**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

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| SPEECH FIRST, INC.<br>*Plaintiff*,<br>v.<br>PAMELA WHITTEN, in her official capacity as President of Indiana University, *et al.*,<br>*Defendants.* | Case No. 1:24-cv-00898 |

**BRIEF IN SUPPORT OF PLAINTIFF'S**
**MOTION FOR A PRELIMINARY INJUNCTION**

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## INTRODUCTION

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Healy v. James*, 408 U.S. 169, 180 (1972) (cleaned up). "The college campus" is supposed to "serve as a marketplace of ideas and a forum for the robust exchange of different viewpoints." *Solid Rock Found. v. Ohio State Univ.*, 478 F. Supp. 96, 102 (S.D. Ohio 1979). Indiana University and its officials have enacted a far-reaching policy that is designed solely to deter, discourage, and otherwise prevent students from expressing disfavored views about the political and social issues of the day.

The University's bias-incidents policy, enforced by its so-called Bias Response Team, martials the authority of administrators to police speech. The University formally defines a "bias incident" as "any conduct, speech, or expression, motivated in whole or in part by bias or prejudice meant to intimidate, demean, mock, degrade, marginalize, or threaten individuals or groups based on that individual or group's actual or perceived identities." Bias incidents can occur on or off campus, including on social media, and the University tracks and logs all of them. Students accused of "bias incidents" can be referred for formal disciplinary proceedings. This policy poses a grave risk of chilling the open and unfettered discourse that should be central to higher education. Its bureaucratic processes—and the vague, overbroad, and viewpoint-based definition of "bias incident" that triggers them—violate the First and Fourteenth Amendments.

Unfortunately, binding yet erroneous Seventh Circuit precedent requires this Court to deny Speech First's motion for a preliminary injunction. Under *Speech First, Inc. v. Killeen*, Speech First likely lacks Article III standing at the preliminary-injunction phase because its

members have not yet been punished by the University for their speech and the University's Bias Response Team—like the bias response team at the University of Illinois before it—disclaims disciplinary authority. *See Speech First, Inc. v. Killeen*, 968 F.3d 628, 644-45 (7th Cir. 2020).

If not for this erroneous precedent, a preliminary injunction would be warranted. Speech First would likely succeed on the merits because the bias incidents policy violates the First and Fourteenth Amendments. Because Speech First would likely succeed on its constitutional claims, it would readily satisfy the remaining criteria for a preliminary injunction. *E.g.*, *Speech First, Inc. v. Khator*, 2022 WL 1638773 (S.D. Tex. May 19, 2022) (granting Speech First a preliminary injunction against a university's speech policy); *Speech First, Inc. v. Sands*, 2021 WL 4315459 (W.D. Va. Sept. 22, 2021) (same); *Speech First, Inc. v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022) (similar).

Speech First respectfully submits that *Killeen* was wrongly decided. The Seventh Circuit's decision stands on the lonely end of a 3-1 circuit split. Two of the cases on the other side of that split were decided after *Killeen*. *See Cartwright*, 32 F.4th at 1124; *Speech First, Inc. v. Fenves*, 979 F.3d 319, 338 (5th Cir. 2020). More importantly, *Killeen* is directly at odds with Supreme Court precedent. That Court rejects the notion that enforcement history is a prerequisite for objective chill. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 160-61 (2014). And that Court has repeatedly emphasized that government entities can unconstitutionally chill speech even when they technically prohibit nothing and punish no one. *See, e.g.*, *Bantam Books v. Sullivan*, 372 U.S. 58, 68 (1963). Because Speech First plans to challenge *Killeen* on appeal,

this Court should let the University create a full record. It must then deny this motion under *Killeen*, allowing Speech First to ask a higher court to overturn that precedent.

## BACKGROUND

### I. The First Amendment and College Campuses

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

The First Amendment's importance is at its apex at our nation's colleges and universities. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'" *Healy*, 408 U.S. at 180. The core principles of the First Amendment "acquire a special significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution's educational mission." *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 863 (E.D. Mich. 1989) (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. N.H. ex rel. Wyman*, 354 U.S. 234, 250 (1957). The First Amendment's protections on college campuses, moreover, are "not confined to the supervised and ordained discussion which takes place in the classroom" but extend throughout a university's campus. *Solid Rock Found.*, 478 F. Supp. at 102.

Put simply, "First Amendment protections [do not] apply with less force on college campuses than in the community at large." *Healy*, 408 U.S. at 180. "The mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973). Indeed, "the point of all speech protection is … to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995). These principles apply with more force "[i]n our current national condition," not less. *Fenves*, 979 F.3d at 339.

Instead of promoting the "robust exchange of ideas," however, universities are now more interested in protecting students from ideas that make them uncomfortable. *Keyishian*, 385 U.S. at 603. To accomplish this goal, administrators adopt policies and procedures that discourage students who disagree with the prevailing campus orthodoxy from openly sharing their beliefs. But universities know that campus speech codes that outright ban "biased," "hateful," "harassing," or "discriminatory" speech have a poor record in court. *See, e.g.*, *Fenves*, 979 F.3d at 338-39 & n.17 (surveying a "consistent line of cases" that have "uniformly found" such "campus speech codes unconstitutionally overbroad or vague"). Thus, universities are increasingly turning to a new, innovative way to deter disfavored speech—so-called "bias response teams." *See* Dkt. 9-9. Living up their Orwellian name, these teams encourage students to monitor each other's speech and to report incidents of "bias" to a team of university administrators.

Universities and their faculty have noted the chilling effect of such bias-incidents policies. *See, e.g.*, Dkt. 9-10; Keith Whittington, *Free Speech and the Diverse University*, 87 Fordham L.

Rev. 2453, 2466 (2019) ("[E]fforts [by bias-response teams] to encourage students to anonymously initiate disciplinary proceedings for perceived acts of bias or to shelter themselves from disagreeable ideas are likely to subvert free and open inquiry and invite fears of political favoritism."). Indeed, the chill is the point. *See, e.g.*, Dkt. 9-11 at 5.

Courts have also recognized that bias response teams chill speech. After Speech First challenged similar bias response teams at the University of Texas, the University of Michigan, and the University of Central Florida, courts acknowledged that bias response teams objectively chill student speech, and all three schools disbanded their teams. *See Fenves*, 979 F.3d at 338 (stressing that Texas's team "represent[ed] the clenched fist in the velvet glove of student speech regulation"); *Cartwright*, 32 F.4th at 1124 (explaining that "the average college-aged student would be intimidated—and thereby chilled from exercising her free-speech rights—by subjection to [Central Florida's] bias-related-incidents policy"); *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 765 (6th Cir. 2019) (finding that Michigan's bias response team "acts by way of implicit threat of punishment and intimidation to quell speech"); *but see Killeen*, 968 F.3d at 644-45.

## II. The University's Bias Incidents Policy

The University has adopted a "bias incidents" policy designed to deter, suppress, and punish disfavored and controversial speech. *See* Dkt. 9-12. The University defines a "bias incident" as "any conduct, speech, or expression, motivated in whole or in part by bias or prejudice meant to intimidate, demean, mock, degrade, marginalize, or threaten individuals or groups based on that individual or group's actual or perceived identities." Dkt. 9-12 at 2. In a video message to the student body from the University dean in charge of the Bias Response

Team on the Bloomington campus, the dean emphasized that the "actual or perceived identities" referenced in the definition are the same protected characteristics that are "identified in the student Code of Conduct." Dkt. 9-13. The policy does not, however, define "bias" or any other key term. The precise contours of what the policy covers are unclear, and the University's circular description of a "bias incident" as "any" incident "motivated … by bias" provides little guidance.

One aspect of the policy is unambiguous, however: it encompasses pure speech. Students can be reported for, among other things, an offensive "Email or Text Message," a problematic "Phone Call," a "Written" comment motivated by bias, and "Verbal" offenses. Dkt. 9-14 at 4-5. Indeed, the University goes out of its way to emphasize that an "offender['s]" speech is an integral part of the offense. Dkt. 9-14 at 5. It instructs complainants that, "[i]f slurs or derogatory language were used against you or another person, please place that language in quotes so we know that it is a part of the incident you are reporting." Dkt. 9-14 at 5. Bias incidents can occur on or off campus, including on "social media" or "other digital source[s]." Dkt. 9-14 at 4-5.

Bias incident complaints can be submitted online via a "Bias Incident Report" form on the University's website, by emailing an administrator directly, or through a cell phone app created by the University. *E.g.*, Dkt. 9-15 at 2. The main webpage for the IU Indianapolis Office of Student Conduct lists the University's "Bias Incident Report" form directly below forms for reporting "harassment, discrimination, or sexual misconduct," "personal misconduct," and "academic misconduct." Dkt. 9-16 at 3.

Importantly, complaints about biased speech can be submitted anonymously. Indeed, the University emphasizes the option of anonymity when encouraging students to report their peers. A University webpage providing "campus resources [and] contacts" for "bias incident reporting" provides a link to the complaint form with the tagline: "All you have to do is complete a form—and it's anonymous." Dkt. 9-17 at 2. Moreover, anyone can file a bias complaint—the section of the report form titled "Reporter Affiliation to IU" gives complainants the option to select "student," "faculty," "staff," "parent/guardian," "alumni," "community member," "no IU affiliation," "unknown," or "other." Dkt. 9-14 at 4.

When reporting biased speech, complainants specify the date and location of the alleged incident and list key details about the "involved parties," including the offender's name, University ID, and email address. Dkt. 9-14 at 3. Complainants are also required to provide a description of the incident and to specify whether they "directly experienced the bias," are "supporting individual(s) who experienced the bias," "witnessed the bias," were a "viewer" of the bias who "observed [it] online," or merely have a "bias concern without being directly impacted." Dkt. 9-14 at 3-4. Complainants must also specify whether the "the Police [were] involved." Dkt. 9-14 at 7. Finally, the form gives complainants the option to download a copy of their as-filed reports. Dkt. 9-14 at 7-8.

The University has created the Bias Response Team, charged it with responding to bias incidents, and staffed it with "trained officials" for a single purpose: "to prevent future incidents" of biased speech. Dkt. 9-12 at 2. Indiana has described itself as "committed" to this purpose, Dkt. 9-12 at 2, and those statements cannot be dismissed as idle talk. To the contrary, IU has quite literally put its money where its mouth is. Cedric Harris, the Assistant Dean for

Student Support and Bias Education and head of IU Bloomington's Bias Response Team, "was hired … to specifically address bias reports as his full-time job." Dkt. 9-18 at 5. Assistant Vice Chancellor of Diversity, Equity, and Inclusion Katherine Betts occupies a similar role at IU Indianapolis. Dkt. 9-19 at 2.

For his part, Dean Harris assures the campus community that his team "take[s] every report we receive seriously." Dkt. 9-20 at 4. The Bias Response Team "reviews all submitted bias incident reports" and "typically" responds within "1-2 business days." Dkt. 9-12 at 2. After receiving a complaint, the team initiates "the Bias Incident Process," which includes "contact[ing] the involved parties" when possible, "collect[ing] information" about the incident, "[e]ngaging person(s) impacting others," and "discuss[ing] next steps" with offenders and/or complainants, should they choose to identify themselves. Dkt. 9-12 at 3-4.

According to Dean Harris, the Bias Response Team "[i]deally" tries "to match up the people involved so they can resolve what happened between them." Dkt. 9-13. In some cases, this process takes the form of "[m]ediation and facilitated dialogue." Dkt. 9-12 at 3. In other cases, the complainant asks Harris "to meet with the offending person to offer some educational insights" about their allegedly problematic speech and "improve how they interact and connect with other students." Dkt. 9-13. In still other cases, Harris or another member of the Bias Response Team will "[r]efer [the complainant] to appropriate campus office that can effectively respond." Dkt. 9-12 at 3.

The Bias Response Team advises complainants that although its "primary goal is to provide support to the individual or community impacted" by a bias incident, all "reports will be evaluated to determine if further investigation is required for potential violations of

university policy and/or criminal law." Dkt. 9-12 at 2. And while bias incidents are distinct from punishable "harassment or discrimination" under the Code of Conduct, the University frequently conflates the two in public statements to the student body, including in social media posts advising specific individuals to report fellow students for pure speech. *See* Dkt. 9-21 (providing a link to a webpage for the Bias Response Team and stating, "thank you for bringing this to our attention. Please report acts of discrimination by sending details to our incident response team here."); Dkt. 9-22 (similar).

Finally, the Bias Response Team will "[l]og all reported incidents" and keep detailed records of the allegations against the offender, ostensibly so it can "track for trends" and "notify campus leaders of ongoing bias incidents." Dkt. 9-12 at 5. The University's actions show that the Bias Response Team takes its logging and tracking responsibilities as "seriously" as it does everything else. *Cf.* Dkt. 9-20 at 3. In June 2020, as the nation was roiled by public debate about race-relations and the police, an IU Bloomington student tweeted screenshots of a fellow student's Twitter account, accused her of being "racist," and tagged the official IU Bloomington Twitter account. Dkt. 9-22. The student took offense to tweets that said "y'all gonna love the police next time you're in trouble"; "it's not just cops or white people killing [A]frican [A]mericans, 94% of deaths to [A]frican [A]mericans from violence were cause by other [A]frican [A]mericans"; and "I think child sex trafficking is a bigger problem than racism in this country." Dkt. 9-22. The student was also offended that his fellow Hoosier had changed her name in her Twitter handle to read, "ALL LIVES MATTER." Dkt. 9-22. The University responded through its official Twitter account, stating "Thank you for bringing this to our attention, [student name]. Please report acts of discrimination or harassment by sending details

to our incident response team here." Dkt. 9-22. The tweet then provided a hyperlink to the University webpage for the Bias Response Team. Dkt. 9-22. The University stressed the importance of submitting formal bias incident complaints so they can be tracked and preserved: "The report will send it directly to the official team who handles these types of situations. They ask students to fill out the report who have witnessed these acts so it can be documented in the system." Dkt. 9-22.

The Bias Response Team's core mission of "prevent[ing]" so-called "biased" speech is consistent with the University's other efforts to eliminate such speech. In May 2021, for example, the University's DEI Office launched a campaign entitled, "Together We Commit." *See* Dkt. 9-23. "Designed to complement Indiana University's anti-racist agenda, the *Together We Commit* initiative provides a more individualized and personal experience that focuses on the words and actions of IU's community members." Dkt. 9-23. The most prominent feature of the campaign was a six-point pledge. The pledge, which the University encouraged students to take, included promises to "be aware of the bias in my language and actions," "to never make assumptions about the race, sexuality, gender, religion, age, education, ability, or socio-economic status of those I meet," and "to call out and *take the appropriate steps to report bias*, hate, and intolerance." Dkt. 9-23; Dkt. 9-24 (emphasis added). The University actively promoted the Together We Commit campaign, including on its flagship social media accounts. *E.g.*, Dkt. 9-25.

The University also vigorously promotes the bias incidents policy itself and urges anyone who has experienced or witnessed a bias incident to report it. The "Bias Response & Education" page on IU's Office of Student Life website tells visitors, "[i]f you experience,

witness, or are aware of a bias incident, report it." Dkt. 9-26. In an article about bias incidents on the University's DEI webpage, Dean Harris stated, "it's important that you report something if you see it because it is easier to take action when we know about it." Dkt. 9-20 at 3. Unsurprisingly, a 2022 campus climate survey conducted at IU Indianapolis found that 61% of conservative undergrads agreed with the statement "I sometimes fear speaking up for what I think." Dkt. 9-27 at 3.

## III. Speech First and This Litigation

Plaintiff, Speech First, is a nationwide membership organization dedicated to preserving human and civil rights secured by law, including the freedom of speech. Trump Decl. [Dkt. 9-2] ¶2. Speech First protects the rights of students at colleges and universities through litigation and other lawful means. *Id.* Speech First has brought similar (and successful) challenges against harassment policies, computer policies, and bias-response teams at other universities, including the University of Central Florida, the University of Houston, the University of Michigan, and the University of Texas. *Court Battles*, Speech First, perma.cc/NQW4-7Z9U (last accessed May 30, 2024).

Speech First has members who currently attend the University, including Students A, B, C, D, and E. Trump Decl. [Dkt. 9-2] ¶¶3-4. Students A-E have "views that are unpopular, controversial, and in the minority on campus." Student A Decl. [Dkt. 9-3] ¶4; Student B Decl. [Dkt. 9-4] ¶4; Student C Decl. [Dkt. 9-5] ¶4; Student D Decl. [Dkt. 9-6] ¶4; Student E Decl. [Dkt. 9-7] ¶4. For example, Student A believes that "most children who identify as transgender or 'non-binary' are confused and should receive counseling"; that men in same-sex relationships who adopt infants carried by surrogates "deprive babies of their mothers and exploit

women in difficult financial circumstances"; that "people who are here illegally should [not] be eligible for in-state tuition or to enroll at American universities"; and that "urban crime rates that disproportionately involve African American males are not evidence of systemic racism but of harmful cultural trends like single-parent households and failing schools." Student A Decl. [Dkt. 9-3] ¶¶5-8. Student B believes that illegal immigrants "are taking jobs and public resources away from taxpaying Americans who need them"; that "protestors who align themselves with the Palestinian cause and condemn Israel either tolerate antisemitism or are antisemitic themselves"; and that "the concept of 'racial equity,' as opposed to equal opportunity, is fundamentally un-American." Student B Decl. [Dkt. 9-4] ¶¶5-7. And Student C believes that "abortion is a grave evil that should be illegal at all stages of pregnancy"; that "the Diversity, Equity, and Inclusion ('DEI') movement is fundamentally racist and harmful to society"; and that "sex is determined by biology, not someone's internal sense of 'maleness' or 'femaleness.'" Student C Decl. [Dkt. 9-5] ¶¶5-7; *see also* Student D Decl. [Dkt. 9-6] ¶¶5-8; Student E [Dkt. 9-7] Decl. ¶¶5-7.

Students A-E want to "[e]ngage in open and robust intellectual debate with [their] fellow students about these topics in the classroom, in other areas of campus, online, and in the broader community." Student A Decl. [Dkt. 9-3] ¶10; Student B Decl. [Dkt. 9-4] ¶9; Student C Decl. [Dkt. 9-5] ¶9; Student D Decl. [Dkt. 9-6] ¶10; Student E Decl. [Dkt. 9-7] ¶9. When someone else voices contrary views, Students A-E "want to point out the flaws in their arguments and convince them to change their minds." Student A Decl. [Dkt. 9-3] ¶11; Student B Decl. [Dkt. 9-4] ¶10; Student C [Dkt. 9-5] Decl. ¶10; Student D Decl. [Dkt. 9-6] ¶11; Student E Decl. [Dkt. 9-7] ¶10. Students A-E want to "speak directly to [their] classmates about these

topics" and "talk frequently and repeatedly on these issues." Student A Decl. [Dkt. 9-3] ¶12; Student B Decl. [Dkt. 9-4] ¶11; Student C Decl. [Dkt. 9-5] ¶11; Student D Decl. [Dkt. 9-6] ¶12; Student E Decl. [Dkt. 9-7] ¶11.

But the University's bias incidents policy makes them "reluctant to openly express [their] opinions or have these conversations in the broader University community." Student A Decl. [Dkt. 9-3] ¶14; Student B Decl. [Dkt. 9-4] ¶13; Student C Decl. [Dkt. 9-5] ¶13; Student D Decl. [Dkt. 9-6] ¶14; Student E Decl. [Dkt. 9-7] ¶13. In addition, Students A-E "do not fully express [themselves] or talk about certain issues because [they] know that students, faculty, or others will likely report [them] to University officials for committing a 'bias-related' incident." Student A Decl. [Dkt. 9-3] ¶15; Student B Decl. [Dkt. 9-4] ¶14; Student C Decl. [Dkt. 9-5] ¶14; Student D Decl. [Dkt. 9-6] ¶15; Student E Decl. [Dkt. 9-7] ¶14. Because the definition of "bias" is so broad and vague, they are "confident that someone will find [their] speech to be 'biased.'" *Id.* They worry that other students will "catch" them engaging in "biased" speech and that the University will take action against them. *Id.* For example, they are afraid that the Bias Response Team will "keep a record on [them], share the allegations with others within the university, call [them] in for meetings, or refer the allegations to the Office of Student Conduct." *Id.*

Speech First brought this suit to ensure that its members and other students will not face discipline, investigation, or any other negative repercussions from the University for their views or their speech. Trump Decl. [Dkt. 9-2] ¶9.

## ARGUMENT

Speech First is entitled to a preliminary injunction if it shows four things: (1) a "likelihood of success on the merits;" (2) "that it has 'no adequate remedy at law' and will suffer 'irreparable harm' if preliminary relief is denied"; (3) that the balance of equities tips in favor of preliminary relief; and (4) that an injunction is in "the public interest." *Cassell v. Snyder*, 990 F.3d 539, 544-45 (7th Cir. 2021). In free-speech cases, the first factor is "determinative." *Id.* (cleaned up). When a policy likely violates the First Amendment, the remaining factors favor a preliminary injunction. *Id.* at 545-46. That is the case here.

As explained above, however, *Killeen* forecloses Speech First's ability to secure quick relief for its members. Under that decision, Speech First likely lacks Article III standing at the preliminary-injunction stage to challenge bias response teams like Indiana's. To be sure, the evidence of objective chill is more thoroughly documented here than it was there. *Killeen* faulted Speech First for not submitting pseudonymous declarations from its student members and for not submitting other "evidence" of chill outside of the unverified complaint. 968 F.3d at 643. But here, Speech First submits pseudonymous declarations from five of its student-members at IU detailing how the bias incidents policy chills their speech, along with other forms of evidence and a verified complaint. *Killeen* also turned on several *legal* conclusions, however, not just concerns about the record. *See id.* at 634 (no associational standing because bias response team "[had] no independent disciplinary authority"); *id.* at 644 n.2 ("We do not suggest that the number and length [of member declarations] alone has any bearing on or significance to our analysis…."). So while *Killeen*'s discussion of Speech First's "sparse" evidentiary submission does not apply here, *Killeen*'s legal holdings about bias response teams do.

Because *Killeen* binds this Court, Speech First cannot prevail here; it will instead ask the Seventh Circuit or Supreme Court to overrule *Killeen* on appeal. This Court should thus let the University submit its evidence and opposition—to create a full record for appeal—and then it must deny this motion under *Killeen*. Speech First will brief the rest of that motion below for the sake of completeness and any proceedings on remand.

## I. Speech First is likely to prevail on the merits.

The University's policy on bias incidents, as enforced by the Bias Response Team, likely violates the First and Fourteenth Amendments. The definition of "bias incident" expressly covers speech: "A bias incident is any conduct, speech, or expression, motivated in whole or in part by bias or prejudice meant to intimidate, demean, mock, degrade, marginalize, or threaten individuals or groups based on that individual or group's actual or perceived identities." Dkt. 9-12 at 2. It encompasses expressive activity both on and off-campus. *See* Dkt. 9-14 at 4-5.

To start, the policy is unconstitutionally vague and overbroad. "In the First Amendment context, the doctrines of vagueness and overbreadth overlap; both are premised on concerns about chilling constitutionally protected speech." *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 835 (7th Cir. 2014) (cleaned up). "Ordinarily when a law is facially challenged on vagueness and overbreadth grounds, the 'court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected' speech." *Id.* Regarding overbreadth, a policy is unconstitutional if it "'punishes a substantial amount of protected free speech, judged in relation to the [policy's] plainly legitimate sweep.'" A policy is unconstitutionally vague when it is not "clear and precise enough to give a person of ordinary intelligence

fair notice about what is required of him," *id.*, or when it is "susceptible to discriminatory or arbitrary enforcement." *Bell v. Keating*, 697 F.3d 445, 462 (7th Cir. 2012). "When speech is involved, rigorous adherence to [these] requirements is necessary to ensure that ambiguity does not chill protected speech." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253-54 (2012).

The bias incident policy fails these overbreadth and vagueness tests. To start, the policy is content- and viewpoint-based. It targets speech committed against "individuals or groups" and that is "motivated in whole or in part by a bias or prejudice" that is "based on that individual or group's actual or perceived identities." Dkt. 9-12 at 2; *see R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-93 (1992). It's well-established that "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992). And the policy's definition of "bias incident" turns on unpredictable assessments about whether student speech is "meant to intimidate, demean, mock, degrade, marginalize, or threaten" a listener. Dkt. 9-12 at 2. Those terms are undefined and subjective. They "beg for clarification." *Fenves*, 979 F.3d at 332. This alone dooms the policy.

The University will likely assert that the Bias Response Team cannot *directly* discipline students for committing bias incidents; but absent *Killeen*, that assertion would be neither true nor relevant. The Supreme Court has long understood that policies that "fall short of a direct prohibition" still violate the First Amendment when they objectively chill speech. *Laird v. Tatum*, 408 U.S. 1, 11 (1972). And courts hold that objective chill can occur through "[i]nformal measures" such as "indirect 'discouragements,'" "'threat[s],'" "'coercion, persuasion, and intimidation.'" *White v. Lee*, 227 F.3d 1214, 1228 & n.8 (9th Cir. 2000) (quoting *Bantam Books*, 372 U.S. at 67, and *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 402 (1950)). As the Eleventh

Circuit recently said about another bias-response team, "[Supreme Court and circuit precedent] demonstrate a commonsense proposition: Neither formal punishment nor the formal power to impose it is strictly necessary to exert an impermissible chill on First Amendment rights—indirect pressure may suffice." *Cartwright*, 32 F.4th at 1123.

The right question is "whether the average college-aged student would be intimidated—and thereby chilled from exercising her free-speech rights—by subjection to the bias-related-incidents policy and the [bias-response team's] role in enforcing it." *Id.* at 1124. The answer—as three circuits have held—is yes. *See id.* at 1122-24 (University of Central Florida's Bias Response Team); *Fenves*, 979 F.3d at 333 (University of Texas's Campus Climate Response Team); *Schlissel*, 939 F.3d at 765 (University of Michigan's Bias Response Team); *but see Killeen*, 968 F.3d at 640-44. The Fifth, Sixth, and Eleventh Circuits reached that conclusion for four reasons, all of which apply here.

***First***, the bias-incidents protocol "acts by way of implicit threat of punishment and intimidation to quell speech." *Id.* From start to finish, the policy is designed to send a clear message to students: If you engage in a "bias incident," you are in trouble. *Cf. Cartwright*, 32 F.4th at 1124 n.5 (explaining that the "tenor" of a similar bias policy was "if your speech crosses our line, we will come after you"). The names "bias incident" and "bias response team" "sugges[t] that the accused student's actions have been prejudged to be [unjust]" and "could result in far-reaching consequences." *Schlissel*, 939 F.3d at 765; *accord Cartwright*, 32 F.4th at 1124. The policy's terminology—"bias," "incident," "target," "offender," "witness," "further investigation," and "potential violations," Dkt. 9-12 at 2-3—also suggests serious misconduct, *see Schlissel*, 939 F.3d at 765 ("Nobody would choose to be considered biased."); *Fenves*, 979

F.3d at 338 ("The CCRT describes its work, judgmentally, in terms of 'targets' and 'initiators' of incidents."). "No reasonable college student wants to run the risk of being accused of" being biased, closed-minded, prejudicial, or unfair. *Cartwright*, 32 F.4th at 1124. "Nor would the average college student want to run the risk that the University will" create a dossier of everything she says or does. *Id.*; *see* Dkt. 9-12 at 5 (the Bias Response Team will "[l]og all reported incidents" and keep detailed records of the allegations against the offender, ostensibly so it can "track for trends" and "notify campus leaders of ongoing bias incidents").

***Second***, the University's practice of "urg[ing]" anonymous reporting "carries particular overtones of intimidation to students whose views are 'outside the mainstream.'" *Fenves*, 979 F.3d at 338; *see* Dkt. 9-26. Because bias incidents are addressed by high-level university officials, including the Director of Student Support & Conduct, a student "could be forgiven for thinking that inquiries from and dealings with [University administrators] could have dramatic effects such as currying disfavor with a professor, or impacting future job prospects." *Schlissel*, 939 F.3d at 765. Especially at the University, where "[f]ailure to comply with the directions of authorized university officials in the performance of their duties" and "[f]ailure to comply with the terms of a conduct outcome or process" are considered "personal misconduct" under the Code of Conduct. Dkt. 9-28 at 2-3. Experts thus agree that these teams objectively chill students' speech. *See generally* Dkt. 9-10; Dkt. 9-11; *see also* Verified Compl. [Dkt. 1] ¶¶31-35; *Fenves*, 979 F.3d at 338.

***Third***, "the breadth and vagueness of the bias-related-incidents policy exacerbates the chill that the average student would feel." *Cartwright*, 32 F.4th at 1124. As noted above, the definitions of "bias" and "bias incident" are open-ended and ill-defined. The Bias Incident

Reporting Form's list of conduct that the University anticipates will be reported only underscores the point. The University expects reports for conduct ranging from "email or text message," "verbal" or "written" expression, "social media" posts, and "slurs" to "property damage," "graffiti or vandalism," and even "physical" altercations. Dkt. 9-14 at 4-5 (cleaned up). And it expects reports for both on-campus and off-campus conduct. *See* Dkt. 9-14 at 5 (listing options to report a student for bias incidents that occur in "on-campus housing," in "academic building[s]," in "classroom[s]," "on-campus [in] general," "off-campus," "online," and on "public transportation"). The University encourages anything and everything to be reported. "Pair th[e] broad, vague, and accusatory language with the task-force-ish name of the investigating organization—the [Bias] *Response Team*—and … it is clear that the average college student would be intimidated, and quite possibly silenced, by the policy." *Cartwright*, 32 F.4th at 1124 (emphasis original).

***Finally***, the University's bias-response team has the power to refer bias-incident reports to disciplinary authorities. *See* Dkt. 9-14 at 2 ("[R]eports will be evaluated to determine if further investigation is required for potential violations of university policy and/or criminal law."); Dkt. 9-12 at 5 ("[r]efer to support services or offices who can appropriately respond"). These referrals can "*lead* to" formal discipline and, at a minimum, "initiat[e] the formal investigative process, which itself is chilling." *Schlissel*, 939 F.3d at 765; *accord Fenves*, 979 F.3d at 333.

In sum, the University's entire "process" for addressing bias incidents, Dkt. 9-12 at 4, "is sufficiently proscriptive to objectively chill student speech." *Schlissel*, 939 F.3d at 765. Speech First is thus likely to succeed.

## II. Speech First satisfies the remaining preliminary-injunction criteria.

Because Speech First is likely to prevail on its constitutional claims, it meets the other criteria for a preliminary injunction. *See Smith v. Exec. Dir. of Indiana War Memorials Comm'n*, 742 F.3d 282, 286 (7th Cir. 2014).

***Irreparable Harm:*** The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *accord Exec. Dir. of Indiana War Memorials Comm'n*, 742 F.3d at 286. Without a preliminary injunction, Speech First will suffer ongoing First Amendment violations and thus irreparable harm. *See Cartwright*, 32 F.4th at 1128 ("[I]n the absence of a preliminary injunction, Speech First would undoubtedly suffer irreparable harm— … 'the sine qua non of injunctive relief.'").

***Balance of Harms and Public Interest:*** "[U]nconstitutional restrictions on speech are generally understood not to be in the public interest and to inflict irreparable harm that exceeds any harm an injunction would cause." *Exec. Dir. of Indiana War Memorials Comm'n*, 742 F.3d at 286. Put differently, the third and fourth factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). "Delayed implementation of a measure that does not appear to address any immediate problem will generally not cause material harm, even if the measure were eventually found to be constitutional and enforceable." *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012) (cleaned up); *see Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 191 (4th Cir. 2013) (A state actor "is in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional." (internal quotation marks omitted)). "Surely, upholding constitutional rights serves the public interest." *Joelner v. Vill. Of Washington Park, Ill.*, 378 F.3d 613, 620 (7th Cir.

2004); *Planned Parenthood of Indiana & Kentucky, Inc. v. Comm'r*, 194 F. Supp. 3d 818, 837 (S.D. Ind. 2016) ("[T]he vindication of constitutional rights serves the public interest."). And that is especially true where, as here, the constitutional right, "serves significant societal interests." *Cartwright*, 32 F.4th at 1128 (cleaned up). These factors strongly favor a preliminary injunction.

## CONCLUSION

The court should grant Speech First's motion and preliminarily enjoin Defendants from enforcing the challenged policies during this litigation. But because of the Seventh Circuit's binding precedent in *Killeen*, this Court must deny Speech First's motion.

Dated: May 31, 2024

Respectfully submitted,

*/s/ Cameron T. Norris*

J. Michael Connolly (*pro hac vice* forthcoming)
Cameron T. Norris
James F. Hasson (*pro hac vice* forthcoming)
Thomas S. Vaseliou (*pro hac vice* forthcoming)
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
(703) 243-9423
mike@consovoymccarthy.com
cam@consovoymccarthy.com
james@consovoymccarthy.com
tvaseliou@consovoymccarthy.com

*Counsel for Plaintiff Speech First, Inc.*

Zachary Kester
CHARITABLE ALLIES
3500 Depauw Blvd., Suite 3090
Indianapolis, IN 46268
463-229-0240
zkester@charitableallies.org

**CERTIFICATE OF SERVICE**

I certify that on May 31, 2024, I electronically filed the foregoing with the Clerk of the Court using the Court's ECF system. I am also serving the foregoing by email and by certified mail, return receipt requested, to the address below:

Anthony Prather
Vice President and General Counsel, Indiana University
Bryan Hall 211
107 S. Indiana Avenue
Bloomington, IN 47405
prather@iu.edu

*/s/ Cameron T. Norris*