No. 19-2807

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SPEECH FIRST, INC.,

Plaintiff-Appellant,

v.

TIMOTHY KILLEEN, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
For the Central District of Illinois (Urbana)
No. 3:19-cv-03142-CSB-EIL
Hon. Colin S. Bruce

BRIEF OF DEFENDANTS-APPELLEES

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Dated: December 13, 2019

ORAL ARGUMENT REQUESTED

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-2807

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

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

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

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Timothy L. Killeen, Robert J. Jones, Justin Brown, Danita M. Brown Young, Rhonda Kirts, January Boten, Debra Imel, Rachael Ahart, Matthew Pinner, Arianna Holterman, Dementro Powell, Jamie Singson, Kimberly Soumar, Lowa Mwilambwe, Alma R. Sealine, Patricia K. Anton, Ramon Cepeda, Kareem Dale, Donald J. Edwards, Ricardo Estrada, Patricia Brown Holmes, Naomi D. Jakobsson, Stuart C. King, Edward L. McMillan, Jill B. Smart, Trayshawn M.W. Mitchell, Darious M. Newsome, Shaina Humphrey, J.B. Pritzker

(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:

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2: N/A

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Attorney's Printed Name: Ishan K. Bhabha

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Attorney's Signature: s/ Lauren J. Hartz Date: December 13, 2019
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

Appellees (collectively, the "University") agree that the jurisdictional statement in Appellant Speech First's brief is complete and correct.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Utilizing formal amendment procedures that required a recommendation from the Conference on Conduct Governance and approval by the Chancellor, the University eliminated a Student Code provision concerning the distribution of promotional materials of candidates for non-campus elections. The district court determined that Speech First's challenge to this provision was moot because there was no basis to find the University would reinstate it. Did the district court abuse its discretion in refusing to preliminarily enjoin the eliminated provision?

II. Did the district court abuse its discretion in refusing to preliminarily enjoin the following policies based on its findings that Speech First lacked standing to challenge them?

A. The district court determined that Speech First could not demonstrate a credible threat to its members' First Amendment rights arising from the University's Bias Assessment Response Team and University Housing's Bias Incident Policy because neither program was compulsory or punitive and both had been successful in fostering safe and open expression, including speech on the very topics Speech First's members claim they wish to address.

B. The district court determined that the University cannot (and does not) issue No Contact Directives based on protected speech, and so its policies regarding No Contact Directives do not prevent or chill Speech First's members from engaging in protected expression.

III. If this Court decides that the district court's standing or mootness determinations constitute an abuse of discretion, should this Court follow its normal course and remand the case for the district court to assess in the first instance whether Speech First can satisfy the demanding standard for preliminary injunctive relief or, in the alternative, deny the preliminary injunction?

STATEMENT OF THE CASE

I. Freedom of Expression at the University

Since its founding in 1867, the University of Illinois has honored an unwavering commitment to the freedom of expression. Because diverse perspectives are central to its educational mission, the University has fostered a vibrant community where tens of thousands of students, and over a thousand registered student organizations, freely express and vigorously debate beliefs spanning the ideological spectrum. The University has built and maintained a community where, as Chancellor Robert Jones put it during the 2018 State of the University Address, "unpopular, unexpected or controversial viewpoints are greeted with reasoned and productive debate rather than with derision, insult or violence." A406, ¶6(b).

These efforts are critical at a time when, as Chancellor Jones has emphasized, the "most serious issues facing all of higher education are related to free speech and expression around divisible and difficult topics." A406, ¶6(e). The University's message to the campus community is clear: "even offensive speech is protected by the First Amendment," and "the best recourse to speech with which we disagree is more speech." A407, ¶6(g).

A. University Policies and Principles

The University's overriding commitment to free expression is codified in the very first provision of the Student Code: "A student at the University of Illinois at the Urbana-Champaign campus is a member of a University community of which all members have at least the rights and responsibilities common to all citizens, free from institutional censorship." A330, ¶9; A344, §1-101. Instructors in the classroom "should encourage free discussion, inquiry, and expression." A344, §1-102. Beyond the classroom, "[m]embers and organizations in the University community may invite and hear any persons of their own choosing, subject only to reasonable requirements on time, place, and manner for use of University facilities." A344, §1-103(b). In addition, "campus press and media are to be free of censorship." A344, §1-103(c). The Student Code repeatedly affirms the University's commitment to free expression, and it does not contain a *single* provision penalizing students for speech alone, even when that speech is motivated by bias. A331, ¶11. Speech First does not identify any such provision.

In addition to the Student Code, the University of Illinois System has "Guiding Principles" that protect free expression on campus. A405, ¶5; A425-434. These principles affirm that "freedom of speech—even controversial, contentious, and unpopular speech—is indispensable to developing the analytical and communication skills of our students and empowering all members of our university communities to be active and informed citizens." A428. Consistent with these principles, Chancellor Jones recently created an initiative called "Chancellor's Critical Conversation" to promote "meaningful and respectful dialogue around local and national issues." A406-407, ¶6(e). The first conversation tackled "one of the most divisive topics at the University, Native American imagery," and drew over 600 participants. A407, ¶6(e).

B. The Reality of Free Expression on Campus

Student life at Urbana-Champaign is living proof of the University's unbending commitment to freedom of expression. The University boasts over 1,800 registered student organizations, including many groups devoted to advocacy across the political spectrum. A411, ¶10. Students need only five members to register an organization, and "[t]here is absolutely no content- or viewpoint-based approval process." *Id.* Once student organizations are registered, they "have access to event and meeting spaces on campus, reimbursement funding from the Student Organization Resource Fund (made up of student activity fees), and equipment and other resources from the Office of Registered Organizations." *Id.*

Several organizations "are built around, and openly and actively support," viewpoints and beliefs that Speech First and its *amici* mischaracterize as nonexistent, or suppressed, on campus. A411, ¶11. These groups include, for example, the Illini Republicans; the Illini Libertarians; Free Speech Uncensored; Students for Chief Illiniwek (urging the return of a Native American symbol for the University); the Illini Public Affairs Committee (supporting a strong U.S.-Israel relationship); WeDignify (advancing pro-life policies); and Turning Point USA (advocating for "free markets and limited government" and exposing professors who allegedly "discriminate against conservative students and advance leftist propaganda in the classroom"). A411-412, ¶11.

These groups are active and prominent participants in campus life. Like all registered student organizations, they receive financial and logistical support from the University for their programming. A411, ¶10. In the past two academic years alone, the University provided financial support for student groups that hosted prominent conservative television and talk radio hosts Lawrence Billy Jones and Steven Crowder. A412-414, ¶13(c), (g). It supplied funding for a group that organized a large pro-life television display on the Main Quad of the University. *Id.* A412-414, ¶9(f). And it provided funding and free event space for Turning Point USA, which has hosted debates on topics such as "whether hate speech should be protected." A412, ¶13(a)-(b).

When University officials anticipate protests at campus events, they take affirmative steps to ensure that both the events and the protests can proceed safely. A412, ¶13. Thus, for instance, the University paid for a police presence

at a recent event hosted by the Illini Republicans with an Immigration and Customs Enforcement official. A413, ¶13(d). Likewise, the University provided free additional security for Turning Point USA's national founder Charlie Kirk to speak, A413-414, ¶13(j), and for a "memorial for victims of illegal immigration," which involved a wall of cardboard boxes displaying information regarding crimes committed by undocumented immigrants, A413, ¶13(h).

Diverse viewpoints likewise flourish in campus publications. Recent opinion pieces and letters to the editor in the *Daily Illini* have expressed support for building a border wall and have opposed a University referendum to divest from Israel. A408-411, ¶9(a)-(k). *Daily Illini* articles describe vigorous debates on campus over issues ranging from immigration reform to gun control to abortion. A409, ¶9(e). And a feature examining President Trump's first year in office quoted multiple students who offered strong support for the president and noted an increase in registered student organizations backing his policies. A410, ¶9(i).

All of this expression is fully protected by the University, which has never punished, or in any way discouraged, students based on the expression of controversial or unpopular viewpoints. Indeed, in recent years, the University has been criticized for *refusing* to censor such viewpoints. *See* A332-333, ¶¶14-15; A351-356. For example, one student organization condemned the University for allowing Turning Point USA to have a presence on campus, accusing the University of "hid[ing] behind free speech and allow[ing] alt-right hatred and violence to fester." A352. Even in the face of such criticism, the University has

remained steadfast in its position that "[a]n unyielding allegiance to freedom of speech—even controversial, contentious, and unpopular speech—is indispensable to developing the analytical and communication skills of our students and empowering all members of our campus communities to be active and informed citizens." A405-406, ¶6(a).

II. The Three Policies Challenged by Speech First

Speech First challenges two current University policies and one former Student Code provision the University eliminated. They are discussed in turn.

A. Amendment to Section 2-407

Section 2-407 of a prior version of the Student Code described a pre-approval process for posting and distributing "promotional materials of candidates for non-campus elections." A068. There is no evidence that the provision was ever enforced, *see* A414, ¶15, and Speech First makes no such allegation in its complaint. On July 18, 2019, the University amended the Student Code to eliminate that provision and bring its written policy in line with its consistent practice of non-enforcement. A414-415, ¶16.

In eliminating the provision, the University followed all steps set forth in the "Procedure for Amending the Student Code." *See id.*; A421. On July 15, 2019, the Conference on Conduct Governance (CCG) reviewed a proposal to eliminate the provision. A414-415, ¶16. The CCG is a standing committee of the Urbana Champaign Senate and includes faculty members, administrators, and students. *Id.* During the July 15 meeting, the CCG voted to recommend an amendment to the Student Code that would eliminate the pre-approval

provision. *Id.* The CCG's recommendation went to the Chancellor, who approved the amendment on July 18. *Id.* The amendment went into effect immediately, *id.*, and is reflected in the current version of the Student Code. RSA027.

As the University's Associate Dean of Students Rhonda Kirts explained, the Student Code now "more accurately reflects the University's longstanding non-enforcement of this provision as well as its commitment to the freedom of expression on campus." A414-415, ¶16. This definitive change is the product of a considered judgment by University officials. *Id.* Dean Kirts, who participated in the amendment process and conveyed the CCG's recommendation to the Chancellor, explained in her sworn declaration: "The University has no intention of restoring the eliminated provision or adopting a new provision similar to it." *Id.*; A522-533.

B. The Bias Assessment & Response Team and University Housing's Bias Incident Protocol

The University's Bias Assessment & Response Team (BART) provides a forum for students to engage in voluntary and private discussions about incidents that are alleged to be motivated by bias. *See* A309, ¶7. Incidents reported to BART can range from the use of an offensive slur in conversation, to racist graffiti on campus, to a planned student event on a controversial subject. *See generally* A181-210. BART has no authority to impose any form of punishment on any student. A311, ¶14. Instead, through its entirely voluntary and non-disciplinary process, BART promotes dialogue about the impact of bias-motivated incidents, and it supports students affected by or involved in them. *See* A309, ¶¶3-4; A317-321.

BART's process begins when members of the campus community notify the University (via email or online form) of an incident perceived to be motivated by bias. A312-313, ¶19. Contrary to Speech First's characterization, these reports originate from a wide range of individuals and concern speech across the ideological spectrum, as illustrated by the following list of incidents in 2016-2017:

- A student reported that white male students in a truck yelled racist and homophobic slurs at him while he was waiting for a bus.
- Multiple people reported that a group of students came into a student meeting and started screaming and using offensive rhetoric against another student because she was Latina and a Republican.
- A student reported that there were multiple swastikas spray painted on to a brick wall on campus.
- A faculty member reported that a student posted on Facebook, "The fact that my school hosted Shaun King, the leader of the Black Lives Matter today really pissed me off. Just as bad as having the leader of the KKK here if you ask me. Just keep dragging white hate all over campus. Sick and tired of it."

A190-192.

BART's members, who hail from various University departments, meet periodically to review reports of incidents. A310, ¶8; A313, ¶22. In cases where the reports identify students by name, BART members decide whether to invite the students to participate in a voluntary conversation. A313-314, ¶24. Most students who receive these email invitations either do not respond at all or decline to participate. A314, ¶24. Those students do not suffer any consequences whatsoever, and BART's involvement in the reported incident ends. *Id.*

When a student elects to meet, the BART staff member explains that the student is not in trouble and is not being charged with any violation of the Student Code. A314, ¶25. The BART staff member also identifies the conduct that drew attention and describes its effect on other members of the community. A313-314, ¶¶22-26. If a student indicates that she wishes to persist in her conduct, the BART staff member will not discourage her. Instead, BART offers to formulate action plans to protect the student's safety in case of confrontation or escalation. A313-314, ¶¶25-26. As January Boten, one of BART's Co-Chairs noted, "[t]he only goal of these conversations is to ensure the safety of the community and all students involved." A314, ¶26.

BART's interactions with students are kept private and are not disclosed outside of the Office for Student Conflict Resolution (which houses various teams and services including BART) unless a student gives permission. A329-330, ¶¶3-6. BART's interactions are likewise not recorded in academic or disciplinary records. A314, ¶27. While reported incidents are compiled into annual reports published on the University's website, the reports do not reveal personally identifying information. A315, ¶29; *see* A181-210.

BART's authority is limited in several important ways. BART's members cannot compel students to speak with them about bias-motivated incidents. A309, ¶5; A313-314, ¶24. If a student declines to speak with BART, as many do, the student is not punished in any way. *Id.* In addition, BART does not "investigate" incidents beyond speaking with the individuals involved if they are

known and if they agree to do so.[1] A309, ¶5. BART cannot, and does not, make a "finding" that a bias-motivated incident has occurred. A309, ¶6; A407-408, ¶¶7, 9.

Moreover, BART cannot and does not impose discipline of any kind upon students whose actions have been reported to it. A309, ¶¶4-6; A311, ¶¶14-15; A330, ¶¶6-7; A407-408, ¶¶7, 9. If, after meeting with BART, a student wishes to continue engaging in the reported conduct, the student has the right to do so without penalty. A314, ¶¶25-26. Simply put, BART is not "a speech police"—it has no coercive or disciplinary role whatsoever. And none of BART's members, including its liaison from the University Police Department, have any law enforcement function as part of their BART role. A310, ¶¶8-10.[2]

One recent example underscores BART's effectiveness. In the 2017-2018 academic year, BART facilitated a voluntary event between two registered student organizations that represented differing viewpoints and frequently reported each other as engaging in bias-motivated incidents. A315, ¶30. The

[1] Speech First states "[t]here is no dispute that BART will attempt to interview both the complaining student and the 'offender' to determine what happened and what type of 'bias' occurred." Br. 10 n.2. Not so. BART reaches out to students only "if they are identified" and only if it determines that such outreach "would be appropriate or beneficial." A313, ¶22. Any "investigation" is limited to these voluntary conversations, *see* A309, ¶5, and Speech First has not produced any evidence to the contrary.

[2] As Dean Boten noted, and contrary to Speech First's allegations, reports made to BART "are not 'referred' from BART to the University Police, nor do the police ever investigate an incident reported to BART unless that incident independently was reported to the Police for law enforcement reasons." A310, ¶10.

event promoted inter-group dialogue, and the participants found that "the more they talked, the better their relationship became." *Id.*

The University provides a similar forum in the campus housing context known as the Bias Incident Protocol (BIP). A535-536, ¶7; A537-538, ¶¶11-12. University Housing, like the University at large, respects and protects the First Amendment rights of all students, celebrating "the multitude of different voices, opinions, experiences, and identities of the Illinois community." A535, ¶6. Based on this commitment to free expression, University Housing uses BIP to help students respond productively to views they might find offensive or hurtful. A535-536, ¶7.

Students who reside in University Residence Halls can report incidents alleged to be motivated by bias. A537, ¶11. Approximately half of these reports are anonymous, *id.*, and over half do not identify the student whose behavior is reported, A538, ¶13. For each reported incident, University Housing convenes a meeting of up to five staff members to discuss the incident and determine the appropriate response, which might include removing graffiti, making individual outreach, and/or issuing a community-wide response. A537-538, ¶¶12-13. As with the BART process, students' participation in any discussion with BIP is entirely voluntary, and no consequences attach to a student's decision whether to participate or whether to persist in the reported behavior. A538-539, ¶¶14-17. During any conversations that take place, University Housing staff does not suggest the reported behavior must stop. Thus, for example, a student who was reported for displaying a Confederate flag in the window of a residence hall was

not asked or instructed to take it down, since that expression is not a violation of any University policy. A539, ¶17. University Housing does not conduct investigations, make findings, threaten or impose penalties, or discourage protected speech. A536-538, ¶¶8-12.

BART and BIP are entirely distinct from the student disciplinary procedures that apply to charged violations of the Student Code or a student's housing contract. *Id.*; A311, ¶¶13-14. The Student Code could not be clearer: "The University discipline system may take action only upon" six enumerated grounds. A346, §1-301. Reports of bias-motivated incidents are not one of those grounds. *Id.*[3] Potential violations of the Student Code are addressed through formal procedures that include mandatory student participation in an investigation, a determination of responsibility, and, if appropriate, discipline. A329, ¶4. BART and BIP have none of these features: they address incidents alleged to be motivated by bias, not potential code or contract violations; they are voluntary, not mandatory; and they provide education and support, not investigative findings and disciplinary consequences. A330, ¶7; A536, ¶¶8-9.

[3] Certain behavior motivated by bias might also violate the Student Code, such as bias-motivated speech accompanied by physical violence, stalking, true threats, and/or sexual harassment. A312, ¶16. When that occurs, the behavior that violates the Student Code is addressed through the student disciplinary process, not BART. Absent those extenuating circumstances, speech alone is never charged as a Student Code violation or handled through the student disciplinary process. A312, ¶18.

C. No Contact Directives

The Student Disciplinary Procedures authorize University disciplinary officers to issue No Contact Directives (NCDs) that instruct a student to refrain from contact with one or more persons under penalty of discipline. A333, ¶¶16-17; A377-378, §4.06(a)-(c). NCDs serve important purposes, including preventing interaction between students after an allegation of sexual misconduct or separating students involved in an escalating conflict that could jeopardize their physical safety. A334-335, ¶¶21-23.

Section 4.06 of the Procedures defines the authority of disciplinary officers to issue NCDs in the very first paragraph. It states that "University disciplinary officers are among those responsible for the enforcement of student behavioral standards and, when possible, the prevention of violations of the Student Code." A377, §4.06(a). In light of these responsibilities, "the Senate Committee on Student Discipline recognizes the right of disciplinary officers to direct an individual subject to student discipline, as described in §1-301(c) of the Student Code, to have no contact with one or more other persons." *Id.* The next paragraph states the expectations of students who receive NCDs. These students may not engage in "oral, written, or third party communication between the identified parties." A377, §4.06(b). NCDs do not prohibit students from occupying the same space, nor do they prohibit students from talking or writing about each other or any other topic, whether privately or publicly. A333, ¶¶17-18. Furthermore, a "No Contact Directive does not, on its own, constitute a

disciplinary finding against the student and is not part of the student's official disciplinary record." A378, §4.06(e).

Section 4.06 also addresses the procedures for imposing NCDs. It states: "If, based upon a report received or a direct request from a member of the university community, a disciplinary officer believes that a No Contact Directive is warranted, the disciplinary officer will notify all recipients in writing, typically by email." A378, §4.06(d)(i). This paragraph likewise addresses the procedures for meeting with recipients of NCDs, modifying NCDs, and rescinding NCDs. *Id.*

The University imposes NCDs consistent with the limited provision of "authority" in Section 4.06(a) and with the specified "procedures" in Section 4.06(d). A student's bias-motivated speech does not subject that student to discipline under the Student Code, and thus is not a basis for the University to issue an NCD. A335, ¶¶24-25; *see also* A400, ¶5. Only bias-motivated speech accompanied by an actual or foreseeable Student Code violation, such as sexual harassment or stalking, can justify the imposition of an NCD. A334-335, ¶¶20-23. Thus, while many students have expressed controversial or unpopular views on campus similar to those Speech First's members allegedly wish to express, *none* have been subjected to NCDs for that expression alone. A334-335, ¶¶23-25; A402, ¶9. In fact, the University has *refused* requests to issue NCDs that would bar such expression. *See* A400-401, ¶6.

The NCD issued to Andrew Minik and Tariq Khan is no exception. *See* A401-402, ¶¶7-8; A267-268. Indeed, the Minik-Khan interactions are the subject of a separate lawsuit in which the district court declined to dismiss

Khan's counter-claims that Minik and others "engaged in threatening behavior and recruited others to threaten and harass him." *See* Report and Recommendation at 2, *Minik v. Bd. of Trs. of Univ. of Ill.*, No. 2:18-CV-02101 (C.D. Ill. Sept. 21, 2018), ECF No. 25, *adopted*, 2018 WL 4904942 (C.D. Ill. Oct. 9, 2018) (Bruce, J.). Those allegations belie the notion that an NCD was issued to Minik on the basis of protected speech alone. As the district court (which also presides over the Minik lawsuit) explained, there was a "history of escalation between Minik and Khan, including Khan receiving death threats which he believed were caused by Minik, and Khan's anger towards Minik over the same." RSA039-040. The NCD "would not have been issued absent that history," and thus does not show that students receive NCDs based on protected speech. RSA040.

III. Speech First's Lawsuit and the Proceedings Below

Appellant Speech First, Inc. is a national advocacy organization that claims to have student members who attend the University. A001, ¶3. According to its complaint's unverified allegations, four anonymous students hold "political, social, and policy views that are unpopular on campus," such as "support [for] President Trump," "oppos[ition to] abortion," "belie[f] in traditional marriage," and support for "building of a wall along the U.S. southern border." Dkt. 1, ¶¶96, 105, 115, 124. The complaint lacks any allegations that the University has targeted these students based on their views or subjected them to any punishment whatsoever. Speech First nonetheless contends that the

University's policies chill these students' speech and violate the First Amendment because they are vague and/or overbroad. *Id.* ¶¶3-5.

Shortly after filing its complaint, Speech First moved for a preliminary injunction. Speech First asked the district court to enjoin the University from: (1) enforcing its policy on the distribution of materials for non-campus elections; (2) taking any action through BART, BIP, or otherwise "to investigate, log, threaten, or punish students (including informal punishments) for bias-motivated incidents"; or (3) issuing NCDs "without clear, objective procedures that ensure the directives are issued consistently with the First Amendment." Dkt. 5 at 21.

In support of its motion, Speech First did not submit any declarations, even pseudonymously, from its student members whose speech was allegedly chilled. Instead, it offered a declaration from its national president, Nicole Neily. A001-004 ("Neily Declaration"). Neily states she is "aware of how BART operates" through second-hand information from current and former students. A002, ¶11. Based on that information, she concludes that four anonymous student members "credibly fear that expressing their views could result in being reported, investigated, and punished by the BART." A002, ¶10. The Neily Declaration "says nothing about BIP" whatsoever. RSA036. On the topic of NCDs, Neily asserts that certain members of Speech First "are aware that the University has imposed No Contact Directives on students for engaging in protected speech and understand that violating a No Contact Directive can lead to severe penalties, including expulsion from the University." A003, ¶16. Notably, Neily does not

identify *when* the University allegedly issued an NCD for a student engaging in protected speech. Nor does Neily claim that Speech First's four anonymous members identified in the complaint (or indeed any other current or past student) were the individuals "aware" of NCDs allegedly being imposed in this manner. The Neily Declaration nonetheless declares that NCDs, like the policies related to bias-motivated incidents, "chill Speech First's members' speech and deter them from speaking openly about issues of public concern." A003, ¶17.

The University opposed Speech First's motion. *See* Dkt. 18. With its opposition, the University submitted declarations from five University administrators, supported by 25 exhibits. *Id.* at ii-iii; *see also* A308-574. This record evidence directly contradicted the second-hand information in the Neily Declaration about the University's policies and practices. Based on this evidence, the University argued that Speech First could not establish a likelihood of success as to the basic justiciability requirements, much less meet its burden to prove the preliminary-injunction factors. *See* Dkt. 18.

The district court agreed and denied Speech First's motion. *See* RSA041. *First*, the court rejected as moot Speech First's challenge to the prior approval requirement, which was eliminated from the Student Code. RSA021-027. The district court found "the University took all of the formal steps necessary to officially change the requirement at issue." RSA026. While Speech First suggested the University was "insincere" when it eliminated the provision, the district court disagreed. *Id.* "[T]he University never enforced the now-eliminated provision," the district court explained, and it "has no intention of restoring the

eliminated provision or adopting a similar provision." RSA025. For these reasons, it was "clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* Put another way, the district court found "no substantial likelihood that the offending policy will be reinstated if this suit is terminated." *Id.*

Second, the district court found Speech First had failed to establish its standing to challenge BART and BIP. RSA030. Rejecting the Neily Declaration as "conclusory," the district court found "more informative the detailed statements about BART from University staff that are personally involved with BART, consistently describing how BART operates." RSA030-031. Based on that evidence, the district court concluded that "being reported to BART or BIP results in essentially no consequences." RSA031. In fact, "[m]ost students contacted by BART do not respond at all, or decline the offer of a meeting, and no consequences occur if a student declines to meet with BART." *Id.* Thus, even if the four anonymous student members were reported to BART or BIP, and even if they were contacted in connection with those reports, the University's policies still did not "constitute[] a credible threat to speech protected by the First Amendment." *Id.* As a result, Speech First's allegations that these policies chilled speech were "subjective" and "unsupported," falling far short of establishing concrete and particularized injury. RSA032.

Finally, the district court found insufficient evidence of standing for Speech First's claims attacking NCDs. RSA039. Based on the record evidence, the district court concluded "No Contract Directives have not been and would

never be issued for speaking on the topics the Students wish to discuss." *Id.* The Minik-Khan episode was not to the contrary, the district court found, because it was based on "the history of escalation" between those individuals, including death threats. RSA039-40. The district court also rejected Speech First's claim that the University's authority to issue NCDs was limitless: "No Contact Directives can only be imposed to enforce the behavioral standards in the Student Code and prevent violations of the Student Code." *Id.* Thus, the district court held, no reasonable student would expect that speaking about controversial issues would itself "result in the issuance of a No Contact Directive, or violate a No Contact Directive if issued." *Id.*

STANDARD OF REVIEW

"A preliminary injunction is an 'extraordinary and drastic remedy,'" *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008), "one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion," *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original) (quotation marks omitted). To justify this extraordinary remedy, "the moving party must demonstrate: (1) a likelihood of success on the merits; (2) a lack of an adequate remedy at law; and (3) an irreparable harm [that] will result if the injunction is not granted." *Woods v. Buss*, 496 F.3d 620, 622 (7th Cir. 2007) (quotation marks omitted). If, and only if, the moving party can satisfy these threshold requirements, then the district court balances the relative harms that could be caused to either party. *Incredible Techs., Inc. v. Virtual Techs., Inc.*, 400 F.3d 1007, 1011 (7th Cir. 2005). The balancing process also takes into account "any

effects that granting or denying the preliminary injunction would have on nonparties"—*i.e.*, the public's interest in the case. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008).

This Court's review of an order denying preliminary injunctive relief is narrow. *Joseph v. Sasafrasnet, LLC*, 734 F.3d 745, 747 (7th Cir. 2013) (quotation marks omitted). This Court "will not reverse a district court's grant or denial of a preliminary injunction absent a clear abuse of discretion by the district court." *Id.* (quoting *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1217 (7th Cir. 1984)); *see also Burlington N. & Santa Fe Ry. Co. v. Bhd. of Locomotive Eng'rs*, 367 F.3d 675, 678 (7th Cir. 2004). "The district court's determinations of law are reviewed *de novo* and its determinations of fact are reviewed for clear error." *Burlington N. & Santa Fe Ry. Co.*, 367 F.3d at 678. The district court's balancing of the preliminary injunction factors is accorded "great deference." *Valencia v. City of Springfield*, 883 F.3d 959, 965 (7th Cir. 2018)(quotation marks omitted).

SUMMARY OF ARGUMENT

Because the reality of life at the University is entirely at odds with its allegations, Speech First (like its *amici*) resorts to mischaracterizations of the record evidence and non-sequiturs about alleged censorship on other college campuses. Speech First claims the University burdens the First Amendment rights of four unidentified student members who contend they cannot express "controversial" viewpoints on campus without fear of reprisal. The district court correctly rejected Speech First's fabrication of University policy and practice, and

properly denied Speech First's motion for preliminary injunctive relief. This Court should affirm.

I. The core of Speech First's complaint is moot. The provision requiring prior approval for the posting and distribution of "materials of candidates for non-campus elections" in Section 2-407 of the Student Code was eliminated through the University's formal amendment process. Speech First introduced no evidence that this provision had ever been enforced even when it was on the books, and the University submitted a sworn declaration from a senior administrator stating the University has no intention of reversing course. The district court did not abuse its discretion when it credited the University's actions of self-correction as sincere and rejected Speech First's challenge as moot.

II.A. Speech First's claim that BART and BIP pose a credible threat of enforcement sufficient for standing is based on caricatures of these important University policies. BART and BIP provide voluntary opportunities for support and dialogue, and they lack any disciplinary component whatsoever. As the district court explained, the four anonymous students "profess a desire to engage others in discussions on certain topics, and all BART can do is provide a forum for students to do exactly that." RSA032. The Sixth Circuit's divided panel opinion reaching a different result is based on a materially different record, conflicts with precedent from other circuits, and contains multiple fatal flaws.

II.B. Speech First's claim that University officials use No Contact Directives (NCDs) to punish students who engage in controversial but protected speech has no basis in the record either. The district court correctly rejected Speech First's

misreading of the University's Student Disciplinary Procedures and mischaracterization of the Minik-Khan incident. It did not abuse its discretion in finding there was no objectively reasonable basis for the four anonymous students to believe they could receive an NCD if they expressed the protected speech they were allegedly self-censoring.

III. The district court's mootness and standing determinations should be affirmed. If they are nonetheless reversed, the Court should remand this case, following the ordinary rule that preliminary-injunction factors are evaluated and balanced in the first instance by the district court. Even if the Court proceeds to evaluate and balance those factors itself, it should find that Speech First is not likely to prevail on the merits of its vagueness and overbreadth claims. Moreover, the remaining factors do not justify the extraordinary relief Speech First seeks, which would enjoin policies critical to the University's ability to promote open and safe expression on campus and achieve its educational mission.

ARGUMENT

I. The District Court Correctly Held That Speech First's Challenge to Section 2-407 of the Student Code Was Moot.

Article III limits federal court jurisdiction to "live cases and controversies." *Ozinga v. Price*, 855 F.3d 730, 734 (7th Cir. 2017). "[A]n actual controversy must exist not only at the time the complaint is filed, but through all stages of the litigation." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1975 (2016). The issue of mootness arises if "a challenged ordinance is repealed during the pendency of litigation, and a plaintiff seeks only prospective relief."

Fed'n of Advert. Indus. Representatives, Inc. v. City of Chicago (Federation), 326 F.3d 924, 929 (7th Cir. 2003). That is precisely what happened here.

This Court's decision in *Federation* is instructive. In that case, the City of Chicago enacted an ordinance prohibiting the placement of alcohol and cigarette advertisements in locations visible to the public. *Id.* at 927. A group of companies that displayed advertisements brought suit claiming the ordinance violated the First Amendment. *Id.* After substantial litigation, the city repealed the challenged ordinance in its entirety. *Id.* at 928. Rejecting the very argument Speech First makes here—that "the City remains free to reenact [the ordinance] at any time," *id.* at 929—this Court found the plaintiffs' challenge to the ordinance moot. *See also, e.g.*, *BBL, Inc. v. City of Angola*, 809 F.3d 317, 324 (7th Cir. 2015) (holding that defendant's elimination of approval requirement mooted prior restraint claim).

Courts have applied this mootness doctrine in the context of a public university's modification of its policies or procedures. In *Beta Upsilon Chi Upsilon Chapter at the University of Florida v. Machen*, 586 F.3d 908 (11th Cir. 2009), the University of Florida initially refused official recognition to a Christian fraternity on the grounds that the fraternity discriminated in its membership on the basis of gender and religion. *Id.* at 913. During the course of litigation—after the district court denied the fraternity a preliminary injunction, and after that decision was appealed to and argued in the Eleventh Circuit—the University changed course. It amended the student handbook and granted official recognition to the fraternity. *Id.* at 915.

In finding the appeal moot, the Eleventh Circuit observed, "[i]n cases where government policies have been challenged, the Supreme Court has held almost uniformly that voluntary cessation of the challenged behavior moots the claim." *Id.* at 917. Because a controversy is live "*only* when there is a substantial likelihood that the offending policy will be reinstated if the suit is terminated," the court examined the record for evidence of potential reinstatement, and it found none. *Id.* The court relied in particular on an affidavit of a university official who described the decision to modify the handbook as "considered" and represented that the modification had already taken effect and would be applied going forward. *Id.* Because the plaintiff did not provide any affirmative evidence that the modification was a "ploy" to evade review, the court rejected its "speculation" about what might happen in the future. *Id.*

As this precedent confirms, Speech First's challenge to Section 2-407 is moot. The provision is no longer part of the Student Code, and none of Speech First's members could conceivably be harmed by it. This Court has "repeatedly held that the complete repeal of a challenged law renders a case moot." *Federation*, 326 F.3d at 930. Absent an ongoing controversy, "the source of the plaintiff's prospective injury has been removed, and there is no 'effectual relief whatever' that the court can order." *Ozinga*, 855 F.3d at 734 (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992)).

Speech First nonetheless argues its claim is not moot because the University might one day reverse course. Br. 49-54. To accept such an argument, the Court must find "evidence creating a reasonable expectation that

[the University] will reenact the [rule] or one substantially similar." *Federation*, 326 F.3d at 930. That expectation is especially difficult to prove where the defendants are public officials, because courts "place greater stock in their acts of self-correction, so long as they appear genuine." *Magnuson v. City of Hickory Hills*, 933 F.2d 562, 565 (7th Cir. 1991). Here, the district court found no evidence that the University would amend the Student Code to resurrect the prior approval requirement it eliminated. While that was "theoretically possible," the district court found "no evidence tending to show that such a theoretical possibility is even remotely likely, *especially given the history of non-enforcement of the requirement*." RSA027 (emphasis added). The district court was right: other than a "theoretical possibility," which exists in virtually every case in which mootness is an issue, Speech First has put forth no evidence creating a reasonable expectation that the University will reenact a requirement it never enforced and then formally eliminated.

Speech First finds no support in the case law upon which it relies. Br. 49-54. This is not a case where the University has openly acknowledged its plans to reinstate the challenged provision. *See United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 & n.* (2018) ("The Government represents, however, that the Southern District intends to reinstate its policy once it is no longer bound by the decision of the Court of Appeals."); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 & n.11 (1982) (similar). Nor is it a case where there is reason to doubt the veracity of the government's representations that it will not revert to prior policy—for example, because they are not the product of a formal process,

see Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 n.1 (2017) (governor's press release on the eve of argument),[4] come from low-ranking employees, *see Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 492 (D.C. Cir. 1988) ("weak assurance" from inferior officer who could not speak for superiors combined with "history of stubborn refusals" to comply with that assurance), or are dubious in light of a history of vigorous enforcement, *see United States v. Atkins*, 323 F.2d 733, 740 (5th Cir. 1963) (representations by current employees where record evidence undermined those representations).[5]

In *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019), a divided panel of the Sixth Circuit held that Speech First's challenge to definitions of "bullying" and "harassing" was not moot, even though the University of Michigan abandoned those definitions after Speech First filed suit. *Id.* at 770. In so ruling, the Sixth Circuit found critical certain facts: (1) the university actively applied the challenged definitions before Speech First filed suit; (2) the university continued to defend its use of those definitions during the suit; (3) the university did not follow any formal process to abandon the definitions and did not produce

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[4] Speech First has abandoned the argument it pressed in the district court that *Trinity Lutheran* abrogated settled Seventh Circuit precedent according deference to state actors. In any event, that argument is untenable in light of post-*Trinity Lutheran* decisions like *Freedom From Religion Foundation, Inc. v. Concord Community Schools*, 885 F.3d 1038, 1051 (7th Cir. 2018), continuing to accord such deference.

[5] Speech First's remaining cases are wide of the mark. In *DeFunis v. Odegaard*, the Supreme Court held that the claim at issue *was* moot and that exceptions to mootness did not apply. 416 U.S. 312, 318 (1974). And in *Rosemere Neighborhood Association v. U.S. EPA*, 581 F.3d 1169, 1173-74 (9th Cir. 2009), the issue was whether the plaintiff would encounter the challenged conduct again, not whether the defendant would discontinue it.

any evidence of a formal process it would need to follow if it wanted to reinstate them; and (4) the university did not affirmatively say that it did not intend to reinstate the abandoned definitions. *Id.* at 769-70. Although the Sixth Circuit used a more stringent mootness standard, in conflict with *Beta Upsilon* and at odds with *Federation*, Speech First's challenge to Section 2-407 is moot even under *Schlissel*'s approach.

Taking the factors found determinative by *Schlissel*, the district court here found: (1) the University did not enforce the requirement before Speech First filed suit; (2) the University has not defended the requirement in this litigation; (3) the University followed formal procedures to amend the Student Code, which included a meeting and a vote by its legislative body as well as final approval from its Chancellor, and the same steps would be required for any future amendment; and (4) the University presented unrebutted testimony that it "has no intention of restoring the eliminated provision or adopting a new provision similar to it," and therefore the elimination is definitive. *See supra* at 18-19. None of these findings by the district court are clearly erroneous, and Speech First has introduced no evidence to the contrary. Given that Speech First "face[s] no future danger" from the prior version of Section 2-407, the district court's mootness decision should be affirmed. *Magnuson*, 933 F.2d at 565.[6]

[6] In this Circuit, a state actor's self-correction is not considered suspect simply because it takes place after suit has been filed. *See Federation*, 326 F.3d at 929-30. Indeed, voluntary cessation frequently arises because a challenged practice is altered after suit has been filed. *See, e.g.*, *Wis. Right to Life, Inc. v. Schober*, 366 F.3d 485, 491 (7th Cir. 2004).

II. The District Court Correctly Held That Speech First Lacks Standing to Challenge BART, BIP, and NCDs.

Under the doctrine of associational standing, an organization like Speech First has standing only if its members do. *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 477 U.S. 274, 289 (1986). Standing has three essential elements: (1) an injury-in-fact, (2) a sufficient causal connection between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58 (2014). Every element must be established for each claim Speech First advances. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). Moreover, Speech First's burden to demonstrate standing in the context of a preliminary injunction motion is "at least as great as the burden of resisting a summary judgment motion," *Lujan v. Nat'l Wildlife Fed'n (Lujan I)*, 497 U.S. 871, 907 n.8 (1990), and therefore requires "specific facts" rather than "mere allegations," *Lujan v. Defenders of Wildlife (Lujan II)*, 504 U.S. 555, 561 (1992).

The injury-in-fact requirement demands an injury that is real and immediate. *Bell v. Keating*, 697 F.3d 445, 451 (7th Cir. 2012). Where, as here, the plaintiff brings a facial challenge under the First Amendment, a prior enforcement action against the plaintiff is not required. *Susan B. Anthony List*, 573 U.S. at 158-59. But in the absence of an enforcement action, plaintiffs must make one of two showings to establish injury-in-fact. Under the first, the plaintiffs must show they intend to engage in conduct at least arguably affected with a constitutional interest but also proscribed by the policy they wish to

challenge, and that they face a credible threat the policy will be enforced against them when they do. *Id.* (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). Under the second, the plaintiffs must show a chilling effect on their expression that is objectively reasonable. *Bell*, 697 F.3d at 454 (citing *Laird v. Tatum*, 408 U.S. 1, 11, 13-14 (1972)).

"Either way, a credible threat of enforcement is critical; without one, a putative plaintiff can establish neither a realistic threat of legal sanction if he engages in the speech in question, nor an objectively good reason for refraining from speaking and 'self-censoring' instead." *Abbott v. Pastides*, 900 F.3d 160, 176 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1292 (2019). Speech First has failed to show that credible threat of enforcement here.

A. BART and BIP Do Not Pose a Credible Threat to the First Amendment Rights of Speech First's Members.

1. The District Court's Factual Findings Regarding BART and BIP Are Amply Supported by the Record.

The district court evaluated and weighed the evidence presented by both sides before making factual findings that compelled its ruling on standing. The only evidence Speech First introduced was "a conclusory statement based on its national association's president's 'familiarity with' anonymous students," to the effect that "the Students' expressing their views on (very generally-described) topics could result in their being reported, investigated, and punished by BART for engaging in a bias-motivated incident." RSA030. The district court gave that statement little weight, finding "more informative the detailed statements about

BART from University staff that are personally involved with BART, consistently describing how BART operates." RSA031.

This Court affords substantial deference to the district court's factual findings. Those findings must stand unless "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Girl Scouts*, 549 F.3d at 1086 (quotation marks omitted); *see also Joseph*, 734 F.3d at 748 (court may not "reweigh the evidence" on clear error review). Speech First comes nowhere close to meeting that demanding standard. Indeed, its sole declaration "says nothing about BIP" whatsoever, *see supra* at 17, and therefore cannot prove any clear error in the district court's factual findings. Nor can Speech First establish through the Neily Declaration or otherwise that the district court clearly erred in its factual findings about BART.

The district court made specific findings about five core features of BART that are relevant to standing. *First*, the district court held "[b]ias-motivated speech alone is not a Student Code violation." RSA011. As a result, the court explained, "[t]he disciplinary processes do not apply to students expressing the views the [anonymous] Students wish to express or any other opinions." RSA031. Both of those key findings are undisputed by Speech First.

Second, the district court found Speech First's members "have not described any statements they wish to make with any particularity, so it is unclear whether they would even be likely to be reported to BART or BIP." RSA031. Furthermore, the district court explained, "[i]t is also not clear that the Students making their desired statements would result in BART or BIP actually

contacting them even if someone did report such statements along with the name of the person who made the statements." RSA031. Directly contrary to these findings, Speech First argues its members "almost certainly will be reported" to BART or BIP, based on the fact that a handful of reports have addressed immigration-related expression over the past two academic years. Br. 28, 30. That is no basis to assume a report would be made in response to the expression contemplated here, particularly given the record evidence about the extent to which "controversial" beliefs like those allegedly held by Speech First's members are in fact expressed frequently and vigorously on campus. *See supra* at 4-7.[7]

Third, the district court found "[c]onversations with BART are optional." RSA031. It is therefore unsurprising that "[m]ost students contacted by BART do not respond at all, or decline the offer of a meeting, and no consequences occur if a student declines to meet with BART." RSA031.[8] Once again, Speech First claims the opposite is true. It insists "[n]o student would see these requests from BART as voluntary." Br. 33. This statement rests on a portion of the Neily Declaration that the district court refused to credit, in which Neily relayed second-hand or even third-hand statements about the invitations that BART

[7] Speech First also complains that the ability to file reports anonymously means BART does not have an educational purpose and serves only to punish the speaker. Br. 31. This ignores evidence in the record that, to the extent a voluntary meeting with the speaker takes place, that conversation includes an educational discussion as well as an action plan for ensuring the speaker can continue to express herself safely in the future. *See supra* at 9-10.

[8] The district court found that the same is true of BIP: "BIP likewise engages in voluntary discussions with students about the impact of their behavior on fellow students, but the students can refuse to discuss the reports without any consequences, as BIP has no power to sanction anyone." RSA032.

extends. RSA035. As the district court pointed out, "[t]here is evidence that *most* of the students contacted by BART either do not respond to BART at all, or decline to meet with BART. That fact suggests most students view BART requests as voluntary, casting doubt on any suggestion that BART requests are presented as mandatory." *Id.* In light of this evidence, Speech First's insistence that "no student" would regard the invitation as voluntary is untenable, and its speculation about how "impressionable 18- to 22-year-olds" would respond to the invitation rings hollow.[9]

Fourth, the district court found that BART (like BIP) has no disciplinary or investigative functions. "BART has no authority to impose sanctions, and BART does not require any student to change his behavior." RSA031. Similarly, "BART does not make findings." RSA031. "While some BART staff are drawn from departments with disciplinary or law enforcement functions, BART has no such functions." RSA031. BART is transparent about these facts when meetings with students do take place. RSA031 ("If a student does meet with BART, staff explain that the student is not 'in trouble' and not being charged with a Student Code violation."). Speech First does not point to any contrary evidence. Instead, it offers a non-sequitur: that BART can refer reports about incidents that also

[9] Speech First goes so far as to claim that certain "statements . . . could cause Speech First's members to be *visited* by BART." Br. 29 (emphasis added). There is absolutely no evidence in the record to support this claim that BART's members physically approach students when reports are made about them. Speech First also asserts that "the silent majority of students" self-censor their speech to avoid interaction with BART. Br. 34. This statement has no basis in the record either.

violate the Student Code or the law to other offices with disciplinary authority. Br. 35. As explained below, that possibility does not change the fact that BART itself lacks disciplinary and investigative functions, and that protected speech does not violate the Student Code or the law and thus is not subject to referral. *See infra* at 38-40.

Fifth, the district court found "BART does not list reports on any students[']records." RSA031. Speech First nevertheless argues that speech is chilled because reports are maintained at the same office that houses the student disciplinary body. Br. 32. Yet Speech First does not provide any evidence that students feared BART based on their understanding of its recordkeeping. Nor does Speech First explain how this point is relevant when protected speech cannot by itself trigger discipline. Thus, it simply is not plausible that a student deciding whether to express a controversial viewpoint would self-censor based on a series of possibilities that there might be a report, that report might be recorded, and that record might be accessible to campus administrators who cannot take any disciplinary action because the expression is fully protected.

Speech First also fails to show that students would self-censor out of fear that they could be identified in the University's public reports about bias-motivated incidents. Br. 36. Reported incidents are stripped of personally identifying information and described at a high level of generality, refuting Speech First's claim that "detailed descriptions" facilitate identification. Br. 13; *see, e.g.*, A192 ("A student reported that white male students in a truck yelled racist and homophobic slurs at him while he was waiting for a bus."); A193 ("A

student reported that another student was targeting student groups with racist messaging."). Nor does the Neily Declaration contain any allegation that Speech First's four anonymous members are aware of the annual reports, much less that their speech is chilled by the reports' existence.

At bottom, Speech First has failed to show that the district court clearly erred when it held that "being reported to BART or BIP results in essentially no consequences." RSA031. To be sure, as the district court acknowledged, "[i]t is a possibility that the Students' desired speech could result in someone making a report, that report could identify the speaker, and BART or BIP could decide to contact the speaker based on the report. But, even if all of those events did occur, the only result would be a voluntary conversation without any possibility of discipline." RSA032. Speech First's caricatures of BART and BIP cannot be squared with the reality of these processes and their educational value. *See* Br. 25-36. Given Speech First's burden to provide "specific facts" rather than "mere allegations," *Lujan II*, 504 U.S. at 561, the Court cannot indulge Speech First's fiction.

2. The District Court Correctly Applied Black-Letter Law in Holding That Speech First Lacks Standing.

The district court correctly applied settled law to the facts of this case. Where, as here, plaintiffs fail to show "that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible, they do not allege a dispute susceptible to resolution by a federal court." *Schirmer v. Nagode*, 621 F.3d 581, 586 (7th Cir. 2010) (quotation marks omitted). An invitation to a voluntary, non-disciplinary meeting is not only insufficient to

confer standing, but fails to implicate the First Amendment at all. *Laird v. Tatum*, 408 U.S. 1, 11 (1972) (plaintiff must be subject to an "exercise of governmental power" that is "regulatory, proscriptive, or compulsory"). For much the same reason, any theoretical fear that led Speech First's anonymous members to self-censor based on the possibility of a voluntary, non-disciplinary meeting—a meeting that most students decline to attend—is merely "chimerical" and does not establish an injury-in-fact. *See Susan B. Anthony List*, 573 U.S. at 159.

Abbott v. Pastides, 900 F.3d 160 (4th Cir. 2018), is directly on point. In *Abbott*, a student (Abbott) was required to meet with university officials after he coordinated a "Free Speech Event" that drew complaints of sexist and racist statements from other students. *Id.* at 163. The purpose of the meeting was to determine whether an investigation was warranted, and after speaking with Abbott, the university concluded it was not. *Id.* Abbott and certain student groups nonetheless sued the university for allegedly violating Abbott's First Amendment rights. *Id.* They argued that the prospect of such meetings in the future chilled their speech. *Id.* at 178. The court disagreed:

> Even an objectively reasonable 'threat' that the plaintiffs might someday have to meet briefly with a University official in a non-adversarial format, to provide their own version of events in response to student complaints, cannot be characterized as the equivalent of a credible threat of "enforcement" or as the kind of "extraordinarily intrusive" process that might make self-censorship an objectively reasonable response.

Id. at 179. That reasoning applies with full force here. Indeed, if a *mandatory* meeting with university officials to explore whether a full-blown investigation is necessary does not support standing, the invitations BART and BIP extend to students for voluntary meetings fall far short of demonstrating an injury-in-fact.

Speech First's principal authorities actually support the University in that each case involved an unmistakable threat that the government would harm the plaintiff if it persisted in its protected speech. *See* Br. 36. In *Bantam Books v. Sullivan*, the Rhode Island Commission to Encourage Morality in Youth sent 35 notices to the plaintiff stating that particular publications were deemed objectionable. 372 U.S. 58, 59-61 (1963). These notices were "phrased virtually as orders, reasonably understood to be such by the distributor, invariably followed up by police visitations, [and] in fact stopped the circulation of the listed publications *ex proprio vigore*." *Id.* Similarly, *Okwedy v. Molinari* addressed a letter sent from the borough president to a billboard owner. 333 F.3d 339, 341-42 (2d Cir. 2003) (per curiam). The letter directed the billboard owner to contact the borough president's legal counsel, and it referenced the "substantial economic benefits" the owner receives from other billboards in the borough. *Id.*

This Court applied *Bantam Books* and *Okwedy* in *Backpage.com v. Dart*, 807 F.3d 229, 231 (7th Cir. 2015). There, a sheriff sent a letter on his official letterhead to various credit card companies requesting that they "immediately cease and desist" ties with a website, calling associations with that website "increasingly indefensible," suggesting the companies could be prosecuted under various cited laws, and seeking "contact information for an individual within your organization that I can work with [harass, pester] on this issue." *Id.* While the thinly veiled threats in each of those cases sufficed to establish standing, the University's invitation to a voluntary meeting here is readily distinguishable. As this Court explained: "What matters is the distinction between attempts to

convince and attempts to coerce." *Id.* at 230-31 (quoting *Okwedy*, 333 F.3d at 344). Speech First has fallen far short of showing that BART or BIP constitute the latter.[10]

The only real support Speech First can muster for its standing argument is the Sixth Circuit's recent decision in *Schlissel*. There, a divided panel found the University of Michigan's Bias Response Team (BRT) chilled speech in a manner sufficient to demonstrate Speech First's standing. 939 F.3d at 765. In so holding, the majority emphasized two aspects of BRT's operations: (1) BRT's ability to make referrals to the Office of Student Conflict Resolution and the police, and (2) BRT's ability to invite students to a voluntary meeting. *Id.* The majority's decision conflicts with the Fourth Circuit's unanimous holding in *Abbott* and, for reasons explained in Judge White's dissenting opinion, is flawed.

First, the fact that BART and BIP have the ability to refer information to campus disciplinarians or law enforcement officials does not establish an objectively reasonable basis for Speech First's members to self-censor protected speech. For one, Speech First never submitted a shred of evidence showing that its members were self-censoring on this basis. Instead, the Neily Declaration claimed its anonymous members "fear[ed] that expressing their views could result in being reported, investigated, and punished *by the BART*." A002, ¶10

[10] This is one reason why Speech First's "PART" hypothetical is clearly distinguishable. Br. 43-44. Neither BART nor BIP aims to promote a specific message; they are available to, and relied upon by, community members with a wide range of viewpoints. Thus BART and BIP are not "a fundamentally coercive policy designed to deter students from expressing disfavored views." *Id.* at 44.

(emphasis added). The fear that BART can punish students is not reasonable, in light of its lack of any disciplinary authority. *See supra* at 10-11. But as relevant here, it was *that* fear—not any referral authority—upon which Speech First relied.

Regardless, even if Speech First had submitted evidence that its members feared BART's "referral authority," that would not form an adequate basis for standing. As Judge White noted in her *Schlissel* dissent, "there is no evidence that a Response Team member has or would refer a 'bias incident' to the OSCR or police without that incident constituting a violation of the Statement or a crime." 939 F.3d at 772 (White, J., dissenting). And Judge White's observation is directly applicable here: BART does *not* refer reports to the University Police, *see* A310, ¶10, and BART makes referrals to the student disciplinary process only if bias-motivated speech or conduct is accompanied by behavior that violates the Student Code, A312, ¶16. The "controversial" speech that the anonymous students allegedly want to express does not violate the Student Code or any law, and thus it *cannot* be the basis for a referral. *See* A311-312, ¶¶15-18; A331-332, ¶¶11-14. Speech First does not even suggest to the contrary, and it certainly has not submitted evidence that a referral has ever been made in these circumstances.[11]

[11] Moreover, as Judge White noted, the notion that a referral to OSCR or the police might chill a student's speech is misplaced for a second reason. Any campus community member can allege a violation of the Student Code to OSCR or a violation of the law to police at any time, and in some cases might be required to do so. "Thus, even if Response Team members did refer reported conduct to the OSCR or police, any member of the University community was already able to do so." 939 F.3d at 772 (White, J., dissenting). In other words, BART's referral

Second, BART and BIP's ability to request voluntary meetings with students does not demonstrate standing either. The majority in *Schlissel* held that "referral power lurks in the background of the invitation," such that "a student who knows that reported conduct might be referred to police or OSCR could understand the invitation to carry the threat: 'meet or we will refer your case.'" 939 F.3d at 765. Regardless of any basis the Sixth Circuit might have had for its speculation that Michigan's BRT used the threat of a referral as a means for forcing students to attend voluntary meetings, the record here is the opposite. As noted above, the *only* basis upon which a referral could even conceivably be made is if a student's conduct violates the Student Code or the law (and *not* for declining an invitation to an optional meeting). The expression at issue here does not violate either. Thus, to countenance the Sixth Circuit's speculation is to accept that University officials would threaten students with a referral they have no legal authority to make. The record indicates otherwise: there is no evidence University officials have ever done so, and the majority of students understand these meetings to be voluntary. The *Schlissel* majority's reasoning is inapplicable here.

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authority would simply make no difference. *See Laird*, 408 U.S. at 11 (rejecting allegations of "chill" where based on individual's fear that defendant, "armed with the fruits of [its] activities, . . . might in the future take some other and additional action detrimental to that individual").

B. Speech First Lacks Standing to Challenge the University's No Contact Directives.

Speech First does not allege that any of its members have been issued, or threatened with, NCDs. Br. at 45; A003. Indeed, other than its complete mischaracterization of an NCD issued to Andrew Minik—which the district court, who is also currently adjudicating a case involving the Mink-Khan interactions, flatly rejected—Speech First does not cite a *single* instance of a student receiving an NCD as a result of "controversial speech," despite many instances of exactly this type of speech on campus. Speech First nonetheless contends it has standing to challenge the University's policy on NCDs, a policy that is critical to maintaining a safe campus environment and entirely consistent with the First Amendment. *See, e.g.*, *N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1343 (2d Cir. 1989) ("There is no constitutional privilege to assault or harass an individual or to invade another's personal space."); *see also Yoona Ha v. Nw. Univ.*, No. 14-CV-895, 2014 WL 5893292, at *2 (N.D. Ill. Nov. 13, 2014) (recognizing that universities may face liability for deliberate indifference where they *fail* to order no contact between individuals in certain circumstances). Correctly, the district court rejected Speech First's allegations as inconsistent with the University's policies.

First, Speech First misreads the University's written policy to argue that an NCD can be issued whenever a disciplinary officer subjectively believes an NCD is "warranted." Br. 45-47. As the district court correctly recognized, Section 4.06(a) lays out the University's authority to issue NCDs. RSA040. The very first sentence of Section 4.06(a) explains that the duty of disciplinary

officers—who alone have the authority to issue NCDs—is "the enforcement of student behavioral standards and, when possible, the prevention of violations of the *Student Code*." A377. Acting pursuant to this mandate, disciplinary officers can "direct an individual subject to student discipline, as described in §1-301(c) of the Student Code, to have no contact with one or more other persons." A377. Thus, this provision cabins the authority of disciplinary officers to issue NCDs to students "subject to discipline." As noted above, it is uncontested that none of the statements the anonymous Speech First members wish to make are violations of the Student Code. *See supra* at 3. To the contrary, they are expressly *protected* by the Code. *See id.*

Speech First entirely ignores Section 4.06(a) and the limitations it places on the issuance of NCDs. Instead, Speech First focuses on a single word within Section 4.06(d)(i), which outlines the "Procedures" for the issuance of NCDs, and specifically the "Notice" to be provided to recipients of NCDs: "If, based upon a report received or a direct request from a member of the university, a disciplinary officer believes a No Contact Directive is warranted, the disciplinary officer will notify all recipients in writing, typically by email." A378. Speech First claims that this sentence demonstrates that NCDs may be issued whenever a disciplinary officer subjectively believes them to be "warranted." But as the district court recognized, that is wrong. RSA040. A disciplinary officer's authority to impose NCDs is cabined by the "Authority" provision (Section 4.06(a)), and thus his or her determination of when an NCD is warranted must naturally be read in light of that provision's limitations.

Second, in contrast with the lack of any evidence Speech First submitted regarding the imposition of NCDs, the University submitted multiple declarations demonstrating that NCDs are only imposed in a narrow set of circumstances, none of which even implicate, let alone target, protected speech. For one, Speech First claims that NCDs are "easily and frequently issued" in the circumstances they challenge here. Yet the record demonstrates that the University issued 103 NCDs during the 2018-2019 academic year to a population of nearly 50,000 students. Br. 47 (citing A334-A335, ¶¶22-23). That rate is not "frequent" under any reasonable measure. Moreover, Speech First agrees that "some of these directives" were proper, and indeed its challenge does not extend to 89% of NCDs, which the University issued to prevent contact between individuals involved in alleged violations of the Student Code, including potential sexual misconduct. A334, ¶22. Of the remaining NCDs, almost none have anything to do with Speech First's challenge, in that they were "issued when a severe, prolonged, and/or escalating conflict between students suggested that a violation of the Student Code, and in some cases physical violence, was likely in the near future." A334-335, ¶23.[12] As Justin Brown, Director of OSCR, explained, an example of this situation is "a long-running conflict between groups of students who had fought in high school, then matriculated at the University, and continued to

[12] Speech First seems to suggest that the University might use this authority to impose NCDs on its members since their speech could lead to "heated exchanges." Br. 48. That is not the standard, however, and the record shows that students and organizations routinely engage in the same expression without receiving NCDs.

threaten each other." A335, ¶23. Speech First does not even suggest a possible constitutional violation there.

Thus, Speech First's challenge boils down to a single NCD, issued to Andrew Minik as part of his long-running conflict with another student, Tariq Khan. According to Speech First, its members have reason to fear NCDs because the University issued one to Minik based on the same type of speech they wish to express. Br. 48. As the district court found, that is not true. The University presented a sworn statement from Rony Die, the official who actually imposed the NCDs on Minik and Khan. He explained that Speech First's second-hand description of events was "simply incorrect." A400, ¶4. The NCD was not issued to Minik based solely on his article about Khan in an online publication. A401-402, ¶7. Instead, it was issued based on "the history of escalation between Minik and Khan, including Khan receiving death threats which he believed were caused by Minik, and Khan's anger towards Minik over the same." RSA039-40. Moreover, as the district court recognized, "Minik acknowledged that Die told him '[t]his is not a direct disciplinary charge' and that 'the no contact order does not prevent me from writing journalistic stories related to Khan.'" RSA039.

In sum, the district court found "No Contract Directives have not been and would never be issued for speaking on the topics the Students wish to discuss, and a No Contact Directive does not prevent a student from expressing any views." RSA039. That finding was based on the correct reading of University policy and that policy's application in practice. As such, the district court *did not* rule in the University's favor based on the "promise that the University has

used and will continue to use its authority responsibly." Br. 47. To the contrary, it found that the University *could not* and *had not* ever issued an NCD to suppress protected expression, let alone the type of speech Speech First's members allegedly wished to express.[13] This stands to reason given that as even Speech First's own allegations about the Minik-Khan NCD make clear, NCDs do not prevent a recipient's free expression on any topic. For these reasons, it is not objectively reasonable for Speech First's members to fear that NCDs will issue in response to their protected speech, and the district court was correct to conclude that Speech First lacks standing to raise this claim. *See Susan B. Anthony List*, 573 U.S. at 159.

III. If Necessary, the Remaining Preliminary-Injunction Factors Should Be Weighed by the District Court in the First Instance, and They Weigh Against Granting Extraordinary Relief.

The district court found Speech First's claims were likely not justiciable and thus declined to reach the remaining preliminary-injunction factors. For the reasons discussed above, that was correct. If this Court nonetheless reverses the district court's mootness or standing determinations, it should remand this case so the district court can evaluate and weigh the remaining preliminary-injunction factors in the first instance. Moreover, even if this Court were to

[13] These circumstances render inapposite the case law Speech First relies upon for the proposition that a government's promises to apply a challenged provision in a certain way, particularly when in tension with its plain language, do not defeat a legal action. Br. 46-47 (citing *United States v. Stevens*, 559 U.S. 460, 480 (2010); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 711 (4th Cir. 1999); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1183 (6th Cir. 1995)).

analyze those factors itself, it should find that they weigh decisively against granting the extraordinary relief Speech First seeks.

A. This Court Should Remand If It Finds the District Court Abused Its Discretion.

Courts of appeals "[o]rdinarily . . . remand to allow the district court to weigh the preliminary-injunction factors in the first instance." *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012). That normal practice should be followed here, where the district court did not even reach the likelihood of success on the merits of the First Amendment claims (let alone the other factors) and ruled without a hearing. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1176 (10th Cir. 2013) (Briscoe, J., concurring in part and dissenting in part) (discussing factors that counsel against reaching remaining preliminary-injunction factors), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Because the district court confined its analysis to mootness and standing, should this Court reverse, it is "disposed to remand to the district court to pick up where it left off." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 305 (D.C. Cir. 2006).

Speech First asks this Court to disregard the ordinary rule, making factual findings and weighing factors itself in the first instance. Br. 54-55. Yet even *Schlissel* remanded the case for the district court to complete the preliminary-injunction inquiry after reversing the district court's standing and mootness

determinations. 939 F.3d at 770.[14] Speech First has provided no persuasive basis for this Court to deviate from the ordinary rule here.

B. If This Court Reaches the Remaining Preliminary-Injunction Factors, They Favor the University.

Even if this Court were to address the remaining factors, those factors weigh decisively against granting the extraordinary relief that Speech First seeks.

1. Speech First Is Not Likely to Prevail on the Merits.

Speech First's overbreadth and vagueness claims lack merit. An overbreadth challenge can succeed "only when the statute is substantially overbroad, *i.e.*, when the statute is unconstitutional in a substantial portion of the cases to which it applies." *Regan v. Time, Inc.*, 468 U.S. 641, 650 (1984). Striking down a policy as overbroad is "strong medicine" to be administered "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Furthermore, to succeed on a vagueness challenge, a plaintiff must show that the challenged policy "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," or that it

[14] In this regard, *Schlissel* is far more instructive than the cases on which Speech First relies, which presented pure legal questions about the constitutionality of state statutes. *See* Br. 54-55 (*ACLU of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Wis. Right to Life State PAC v. Barland*, 664 F.3d 139, 151 (7th Cir. 2011)). Indeed, the defendant in *ACLU of Illinois* did not develop any arguments about the remaining preliminary-injunction factors, so it was unnecessary for this Court to make factual findings or balance harms after it addressed the constitutionality of the state statute at issue there. Br. of Anita Alvarez, *ACLU of Illinois v. Alvarez*, No. 11-1286 (7th Cir. July 26, 2011), Dkt. 29 at 45-46. Here, by contrast, the University presents arguments about each preliminary-injunction factor, and resolving its arguments will require not only factual findings but also the type of balancing typically reserved for a district court.

"authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). Speech First's claims fail under these demanding standards.

First, Speech First challenges the University's definition of "bias-motivated incidents" as overbroad and vague. Br. 55-58. This challenged definition applies only to BART and BIP. Yet neither of those processes places any "burden on protected expression" because neither process is disciplinary nor compulsory. *Meese v. Keene*, 481 U.S. 465, 480 (1987); *see also Laird*, 408 U.S. at 11 (finding no cognizable First Amendment claim when the alleged "chilling effect" appeared to arise from perception that program at issue was "inappropriate," and not from any "regulations, proscriptions, or compulsions" to which the challengers were subject). The definition of "bias-motivated incidents" cannot as a matter of law be unconstitutionally overbroad or vague, because nothing is proscribed and no one can be punished. Were any further proof needed of this fact, the challenged definition of "bias-motivated incidents" comes from the BART website, and does not appear in the University's Student Code or Student Disciplinary Procedures. *Compare* A179-180, *with* A008-178. In short, the University's definition of "bias-motivated incidents" does not implicate, let alone violate, the First Amendment.

Second, Speech First's overbreadth challenge to NCDs is also unavailing. Br. 58-61. Speech First misconstrues the Student Disciplinary Procedures in claiming that University disciplinary officers can issue NCDs whenever they subjectively believe such action is "warranted." Br. 59. The Procedures expressly limit the circumstances in which NCDs can be issued to potential or

reported violations of the Student Code. *See supra* at 14-15. The Student Code does not prohibit speech protected by the First Amendment, *see supra* at 3, and so NCDs cannot be issued based solely on the type of speech that the anonymous students allegedly wish to express. Read in context, then, the NCD policy is not unconstitutionally overbroad. *Cf. United States v. Stansell*, 847 F.2d 609, 614 (9th Cir. 1988) (rejected overbreadth challenge because when "[c]onstrued in proper context, the regulation at issue is not a grant of unfettered discretion").

What is more, a facial challenge based on overbreadth can succeed only in cases of substantial overbreadth, where the policy at issue "is unconstitutional in a substantial portion of the cases to which it applies." *Regan*, 468 U.S. at 650. This means "the district court must ascertain whether the unconstitutional applications of a statute are substantially greater than the statute's legitimate sweep." *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 688 n.4 (7th Cir. 1998) (citing *Broadrick*, 413 U.S. at 613). Speech First has identified only one purportedly unconstitutional application of the policy, but because the NCD was not issued based on Minik's protected speech, it does not demonstrate an unconstitutional application. *See supra* at 15-16. Indeed, even accepting Speech First's mischaracterization of that episode, "one arguably unconstitutional application of the statute does not prove that it is substantially overbroad, particularly in light of the numerous instances in which" the University issues NCDs that are indisputably legitimate. *Regan*, 468 U.S. at 651, 652 n.8; *see supra* at 43-44 (detailing circumstances in which NCDs are issued); Br. 47 (conceding circumstances in which NCDs are proper).

Speech First's challenge also fails because the NCD policy is "readily susceptible to a narrowing construction that would make it constitutional." *Schultz v. City of Cumberland*, 228 F.3d 831, 850 (7th Cir. 2000) (citing *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988)). As explained above, the policy can be (and in practice is) construed to permit NCDs only in the context of potential or reported violations of the Student Code. *See supra* at 14-15. Even if this were not the only reading of the policy, it is a "reasonable and readily apparent" construction, *Wisconsin Right To Life, Inc. v. Barland*, 751 F.3d 804, 833 (7th Cir. 2014), and it prevents any "potentially unconstitutional applications from dwarfing the [policy's] legitimate reach," *Schultz*, 228 F.3d at 851.

Without a likelihood of success on the merits, Speech First cannot establish a critical threshold requirement for obtaining preliminary injunctive relief. *See Foodcomm Int'l v. Barry*, 328 F.3d 300, 303 (7th Cir. 2003).

2. The Remaining Factors Also Weigh Against This Relief.

The remaining factors also weigh decisively against granting relief. *First*, Speech First cannot show irreparable harm absent a preliminary injunction.[15]

[15] While the University does not defend the eliminated approval requirement on its merits, a preliminary injunction should not be entered even if this Court reverses on mootness grounds. "[A] preliminary injunction does not follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits. Rather, a court must also consider whether the movant has shown that he is likely to suffer irreparable harm in the absence of preliminary relief," among other factors. *Benisek v. Lamone*, 138 S. Ct. 1942, 1943-44 (2018). Speech First cannot meet that standard as to the eliminated requirement because "there is no showing of any real or immediate threat that the plaintiff will be wronged again." *City of L.A. v. Lyons*, 461 U.S. 95, 111 (1983).

Speech First falls back on the presumption that any deprivation of a First Amendment right constitutes irreparable harm. Br. 63-64. But for all the reasons discussed above, Speech First has not "shown it likely" that the University violated, or in the future will violate, First Amendment freedoms, so irreparable harm cannot be "presumed" here. *See Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006). There is simply no basis in the record to hold that the University will deprive Speech First's student members of their First Amendment rights if the Court refuses to issue a preliminary injunction.

Second, Plaintiff cannot show that the balancing of harms favors this extraordinary relief. *See MacDonald v. Chicago Park Dist.*, 132 F.3d 355, 362 (7th Cir. 1997) (finding likelihood of success on merits insufficient to grant injunctive relief where defendant showed "advantage on the balance of harms" in First Amendment context). It is well-established that universities have interests in "being allowed to manage their affairs and shape their destiny free of minute supervision by federal judges and juries," and in "maintain[ing] an atmosphere conducive to learning." *Brandt v. Bd. of Educ. of City of Chicago*, 480 F.3d 460, 467 (7th Cir. 2007); *see also Am. Future Sys., Inc. v. Pa. State Univ.*, 752 F.2d 854, 865 (3d Cir. 1984) ("[A] public university has a significant interest in carrying out its educational mission, and that this interest necessarily gives it some power to regulate its students' lives").

The policies that Speech First seeks to enjoin are critical to the University's functioning and achievement of its educational mission. These policies foster dialogue on important issues, provide resources to students who feel victimized

by bias,[16] ensure that students can express themselves safely and effectively, and prevent escalation between students that could lead to violence or other conduct prohibited by the Student Code. Proof positive of the success of these policies is the reality of campus life, with over a thousand student organizations giving tens of thousands of students the opportunity to express themselves on topics spanning the ideological spectrum. Given these important interests, it is no surprise that even the majority in *Schlissel* refused to reverse the district court's finding that this factor weighed against granting a preliminary injunction there. 939 F.3d at 770.

Third, Speech First's request for relief disserves the public interest. If the policies are enjoined, the University's mission will suffer, as will all students who wish to live and learn in a respectful environment where individuals can disagree without derision, insult, or violence. *See, e.g.*, *Sonnier v. Crain*, 649 F. Supp. 2d 484, 491 (E.D. La. 2009). The challenged policies are critical to open and safe expression at Illinois's flagship public university, and enjoining them hurts not only the campus community but also the public at large.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Dated: December 13, 2019 Respectfully submitted,

[16] Again, students who share viewpoints with Speech First's members have used BART to reports incidents they perceive as biased against them. *See supra* at 9; *see also, e.g.*, A205 (report of pro-Israel flyer vandalized with "Free Palestine"); A200 (report of student using slur that peer was "white supremacist"); A208 (report of student insulting peers who believe in religion).

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

1. This Brief complies with type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and Circuit Rule 32(b) because, according to the word count function of Microsoft Word 2013, this Brief contains 13,975 words excluding the parts of the Brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

2. This Brief complies with the typeface and type style requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure and Circuit Rule 32(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 12-point Bookman Old Style font for the main text and 12-point Bookman Old Style font for footnotes.

Dated: December 13, 2019

/s/ Ishan K. Bhabha
Ishan K. Bhabha

CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), I, Ishan K. Bhabha, an attorney, certify that all materials required by Circuit Rule 30(a) are included in the Joint Appendix.

Dated: December 13, 2019

/s/ Ishan K. Bhabha
Ishan K. Bhabha

CERTIFICATE OF SERVICE

I, Ishan K. Bhabha, an attorney, hereby certify that on December 13, 2019, I caused the foregoing **Brief of Defendants-Appellees** to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Pursuant to ECF Procedure (h)(2) and Circuit Rule 31(b), and upon notice of this Court's acceptance of the electronic brief for filing, I certify that I will cause 15 copies of the **Brief of Defendants-Appellees** to be transmitted to the Court via hand delivery within 5 days of that notice date.

/s/ Ishan K. Bhabha
Ishan K. Bhabha