UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

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*

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

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

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

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

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. 5087 3gaiCompareTc .07

"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.

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."); *Y.M.C.A.*, 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 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.

DATED: March 19, 2015

Respectfully submitted,

/s/ Robert Corn-Revere

ROBERT CORN-REVERE (*pro hac vice*)
bobcornrevere@dwt.com
RONALD G. LONDON (*pro hac vice*)
ronnielondon@dwt.com
LISA B. ZYCHERMAN (*pro hac vice*)

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 19