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.

PETITION FOR REHEARING *EN BANC*

WILLIAM S. CONSOVOY
J. MICHAEL CONNOLLY
CAMERON T. NORRIS
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Suite 700
Arlington, Virginia 22209
(703) 243-9423

Counsel for Plaintiff-Appellant
Speech First, Inc.

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.**

[✔] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

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** ____

Address: 1600 Wilson Blvd., Suite 700, Arlington, VA 22209

Phone Number: 703-243-9423 Fax Number: 703-243-9423

E-Mail Address: mike@consovoymccarthy.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-2807

Short Caption: Speech First, Inc. v. Killeen

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.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

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:

J. Michael Connolly

Cameron T. Norris

(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/ 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

Address: 1600 Wilson Blvd., Ste. 700
Arlington, VA 22209

Phone Number: 703-243-9423 Fax Number: 703-243-9423

E-Mail Address: will@consovoymccarthy.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-2807

Short Caption: Speech First, Inc. v. Killeen

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.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

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:

J. Michael Connolly

William S. Consovoy

(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/ 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

Address: 1600 Wilson Blvd., Ste. 700
Arlington, VA 22209

Phone Number: 703-243-9423 Fax Number:

E-Mail Address: cam@consovoymccarthy.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

RULE 35 STATEMENT

Petitioner Speech First requests rehearing en banc because: (1) the panel incorrectly decided an exceptionally important question by holding that public officials are entitled to special solicitude in evaluating whether voluntary cessation moots a §1983 action; (2) circuit precedent requiring this solicitude contravenes Supreme Court precedent, including *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); and (3) the panel split with the Sixth Circuit by holding that the University's repeal of a campus rule mooted Speech First's challenge.

STATEMENT

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.'" Op. 10 (quoting A068, §2-407). A student who violated this rule faced "disciplinary action, including reprimand, censure, probation, suspension, and dismissal from the University." Op. 10-11. In its complaint, brought under 42 U.S.C §1983, and in its preliminary-injunction motion, Speech First claimed that the prior-approval rule violated the First

Amendment. Four days before filing its opposition to Speech First's preliminary-injunction motion, the University repealed the rule. Op. 11. The district court held that the repeal mooted Speech First's claim and denied a preliminary injunction on that basis. Op. 12.

In a divided opinion, the panel affirmed. Op. 28-33.[1] The case would have been different had the defendants been private parties. "As a general rule," the majority noted, "'a defendant's voluntary cessation of challenged conduct will not render a case moot because the defendant remains 'free to return to his old ways.'" Op. 28. Here, though, the prior-approval rule was repealed by "a public entity and an arm of the state government of Illinois, and therefore receives the presumption that it acts in good faith." Op. 30. Based on that presumption, the claim was moot. Op. 30-33. The majority acknowledged its disagreement with *Speech First v. Schlissel*, 939 F.3d 756, 765 (6th Cir. 2019). Op. 31.

[1] The panel also affirmed denial of a preliminary injunction on Speech First's other claims. Op. 14-27. Speech First does not seek en banc review of those claims.

Judge Brennan dissented. Op. 45-53. In his view, the University hadn't met its "'heavy burden' of persuading the court that there is no reasonable expectation that the challenged conduct will reappear in the future," Op. 47, even accepting that public officials are afforded solicitude not given to private parties, Op. 50. "The relative ease, timing, and manner by which the University amended the Student Code," he explained, "are all measures as to whether it meets this heavy burden. On none of these criteria has the University shown with absolute clarity that the prior approval rule has perished permanently." Op. 47. The Sixth Circuit was right and the majority was wrong. Op. 53.

ARGUMENT

I. The panel incorrectly held that Defendants' voluntary cessation of illegal conduct mooted this case.

A defendant establishes 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." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). This case wouldn't be moot under this standard had the defendants

been private parties. Op. 28-29; *e.g.*, *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968). The panel reached a contrary judgment, however, because, "'[w]hen the defendants are public officials,'" this Circuit "'place[s] greater stock in their acts of self-correction, so long as they appear genuine.'" Op. 28-29 (quoting *Fed'n of Advert. Indus. Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 929 (7th Cir. 2003)). This two-track approach to voluntary cessation conflicts with Supreme Court precedent and should be overruled. Even accepting that public officials receive special solicitude, though, the panel's ruling is wrong for the reasons given by Judge Brennan and the Sixth Circuit in *Schlissel*.

A. Circuit precedent giving special solicitude to public officials under the voluntary-cessation doctrine should be overruled.

The two-track approach to voluntary cessation the panel was bound to apply traces back to *Ragsdale v. Turnock*, 841 F.2d 1358 (7th Cir. 1988). As the court explained, "voluntary cessation of putatively illegal conduct ordinarily will not moot a controversy" because "[d]efendants bear a heavy burden of persuading the court that a controversy is moot." *Id.* at 1364-65. At the same time, "cessation of the allegedly illegal conduct by government officials has

been treated with more solicitude by the courts than similar action by private parties. According to one commentator, such self-correction provides a secure foundation for a dismissal based on mootness so long as it appears genuine." *Id.* at 1365 (citing 13A Wright, Miller & Cooper *Federal Practice and Procedure* §3533.7, at 353 (2d ed. 1984)). That underdeveloped reasoning has provided the governing test for mootness in this Circuit ever since. Op. 28-29 (collecting cases); *Wis. Right to Life, Inc. v. Schober*, 366 F.3d 485, 491-92 (7th Cir. 2004).

The misguided approach should be abandoned. The Supreme Court has never suggested—let alone held—that the test for voluntary cessation is more forgiving when it comes to public officials. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 551 U.S. 701, 719 (2007); *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974); *Gray v. Sanders*, 372 U.S. 368, 376 (1963). To the contrary, the Court has held that a case is not moot unless the public official has "carried the 'heavy burden'" of proving it is "'absolutely clear that the allegedly wrongful behavior could

not reasonably be expected to recur.'" *Trinity Lutheran*, 137 S. Ct. at 2019 n.1 (quoting *Friends of the Earth*, 528 U.S. at 189). If there were in fact different standards, as circuit precedent holds, the Supreme Court would not have deployed the standard used in *Friends of the Earth* (private party) to reject the mootness argument made in *Trinity Lutheran* (public official). In short, there is *no* Supreme Court case substantiating the proposition that public officials shoulder a less demanding burden under the voluntary-cessation doctrine than do private parties.

The Court's approach also conflicts with those of other circuits. The First Circuit, for example, has refused to "join the line of cases holding that when it is a government defendant which has altered the complained of regulatory scheme, the voluntary cessation doctrine has less application unless there is a clear declaration of intention to re-engage." *ACLU of Mass. v. U.S. Conf. of Cath. Bishops*, 705 F.3d 44, 56 n.10 (1st Cir. 2013) (declining to follow *Ragsdale*, 841 F.2d at 1365). The D.C. and Eighth Circuits likewise do not give special solicitude to government officials. *See Fed. Corr. Complex Coleman v. FLRA*, 737 F.3d 779, 783 (D.C. Cir. 2013) (placing burden on

government defendants without any presumptions in their favor); *Am. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 421 (8th Cir. 2007) (same). These circuits are correct.

The reasons for imposing a "heavy burden" apply equally to public officials. Just like a private party, a public official has every incentive to "return to his old ways" once the suit is dismissed as moot. *City of Mesquite*, 455 U.S. at 289 n.10. If the government could moot a case by voluntarily changing a challenged policy, 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 just as easily frustrate "the 'public interest in having the legality of the practices settled.'" *DeFunis*, 416 U.S. at 318.

If anything, there is even *more* reason to impose a heavy burden on public officials. The supposition that they are inherently more trustworthy—or inherently less likely to resume illegal conduct—turns §1983 on its head. "The very purpose of §1983," after all, "was to interpose the federal courts

between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). Congress had "realized that state officers might, in fact, be antipathetic to the vindication of [federal] rights." *Id.*; *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) ("The purpose of §1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails."). There is no justification for putting a thumb on the scale in favor of public officials.

Finally, injunctive relief is often the only way to redress constitutional violations since public officials are frequently immune from damages claims. *Pearson v. Callahan*, 555 U.S. 223 (2009). This should weigh against affording them special treatment. To be certain, that doesn't mean voluntary cessation can never moot claims against public officials. *See, e.g.*, *L.A. Cnty. v. Davis*, 440 U.S. 625, 631-34 (1979). But it does mean that public officials should meet the "stringent" test that applies to everyone else. *Friends of the Earth*, 528 U.S. at 189. There is only *one* standard for evaluating whether voluntary cessation

moots an injunctive-relief claim. En banc review should be granted to overrule circuit precedent holding otherwise.

B. Even accepting circuit precedent, the majority's mootness ruling created a split with the Sixth Circuit and is wrong.

Even if the Court's mootness precedent is not revisited, the panel decision presents a question of exceptional importance on an issue in which there is now a circuit split. *See* Fed. R. App. P. 35(b)(1)(B). According to the majority, the prior-restraint rule is no longer "a threat to students past, present, or future." Op. 30. That is wrong. The University's repeal contains none of the formality that comes with notice-and-comment rulemaking or repeal of a statute, which typically requires votes of hundreds of legislators in two branches and the governor's signature. *Thomas v. Fiedler*, 884 F.2d 990, 994 (7th Cir. 1989). A recommendation from a University committee and approval by the Chancellor is not the type of "legislative-like procedures" that presumptively moot a case. *Schlissel*, 939 F.3d at 768; *e.g.*, *Ozinga v. Price*, 855 F.3d 730 (7th Cir. 2017). "It took only four days for the University's conduct conference to repeal the challenged provision and for the chancellor to approve," and "a repeal could be undone in the same time frame with the

same ease." Op. 47 (Brennan, J.). The University "remains unconstrained to reverse itself on the prior approval requirement." *Id.*

"The timing of the University's change"—repealing the prior-approval rule only "after the complaint was filed"—further "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."). "The prior approval rule was withdrawn nearly two months into this litigation, and just before the University responded to the crucial preliminary injunction motion." Op. 48 (Brennan, J.). This Court has correctly rejected mootness arguments under similar circumstances. *Sefick v. Gardner*, 164 F.3d 370, 372 (7th Cir. 1998). It should have done so here.

Assurances that the University "does not intend to reenact the provision" are insufficient. Op. 30. The declarations submitted in opposition to the preliminary-injunction motion say no more than "what the University intends … presently." *Schlissel*, 939 F.3d at 769. "But more than a non-committal statement is required to persuade that the challenged provision

will not resurface." Op. 49 (Brennan, J.). None of them "promise that the University will not revisit this Student Code provision," and no such promise would "bind the University" anyway. *Id.* Accordingly, even if the University promised that it "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.

The majority emphasized the absence of "evidence that the University … ever enforced" the prior-approval rule as buttressing its determination that the rule is gone for good. Op. 32. "Besides falling prey to the gambler's fallacy (an inference about unknown future events based upon known past events), the only evidence of the prior approval rule's history of enforcement is a single sentence in [one] declaration, which is limited to [the declarant's] personal experience, not that of the entire University." Op. 49 (Brennan, J.). As Judge Brennan noted, "'[t]he lack of discipline against students could just as well indicate that speech has already been chilled.'" *Id.* at 50 (quoting *Schlissel*, 939 F.3d at 766).

This case might be different had the University "acknowledge[d]" that the rule "is plainly unconstitutional." *Wis. Right to Life*, 366 F.3d at 492. The University would have at last then "come closer to bearing its heavy burden." Op. 51 (Brennan, J.). The University, however, has ardently refused to do so. "This stance does not bespeak of a genuine belief that the [rule] was of a type that would not be contemplated again.'" *DeJohn v. Temple Univ.*, 537 F.3d 301, 311 (3d Cir. 2008). If the University truly intends to permanently abandon the rule, then it would "agree[] to a judgment declaring [it] unconstitutional." *Associated Gen. Contractors of Am. v. City of Columbus*, 172 F.3d 411, 420 (6th Cir. 1999).

The majority disagreed, stating that this Court has never demanded "a concession that a rule is unconstitutional." Op. 32. But that was erroneous. In *Ragsdale*, the defendants' concession that the disputed "requirement [was] unconstitutional under governing Supreme Court decisions" was critical to the conclusion that the case was moot. 841 F.2d at 1365. "We believe," this Court explained, that "defendants' now public policy of non-enforcement of the hospitalization requirement, *particularly in view of the reasons therefor (i.e.,*

that enforcement is barred by clear Supreme Court precedent), moots any challenge to that requirement." *Id.* at 1365-66 (emphasis added).

It is one thing to presume that public officials act in good faith, but it is quite another to relieve them of their obligation to prove mootness. "'The party asserting mootness,'" even in cases involving government officials, "'bears [the] 'heavy burden'" of establishing mootness based on voluntary cessation. Op. 47 (Brennan, J.) (quoting *Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988, 999 (7th Cir. 2002)). But the majority transferred that burden to Speech First. That error affected its analysis from top to bottom.

II. Whether public officials—especially campus administrators who are sued for violating the First Amendment—are entitled to this special solicitude is an issue of exceptional importance.

This petition raises an exceptionally important issue. The Court's decision encourages government officials—and university administrators in particular—to enact unconstitutional policies. "'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). Yet universities across the country regularly violate students' First

Amendment rights. Their motives vary: Some seek to protect students from "harmful" speech on issues of race, gender, sexual orientation and other characteristics; some seek to avoid the publicity that comes when controversial speakers visit campus or students engage in contentious demonstrations; and still others seek to stifle dissemination of ideological views they oppose. FIRE, *Spotlight on Speech Codes 2019: The State of Free Speech on Nation's Campuses* (2019), bit.ly/2GAyfKJ.

Whatever their motives, their methods are similar. Some of the most common include:

- ***Speech Codes***. Speech codes punish students under broadly worded regulations, such as provisions forbidding "bullying," "hate speech," and "incivility." *See id.* at 10, 19-21. For example, until Speech First sued, the University of Michigan prohibited "harassment," which included speech that was "perceived as intimidating, demeaning or bothersome to an individual." *Speech First v. Schlissel*, 333 F. Supp. 3d 700, 707 (E.D. Mich. 2018). Because speech codes impose vague,

overbroad, content-based restrictions on speech, they violate the First and Fourteenth Amendments.

- ***Bias Response Teams***. In recent years, colleges and universities across the country (including the University of Illinois) have created "bias response teams" charged with documenting, investigating, and punishing students who engage in "bias." Speech on issues of race, religion, gender, immigration, sexual orientation, and other characteristics are often deemed "biased" and then reported to the bias response team. FIRE, *Bias Response Team Report 2017*, at 15-19 (2017), bit.ly/31CfKPJ. Not surprisingly, 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." *Id.* at 28.
- ***Prior Restraints***. Many universities prohibit students from speaking on certain topics until they receive university permission. These prior restraints can take many forms, such as requiring students to get prior approval for campus demonstrations or to use a public theater

for controversial speakers. FIRE, *Speech Codes*, at 23. The University of Illinois's policy here was an unconstitutional prior restraint.

- ***Free Speech Zones***. "Free speech zones" are small, isolated places on campus that the university has designated as the only location where students may engage in free expression. Even worse, universities often require students to register far in advance to speak in these areas, thus burdening speakers with paperwork and preventing spontaneous speech. *Id.* at 24. For example, one California student was prevented from passing out constitutions on Constitution Day because he didn't make an appointment to use the free speech zone. Cecilia Simon, *Want a Copy of the Constitution? Now, That's Controversial!*, New York Times (Aug. 1, 2016), nyti.ms/3frCZko.

These anti-speech efforts have taken a toll. A recent study found that more than *two-thirds* of college students don't feel free to speak their views on campus. Knight Foundation, *College Students Support the First Amendment, but Some Favor Diversity and Inclusion Over Protecting the Extremes of Free Speech* (May 13, 2019), kng.ht/31Qsz8w. That number is even higher for

students with disfavored views. Per a recent poll, 73% of Republican and Republican-leaning college students have remained silent in class because they fear their grades will suffer if they speak up. Jennifer Kabbany, *Poll: 73 Percent of Republican Students Have Withheld Political Views in Class for Fear Their Grades Would Suffer*, College Fix (Sept. 4, 2019), bit.ly/37rR1hP. This retreat from open discourse harms not just the students who refrain from speaking; the entire academic community suffers when students and faculty are denied or deterred from hearing, discussing, and debating opposing viewpoints. Frederick Douglass, *A Plea for Free Speech in Boston at Music Hall* (1860) ("Equally clear is the right to hear. To suppress free speech is a double wrong. It violates the rights of the hearer as well as those of the speaker.").

Universities feel emboldened to enact unconstitutional speech policies because they rarely face consequences. Universities frequently revise their policies after they are sued in order to moot the case and avoid an adverse judgment. In *all four* of Speech First's cases, the universities repealed their policies after being sued and then argued that the issue was moot. When Speech First sued the University of Michigan over its speech codes, the

university quickly revised its policies and argued the challenge was moot. *Schlissel*, 939 F.3d at 767-70. When Speech First sued the University of Texas over various speech codes—including one that prohibited "harassment," which it defined to include "racism, sexism, heterosexism, cissexism, ageism, ableism, and any other force that seeks to suppress another individual or group of individuals"—the university deleted its policies while the case was on appeal and then argued the challenge was moot. *See Speech First v. Fenves*, No. 19-50529 (5th Cir.) (Dkt. 515155105). When Speech First sued Iowa State University over its rules limiting "chalking" on public sidewalks to only certain groups and certain messages, the university abandoned its policy within days of being sued and then argued the challenge was moot. *Speech First v. Wintersteen*, No. 20-cv-2 (S.D. Iowa) (Docs. 1 and 22). And here, as explained, the University did the same thing with its prior-approval rule. This is no coincidence. It is the standard playbook.

Absent judicial relief, students must rely solely on the university's "promise" to respect free speech in the future. Unsurprisingly, universities

have a notoriously bad track record of reneging on their promises. *See* Brief *Amicus Curiae* of FIRE et al. at 6-11, *Speech First Inc. v. Schlissel*, No. 18-1917 (6th Cir. 2018) ("FIRE's archives abound with examples of universities that eliminated problematic restrictions on student speech, only to reinstate them (or substantially similar policies) at a later date."); *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). This is the "Speech Code Hokey Pokey": "When the complaint appears, you pull your bad policy in. When the case is moot, you put your bad policy out. . . . This way, you'll never have to turn your censorship around—*that's what it's all about*." Greg Lukianoff & Adam Goldstein, *Speech Code Hokey Pokey*, Volokh Conspiracy (Sept. 12, 2018), bit.ly/2rFNc9u.

Universities also seek to moot cases to avoid paying plaintiffs' attorney's fees. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res.*, 532 U.S. 598 (2001) (requiring a "judicially sanctioned change in the legal relationship of the parties" to be a "prevailing party" entitled to attorney's fees). But the availability of attorney's fees is critical to protecting

constitutional rights. "Congress expressly recognized that a plaintiff who obtains relief in a civil rights lawsuit does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest importance." *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (cleaned up). "If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers." *Id*.

Without the availability of attorney's fees, few attorneys will be available to vindicate students' constitutional rights, and fees provisions no longer will deter bad actors. *Carey v. Piphus*, 435 U.S. 247, 257 n.11 (1978). Notably, in limiting plaintiffs' ability to recover attorney's fees from government actors, the Court in *Buckhannon* stressed that it was unlikely that defendants would "unilaterally moot[] an action before judgment in an effort to avoid an award of attorney's fees" because they would bear a heavy burden to demonstrate mootness. 532 U.S. at 608. According to the Court, "petitioners' fear of mischievous defendants" was overblown since "'[i]t 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' unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* at 608-09 (quoting *Friends of the Earth*, 528 U.S. at 189).

But these fears have come to pass. Universities engage in blatantly unconstitutional behavior and then "evade sanction by predictable 'protestations of repentance and reform.'" *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66-67 (1987). This Court's intervention is needed.

CONCLUSION

The Court should grant the petition for rehearing en banc.

Respectfully submitted,

/s/ J. Michael Connolly

William S. Consovoy
J. Michael Connolly
Cameron T. Norris
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
(703) 243-9423
mike@consovoymccarthy.com

Counsel for Plaintiff-Appellant Speech First, Inc.

CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rule of Appellate Procedure 32(b)(2) because it does not exceed 3,900 words, excluding the parts of the document exempted by Federal Rule 32(f). Further, this brief complies with Federal Rule 32(a)(5)-(6) and Circuit Rule 32(b) because it has been prepared in a proportionally-spaced face, with serifs, using Microsoft Word Office 365, in 14-point Palatino Linotype font, set in a plain, roman style.

/s/ J. Michael Connolly
J. Michael Connolly

Counsel for Plaintiff-Appellant
Speech First, Inc.

Dated: August 11, 2020

CERTIFICATE OF SERVICE

I hereby certify that I filed a true and correct copy of this petition with the Clerk of this Court via the CM/ECF system on August 11, 2020, which will notify all counsel of record.

/s/ J. Michael Connolly
J. Michael Connolly

Counsel for Plaintiff-Appellant Speech First, Inc.

Dated: August 11, 2020