UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

PHILLIP BEVERLY, *et al.*,	)	
	)	
Plaintiffs,	)	Case No. 1:14-CV-04970
	)	
v.	)	Judge Joan B. Gottschall
	)	
WAYNE D. WATSON, *et al.*,	)	Magistrate Judge Sheila Finnegan
	)	
Defendants.	)	

PLAINTIFFS' REPLY TO RESPONSE IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Defendants have engaged in an ongoing campaign to silence the *CSU Faculty Voice* blog and to punish Plaintiffs for having the temerity to criticize the Chicago State University ("CSU") administration. This campaign has employed cease and desist letters, new restrictive policies, enforcement of petty infractions for pretextual reasons, and – as shown in the attached declaration of former CSU Interim Vice President of Enrollment and Student Affairs LaShondra Peebles – efforts to manufacture false sexual harassment claims against Professor Beverly. Declaration of LaShondra Peebles ("Peebles Decl."). All of these actions were taken for the express purpose of shutting down the blog and otherwise muzzling Plaintiffs, to further Defendant Watson's oft-repeated claim that he is in "a fight" with Professor Beverly and other contributors to the blog. *Id*. ¶¶ 6-16. Plaintiffs sought preliminary injunctive relief to "freeze the situation" to prevent the possibility of further constitutional deprivations, until this Court decides the ultimate merits of this case. *Ayers v. City of Chi.*, 125 F.3d 1010, 1013 (7th Cir. 1997) (Posner, C.J.).

In opposing Plaintiffs' Motion for Preliminary Injunction ("PI Mot." & "PI Mem."), the Defendants' Response reflects at every turn their skewed perspective on this case ("Opp."). Defendants complain there has been too much delay getting to this point, *e.g.*, Opp. 2 & § II, and Plaintiffs agree – but Defendants caused the delay, and thus cannot rely on the time passed as an

excuse to avoid injunctive relief. Defendants also overstate the scope of relief sought in an effort to force Plaintiffs to prove more than the law requires for a preliminary injunction. Opp. §§ I.A-B. As the Motion and Proposed Order make clear, the relief sought is targeted to preventing recurrence of Defendants' actions that unconstitutionally infringe Plaintiffs' protected speech.

I. THE TIMING OF THE PRELIMINARY INJUNCTION MOTION DOES NOT "NEGATE" IRREPARABLE HARM

Defendants labor under the misimpression that they can "negate" irreparable harm simply by dragging their feet. *See* Opp. 21. From the earliest stages of this litigation Plaintiffs diligently pursued a standstill agreement to prevent irreparable harm to their First Amendment rights. After service of the Complaint on July 21, 2014 (Dkt. 9), Defendants sought and received an additional month to answer (Dkts. 12-14), *see also* Declaration of Robert Corn-Revere ("Corn-Revere Decl.") ¶ 2, and the undersigned worked with defense counsel in the Illinois Attorney General's Office toward potential settlement, with the understanding that no action adverse to Plaintiffs would occur as the parties negotiated. *See id*. ¶ 3 & Ex. A**;** Dkt. 63-1 at 74, Ex. J to Opp., Tr. 5:21-6:19, 9:1-7. However, once the parties agreed to dismissal of CSU's Board of Trustees, an answer was on file, and the case was referred to Magistrate Finnegan for, *inter alia*, a settlement conference (Dkts. 18-23), the remaining Defendants – nearly four months into the case – substituted new counsel. (Dkts. 27-33.) New counsel then sought time to "confer with clients" and (ostensibly) opposing counsel (Dkt. 34), before entering any settlement discussions. Corn-Revere Decl. ¶ 5.

In late October 2014, new defense counsel sought language from Plaintiffs for a potential settlement, which Plaintiff provided, but never received a substantive response from Defendants. *Id*. ¶ 6. After the November 6, 2014, status conference, where defense counsel insisted Plaintiffs' moratorium proposal was too general – even after a pause in the hearing to allow the parties

to discuss revisions – Plaintiffs suggested that if the parties were to find common ground or a basis for a moratorium, Defendants should put their reasoning (and proposed language) in writing. *Id.* ¶ 7; *see also* Dkt. 35. Only after eleven days passed did Defendants' counsel respond, with a letter that refused to suggest counter-language for a moratorium, but rather sought another settlement demand from Plaintiffs. Corn-Revere Decl. ¶ 8 & Ex. B. Plaintiffs complied, sending the outline that had been provided to original defense counsel, along with additional material to facilitate settlement, or at least a standstill. *Id*. ¶ 9 & Ex. C.

Defendants responded by filing a motion to dismiss the next business day. (Dkts. 36-37.) Plaintiffs then filed immediately for a preliminary injunction (along with their Opposition to Defendants' Motion to Dismiss) as Defendants had by then made clear they never intended to enter a standstill agreement. (Dkts. 42-46.)

This Court promptly denied Defendants' Motion to Dismiss (Dkts. 50-51), and continued to explore the possibility of a standstill agreement with the parties. But Defendants interposed delay at each step, dragging the process out before ultimately proposing a "compromise" that would not have protected Plaintiffs' First Amendment rights.[1] It is plainly false that "nothing happened to trigger Plaintiffs' request." Opp. 21. Rather, after diligently seeking a non-litigated understanding and being strung along by Defendants, and pursuing the Court's assistance with

[1] *See* Dkts. 52-58. Judge Finnegan held four conferences over two weeks to see if the parties could agree to a standstill. When Judge Finnegan initially suggested, on January 21, 2015, a standstill agreement premised on Plaintiffs' Proposed Order, defense counsel, apparently not having done so before the conference, claimed to need additional time to confer with their clients. Around close-of-business on January 27 – less than twelve hours before the next status conference – defense counsel proffered modifications to the Proposed Order that vitiated the protections sought by Plaintiffs. Thereafter, following the January 28 status conference, Defendants requested a further redline from Plaintiffs, which counsel provided the next day. Plaintiffs did not receive any response before the final conference on February 2, during which the parties agreed to a briefing schedule.

mediated rather than litigated *pendente lite* relief, Plaintiffs moved for a preliminary injunction once it was clear there was no other option.

Defendants' claim that the elapsed time "calls into question any allegation that speech is being chilled" or of irreparable harm is wrong on the law.[2] As this Court has explained, "[t]he Seventh Circuit [] does not support a general rule that irreparable injury cannot exist if the plaintiff delays in filing its motion for preliminary injunction. In fact, the mere passage of time" does not undercut irreparable injury or the propriety of preliminary injunctive relief, but rather defendant "must have been lulled into a false sense of security or acted in reliance on the plaintiff's delay." *National Council of YMCA v. Human Kinetics Publ'rs, Inc.*, 2006 WL 752950, at *6 (N.D. Ill. Mar. 15, 2006) (internal quotation marks and citations omitted); *Chattanooga Mfg., Inc. v. Nike, Inc.*, 301 F.3d 789, 792-93 (7th Cir. 2002). *See also Fenje v. Feld*, 2002 WL 1160158, at *2 (N.D. Ill. May 29, 2002).

Here, if any party "acted in reliance" to their detriment, it was Plaintiffs, who gave Defendants every opportunity to agree to a reasonable negotiated standstill, rather than having to litigate a preliminary injunction. Nothing about that process undermines that Plaintiffs are suffering irreparable harm and remain at risk of further incursion on the First Amendment rights, a state of affairs that has continued too long, and must be enjoined. *See Ty, Inc. v. Jones Grp., Inc.*, 237 F.3d 891, 903 (7th Cir. 2001) (holding, despite alleged eight-month delay in filing preliminary injunction motion, that "evidence of mere delay alone, without any explanation … why such a delay negatively affected [defendant], [does] not lessen [the] claim of irreparable injury").

[2] Opp. 21. The primary authority Defendants rely upon is an aside in a summary denial of injunctive relief (in an unpublished opinion from outside this District) where irreparable harm was plainly absent. *See id.* (citing *Tarvin v. Bd. of Educ. of E. St. Louis Sch. Dist. No. 189*, 2010 WL 1444862, at *2 (S.D. Ill. Apr. 9, 2010)).

II. THE COURT SHOULD GRANT A PRELIMINARY INJUNCTION BECAUSE PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR RETALIATION CLAIM

A. Defendants Agree That Plaintiffs Engaged in Protected Speech

Defendants grudgingly admit that "some of" Plaintiffs' speech "did occur on matters of public concern," Opp. 11, correctly citing the constitutional test for the right of CSU employees to speak on such issues. They nevertheless also argue that Plaintiffs did not engage in protected speech.[3] Defendants' argument that Plaintiffs did not apply the "*Pickering/Garcetti* test" ignores PI Mem. 4-6, which provides the requisite analysis. If anybody "failed" to do anything, it is Defendants, who overlook this discussion, and in the process do not even address the case law from this Circuit that Plaintiffs cited. *See* PI Mem. 6 (citing *Wainscott v. Henry*, 315 F.3d 844, 849 (7th Cir. 2003); *Meade v. Moraine Valley Cmty. Coll.*, 770 F.3d 680 (7th Cir. 2014)).

Continuing in this vein, Defendants claim "Plaintiffs assert in conclusory fashion [that they were] speaking on matters of public concern." Opp. 10 However, Plaintiffs showed that their speech covered such matters as CSU censorship of the student paper, illegal CSU withholding of public records, cronyism, the enrollment impact of CSU's maladministration, transparency of public administration, and similar matters. PI Mem. 5. Defendants somehow missed not only this discussion, but also specific references in Professor Beverly's Declaration, and its numerous exhibits, that all support Plaintiffs' showing on this point. *See id*. (citing Beverly Decl.).

Defendants accordingly can only complain, at most, that the *CSU Faculty Voice* does not "uniformly" address matters of public concern. Opp. 10. Not only is this incorrect (as shown imminently), it admits that most of Plaintiffs' speech involved matters of public concern. *See*

[3] *Id*. § I.C.1 (for public university employees' speech to be protected, they must speak on matters of public concern and balance must favor their interest in speaking as a citizen over government's interest in efficient and effective performance of public service) (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Garcetti v. Ceballos*, 547 U.S. 410 (2006)).

also id. 11 n.11 (admitting "Plaintiffs' blog likely contains some speech on matters of public concern"). Indeed, the Defendants do not claim – nor could they – that criticism of Watson's administration is not a matter of public concern, as it clearly "relates to a matter of political, social, or other concern [to] the community." *Love v. Chicago Bd. of Educ.*, 5 F.Supp.2d 611, 614 (N.D. Ill. 1998) (citing *Connick v. Myers*, 461 U.S. 138, 146 (1983)). This alone satisfies the first half of the *Pickering* standard.

Defendants also are wrong in claiming matters of hiring, curriculum or course-offerings are not matters of public concern, *see* Opp. 10-11, as they go to the efficacy of this administration's oversight of CSU and the allocation of its resources for improper purposes at the expense of its pedagogical mission. *See, e.g.*, *Love*, 5 F.Supp.2d at 615-17; *Lifton v. Bd. of Educ. of City of Chi.*, 290 F.Supp.2d 940, 943-44 (N.D. Ill. 2003). *Compare* Dkt. 45-1, Beverly Decl., Exs. A-I, N; Dkt. 45-1, Bionaz Decl., Exs. A-C. *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008), discussed by Defendants, Opp. 10-11, is distinguishable, as "Renken complained to … University officials" about a grant that "fell within the teaching and service duties [] he was employed to perform." 541 F.3d at 774. Publishing the *CSU Faculty Voice* to the general public (and otherwise speaking out against CSU administration policies) is not part of either Plaintiff's "duties," or in any way curricular, nor is it directed to "University officials."[4] Rather, as noted in *Colburn*, on which it seems Defendants attempt to rely, *see supra* note 4, "[e]xposing wrongdoing within a public entity" – *i.e.*, the primary focus of Plaintiffs' speech here – "may be a matter of public concern." 973 F.2d at 586. Indeed, "[m]any public employees who speak out about conduct

[4] Defendants also cite *Wernsing v. Thompson*, 423 F.3d 732 (7th Cir. 2005), purportedly regarding "speech about [the] faculty evaluation process … [as] not a matter of public concern," Opp. 11, but none of the parties in that case were school officials or personnel. To the extent Defendants rely on *Colburn v. Trustees of Ind. Univ.*, 973 F.2d 581 (7th Cir. 1992), discussed in *Wernsing*, 423 F.3d at 752-53, there, too, the speech was exclusively within the University and up the "chain of command" to school officials, it involved only the treatment of plaintiffs, and it was thus of primarily personal interest to them.

within their places of employment have some interest in the institution of change," but that "by itself [does] not prevent their speech form being constitutionally protected." *Id*. at 587.

As to *Pickering* balancing, there is no serious effort to show that the Defendants' interests in quelling criticism outweighs Plaintiffs' right to speak as citizens. *See* Opp. 11-12. Defendants cite a "seven-factor test," *id*. 11 (quoting *Gustafson v. Jones*, 290 F.3d 895, 909 (7th Cir. 2002)), but then discuss only one of those points. *Id*. 11-12. And that factor, "harmony among coworkers," is not a *Pickering* shield that government actors in management positions – like university officials – can use to justify retaliating against subordinates who speak on matters of public concern. As the Seventh Circuit has recognized, the question of maintaining discipline or harmony among coworkers arises under *Pickering* where statements are directed towards a person with whom the employee would normally be in contact. *Glass v. Dachel*, 2 F.3d 733, 744 n.8 (7th Cir. 1993). Here, Plaintiffs' speech was directed toward the public at large on matters involving public corruption. *E.g.*, *Meade*, 770 F.3d at 684-85.

Moreover, Defendants offer no evidence that Plaintiffs' speech on the blog fostered disharmony between them and any coworkers (other than the Defendants). In similar circumstances, this Court was "not persuaded that the disagreement, or even outrage, of such a relative few would ever outweigh a fellow faculty member's right to speak out on matters of public concern" *Thompson v. Bd. of Educ. of City of Chi.*, 711 F.Supp. 394, 404 (N.D. Ill. 1989). Beyond that – regardless where that factor may settle – there is no effort to show ***any*** of the other six factors tilt in Defendants' favor. *But see* Opp. 12 (bare statement that "[a]nalysis of other steps reveals other defects and issues"). Conversely, not only does the "time, place and manner" of Plaintiffs' speech tilt the balance in their favor, *see id*. 11 (quoting *Gustafson*), it is clear that several other factors favor Plaintiffs as well. These include whether "personal loyalty" is an

element of Plaintiffs' jobs, whether their speech affected their performance, and whether discussion of the efficacy of CSU's present administration is vital to informed decision-making. *Id*. All told, Plaintiffs easily satisfy the *Pickering/Garcetti* test for whether they have engaged in protected speech, and wish to continue doing so.

B. Plaintiffs Have Been Deterred in Their Speech

Plaintiffs have been deterred in speaking, as persons of ordinary firmness would be, and the fact that they have not been wholly silenced does not change that fact. The policies at issue here by their very terms limit expression (and do not merely "protect[] [CSU] technology assets," as Defendants assert). Moreover, the penalties already imposed on Plaintiffs exceed the Seventh Circuit's minimal, objective standard in speech retaliation cases.[5]

First, the wide-ranging application of the policies is apparent on their face. As the Court acknowledged in denying the motion to dismiss, "the allegation that the blog is hosted on a non-CSU server does not negate … that the defendants were threatening the plaintiffs based on the Computer Usage and Cyberbullying Policies." *Beverly v. Watson*, __ F.Supp.3d __, 2015 WL 170409, at *4 (N.D. Ill. Jan. 13, 2015). Consequently, it is entirely reasonable for Plaintiffs to assert that the policies would likely deter free expression on the *CSU Faculty Voice* blog, or any other medium subject to the policies. Furthermore, the policies on their face prohibit any protected expression that may "embarrass" or "humiliate," or which some may consider "lewd," "harassing," or "hostile" and, in this manner, have nothing to do with "protecting technology." Such vague prohibitions would "likely deter a person of ordinary firmness from continuing to engage in protected activity." *Surita*, 665 F.3d at 878.

[5] PI Mem. 7-8 (citing *Surita v. Hyde*, 665 F.3d 860, 878 (7th Cir. 2011); *Bridges v. Gilbert*, 557 F.3d 541, 555 (7th Cir. 2009); *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982); *Pieczynski v. Duffy*, 875 F.2d 1331, 1333 (7th Cir. 1989)).

Plaintiffs contend that the penalties already imposed on their speech critical of the CSU administration, as well as threats of future sanctions, further support a finding that Defendants' retaliatory actions have had a chilling effect. *See* PI Mem. 6-8. In particular, Defendants "demanded" that Plaintiffs "immediately disable" the *CSU Faculty Voice* for allegedly violating civility standards, which are set forth in the Computer Usage Policy. Defendants also subjected Professor Bionaz to an enforcement action under the Cyberbullying Policy following an in-person conversation with another CSU employee. Bionaz Decl. ¶¶ 18-19; PI Mem. 3. The Declaration of Renee Mitchell ("Mitchell Decl."), which Defendants cite to support their assertion that "the policies have never been enforced against the Plaintiffs," Opp. 5, 12 & Ex. A, does not dispute either of these acts. In fact, Mitchell only avers that the Computer Usage Policy "has never been enforced" against Plaintiffs, and does not address the Cyberbullying Policy at all.[6]

Defendants' claim that the policies have nothing to do with the targeted speech, *see* Opp. 13, ignores the facts. Both Plaintiffs were threatened with sanctions or investigated for speech under the cited policies, which only ***reinforces*** the chilling impact on them. Plaintiffs attested not only to being more reticent to post articles to their blog and to avoiding leveling criticism that they previously would have posted without hesitation, Bionaz Decl. ¶ 23, but also that other faculty members have avoided being associated with speech critical of the administration. Beverly Decl. ¶ 23. Moreover, the argument ignores the settled law of this Circuit that the First

[6] Mitchell Decl. ¶ 5. Defendants' other declarant, Prashant Shinde, similarly discusses only the Computer Usage Policy, averring that it would not "apply to *CSU Faculty Voice* blog activities that have no connection to CSU technology assets." Opp. Ex. B, ¶ 4. Shinde's statement on the policy's applicability to the *CSU Faculty Voice* notwithstanding, Plaintiffs provide herewith testimony that CSU officials, including Watson and Carter, adopted the policy with the express objective that it be used to shut down the blog and discipline Plaintiffs. Peebles Decl. ¶¶ 13-14. Peebles' account further confirms the falsity of Defendants' wholly unsupported claim in their motion to dismiss that CSU adopted the Cyberbullying Policy because Illinois law required it. Dkt. 36, Mot. to Dismiss 2-3 (citing 105 ILCS 5/27-23.7 (2010) (imposing duty to adopt "bullying prevention" rules only on elementary and secondary schools)). *See also* Dkt. 41, Opp. to Mot. to Dismiss 4.

Amendment prohibits ***both*** retaliation and threats of future enforcement. *Surita*, 665 F.3d at 877; *Fairley v. Andrews*, 578 F.3d 518, 525 (7th Cir. 2009).

C. Defendants Campaign of Retaliation Against Plaintiffs' Speech is Targeted, Malicious, and Persistent

Contrary to Defendants' claims, Opp. § I.C.3, no unjaundiced reader of the Beverly and Bionaz Declarations could doubt whether Plaintiffs were targeted for their speech criticizing CSU. And if there had been any room for doubt, the Peebles Declaration now removes any that may have remained.[7] Watson and the other named Defendants engaged in a sustained course of conduct for the express purpose of suppressing the *CSU Faculty Voice* and punishing Plaintiffs for criticizing the administration. Unfortunately, Plaintiffs are far from unique when it comes to incurring Watson's wrath. The retaliatory campaign against Professors Beverly and Bionaz is just part of a sad and ugly pattern at CSU.[8]

The *Peebles* complaint and declaration confirm that Watson, his co-Defendants, and other CSU officials acted to sanction Plaintiffs in retaliation for their speech. Peebles Decl. ¶¶ 6-16 & Ex. 1, Peebles Compl. ¶¶ 37-46. Peebles states that Defendants' letters targeting the *CSU Faculty Voice*, the apparent application therein of the Computer Usage Policy, adoption of the Cyberbullying Policy, and punishment of Beverly all were part of a sustained campaign of

[7] The complaint in *Peebles v. Chi. State Univ.*, No. 2015L001706 (Cook Cty. Cir. Ct. filed Feb. 18, 2015) revealed a number of facts that are directly relevant to this case and are the subject of the Peebles Declaration. The allegations in that complaint, as further substantiated in the declaration, reveal additional individuals who participated in retaliating against the Plaintiffs. As a consequence, Plaintiffs will seek leave of the Court to file an amended complaint pursuant to Fed. R. Civ. P. 15(a)(2).

[8] *See Preston v. Bd. of Trustees of Chi. State Univ.*, 2015 WL 327369, at *1, *6-*7 (N.D. Ill. Jan. 26, 2015) (Gottschall, J.) (recounting plaintiffs' allegations that CSU officials retaliated by invalidating student government elections and orchestrating unsubstantiated claims that eventually resulted in Preston's expulsion, and in a criminal prosecution in which he was found not guilty); *Crowley v. Chicago State Univ.*, No. 10 L 12657 (Cook Cty. Cir. Ct. Aug. 28, 2014) (affirming judgment and damage award of former CSU legal counsel James Crowley against Watson and CSU for retaliatory discharge); Jodi S. Cohen, *Chicago State loses its appeal of jury's $3 million verdict*, Chi. Trib., Aug. 29, 2014, at 6.

retaliation for Plaintiffs' speech. *Id*. She explains that Watson was enraged by the blog's criticism of his administration, and reminded his staff that he was in a "fight" against the *CSU Faculty Voice* and its contributors. Peebles Decl. ¶ 7.

There is much more than "suspicious timing" behind Plaintiffs' claims based on CSU's bogus trademark claims lodged against their blog. Opp. 14, 17 & n.23. Specifically, Peebles attended a meeting in November 2013 with Watson, Cage, Henderson and other CSU officials to draft the cease-and-desist letter to be sent to Professor Beverly, Peebles Decl. ¶ 11, at which Watson insisted on asserting intellectual property claims even if they did not "stick." *Id*. ¶ 12. The same is true of CSU's Computer Use and Cyberbullying policies. Defendant Watson suggested relying on the "civility standard" set forth in the CSU Computer Use Policy to restrict the blog. *Id*. ¶ 12. Peebles also confirms that the Cyberbullying Policy was conceived in September or October 2013 by Watson, Cage, Henderson and other CSU officials ***specifically to discipline Beverly*** and to shut down the *CSU Faculty Voice*. *Id.* ¶¶ 13-16. *Compare* Opp. 15 ("Plaintiffs have no evidence to show they were the target of these policies' passage.").

But the story gets even darker. Watson and others sought to induce Peebles to file false sexual harassment charges against Professor Beverly, which she adamantly declined to do. Watson had instructed Peebles to report any interactions with Beverly, and, when she did so, Watson asserted – without basis and over Peebles' objection – that Beverly somehow had threatened her. *Id*. ¶¶ 17-19. Months later, Peebles was subjected to considerable pressure from Watson and other CSU officials to file a false sexual harassment suit against Beverly based on that meeting. *Id*. ¶¶ 24-36. Peebles' repeatedly denied being sexually harassed, and steadfastly refused to provide false testimony against Professor Beverly. *Id*. The efforts to manufacture false charges against Beverly culminated at a February 2014 meeting at Watson's residence, where CSU

officials and friends of Watson discussed options to shut down the *CSU Faculty Voice* and get rid of Beverly. *Id*. ¶¶ 27-35. When Peebles again refused to file sexual harassment charges, she was accused of not being a "team player," and left the discussion in distress. *Id*. ¶ 35.

Defendants' claim it is "inconceivable" that the content of Plaintiffs' speech triggered a retaliatory response, Opp. 15-16, but this only shows that the word "inconceivable" does not mean what they think it means. *See Adkins v. E.I. Du Pont Nemours & Co.*, 1995 WL 704779, at *7 & n.5 (D. Del. Nov. 21, 1995) (citing *The Princess Bride* (Twentieth Century Fox, 1987)). The Cyberbullying Policy was conceived to shut down Plaintiffs' blog and provide a vehicle to discipline them. Peebles Decl. ¶ 13. The combined weight of Plaintiffs' prior showing and the additional evidence here provides all the support needed to overcome any argument about a lack of "causal links," Opp. 14, and plainly constitutes "more than speculation or conjecture to assert that any 'protected speech' was a motivating factor for … Defendants." Opp. 20.

The same is true of any attempt by "Defendants to show that Plaintiffs' speech was not a but-for cause of [Defendants'] action," a burden Defendants admit that they bear. *Id*. 14. *See also id*. 15. Nor can there be any further protest about "missing … evidence." *Id*. ("the *only* 'evidence Plaintiffs offer … is alleged temporal proximity"). While the Seventh Circuit has observed that "it is rare for a plaintiff to have smoking gun evidence," PI Mem. 8-9 (quoting *Valentino v. Village of S. Chi. Heights*, 575 F.3d 664, 672-74 (7th Cir. 2009)), it is hard to imagine a more fitting metaphor for Ms. Peebles' complaint and declaration here.

D. Plaintiffs Are Likely to Prevail on the Facial Challenges to CSU's Computer Usage and Cyberbullying Policies

Plaintiffs are likely to prevail on their facial challenges to the Computer Usage and Cyberbullying policies, although such a showing is unnecessary to secure the preliminary injunction Plaintiffs seek. The Opposition defends the policies primarily under forum analyses,

but that is flawed for various reasons. First, it presupposes the policies cannot be applied to the *CSU Faculty Voice* and/or to electronic – or other – communications not transmitted by "CSU's technology assets and services." Opp. 4-6, 12. But as this Court has held, there is nothing on the face of the policies that limits them in this regard,[9] and each policy has been applied beyond this limit.[10] And Defendants' admission that the Cyberbullying Policy has "restrictions that go beyond CSU-owned resources," Opp. 8, undercuts their arguments based on the policies being limited to governing a non-public forum.

Defendants also rely on these misplaced assumptions about the nature of the fora that the policies regulate to claim "plenary authority" to regulate, as if this somehow insulates them from the constitutional bar against vague or overly broad speech restrictions. Opp. 4-5, 8. But vagueness and overbreadth are prohibited even in nonpublic forums, *e.g.*, *Bynum v. U.S. Capitol Police Bd.*, 93 F.Supp.2d 50, 56-60 (D.D.C. 2000); *Lewis v. Wilson*, 89 F.Supp.2d 1082 (E.D. Mo. 2000), *aff'd in relevant part*, 253 F.3d 1077 (8th Cir. 2001), and an overbreadth challenge against an entirely unreasonable restraint will succeed regardless how a forum is classified. *See Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 574-75 (1987).

In this connection, Defendants do not even attempt to explain how requiring "civility" and "respecting the rights of others," or generically banning speech that is claimed to "harass,"

[9] *Beverly*, 2015 WL 170409, at *3-4 (N.D. Ill. Jan. 13, 2015). This lack of limiting principle is one significant way (though far from the only one) in which the policies are vague and overbroad. *See also infra* 14-16.

[10] *See Beverly*, 2015 WL 170409, at *3 ("It is eminently reasonable to read the … demand to shut down the *CSU Faculty Voice* [as] based on [] alleged failure to meet CSU on-line civility standards … memorialized in CSU's Computer Usage Policy" and the "same goes for the Cyberbullying Policy"); Opp. Ex. F (CSU letter citing civility and professionalism standards); *infra* 14-15 (discussing enforcement action against Professor Bionaz under Cyberbullying Policy for offline, in-person statements).

"humiliate," or "embarrass," avoids being vague and overbroad.[11] Rather, they claim Plaintiffs have not sufficiently targeted these terms, *e.g.*, Opp. 6-7, 9, but at the same time complain that "cases cited by Plaintiffs" on this very point "all involve general restrictions on … speech" rather than (presumably) speech that the Computer Usage and Cyberbullying policies restrict. Opp. 5. This line of attack at once acknowledges Plaintiffs' showing and completely misses the point. *See* PI Mem. 11-13 & n.2 (citing cases). *See also New Jersey v. Pomianek*, __ A.3d __, 2015 WL 1182529, at *11-*13 (N.J. Mar. 17, 2015) (invalidating harassment-related statute, in part as an "amorphous code of civility").

The fact that cases holding concepts like "civility," "harassment," "embarrassment," etc., to be vague involved policies dealing primarily (or solely) with speech, *id*., makes them no less applicable to the use of those vague concepts in the policies challenged here. A vague term is a vague term, regardless whether it governs a policy that regulates solely speech or it controls a speech-restricting provision in a policy that covers other matters. The same is true of over-breadth. *Cf.* Opp. 4 ("overbreadth and vagueness are two sides of the same coin") (internal quotation marks omitted). Where such vague and overbroad terms are used to restrict speech, the operative parts of a regulation that rely on them are invalid, regardless of whatever else (if anything) might be salvaged from adjoining provisions that may regulate other matters.

Otherwise, the challenged policies – which are vague and overbroad because, *e.g.*, it cannot be discerned ***where*** they apply, or ***what speech*** they restrict – afford CSU officials unfettered discretion to punish speech in violation of the First Amendment.[12] Indeed, Defendants amply

[11] It is basic law that Defendants bear the burden of proving the constitutionality of their policies. *E.g., United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000).

[12] *See, e.g., City of Houston v. Hill*, 482 U.S. 451, 465-67 (1987); *Bell v. Keating*, 697 F.3d 445, 454, 462-63 (7th Cir. 2012); *cf. Bynum*, 93 F.Supp.2d at 58; *Lewis*, 253 F.3d at 1080-81.

demonstrated as much in subjecting Professor Bionaz to enforcement under the Cyberbullying Policy. *See* PI Mem. 3, 8. Defendants attempt to play this down by offering "CSU's ultimate conclusion that Bionaz did not violate the Cyberbullying Policy," Opp. 16, but this just illustrates the point. Even if the matter was resolved without penalty, *id*., there should have been no investigation ***in the first instance***, given the Cyberbullying Policy's asserted inapplicability to the offline conduct at issue.[13]

Defendants argue that the ultimate conclusion of that particular investigation removes any "threat," Opp. 16, but quite the opposite is true. Defendant Carter specifically threatened Professor Bionaz with future enforcement, and nothing in the policy precludes such an arbitrary application.[14] *See, e.g.*, *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 133 n.10 (1992) ("[S]uccess of a facial challenge on the grounds that an ordinance delegates overly broad discretion … rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so.").

This is exactly the kind of vagueness that renders the Cyberbullying Policy (and Computer Usage Policy) facially unconstitutional, and is why Defendants must be preliminarily enjoined from any enforcement action that punishes Plaintiffs' protected speech. *E.g.*, *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 634 (1980). *Cf. Bell*, 697 F.3d at 454 ("[P]ast experience … lends credibility … that the City will enforce … against individuals en-

[13] Opp. 7-8. Interestingly, however, while Defendants offer declarations in an effort to disclaim potential applicability of Computer Usage Policy to the *CSU Faculty Voice* or other communications that do not use CSU's property, *id*. Exs. A-B, no such declaration is offered with respect to the asserted limits of the Cyberbullying Policy which, as shown above, was adopted as a direct reaction to Plaintiffs' speech. *See supra* 11.

[14] As Defendants admit, Professor Bionaz was advised that "if your behavior continues you could be [] responsible for violating the Policy and subjected to disciplinary action." Opp. 16-17 & Ex. K. As the only "behavior" at issue was in-person communication, this warning can be viewed only as meaning that enforcement against offline such speech under the Policy is possible.

gaged in protected speech activities when certain triggering events occur."). *See also id.* at 455 ("the fact that the ordinance applies only if triggered does not attenuate [the] likelihood of prosecution … or subvert the concreteness of [the] chilling injury" but rather "putative vagueness surrounding those triggering events *compounds* [the] chilling claim") (citation omitted, emphasis original).

III. THE SCOPE OF PRELIMINARY INJUNCTION IS PROPER

A. Defendants Exaggerate the Scope of Relief Plaintiffs Seek

Defendants argue that Plaintiffs must "meet their burden for Counts I and II" to show a likelihood of succeeding on those facial challenges as well, in order to obtain the requested preliminary injunction. Opp. 3. That is incorrect. Plaintiffs seek only a standstill to prevent interference with the *CSU Faculty Voice* and/or punishment for its publication, or for other criticism of CSU as this case is pending. Such relief would include – but not be limited to – application of the Computer Usage and/or Cyberbullying Policies. *See* PI Mot. *passim*; PI Mem. 9-13, 15. Plaintiffs do not seek suspension of all policies, as is clear both from their showing on the balance of harms (a preliminary injunction element that Defendants do not address), *see* PI Mem. § II.C, and from the Proposed Order. The preliminary injunction motion does not "seek a facial injunction, regulating enforcement … against anyone for any reason" as Defendants assert.[15]

A preliminary injunction is not a decision on the merits, but rather requires showing enough substantive merit to warrant freezing matters to ensure protection for the movant, which is all Plaintiffs presently seek in the form of focused *pendente lite* relief. *See supra* 1 (quoting *Ayers*, 125 F.3d at 1013). Plaintiffs thus need to show likelihood of succeeding on the merits on

[15] Opp. 22 (emphasis omitted). Indeed, Plaintiffs' Proposed Order leaves Defendants free to enforce even policies that may affect speech, provided Defendants stay within constitutional limits. *See* Proposed Order at 1 (citing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999)).

only so much of their Complaint as is necessary to justify the scope of preliminary injunctive relief sought, and not on each and every count. *See, e.g., Ty, Inc.*, 98 F.Supp.2d at 1002 ("In light of the fact that the court finds in favor of Plaintiff [in granting a preliminary injunction] on its trademark infringement claim, it is not necessary to reach a conclusion [] whether a preliminary injunction should be granted on Plaintiff's trademark dilution claim."); *YMCA*, 2006 WL 752950, at *3 n.2 (same). As Defendants admit, likelihood of succeeding on such a claim – here, that Defendants unconstitutionally targeted Plaintiffs' speech, and can still do so – "collapses" into entitlement to a preliminary injunction. Opp. 2, 21. Plaintiffs easily clear that bar by showing Defendants targeted protected speech and violated the First Amendment.

B. The Requested Relief is Appropriately Tailored

Defendants complain that the requested preliminary injunction as stated in the Proposed Order is "fundamentally flawed," Opp. 22, even though the relief sought is commensurate with both Defendants' prior efforts to silence Plaintiffs, and the speech-targeting weapons that are at their disposal if not enjoined. Plaintiffs have now shown that Defendants, ***at a minimum***:

- Have a history of suppressing dissent and other speech;
- Targeted the *CSU Faculty Voice* blog with trumped-up trademark claims;
- Cited the *CSU Faculty Voice* for failing to adhere to "civility" standards that echoed the language of CSU's Computer Usage Policy;
- Considered requesting the host of the *Voice* to have the site taken down;
- Adopted the Cyberbullying Policy in reaction to Plaintiffs' speech;
- Suspended Professor Beverly for participation in the *Repression* forum;
- Subjected Professor Bionaz to an enforcement proceeding under the Cyberbullying Policy based on offline speech; and
- Sought to elicit false sexual harassment claims against Professor Beverly.

Pl. Mem. § II A; *supra* § II.C. Given this, it is somewhat disingenuous for Defendants to object that "Plaintiffs request relief as to all CSU policies even though only two have been mentioned in this lawsuit." Opp. 22. But in any event, even this overstates the scope of injunction sought.

Plaintiffs seek only to ensure they can engage in their protected speech without suffering punishment or retaliation in violation of the First Amendment. The Proposed Order seeks to ensure no further interference by Defendants with the *CSU Faculty Voice*, and to preclude sanctions for criticisms stated there or through other modes of communication. It also seeks to bar application of CSU policies, including those governing Computer Usage and Cyberbullying, against constitutionally protected acts or expression, and even then, preserves authority to protect against speech that falls within the *Davis* standard. There is nothing "vague" about these eminently reasonable restrictions, Opp. 22, especially given all that has transpired.

CONCLUSION

For the foregoing reasons, and those stated in their Motion and Memorandum in Support of it, this Court should preliminarily enjoin the Defendants from taking any retaliatory actions against the Plaintiffs for publication of the *CSU Faculty Voice*, and from enforcing the speech restrictions in the Computer Usage Policy and the Cyberbullying Policy.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Reply to Response in Opposition to Motion for Preliminary Injunction was served upon all counsel of record on this 19th day of March 2015 via use of the Court's ECF system.

/s/ Robert Corn-Revere
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