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INTRODUCTION

Intellectual inquiry and debate on college campuses have been a contested topics for much of American history. The freedom of the intellectual quest that college and university students benefit from encourages speech and debate from all areas of the political spectrum. For example, students these days on campus constantly engage in political speech and debate stemming from the current administration or the most recent decision and composition of the Supreme Court.[1]

This has occurred for decades. A prime example of this was during the 1970s, when students protested the Vietnam War.[2] Fast forward to today, students are engaging in controversial dialogue surrounding political views, which necessarily means that higher education institutions create a ripe environment for students to discuss

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[1] Julian E. Zelizer & Morton Keller, *Is Free Speech Really Challenged on Campus?*, The Atlantic, Sept. 15, 2017, https://www.theatlantic.com/education/archive/2017/09/students-free-speech-campus-protest/539673/.

[2] Lovgren, Fred, *The Antiwar University*, N.Y. Times, May 27, 1972.

issues.[3] A larger debate around the extent of freedom of speech and what is permissible on a university's property occasionally results in conflict among students and a school's administration, with students claiming content-based regulation of speech and possibly filing a First Amendment complaint against their university. However, these student grievances have evolved into a question of whether a party has the appropriate standing to bring the lawsuit. In mid-2020, the Seventh Circuit held that a free speech organization could not bring a lawsuit against several University of Illinois administrators, finding that the university's initiatives did not create an injury in fact necessary to support a viable First Amendment lawsuit.

The University of Illinois, through its administrators, created several programs, policies, and protocols that addressed incidents of potentially biased or racist speech on the university campus by students.[4] The programs and policies were intended to create a meaningful, hospitable platform for discussions involving bias, racism, and politically incorrect language.[5] Yet, these policies left certain conservative students "chilled."[6] Speech First, Inc., when it filed its complaint as an association on behalf of University students, could not necessarily demonstrate how the students were "chilled," as the university's initiatives merely created a safe platform for addressing students who offended others through biased and racist speech to create and foster an environment of learning and understanding between its students, not stopping it altogether.[7] Hidden within the discussion of free speech on college campuses lies a smaller, more complicated discussion of how student speech can somehow be chilled by university policies providing environments to create debate and free inquiry.

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[3] Zelizer, *supra*.

[4] Speech First, Inc., v. Thomas L. Killeen, 968 F.3d 628 (7th Cir. 2020).

[5] *Id.* at 632-33.

[6] *Id.*

[7] *Id.* at 647 (affirming the Central District of Illinois's finding that Speech First, Inc. did not sufficiently allege an injury in fact under the standing doctrine).

The Seventh Circuit also found that the free speech organization's complaint was moot regarding a challenge to a portion of the student conduct code.[8] The university eventually repealed the portion at issue, but the free speech organization decided to continue with litigation regarding this portion of the student code.[9] The Seventh Circuit stated that through all stages of litigation, the case and controversy must be alive.[10] A repealed student code section could not be revived simply for the Seventh Circuit to decide whether it, in the past, "chilled" student speech.[11] However, Judge Brennan, offering a separate opinion that dissented from the majority's holding about the case's mootness, did believe that the petitioners brought a timely complaint about the student code section that required "prior approval" regarding student-made, candidate-focused posters and other distributed materials for non-campus elections.[12] Judge Brennan found it suspect, the timing of the repeal of the student code, as it happened approximately seven weeks into the beginning stages of litigation.[13]

A CLOSE ANALYSIS OF STANDING AND MOOTNESS

The standing doctrine aids courts in disposing cases or controversies which lack a valid cause of action, a constitutionally rooted requirement, by determining which party is the best suited to

[8] *Id.* at 646.

[9] *Id.* The University has never enforced this policy and repealed it through its formal amendment process, resulting in "a full vote by the Conference on Conduct Governance and approval by the chancellor." *Id.* Speech First, Inc. recognizes that "this process is analogous to legislation" which would moot the issue. *Id.* The Seventh Circuit also found persuasive the sworn affidavit by the Associate Dean of Students Rhonda Kirts that the University has no intention of restoring the eliminated provision. *Id.* at 636, 646.

[10] *Id.* at 645.

[11] *Id.* at 646 (finding that the "policy is not a threat to students past, present, or future").

[12] *Id.* at 657 (Brennan, J., dissenting).

[13] *Id.* at 653-54 (finding that the "relative ease, timing, and manner" the University used in abolishing the Student Code casts doubt on the permanency of the repeal).

bring the case.[14] The standing doctrine has a long history, starting from its constitutional beginnings in Article III. Article III standing requires a complaining party to establish (1) an injury in fact, (2) that the challenged conduct caused the injury, and (3) some likelihood that a decision in his favor will remedy the injury.[15]

The contents of the standing doctrine itself have a long history in American jurisprudence.[16] The connection and link it has to free speech issues is also lengthy and varied.[17] The standing doctrine has been developed through the years to demonstrate a petitioning party's need to illustrate an injury in fact, which is the main issue in *Speech First, Inc. v. Killeen, et al.*[18] A free speech organization and association attempted to speak on behalf of various students at the University of Illinois at Urbana-Champaign, but ultimately failed to demonstrate a "chilling effect" that various school policies had in deterring students from speaking freely.[19]

HISTORY AND ORIGIN OF THE STANDING DOCTRINE

The standing doctrine has a long history. It originated from the "case or controversy" section of Article III of the United States Constitution.[20] In short, its tripartite scheme was formalized in 1978, where it resulted from 1970s jurisprudence that closed the gaps in Article III criteria.[21] Prior to 1978, the standing doctrine's criterion

[14] Heather Elliot, Article, *Standing Lessons: What We Can Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine*, 87 Ind. L.J. 551, 557 (2012); *see also* Evan Tsen Lee & Josephine Mason Ellis, Article, *The Standing Doctrine's Dirty Little Secret*, 107 Nw. U.L.Rev. 169, 176 (2012).

[15] Susan B. Anthony List v. Driehaus ("SBA List"), 573 U.S. 149, 157-58 (2014).

[16] Elliot, *supra* note 14, at 557.

[17] Howard, Celia A., Note, *No Place For Speech Zones: How Colleges Engage in Expressive Gerrymandering*, 35 Ga. St. U.L.Rev. 387, 408-09 (2019).

[18] Lee, *supra* note 14, at 171.

[19] *Speech First, Inc.*, 968 F.3d at 638-39.

[20] U.S. CONST. art. II, § 2; Elliot, *supra* note 14, at 557.

[21] *Id.*

were a more relaxed version of the strict and infamous tripartite test. In the early 1960s, the Supreme Court explained that the standing doctrine analyzed if "the appellants [had] alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court . . . depends."[22] The Court's main policies in creating the standing doctrine formula and roadblock for would-be plaintiffs arises out of judicial economy.[23] Additionally, the standing doctrine ensures that the separation of powers instilled by the Constitution's structure of separate branches will be kept while also preventing political activity and legislative procedures out of court activity so that courts may keep doing their jobs.[24] The courts main role is to interpret laws and provide clarity, not overreach into political decisions that lead courts to act in a legislative or executive capacity.

Originally, the standing doctrine took the opposite effect of the Seventh Circuit's decision in *Speech First, Inc.*, where it kept liberal plaintiffs out of court in the 1960s and 1970s.[25] Those cases advocated for environmental and civil rights.[26] But, a turning point in environmentalist cases where the Court found standing, signaled a change in shift to the current critical use or weaponization of the

[22] Baker v. Carr, 369 U.S. 186, 204 (1962). This less particularized approach to the doctrine resulted in a long line of cases determining each specific element of the tripartite test, resulting in a specific analysis to each element, leading to the current day doctrine. *See, e.g.,* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013) (discussing "injury in fact" as a nonconjectural or hypothesized "possible" harm, but one that has already occurred or is imminent) (internal citations omitted). It is also important to note that "[t]he Court has issued opinions dealing with a variety of special circumstances under the constitutional standing doctrine, to the text of the note including generalized grievances, to the text of the note procedural injury, to the text of the note informational injury, to the text of the note and risk of harm." Elliot, *supra* note 14, at 556. The standing doctrine that currently exists in the 2010s is much more nuanced and stricter than the theorized version that appeared in *Baker v. Carr*. 369 U.S. at 204.

[23] Elliot, *supra* note 14, at 554.

[24] *Id.* at 557.

[25] *Id.* at 559.

[26] *Id.*

standing doctrine.[27] The Court gently opened the narrowly construed standing doctrine in a few environmental instances, but held the standing doctrine's formalist analysis close when it refused tax payers, and the like, the ability to sue simply because of their status as a taxpayer for civil rights issues, such as misappropriation of federal funds to private versus public schools and charitable tax exemptions for a hospital that did not serve the poor.[28] The Court reasoned that in both of these instances, the injury in fact could not be sufficiently alleged for the taxpayer to be the best suited party for that specific issue.[29]

Further, the 1960s gave birth to public interest litigation that severely threatened the constitutional separation of powers.[30] Therefore, "rather than supporting the conservative goal of keeping broad-based public interest litigation out of court, restrictive standing requirements may originally have achieved precisely the opposite result: preserving and enshrining the liberal New Deal administrative state."[31] Some scholars and academics believe the standing doctrine is

[27] *See, e.g.,* Sierra Club v. Morton, 405 U.S. 727 (1972); Lujan v. Defenders of Wildlife, 504 U.S. 555, 562-67 (1992).

[28] Allen v. Wright, 468 U.S. 737, 755-56 (1984) (finding no standing for a taxpayer plaintiff since the alleged misappropriation of federal funds was a "mere stigmatic injury"); Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 42-43 (1976). The Supreme Court in *Allen* and *Simon* blocked the plaintiff taxpayers for appearing in federal court, as the injuries alleged could not be traced to their status as taxpayers, however the Court has also somewhat bent its formalist approach to environmental litigation instances, where the injury need not be an economic one, but one of aesthetic enjoyment, a departure from what normally qualified as a "particularized" injury. *See* Lee, *supra* note 14, at 178-79 (discussing current interpretation of "harm" under the standing doctrine, where economic or "wallet" harm are legally recognized injuries, whereas other harms, such as ideological harm, are not).

[29] Elliot, *supra* note 14, at 560.

[30] *Id.* (quoting Ho, Daniel E. & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006*, 62 Stan. L. Rev. 591, 640-47 (2010) (suggesting rise of public interest litigation in the 1960s as a reason for tightening of standing doctrine in the 1970s)).

[31] *Id.* It seems as though courts continually use the standing doctrine to oppose both sides of the political spectrum's policy agendas in courts to prevent

used as a weaponized tool for liberal justices to preclude litigation which challenges progressive programs by various conservative activists and parties.[32] However, that is not necessarily the case. While critics of the standing doctrine may claim that it ultimately stops a balanced inquiry of new programs and policies, it actually presupposes and correctly identifies how the balanced inquiry must be sought by maintaining separation between the branches of the federal government.

Beginning in the 2000s, the standing doctrine had swung away from the 1960s dismissal of liberal-leaning court advocacy, now acting as a barrier and bar for conservative plaintiffs who challenged gay rights and defended the Federal Defense of Marriage Act.[33] As the country's politicization and divisiveness took a turn towards a prevalent liberal leaning, the Court enacted the standing doctrine to

overreaching in to a legislative or rule-making spheres. From blocking liberal-leaning environmental litigation in the 1960s and conservative-based free speech agenda in the 2010s, the standing doctrine allows courts to focus on judicial decision-making instead of unintentionally creating and shaping legislation. *See, e.g., Clapper*, 568 U.S. at 408 (quoting Raines v. Byrd, 521 U.S. 811, 819-20 (1997)). The Supreme Court explained that the "standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Governmental was unconstitutional," *id.*, and that "relaxation of standing requirements is directly related to the expansion of judicial power," United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

[32] Elliot, *supra* note 14, at 563. *See, e.g.,* Glenn v. Holder, 738 F. Supp. 2d 718, 731 (E.D. Mich. 2010) (holding that pastors lacked standing to challenge the criminal provisions of the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act, which added sexuality as a protected category); Morrison v. Bd. of Educ., 521 F.3d 602, 610-11 (6th Cir. 2008) (holding that a student opposed to homosexuality on religious grounds lacked standing to challenge school board's ban on making stigmatizing comments about other students' sexual orientation); Daubenmire v. City of Columbus, 452 F. Supp. 2d 794, 812 (S.D. Ohio 2006) (holding that plaintiffs who burned gay-pride flags to protest homosexuality lacked standing to seek injunctive relief against city); Gilles v. Davis, 427 F.3d 197, 208 (3d Cir. 2005) (holding that plaintiffs who preached against homosexuality on university campus lacked standing to challenge permit requirement imposed by university, when they had never even applied for the permit).

[33] *Id.* at 563-64.

allow a quiet, yet warranted tempering of conservative voices to appropriate volumes. By closing the door for certain conservative plaintiffs, the standing doctrine guards against frivolous or misplaced lawsuits regarding certain policies and programs that have been enacted most recently.[34] Further, it encourages and helps to maintain the balance between the three branches of government and pushes judicial economy in federal courts.[35]

For associations or certain groups of people that are disallowed from bringing a claim in federal court, the same rules for the standing doctrine apply. Associational standing must also sufficiently allege the same tripartite initial analysis that the Court has set out since its formalization in 1978.[36] Associations must be able to allege standing so that political groups do not have the ability or power to attach themselves to pet issues or projects. A key idea here is that an association simply cannot be granted a wider breadth for standing because it represents a group.[37] A number of plaintiffs alone do not allege an injury. The case analytics are fact-specific.

Speech First, Inc. demonstrates the fact that, sometimes, the association or interest group has the correct motive and method for bringing a claim in federal court, and sometimes it does not. Speech First, Inc. has successfully litigated issues akin to the one in the Seventh Circuit in the past, just like other interest groups have done, yet in some instances, a mere allegation of wrongdoing or injury in fact is not sufficient enough for a court to allow the case to enter into its jurisdiction.[38] Speech First, Inc., and similar groups may be able to allege standing in certain cases, just not all.

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[34] *Id.*

[35] *Id.*

[36] United Food & Com. Workers Union Local 751 v. Brown Grp., Inc., 517 U.S. 544, 552 (1996) (explaining the modern doctrine of associational standing, "under which an organization may sue to redress its members' injuries, even without a showing of injury to the association itself, emerges from a trilogy of cases.").

[37] *Id.* (quoting Warth v. Seldin, 422 U.S. 490, 511 (1975).

[38] *See* Speech First, Inc. v. Schlissel, 939 F.3d 756 (6th Cir. 2019).

THE DOCTRINE OF MOOTNESS

Mootness is attached to the standing doctrine, where it analyzes the appropriate timing of a case and the timing of a court's redressability for the alleged injury.[39] This doctrine is similar to the standing doctrine in that the Court tries to adhere to an efficient adversarial system, but it does not focus on the parties themselves, rather, it focuses on the timing of the case and controversy before a court.[40] Mootness, under Article III's case or controversy provision, "must exist not only [when] 'the complaint is filed,' but through 'all stages' of litigation."[41] Mootness also does not focus on the initial appearance of the case; it focuses on the potential case for the entire existence of the litigation process.[42] The Court has described the doctrine of mootness as "standing set in a time frame," and the controversy must remain "live" for the entire cycle of litigation, otherwise, there would be no standing.[43] In being similar but distinct from the standing doctrine, this creates another barrier that plaintiffs must avoid in order for a court to hear their case.

Mootness requires that a case be dismissed whenever a circumstance would eliminate an element of a case or controversy.[44] The consequences and high stakes of mootness requires a comprehensive structure, necessary to glean and create viable issues for a court to determine when and where a plaintiff may find redress for a sufficient harm. For an appeal, the case cannot be moot. Therefore, "the law of mootness recognizes that an appeal represents the continuation of a single case or controversy, not the initiation of a

[39] Scott, Ryan W., *ARTICLE: CIRCUMVENTING STANDING TO APPEAL*, 72 Fla. L. Rev. 741, 773 (Jul. 2020) (quoting Already, LLC v. Nike, Inc., 568 U.S. 85, 90-91 (2013)).

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.* (quoting *Already, LLC*, 568 U.S. at 91).

[44] *Id.* at 774.

new one."[45] Again, this principle takes into consideration the fact that a case's life cycle must demonstrate standing throughout. It is not as though an injury can be renewed in time for an appeal because an appeal is a continuation, not a standalone, new case on the same issue. Second, the doctrine of mootness also "recognizes that the parties' own actions can render a controversy moot."[46] It is in these instances that a case may end because parties choose to resolve the dispute in a manner that is separate from a court's eyes and actions. For example, parties settling a case or a plaintiff's withdrawal from the complaint would render a case or controversy moot due to a party's own actions.[47]

While the doctrine of mootness might seem as though it is just another brick wall or barrier in a potential plaintiff's way, the doctrine carries more flexibility than the standing doctrine. The Supreme Court acknowledged and explained two exceptions to the doctrine of mootness. First, a defendant's "voluntary cessation" of challenged conduct would not render a case moot without a strong demonstration that the conduct "cannot reasonably be expected to recur."[48] This protects against a defendant agreeing to alter its actions with no guarantee that it would not regress to its original ways.[49] Second, a case or controversy may seem as though it is moot, yet cases that are "capable of repetition, yet evading review" may be heard by a court because the plaintiff has a reasonable chance of being injured in the same way again.[50] Therefore, this aids in resolving conflict that may not be fully resolved since it is bound to recur in the future.

The court system in the United States, because of the absolute bar it sets with the standing doctrine, allows more flexibility in granting standing through an exception to the doctrine of mootness. While a court may find that a case is moot, and therefore, it lacks standing, this

[45] *Id.*
[46] *Id.* at 775.
[47] *Id.*
[48] *Id.* at 775-76.
[49] *Id.*
[50] *Id.* at 777.

more malleable review and standard that a court may apply creates adaptability to hear and assist in certain cases or controversies.

THE SEVENTH CIRCUIT'S MOST RECENT STANDING ISSUE – *SPEECH FIRST, INC. V. KILLEEN, ET. AL.*

The Seventh Circuit grappled with analyzing standing in the form of free speech on college campuses and in American higher education. Free speech on college campuses is a hot button issue across the country, with issues pertaining to free intellectual inquiry and a self-proclaimed dearth in the ability to speak freely in higher education.

Free speech on college campuses across the country create opportunities for students to freely express their individual thoughts. However, universities are developing programs for students to find common ground and understanding through dialogue that discourages biased and prejudiced speaking.[51] At the University of Illinois, the administration created a comprehensive platform for students to use to accomplish these goals.[52] A free speech group, Speech First, sued twenty-nine administrators at the University on behalf of four anonymous students, claiming First Amendment violations since the university's program "chilled free speech" and harmed students who wished to express more conservative, traditional views.[53] The Seventh Circuit, in *Speech First, Inc. v. Killeen*, found that Speech First had no standing to bring a First Amendment complaint, as there was no injury in fact or "chilling effect" from University policies, nor were there signs of administrative coercion or punishment towards students who

51 Howard, *supra* note 17, at 402 (stating that "[i]n the past few years, there has been a firestorm of speakers and opinion pieces lashing out against school speech policies, and tensions appear to be escalating on campus."). *See also,* Kashana Cauley, *When Conservatives Suppress Campus Speech*, N.Y. TIMES (Oct. 17, 2017), https://www.nytimes.com/2017/10/17/opinion/conservatives-campus-speech-wisconsin.html; Elliot C. McLaughlin, *War on Campus*, CNN (May 1, 2017), http://www.cnn.com/2017/04/20/us/campus-free-speech-trnd/index.html.

52 *Speech First, Inc.*, 968 F.3d at 632.

53 *Id.*

believe these conservative views.[54] The Seventh Circuit's holding that found no case or controversy existed for Speech First against the University of Illinois demonstrates that while the First Amendment is an assumed right for every person in the United States, a First Amendment complaint is not.

In *Speech First, Inc. v. Killeen,* the Seventh Circuit addressed the standing doctrine and mootness for freedom of speech on college campuses. It almost seems as though it was the perfect time for the Seventh Circuit to analyze such an issue when a self-proclaimed crisis has started across the country and supposedly chilling free speech on college campuses.[55] In fact, with President Trump's executive order in March 2019, the free speech crisis on college campuses seemed as though it was a legitimate issue at the forefront of the executive administration. The executive order, titled "Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities," demonstrated the executive administration's desire to preserve speech of all kinds on college campuses.[56] The "free inquiry" component of the executive order sought to promote "free and open debate on college and university campuses."[57] Except, the free and open campus environment for debates and thorough inquiry acts as a prerequisite to receive federal funding, which bring in itself another wholly debatable issue of coercively conditioning a University's policy in order to receive federal monies.

Maybe it is not the fact that some students believe that higher education institutions are continually attempting to "chill" some sort of conservative, right-wing policies and speech, but it is the disbelief that higher institutions should instill policies that create a safe and open environment for this "free inquiry" that the Trump

[54] *Id.* at 647.

[55] Bollinger, Lee C., *Free Speech on Campus is Doing Just Fine, Thank You*, The Atlantic (June 12, 2019), https://www.theatlantic.com/ideas/archive/2019/06/free-speech-crisis-campus-isnt-real/591394/.

[56] Executive Order No. 13864, 84 Fed. Reg. 58, 11401 (Mar. 26, 2019).

[57] *Id.*

Administration desires.[58] The administrators at the University of Illinois, which brought about the newest First Amendment issue on a college campus, wanted to promote free inquiry of its students and engage in meaningful debate and discussion. However, the administrators also knew that leaving students to their own devices in order to do so created a potentially hostile environment for this debate.[59] The administrators wanted to promote fairness in free inquiry, which some students found to be "chilling."[60]

The Seventh Circuit did not weigh the merits of the claimed First Amendment violations that Speech First, Inc. complained about on behalf of a few University students who were members of its group.[61] The Seventh Circuit expounded upon and carefully explained the need for control and separation of the courts from legislative and executive bodies by analyzing whether Speech First was the appropriate party for the case. In asking for a preliminary injunction to cease the three University policies it alleged violated the First Amendment, Speech First argued that students were forced to "engage in self-censorship" and that the policies "deter[red] them from speaking openly about issues of public concern."[62]

Case Background

The policies themselves that University of Illinois adopted do nothing more than create a meaningful, safe platform for students to express their concerns about other students' views that are potentially harmful and detrimental to students. The Bias Assessment Response Team and the Bias Incident Protocol are just two of the contested university policies that Speech First, Inc. challenged in its latest crusade.

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[58] Bollinger, *supra*.

[59] *Speech First, Inc.*, 968 F.3d at 635-36 (recounting statistics of the impact of policies among students in calming biased and racist incidents on campus).

[60] *Id.* at 633.

[61] *Id.* at 632.

[62] *Id.*

The Bias Assessment Response Team (BART) and the Bias Incident Protocol (BIP) are programs that the University of Illinois administration uses to address concerns of students who demonstrate views that are discriminatory, racist, or otherwise harmful in some nature.[63] Any member of the student body may report an incident of biased or discriminatory speech with BART, that is attached to the Office for Student Conflict Resolution.[64] After reporting through an anonymous webform, it is dumped into an internal database.[65] From there, BART members discuss the database reports in bi-weekly meetings to determine whether it is necessary to reach out to all students involved in the incident.[66] If a BART meeting does happen, BART cannot require students to change their behavior nor does it have the authority to issues sanctions if the student chooses not to do so.[67] In addition, there is no formal sanction or punishment of any kind if a student is reported to BART.[68]

BIP is a separate, but identical, program and policy to BART that operates for university houses and does not come with campus-wide jurisdiction. BIP addresses bias-motivated incidents in residence halls at the university and within university housing.[69] Again, there are no sanctions or foreseeable punishment that a student would encounter for either being reported to BIP through its anonymous webform.[70]

Speech First, Inc. admitted that neither it nor its members had any firsthand knowledge of BART or BIP; it relied on students'

[63] *Id.* "Bias-motivated incidents" are "actions, or expressions that are motivated, at least in party, by prejudice against or hostility toward a person (or group) because of the person's (or group's) actual or perceived age, disability/ability status, ethnicity, gender, gender identity/expression, national origin, race, religion/spirituality, sexual orientation, socioeconomic class, etc," according to BART standards. *Id.* at 632-33.

[64] *Id.* at 633.

[65] *Id.*

[66] *Id.* at 633-34.

[67] *Id.* at 634-35.

[68] *Id.*

[69] *Id.*

[70] *Id.*

communications about these policies in filing suit.[71] The president of Speech First, Inc. only asserted that the identity of the student who committed the bias-motivated incident may be used in the future to target students.[72] Yet, the University challenged this argument, as BART and BIP conversations are entirely voluntary and actions and sanctions against the student do not occur solely because of the anonymous complaint that would be filed in the webform.[73]

While BART and BIP do not have any formalized punishment, policy, or consequence attached to a finding of biased-motivated speech, BART does publish an annual report of incidents with generalized data, removing any identifying markers of students involved.[74] BART and BIP incidents may also be connected to instances of behavior that coincide with a violation of the University's Student Code, such as physical violence, sexual harassment, or stalking, but BART incidents themselves are not handled through the University's formalized disciplinary system.[75] Yet, these University Student Code violations that are initially reported through the BART and BIP systems are not referred to the University's formal

[71] *Id.* at 634.

[72] *Id.* Notably, Speech First's National President, Nicole Neily, reported that one student advisor told a BART-reported student "'that he could see from the student's files that the student had met with someone from the BART.'" *Id.* But, the Seventh Circuit did not expand further on this point in its decision, as "Neily provide[d] no other detail about BART and its operations." *Id.* While a BART report could be seen on a student's records, the Seventh Circuit still found that there were still no particularized injuries coinciding with this issue. *Id.* at 643-44.

[73] *Id.* at 634.

[74] *Id.* at 633. The Seventh Circuit's decision lists three examples of BART incidents published in its annual report, including removal of chalked phrases, such as "Women are Worthless" and "Go White Privilege." *Id.* at 633-34. Other instances of face-to-face student speech reported to BART include a student telling another that he voted for Trump to deport another student and a posting on Facebook about an "Affirmative Action Bake Sale" where students would be charged different prices for the food based on race and ethnicity. *Id.* The Annual Report noted that chalked saying were removed within an hour of being reported to BART and that some students involved in the latter two instances met with a member of the BART team. *Id.* No other disciplinary measures were listed in the Annual Report samples.

[75] *Id.*

disciplinary process, nor are they investigated by police from a BART referral.[76] This enforces and upholds the University's goal to provide a platform for meaningful discussion and educational opportunities rather than punish students for content-based speech.[77]

Additionally, Speech First, Inc. challenged another policy named as No Contact Directives ("NCDs").[78] The University's Student Disciplinary Procedures explained that disciplinary officers from the university may direct an individual student who is subject to student discipline to have no contact with one or more persons with an NCD.[79] There is no physical distance requirement that students under NCDs must avoid each other, but any form of communication with the sole purpose of provoking or intimidating discourse between the students is highly discouraged.[80] There is only a recommendation of the punishment of dismissal from the University if a student violates an NCD he or she has with another student.[81]

However, again, the University detailed that it only imposes NCDs in response to violations of the student code to prevent potential violations, and that no student has ever been subject to NCDs for expression alone.[82] There is no formal punishment given to students who choose to not follow the NCD, and outside of the provocation or intimidation contexts, students under NCDs may interact and communicate with each other.[83] The only instance of an NCD mentioned in the Seventh Circuit's opinion stemmed from two students after one attended an anti-Trump rally and attacked students in attendance.[84] The second student subsequently wrote a student

[76] *Id.* at 634.
[77] *Id.*
[78] *Id.* at 635-36.
[79] *Id.*
[80] *Id.*
[81] *Id.* at 636.
[82] *Id.* at 635-36.
[83] *Id.*
[84] *Id.* at 636.

newspaper article about the entire incident.[85] The official NCD suggested that the second student not write about the first student, but the students were both aware that this was not a disciplinary charge, just a recommendation.[86] Further, the second student was still permitted to write journalistic stories about the first student.[87] The students were encouraged to create physical spaces in their interactions, but the two students' speech was not restricted. It was only provoking or intimidating contact between the two that was discouraged by the University.

The last policy that Speech First, Inc. cited at the University of Illinois for chilling speech was Student Code § 2-407, which prohibited students from "posting and distributing leaflets, handbills, and other types of materials" about candidates for non-campus elections without prior approval.[88] Students who ignored this section of the student code did face disciplinary action, including reprimand, censure, probation, suspension, and dismissal from the University.[89] However, the record before the Seventh Circuit lacked any evidence that the University did, in fact, enforce this section of the student code.[90]

Soon after the initiation of Speech First's case against Killeen and other defendants, Student Code § 2-407 was repealed.[91] The Associate Dean of Students issued a University-sanctioned statement clarifying that the University had no intention of restoring this eliminated provision.[92] Further, the repeal took immediate effect without delay by the University Chancellor.[93] The University was swift to amend its

[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.* at 636-37.
[89] *Id.*
[90] *Id.*
[91] *Id.* at 637.
[92] *Id.*
[93] *Id.*

student code by repealing this certain provision by students, faculty, and administrators sitting on the Urbana-Champaign Senate.

On appeal, Speech First, Inc. only argued that the District Court for the Central District of Illinois erred when it found that Speech First, Inc. did not allege an injury in fact under the standing doctrine analysis.[94] Under current standing doctrine jurisprudence, the "chilled" speech that Speech First intended to demonstrate, that the University prevented students from engaging in, was not a sufficient injury. Therefore, Speech First, Inc. could not be the most appropriate and best suited party for this particular lawsuit.

Comparing and Contrasting with Other Circuits

In analyzing BART and BIP, the Seventh Circuit found that there was no alleged injury for a few significant reasons. First, it agreed with the district court that "[b]ias-motivated speech alone is not a Student Code violation," as any disciplinary process attached to BART or BIP does not apply to students whose views expression was supposedly chilled or limited under these policies.[95] Speech First, Inc. does not dispute this finding from the district court.[96] Therefore, this first reason shows that its members did not "face a credible threat of enforcement" by the University for more conservative, expressed views.[97]

Second, the Seventh Circuit compared this case to *Abbott v. Pastides*, 900 F.3d 160 (4th Cir. 2018). The main similarity between these cases is that the students in *Killeen* were unable to make with clarity and specificity the speech they would have preferred to express.[98] Therefore, it was unlikely that the students would have been

[94] *Id.* at 637-38.

[95] *Id.* at 639.

[96] *Id.*

[97] *Id.*

[98] *Id.* at 640. The Seventh Circuit noted that Abbott v. Pastides, 900 F.3d 160 (4th Cir. 2018), was instructive to its *Speech First, Inc. v. Killeen* analysis, as it demonstrated a mandatory, compulsory event rather than a voluntary, optional one that had a weighted, implied threat of chilled speech, in part silenced by the

reported to either BART or BIP. In *Abbott*, students received official letters instructing them to attend a mandatory meeting with the University of South Carolina officials after the students hosted a "Free Speech" event.[99] The Fourth Circuit found that the *Abbott* plaintiffs failed to identify any speech event they planned or desired to sponsor at this event.[100] Therefore, the *Abbott* plaintiffs missed illustrating how the defendants deterred "some specific intended act of expression protected by the First Amendment."[101] Without any specific statements of what particular speech students wished to engage in, it is difficult to imagine any sort of injury in fact, as a claimed First Amendment right to expression was not blocked or chilled by a university policy which aims to protect students against bias-motivated or racist speech.[102] Claimed lack of expression alone does not constitute any recognizable injury in the Seventh Circuit's opinion for Article III standing for an alleged First Amendment violation.[103]

Since most conversations with BART were optional and in no way mandatory for students, the district court finding that the lack of any discipline by BART or BIP with identified students also resulted in no harm or injury to the student.[104] The Seventh Circuit distinguished this finding and reasoning from *Bantam Books, Inc. v.*

University of South Carolina. While the University of South Carolina's goals were the same at the University of Illinois's in attempting to prevent incidences of biased and racist speech, among other things, the execution of this goal ultimately is what differed between the two higher education institutions. Yet, the articulation of what speech was exactly "chilled speech" by the two universities led the Seventh Circuit to its ultimate conclusion.

[99] *Abbott*, 900 F.3d at 163.

[100] *Id.*

[101] *Id.* at 171.

[102] *Id.*

[103] Again, this brings to prominence the formalized, tripartite Article III standing scheme that federal courts must utilize. Otherwise, plaintiffs could potentially bring frivolous lawsuits that are not redressable, nor would it be equitable for a court to potentially admonish the defendant if the plaintiff cannot allege a sufficient injury.

[104] *Speech First, Inc.*, 968 F.3d at 640.

Sullivan.[105] In *Bantam Books*, the Rhode Island Commission to Encourage Morality in Youth notified a publication distributor dozens of times, stating that certain publications were inappropriate for sales to children.[106] The complaints were followed up with police visitations.[107] The Supreme Court found that these complaints were "virtually . . . orders" that were disguised and could be explained as "thinly veiled threats."[108] Here, though, since the students' involvement was optional and no threats were made for noncompliance following a BART or BP incident report, there were "essentially no consequences."[109]

Since the University's policies essentially held no consequences for students, the Seventh Circuit held fast to the traditional understanding of the standing doctrine, contemplating actual injury in fact, rather than a far-flung alleged injury that had a small chance of occurring in the future. In a further comparison with *Abbott*, the Seventh Circuit also explained that the *Abbott* mandatory meeting with administrative officials at the University of South Carolina, again, distinguishes itself from the voluntary nature of BART and BIP at the University of Illinois.[110] Plainly put by the Fourth Circuit in *Abbott*,

> [A] threatened administrative inquiry will not be treated as an ongoing First Amendment inquiry sufficient to confer standing unless the administrative process itself imposes some significant burden. . . . 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

[105] 372 U.S. 58 (1963).
[106] *Id.* at 59-61.
[107] *Id.* at 68.
[108] *Id.*
[109] *Speech First, Inc.*, 968 F.3d at 640-41.
[110] *Id.* at 641; *Abbott*, 900 F.3d at 171.

> "extraordinarily intrusive" process that might make censorship and objectively reasonable response.

Id. at 179 (emphasis added). Therefore, an optional meeting at the University of Illinois cannot allege a sufficient injury in fact where a mandatory one at the University of South Carolina does not. An optional meeting at the University of Illinois would allow all students involved an opportunity to share their stories, rather than acting as a disciplinary measure. Again, the goal to provide a safe platform to discuss and resolve incidents of biased-motivated speech with no coercion to participate allows for learning, rather than condemnation for reported students.[111]

The last argument that Speech First, Inc. claimed attempted to compare the alleged First Amendment violation here with *Backpage.com, LLC v. Dart*.[112] It claimed that the University of Illinois "can chill speech without threatening an investigation or prosecution, and even without authority to take any official action.'"[113] However, the threat of an investigation in *Backpage.com* issued from Sheriff Dart to prevent sex trafficking was sent on official letterhead that demanded action, and also condemned the plaintiff's activities and reminded them of their potential liability.[114] Again, the Seventh Circuit readily distinguished Sheriff Dart's letter from the University's administrators ask for students to attend a voluntary meeting.[115] The nature of Sheriff Dart's letter, with the impact it had on official letterhead and reminder of potential liability, acted as a more coercive tool in obtaining the plaintiffs' compliance, as opposed to a requested, but optional, meeting between a university administrator and

[111] *Speech First, Inc.*, 968 F.3d at 641.

[112] 807 F.3d 229 (7th Cir. 2015).

[113] *Speech First, Inc.*, 968 F.3d at 641-42 (quoting *Backpage.com*, LLC, 807 F.3d at 236).

[114] *Speech First, Inc.*, 968 F.3d at 642 (describing *Backpage.com*, LLC, 807 F.3d at 236).

[115] *Speech First, Inc.*, 968 F.3d at 642.

students.[116] The Seventh Circuit stated that "when the majority of students BART contacts decline a meeting, Speech First's speculation that BART's outreach carries an implicit threat of consequences lacks merit."[117]

Regarding NCDs, there was an insufficient injury in fact, as no protected speech was prevented from the NCDs themselves. The NCDs acted as a protective tool to prevent incidences of racism and bias between students.[118] It was not intended to chill speech, just its direction in situations where the speech could be found volatile and negatively impact students.[119] The University of Illinois still encourages students to engage in intellectual inquiry and discourse, even with the NCDs in place.[120] And, again, Speech First failed to demonstrate any evidence that showed how students feared from expressing a particular viewpoint with the supposed threat of an NCD being issued to them.[121] The argued self-censorship that Speech First, Inc. alleges with NCDs could not be found in the current findings before the Seventh Circuit.[122]

The Seventh Circuit did not spend a lot of its resources discussing the doctrine of mootness for Student Code § 2-407.[123] Student Code § 2-407 was a "prior approval" rule that "prohibited students from post[ing] and distributing leaflets, handbills, and other types of materials about candidates for non-campus elections without" consent from the University.[124] While a party's actions may render a case or controversy moot, it is not a dispositive indicator that no case or

[116] *Id.*
[117] *Id.*
[118] *Id.* at 633.
[119] *Id.*
[120] *Id.* at 644.
[121] *Id.*
[122] *Id.*
[123] *Id.* at 645-46.
[124] *Id.* at 636.

controversy exists.[125] Rather, there must be some sort of affirmative action by the party to illustrate that it will not slip back into its old ways or habits.[126] The swift repeal of the student code provision by the University Senate may seem suspicious to some, but it did not raise any alarms with the Seventh Circuit. Namely, the University contended and demonstrated that it does not intend to reinstate the challenged provision, nor does it want to amend a new one in its place into the student code.[127]

Judge Brennan was the only judge on the panel to dissent regarding the issue of mootness of repealed Student Code § 2-407. He agreed with the other judge's in that BART, BIP, and NCDs did not reveal any injury in fact to sustain standing in this case, but the student code provision was not denounced with the standards of "heavy burden" and absolute clearness that attaches to a doctrine of mootness question in school and education cases.[128] To Judge Brennan, the swift repeal of the student code provision shortly after the case started its litigation life cycle was suspicious.[129] The firm denouncement was not firm enough, according to other education and school district cases

[125] *Id.*; *see* Fed'n of Advert. Indus. Representatives, Inc. v. City of Chicago ("Federation"), 326 F.3d 924, 930 (7th Cir. 2003) (holding that where a policy's repeal is not genuine, then a court may refuse to find that the case is moot); *see also* United States v. W.T. Grant Co., 345 U.S. 629, 632-33, 73 S. Ct. 894, 97 L. Ed. 1303 (1953) (stating that "a defendant's voluntary cessation of challenged conduct will not render a case moot because the defendant remains 'free to return to his old ways.'"). A case only becomes moot if it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000).

[126] *W.T. Grant Co.*, 345 U.S. at 632-33.

[127] *First Speech, Inc.*, 968 F.3d at 646.

[128] *Id.* at 653-54; *Friends of the Earth, Inc.*, 528 U.S. at 189. If there was no absolute clearness of a defendant's willingness to not return to his old ways, voluntary compliance could merely be demonstrative and persuade a court to dismiss the case. *Id.* (quoting United States v. Concentrated Phosphate Export Assn., Inc., 393 U.S. 199, 203 (1968)). A defendant's voluntary compliance of dismissing or repealing a policy without a firm adherence to condemning it does not render a case moot. *Friends of the Earth, Inc.*, 528 U.S. at 189.

[129] *Speech First, Inc.*, 968 F.3d at 653.

involving the same issue of mootness. He reasoned that the University of Illinois's failure "to document in any way its decision to make the change permanent" would be sufficient to present a live controversy that is not already moot.[130]

A further reconciliation between the heavy burden and mootness doctrine that Judge Brennan analyzes would also require or expect the University to adopt a "forward-looking, binding, and formal policy position" against the past student code provision as evidence of not returning to its old ways.[131] A simple declaration of repealing the student code provision with an announcement of an intention to not instill it again in a disguised form was not sufficient to maintain the issue as moot, according to Judge Brennan.[132]

While Judge Brennan differs from his colleagues in the Seventh Circuit regarding the doctrine of mootness, the University's denouncement and repeal must be taken in good faith.[133] Therefore, while the burden that the majority and Judge Brennan used in their analyses differs, the repeal of the student code provision announces the same result. It is important to note that while the standing doctrine and mootness doctrine application here seems to revert to the old, formalistic scheme derived from Article III, the Seventh Circuit correctly applied caselaw to Speech First, Inc.'s complaint against the University of Illinois. There was no realized injury in fact. The only issue of "chilled" speech resulted from students' unrealized fear, not from actual instances in which protected speech was extinguished by the University.[134] The free speech crisis and supposed free intellectual inquiry dearth on college campuses does not present itself here, as the

[130] *Id.*; Freedom from Religion Found., Inc. v. Concord Comm. Sch., 885 F.3d 1038, 1052 (7th Cir. 2018).

[131] *Speech First, Inc.*, 968 F.3d at 656.

[132] *Id.*

[133] *Id.* at 646 (stating that the "University is a public entity and an arm of the state government of Illinois, and therefore receives the presumption that it acts in good faith.").

[134] *Id.* at 633. The parties do not dispute that, "if its members were to have standing, Speech First would have associational standing," however, Speech First only contested the injury in fact portion of the tripartite standing test. *Id.* at 638.

University of Illinois was only creating a platform for understanding during speech and debate; not a complete barrier of accessing other students' varied opinions.[135]

A Close Call – How Schlissel and Killeen Differ, Even with Nearly Identical Facts

The Seventh Circuit deviated and distinguished *Killeen* from its cousin in the Sixth Circuit, *Speech First, Inc. v. Schlissel*.[136] In a nearly identical case featuring students at the University of Michigan, the Sixth Circuit held that the university students had standing.[137] The University of Michigan's policies for encouraging a safe, accommodating space for students to voice their opinions on a neutral platform, while also monitoring for harassing language, were actionable under the standing doctrine.[138]

The Sixth Circuit differed from the Seventh Circuit, finding that the students had standing, as the injury in fact was not as far flung and more realized than the students at the University of Illinois.[139] The Sixth Circuit also granted Speech First, Inc. associational standing, rather than denying it altogether.[140] While the policies between the two universities accomplish the same goals, the Sixth Circuit found that the University of Michigan's policies does, in fact, have an injury in fact, where students demonstrated that their opinions and speech were "chilled" due to potential punishment by the university.[141] The Sixth Circuit stated that the policy similar to the University of Illinois's BART protocol and program that it "subjects students to processes

[135] *Id.* at 633; Bollinger, *supra*.

[136] 939 F.3d 756 (6th Cir. 2019).

[137] *Id.* at 770-71. An important point to note is that Speech First, Inc. was given associational standing in *Schlissel*. *Id.* at 765. Both students have an

[138] *Id.*

[139] *Id.* at 765-66.

[140] *Id.*

[141] *Speech First, Inc.*, 968 F.3d at 643; Speech First, Inc. v. Schlissel, 939 F.3d at 764-65.

which could lead to . . . punishments," and had the potential to also lead to "consequences that [the student] would otherwise not face."[142]

In comparison to the University of Illinois's BART policy and protocol, Speech First did not allege any viable and valuable evidence that a student's failure to respond to an instance of outreach or accept a meeting with the BART team.[143] Additionally, the invitation to attend a BART meeting or outreach instance similarly did not feel like an "implicit threat" to students.[144] The University of Illinois's students virtually faced no repercussions for not attending or acknowledging a BART meeting, nor could Speech First, Inc., for the university students, demonstrate that the threats carried weight, and therefore, not empty.[145] The Seventh Circuit further pointed out the since the "majority of students decline to meet [this] signals that students do not fear consequences from the refusal to participate."[146]

When also discussing the practicalities and realities of these two programs, there are notable differences for the effect that each university's policy had on students. The University of Michigan students were able to allege that speech was 'chilled" and that threats or noncompliance in attending a meeting or adhere to the program did carry weight and could carry some sort of punishment, even though it was minimal.[147] The University of Illinois students, while it had the Sixth Circuit's Schlissel decision as a persuasive example, failed to illustrate the impact that the BART policy had on them. Speech First also had no firsthand knowledge of the BART policy and protocol, therefore, the information obtained in this lawsuit against the university was akin to secondhand knowledge.[148] By refusing to give Speech First associational standing here in *Killeen*, the Seventh Circuit logically parted ways with the Sixth Circuit and demonstrated the

[142] *Id.* at 765.
[143] *Speech First, Inc.*, 968 F.3d at 643-44.
[144] *Id.*
[145] *Id.*
[146] *Id.* at 640.
[147] Speech First, Inc. v. Schlissel, 939 F.3d at 756.
[148] *Speech First, Inc.*, 968 F. 3d at 634.

effectiveness of properly alleging injury in fact for standing doctrine questions and cases.

A second comparison and parallel between *Schlissel* and *Killeen* also happened regarding the issue of mootness for each of these cases.[149] Both the Sixth and the Seventh Circuits analyzed both of these issues through the standing and mootness doctrine to produce justiciable and viable outcomes for all parties involved. The standing doctrine, while arguably a brick wall for some lawsuits, rationally and logically selects cases that result in actual issues reaching resolutions, instead of intangible results for unrealized problems. The mootness doctrine also similarly functions in this way. It selects and carves out instances in which it would be the most appropriate time for a court to decide a lawsuit.

In adhering to the mootness principle, the Seventh Circuit created an additional rule regarding the ripeness or correct timing of cases. In *Killeen*, the student code section found to be the source of mootness in the case was repealed seven weeks into the start of litigation.[150] While Judge Brennan stated that this was suspicious in his own dissent from the panel, the Seventh Circuit found that the repeal of the student code section did not warrant review by the court.[151]

This Seventh Circuit decision continues to close the door for First Amendment issues by way of carefully construing parties who are most appropriate to bring a grievance in to court. This narrowing does not take away First Amendment freedoms, rather it supposes a correct disposition of a complaint to adhere to the old standing doctrine that continuously evolves.

ANALYSIS

[149] In *Speech First, Inc. v. Killeen*, 936 F.3d at 646, the majority held that the Student Code provision was moot. In *Speech First, Inc., v. Schlissel*, 939 F.3d at 770, the University of Michigan did not put forth enough affirmative action for the Sixth Circuit to find the case not moot. Even with using the same blackletter law, the Sixth Circuit instructed a rigid analysis of what constitutes as genuine and affirmative regarding the repeal of a policy as to render a case moot.

[150] *Speech First, Inc.*, 968 F.3d at 633.

[151] *Id.* at 654-55.

The Seventh Circuit held true to the tripartite scheme from the 1970s that developed into a carefully crafted and nuanced test regarding a party's standing. The Seventh Circuit did not condemn Speech First, Inc. for choosing to file this case as an association.[152] It held that Speech First, Inc. did not demonstrate an injury in fact, a legally recognized cause of action, when disapproving of the University's policies.[153] Therefore, this case does not expect future litigants to always have an individual party as a plaintiff, but asks that litigants have a more traditionally recognized and sound injury when filing a case in federal court.[154]

In further detailing and explaining that the injury was not "in fact" as required by traditional standing doctrine jurisprudence, the Seventh Circuit correctly held that there was no "credible threat" felt by students about content-based regulation or coerced self-censorship from BART, BIP, or the NCDs.[155] When students' speech had no formal or University-recognized enforcement that required the students to change their opinions or stop their speech altogether, this is not indicative of any "chilling" or censorship. Rather, the policies, based on University statistics serve as a processional tool in allowing students to bridge ideological gaps through a valid learning opportunity and optional conversation.[156] The Seventh Circuit was correct in finding that a completely optional ability to participate in a learning experience cannot be a realized injury, nor can it be a hypothesized injury.[157]

In returning to other associations or organization that have attempted to file suit on behalf of its members in the Seventh Circuit,

152 *Id.* at 638 (clarifying that associational standing would readily apply to Speech First "if its members were to have standing, Speech First would have associational standing," and that no party contests this on appeal).

153 *Id.* at 633.

154 Lee, *supra* note 14, at 178-79 (commenting on how "injury in fact" must be realized and not hypothesized).

155 *Speech First, Inc.*, 968 F.3d at 644, 647.

156 *Id.* at 632.

157 *Id.* at 634.

those claims have been dismissed for reasons other than standing. Two COVID-19 cases filed during mid-2020 illustrate that the Seventh Circuit will still find that associational standing is valid and will continue to bypass cases that cannot satisfy all three elements of the tripartite scheme of injury in fact, traceability, and redressability. First, the Seventh Circuit held that the Northern District of Illinois correctly denied two church's 42 U.S.C. § 1983 that sought an injunction to Governor J.B. Pritzker's Executive Order 2020-32.[158] The Executive Order prohibited "[a]ll public and private gatherings of any number of people occurring outside a single household or living unit" except for essential purposes.[159] The Seventh Circuit focused its analysis on the 42 U.S.C. § 1983 claim, where the churches alleged discrimination of their religion in violation of the First Amendment because of the size restriction of gatherings and general condemnation of large gathering that the churches would have.[160] The Seventh Circuit found no need for a standing analysis, nor did it find that the church did not have standing to file a claim on behalf of its members, therefore, demonstrating that associational standing is valid in the circuit.

Second, when the Illinois Republican Party filed a First Amendment claim against Governor Pritzker, the Seventh Circuit was, again, willing to overlook the standing analysis that it gave to Speech First, Inc.[161] The Illinois Republican Party alleged that the religious carve-out exception in Executive Order 43 violated the Party's right to free speech under the First Amendment, as Governor Pritzker only exempted religious activities from Executive Order 43.[162] It focused on the merits of the complaint against the Governor's Executive Order and alleged disparate treatment of religious groups and political

[158] Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341, 347 (7th Cir. 2020).

[159] Ill. Exec. Order No. 2020-38 (Apr. 30, 2020), https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-32.aspx.

[160] *Elim Romanian Pentecostal Church*, 962 F.3d at 342.

[161] Ill. Republican Party v. Pritzker, 973 F.3d 760, 764 (7th Cir. 2020).

[162] *Id.* at 761-62.

groups.[163] The Seventh Circuit held that a preliminary injunction against the Executive Order was unwarranted, as Governor Pritzker could exempt or allow for religious activities under Executive Order 43 while declining to do the same for other types of activities.[164] The Seventh Circuit's willingness to analyze the case's merits continues to demonstrate that associational standing, if pled correctly by a plaintiff, will allow for a case and controversy in the circuit.

Returning to the standing and doctrine question analyzed in Speech First, Inc., the Seventh Circuit further developed the standing doctrine and the mootness doctrine. The adherence to the tripartite scheme and its many nuances in determining what a credible threat or injury in fact entails creates room for courts to explore and outline instances in which a particularized injury in fact is realized, and therefore, creates standing for a plaintiff's case or controversy.

The Seventh Circuit further analyzed the meaning of "injury in fact" for its circuit, not wanting to overreach politically or legislatively into other branches of the federal government.[165] Additionally, by finding Speech First's complaint as moot, it prevented an advisory decision that would be in opposition to courts' main function of resolving "live" disputes between parties so that any redress has an immediate impact, rather than one in theory.[166] *Speech First, Inc. v. Killeen* will not be the last case of its kind, as the issue of students' First Amendment rights at college will continue to progress and permeate through other campuses. However, the Seventh Circuit, similar to *Abbott* and *Speech First, Inc. v. Schlissel*, created another instructive decision that courts around the country may rely upon in analyzing whether a policy does allege a particularized, realized injury in fact worthy of standing.

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[163] *Id.* at 763-64. The Seventh Circuit also addressed mootness in *Elim Romanian Pentecostal Church*, 962 F.3d at 344-45, and *Illinois Republican Party*, 973 F.3d at 763, where it found that the case was not moot if the Executive Orders at issue in either case changed, since Governor Pritzker committed himself to possible reinstatement of the Executive Orders dependent upon the state of the pandemic.

[164] *Id.* at 764.

[165] *See* Elliot, *supra* note 14, at 557.

[166] Scott, *supra* note 39, at 773 (quoting *Already, LLC*, 568 U.S. at 91).

CONCLUSION

The standing doctrine is a necessary prerequisite to address legitimate concerns in federal courts. The Seventh Circuit demonstrated the need for students themselves to bring claims of First Amendment violations where there is actual injury and fear of a chilling effect on speech. Merely proposing that a higher education institution's policies detract from students' right to free inquiry and meaningful speech and debate on a college campus does not help fix the supposed free speech crisis currently happening across the country. In order to find a more equitable solution to balancing a party's rights and grievances, it is best to adhere to Article III's longstanding tradition of requiring a proper party to bring a claim.

Further, mootness of certain student codes and the idea that the alleged grievance should still be addressable by the time a court decides the issue is also of utmost importance. The flexibility in the doctrine of mootness allows for the door to a case or controversy to remain slightly propped open in the Seventh Circuit for plaintiffs that lack standing in the traditional sense with the tripartite scheme. However, the doctrine of mootness is still useful in apportioning when a case or controversy is most appropriately brought before a court.

Therefore, from one of its newest cases, the Seventh Circuit has created a further understanding of the standing doctrine. Even though this doctrine has long been criticized, it supports the efficiency of the court system in saving the court's time and parties' money. The only issue now is whether an independent free speech organization will ever be able to establish an injury in a tangible way that the Seventh Circuit will recognize.