual" dispute about *what* BART does; they have a legal dispute about the First Amendment significance of what BART does. The district court receives no deference on that question. In any event, any presumption of correctness "has lesser force" here because the district court's findings are "based on documentary evidence." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 500 (1984). Because the trial record is entirely document-based (consisting only of declarations and exhibits) and the district court held no hearing, any factual findings are "more amenable to evaluation by a reviewing court." *Miller v. Thane Int'l., Inc.*, 519 F.3d 879, 888 (9th Cir. 2008); *see, e.g., Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S.A., Inc.*, 549 F.3d 1079, 1088 (7th Cir. 2008) (reversing denial of a preliminary injunction

because "the facts in the record … tell a different story"); *Schlissel*, 939 F.3d at 765 (same).

* * *

Forbidding Speech First's members from even *challenging* BART and BIP would set a dangerous precedent. Try as it might, the University cannot explain why BART is acceptable but a Patriotism Assessment Response Team is not. *See* SF-Br. 43-44. The University argues that BART does not seek "to promote a specific message," but is instead "available to, and relied upon by, community members with a wide range of viewpoints." U-Br. 38 n.10. But targeting "bias" *is* promoting a specific viewpoint. *See* R.*A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 391-92 (1992) (a prohibition on "bias-motivated" speech is "viewpoint discrimination").

The University has no more of a right to use BART to support a climate free of "bias," than it would to use the Patriotism Assessment Response Team to support a climate free of anti-American sentiment, a Zionism Assessment Response Team to support a climate free of anti-Palestinian sentiment, or a Communism Assessment Response Team to support a climate free of communist sympathies. It strains credulity to suggest that these policies—which differ from BART only in the speech they disfavor—are so innocuous that they could evade

First Amendment scrutiny altogether. Yet that is the necessary result of accepting the University's theory of Article III standing.

B. The University's voluntary cessation did not moot Speech First's challenge to the leafletting policy concerning non-campus elections.

The controversy over the University's leafletting policy is not moot.[4] The University bears the "heavy burden" of proving "it [is] absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017). While the University insists that it is *Speech First*'s burden to present "'evidence creating a reasonable expectation that [the University] will reenact the [repealed rule] or one substantially similar,'" U-Br. 25-26, the University "gets it backwards," *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 713 (6th Cir. 2016), *rev'd in other part*, 138 S. Ct. 1833 (2018). Even in cases involving the government, it is "[t]he party asserting mootness" who "bears [the] 'heavy burden'" of showing mootness from voluntary cessation. *Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988, 999 (7th Cir.

[4] The University puzzlingly describes Speech First's challenge to the leafletting policy as the "core" of its complaint. U-Br. 22. That is not true, and the University cites nothing to support its characterization.

2002); *accord Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007).

The University mistakenly relies on cases where voluntary cessation was accomplished via *legislation*. *See Federation of Advert. Indus. Reps., Inc. v. City of Chicago*, 326 F.3d 924, 930 (7th Cir. 2003) ("repeal of a contested ordinance"); *BBL, Inc. v. City of Angola*, 809 F.3d 317, 324 (7th Cir. 2015) (same). Courts place more weight on voluntary cessation in those cases because undoing legislative changes requires coordination from multiple independent actors (who are often nonparties) and compliance with externally imposed procedures—notices, hearings, markups, votes from numerous elected officials, approval by an elected executive, and the like. *See Bell v. City of Boise*, 709 F.3d 890, 899 (9th Cir. 2013); *Libertarian Party of Ark. v. Martin*, 876 F.3d 948, 951-52 (8th Cir. 2017). But these cases cannot be automatically extended to other forms of voluntary cessation; "the form the governmental action takes is critical." *Fikre v. FBI*, 904 F.3d 1033, 1038 (9th Cir. 2018). Unlike "'a statutory change'" that undergoes "the rigors of the legislative process," *id.*, a "merely regulatory" change that lies within "the discretion" of "one agency or individual" usually does not moot a case. *Schlissel*, 939 F.3d at 768.

The University's voluntary cessation here was regulatory, not legislative. University administrators are not elected, not accountable, and not subject to external procedures that constrain their policymaking. And when it comes to free speech, they 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). Perhaps that is why this Court has never given a public university's voluntary cessation any special solicitude, *e.g.*, *Rabinowitz v. Bd. of Jr. Coll. Dist. No. 508*, 507 F.2d 1255, 1256 (7th Cir. 1974), and why the Supreme Court stated in dicta that it would treat voluntary cessation by a public university the same as voluntary cessation by a private defendant, *see DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974).[5]

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

While the University notes that it followed its internal procedures for amending the Student Code, U-Br. 28, that fact changes nothing. The University would not have to "go through the same process … to change the [Code] again." *Schlissel*, 939 F.3d at 769. It remains "unconstrained" because these procedures are entirely self-imposed. *Bell*, 709 F.3d at 900. In fact, the University admits that the Code is "subject to change without notice," *Student Code*, Univ. of Ill., studentcode.illinois.edu/ (last visited January 17, 2020), and that there are several ways to amend the Code outside of the procedure employed here, A421. Nor are the University's self-imposed procedures "particularly burdensome" anyway. *A. Philip*, 838 F.3d at 713. Here, for example, the amendments required nothing more than one committee meeting (a week before the University's opposition to the preliminary injunction was due), and the Chancellor's signature three days later. A414-15, ¶16.

Even if the University's procedures were binding or cumbersome, they still could not moot Speech First's claim. "The timing of the University's change"—invoking its procedures only "after the complaint was filed"—"raises suspicions that its cessation is not genuine." *Schlissel*, 939 F.3d at 769; *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."); *Sefick v. Gardner*, 164 F.3d 370, 372 (7th Cir. 1998) (rejecting mootness where the new policy was "adopted after the commencement of th[e] suit"). As does the University's lack of transparency when it invoked its procedures. *See Harrell v. Fla. Bar*, 608 F.3d 1241, 1267 (11th Cir. 2010) (rejecting mootness where the government "acted in secrecy, meeting behind closed doors and, notably, failing to disclose any basis for its decision").

The University emphasizes Kirts' statement that "the University has no intention of restoring the eliminated provision or adopting a new provision similar to it." A415, ¶16. But this declaration says no more than "what the University intends … presently." *Schlissel*, 939 F.3d at 769. What is missing is a *promise* that the University will *never* revert to its old policy. *See R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102, 106 (2d Cir. 1989) (rejecting mootness because the defendant's affidavit said it was not currently trying to acquire a company, but never "disavowed any future intention to acquire [it]"); *Rosales-Garcia v. Holland*, 322 F.3d 386, 396-97 (6th Cir. 2003) (en banc) (rejecting mootness because the government said it had released the plaintiff, but "made no … promise" not to detain him again).

As Speech First also explained (with no discernible response from the University), Kirts's declaration does not bind her superiors, future deans, or even herself. *See* SF-Br. 53-54. "So even if [Kirts] stated that the University would never reenact the challenged definitions, it is difficult to understand why that statement should be construed to have any binding or controlling effect as far as mootness goes." *Schlissel*, 939 F.3d at 769; *accord Freedom from Religion Found., Inc. v. Concord Cmty. Sch.*, 885 F.3d 1038, 1052 (7th Cir. 2018) ("Though the district court determined that [the superintendent] was sincere in his affidavit, there is no guarantee that a future superintendent would take the same stance.").

Finally, the University claims it "did not enforce the requirement before Speech First filed suit." U-Br. 28. But that drastically overstates the record. While Kirts stated she had "never seen or heard of a student ever being punished" under this provision, A414, ¶15, the recollection of one official is not the same as official records of non-enforcement (records that, conveniently, are in the University's sole possession). Nor is it evidence that the University refrained from punishing students who were openly violating the rule. It is just as likely that Kirts did not "see[] or hear[] of a student ever being punished" because students do not typically and openly violate the Student Code. *See* SF-Br. 52-53. "The lack of

discipline against students could just as well indicate that speech has already been chilled." *Schlissel*, 939 F.3d at 766.[6]

Worse, the University is *still* defending the policy. While it "does not defend the eliminated approval requirement on its merits," U-Br. 50 n.15, the University has never admitted that the requirement "is plainly unconstitutional." *Wis. Right to Life, Inc. v. Schober*, 366 F.3d 485, 492 (7th Cir. 2004); *see Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 831 (7th Cir. 2014) (rejecting mootness due to the government's "halfhearted concession"). And the University apparently still defends "the *need* for the former policy." *DeJohn v. Temple Univ.*, 537 F.3d 301, 310 (3d Cir. 2008). Both here and below, the University insists that all of "[t]he policies that Speech First seeks to enjoin are critical to the University's functioning and achievement of its educational mission." U-Br. 51; *see* PI Opp. at 22 (Doc. 18) ("*Each* challenged policy advances" the University's "educational mission" (emphasis added)). "'This stance does not bespeak of a genuine belief that the [policy] was of a type that not be contemplated again.'" *DeJohn*, 537 F.3d at 311. Indeed, the

[6] To prove mootness, the University of Michigan similarly asserted that "no student ha[d] ever been sanctioned under the [now-repealed policies] for expressing views like those held by [Speech First's members]." Doc. 18-8 at 7-8 ¶¶21-22, *Schlissel*, No. 18-cv-1145 (E.D. Mich.). The Sixth Circuit rightly rejected this argument.

Student Code is reissued every year, and the University chose to keep this policy in place for at least eight straight years. *See Archives*, Univ. of Ill., studentcode.illinois.edu/information/archives/ (last visited Jan. 17, 2020).

At bottom, Speech First need not "put forth … evidence" revealing some secret plot to reenact the repealed policy as soon as this litigation ends. U-Br. 28. The question is whether the *University* has met its "heavy burden" to show that it is "absolutely clear" this case no longer presents a live controversy between the parties. *Trinity Lutheran*, 137 S. Ct. at 2019 n.1. It has not.

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

As explained, SF-Br. 44-45, Speech First has standing to challenge the NCD policy because its members' intended speech is "arguably proscribed by the [policy] they wish to challenge" and they face a credible "threat of future enforcement." *SBA List*, 573 U.S. at 161-65. The University's contrary arguments fail.

The University first argues that speech on issues of public concern can never be the basis for an NCD. According to the University, Section 4.06 does not authorize NCDs merely because they are "warranted," but instead "expressly limits" NCDs to "potential or reported violations of the Student Code." U-Br.

48-49. In other words, the University interprets Section 4.06 to allow a disciplinary officer to issue an NCD whenever the University determines that a student has violated (or may violate in the future) any provision of the Student Code. U-Br. 48-49, 15.

As explained, this constraint on the University's authority appears nowhere in the text. SF-Br. 46. The University notes that Section 4.06 authorizes NCDs only against individuals "subject to student discipline, as described in §1-301(c) of the Student Code." A157, §4.06(a). But that phrase simply defines which individuals are subject to the University's "jurisdiction." *See* A030-031, §1-301(c). Indeed, other parts of the Student Code use similar language for the same purpose. *See* A028, §1-111(b) (stating that the Sexual Misconduct Policy applies to individuals "subject to student discipline pursuant to §1-301 of the Student Code").

Unlike the University's interpretation, Speech First's reading requires no textual gymnastics. Section 4.06 states plainly: "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" and "[t]he directive will be effective when the notification is sent." A158, §4.06(d)(i). The policy thus authorizes the imposition of

an NCD for any reason an officer "believes" is "warranted," even if that reason is a student's protected speech. At the very least, the NCD policy "arguably covers" protected speech, which is all that Speech First must show to have Article III standing. *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003).

The University next claims that "in practice" NCDs are not imposed on the basis of "protected speech." U-Br. 43. As an initial matter, what happens "in practice" is not relevant when the face of the policy restricts protected speech by the class to which the plaintiff belongs. *See N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999); *N.H. Right to Life PAC v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996). In these circumstances, "the threat [of prosecution] is latent in the existence of the statute." *Majors*, 317 F.3d at 721; *accord ACLU of Ill. v. Alvarez*, 679 F.3d 583, 591, 594 n.3 (7th Cir. 2012); *Schlissel*, 939 F.3d at 766-67; *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 365 (M.D. Pa. 2003). Further, self-imposed limiting constructions that the University has not published and that "no … court" has imposed cannot possibly defeat standing. *Majors*, 317 F.3d at 721. Courts will "not uphold an unconstitutional [law] merely because the Government promised to use it responsibly," *United States v. Stevens*, 559 U.S. 460, 480 (2010)—much less deny standing to challenge it, *N.C. Right to Life*, 168 F.3d at 711.

In any event, the University admits that it can issue an NCD whenever incidents "*suggest[]* that a violation of the Student Code" is "*likely* in the near *future*." A335, ¶23 (emphases added). If the grounds for an NCD are that broad—encompassing anything that makes an officer guess that a student might later violate some provision of the Student Code (a 100-plus page document)—then the policy covers limitless amounts of protected speech. Unsurprisingly, the University *has* issued an NCD in response to protected speech. SF-Br. 48. Although the University says the NCD against Minik was based on a "history of escalation," U-Br. 44, the University does not dispute that the trigger for the NCD was Minik's news article about a public protest. The University dismisses this incident as a "single" example, U-Br. 44, but it is certainly enough for Speech First to show *standing*. *SBA List*, 573 U.S. at 164.

In short, the University has adopted a rule that allows it to issue NCDs for virtually any reason, and there is a clear, public example of the University doing so in response to protected speech. SF-Br. 48. That the policy could be applied to protected speech is "not 'imaginary or wholly speculative,'" *SBA List*, 573 U.S. at 160, which is all Speech First needs to satisfy the "'quite forgiving'" credible-threat standard, *Wollschlaeger v. Governor*, 848 F.3d 1293, 1305 (11th Cir. 2017) (en banc).

Speech First has Article III standing, regardless whether it will prevail on its First Amendment overbreadth challenge. *See Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 475 (7th Cir. 2012).

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

Speech First easily satisfies all the criteria for a preliminary injunction. The University's contrary arguments either assume its standing and mootness arguments will prevail or raise pure questions of law. To conserve judicial resources, this Court should resolve these questions and instruct the district court to enter a preliminary injunction.

A. The University's policies are likely unconstitutional.

The University does not defend two of its policies on the merits. It explicitly "does not defend" its prior restraint on non-campus election speech. U-Br. 50 n.15. And it does not dispute that, if BART and BIP objectively chill speech, then its definition of "bias-motivated incidents" is overbroad and void for vagueness. SF-Br. 55-58. The University simply repeats its argument that Speech First lacks standing to challenge this policy. U-Br. 48. That argument is unpersuasive, for the reasons given above. *Supra* I.A.

While the University does defend the merits of its NCD policy, its legal arguments are unpersuasive. By granting disciplinary officers nearly unlimited authority to issue an NCD—constrained only by their judgment that an NCD is "warranted"—the policy has a scope of such "alarming breadth" that it is unconstitutionally overbroad. *Stevens*, 559 U.S. at 474.

The NCD policy is not subject to a "narrowing construction." U-Br. 50. This Court is "'without power to adopt a narrowing construction … unless such a construction is reasonable and readily apparent.'" *Barland*, 751 F.3d at, 833. Narrowing constructions should be invoked "sparingly and with caution." *Id*. If the Court would have to "rewrite [the policy] to conform it to constitutional requirements," then it must instead find it unconstitutional and let the University "bring it into conformity with the federal Constitution." *Stevens*, 559 U.S. at 460. As explained, *supra* I.C, the University's interpretation that the NCD policy is limited to "potential or reported violations of the Student Code" is not a "reasonable and readily apparent" interpretation.

The University counters that Speech First has "identified only one purportedly unconstitutional application of the policy" and thus the NCD policy is not "substantially overbroad." U-Br. 49. Not so. Without real constraints on the

University's authority to issue an NCD, the policy's scope is limitless. Students can (and do) get into heated exchanges about issues of public policy in the classroom, during student demonstrations on campus, while campaigning to support a candidate, or in online public forums. Some students will be confronted with speech they find biased, offensive, hurtful, or simply wrong. The NCD policy authorizes punishment for this speech as long as a disciplinary officer deems it "warranted." And, even if the University's narrowing construction were accepted, a disciplinary officer could still issue an NCD if he thought a student *potentially* might violate *any provision* of the Student Code. *Supra* I.C. The NCD policy simply "lacks the necessary specificity and tailoring to pass constitutional muster." *Bell v. Keating*, 697 F.3d 445, 459 (7th Cir. 2012). The First Amendment, does not allow the government to "shut off discourse solely to protect others from hearing it." *Snyder v. Phelps*, 562 U.S. 443, 459 (2011).

Finally, the University, not surprisingly, has no response to Illinois' Stalking No Contact Order Act, *see* SF-Br. 60, which allows a no-contact order to be issued only when 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 suffer emotional

distress." 740 ILCS 21/10. That the University resists imposing similar restraints on its disciplinary officers is unacceptable. As it stands now, the NCD policy is substantially overbroad.

B. The equitable factors favor a preliminary injunction.

The remaining preliminary-injunction factors—irreparable injury, balance of the equities, and the public interest—also favor Speech First. While the University disagrees with Speech First on the merits, U-Br. 50-51, it does not dispute that any "loss of First Amendment freedoms … unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

The University claims that its now-repealed policy on speech about non-campus elections can no longer irreparably harm Speech First. U-Br. 50 n.15. But this (nonjurisdictional) argument is doubly forfeited, as the University did not raise it below and raises it here only in a footnote. *United States v. House*, 872 F.3d 748, 752 (6th Cir. 2017). And it's wrong. A court's "'power to grant injunctive relief survives discontinuance of the illegal conduct.'" *EEOC v. KarenKim, Inc.*, 698 F.3d 92, 100 (2d Cir. 2012). Injunctive relief is warranted, despite a defendant's voluntary cessation, when there is "more than a 'mere possibility' that [the] challenged conduct will recur." *Sherwood v. TVA*, 842 F.3d 400, 407 (6th Cir. 2016).

That standard is met here, for the same reasons Speech First's claim is not moot. *Supra* I.B.

As for the other factors, "'injunctions protecting First Amendment freedoms are always in the public interest.'" *Alvarez*, 679 F.3d at 590. And the balance of equities cannot possibly favor the University. While the University believes its policies serve important interests, none of that matters if the policies are likely unconstitutional (and thus unenforceable). Defendants and the public are "not harmed by preliminarily enjoining the enforcement of a [policy] that is probably unconstitutional." *Id.* at 589-90.

Even taking the University's interests at face value, they do not move the equitable needle. The University claims an amorphous interest in avoiding "'supervision by federal judges,'" U-Br. 51, but binding precedent "leave[s] no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses." *Healy v. James*, 408 U.S. 169, 180 (1972). The University also says its policies ensure that students "express themselves safely and effectively" without "derision" or "insult." U-Br. 51-52. While this goal might seem "enlightened," it is "a decidedly fatal objective"; the whole "'point'" of the First Amendment "'is to shield just those

choices of content that in someone's eyes are misguided, or even hurtful.'" *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 579 (1995); *Snyder*, 562 U.S. at 458. A preliminary injunction also would not stop the University from "provid[ing] resources to students who feel victimized by bias" or from preventing "violence." U-Br. 51-52. Speech First did not ask the district court to enjoin BART or BIP from providing resources to bias "victims," and the University could immediately amend its NCD policy to cover violence, sexual misconduct, and other violations of the Student Code. *See Bair*, 280 F. Supp. 2d at 373. None of the University's concerns justify allowing it to continue violating students' rights during this litigation.

C. Additional preliminary-injunction proceedings would be wasteful and inefficient.

The University notes that this Court "'[o]rdinarily'" allows district courts "'to weigh the preliminary-injunction factors in the first instance.'" U-Br. 46 (quoting *Alvarez*, 679 F.3d at 589). But, as the next sentence of its cited authority explains, this ordinary rule does not apply "in First Amendment cases." *Alvarez*, 679 F.3d at 589. When "[t]he parties have fully briefed the likelihood of success on the merits, which raises only a legal question [under the First Amendment], it makes sense for [the appellate court] to address whether preliminary injunctive

relief is warranted." *Id.* at 590. "This is because" the other preliminary-injunction factors are usually satisfied once "the moving party establishes a likelihood of success on the merits." *Id.* at 589-90; *see* SF-Br. 63-64.

So too here. Speech First's claims require no new "factual findings" by the district court. U-Br. 46. The University does not defend its prior restraint on speech concerning non-campus elections, and its defenses of the NCD policy are purely legal. The only "factual" questions in this case involve the University's policy on bias-motivated incidents, as enforced by BART and BIP. But the University's defense of that policy simply repeats its objection to Speech First's Article III standing—an objection that the district court *did* consider and that this Court must review anyway. Thus, "efficiency supports" reviewing the merits of Speech First's claims "now, lest [the Court] remand on the question only to face another appeal of the injunction ruling down the road." *Boerschig v. Trans-Pecos Pipeline, LLC*, 872 F.3d 701, 706 (5th Cir. 2017).

Nor does the district court need to "weigh[]" the preliminary-injunction factors. U-Br. 46. When a plaintiff identifies a likely First Amendment violation, that is "normally" where the analysis "'ends.'" *Alvarez*, 679 F.3d at 590; *Higher Soc'y of Ind. v. Tippecanoe Cty.*, 858 F.3d 1113, 1116 (7th Cir. 2017). True, in unusual cases,

the balance of harms might weigh "so strongly in the defendant's favor" that the plaintiff needs "a stronger showing of likely success." *MacDonald v. Chicago Park Dist.*, 132 F.3d 355, 357 (7th Cir. 1997). But the University makes no effort to prove that the equities tilt "so strongly" in its favor. Nor could it. The University's stated harms are generic, amorphous, and not jeopardized by the narrow relief that Speech First seeks. In short, this is the "usual[]" case where the likely merit of Speech First's constitutional claims is "'determinative.'" *Higher Soc'y*, 858 F.3d at 1118; *Schlissel*, 939 F.3d at 770.[7]

CONCLUSION

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

[7] The *Schlissel* court predicted that additional preliminary-injunction proceedings would be useful on remand. 939 F.3d at 770. That prediction turned out to be wrong. After the Sixth Circuit reversed the district court's holdings on standing and mootness, the University of Michigan quickly settled the case.

Respectfully submitted,

/s/ J. Michael Connolly

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Dated: January 17, 2020

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

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I hereby certify that on January 17, 2020, the Reply 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