NO. _____

IN THE

Supreme Court of the United States

ASHLYN HOGGARD,

Petitioner,

v.

RON RHODES, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

DAVID A. CORTMAN
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd. NE, Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774

KRISTEN K. WAGGONER
JOHN J. BURSCH
Counsel of Record
ALLIANCE DEFENDING FREEDOM
440 First Street NW
Suite 600
Washington, DC 20001
(616) 450-4235
jbursch@ADFlegal.org

Counsel for Petitioner

(additional counsel listed on inside cover)

TYSON C. LANGHOFER
CHRISTOPHER P. SCHANDEVEL
MATHEW W. HOFFMANN
ALLIANCE DEFENDING
FREEDOM
20116 Ashbrook Place
Suite 250
Ashburn, VA 20147
(571) 707-4655

ETHAN C. NOBLES
NOBLES LAW FIRM
149 S. Market
Benton, AR 72015
(501) 794-9742

QUESTIONS PRESENTED

1. Whether qualified immunity shields public-university officials from liability when the reasoning—but not the holding—of a binding decision gave the officials fair warning they were violating the First Amendment.

2. What degree of factual similarity must exist between a prior case and the case under review to overcome qualified immunity in the First Amendment context?

3. Whether public-university officials should be held to a higher standard than police officers and other on-the-ground enforcement officials for purposes of qualified immunity.

PARTIES TO THE PROCEEDING

Petitioner is Ashlyn Hoggard.[1]

Respondents are Ron Rhodes, Tim Langford, Niel Crowson, Stacy Crawford, Price C. Gardner, William Stripling, and Martha Spack, all Arkansas State University officials or members of the University Board of Trustees.

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Eighth Circuit, No. 19-3016, *Turning Point USA at Arkansas State University* et al. v. *Rhodes*, et al., judgment entered August 31, 2020.

U.S. District Court for the Eastern District of Arkansas, No. 3:17-cv-00327-JLH, *Turning Point USA at Arkansas State University*, et al. v. *Rhodes*, et al., final judgment entered August 19, 2019.

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[1] Turning Point USA at Arkansas State University was also a plaintiff below but has no remaining claims for relief.

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The district court's initial ruling denying Respondents' motion to dismiss is unreported but available at No. 3:17-cv-00327, 2018 WL 1460863 (E.D. Ark. Mar. 23, 2018), and reprinted in the Appendix ("App.") at 60a–65a. The district court's final ruling granting Respondents summary judgment is reported at 409 F. Supp. 3d 677 and is reprinted at App.24a–59a. The Eighth Circuit's affirmance is reported at 973 F.3d 868 and reprinted at App.1a–23a.

STATEMENT OF JURISDICTION

On August 31, 2020, the Eighth Circuit issued its opinion concluding that Respondents violated Petitioner Ashlyn Hoggard's First Amendment rights but nonetheless affirming summary judgment based on qualified immunity. Lower courts had jurisdiction under 28 U.S.C. 1331 and 28 U.S.C. 1291. This Court has jurisdiction under 28 U.S.C. 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

42 U.S.C. 1983 states, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

INTRODUCTION

Petitioner Ashlyn Hoggard sued to challenge Arkansas State University's inaptly named "freedom of expression" policies. These policies required anyone wishing to speak anywhere on campus—including students—to ask permission from University officials before communicating. The policies also gave University officials unbridled discretion to decide whether and how to enforce these speech restrictions.

In the fall of 2017, Ashlyn fell victim to that discretion when she set up a small table near the student union to recruit for a new Turning Point USA chapter. Apparently applying an unwritten "Tabling Policy" that only allowed *registered* student groups and University departments to table in this high-traffic location, University officials told Ashlyn that she was not allowed to table there. The University had "Free Expression Areas" for unregistered groups like hers—but those had to be reserved in advance. Despite Ashlyn's objection, campus police ordered her to remove her table.

The Eighth Circuit easily concluded that the officials violated Ashlyn's First Amendment rights. But the panel affirmed summary judgment for the officials responsible for the challenged policies, holding they were entitled to qualified immunity because prior cases did not clearly establish Ashlyn's rights. That was odd because the Eighth Circuit had previously recognized a heavy presumption of unconstitutionality when a university requires permission before using an outdoor space. *Bowman* v. *White*, 444 F.3d 967, 980 (8th Cir. 2006). The difference was that the court in *Bowman* had ruled *against* the plaintiff there because he was a non-student and had previ-

ously disrupted the campus community by attracting large crowds. Even though Ashlyn *was* a student and *did not* disrupt or attract large crowds, the panel concluded that Ashlyn's First Amendment rights were not "beyond debate" before this case.

In four other circuits—the Sixth, Seventh, Ninth, and Eleventh—Ashlyn likely would have prevailed. Those courts all look to the *reasoning* of prior decisions for determining clearly established law, not just the outcome. Two circuits—the Fifth and the Tenth—look only to prior outcomes, wrongly labeling necessary legal reasoning as mere *dicta*. And the Eighth Circuit is effectively in the latter camp. Here, the court criticized any Arkansas State official who believed the Tabling Policy was permissible for "ignor[ing] the critical fact that the *Bowman* plaintiff was a non-student, and the speech restrictions [there] were justified by compelling safety and administrative concerns." App.19a. "Nonetheless," the court went on, "*Bowman*'s distinguishability does not mean the defendants 'knowingly violated the law.'" *Ibid.* (cleaned up).

This Court should grant the petition, resolve the circuit conflict, and deny the officials qualified immunity. In doing so, the Court should also clarify how "specific" a prior precedent must be to shield government conduct that violates the First Amendment. And the Court should resolve a separate 3-1 circuit split over the level of deference owed to university officials in the First Amendment context.

The quagmire of lower-court, qualified-immunity rules—particularly on public-university campuses—is in desperate need of this Court's clarification. Review is warranted.

STATEMENT OF THE CASE

I. Background

The relevant facts are uncomplicated and undisputed. In fall 2017, Ashlyn transferred to Arkansas State University-Jonesboro as a junior majoring in political science. 8th Cir. Joint Appendix ("J.A.") 104, 806. Earlier that year, Ashlyn had learned about a national organization called Turning Point USA and had reached out to its founder on Twitter. *Id.* at 114. Ashlyn liked that the organization educated students about the differences between capitalism and socialism, big government and small government, and the importance of free markets. *Ibid.*

Because Turning Point did not have an active chapter at the University, Ashlyn decided to start one. J.A.115–17, 147. She was introduced via email to Emily Parry, Turning Point's south-central regional manager, who showed Ashlyn how to complete the necessary paperwork to start the new student organization. *Id.* at 117, 123. The two of them filled out and submitted an application on Turning Point's website. *Id.* at 147. Together, they decided to set up a table on campus the next day to recruit members for the new chapter. *Id.* at 123. (Five members were required to register as a student organization. J.A.346.)

Ashlyn and Emily decided to table on the side of a large, paved walkway leading to the student union entrance, an area called Heritage Plaza. J.A.121, 125, 231, 240, 247, 263, 798. That location allowed interested students to stop and voluntarily approach their table, so Ashlyn and Emily did not have to solicit students who might not be interested. *Id.* at 130.

After 20–30 minutes, a University official ordered Ashlyn and Emily to leave. J.A.119, 236. When they did not do so immediately, the official called another official who called campus police. *Id.* at 119, 236–37, 240, 717. The responding officer testified that he was addressing a complaint that someone was violating "the freedom of speech reservation policy." *Id.* at 742, 756. The second official explained that the University had "freedom of speech areas," and that an advance reservation was required to use those areas—which Ashlyn and Emily did not have. *Id.* at 344, 346 (videos of the encounter). Heritage Plaza itself was not available for unregistered student organizations to recruit members, only existing organizations. *Id.* at 234–35, 663–64. The official concluded by telling Ashlyn and Emily they couldn't speak anywhere on campus without telling the official first, and the responding officer threatened arrest. *Ibid.* As the Eighth Circuit put it, Ashlyn's "recruiting efforts—at least at her [Heritage Plaza] informational table—were done for the day." App.4a.

The larger Arkansas State University System had a "Freedom of Expression Policy" that governed all its campuses. J.A.41–43, 850. That policy included speech zones, a 72-hour advance-reservation requirement for the rest of campus, a lack of defined terms, and substantial discretion delegated to University officials. *Id.* at 41–43, 418. The Jonesboro campus's policy mostly tracked the system policy. *Id.* at 45–48, 421–23. And the Jonesboro official responsible for reserving the free expression areas admitted that she had extensive discretion; she could even allow speakers to remain in a free-expression area *without* an advanced reservation if she chose. *Id.* at 220, 224–25, 228, 244.

Tellingly, there is *no* written policy specifying who may table in Heritage Plaza. J.A.236, 249–51. The Tabling Policy enforced against Ashlyn "simply emerged from the bureaucratic aether." App.14a. It gave a University official unfettered authority to grant or deny speakers permission to set up a table. J.A.46. It is undisputed that Ashlyn and Emily were not causing a disturbance, were not blocking a thoroughfare, and did not draw any complaints. *Id.* at 244–45. Yet officials barred them from recruiting student members in the Plaza and refused even to offer them the opportunity to move to a "free expression area" and continue speaking there. *Id.* at 125, 242, 344.

II. Proceedings

Ashlyn and Turning Point USA at Arkansas State University filed suit, bringing facial and as-applied challenges to the University's speech policies. Ashlyn sought an injunction and compensatory damages. The facial challenge was then rendered moot by the Arkansas General Assembly's enactment of the Forming Open and Robust University Minds (FORUM) Act, and the University's resulting repeal of its speech policies. J.A.1042–44. The parties cross-moved for summary judgment on the as-applied claims, and the district court denied the plaintiffs' motion and granted the officials', holding that the officials were entitled to qualified immunity. App.24a–59a.

The Eighth Circuit easily concluded that the University officials had violated Ashlyn's rights: "[T]he (limited) availability of alternative forums and the defendants' educational expertise cannot compensate for the weak justification . . . the defendants offer for their status-based discrimination." App.17a.

On qualified immunity, the panel's analysis focused on *Bowman* v. *White*, 444 F.3d 967, 974 (8th Cir. 2006). *Bowman* was also "an Arkansas campus speech case," and in that case, the court had "upheld several complained-of speech restrictions imposed in an unlimited public forum." App.19a. While at first blush an Arkansas State University official might thus have viewed *Bowman* as authorizing the Tabling Policy, such a view "ignores the critical fact that the *Bowman* plaintiff was a non-student, and the speech restrictions [there] were justified by compelling safety and administrative concerns." *Ibid.* (The non-student was a street preacher who drew massive, disruptive crowds. *Bowman*, 444 F.3d at 973.) "Under these circumstances," and in that "as applied" challenge, the *Bowman* court held that the policy overcame the "heavy presumption of unconstitutionality" against prior restraints on speech. 444 F.3d at 974, 980–81. In contrast here, Ashlyn was a student and had never caused a campus disturbance. So even though the *Bowman* court ruled for the university defendants, its reasoning dictated the unconstitutionality of the unwritten Tabling Policy at issue here.

But rather than applying *Bowman*'s reasoning, which required judgment in favor of Ashlyn, the panel focused on the decision's result—judgment in favor of school officials. Given that outcome, opined the panel, the University officials here "could have reasonably viewed *Bowman* as permitting the Tabling Policy; *Bowman*'s distinguishability does not mean the defendants knowingly violated the law." App.19a (cleaned up). Accordingly, the University officials escaped any responsibility and left Ashlyn with no redress for her constitutional injuries.

REASONS FOR GRANTING THE WRIT

I. This Court should grant review to resolve a 4-3 circuit split over whether a binding decision's reasoning can "clearly establish the law" for purposes of qualified immunity.

The circuits are sharply divided over whether "clearly established" law comes only from prior cases' holdings or also includes their reasoning. That split derives from this Court's decision in *Hope* v. *Pelzer*, 536 U.S. 730 (2002), which strongly suggested that a previous decision's reasoning can indeed give fair warning of what is unconstitutional.

In *Hope*, this Court held that qualified immunity did not shield three prison officials from liability for violating the Eighth Amendment when they repeatedly punished an inmate by handcuffing him to a "hitching post." 536 U.S. at 733–35, 745–46. Rejecting the Eleventh Circuit's "rigid gloss on the qualified immunity standard," this Court explained that the "salient question" was "whether the state of the law" gave the prison officials "fair warning" that their conduct was unconstitutional. *Id.* at 739, 741.

To answer that question, this Court relied in part on the "reasoning, though not the holding," of a binding Eleventh Circuit case. *Id.* at 743. "Although the facts of [that] case [were] not identical," and the court there had held that the challenged conduct was *not* unconstitutional, the case's "premise [had] clear applicability" in *Hope*. *Ibid.*[1] Thus it "gave fair warn-

[1] Accord Amanda K. Eaton, *Optical Illusions: The Hazy Contours of the Clearly Established Law and the Effects of* Hope v. Pelzer *on the Qualified Immunity Doctrine*, 38 GA. L. REV. 661, 689 (2004).

ing" to the prison officials "that their conduct crossed the line of what is constitutionally permissible." *Ibid.* Stated differently, the "reasoning, though not the holding," of the case should have made it "apparent" to "reasonable officers in that Circuit" that their conduct violated the Eighth Amendment. *Ibid.*

A. The Sixth, Seventh, Ninth, and Eleventh Circuits all look to the reasoning of prior decisions for clearly established law.

Before *Hope*, it was unclear whether "the state of the law" could give reasonable officials "fair warning" that their conduct was unconstitutional based on a binding decision's reasoning. 536 U.S. at 741. The Eighth Circuit had held that mere "statements" (i.e., reasoning) in a prior decision of this Court did "not create a clearly established right but instead constitute[d] *dicta*." *Brown* v. *Frey*, 889 F.2d 159, 169 (8th Cir. 1989).[2] Likewise, the Eleventh Circuit "held that dicta cannot clearly establish the law for qualified immunity purposes." *Jones* v. *Cannon*, 174 F.3d 1271, 1288 n.11 (11th Cir. 1999). On the Second Circuit, though, Judge Calabresi had observed "that lucid and unambiguous dicta concerning the existence of a constitutional right *can without more* make that right 'clearly established' for purposes of a qualified immunity analysis." *Wilkinson ex rel. Wilkinson* v. *Russell*, 182 F.3d 89, 112 (2d Cir. 1999) (Calabresi, J., concurring in part) (emphasis added). Forecasting

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[2] When a court sets forth legal standards as it reasons its way toward a holding that officials acted lawfully, those statements are not *dicta* in the usual sense but are essential to the outcome. Confusingly, courts in this context often use the terms "*dicta*," "statements," and "reasoning" interchangeably.

what this Court would write in *Hope*, Judge Calabresi reasoned that "there could be enough clear statements about a right in dicta [i.e., reasoning] from other cases so that a court could declare that the right had been clearly established." *Id.* at 113 n.4.

Following *Hope*, four circuit courts of appeals have all held that the reasoning of a prior, binding decision can supply the required specificity to show that the law is clearly established:

1. Just months after the decision, the Sixth Circuit applied the Court's "recent guidance in *Hope*" to hold that a plaintiff's Fourth Amendment right to be free from detention "for three hours in ninety-degree heat with no ventilation" was "clearly established for qualified immunity purposes." *Burchett* v. *Kiefer*, 310 F.3d 937, 945 (6th Cir. 2002). In *Hope*, this Court had "made clear" that "a right is clearly established when '[t]he reasoning, though not the holding,' of a prior court of appeals decision puts law enforcement officials on notice, or when the 'premise' of one case 'has clear applicability' to a subsequent set of facts." *Ibid.* (quoting *Hope*, 536 U.S. at 743). Citing the reasoning of three of its prior decisions, the Sixth Circuit held that the "premises" enunciated in those cases had "clear applicability" to the case before it, and that "the reasoning of those cases should have alerted reasonable officers to the constitutional violations inherent in subjecting a detainee to excessive heat." *Id.* at 946. See also *Bible Believers* v. *Wayne Cnty.*, 805 F.3d 228, 258 (6th Cir. 2015) (en banc) (the "facts and analysis" in a partially overruled prior decision had "nonetheless alerted" the defendants that their actions "could subject them to liability"); *Feathers* v. *Aey*, 319 F.3d 843, 850 (6th Cir. 2003) (applying the language from *Hope*).

2. More recently, the Ninth Circuit applied *Hope* and held that the "reasoning, though not the holding," of one of its prior decisions "gave fair warning" to the defendant police officers that "their conduct crossed the line of what is constitutionally permissible." *Hernandez* v. *City of San Jose*, 897 F.3d 1125, 1138 (9th Cir. 2018) (quoting *Hope*, 536 U.S. at 743). In its prior case, the court had "ultimately held" that the plaintiffs had "*failed* to establish a constitutional violation." *Ibid.* (emphasis added). But it also had explained that it would have reached a different result if certain critical facts had been different. *Ibid.* Those facts *were* different in *Hernandez*. *Ibid.* And under *Hope*, that was enough to clearly establish the "violative nature" of the officers' "particular conduct." *Ibid.* (cleaned up).

3. As for the Eleventh Circuit, it abandoned its pre-*Hope* position that "dicta cannot clearly establish the law for qualified immunity purposes." *Jones*, 174 F.3d at 1288 n.11. In *Bailey* v. *Wheeler*, the court applied *Hope*'s language to reject the defendant's qualified-immunity defense. 843 F.3d 473, 484 (11th Cir. 2016). That defense failed since the "reasoning" of one of the court's prior decisions and the "broad principle it establishe[d]" should have placed the defendant "on notice that he could not potentially endanger [the plaintiff's] life in retaliation for [his] exercise of his First Amendment rights." *Ibid.* Accord *Mercado* v. *City of Orlando*, 407 F.3d 1152, 1159 (11th Cir. 2005) (quoting *Hope*'s "reasoning, though not the holding" language); *Jones* v. *Fransen*, 857 F.3d 843, 852 (11th Cir. 2017) (same).

4. Finally, the Seventh Circuit has made a similar shift. But unlike the Eleventh Circuit, the Seventh Circuit grounded its change in *Anderson* v. *Creighton*, 483 U.S. 635 (1987). In *Lunini* v. *Grayeb*, the court had previously rejected an argument that language in a "factually dissimilar" prior case clearly established the relevant law. 395 F.3d 761, 772 (7th Cir. 2005), *as amended on denial of reh'g and reh'g en banc* (Mar. 4, 2005). The "actual holding" in that prior case had "ultimately vindicated the police officers' claims of qualified immunity." *Ibid.* And the relevant language was "pure dicta." *Ibid.* Thus, "[h]owever suggestive" that dicta might have been, the court in *Lunini* concluded that "a claim in a factually dissimilar case which ultimately fails to survive a qualified immunity defense cannot be said to sufficiently define the contours of the purported right." *Ibid.* (cleaned up).

Five years later, the Seventh Circuit did an about face. Discussing the same language it had disparaged as "pure dicta" in *Lunini*, the court in *Hanes* v. *Zurick* countered that "even dicta may clearly establish a right." 578 F.3d 491, 496 (7th Cir. 2009) (citing *Anderson*, 483 U.S. at 640). Quoting Judge Calabresi's concurrence in *Wilkinson*, the court added that the "statement" in its earlier opinion "could not be more lucid and unambiguous." *Ibid.* Thus, "[s]ince the conduct alleged" was "almost identical to the requirements set out" in that earlier opinion, "a reasonable officer was on notice that such conduct violates the constitution." *Ibid.* Accord *Est. of Escobedo* v. *Bender*, 600 F.3d 770, 786 (7th Cir. 2010) (finding violation of clearly established right because, "through the use of lucid and unambiguous dicta," the court had "repeatedly expressed [its] concern with the overuse of flash bang devices") (cleaned up).

B. The Fifth and Tenth Circuits look only to results, not reasoning.

Other circuits take the opposite approach. Even while recognizing that some "courts have suggested dicta can clearly establish the law for purposes of qualified immunity," the Fifth Circuit insists that "clearly established law comes from holdings, not dicta." *Morrow* v. *Meachum*, 917 F.3d 870, 875 & n.6 (5th Cir. 2019). Accordingly, the Fifth Circuit does not require government officials to know the law announced in previous decisions, only the outcome: "[W]hile officers are charged with knowing the *results* of our cases—at least when they are so numerous and pellucid as to put the relevant question beyond debate—officers are not charged with memorizing every jot and tittle we write to *explain* them." *Id.* at 875–76 (emphasis added, cleaned up).

Similarly, the Tenth Circuit in *Leiser* v. *Moore*, 903 F.3d 1137 (10th Cir. 2018), refused to rely on reasoning in this Court's "precedents regarding a constitutional protection against government disclosure of personal information," after this Court made clear that those statements "were dicta." *Id.* at 1143. Given that qualification, the Tenth Circuit concluded that "clearly established law [did] not support Plaintiff's constitutional claim." *Id.* at 1145. See also *Harris* v. *Mahr*, No. 20-1002, 2020 WL 7090506, at *3 (10th Cir. Dec. 4, 2020) ("This discussion of the failure-to-intervene theory was simply dicta and would not constitute clearly established law."); *Thomas* v. *White-Gordon*, 672 F. App'x 832, 836 (10th Cir. 2016) ("Anything in that opinion supporting substantive-due-process claims would have to be dicta, hardly the basis for clearly established law.").

In sum, four circuits have held—consistent with *Hope*—that the reasoning of a prior decision can supply the required specificity to show that the law is clearly established, even if the outcome of the prior decision is not directly applicable to the current situation. And two have held that it cannot.

C. The Eighth Circuit's decision in this case shows that it remains squarely in the Fifth and Tenth Circuits' camp.

Eighth Circuit judges were previously divided over whether the reasoning of a prior opinion can be enough to clearly establish the law. For example, in *Robinson* v. *Hawkins*, Judge Colloton accused the majority of wrongly relying "on *dicta* rather than holdings" of prior decisions. 937 F.3d 1128, 1141 (8th Cir. 2019) (Colloton, J., dissenting in part). But the majority never said it was doing that. Instead, it expressly said it was relying on the *holding* from a prior case. *Id.* at 1137 ("clearly established law *holds* . . .") (emphasis added); *id.* at 1138 ("we *held* the search had not violated clearly established law because . . .") (emphasis added).

In dueling concurrences in an *en banc* decision issued just last year, the same question reemerged. In *Dillard* v. *O'Kelley*, the Eighth Circuit held that the "uncertain status of the right to informational privacy" meant that the defendants were entitled to qualified immunity against a claim that they had violated that right. 961 F.3d 1048, 1055 (8th Cir. 2020) (en banc), *cert. denied,* No. 20-670, 2021 WL 78198 (U.S. Jan. 11, 2021). "If a right does not clearly exist, it cannot be clearly established." *Ibid.*

Judge Colloton joined the majority opinion in full, but he wrote individually "in response to the separate opinions that follow[ed]" his. *Id.* at 1055 (Colloton, J., concurring). As he read those opinions, both took "the view that court decisions *rejecting* a plaintiff's claim of constitutional right can clearly establish a constitutional right for the benefit of a future plaintiff." *Ibid.* And he believed the court had "properly decline[d] to adopt that reasoning" because courts typically cannot "in dicta create or recognize a clearly established right." *Id.* at 1055–56.[3]

In a separate concurring opinion, Judge Grasz pushed back on that characterization of the dispute. *Id.* at 1058 n.7 (Grasz, J., concurring in part and concurring in the result). Judge Grasz agreed "that obiter dictum is not binding law." *Ibid.* But he added that "the notion that recognition of a constitutional right, analytical framework, or legal test is per se dicta in a case where a violation of a constitutional right is not found to have been successfully alleged sweeps too broadly." *Ibid.* "The legal standard applied is not beyond the case." *Ibid.* (cleaned up). "It is essential to its determination." *Ibid.* And Judge Grasz was not aware of any "precedent standing for the proposition that the legal standard employed by an appellate court is not part of its holding unless it *also* finds that a violation of that standard has occurred." *Ibid.* So courts can look to the reasoning of a prior decision if it can be said that the reasoning is part of that prior decision's holding.

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[3] Judge Colloton allowed for "the likely exception of decisions that declare a constitutional violation in a concrete case before granting qualified immunity." *Id.* at 1056.

"Given the conflicting views exhibited in [*Dillard*] about how binding law is decreed, and how clearly established rights are recognized," Judge Colloton urged that the issue deserves "renewed attention." *Id.* at 1057 (Colloton, J., concurring).

Two months after *Dillard*, the court below issued its opinion in this case. App.1a. In her briefing, Ashlyn had argued that the reasoning in the Eighth Circuit's *Bowman* decision "would have alerted reasonable officials to the constitutional problems" with Arkansas State's "blanket [speech] policies." Appellant's Reply Br. at 16. In *Bowman*, the Eighth Circuit "rightly recognized that a university's requirement that a group 'obtain a permit before 'using' outdoor space is a prior restraint on speech against which there is a heavy presumption of unconstitutionality.'" Appellant's Opening Br. at 26 (quoting *Bowman*, 444 F.3d at 980). And that "heavy presumption" had only been overcome in *Bowman* in light of specific facts—a non-student speaker who caused disruption by drawing large crowds—that were not present here. *Id.* at 27. Thus, the outcome in *Bowman* is "the exception to the clearly established rule." *Ibid.* And any reasonable official reading that decision "should have easily recognized" that applying Arkansas State's speech codes to Ashlyn "does not fall under that narrow exception and is prohibited." *Ibid.*

In support, Ashlyn cited the Sixth Circuit's *en banc* decision in *Bible Believers* and quoted this Court's holding in *Hope* "that the 'reasoning, though not the holding' of a prior case 'gave fair warning to respondents that their conduct crossed the line of what is constitutionally permissible.'" Reply Br. at 16 (quoting *Hope*, 536 U.S. at 743). "Far from reading *Bowman* as a blank check, reasonable officials would

have been 'made to hesitate,' *Harlow* v. *Fitzgerald*, 457 U.S. 800, 819 (1982), by *Bowman*'s reminder that prior restraints carry a 'heavy presumption of unconstitutionality,' and by its narrow ruling that the presumption was overcome only 'under the circumstances' there." *Ibid.* (cleaned up).

The *Bowman* court also assessed—but ultimately upheld—a policy that banned *non-university* entities from speaking on campus "during so-called 'dead days'" to protect students' "educational experience . . . by preserving limited quiet study and exam-taking time." 444 F.3d at 982–83. Like the Tabling Policy here, that policy "limit[ed] the designated forums to certain classes of speakers." *Id.* at 983. The *Bowman* plaintiff argued that the dead-day ban was "underinclusive" because it allowed speech by university entities, which the plaintiff thought "could be just as intrusive as speech by Non-University Entities." *Ibid.* Disagreeing, the *Bowman* court held that it "was reasonable for the administration to conclude that University Entities who do reserve space in the designated forums on these dates are more likely to be attuned to the special needs of the university community during examination and commencement periods, and thus less likely to disrupt the campus during these sensitive times." *Ibid.* (cleaned up). *For that reason*, the court held that the dead-day ban "passes constitutional muster." *Ibid.* But the reasoning supporting that holding should have alerted the officials here that it was *not* reasonable to distinguish between registered and unregistered *student* groups when the only reason given for the policy was to preserve Heritage Plaza as the "living room of campus," meaning a comfortable place for *students* to spend their time. App.19a.

Absent any "renewed attention" to the debate that had played out in *Dillard*, though, the court below ignored Ashlyn's argument—and this Court's decision in *Hope*—entirely, holding that because *Bowman* ruled for the university defendants, "the defendants [here] could have reasonably viewed *Bowman* as permitting" Arkansas State University's challenged policy. App.19a. This was so, said the panel, even though the University officials' view of *Bowman* "ignores the critical fact that the *Bowman* plaintiff was a non-student, and the speech restrictions were justified by compelling safety and administrative concerns," App.19a, and even though "none of those factors are present here," App.16a.

In other words, while the court recognized that the defendants' Tabling Policy violated Ashlyn's constitutional rights, and that their reading of *Bowman* "ignores the critical fact[s]" that make up the reasoning in *Bowman*, the court still held that qualified immunity shields the defendants from liability for their unconstitutional policies. App.19a. That ruling overlooked that the "reasoning, though not the holding," of *Bowman* should have made it "apparent" to reasonable university officials that the speech policies challenged here violated the First Amendment. *Hope*, 536 U.S. at 743. Thus, this case is an ideal vehicle for resolving the circuit split over whether the reasoning in a prior decision can supply the required specificity, i.e., clearly established law, for purposes of qualified immunity.

II. This Court also should grant review to clarify how much factual specificity in a prior case is required to overcome qualified immunity in the First Amendment context.

The Eighth Circuit here also failed to ask the "salient question . . . whether the state of the law" gave the University officials "fair warning" that their policies were unconstitutional. *Hope*, 536 U.S. at 741. Instead, the court asked only whether the state of the law had placed the constitutional question "beyond debate." App.18a, 19a, 21a.

"The Court's language in *Hope* is clearly more 'plaintiff-friendly,' but since that decision, the 'fair warning' formula has been virtually ignored by [this] Court." Karen Blum, Erwin Chemerinsky, & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 TOURO L. REV. 633, 654 (2013). In contrast, the "beyond debate" phrase "appeared for the first time" in this Court's 2011 decision in *Ashcroft* v. *al-Kidd*, 563 U.S. 731 (2011). Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 66 (2016). And the Court applied it in "eight of the eleven subsequent" opinions following *al-Kidd* in which the Court held that "government officials did not act in violation of clearly established law." *Ibid.*

Without ever disavowing *Hope*'s test, then, this Court's phrasing in *al-Kidd* appears to have "raised the bar for plaintiffs to overcome the clearly-established-law hurdle." Blum, supra at 654. And "[l]ower courts have taken note" of the Court's "conflicting messages" and its apparent "raising of the

qualified immunity bar." *Id.* at 655.[4] As a result, "courts of appeals are divided—intractably—over precisely what degree of factual similarity must exist." *Zadeh* v. *Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part). When courts require a prior case with such similar facts as to place the constitutional question beyond debate, "qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly." *Ibid.*

This Court should resolve the tension between these two competing standards by granting the petition and holding that less factual specificity is required outside the Fourth Amendment context. "[S]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts." *Mullenix* v. *Luna*, 577 U.S. 7, 12 (2015). Excessive-force cases in particular involve "an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue." *Kisela* v.

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[4] Accord Daniel K. Siegel, *Clearly Established Enough: The Fourth Circuit's New Approach to Qualified Immunity in Bellotte* v. *Edwards*, 90 N.C. L. REV. 1241, 1251–52 (2012) (discussing the "apparent inconsistency" between *Hope* and *Brosseau* v. *Haugen*, 543 U.S. 194 (2004), and the "variety of attempts among the circuits to reconcile the two cases").

Hughes, 138 S. Ct. 1148, 1153 (2018) (cleaned up). So, it makes some sense that "overcoming qualified immunity is especially difficult in [these] cases." *Morrow*, 917 F.3d at 876. Accord, *e.g.*, *A.N. by & through Ponder* v. *Syling*, 928 F.3d 1191, 1199 (10th Cir. 2019).

Moreover, "excessive-force claims often turn on split-second decisions to use lethal force." *Morrow*, 917 F.3d at 876 (cleaned up). "That means the law must be *so* clearly established that—in the blink of an eye, in the middle of a high-speed chase—every reasonable officer would know it immediately." *Ibid.*

The flip side of those situations are cases like this one—where "the range of reasonable judgments naturally narrows by virtue of the officials' increased opportunity for reasoned reflection." *Dillard* v. *City of Springdale*, 930 F.3d 935, 945 (8th Cir. 2019), *reh'g en banc granted, opinion vacated* (Oct. 17, 2019), *on reh'g en banc sub nom. Dillard* v. *O'Kelley*, 961 F.3d 1048 (8th Cir. 2020), *cert. denied,* No. 20-670, 2021 WL 78198 (U.S. Jan. 11, 2021). The defendants here are university officials who had years to review and decide how to implement the unconstitutional speech codes Ashlyn challenges. Nothing excuses their failure to heed *Bowman*'s "fair warning" that their policies were unconstitutional. *Hope*, 536 U.S. at 741. But unless and until this Court "cabin[s]" its more demanding "language to any particular context, these general characterizations of the qualified immunity defense" will continue to "place a thumb on the scales favoring state actors in all cases, and not just in the Fourth Amendment context." *Valdez* v. *Roybal*, 186 F. Supp. 3d 1197, 1273 (D.N.M. 2016).

III. Finally, this Court should grant review to resolve a 3-1 circuit split over whether school officials should be held to a higher standard than other state officials.

The fact that all the defendants here are university officials charged with adopting, reviewing, and implementing the challenged policies—not the officials or police officers charged with enforcing them—presents an opportunity to resolve a different circuit split over whether courts should treat school officials differently than other government defendants for purposes of qualified immunity.

In *Holloman ex rel. Holloman* v. *Harland*, the Eleventh Circuit rejected a qualified immunity defense raised by the defendants—a high school teacher and principal—holding that both had violated the plaintiff student's clearly established First Amendment rights. 370 F.3d 1252, 1269–70, 1278–79 (11th Cir. 2004). Government officials are not "free of the responsibility to put forth at least some mental effort in applying a reasonably well-defined doctrinal test to a particular situation." *Id.* at 1278. And the court did "not find it unreasonable to expect the defendants—*who hold themselves out as educators*—to be able to apply" the relevant legal standard "notwithstanding the lack of a case with material factual similarities." *Ibid.* (emphasis added). Ashlyn quoted this language from *Holloman* in her opening brief. Opening Br. at 35 n.20. But the panel below ignored it.

In contrast, the Fourth, Fifth, and Seventh circuits have all staked out the opposite position in qualified-immunity cases arising in the educational context. See *Abbott* v. *Pastides*, 900 F.3d 160, 174 (4th

Cir. 2018) ("As we and other courts have recognized, First Amendment parameters may be especially difficult to discern in the school context."); *Morgan* v. *Swanson*, 755 F.3d 757, 760 (5th Cir. 2014) ("Where there are no allegations of malice, there exists a presumption in favor of qualified immunity for officials in general, and *for educators in particular*.") (emphasis added); *Hosty* v. *Carter*, 412 F.3d 731, 739 (7th Cir. 2005) (noting that "[m]any aspects of the law with respect to students' speech . . . are difficult to understand and apply"). As a result of that extra measure of deference afforded to school officials by many courts, the Fifth Circuit remarked in *Morgan* that its "review of existing law reveal[ed] that educators are *rarely* denied immunity from liability arising out of First-Amendment disputes." 755 F.3d at 760 (emphasis added).

But college officials and administrators should be held to a *higher* standard than police officers and other state officials—not a lower one. The "university is a traditional sphere of free expression" that is "fundamental to the functioning of our society." *Rust* v. *Sullivan*, 500 U.S. 173, 200 (1991). Courts "do not hold police officers to the same standard [they] would apply to a law professor walking the beat." *McGaughey* v. *City of Chicago*, 664 F. Supp. 1131, 1138 (N.D. Ill. 1987), *opinion vacated in part on reconsideration,* 690 F. Supp. 707 (N.D. Ill. 1988). But the inverse should also be true: when professors and other university officials are sued over policies that violate their students' constitutional rights, they should be held to a higher standard than a police officer "walking the beat." *Ibid.* Courts and the general public should be able to expect a broader range of professional competence from school officials

at the university level. Accord *Malley* v. *Briggs*, 475 U.S. 335, 346 n.7 (1986) (framing the question as whether the defendant police officer's warrant "request [was] outside the range of the professional competence expected of an officer"). And given that broader range of professional competence, university officials should be held accountable when, as here, applying even some mental effort to the relevant caselaw would have given them "fair warning" that their policies were unconstitutional. *Hope*, 536 U.S. at 741.

IV. This case is an ideal vehicle to resolve circuit conflicts and provide much needed clarity for a doctrine that allows officials nationwide to violate the Constitution with the appearance of impunity.

This case presents a compelling vehicle for the Court to clarify or realign qualified immunity for five reasons.

First, the governing legal standard was outcome-determinative. The Eighth Circuit easily concluded that the University officials violated the First Amendment. Yet the panel allowed the officials to escape liability because it failed to acknowledge that *Bowman*'s reasoning provided the required specificity to show that the applicable law is clearly established. This case thus places the circuit split directly before the Court. Moreover, the Eighth Circuit's determination of a constitutional violation followed by exculpation for the University officials displays the unfairness of qualified immunity. Clarifying the clearly established standard will take an important step towards restoring public faith in constitutional adjudication.

Second, the record cleanly frames the issues. The district court ruled on a motion for summary judgment. The factual record is appropriately developed and shows a textbook First Amendment violation. The parties do not dispute any material facts. No jurisdictional problems exist. And Ashlyn does not appeal any legal issue besides qualified immunity. No factual or legal roadblocks prevent this Court from reaching the questions presented.

Third, this case involves a First Amendment violation, not a fact-bound Fourth Amendment claim. Perhaps a higher degree of specificity is needed in Fourth Amendment cases where police officers face unique situations involving split-second, life-or-death decisions. *Mullenix*, 577 U.S. at 12. But the exact opposite is true of First Amendment cases. Ashlyn's case involves no highly complex fact patterns or split-second decisions. Her speech about free markets and individual liberty assuredly posed no lethal threat. And Ashlyn did not even seek relief against the officer and employees who told her to stop speaking—just the officials responsible for the policies themselves.

Fourth, Respondents are college administrators and trustees, and society should be able to expect them to follow the Constitution. They had years to adopt, debate, review, revise, amend, and implement their speech policies. And they undoubtedly had time for "reasoned reflection." *Dillard*, 930 F.3d at 945.

Finally, further percolation would not help. As outlined above, there is profound confusion in the lower courts about the clearly-established standard. Only this Court can clarify that standard, so there is no opportunity for exploration or experimentation in the lower courts. Certiorari is warranted.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

KRISTEN K. WAGGONER
JOHN J. BURSCH
Counsel of Record
ALLIANCE DEFENDING FREEDOM
440 First Street NW
Suite 600
Washington, DC 20001
(616) 450-4235
jbursch@ADFlegal.org

DAVID A. CORTMAN
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd. NE, Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774

TYSON C. LANGHOFER
CHRISTOPHER P. SCHANDEVEL
MATHEW W. HOFFMANN
ALLIANCE DEFENDING FREEDOM
20116 Ashbrook Place
Suite 250
Ashburn, VA 20147
(571) 707-4655

ETHAN C. NOBLES
NOBLES LAW FIRM
149 S. Market
Benton, AR 72015
(501) 794-9742

JANUARY 2021

APPENDIX

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United States Court of Appeals
For the Eighth Circuit

No: 19-3016

Turning Point USA at Arkansas State University; Ashlyn Hoggard

Plaintiffs – Appellants

v.

Ron Rhodes, In his individual capacity (Originally named in his individual and official capacities as member of the Board of Trustees of the Arkansas State University System); Tim Langford, Dr., Individual and official capacities as member of the Board of Trustees of the Arkansas State University System; Niel Crowson, Individual and official capacities as member of the Board of Trustees of the Arkansas State University System; Stacy Crawford, Individual and official capacities as member of the Board of Trustees of the Arkansas State University System; Price C. Gardner, Individual and official capacities as member of the Board of Trustees of the Arkansas State University System; Charles L. Welch, Individual and official capacities as member of the Board of Trustees of the Arkansas State University System; Kelly Damphousse, Chancellor of Arkansas State University, in his individual and official capacities; William Stripling, Vice Chancellor for Student Affairs of Arkansas State University, in

his individual and official capacities; Martha Spack, Director of Student Development and Leadership for Arkansas State University, in her individual and official capacities; Christy Clark, In her official capacity as a member of the Arkansas State University System Board of Trustees (Originally named as Ron Rhodes)

Defendants – Appellees

Speech First, Inc.; Young Americans for Liberty; The National Legal Foundation; Pacific Justice Institute; Cato Institute

Amici on Behalf of Appellants

Appeal from United States District Court
for the Eastern District of Arkansas – Jonesboro

Submitted: June 18, 2020
Filed: August 31, 2020

Before LOKEN and GRASZ, Circuit Judges, and CLARK[1], District Judge.

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[1] The Honorable Stephen R. Clark, Sr., United States District Judge for the Eastern District of Missouri, sitting by designation.

GRASZ, Circuit Judge.

Ashlyn Hoggard and Turning Point USA sued Arkansas State University, its administrators, and its trustees for violating their rights under the Free Speech Clause of the First Amendment. The district court[2] granted summary judgment to the defendants. We affirm.

I. Background

A. Factual Background

Just outside the Reng Student Union, Arkansas State University student Ashlyn Hoggard set up a small table. She was accompanied by Emily Parry, a non-student representative for Turning Point USA ("Turning Point"), an organization focused on promoting free markets, limited government, and individual liberty. Hoggard and Parry aimed to recruit students for a local Turning Point chapter, which they hoped could become a registered student organization at Arkansas State. But in short order, two University administrators, Sarah Ponder and Elizabeth Rouse, approached the table to investigate.

Rouse told Hoggard and Parry they could not "table" at their present location. (We will call this area the "Union Patio.") If Hoggard and Parry wanted to set up a table and display their signage ("Free Market, Free People," "Big Government Sucks"), Rouse explained, they could do so elsewhere — specifically, in a campus "Free Expression Area," one

[2] The Honorable J. Leon Holmes, United States District Judge for the Eastern District of Arkansas.

of which was less than 100 yards away. In response, Parry expressed her views about the constitutionality of Free Expression Areas and other campus-speech restrictions. University Police Officer Terry Phipps quickly arrived at the scene and ordered Parry to leave campus. Hoggard was told to take down her table. Her recruiting efforts — at least at her Union Patio informational table — were done for the day.

B. University Policies

Hoggard blames several University policies for her inability to table at the Union Patio. She points to three policies in particular, which we outline briefly here.

Arkansas State University's Freedom of Expression Policy ("System Policy") permits individual Arkansas State University campuses — including the Jonesboro campus Hoggard attended — to establish "Free Expression Areas" and impose reasonable time, place, and manner restrictions on their use. It further explains that Arkansas State "has not opened its campuses as public forums."

The Jonesboro campus has its own Freedom of Expression Policy ("Campus Policy"). It explains that the Jonesboro campus "is not a public forum open for assembly and expression of free speech." But it establishes several Free Expression Areas throughout campus, which can be used for speeches, demonstrations, and expressive activities. According to the Campus Policy, anyone can use the Free Expression Areas, regardless of viewpoint, so long as they get advance permission and adhere to reasonable time,

place, and manner restrictions. Other areas of campus may be used for speeches, marches, and demonstrations, so long as the University receives advance notice and grants permission.

Finally, as an outgrowth of the Campus Policy, the Jonesboro campus has an unwritten policy restricting tabling at the Union Patio to registered student organizations and University departments ("Tabling Policy"). A student's application to create a registered student organization must be first approved by the University. For approval, a student organization seeking registration must have five members, a faculty or staff advisor, and a constitution. And while the application form for an organization to become registered indicates that only registered student organizations and University departments can use certain tables *inside* the Union, it is silent on Union Patio tabling restrictions. It is unclear whether the average Arkansas State student even knew about this unwritten Tabling Policy.

C. Procedural History

Hoggard and Turning Point sued the University, its trustees, and various administrators in federal court. They sought injunctive relief under 42 U.S.C. § 1983, claiming both the System and Campus policies violated due process and unconstitutionally infringed upon freedoms guaranteed by the First Amendment. Hoggard further alleged that the University trustees and administrators were liable for damages.

In the midst of this litigation, the State of Arkansas passed the Forming Open and Robust

University Minds (FORUM) Act. *See* Ark. Code Ann. §§ 6-60-1001 to 1010. According to this new law, state universities cannot carve out "free speech zones" for expressive conduct prohibited in other outdoor campus areas; in effect, all outdoor campus areas are "public forums" for students. Ark. Code Ann. § 6-60-1005. Arkansas State University, according to the FORUM Act, must therefore permit more expressive conduct than do the System and Campus Policies.[3]

Following this change in Arkansas law, the district court granted the defendants' motion for summary judgment. According to the district court, the passage of the FORUM Act mooted Hoggard's request for injunctive relief. The district court also rejected Hoggard's § 1983 due-process and First-Amendment damages claims, finding that the defendants were entitled to qualified immunity because they had not violated a clearly established right.[4] Now, on appeal, Hoggard challenges the

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[3] We note that, while the Jonesboro campus' Tabling Policy is unwritten, the FORUM Act now requires speech regulations be made "public in [universities'] handbooks, on their websites, and through their orientation programs." Ark. Code Ann. § 6-60-1007; *see also* § 6-60-1005 (requiring a state university's time, place, and manner restrictions on speech be "published" and prohibiting them from preventing students from "spontaneously and contemporaneously assembl[ing], speak[ing], and distribut[ing] literature").

[4] The district court also determined that four of the defendants — all University administrators — could not be held liable, as they were not "individually involved in enforcing the Policy against Hoggard." Hoggard challenges this determination on appeal. But because all remaining defendants are entitled to qualified immunity (as we explain below), we need not decide

district court's ruling — she argues University administrators and trustees violated her clearly-established constitutional right to free speech, and they are not, therefore, immune from suit. Our analysis focuses solely on whether the University's administrators and trustees can be liable for money damages under 42 U.S.C. § 1983.

II. Analysis

Section 1983 allows citizens to sue state officials for violating their "rights, privileges, or immunities secured by the Constitution and laws." According to Hoggard, the University administrators and trustees (i.e., the state officials who created and enforced state-university policies) violated her First Amendment free speech rights and should be liable for her damages.

The district court, however, granted summary judgment to the defendants under the qualified immunity doctrine. "Qualified immunity shields public officials from liability for civil damages if their conduct did not 'violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Dillard v. O'Kelley*, 961 F.3d 1048, 1052 (8th Cir. 2020) (en banc) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). We must therefore determine "(1) whether the facts shown by the plaintiff make out a violation of a constitutional or statutory right, and (2) whether that right was clearly established at the time of the defendant[s']

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whether these administrators were involved enough to otherwise be liable under § 1983.

alleged misconduct." *Brown v. City of Golden Valley*, 574 F.3d 491, 496 (8th Cir. 2009). And our analysis will proceed in that order — we will first examine whether Hoggard's rights were violated and will then turn to whether those rights were clearly established. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009) ("The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first . . . .").

We review de novo the grant of summary judgment and view the record and draw all reasonable inferences therefrom in the nonmoving party's favor. *Richardson v. Omaha Sch. Dist.*, 957 F.3d 869, 876 (8th Cir. 2020).

A. Violation of a Federal Statutory or Constitutional Right

1. Forum Analysis

The First Amendment guarantees a right of free speech. *See* U.S. Const. amend. I. But while the First Amendment's text prohibits laws "abridging the freedom of speech," the freedom of speech enjoyed by citizens is not absolute. *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002). The Constitution does not give Hoggard "unfettered latitude" to speak and set up tables "wherever and whenever [s]he might choose." *Ball v. City of Lincoln*, 870 F.3d 722, 729 (8th Cir. 2017). Rather, the State of Arkansas, "no less than a private owner of property, has the power to preserve the property under its control for the use to which it

is lawfully dedicated." *Id.* (quoting *United States v. Grace*, 461 U.S. 171, 178 (1983)). As such, the First Amendment does not require Arkansas to "freely . . . grant access to all who wish to exercise their right to free speech" on its property "without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Id.* (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799–800 (1985)). Thus, the legality of speech restrictions on state property "turns on the nature of the property involved and the restrictions imposed." *Id.*

To determine the nature of the property involved, we undertake a "forum analysis." *Bowman v. White*, 444 F.3d 967, 974 (8th Cir. 2006). This is because the law generally tolerates speech restrictions in some forums to a greater extent than in others. For example, the government's ability to restrict speech is sharply circumscribed in "traditional" and "unlimited designated" public forums. *Id.* at 975–76. When an area is traditionally open for free expression, or is designated as a forum for all speakers and topics, we subject speech restrictions in such areas to heightened scrutiny. *Id.* At the opposite end of the spectrum, some government property is "not by tradition or designation a forum for expressive activities by the public." *Ball*, 870 F.3d at 730 (quoting *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 46 (1983)). "The government retains much broader discretion to restrict expressive activities" in these "nonpublic forum[s]." *Id.*

The Union Patio, where Hoggard set up her informational table, lies somewhere between these

two extremes. The district court implied, and Hoggard no longer contests, that the University had "limit[ed] the expressive activity" permitted on the Union Patio "to certain kinds of speakers or to the discussion of certain subjects." *Bowman*, 444 F.3d at 976 (quoting *Make the Road By Walking, Inc. v. Turner*, 378 F.3d 133, 143 (2d Cir. 2004)). The Union Patio is therefore a "limited designated public forum," in which speech restrictions must be "reasonable" and "viewpoint neutral." *Id.*

2. Restrictions at Issue

We must identify the restrictions in play before we examine their reasonableness and neutrality. No restriction specifically listed in the System or Campus Policies was enforced against Hoggard. She was not in a Free Expression Area. Nor did she attempt to set up a table elsewhere. Nobody told her to leave campus, or to quit talking about Turning Point and its views. Rather, Hoggard was instructed to take down her table because the Union Patio was reserved for registered student organizations and University departments. Only the unwritten Tabling Policy was enforced against Hoggard, and thus, only the Tabling Policy's constitutionality is properly at issue.

According to unrebutted testimony, tabling at the Union Patio is reserved for University departments and registered student organizations. The application form for registering a student organization requires five members, a constitution, and an advisor. Such requirements might constitute viewpoint discrimination if they could not be met due to an organization's views. But that is not the case here. Hoggard

does not allege viewpoint discrimination. And, at least as applied to her, the Tabling Policy was not viewpoint-discriminatory. True, the Tabling Policy favors the viewpoints of officially-recognized groups over unrecognized groups and individuals. But the Supreme Court has described such favoritism as status-based discrimination, rather than viewpoint-based discrimination. *Perry*, 460 U.S. at 48–49.[5] And because status-based distinctions are "inherent and inescapable" in limited public forums, "[t]he touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves." *Id.*

So our focus, in this case, is the Tabling Policy's reasonableness. Our inquiry takes into account "all surrounding circumstances." *Powell v. Noble*, 798 F.3d 690, 701 (8th Cir. 2015). In particular, we must consider (1) the University trustees' and administrators' expertise in creating educational policies; (2) the purpose served by the forum; and (3) the alternative channels of communication available to Hoggard in light of the policies. *See id.* ("A restriction must be reasonable in light of the purpose which the forum at issue serves and the reasonableness of a restriction on access is supported when substantial alternative channels remain open for the restricted communication.") (internal quotation and alteration omitted); *see also Widmar v. Vincent*, 454 U.S. 263,

[5] Again, this is not to say a policy favoring speech of recognized groups could not be challenged on the basis of viewpoint discrimination. If the group's status (upon which forum access is predicated) depends on what views it holds, viewpoint-discrimination may be at issue. But that is not the case here.

276–77 (1981) (deferring to a university's judgments about academic affairs, while reviewing the constitutionality of speech restrictions).

3. Educational Expertise

We will not "substitute our own notions of sound educational policy for those of the school authorities which we review." *Albright ex rel. Doe v. Mountain Home Sch. Dist.*, 926 F.3d 942, 948 (8th Cir. 2019) (quoting *Special Sch. Dist. No. 1, Minneapolis Pub. Sch. v. R.M.M. ex. rel. O.M.*, 861 F.3d 769, 771–72 (8th Cir. 2017)). How, and whether, to run a registered student organization program or to maintain the Union Patio is largely up to the defendants' discretion, which for the most part we leave unquestioned. However, we retain authority to determine "whether a public university has exceeded constitutional constraints, and we owe no deference to universities when we consider that question." *Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 686 (2010).

4. Justification of the Forum's Restrictions in Light of its Purpose

With this in mind, we turn to the defendants' justification for the Tabling Policy. According to the defendants, the Union Patio is "unique." The University's policies "afford privileges to [registered student] organizations to use that space," which are not afforded to other organizations and individuals. The Union, defendants say, is the "living room of campus." It is where students eat, hang out, and attend meetings. And so the area outside the Union

— the Union Patio — is supposed to remain a comfortable area — an area in which students need not worry about whether they'll be harassed by pushy buskers, hucksters, and pamphleteers.[6]

This might reasonably justify excluding non-University individuals from speaking at the Union Patio. *Cf. Bowman*, 444 F.3d at 980–83 (citing, as reasons for speech restrictions, safety concerns about persons unaffiliated with the university). But unlike the plaintiff in *Bowman*, Hoggard was a student — she belonged on campus. She was, to use the defendants' phrase, a "part of [the] campus community." She presumably paid the Student Union Fees supporting maintenance of the Student Union and aspects of the registered student organization program. We fail to see why restricting Union Patio tabling to registered student organizations is any more conducive to creating a "comfortable," "living-room" atmosphere within the Union than opening Patio tabling to all students and groups thereof. The First Amendment protects the rights of both groups *and individuals*. *See Healy v. James*, 408 U.S. 169, 180–85 (1972) (requiring courts to examine First Amendment implications when state colleges restrict the speech and associational rights of non-recognized student groups); *see also McCutcheon v. FEC*, 572 U.S. 185, 206 (2014) ("The whole point of the First Amendment is to afford *individuals* protection

[6] The defendants put forward no other justification for the policy. We therefore assume, for purposes of this appeal, that no other justification for the policy exists. *Richardson*, 957 F.3d at 876 ("We . . . view[ ] the record in the light most favorable to the nonmoving party and draw[ ] all reasonable inferences in that party's favor").

against . . . infringements [on free speech in the name of the public good].") (emphasis added).

5. Availability of Alternative Forums

The record is unclear about the availability of alternative forums. Part of the trouble is that the Tabling Policy is unwritten. This, in itself, does not pose a First Amendment problem. *Families Achieving Indep. & Respect v. Neb. Dep't. of Soc. Servs.*, 111 F.3d 1408, 1415 (8th Cir. 1997) (en banc). The problem, rather, comes from the Tabling Policy's vagueness, coupled with the ambiguities surrounding the University's enforcement of its speech policies. *See id.* As an initial matter, nobody seems to know where the Tabling Policy came from; it's as if it simply emerged from the bureaucratic aether. And while it is clear and undisputed that tabling outside the Union is restricted, the availability of alternative channels of communication remains unclear. The deposition testimony is loaded with murky questions and murkier answers. Can two students sitting at a Union Patio table talk to other students passing by? According to one defendant, it depends on whether their speech is "offensive." Could a student group — officially recognized or otherwise — approach other students outside the Union Patio to talk politics? Apparently, it "depends" on whether the University receives complaints. What about distributing written material? The Campus Policy does not mention the Union Patio as an appropriate place for distribution, but — as one defendant explained — registered student organizations can distribute pamphlets there while non-registered groups and individuals cannot. In this light, one might reasonably infer, as we are

required to do, that the availability of Hoggard's alternative communicative channels depended on the "offensiveness" of Hoggard's speech and how University administrators chose to enforce the unwritten and ambiguous aspects of the various policies at play. *See Richardson*, 957 F.3d at 876 ("We . . . view[ ] the record in the light most favorable to the nonmoving party and draw[ ] all reasonable inferences in that party's favor."); *see also Minn. Majority v. Mansky*, 708 F.3d 1051, 1060 (8th Cir. 2013) (acknowledging potential § 1983 liability for deliberate indifference toward a state policy's selective enforcement).

There are, of course, a few channels of communication clearly available to Hoggard. Two immediately come to mind. First, Hoggard, by herself and without tables, signs, or literature, could have approached individual students practically anywhere on campus to discuss economic freedom, small government, and forming a Turning Point chapter. She could have done this in person or through social media. Second, she could have set up her table in a Free Expression Area.

The first alternative amounts to little. Telling Hoggard she can still associate with her peers to discuss politics is not the same as providing an alternative forum. Rather, it is simply a recognition of her basic First Amendment rights.

The second alternative amounts to a presumptively-unconstitutional prior restraint on speech. *See Bowman*, 444 F.3d at 980 (finding a university's requirement of obtaining permission

before using an unlimited designated public forum a prior restraint, which bears the "heavy presumption of unconstitutionality"). The Free Expression Areas on campus are unlimited designated public forums, but a speaker must get prior permission from the school in order to use them. It is unclear how far in advance this permission must be sought. Rouse told Hoggard that 24-hour notice was required, but the written System and Campus Policies say no such thing. We recognize that we have upheld similar prior restraints when a non-student's speech, crowd control, and safety concerns were at issue. *Id.* at 983. But none of those factors are present here; Hoggard was a student, and the defendants never cited crowd control or safety to justify treating students representing registered student organizations differently from their unaffiliated peers. We have not identified a case in which we allowed a university to impose a prior restraint on a student wishing to use an unlimited public forum.

6. Constitutionality of Restrictions

When we consider these factors together, we find that the Tabling Policy, as applied to Hoggard, is unconstitutional. We defer to the defendants' judgment about the importance of establishing a space serving as the campus "living room," as well as their determination that students should feel comfortable in the space in which they eat, meet, and socialize. But this legitimate university interest bears no rational relationship to the distinction between registered student organizations and individual students when it comes to using the Union Patio. Compare Hoggard's case to *Perry*, in which the

Supreme Court upheld a limited-public-forum restriction permitting mailroom access to one teachers' union but not another. 460 U.S. at 38–39. The restriction in *Perry* was found reasonable, at least in part, because of the two unions' different obligations and responsibilities — one exclusively represented all the school district's teachers, and the other was a rival vying for support. *Id.* at 51–53. The union serving as the teachers' exclusive bargaining representative had compelling reasons to use the school's mailroom that the other union did not. *Id.* Unlike in *Perry*, registered student organizations do not have obligations and responsibilities more directly tied to the forum's use than do individual Arkansas State students.

In short, we cannot find the distinction between registered student organizations and individual students reasonable, when the sole justification offered for the distinction provides no meaningful reason for differentiating the two. At least in this case, the (limited) availability of alternative forums and the defendants' educational expertise cannot compensate for the weak justification (i.e., creating a comfortable, living-room atmosphere) the defendants offer for their status-based discrimination. This is not to say, of course, that distinguishing between registered student organizations, unregistered organizations, and individual students is irrational *per se*. Public schools are free to restrict forum access when they have a nondiscriminatory reason for doing so. *See*, *e.g.*, *Victory Through Jesus Sports Ministry Found. v. Lee's Summit R-7 Sch. Dist.*, 640 F.3d 329, 335 (8th Cir. 2011). There may be good reasons for distinguishing between registered student organiza-

tions and other members of the university community for purposes of accessing a particular university forum. But such reasons have not been presented in this case. Thus, we conclude Hoggard put forward sufficient facts to show a constitutional violation.

B. Clearly Established First Amendment Rights

The ultimate success of Hoggard's § 1983 claim, however, depends on whether it was "sufficiently clear that every reasonable official would have understood" that, by preventing Hoggard from Union Patio tabling, he or she was violating the First Amendment. *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (quotations and alterations omitted). That is, we must determine whether the right violated by the defendants was "clearly established" at the time of the violation. *Id.* We do not "define clearly established law at . . . a high level of generality." *Id.* at 665 n.5 (quotation omitted). "Rather, we look for a controlling case or 'a robust consensus of cases of persuasive authority.' There need not be a prior case directly on point, but 'existing precedent must have placed the statutory or constitutional question beyond debate.'" *Dillard*, 961 F.3d at 1052 (internal citation omitted) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741–42 (2011).

The rights at issue here — Hoggard's rights under the First Amendment — were not clearly established. The case most closely on point, *Bowman v. White*, may have given a reasonable impression that the Tabling Policy was constitutionally acceptable. 444 F.3d 967. While we find *Bowman* distinguishable from the case

at hand, the scope of Hoggard's First Amendment right to "table" at the Union Patio was not "beyond debate" on October 11, 2017. *Dillard*, 961 F.3d at 1052.

Bowman was also an Arkansas campus speech case. In *Bowman*, we upheld several complained-of speech restrictions imposed in an unlimited public forum. 444 F.3d at 983. Given the stricter scrutiny involved in unlimited-public-forum cases and the fact that the case involved a presumptively-unconstitutional prior restraint, an official might have reasonably believed the Tabling Policy — which regulated a more loosely-scrutinized *limited* public forum and did not directly involve a prior restraint — was permissible. This view of *Bowman*, however, ignores the critical fact that the *Bowman* plaintiff was a non-student, and the speech restrictions were justified by compelling safety and administrative concerns. *Id.* at 980–83. Nonetheless, the defendants could have reasonably viewed *Bowman* as permitting the Tabling Policy; *Bowman*'s distinguishability does not mean the defendants "knowingly violate[d] the law." *Dillard*, 961 F.3d at 1052 (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)).

Hoggard cites other cases attempting to show the First Amendment violation was "clearly established." But her cases are inapposite. Most of them simply do not involve limited public forums, which insulates against a reasonable official's knowledge that unjustified limited-public-forum distinctions between students and registered student organizations are

impermissible.[7] Another of Hoggard's cases, *Thomas v. Collins*, involved a content-based restriction and did not undertake a forum analysis. 323 U.S. 516 (1945). She also cites cases about officials allegedly possessing overly-broad discretion to enforce speech restrictions. *See Douglas v. Brownell*, 88 F.3d 1511, 1521–23 (8th Cir. 1996) (rejecting § 1983 plaintiff's similar arguments for lack of evidence of defendant's selective enforcement); *see also Minn. Majority*, 708 F.3d at 1060 (rejecting a selective-enforcement argument because the plaintiff failed to allege deliberate indifference to the selective enforcement). But these overly-broad-discretion cases do not "clearly establish" the Tabling Policy's unconstitutionality, because the Tabling Policy's unconstitutionality stems from its unjustified distinction between registered student organizations and other

[7] *See Ball*, 870 F.3d 722 (nonpublic forum's restrictions upheld); *Boardley v. U.S. Dep't of Interior*, 615 F.3d 508, 516 (D.C. Cir. 2010) (public forum); *Knowles v. City of Waco*, 462 F.3d 430, 433 (5th Cir. 2006) (public forum); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1032 (9th Cir. 2006) (designated public forum); *Bowman*, 444 F.3d 967 (designated public forum); *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 604–05 (6th Cir. 2005) (public forum); *Burk v. Augusta-Richmond Cty.*, 365 F.3d 1247, 1249 (11th Cir. 2004) (public forum); *Cmty for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1391 (D.C. Cir. 1990) (public forum); *see also Douglas v. Brownell*, 88 F.3d 1511, 1521 (8th Cir. 1996) (examining a prior restraint's constitutionality and whether a speech restriction was "narrowly tailored"); *Rosen v. Port of Portland*, 641 F.2d 1243, 1246 (9th Cir. 1981) (examining a prior restraint and applying "the most exacting scrutiny" to a speech restriction).

students, not from the way officials exercised their discretion by enforcing it against Hoggard.

In short, Hoggard failed to identify "controlling authority" or "a robust consensus of cases of persuasive authority" that "placed the . . . constitutional question beyond debate at the time of the alleged violation." *Kelsay v. Ernst*, 933 F.3d 975, 979 (8th Cir. 2019) (en banc) (quoting *al-Kidd*, 563 U.S. at 741–42). Her First Amendment right to access a limited public forum, which she was unjustifiably denied, was not "clearly established" at the time. Granting qualified immunity was therefore appropriate.

III. Conclusion

We find that the Tabling Policy, as it was enforced against Hoggard, violates the First Amendment. The defendants' restriction of Union Patio access to registered student organizations has no rational relationship to their proffered justification. As such, the Tabling Policy's enforcement against Hoggard on October 11, 2017, was unreasonable and unconstitutional. But the defendants may reasonably have not understood this at the time. We find the defendants were properly granted qualified immunity and we therefore affirm the district court's grant of summary judgment.

LOKEN, Circuit Judge, concurring.

I agree that defendants acting in their individual capacities did not take action that violated Hoggard's clearly established First Amendment rights. Therefore, defendants are entitled to qualified

immunity from Hoggard's § 1983 damage claims, the only claims at issue on appeal. I join Part II.B. of the court's opinion and concur in the decision to affirm the grant of summary judgment.

I cannot join Part II.A. because it ignores -- explicitly in footnote 4 on page 5 -- the fundamental principle that § 1983 damage liability is personal and therefore Hoggard must prove that each "defendant's unconstitutional action was the 'cause in fact' of [her] injury." Clark v. Long, 255 F.3d 555, 559 (8th Cir. 2001) (quotation omitted); see Cox v. Sugg, 484 F.3d 1062, 1066 (8th Cir. 2007) (absolving university administrators on this ground); see generally Doran v. Eckold, 409 F.3d 958, 965 (8th Cir.) (en banc), cert. denied, 546 U.S. 1032 (2005). As Hoggard presented insufficient evidence of these defendants' personal involvement in denying her access to the Union Patio, I would pass over the question of a constitutional violation -- an issue largely if not entirely mooted when Arkansas enacted the FORUM Act -- and simply decide the appeal on the clearly established issue.

The summary judgment record establishes that Hoggard was poorly treated by Sarah Ponder and Elizabeth Rouse, mid-level University administrators. In the modern university, it is all too common for *petits fonctionnaires*, arbitrarily enforcing broad rules and policies, to take action that may be politically correct but is not viewpoint neutral. When such actions trample a student's constitutionally protected right of free speech, those responsible should be held accountable. But Hoggard did not sue Ponder or Rouse, perhaps because Turning Point's

attorneys saw "bigger fish to fry" in a facial attack on multiple University policies. The FORUM Act mooted this *cause célèbre*. Plaintiffs labored on, now accusing the highest ranking University trustees and administrators of being personally involved in a single episode in which their underlings applied an unwritten Tabling Policy to deny student Hoggard use of a table on the Union Patio to recruit other students to join an as-yet unregistered student organization. The court says their individual involvement does not matter and proceeds to broadly condemn a "policy" that, for all the record reveals, may have been an *ad hoc* creation of Ponder and Rouse to further their personal notions of what student speech was appropriate for the "living room of campus." This is not our proper role in deciding § 1983 appeals raising sensitive constitutional issues.

I would agree with much, perhaps all, of the court's analysis in Part II.A. if the record established that University policymakers authorized and approved a Tabling Policy enforced to deter protected student speech, like the action taken against Hoggard. But Part II.A. addresses a hypothetical, not this case. I therefore suggest that, as precedent, Part II.A. be treated as a thoughtful but not controlling advisory opinion.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

TURNING POINT USA AT ARKANSAS STATE UNIVERSITY; and ASHLYN HOGGARD — PLAINTIFFS

v. No. 3:17CV00327 JLH

RON RHODES, individually, *et al.* — DEFENDANTS

OPINION AND ORDER

This case presents a constitutional challenge to the "Freedom of Expression" policy previously in force at Arkansas State University campus in Jonesboro and the concomitant system-wide policy, which were repealed this spring.[1] The Policy applied to faculty, staff, students, student organizations, and visitors. Document #40-10 at 3. It designated seven specific areas of the ASU campus as "Free Expression Areas" where individuals could schedule "speaking, demonstrating, and other forms of expression" during certain hours on Monday through Friday. A person who wished to use other areas or other times for "speeches and demonstrations" could request to do so seventy-two hours or more in advance of the event. The Policy also provided that written materials could be distributed in specifically designated "distribution

[1] The plaintiffs refer to these two policies as a single policy being challenged and the Court will proceed likewise unless the context indicates otherwise.

areas," including any of the Free Expression Areas. No stands, tables, or booths were allowed in distribution areas, except in the Free Expression Areas, and only with permission from a specified university official. *Id.* at 3-4.

In the fall of 2017 ASU student Ashlyn Hoggard wanted to start a local chapter of Turning Point USA on the ASU campus.[2] Hoggard, along with Emily Parry, a non-student representative of Turning Point USA, set up a table on the edge of a large, open patio area outside the Reng Student Union in Heritage Plaza on ASU's campus. They began speaking with passing students in an attempt to recruit individuals and start a local Turning Point USA chapter. Hoggard and Parry had not requested permission from any ASU official to set up the table or promote Turning Point USA on the Heritage Plaza patio.

ASU student union administrators Sarah Ponder and Elizabeth Rouse soon approached them, told them that they were not allowed to set up a table where they were, and instructed them to stop their activities. Two ASU police officers, Terry Phipps and Andrew Thrasher, arrived. After Parry engaged the ASU employees verbally, Phipps issued Parry a citation for violating the Policy and directed her to leave campus. Hoggard and Parry took down their table and stopped their promotion activities that day.

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[2] Turning Point USA is a national organization whose mission is, in Hoggard's words, to "[e]ducate students about the importance of fiscal responsibility, free markets, and limited government." Document #35-7 at 2.

Hoggard later succeeded in starting a chapter of the organization at ASU.

This lawsuit commenced. Hoggard and Turning Point USA at ASU sued several ASU officials in their official capacities for injunctive and declaratory relief and in their individual capacities for damages. The plaintiffs claim under 42 U.S.C. § 1983 that the Policy violates the first and fourteenth amendments to the United States Constitution. They challenge the Policy on its face and as it was applied to them. The complaint named as defendants, in their official and individual capacities, the following: Ron Rhodes, Tim Langford, Niel Crowson, Stacy Crawford, and Price Gardner, all members of the Board of Trustees of the Arkansas State University System as of October 2017; Charles Welch, President of the ASU System; Kelly Damphousse, Chancellor of ASU; William Stripling, Vice Chancellor for Student Affairs of ASU; and Martha Spack, Director of Student Development and Leadership of ASU. In February, the Court granted a motion to substitute a new member of the Board, Christy Clark, in her official capacity for former Board member Ron Rhodes in his official capacity. Rhodes remains as a defendant in his individual capacity only. Notably, the plaintiffs have not named Ponder, Rouse, Phipps, or Thrasher as defendants; nor is Parry a plaintiff.

As relief, the complaint requests a declaratory judgment that the Policy and associated practices, facially and as applied, violate the plaintiffs' rights under the first and fourteenth amendments; an injunction prohibiting the defendants from enforcing

the Policy and associated practices; compensatory and nominal damages; and attorneys' fees.

The defendants have moved to dismiss the case as moot. The plaintiffs and the defendants have filed cross motions for summary judgment. The Court held oral argument on these motions. The defendants also have filed a supplemental motion for summary judgment addressing an issue that came up at the oral argument—whether the trustees can be individually liable for failing to repeal the Policy. For the reasons that will be explained, the motion to dismiss as moot is granted on all claims except the claim against the defendants in their individual capacities for nominal damages. Based on the doctrine of qualified immunity, summary judgment is granted in favor of the defendants on that claim.

MOTION TO DISMISS

Article III of the United States Constitution authorizes federal courts to hear cases and controversies. A case is moot, and no longer a case or controversy, when the issues presented are no longer live or the parties no longer have a legally cognizable interest in the outcome. *Teague v. Cooper*, 720 F.3d 973, 976 (8th Cir. 2013) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91, 133 S. Ct. 721, 726, 184 L. Ed. 2d 553 (2013)). "Through the passage of time and the occurrence of irrevocable events, disputes may disappear so that federal courts no longer can grant effective relief." *McFarlin v. Newport Special Sch. Dist.*, 980 F.2d 1208, 1210 (8th Cir. 1992).

A request for injunctive relief is moot if the injunctive relief sought would no longer have any meaning for the party seeking it. *See Forbes v. Ark. Educ. Television Comm. Network Found.*, 982 F.2d 289, 289 (8th Cir. 1992) (per curiam); *McFarlin*, 980 F.2d at 1210. Likewise, for a federal court to issue a declaratory judgment, the dispute must call not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts. *Webb v. Smith*, 2018 WL 1401315, at *3, 4:17CV00660-JLH (E.D. Ark. Mar. 20, 2018) (quoting *Ashcroft v. Mattis*, 431 U.S. 171, 172, 97 S. Ct. 1739, 1740, 52 L. Ed. 2d 219 (1977)). If, therefore, a law has been amended or repealed, claims for injunctive or declaratory relief based on the previous version of the law are generally moot because there is no longer a need for court action. *Phelps-Roper v. City of Manchester*, 697 F.3d 678, 687 (8th Cir. 2012) (en banc). The exceptions to this rule are "rare and typically involve situations where it is virtually certain that the repealed law will be reenacted." *Teague*, 720 F.3d at 977.

Here, the plaintiffs ask the Court to enjoin the defendants from enforcing the Policy. Document #1 at 20. They also seek a declaratory judgment that the Policy and associated practices violate their constitutional rights. *Id.* Their requests for injunctive and declaratory relief revolve entirely around the Policy and ASU's enforcement of the Policy.

As the Court previously mentioned, however, the Policy has been repealed. In March the Arkansas

General Assembly passed the FORUM Act,[3] which prohibits state-supported universities from limiting expressive activities to only designated areas. Soon afterwards, the ASU Board of Trustees repealed the Policy. Document #57-2. The defendants contend that the case is therefore moot.

There is no reasonable expectation that the Board will reenact the earlier version—doing so would violate the FORUM Act. *See Phelps-Roper*, 697 F.3d at 687. Nor is there any evidence that the state will repeal the FORUM Act. *See Teague*, 720 F.3d at 977-78. An injunction prohibiting the defendants from enforcing the Policy thus would have no meaning because the Policy is no longer in effect and cannot be enforced against the plaintiffs or anyone else. A declaratory judgment would not adjudicate the parties' present rights pertaining to the Policy because it no longer exists and no one has any rights under it. The plaintiffs' claims for declaratory and injunctive relief are moot. As the claims against the defendants in their official capacities sought only declaratory and injunctive relief, all official-capacity claims are dismissed.

All the plaintiffs' facial challenges to the former Policy are also moot. *See Phelps-Roper*, 697 F.3d at 687. When a statute, ordinance or policy has been repealed, a plaintiff's facial challenge to it could remedy nothing — she is in no jeopardy that it will be enforced against her, and she has no legally

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[3] The full title of the act is "Forming Open and Robust University Minds (FORUM) Act," 2019 Ark. Acts 184. It is codified at Ark. Code Ann. § 6-60-1001, *et seq*.

cognizable interest in its constitutionality. In *Phelps-Roper*, the plaintiff's facial challenge to previous versions of a city ordinance became moot after the city amended it. *Id.* at 687. The court held that even the plaintiffs' "request for nominal damages does not give them standing to challenge the first two versions of the ordinance because they cannot revive an otherwise moot claim against 'a regime no longer in existence.'" *Id.* (quoting *Morrison v. Bd. of Educ.*, 521 F.3d 602, 611 (6th Cir. 2008)). Many other courts have dismissed facial challenges as moot based on changed circumstances. *Reyes v. City of Lynchburg*, 300 F.3d 449, 453 (4th Cir. 2002) (holding that after ordinance was repealed "[t]he question of overbreadth [did] not present a live case or controversy" and the facial overbreadth challenge was moot); *Advantage Media, LLC v. City of Eden Prairie*, 405 F. Supp. 2d 1037, 1046 n.5 (D. Minn. 2005) ("Further, the [challenged] provisions were removed from the code . . . which renders plaintiff's facial challenge and corresponding request for injunctive relief moot." (citing *Coral Springs St. Sys., Inc. v. Sunrise*, 371 F.3d 1320, 1346 (11th Cir. 2004); *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1256–57 (10th Cir. 2004))); *Phelps-Roper v. Heineman*, 710 F. Supp. 2d 890, 908-09 (D. Neb. 2010) (dismissing as moot facial challenge to statute because there was no risk it could be applied to the plaintiff); *Rock for Life-UMBC v. Hrabowski*, 643 F. Supp. 2d 729, 741 (D. Md. 2009) (dismissing as moot a facial challenge to the constitutionality of a university policy amended after litigation commenced); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 867 n.5 (N.D. Tex. 2004) (same). The

facial challenges to the former Policy are moot and therefore dismissed.

The defendants argue that the plaintiffs' claims for damages also are moot. It is well established that changed circumstances do not render moot claims for damages that arise from violations of the plaintiff's own constitutional rights. *See Advantage Media, LLC v. City of Eden Prairie*, 456 F.3d 793, 803 (8th Cir. 2006); *see also Watlington v. City of McCrory, Ark.*, 2:17CV00002-DPM, Document #31, (E.D. Ark. Aug. 3, 2017). In *Advantage Media*, the city amended its municipal sign code after Advantage sued the city for denying its sign permit application. Because the alleged deficiencies in the code were remedied after the action commenced, the request for injunctive relief was moot. *Id.* at 803. Advantage had standing however because, as the Eighth Circuit explained, "Advantage might be entitled to nominal damages if it could show that it was subjected to unconstitutional procedures." *Id.* Similarly, in *Watlington*, the city repealed the challenged ordinance soon after the plaintiffs filed their complaint, making the plaintiffs' request for injunctive relief moot, but Judge Marshall explained that the entire case was not moot inasmuch as the plaintiffs sought damages for the police chief's enforcement of the allegedly unconstitutional ordinance against them. *Watlington*, 2:17CV00002, Document #31 at 2.

These cases and others stand for the proposition that even if changed circumstances render a request for injunctive relief moot, the case itself is not moot if the plaintiff could recover damages—even nominal damages—for a constitutional violation. *See also*

Stevenson v. Blytheville Sch. Dist. No. 5, 800 F.3d 955, 964-65 (8th Cir. 2015) (although the Arkansas General Assembly amended the statute at issue, mooting the claim for injunctive relief, "the appellants could potentially recover money damages for any constitutional violation arising from" a violation of the former statute) (citing *Brandywine, Inc. v. City of Richmond*, 359 F.3d 830, 836 (6th Cir. 2004)); *McFarlin*, 980 F.2d at 1211 (although student's graduation rendered her claim for preliminary injunctive relief moot, the entire case was not moot because plaintiffs could "advance the damages claim on behalf of their daughter against the defendants for allegedly depriving [their daughter] of civil rights"); *Forbes*, 982 F.2d at 289 ("The underlying case is not moot. The complaint contains a prayer for money damages.").

In this case, the complaint seeks damages from all remaining defendants in their individual capacities. Document #1 at 21. Accordingly, the passage of the FORUM Act and the Board's subsequent repeal of the Policy does not moot the claim for damages caused by its enforcement.[4]

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[4] The defendants briefly argue that the Policy was not applied to Hoggard. Document #36 at 38-39. This argument fails at the summary judgment stage. The University officials who directed Hoggard and Parry to stop their activities informed them that they could do what they were doing only by reserving a "free speech area" — which the Policy allows for. Document #1-6; Document #40-3 at 0:35-2:25 (video recording). Taking these facts in the light most favorable to Hoggard, the Policy was applied to her.

The defendants next argue that Hoggard's claim for compensatory damages is foreclosed because she disclaimed any interest in compensatory damages in her deposition. Document #58 at 6. If a party abandons a claim for compensatory damages, the former claim cannot rescue an otherwise moot case. *See* 13C Charles Alan Wright, Arthur R. Miller, & Edward Cooper, Federal Practice & Procedure § 3533.3 (3d ed.). At her deposition Hoggard was repeatedly asked whether she wanted monetary damages from this lawsuit. She ultimately answered "no, I just want the policy changed." Document #35-1 at 41.

Assuming, without deciding, that Hoggard's deposition testimony amounts to abandonment of compensatory damages,[5] her claim is not moot because the complaint also seeks nominal damages. Even a claim for nominal damages for constitutional violations suffices to avoid mootness. *See Advantage Media, LLC*, 456 F.3d at 803 (challenges were not moot because plaintiff "might be entitled to nominal damages if it could show that it was subjected to unconstitutional procedures"); *see also* 13A Federal Practice & Procedure § 3533.3 ("The very determination that nominal damages are an appropriate remedy for a particular wrong implies a ruling that the wrong is worthy of vindication by an essentially declaratory judgment. A valid claim for nominal

[5] The Court notes that in her response to the motion to dismiss, Hoggard, through her attorneys, states that she still seeks damages. Document #61 at 10, 15-16.

damages should avoid mootness.") (footnotes omitted).

The defendants argue that *Advantage Media* was implicitly overruled by *Phelps-Roper*, where the Eighth Circuit said that a claim for nominal damages did not give the plaintiffs standing to challenge on free-speech grounds repealed versions of an ordinance, stating that a request for nominal damages does not "revive an otherwise moot claim against 'a regime no longer in existence.'" *Phelps-Roper*, 697 F.3d at 687 (quoting *Morrison*, 521 F.3d at 611). Although the *Phelps-Roper* opinion can be read to say that a request for nominal damages never preserves a challenge to a repealed law from mootness, the facts in *Phelps-Roper*, and in *Morrison*, are distinguishable from the facts here. In *Phelps-Roper*, the plaintiffs never engaged in any picketing that would have been prohibited. *See Phelps-Roper*, 697 F.3d at 685. Likewise, in *Morrison*, the plaintiff never engaged in speech prohibited by the school policy at issue. *Morrison*, 521 F.3d at 605. In both cases, the as-applied claim was based only on the allegation that the plaintiffs' free speech rights had been chilled, not that the allegedly unconstitutional ordinance or policy had been enforced against the plaintiffs. In *Advantage Media*, the ordinance was enforced against the plaintiff.

Thus, *Advantage Media* and *Phelps-Roper* can be reconciled as follows: *Advantage Media* stands for the proposition that when a statute, ordinance or policy has been enforced against a plaintiff, repeal of the policy does not moot the plaintiffs' as-applied claim for nominal damages; whereas *Phelps-Roper* stands

for the proposition that when a statute, ordinance or policy has not been enforced against a plaintiff, repeal of the policy moots the plaintiffs' as-applied claim for nominal damages. As the Sixth Circuit said in *Morrison*, "No readily apparent theory emerges as to how nominal damages might redress past chill." *Morrison*, 521 F.3d at 610. Here, as in *Advantage Media*, the now-repealed ASU Policy was enforced against Hoggard. If the Policy was unconstitutional, her constitutional rights were violated. Because the facts of *Phelps-Roper* and the facts of *Advantage Media* are distinguishable, and because the Eighth Circuit did not explicitly overrule *Advantage Media*, *Advantage Media* remains binding precedent; and it is directly on point, whereas *Phelps-Roper* is not.

The defendants' motion to dismiss on mootness grounds is granted in part and denied in part. The plaintiffs' claims for injunctive and declaratory relief are moot and therefore dismissed. All claims against the defendants in their official capacities are correspondingly dismissed. The plaintiffs' claims challenging the Policy on its face are dismissed. The plaintiffs' claim for nominal damages for the enforcement of the Policy against them is not moot.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Remaining are challenges to the former Policy as it was applied to the plaintiffs. The remaining defendants are the individual members of the ASU Board of Trustees as of October 11, 2017, in their individual capacities: Ron Rhodes, Tim Langford, Niel Crowson, Stacy Crawford, and Price Gardner;

Charles Welch, the President of the ASU system; Kelly Damphousse, Chancellor of ASU; William Stripling, Vice Chancellor for Student Affairs of ASU; and Martha Spack, Director of Student Development and Leadership at ASU.

A court should enter summary judgment if the evidence, viewed in the light most favorable to the nonmoving party, demonstrates that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986); *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc). A genuine dispute of material fact exists only if the evidence is sufficient to allow a jury to return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 249, 106 S. Ct. at 2511. A movant is entitled to summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). A moving party may satisfy its initial burden by pointing out to the district court that the nonmoving party lacks the evidence to prove an essential element of its case. *Bedford v. Doe*, 880 F.3d 993, 996-97 (8th Cir. 2018). If this burden is satisfied, the nonmoving party must submit evidentiary materials of specific facts showing the presence of a genuine dispute for trial, such that a jury could reasonably find in that party's favor. *See id.* at 997.

The defendants first argue that they are entitled to summary judgment because none of them was personally involved in causing the alleged injuries. Document #36 at 39-40. To establish that a state official is personally liable under section 1983, a plaintiff must prove that the official acting under color of state law caused the deprivation of the plaintiff's constitutional right. 42 U.S.C. § 1983; *see Clay v. Conlee*, 815 F.2d 1164, 1169-70 (8th Cir. 1987). Vicarious liability does not apply, so a plaintiff must prove that each defendant's individual actions violated the constitution. *Ashcroft v. Iqbal*, 556 U.S. 662, 676, 129 S. Ct. 1937, 1948, 173 L. Ed. 2d 868 (2009); *Parrish v. Ball*, 594 F.3d 993, 1001 (8th Cir. 2010).

The defendants point out that none of them was personally involved in enforcing the Policy against Hoggard. Document #36 at 39-40; Documents #67 and 68. No evidence shows that any of the defendants created or authored the Policy at issue, nor does evidence show that any of them applied it against Hoggard. No defendant was present at the incident with Hoggard and Parry. No defendant received, processed, or denied a request by Hoggard to use the area. None of them directly or indirectly ordered Hoggard and Parry to cease their activities and for Parry to leave campus. The Court must therefore consider whether the conduct by the individual defendants as administrators and trustees constituted sufficient personal involvement in the plaintiffs' injuries.

Defendants Welch, Damphousse, Stripling, and Spack

The claims against administrators Welch, Damphousse, Stripling, and Spack rest on their responsibility and authority for enforcing ASU policies. Document #1 at ¶¶ 34, 41, 48, and 58. General supervisory authority over a state entity's operations, alone, is insufficient to connect a state official to a plaintiff's injury under section 1983. *Jackson v. Nixon*, 747 F.3d 537, 545 (8th Cir. 2014). At least one federal court has held that a university administrator's liability cannot rest simply on the administrator's "ultimate responsibility for all policies promulgated by" the university. *See Rock for Life-UMBC*, 643 F. Supp. 2d at 742.

In response to the defendants' motion for summary judgment, the plaintiffs contend that the administrator defendants were personally involved in the alleged deprivation of Hoggard's constitutional rights because they authorized the Policy's enforcement generally. Document #49 at 48. Specifically, the plaintiffs note that defendants Stripling and Spack were responsible for enforcing the policy—Spack's office reviewed free speech area reservation requests, and Spack reported to Stripling, the Vice Chancellor for Student Affairs. *Id.* (citing, *e.g.*, Document #35-3 at 5; Document #35-2 at 3). The plaintiffs do not explain how defendants Welch and Damphousse are personally responsible for Hoggard's alleged injury, nor do they point to any evidence connecting them to it.

The Policy required use of Free Expression Areas to be scheduled, and for certain requests to be made, through the Vice Chancellor for Student Affairs or the Director of Student Development and Leadership. Document #1-3 at 2-3. As of October 11, 2017, those individuals were Stripling and Spack. That these two individuals were charged with approving and scheduling reservations of Free Expression Areas might connect them to a reservation denial. But Hoggard admitted in her deposition that she never made a request to either Stripling or Spack to engage in any expressive activity on the ASU campus.

Nothing in the record shows that Stripling, Spack, Welch, or Damphousse was individually involved in enforcing the Policy against Hoggard. Because the plaintiffs have not shown that any of these individuals caused a deprivation of their constitutional rights, summary judgment must be granted on all claims in favor of Stripling, Spack, Welch, and Damphousse.

Defendants Rhodes, Langford, Crowson, Crawford, and Gardner

The plaintiffs' claims against the members of the Board of Trustees, in their individual capacities, rest on the trustees' policymaking authority for the ASU system. Document #1 at ¶¶ 25-29. A state official may be liable if he creates, applies, or interprets a policy or directive that leads to a constitutional violation. *Jackson*, 747 F.3d at 543-45 (citing *Bonner v. Outlaw*, 552 F.3d 673, 679 (8th Cir. 2009)); *Marchant v. City of Little Rock, Ark.*, 741 F.2d 201, 205 (8th Cir. 1984). *See also Messimer v. Lockhart*, 702 F.2d 729, 732 (8th

Cir. 1983) (holding that a department of corrections director may be liable for failing to change a particular prison's allegedly unconstitutional policy based on the director's statutory responsibility to supervise the administration of all corrections facilities). *Cf. Brown v. Mo. Dep't of Corr.*, 353 F.3d 1038, 1040 (8th Cir. 2004) (dismissing supervisory employees because the complaint did not allege "facts that would suggest personal involvement, tacit authorization, or a policy directive" for the conduct at issue).

The ASU Policy originated in 1998. *See*, *e.g.*, Document #40-10 at 5; Document #40-9 at 17. None of the individual trustee defendants was involved in authoring or approving the Policy because none was on the Board of Trustees at that time. Document #67-1 at 2.

At a June 23, 2009, Board of Trustees meeting, however, Rhodes moved for the Board to adopt an ASU system-wide policy governing the establishment of free expression policies on each campus within the ASU system. Document #69-1 at 3. The Board adopted that system-wide policy as one of many system policies it adopted shortly after the Arkansas State University System came into being.[6] Document #40-9 at 12, 18. The June 2009 system policy required each ASU campus to establish procedures governing freedom of expression. Document #69-1 at 7.

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[6] None of the current Board defendants other than Rhodes was on the Board of Trustees in 2009. Document #67-1 at 2.

The plaintiffs' complaint mentions this ASU system policy and included the system-wide policy as an exhibit. Document #1-2. The complaint states that ASU enacted the Freedom of Expression Policy at issue in this case "[a]s mandated by the ASU System" policy. Document #1 at ¶ 77. Thereafter, the complaint states that it refers to the two policies "collectively" as one "Speech Zone Policy" that is being challenged. *Id.* The complaint therefore seems to assume that the 2009 ASU system-wide policy caused the enactment of the Policy at ASU Jonesboro or otherwise caused the plaintiffs' alleged harm.[7]

By the time the system-wide policy came into being, however, the Freedom of Expression Policy had existed at ASU Jonesboro for more than a decade. There is no evidence that the 2009 system-wide policy led to any changes to the campus policy. Although the 2009 system-wide policy states that it supercedes the 1998 policy, *see id.* at 9, the record reflects that the ASU policy remained in place and that the relevant ASU officials continued to use it without interruption to schedule reservations of Freedom of Expression Areas on the ASU campus. *See* Document #40-9 at 9-

[7] Other than this assumed connection between the two policies, the system policy itself is not meaningfully challenged in this case. At the summary judgment stage the plaintiffs only mention the Policy at ASU and in fact refer to it, and only it, as the "Speech Zone Policy" being challenged. *E.g.*, Document #41 at 9 (plaintiff's motion); Document #49 at 9 (plaintiff's response to defendants' motion). Only in response to the defendants' supplemental motion for summary judgment do the plaintiffs state that "[t]he ASU System Speech Zone Policy and the ASU Speech Zone Policy comprised the "Speech Zone Policy" challenged by Plaintiffs in their complaint and enforced by Defendants to suppress Plaintiffs' speech." Document #68.

18; Document #40-11 at 7-10. Assuming, however, that Rhodes's participation in the adoption of the system-wide policy is sufficient personal involvement to render him potentially liable, for reasons that will be explained, he is protected by qualified immunity.

Aside from Rhodes, the plaintiffs have not pointed to any specific actions taken by the individual Board of Trustee members—other than generally failing to repeal the Policy—that connects them to its enforcement against Hoggard. Their claims therefore turn on whether the individual trustees can be held liable based on their failure as general ASU policymakers to repeal the Policy.

In *Messimer v. Lockhart*, the plaintiff claimed that a prison warden's policy of confining protective custody inmates together violated his constitutional rights. 702 F.2d at 732. Under state law, the state department of corrections director had the statutory authority to change the policy. *Id.* The Eighth Circuit held that the complaint stated a claim against the director who "may be responsible for his own failure to act." *Id.* The *Messimer* case has not been overruled and has been relied on for the same proposition as recently as 2014. *See Jackson*, 747 F.3d at 544 (holding that complaint alleged sufficient personal involvement as to the Missouri Department of Corrections director based on his statutory responsibility to implement and enforce the policies at issue); *see also Langford v. Norris*, 614 F.3d 445, 464 (8th Cir. 2010) (explaining that defendants who designed or oversaw the prison medical grievance procedure could be liable if the unwieldy procedure

caused the denial of constitutionally adequate treatment).

Arkansas law charges the Board of Trustees with the management and control of ASU. Ark. Code Ann. § 6-65-202. The bylaws of the Board of Trustees provide the same, and they identify further functions of the Board of Trustees in its exercise of that management and control. Document #40-7 at 3. According to the bylaws the Board of Trustees must, among many other things, "determine major policy," "review existing policy," and "[e]stablish substantive institutional policy for the operation of" ASU. *Id.* The *Messimer*, *Jackson*, and *Langford* cases are not precisely on point because they involved prison policies and operations, but they lend support to the theory that the individual trustees were sufficiently personally involved in injuries caused by the ASU Policy based merely on their duty to determine, review, and establish policies for ASU.

Assuming, for the purposes of the defendants' motion for summary judgment, that the trustees were personally involved in causing Hoggard's alleged injuries, they are nevertheless entitled to summary judgment on the basis of qualified immunity.

The defense of qualified immunity protects government officials who act reasonably. The rule serves "to excuse an officer who makes a reasonable mistake in the exercise of his official duties." *Dillard v. City of Springdale*, 930 F.3d 935, ____ (8th Cir. 2019) (quoting *Edwards v. Baer*, 863 F.2d 606, 607 (8th Cir. 1988)). It attaches so long as the official did not violate a clearly established right of which a

reasonable person standing in the official's shoes would have known. *Estate of Walker v. Wallace*, 881 F.3d 1056, 1060 (8th Cir. 2018); *Robinson v. Payton*, 791 F.3d 824, 830 (8th Cir. 2015).

At the summary judgment stage the plaintiff bears the burden to show that the facts, viewed in her favor, demonstrate the deprivation of a constitutional or statutory right that was clearly established at the time of the deprivation. *Parrish*, 594 F.3d at 1001. An individual government official is entitled to qualified immunity if no genuine dispute of material fact exists "regarding whether the officials' actions, even if unlawful, were objectively reasonable 'in light of the legal rules that were clearly established at the time [their actions were] taken.'" *Id.* (quoting *Davis v. Hall*, 375 F.3d 703, 711 (8th Cir. 2004)). Courts may exercise their discretion in deciding whether to first address whether the facts make out a deprivation of a constitutional right or whether the right was clearly established. *See Pearson v. Callahan*, 555 U.S. 223, 242, 129 S. Ct. 808, 821, 172 L. Ed. 2d 565 (2009); *Morgan v. Robinson*, 920 F.3d 521, 524-27 (8th Cir. 2019) (en banc).

A right is clearly established if it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Morgan*, 920 F.3d at 524. Although the official's very action need not have previously been held unlawful, in light of preexisting law the unlawfulness of the official's action must be apparent. *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 2515, 153 L. Ed. 2d 666 (2002). "This requires a high 'degree of specificity.'" *District of Columbia v. Wesby*, ___ U.S. ___, 138 S. Ct.

577, 590, 199 L. Ed. 2d 453 (2018) (quoting *Mullenix v. Luna*, 577 U.S. ___, 136 S. Ct. 305, 309, 193 L. Ed. 2d 255 (2015) (per curiam)). "Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Austell v. Sprenger*, 690 F.3d 929, 936 (8th Cir. 2012) (quotation omitted). Indeed, "existing precedent must have placed the statutory or constitutional question beyond debate." *White v. Pauly*, 580 U.S. ___, 137 S. Ct. 548, 551, 196 L. Ed. 2d 463 (2017) (quoting *Mullenix*, 577 U.S. ___, 136 S. Ct. at 308). The defense therefore gives officials some "breathing room to make reasonable but mistaken judgments" and "some leeway when acting in legally murky environments." *Estate of Walker*, 881 F.3d at 1060.

In this case it is unclear when the plaintiffs contend the trustees should have known to repeal the Policy. Even assuming that the officials' failure to repeal the Policy—and therefore their involvement in causing the plaintiffs' injury—took place as late as the day it was enforced against Hoggard and through the day before it was repealed, they are entitled to qualified immunity. As will be explained, the relevant binding authority did not place the constitutional question beyond debate such that every reasonable official in the trustees' positions would have known that the failure to repeal the Policy, and its being subsequently enforced against Hoggard in the manner that it was, violated the constitution.

The first amendment, which the Supreme Court has made applicable to the states through the fourteenth amendment, provides that Congress shall make no law abridging the freedom of speech. Const.

Amend. I; *Gitlow v. People of the State of N.Y.*, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925). Despite the fact that the first amendment seemingly imposes an absolute prohibition on laws that abridge the freedom of speech, the Supreme Court has repeatedly held that free speech is not an absolute right; and the application of the first amendment to every state and local governmental entity—including schools, prisons, and a vast array of other governmental bodies—makes it impossible for the prohibition to be absolute. *See Gresham v. Rutledge*, 198 F. Supp. 3d 965, 968-69 (E.D. Ark. 2016).[8]

According to the federal appellate courts, the constitutionally permitted extent to which the government may control expressive activities on its

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[8] Smolla says that absolutism is too simplistic to be a viable method of addressing "modern First Amendment conflicts." Rodney A. Smolla, 1 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 2.50 (April 2019 update). That phrase suggests that something has changed in "modern" times that renders absolutism no longer able to decide first amendment issues. Smolla's answer to the question of what has changed is that the courts did not develop first amendment jurisprudence until after World War II. *Id.* The development of modern first amendment jurisprudence thus closely follows the incorporation of the first amendment into the fourteenth amendment, making it applicable to the states. *See Stromberg v. California*, 283 U.S. 359, 368, 51 S. Ct. 532, 535, 75 L. Ed. 1117 (1931) ("the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech"); *Cantwell v. State of Connecticut*, 310 U.S. 296, 303, 60 S. Ct. 900, 903, 84 L. Ed. 1213 (1940) (same). In other words, the temporal sequence suggests that the proliferation of free speech cases that cannot be resolved by "absolutism" is due more to the expansion of the first amendment beyond a prohibition simply on Congress than to ambiguities in the terms "abridge" and "freedom of speech."

property turns on the nature of the property involved and the restrictions imposed. *Ball v. City of Lincoln, Nebraska*, 870 F.3d 722, 729 (8th Cir. 2017) "The Supreme Court 'has adopted a forum analysis as a means of determining when the [g]overnment's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes.'" *Id.* (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985)). The extent to which the government can control access therefore depends on the relevant forum.

A traditional public forum is an area that has historically and traditionally been available for public expression and that has the physical characteristics of a public thoroughfare. *Id.* at 730 (citing *Bowman v. White*, 444 F.3d 967, 975 (8th Cir. 2006)). Quintessential examples are streets, sidewalks, and public parks. *Id.* In such areas the government's ability to restrict speech is the most circumscribed: any content-based restriction on speech must be "necessary to serve a compelling state interest" and must be "narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 955, 74 L. Ed. 2d 794 (1983). Still, the government may impose content-neutral time, place, and manner restrictions on speech in traditional public forums as long as the restrictions are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.* The government at times intentionally opens up other public property for public discourse; that is, in areas other than

traditional public forums, the government may designate its property as a public forum by making it generally open to the public as a place for expressive activity. *Id.* As long as it does so, the government is bound by the same standards as in traditional public forums. *Id.* at 46, 103 S. Ct. at 955. Finally, if government property is not traditionally and has not been designated a forum for expressive activities by the public, then the government may restrict or control access to a greater degree. *Id.* In such areas, not only may the government may establish time, place, and manner regulations on speech, it may reserve the forum for whatever the government's intended purpose may be, "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.*

Identifying government property as the appropriate type of forum—and so determining the extent to which the government may restrict speech there—is no easy task. And which type of forum best describes a public university campus, or certain parts of the campus, is a particularly vexed question. *See Hershey v. Goldstein*, 938 F. Supp. 2d 491, 508-10 (S.D. N.Y. 2013) (collecting cases); *compare Bowman*, 444 F.3d at 776 (holding that the university spaces at issue were "unlimited designated public fora"), *with Bowman*, 444 F.3d at 983 (Bye, J., concurring) (opining that the university spaces at issue "should be recognized as traditional public fora"); *compare Ball*, 870 F.3d at 736 (holding entirety of a plaza area was a nonpublic forum), *with Ball*, 870 F.3d at 737-38 (Melloy, J., dissenting) (opining that part of the plaza area was a traditional public forum). Some courts

have declined to use the complex forum analysis in what is ultimately a search for sensible results—particularly where the area at issue does not appear to fit neatly into one of the Supreme Court's forum classifications. *See Gilles v. Blanchard*, 477 F.3d 466, 473-74 (7th Cir. 2007) (declining to use the forum "template" to resolve the case where the case at issue falls between the cracks of the forum analysis).

Recognizing the difficulty of the issue is not to say that first amendment law, according to the federal appellate courts, is never clearly established and that qualified immunity always protects state actors in their individual capacities. At times the law is, according to the courts, clearly established, and university officials who transgress its bright lines are on the hook for money damages. *See*, *e.g.*, *Burnham v. Ianni*, 119 F.3d 668, 675-77 (8th Cir. 1997) (en banc). Here, however, the unlawfulness of failing to repeal the policy would not have been apparent to reasonable trustees standing in the defendants' shoes.

Two Eighth Circuit cases primarily guide the Court's analysis here. The Eighth Circuit previously upheld, for the most part, the University of Arkansas's analogous campus-wide policy regarding use by speakers of its campus facilities and space. *Bowman*, 444 F.3d at 983. That policy required, among other things, non-university entities, like Bowman, to make reservations in advance of using campus space. *Id.* at 972. It also imposed a three-day advance notice requirement before using the space. *Id. Bowman* held that the outdoor areas at issue on the University of Arkansas campus were unlimited designated public forums because the university had

long permitted speech, by both university and non-university entities, at the locations at issue. *Id.* at 979. There was no evidence the policy was not content neutral, and so the question became whether the time, place, and manner restrictions on the property were narrowly tailored to meet one or more of the university's proffered government interests.

The Eighth Circuit answered that three of the four relevant restrictions were constitutional. The requirement that non-University entities obtain a permit before using the outdoor space was lawful even though it was a prior restraint, against which there is a heavy presumption of unconstitutionality. *Id.* at 980. The policy did not delegate overly broad discretion to officials, and it did not allow the denial or revocation of permits on the basis of content—it applied to all nonprofit non-university entities, and permits could be denied or revoked only for limited reasons. *Id.* at 980-81. The permit requirement did not burden substantially more speech than necessary to further the university's interests in ensuring public safety, minimizing disruption of the educational setting, and coordinating the use of limited space by multiple entities. *Id.* at 981. The three-day notice requirement was also constitutional despite potentially preventing spontaneous speech—three days was a relatively modest requirement, which allowed the university to plan for exigencies such as security, crowd control, and insurance requirements that might be necessary for a given event. *Id.* at 982.[9]

[9] The Eighth Circuit also held that a ban on non-university entities during final examinations and commencement activities

Like the University of Arkansas policy in *Bowman*, the ASU Policy required speakers to schedule their use of campus space for speaking and to provide the University with advance notice of their intent to do so, and, like that policy, the ASU Policy applied to all individuals and entities. The Policy similarly sought to serve legitimate interests, comparable to those in *Bowman*, namely, assuring equal opportunity for speech, preserving order within the university community, protecting university property, and providing a secure environment for exercising freedom of expression. Document #1-3. Reasonable university trustees in the positions of the members of the ASU Board of Trustees could have understood *Bowman* to mean that permit and advance notice requirements for speakers on a university campus may be used without violating the first amendment—even if the campus areas are designated public forums—and that failing to repeal ASU's similar Policy would not violate a clearly established constitutional right.

Another Eighth Circuit decision—decided less than two months before the incident at issue in this case—further demonstrates that it was reasonable for officials standing in the defendants' shoes not to repeal the Policy. In *Ball v. City of Lincoln, Nebraska*, the Eighth Circuit held that an outdoor plaza—owned

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was constitutional. *Id.* The only aspect of the University of Arkansas's policy that was held unconstitutional was a five-day cap on which a speaker could speak per semester — this part of the policy was not narrowly tailored to achieving its interest in fostering diversity and avoiding monopolization of space because the policy could just as easily allow the plaintiff more days to speak if the space was not already being used. *Id.* at 981-82.

by the city but managed by an entertainment venue company—was a nonpublic forum where the government was minimally restricted. 870 F.3d 722, 736 (8th Cir. 2017). This was true despite that the plaza area possessed physical features that made it look like a public forum and that it was physically accessible to the public. *Id.* at 731-33. It was primarily a venue for commercial use by the arena, a means to facilitate safe access for its patrons, a security screening area, and a gathering place for arena patrons. *Id.* The Eighth Circuit noted that there was no evidence that the plaza was used for public expression or that it was made available for expressive activity by the public. *Id.* at 735. The City's principal purpose with respect to the plaza was to protect the rights of arena tenants, to allow for crowd management and safety, to provide a gathering place for arena patrons, and to provide an area for security screening—not to be open to the public for expressive activities. *Id.*

The defendants argue that, like the plaza in *Ball*, Heritage Plaza is a nonpublic forum where the government may more broadly restrict speech. The plaintiffs say that *Ball* does not support ASU's position because, unlike the plaza in *Ball*, Heritage Plaza has long been open for expressive activities by the public. The defendants contend, however, that ASU did not open Heritage Plaza—where Hoggard and Parry set up their table—for expressive activity by the public, but restricted expressive activity to only certain types of speech.

According to the defendants, as a matter of practice, Heritage Plaza is not generally available to the public for expressive activities; thus, it is not a

traditional or designated public forum. Document #50 at 2-4. They point to the deposition and declaration testimony of Elizabeth Rouse, the university employee who is charged with booking reservations for the space around the Reng Student Union. Document #35-5 at 2. Rouse testified that only Registered Student Organizations and ASU departments were allowed to reserve that area. *Id.*; Document #35-4 at 14, 18-19. In her deposition Rouse identified Heritage Plaza as available only for Registered Student Organizations to reserve. Document #34-4 at 18-19; *see also* Document #35-13 (satellite image). She specified a nearby but separate grassy area along Caraway Road as an area available for general reservation under the Policy. Document #34-4 at 18-19; *see also* Document #35-13.

The plaintiffs argue that the Policy itself disputes Rouse's testimony because, they say, the Policy lists the area where Hoggard and Parry set up their table as a Free Expression Area open to reservation by anyone. The Policy, however, confirms Rouse's testimony because it describes the third Free Expression Area as "Heritage Plaza east of Reng Student Union *at Caraway Road*"—the location specified by Rouse—and not anywhere in Heritage Plaza. Document #1-3 at 3.

The plaintiffs next point out that the Policy allows "other areas of the campus," besides the Free Expression Areas, to be reserved if any individual or group desires to use them. *Id.* at 2. They say that this reference to "other areas of campus" for speech by any individual or group means that Heritage Plaza is not limited to only specific groups. But the fact that other

areas of campus may be reserved by anyone does not contradict the defendants' evidence that, as a matter of ASU practice, Heritage Plaza may be reserved only by university-affiliated groups.

Finally, the plaintiffs argue that a non-university-affiliated speaker held an event in Heritage Plaza on October 11, 2017, belying ASU's contention that only university-affiliated speakers are allowed there. Document #50 at 3-4. But, as explained above, it is undisputed that anyone may reserve the separate grassy area at the end of Heritage Plaza along Caraway Road, and Rouse's unrebutted deposition testimony reflects that the other speaker was at the end of Heritage Plaza. Document #35-4 at 25.

In short, the plaintiffs have failed to present evidence to create a genuine dispute as to whether ASU has reserved Heritage Plaza—including the patio portion where Hoggard and Parry set up their table—for speech by only certain university-affiliated speakers, and that it is not generally open for expressive activity by the public. *See Perry Educ. Ass'n*, 460 U.S. at 46, 103 S. Ct. at 955. In *Ball*, that the plaza was not open for expressive activity by the public informed the Eighth Circuit's holding that it was a nonpublic forum. *Ball* therefore further supports the conclusion that the defendants did not transgress a bright line of first amendment case law when it failed to repeal the Policy that effectively restricted speech in the Heritage Plaza patio.

The plaintiffs have not met their burden to demonstrate that the right at issue was clearly

established. *See Morgan*, 920 F.3d at 524. The only cases to which they can point are non-binding district court cases. *See Clayton Smith v. Tarrant Cnty. Coll. Dist.*, 670 F. Supp. 2d 534 (N.D. Tex. 2009); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575 (S.D. Tex. 2003); *Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, 2012 WL 2160969 (S.D. Ohio June 12, 2012). A "robust consensus" of persuasive authority can perhaps dictate that law is clearly established. *Lane v. Nading*, 927 F.3d 1018, 1022 (8th Cir. 2019) (quoting *Wesby*, 138 S. Ct. at 589). But a handful of district court cases is not robust consensus, *see id.* at 1023, and the strong Eighth Circuit precedent to the contrary further shows that these cases do not represent a robust consensus. *Bowman* and *Ball* show that Rhodes, Langford, Crowson, Crawford, and Gardner acted well within the breathing room accorded them as public officials in making the decision—even if mistaken—not to repeal the Policy. Summary judgment is therefore granted in favor of the defendants on the plaintiffs' first amendment claims.

The plaintiffs also claim a violation of their fourteenth amendment right to due process of law. They say that the Policy violated their right to due process because its terms "speaking, demonstrating, and other forms of expression" are vague and undefined. Vague regulations are impermissible under the due process clause because they fail to provide adequate notice of prohibited conduct and they allow for arbitrary and discriminatory enforcement. *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1308 (8th Cir. 1997) (citing *Smith v. Goguen*, 415 U.S. 566, 572-73, 94 S. Ct. 1242,

1247, 39 L. Ed. 2d 605 (1974); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322 (1926)). "A stringent vagueness test applies to a law that interferes with the right of free speech." *Id.* at 1309. Nevertheless, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Adam & Eve Jonesboro LLC v. Perrin*, No. 18-2818, *7-*8 (8th Cir. Aug. 12, 2019) (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-19, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010)).

In an as-applied vagueness challenge, such as this one, the Court must consider the particular facts at hand because a "plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Holder*, 561 U.S. at 18-19, 130 S. Ct. at 2719. This general rule applies equally to expressive conduct. *Id.* at 19, 130 S. Ct. at 2719. Thus, even if the scope of a statute or regulation is not clear in every application, if the terms are clear in their application to a plaintiff's conduct, the vagueness challenge must fail. *Id.* at 21, 130 S. Ct. at 2720.

A regulation is unconstitutionally vague, and therefore void, if it does not provide a person of ordinary intelligence with fair notice of what it prohibits or requires. *See id.* at 20-22, 130 S. Ct. at 2720-21. Courts have traditionally relied on the common usage of statutory language, judicial explanations of its meaning, and previous applications of the statute to the same or similar conduct in order to determine whether an ordinance is unconstitutionally vague. *Stephenson*, 110 F.3d at 1309.

The plaintiffs' claim that the individual trustees violated their fourteenth amendment right to due process of law fails for the same reason as their first amendment claim. Taking into account the specific facts of this case, the plaintiffs have not demonstrated that enforcing the Policy against Hoggard violated a clearly established right. *See Estate of Walker*, 881 F.3d at 1061 (reversing the denial of qualified immunity because the district court defined the constitutional right in question too generally; the issue of whether the right was clearly established must be particularized to the case).

Instead, the activities in which Hoggard engaged comfortably fall within the scope of the Policy terms "speaking, demonstrating, and other forms of expression." Although it is undisputed that the Policy does not define those terms, the Policy as a whole reveals their meaning. *See* Document #1-3. The introduction explains that the Policy serves to balance university operations with ASU's commitment to affording opportunities for "protests and demonstrations." The section describing how to reserve Free Expression Areas is entitled "Speeches and Demonstrations." All these words signify formal methods of expression, and they inform the words "speaking, demonstrating, and other forms of expression" mentioned in the Policy. A person of ordinary intelligence would know that the Policy embraces setting up a table to promote a non-university political organization and soliciting membership into it. Moreover, considering any "previous applications of the [Policy] to the same or similar conduct," there is no evidence the Policy has ever been enforced against, for example, merely

casual conversations or study groups. *See Stephenson*, 110 F.3d at 1309.

The plaintiffs note that it is difficult to determine whether the Policy applies to hypothetical situations. They point to ASU officials' deposition testimony revealing uncertainty as to whether the Policy would apply in gray areas, such as to students wearing "Make America Great Again" hats. "Whatever force these arguments might have in the abstract, they are beside the point" in this as-applied challenge. *Holder*, 561 U.S. at 22, 130 S. Ct. at 2721. Hoggard and Parry's actions readily fall within the Policy's ambit, and so the plaintiffs' case presents no such vagueness problem. *See id.* at 23, 130 S. Ct. at 2721.

The plaintiffs have not cited a case in which similar language was held unconstitutionally vague as applied to similar conduct, nor have they otherwise met their burden to demonstrate that the right at issue was clearly established. *See Morgan*, 920 F.3d at 524. Summary judgment is therefore granted in favor of the remaining defendants on the plaintiffs' fourteenth amendment claims.

CONCLUSION

For the reasons explained, the plaintiffs' claims are dismissed as moot except for their claims against the defendants in their individual capacities for damages for the enforcement of the now-repealed ASU Freedom of Expression Policy against them. The motion to dismiss is therefore GRANTED IN PART and DENIED IN PART. Document #57. The ASU administrators—Charles Welch, Kelly Damphousse,

William Stripling, and Martha Spack—did not participate in the enforcement of the Policy against the plaintiffs, and they cannot be liable absent personal participation. Therefore, summary judgment is granted in their favor on the plaintiffs' claims against them in their individual capacities. The ASU trustees—Ron Rhodes, Tim Langford, Niel Crowson, Stacy Crawford, and Price Gardner—are protected by the doctrine of qualified immunity from the plaintiffs' claims against them in their individual capacities for failing to repeal the campus policy and for Rhodes's participation in adopting the system-wide policy. They are entitled to summary judgment on that basis. The defendants' motion for summary judgment is GRANTED as to the plaintiffs' damage claims against them in their individual capacities. Document #35. The defendants' supplemental motion for summary judgment is DENIED. Document #67. The plaintiffs' motion for summary judgment is DENIED. Document #40.

IT IS SO ORDERED this 19th day of August, 2019.

J. Leon Holmes

J. LEON HOLMES
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

TURNING POINT USA AT ARKANSAS STATE UNIVERSITY; and ASHLYN HOGGARD — PLAINTIFFS

v. No. 3:17CV00327 JLH

RON RHODES, in his individual and official capacities as member of the Board of Trustees of Arkansas State University System; *et al.* — DEFENDANTS

OPINION AND ORDER

Ashlyn Hoggard is a student at Arkansas State University in Jonesboro, Arkansas. She wanted to form a Turning Point USA chapter and register it as a student group on campus. In the Fall 2017 semester, Hoggard and a Turning Point employee set up a table with two poster boards about Turning Point on the edge of a large walkway outside the student union. The table was not obstructing any buildings' exits or entrances. They talked with students and encouraged them to join their group. A university employee and campus police officer soon informed Hoggard and her companion that they were violating the campus freedom of expression policy. The officer issued Hoggard's guest a criminal trespass warning and banned her from the entire campus.

The freedom of expression policy governs first amendment expression on all of campus. Document #1-2; Document #1-3. The policy distinguishes between "Free Expression Areas" and all other areas of campus, whether greens, buildings, or sidewalks and roads. *Id.* The policy applies to faculty, staff, students, student organizations, and visitors. *Id.* Free expression areas are generally available for speeches and demonstrations between 8:00 a.m. and 9:00 p.m. Monday through Friday. Document #1-3. Persons wishing to use this space must request permission to use it in advance with the Director of Student Development and Leadership. *Id.* Persons wishing to use other areas of campus must request permission at least 72 hours in advance with the Vice Chancellor of Student Affairs or the Director of Student Development and Leadership. *Id.* In addition, those wishing to distribute noncommercial written material, such as pamphlets or circulars, may only do so in certain designated areas and only with the permission of the Director of Student Development and Leadership. *Id.* Stands, tables, and booths may only be used in free expression areas to distribute written materials. *Id.* The policy does not require university officials to respond to requests to use free speech areas or other areas within a certain time frame or even at all. *Id.*

Hoggard and the Turning Point organization sued various university officials in their official and individual capacities, alleging that the freedom of expression policy is unconstitutional both facially and as applied to Hoggard and the organization. She says that this policy has unconstitutionally burdened her protected first amendment rights. She wants to

discuss Turning Point with students and hand out written materials without needing the approval of the university in advance. The university has now moved to dismiss the complaint on three grounds: standing, sovereign immunity, and qualified immunity.

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although detailed factual allegations are not required, the complaint must set forth "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). The Court accepts as true all of the factual allegations contained in the complaint and draws all reasonable inferences in favor of the nonmoving party. *Gorog v. Best Buy Co., Inc.*, 760 F.3d 787, 792 (8th Cir. 2014). The complaint must contain more than labels, conclusions, or a formulaic recitation of the elements of a cause of action, which means that the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1965.

The defendants argue that Hoggard and the organization lack standing to challenge the policy because Hoggard never requested nor was denied a permit. They also say that Hoggard and the

organization are not challenging the policy's prohibition on the use of stands, tables, or booths , and, therefore, any remedy would not afford them relief. The constitutional requirement of standing does not require Hoggard first to seek and be denied a permit before she will have an injury. *See Bloedorn v. Grube*, 631 F.3d 1218, 1228 (11th Cir. 2011) (rejecting challenge to standing where plaintiff did not seek a permit from the university); *see also Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 157-58, 122 S. Ct. 2080, 2085, 153 L. Ed. 2d 205 (2002) ("They also explained at trial that they did not apply for a permit because they derive their authority to preach from Scripture."). More fundamentally, Hoggard's alleged injury is not that the permit was denied but that she had to seek a permit in the first place. With respect to the second part of the defendants' standing argument, the complaint makes clear that Hoggard and Turning Point are challenging the policy as a whole and as applied to their conduct when they were asked to leave by the university employee and campus police officer. *See* Document #1 at ¶¶109-18, 129. The plaintiffs have standing.

The defendants next argue that the plaintiffs' claims are barred by sovereign immunity. The defendants acknowledge, though, that claims against state officials in their official capacities for prospective injunctive relief are not barred by sovereign immunity. Hoggard and Turning Point seek prospective injunctive relief against the defendants in their official capacities and seek compensatory damages against the defendants only in their

individual capacities. The plaintiffs' claims are not barred by sovereign immunity.

The defendants last argue that they are entitled to qualified immunity because "[t]his case is materially indistinguishable from *Bowman v. White*, 444 F.3d 967 (8th Cir. 2006), which upheld the constitutionality of substantively identical policy provisions of the University of Arkansas at Fayetteville." The defendants' argument relies almost entirely on *Bowman* governing this case. At this stage, the Court cannot say as a matter of law that *Bowman* controls the facts here. First, *Bowman* was decided after a plenary hearing—a proceeding under Federal Rule of Civil Procedure 65(a)(2) wherein a court consolidates the hearing on a preliminary injunction with the trial on the merits—and not at this early stage. Second, the plaintiff in *Bowman* only challenged the policy as applied to his activities. Third, the Eighth Circuit was careful to tailor its analysis to the facts before it in *Bowman*. For example, the court limited its forum analysis to specific locations on Fayetteville's campus, *id.* at 977, 979, and the court also analyzed the university's time, place, and manner restrictions in light of the plaintiff's "demonstrated . . . capacity to attract a crowd and disrupt the unique educational environment." *Id.* at 981.

Perhaps most significantly, the policy at issue in *Bowman* was not made a part of the pleadings and is not before the Court. Other than the description in *Bowman* and the court's as-applied analysis of it, this Court has no way of knowing whether it is materially indistinguishable to Arkansas State's policy.

Moreover, even if the policies were materially indistinguishable, the forums are not. The spaces and their historical uses are unique to each campus.

The university's freedom of expression policy requires Hoggard to seek and receive the university's permission before she is allowed to exercise first amendment freedoms on campus. The policy is a prior restraint on her first amendment rights, as interpreted by the Supreme Court, against which there is a "heavy presumption" of unconstitutionality. *See Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 130, 112 S. Ct. 2395, 2401, 120 L. Ed. 2d 101 (1992).

At this stage, the Court cannot say that *Bowman* controls this case, nor that this presumption has been rebutted. The defendants' motion to dismiss is DENIED. Document #11.

IT IS SO ORDERED this 23rd day of March, 2018.

J. Leon Holmes

J. LEON HOLMES
UNITED STATES DISTRICT JUDGE