

**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' MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

BACKGROUND

This is a textbook case of retaliation by a university administration trying to silence speech of undoubted public interest and importance by professors at the school. Since 2009, Plaintiffs Phillip Beverly and Robert Bionaz have published online the independent blog *CSU Faculty Voice* as a forum to expose administrative malfeasance to the CSU community. Declaration of Robert Bionaz ("Bionaz Decl.") ¶2; Declaration of Phillip Beverly ("Beverly Decl.") ¶2. In the past calendar year alone, the blog has uncovered numerous scandals, including: lying by top-level CSU administrators on their job applications and resumes; crony hiring and promotional practices to reward friends and associates of Defendant Watson; dissertation plagiarism by the current Provost; questionable budget practices; and fundraising and public relations failures. Bionaz Decl. ¶¶2, 9-11 & Exs. A-C; Beverly Decl. ¶¶7-8, 14 & Exs. C-I, N. Contributors to the *CSU Faculty Voice*, including Plaintiffs, base their reporting on public documents obtained via the Illinois Freedom of Information Act. Bionaz Decl. ¶3; Beverly Decl. ¶5. The practices brought to light in the *CSU Faculty Voice* have received

widespread media attention, including front page coverage by the *Chicago Tribune*. Beverly Decl. ¶14 & Ex. M.

In response, Defendants Watson, Cage, and Carter have taken an escalating series of actions to suppress the *CSU Faculty Voice* and to punish the Plaintiffs. In January 2012, the University adopted a Computer Use Policy that applies to electronic communications “including websites and blog posts” and that prohibits “any communication [that] tends to embarrass or humiliate any member of the community.” Compl. Ex. B. After a series of articles criticizing various aspects of CSU’s administration, Defendants Watson and Cage admonished Professor Beverly on November 6, 2013 for violating the school’s “civility” standards. Beverly Decl. ¶8. Less than a week later, Defendant Cage sent a letter to Professor Beverly ordering him to “disable” the blog by November 15, 2013, alleging that the *CSU Faculty Voice* “lack[ed] civility and professionalism” in violation of CSU policies, and because it assertedly violated CSU trademarks.¹ This was followed by a January 3, 2014 letter from outside counsel, retained by CSU, demanding changes to the blog based on supposed trademark concerns. *Id.* ¶12 & Ex. L.

When Plaintiffs refused to take down the *CSU Faculty Voice*, Defendants sought new ways to silence the blog. Defendants admit that “in or around late January or early February 2014, some CSU administrators, including Dr. Watson and Cage, discussed the university’s options and rights regarding the *CSU Faculty Voice*[.]” Answer, Dkt. 20 (“Answer”) ¶34. Defendants further admit that “an attendee at the discussion may have raised the possibility of contacting Google, Inc.,” which owns the host for the *CSU Faculty Voice*, to request take-down of the site. *Id.* ¶35; Beverly Decl. ¶15.

¹ Beverly Decl. ¶11 & Ex. J. At the time Defendant Cage claimed trademark infringement, the university held no registered trademarks. *Id.* ¶12; Bionaz Decl. ¶13. As discussed below, Defendants’ trademark claims were transparently frivolous. *See infra* 10-11.

When Defendants' trademark infringement threats failed to suppress the *CSU Faculty Voice*, the administration adopted a "Cyberbullying Policy." Answer ¶42; Bionaz Decl. ¶16; Beverly Decl. ¶21. The new policy prohibits "deliberate or repeated conduct" including "the use of information and communication technologies to support a deliberate, repeated, and hostile course of conduct that is intended to harm others" through "internet blog postings, social media site postings, internet chat room postings, and/or other internet postings." It extends to "[o]ff-campus expressive conduct (verbal, physical, aural, graphic, symbolic, or written) including, without limitation, cyberbullying and electronic speech, that is intended by the recipient to reach the CSU campus and does, in fact, reach the CSU campus."

Defendants applied the Cyberbullying Policy to Plaintiff Bionaz following a face-to-face conversation he had with CSU Interim Public Relations Director Thomas Wogan in the school's library on May 14, 2014, five days after the policy was adopted. Bionaz Decl. ¶¶18-19. Plaintiff Bionaz had criticized Wogan for a comment Wogan made at a Board of Trustees meeting, *id.* ¶19, and on May 20, 2014, Wogan filed a "harassment" complaint against Plaintiff Bionaz under the "Cyberbullying Policy" based on this minute-long conversation.

Defendant Carter investigated Wogan's complaint even though she was informed that there had been no "electronic communication," a seeming prerequisite for application of the new policy. On September 29, 2014, Defendant Carter informed Bionaz by letter that "it cannot be determined that you harassed Mr. Wogan in violation of the Policy," but she nevertheless warned Bionaz that "if your behavior continues, ***you could be found responsible for violating the Policy*** and subjected to disciplinary action." *Id.* ¶21 & Ex. D (emphasis added).

Defendants' retaliatory actions have extended to other on-campus activities by the Plaintiffs that are critical of the CSU administration. On April 9, 2014, faculty and students,

including Plaintiff Beverly, conducted a “Repression at CSU” event to highlight free speech abuses on campus. Beverly Decl. ¶16. Defendants denied the group use of a room they had reserved for the event, and posted police to prevent access. *Id.* The event was eventually held in the classroom of a sympathetic, retired faculty member.

Professor Beverly invited his Public Management students to attend the event to provide them with firsthand exposure to the need for open meetings and transparency. *Id.* ¶18. Following the event, CSU officials informed Professor Beverly that he faced a disciplinary review for such “infractions” as holding his class in “an unauthorized location” and because two students complained that they had been criticized by program speakers (other than Professor Beverly) at the event. *Id.* ¶19; Answer ¶38. The Cyberbullying Policy was among the policies raised with Professor Beverly as the basis for sanctions. Beverly Decl. ¶19. On July 1, 2014, Beverly was informed he would be denied two days’ pay for violating Board of Trustees policies. *Id.* ¶20 & Ex. P.

Notwithstanding the filing of the instant suit on July 1, 2014, Defendants have continued to attack free speech on the CSU campus and subject Plaintiffs to retaliatory investigations. Bionaz Decl. ¶¶21-22; Beverly Decl. ¶22. Moreover, this Fall, the Board of Trustees unilaterally dissolved the Faculty Senate, without notice, and outside of the Board’s open meetings. Beverly Decl. ¶22.

ARGUMENT

I. DEFENDANTS’ EFFORTS TO SILENCE THE CSU FACULTY VOICE VIOLATE THE FIRST AMENDMENT

This case presents classic First Amendment questions that arise under the doctrine governing the right of university employees to speak on matters of public concern, as set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968), and its progeny. Public employers like

CSU “may not respond to their employees’ protected activity with actions aimed to deter that activity.” *Massey v. Johnson*, 457 F.3d 711, 716 (7th Cir. 2006). To make out a *prima facie* case of First Amendment retaliation, the employee must show that (1) his speech is constitutionally protected, (2) he has suffered a deprivation likely to deter free speech, and (3) his speech was at least a motivating factor in the adverse action. *Id.* These elements are easily met in this case.

A. Plaintiffs Are Engaged in Constitutionally-Protected Speech

The *CSU Faculty Voice* launched in part because of unsuccessful efforts by the University to censor the student newspaper for publishing articles critical of the administration and illegal efforts by CSU to improperly withhold public records under the Illinois Freedom of Information Act. Compl. ¶17; Beverly Decl. ¶2 & Exs. A-B. *See Moore v. Watson*, 838 F. Supp. 2d 735 (N.D. Ill. 2012) (retaliatory termination of CSU student newspaper faculty advisor violated First Amendment). The blog has since addressed many significant matters of public administration such as faculty qualifications and cronyism, maladministration of the university and its effect on enrollment, patronage and hiring practices, the need for transparency in public administration, the unconstitutional computer use policy, and relations with the Faculty Senate, among others. Beverly Decl. ¶¶7-8, 14 & Exs. C-I, N.

There is no question but that such activities are constitutionally protected. For nearly fifty years, the law has been clear that public school and university employees have a First Amendment right to comment on matters of public administration that involve how their schools are run. *Pickering*, 391 U.S. at 572. The Court “unequivocally rejected” the idea that state-employed educators lose the right “to comment on matters of public interest in connection with the operation of the public schools in which they work,” citing “numerous prior decisions” affirming their First Amendment rights. *Id.* at 568.

In particular, public employees have a right to speak out on “corruption in a public program and misuse of state funds” which “obviously involve[] matter[s] of significant public concern.” *Lane v. Franks*, 134 S. Ct. 2369, 2380 (2014). The First Amendment interest in exposing and criticizing government waste is thus well-established, *Valentino v. Vill. of S. Chi. Heights*, 575 F.3d 664, 672-73 (7th Cir. 2009), and “[a]n employee’s ability to highlight the misuse of public funds or breaches of public trust is a critical weapon in the fight against government corruption and inefficiency.” *Wainscott v. Henry*, 315 F.3d 844, 849 (7th Cir. 2003). Of particular relevance here, the Seventh Circuit recently confirmed that a public college violates the First Amendment when it retaliates against a faculty member for publicly criticizing the school’s administration. *Meade v. Moraine Valley Cmty. Coll.*, 770 F.3d 680 (7th Cir. 2014).

B. Efforts to Silence the CSU Faculty Voice Constitute Unconstitutional Retaliation

1. Defendants’ Retaliatory Actions Are Likely to Deter Free Expression

The Defendants’ various formal and informal actions to silence the *CSU Faculty Voice* and to punish Professors Beverly and Bionaz for their speech represent a clear case of retaliation, while the ongoing threat of future enforcement under vague and overly broad policies has a chilling effect. The Seventh Circuit has made clear that “[r]etaliation claims and chilling claims are related in that the Constitution protects citizens from penalties that follow protected speech (retaliation) **and** threats of penalties for future protected speech (chilling).” *Surita v. Hyde*, 665 F.3d 860, 877 (7th Cir. 2011) (emphasis added). *See also Fairley v. Andrews*, 578 F.3d 518, 525 (7th Cir. 2009). In this case, Defendants have committed both offenses.

Defendants’ argument that this is nothing more than a pre-enforcement challenge combined with their assertion that there is no constitutional harm because Plaintiffs’ blog “is still operating,” *see* Mot. to Dismiss 5 (Dkt. 36), misstates both the facts and the law. Under the applicable legal standard, the Defendants need not have achieved their ultimate objective of

silencing their critics in order to be liable for a constitutional violation because retaliation for the exercise of free expression “is particularly proscribed by the First Amendment.” *Cate v. Oldham*, 707 F.2d 1176, 1189 (11th Cir. 1983). Additionally, “[t]hreatening penalties for future speech goes by the name of ‘prior restraint,’ and a prior restraint is the quintessential first-amendment violation.” *Fairley*, 578 F.3d at 525.

The Seventh Circuit applies an objective test to determine constitutional injury: “whether the alleged conduct by the defendants would likely deter a person of ordinary firmness from continuing to engage in protected activity.” *Surita*, 665 F.3d at 878. *See Bridges v. Gilbert*, 557 F.3d 541, 555 (7th Cir. 2009). “[S]ince there is no justification for harassing people for exercising their constitutional rights, [the effect on freedom of speech] need not be great in order to be actionable.” *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982). *See Pieczynski v. Duffy*, 875 F.2d 1331, 1333 (7th Cir. 1989).

In this case, the penalties already imposed on Plaintiffs’ speech critical of the CSU administration, as well as threats of future sanctions, exceed this minimum threshold. Defendants have “demand[ed] that [the Plaintiffs] immediately disable Chicago State University Faculty Voice Blog” for allegedly violating “standards of conduct required of faculty members,” and for assertedly violating “CSU trade name and trademark rights.” Compl. ¶¶23-25, 29-31 & Exs. A, D. They have threatened litigation if the Plaintiffs fail to comply, and admittedly met at President Watson’s official residence to look for additional ways to suppress the *CSU Faculty Voice*. Compl. ¶¶23-25; Answer ¶¶34-35. The Defendants attempted to deny access to a room for a meeting on “Repression at CSU,” and after the meeting took place despite efforts to block it, Defendant Watson took administrative action against Professor Beverly, imposing a two-day suspension on August 18-19, 2014. Beverly Decl. ¶¶16-20 & Ex. P.

After adopting its vague and overly broad Cyberbullying Policy in May, 2014, CSU attempted to apply it to Professor Bionaz for comments critical of the administration made in a brief face-to-face encounter and warned him that, “if his behavior continues, he could be found responsible for violating the policy and subjected to disciplinary action.” Bionaz Decl. ¶¶18-22. CSU officials also cited the Cyberbullying Policy in a meeting with Professor Beverly before he received his two-day suspension. Beverly Decl. ¶19.

This is far more than a mere “campaign of petty harassments” which alone would be sufficient to satisfy this element of the test. *Bart*, 677 F.2d at 625. Threatening sanctions (and in at least one instance, actually imposing sanctions), selectively applying work rules, and adopting policies designed to deter speech are precisely the types of action that would deter a person of ordinary firmness from exercising their rights. *E.g.*, *Fairley*, 578 F.3d at 525; *Wallace v. Benware*, 67 F.3d 655, 662-64 (7th Cir. 1995). In the academic context, threats of discipline and manipulating a professor’s relationship with his students have been considered a “judicially cognizable chilling effect” on First Amendment rights. *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992). *See also Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968, 971-72 (9th Cir. 1996); *Silva v. Univ. of N.H.*, 888 F. Supp. 293, 313-14 (D.N.H. 1994).

2. Defendants’ Adverse Actions Targeted Protected Speech

Defendants have been quite forthcoming about their desire to suppress, limit, or penalize Professors Beverly and Bionaz for their speech. *See supra* 2-3. Such evidence is more than sufficient to establish injury and causation in a First Amendment retaliation case. A plaintiff need only show that his speech was “a motivating factor” in the defendant’s conduct, *Surita*, 665 F.3d at 874, which may be demonstrated even with circumstantial evidence. *Valentino*, 575 F.3d at 672. The Seventh Circuit has noted it is “rare for a plaintiff to have smoking gun evidence

that a defendant knew of her protected speech or for a defendant to admit such knowledge,” and has looked to such factors as the suspicious timing of retaliatory actions, remarks made by defendants, or explanations for adverse actions that are either “too fishy” or “too convenient.” *Id.* at 672-74. While courts must be alert to the possibility that “a defendant’s stated reason for terminating [or punishing] a plaintiff was a mere front for an ulterior, unlawful motive” or the “articulated reason for [defendant’s] action was not worthy of credence and was thus pretextual,” in this case, Defendants have made clear from the beginning they were bothered by Plaintiffs’ speech, and that they took various actions because of it. *Valentino*, 575 F.3d at 673. *See also Levin*, 966 F.2d at 88; *Felarca v. Birgeneau*, 2014 WL 206762, at *8 (N.D. Cal. Jan. 17, 2014).

Once a censorial motivation is shown, the burden shifts to the Defendants to prove that the plaintiff’s speech ***did not*** trigger any adverse actions to restrict it. *Surita*, 665 F.3d at 874. They must prove a “lack of but-for causation once the plaintiff has shown that retaliation was at least a motivating factor.” *Massey*, 457 F.3d at 717 n.2. This will be difficult, as Defendants here have acknowledged taking steps to restrict speech by Professors Beverly and Bionaz as well as the *CSU Faculty Voice*. They have argued instead that their actions were justified, which, as explained below, is wrong as a matter of law.

II. INJUNCTIVE RELIEF IS NECESSARY TO PREVENT FURTHER CONSTITUTIONAL VIOLATIONS

Injunctive relief is warranted when the plaintiffs demonstrate: “(1) they are reasonably likely to succeed on the merits; (2) no adequate remedy at law exists; (3) they will suffer irreparable harm which, absent injunctive relief, outweighs the irreparable harm the respondent will suffer if the injunction is granted; and (4) the injunction will not harm the public interest.” *Joelner v. Vill. of Wash. Park*, 378 F.3d 613, 619 (7th Cir. 2004). These factors are evaluated on a sliding scale where “the greater the likelihood of success on the merits, the less heavily the

balance of harms must tip in the moving party's favor." *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 830 (7th Cir. 2014) (internal quotation marks and citation omitted). In First Amendment cases like this one, the likelihood of success on the merits is usually the determinative factor. *Id.* at 830-31.

A. A Preliminary Injunction is Warranted Because Plaintiffs Are Likely to Prevail at Trial and Have Raised Serious Questions Regarding First Amendment Violations

This Court should enjoin the Defendants' various efforts to punish or chill the speech of Professors Beverly and Bionaz because there can be "no justification for harassing people for exercising their constitutional rights." *Bart*, 677 F.2d at 625. Defendants' effort to explain their actions in their Motion to Dismiss – that they were merely threatening litigation to "request[] 'edits' be made to the blog" and that they initiated disciplinary charges "pursuant to a CSU Board of Trustees' policy, *not* one of the Challenged Policies," Mot. to Dismiss 2, 9-10 (emphasis in original) – is more of an admission than a defense. Regardless of whether retaliation is accomplished through threats of litigation, reference to fictitious trademark rights, reliance on "civility requirements" (as set forth in some "Computer Use" or "Cyberbullying" policy), or invocation of any other policy that can be used to punish speech, it is prohibited by the First Amendment.

1. Spurious Trademark Claims

Defendants' apparent belief that unadorned references to trademarks somehow bars First Amendment scrutiny of their demands to "disable" or "edit" the *CSU Faculty Voice* is wrong. Even if this were a traditional trademark case – which it is not – numerous decisions make clear that trademarks cannot be "transformed from rights against unfair competition to rights to control language." *CPC Int'l, Inc. v. Skippy, Inc.*, 214 F.3d 456, 462 (4th Cir. 2000) (citation omitted). Courts have cautioned that the enforcement of trademark rights must be tempered by

First Amendment concerns. *Cliff Notes, Inc. v. Bantam Doubleday Dell Publ'g Grp., Inc.*, 886 F.2d 490, 495-96 (2d Cir. 1989); *E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1099-1101 (9th Cir. 2008); *ETW Corp. v. Jireh Publ'g Inc.*, 332 F.3d 915, 918-19 (6th Cir. 2003); *Rogers v. Grimaldi*, 875 F.2d 994, 998 (2d Cir. 1989). In cases like this, courts have held that First Amendment interests outweigh possibility of confusion in the use of university trademarks. *See Univ. of Ala. Bd. of Trs. v. New Life Art, Inc.*, 683 F.3d 1266, 1276-78 (11th Cir. 2012).

Defendants admit they invoked trademark law to suppress or “edit” the *CSU Faculty Voice*, but do not attempt to explain how such demands could be consistent with the First Amendment, or that they are even supported by basic trademark law principles. Even in a traditional trademark dispute, it is far from clear that CSU could legitimately bar the Plaintiffs from referencing the school’s name. **First**, nominative uses of a trademark – *i.e.*, use of a mark to identify or refer to the mark holder’s product – are protected and do not give rise to any cause of action under trademark laws. *See New Kids on the Block v. News America Publ'g, Inc.*, 971 F.2d 302 (9th Cir. 1992). **Second**, the *CSU Faculty Voice* is not a commercial endeavor, and thus is not subject to normal trademark enforcement. *Taucher v. Born*, 53 F. Supp. 2d 464, 480 (D.D.C. 1999). **Third**, trademark rights cannot be invoked to silence critical commentary. *See, e.g., Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161, 1165 (C.D. Cal. 1998) (holding it was not trademark infringement to use Bally’s mark for website “ballysucks.com” dedicated to “complaint[s], issues, problems, beefs, grievances, grumblings, accusations and gripes with Bally Total Fitness health clubs”).

2. Civility Requirements

Likewise, the Defendants can claim no First Amendment immunity by asserting they made no attempt to apply the Computer Use or Cyberbullying Policies to the Plaintiffs, or that

the vague references to “civility” and “professionalism” requirements in their cease-and-desist letters were nothing more than “generic statement[s].” Mot. to Dismiss 10. This ignores the fact that the Complaint alleges not just facial challenges to the two named policies, but also challenges the Defendants’ retaliatory actions more broadly. Plainly, the vagueness of Defendants’ threat and the amorphous nature of the policies is not a defense – it is the heart of the constitutional problem. Regardless of which policy the Defendants invoke, their attempt to restrict or penalize Plaintiffs’ speech for lacking “civility” violates the First Amendment.

Where such nebulous concepts are used to restrict expression, it is “‘not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all.’” *Baggett v. Bullitt*, 377 U.S. 360, 374 (1964) (citation omitted). Vague regulations lend themselves to unpredictable and discriminatory applications, particularly, as here, where the Defendant cannot even be bothered to say which rule (or other regulation) they are using to restrict speech. The Computer Use Policy equates harassment with “embarrass[ing]” or “lewd” speech, while the Cyberbullying Policy prohibits such speech as “harm[ful].” Defendants admit that critical terms in the Computer Usage and Cyberbullying policies are left undefined. Answer ¶¶48-50; 56-57. Under the policies’ plain language, it is “impossible to discern any limitation on its scope or any conceptual distinction between protected and unprotected conduct.” *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 867 (E.D. Mich. 1989).

Such policies are too vague and overbroad to survive a First Amendment challenge. *E.g.*, *San Bernardino Valley Coll.*, 92 F.3d at 972. In particular, trying to enforce such malleable concepts as “civility” present severe constitutional problems. *Coll. Republicans at San Francisco State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1018 (N.D. Cal. 2007). As a consequence,

courts from across the country have invalidated campus speech codes and anti-harassment policies.² The unspecified nature of the Defendants' threat in this case is the problem given the breadth of the regulatory tools at their disposal. *Levin*, 966 F.2d at 90. And whether they employed these specific tools or some other unnamed Board policy is of no moment – retaliation against protected expression is unconstitutional either way.

3. Disciplinary Actions

The Defendants' acknowledgement that Professor Beverly faced disciplinary charges is fatal to any defense they might mount under the First Amendment, and it is no answer that "charges were pursuant to a CSU Board of Trustees' Policy, *not* one of the Challenged Policies." Mot. to Dismiss 13 (emphasis in original). The context of the disciplinary action makes clear it was part of the pattern of retaliatory actions the Defendants took against the Plaintiffs. *See supra* 8-9 (describing factors to review in examining retaliatory motivation). In these circumstances, it is not necessary to have a statement from Defendants that they disciplined Professor Beverly because of his criticism of the administration. *Levin*, 966 F.2d at 88. In fact, the Court is free to disregard any implausible disclaimers. *Surita*, 665 F.3d at 871; *Valentino*, 575 F.3d at 673.

Defendants' motivations were plain under the circumstances. The meeting that led to the sanctions was an examination of "Repression at CSU." When the Defendants failed to prevent the meeting by denying a room for the event, they imposed a subsequent punishment on Professor Beverly. Beverly Decl. ¶¶16-20. Professor Beverly had helped organize the meeting

² See, e.g., *De John v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008); *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001); *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 372 (M.D. Pa. 2003); *Dambrot v. Cent. Mich. Univ.*, 839 F. Supp. 477 (E.D. Mich. 1993), *aff'd*, 55 F.3d 1177 (6th Cir. 1995); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. at 863.

in his capacity as Chair of the Faculty Senate Executive Committee, but spoke at the 90-minute meeting for only about three minutes. *Id.* ¶17. Nevertheless, Defendant Watson found Professor Beverly had violated Board policies and suspended him without pay for two days. *Id.* ¶20 & Ex. P. Regardless which policy supplied the vehicle for imposing punishment on Professor Beverly, Plaintiffs are likely to succeed on the merits of their claim of unconstitutional retaliation. *See, e.g., Levin*, 966 F.2d at 88-90; *Silva*, 888 F. Supp. at 313-14.

B. Injunctive Relief is Necessary to Prevent Irreparable Injury to Plaintiffs

It is indisputable that Plaintiffs and the CSU community will suffer irreparable injury if injunctive relief is not granted. *Elrod v. Burns*, 427 U.S. at 347, 373-74 (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”). Specifically, Plaintiffs’ plan to continue investigating and writing about CSU matters on their blog and their ability to do so will be threatened without immediate relief from this Court. Bionaz Decl. ¶¶6-7, 17, 23; Beverly Decl. ¶¶13, 23. Indeed, Defendants have already promised future enforcement of the Cyberbullying Policy. *See supra* 3.

C. The Harm Absent Injunctive Relief Far Outweighs Any Potential Harm to Defendants

Defendants will suffer little or no harm if enjoined from enforcing the subject policies because Plaintiffs’ request for injunctive relief – which would command Defendants to comply with the Constitution – will cause no legally cognizable harm. While Defendants have an interest in maintaining safe and orderly campuses for public education, enjoining the Defendants’ policies will not alter or harm their ability to protect that interest.

Further, when, as here, it has been shown that challenged restrictions are unconstitutional, “no substantial harm to others can be said to inhere in [their] enjoinder.” *Déjà vu of Nashville, Inc. v. Metro. Gov’t of Nashville & Davidson Cnty.*, 274 F.3d 377, 400 (6th Cir. 2001); *accord*

ACLU v. Ashcroft, 322 F.3d 240, 247 (3d Cir. 2003), *aff'd*, 542 U.S. 656 (2004). In contrast, Plaintiffs will suffer irreparable harm if the injunction does not issue, thereby tipping the balance of hardships in Plaintiffs' favor and further justifying the issuance of a preliminary injunction. See *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 973-74 (9th Cir. 2002).

D. The Public Interest Favors a Preliminary Injunction

A preliminary junction is particularly warranted in this case because “injunctions protecting First Amendment freedoms are always in the public interest.” *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 590 (7th Cir. 2012) (citation omitted); *Personal PAC v. McGuffage*, 858 F. Supp. 2d 963, 969 (N.D. Ill. 2012). In this respect, “the public [] has an undeniable interest in seeing that the First Amendment is enforced to protect free expression,” *Entertainment Software Ass’n v. Chicago Transit Authority*, 696 F. Supp. 2d 934, 949 (N.D. Ill. 2010), and “the public interest is not harmed by preliminarily enjoining the enforcement of [regulation] that is probably unconstitutional.” *Alvarez*, 679 F.3d at 590. The public interest inquiry thus “collapses” into the Plaintiffs’ showing of likelihood of success on the merits, which they have satisfied above. *E.g.*, *id.* at 589; *Personal PAC*, 858 F. Supp. 2d at 969.

CONCLUSION

For the foregoing reasons, 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 restrictions on speech in the Computer Usage Policy and the Cyberbullying Policy.

DATED: December 31, 2014

Respectfully submitted,

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