No. 20-1066

IN THE
Supreme Court of the United States

ASHLYN HOGGARD,
Petitioner,

v.

RON RHODES, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTION PRESENTED

After petitioner filed suit, the Arkansas legislature enacted the Forming Open and Robust University Minds (FORUM) Act, which prospectively eliminated all of the Arkansas State University speech policies petitioner had challenged. The FORUM Act mooted all of petitioner's claims except for her as-applied challenge to the University's "Tabling Policy," for which petitioner seeks only nominal damages. The Tabling Policy allowed only registered student organizations and University departments to set up tables in the Student Union or on the outside patio. Petitioner had not attempted to register her student organization before setting up her table on the Student Union patio, and she was asked by University employees who were never named as defendants to move the table to a different location. The question presented is:

Whether high-ranking University administrators and members of the Board of Trustees, none of whom enforced the Tabling Policy against petitioner or created that policy, are entitled to qualified immunity and therefore not personally liable to petitioner because lower-level university officials asked petitioner to move a table out of a limited designated public forum reserved for registered student organizations, and the most analogous binding precedent at the time had upheld similar and more burdensome policies against First Amendment challenges.

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INTRODUCTION

While this case was pending, the Arkansas legislature enacted the Forming Open and Robust University Minds (FORUM) Act. The FORUM Act required Arkansas State University ("ASU") to rescind all of the speech policies that petitioner challenged, mooting her facial challenge and claims for prospective relief. The only remaining claim in this case is petitioner's as-applied challenge to the "Tabling Policy," which limited the use of tables inside and on the patio outside the Student Union to registered student organizations and ASU departments. But petitioner did not attempt to register her organization before she filed suit and, when she eventually applied for registration, she was successful. Moreover, she sued none of the ASU employees who asked her to move the table. Instead, she sued only ASU's Trustees and its highest-ranking administrators, none of whom created the Tabling Policy or enforced it against petitioner. This suit is a moot case against the wrong defendants over a policy that no longer exists.

The Eighth Circuit correctly held that respondents were entitled to qualified immunity and could not be held personally liable for petitioner's as-applied challenge. These high-ranking officials were not personally involved in causing petitioner's alleged constitutional injury. But, even assuming they were, the most analogous binding precedent had upheld similar and more burdensome speech restrictions. Any reasonable official thus would have understood that the Tabling Policy did not violate the First Amendment. In fact, under this Court's precedent, the Tabling Policy was a reasonable restriction of speech in a limited public forum that raises no First Amendment concerns.

Contrary to petitioner's claim, this case presents no circuit splits for this Court to resolve. The circuits agree that qualified immunity is based on both the holdings and the reasoning of prior cases – a distinction that would not help petitioner in any event. Nor are the circuits split over whether a different standard should apply to school officials; all circuits apply the same standard to government officials regardless of their profession. This case also does not necessitate clarification of the required level of factual specificity in a prior case, because no higher or lower level of factual specificity would have saved petitioner's claim. And, even if any of those conflicts were presented, this largely moot and highly fact-bound case is neither sufficiently important nor the appropriate vehicle for this Court to address the broad qualified-immunity questions petitioner raises.

STATEMENT

A. Factual Background

In 2017, petitioner Ashlyn Hoggard, a student at the Jonesboro campus of Arkansas State University ("ASU"), decided she wanted to join Turning Point USA ("Turning Point"), a national student organization. *See* C.A. App. 843-45. Turning Point connected her with Emily Parry, a Turning Point representative who was not an ASU student. *Id*. at 117 (Tr. 62:23-63:23), Phipps Video[1] at 00:44-00:46.

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[1] Two video recordings of the incident at issue – one from the body-worn camera of Terry Phipps, a campus police officer ("Phipps Video"), and one from Emily Parry's cell phone ("Parry Video") – were submitted to the district court as exhibits to respondents' motion for summary judgment on a CD. C.A. App. 264-67 (noting exhibit covers for both videos). Respondents are enclosing a CD containing a copy of those videos with this brief.

Petitioner then obtained an ASU application form to register a local Turning Point chapter. C.A. App. 65-67, 107-08 (Tr. 24:13-25:20). The form explained that, to register her chapter, petitioner needed to recruit five student members and one faculty or staff advisor, to present a constitution, and to complete the three-page form. *Id.* at 65. The form also notified petitioner that "[n]o off-campus groups will be allowed to reserve a table for any reason – Information Tables are designed for [registered student organizations] and [ASU] department use only." *Id.* at 66.

Parry then proposed setting up a Turning Point table outside the ASU Student Union (the "Heritage Plaza patio") before petitioner attempted to register her Turning Point chapter with ASU. *Id.* at 123 (Tr. 87:17-19). It is undisputed that the purpose and design of the Student Union is "to create a welcoming atmosphere for students to congregate, be comfortable, and relax." *Id.* at 876. The Student Union is "the living room of campus" because it is where students eat, spend free time, study, and have their offices. *Id.* at 216 (Tr. 90:12-22), 235 (Tr. 65:11-17).

On October 11, 2017, Parry brought the Turning Point table to campus, and she and petitioner set up the table on the Heritage Plaza patio. *Id.* at 123 (Tr. 87:17-19), 125 (Tr. 95:18-19), 881. Video footage shows that Elizabeth Rouse, the Events Coordinator for the Student Union, calmly informed petitioner and Parry that they were not allowed to set up the table on the Heritage Plaza patio. *See* Parry Video at 00:07-00:41; Phipps Video at 00:30-01:19; *see also* C.A. App. 136 (Tr. 138:12-15) (petitioner agreeing videos are best evidence of what occurred).[2] Petitioner was not

[2] Another school official, Sarah Ponder, does not appear in the videos, but she first asked petitioner and Parry to move the table

allowed to set up the table because ASU had restricted the use of tables in the area to registered student organizations and ASU departments (the "Tabling Policy"), but petitioner had not registered her local chapter with ASU. *See* C.A. App. 234-35 (Tr. 64:23-65:17). In the videos, Coordinator Rouse can be seen kneeling and speaking to petitioner in a friendly manner about the registration process. *See* Phipps Video at 04:17-04:23; Parry Video at 05:00-05:04. Coordinator Rouse testified that her goal was to get petitioner's new chapter registered, which would allow its members to set up a table on the Heritage Plaza patio "any day." C.A. App. 244 (Tr. 102:13-103:1).

Coordinator Rouse also informed petitioner and Parry that they could set up their table elsewhere on campus, in any of the "Free Expression Areas." *See* Parry Video at 00:36-00:41; C.A. App. 45-47. Outside organizations and non-registered student groups could reserve those areas regardless of content or viewpoint, and Coordinator Rouse's office had never denied a request. C.A. App. 45-47, 254. Reservations also could be made on a first-come, first-served and same-day basis by either email, telephone, or walk-in. *Id.* at 254.

Parry refused to remove the table from the Heritage Plaza patio and instead began to argue with Coordinator Rouse and Officer Phipps. *See* Phipps Video at 00:00-01:50. Petitioner quietly sat next to the table. *See id.* Eventually, after Parry continued to argue and refused to move, Officer Phipps issued to her a *persona non grata* citation, which required Parry to leave campus. C.A. App. 69. Another campus police officer,

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from the Heritage Plaza patio. C.A. App. 847. She then left the scene, and Parry and Officer Phipps began recording the incident thereafter. *Id.* at 119 (Tr. 70:17-25).

Andrew Thrasher, also was present at the scene. *See* Phipps Video at 03:12-04:16. Respondents were not present at any point during the incident. Parry then left the patio with her table, and petitioner followed her. *Id.* at 11:50-12:40. As petitioner and Parry left the Heritage Plaza patio, they promoted Turning Point with passing students. *Id.* at 05:50-06:32, 09:20-12:25.

ASU took no adverse action against petitioner. No ASU official issued her a citation or disciplined her in any way. C.A. App. 136 (Tr. 137:8-20). No ASU official told her to leave campus or threatened her with punishment or arrest. *Id.* at 127 (Tr. 101:18-20), 135 (Tr. 136:7-12). No ASU official told her she could not speak to students on campus about her topics of choice or promote Turning Point. *Id.* at 127 (Tr. 102:15-18), 135 (Tr. 135:1-9), 149 (Tr. 189:20-22), 153 (Tr. 207:1-3). No ASU official told her she could not set up a table elsewhere on campus or that she could not try to set up a table again on the Heritage Plaza patio once she registered her organization. *Id.* at 127 (Tr. 102:19-21), 149 (Tr. 189:17-19).[3]

About a year later, in September 2018, petitioner submitted an incomplete application to register a Turning Point chapter at ASU. *Id.* at 254, 259-61. Coordinator Rouse promptly notified petitioner of the missing information, and the Turning Point chapter at ASU became a registered student organization soon

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[3] Petitioner incorrectly claims (at 5-6) that ASU officials threatened her with arrest and barred her from recruiting student members. As petitioner testified, and as the videos confirm, no ASU official told petitioner that her message could not be communicated in any manner; "[t]hey just said [she] couldn't do it *that way*," i.e., by setting up a table on the Heritage Plaza patio. C.A. App. 135 (Tr. 135:5-9) (emphasis added).

after petitioner provided that information to Coordinator Rouse. *Id.* at 254.

B. Procedural History

1. In December 2017, petitioner sued the ASU System Board of Trustees and a number of high-ranking ASU administrators pursuant to 42 U.S.C. § 1983.[4] C.A. App. 15. Petitioner never sued Rouse, Ponder, Phipps, or Thrasher – the only ASU officials who were present on October 11, 2017 and who enforced the Tabling Policy against petitioner. Parry was never a plaintiff in this case.[5]

The complaint challenged on First Amendment grounds two ASU policies, both facially and as applied to petitioner: ASU's system-wide Freedom of Expression Policy (the "System Policy") and the ASU

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[4] Specifically, petitioner sued Trustees Ron Rhodes, Tim Langford, Niel Crowson, Stacy Crawford, and Price Gardner in their official and individual capacities. C.A. App. 15. The district court later granted petitioner's motion to substitute Christy Clark, in her official capacity, as she had replaced Rhodes as Trustee. *Id.* at 11, 340 n.2. Rhodes remained a defendant in his individual capacity. *See id.* Because Clark was sued only in her official capacity, petitioner's as-applied claim does not involve her and she is not a respondent. *See* Pet. ii. Petitioner also sued the following school administrators in their official and individual capacities: President Charles L. Welch, Chancellor Kelly Damphousse, Vice Chancellor for Student Affairs William Stripling, and Director of Student Development and Leadership Martha Spack. C.A. App. 15. Petitioner abandoned her claims against Welch and Damphousse before the Eighth Circuit, *see* Appellants' C.A. Br. 21 n.14, so those officials also are not respondents, *see* Pet. ii. "Respondents" refers to the ASU administrators and Trustees named in the petition: Rhodes, Langford, Crowson, Crawford, Gardner, Stripling, and Spack.

[5] "Turning Point USA at Arkansas State University" was originally a plaintiff as well, C.A. App. 15, but "has no remaining claims for relief" and, therefore, is not a petitioner, Pet. ii n.1.

Jonesboro campus's Freedom of Expression Policy (the "Campus Policy"). *Id.* at 22-35, 1039.[6] The System Policy stated that the ASU system "has not opened its campuses as public forums" and allowed individual ASU campuses to designate "Free Expression Areas for speeches and demonstrations." *Id.* at 41. The Campus Policy designated Free Expression Areas throughout the Jonesboro campus. *Id.* at 45-47. The complaint sought relief from "associated practices" of the Campus and System Policies, *id.* at 34, but did not mention the Tabling Policy.

Petitioner initially sought declaratory and injunctive relief, compensatory and nominal damages, and attorneys' fees. C.A. App. 34-35. During discovery, however, petitioner disavowed any desire for compensatory damages. *Id.* at 141 (Tr. 159:5-9).

2. In February 2019, Arkansas enacted the Forming Open and Robust University Minds (FORUM) Act. *See* Ark. Code Ann. § 6-60-1001 *et seq.* The FORUM Act comprehensively addresses the ability of public universities such as ASU to regulate speech on campus and prohibits the creation of designated "free-speech zones." *Id.* § 6-60-1005. In response to the FORUM Act, ASU's Board of Trustees repealed the System and Campus Policies, as well as "all other freedom of expression policies," and instructed all ASU campuses to comply with the Act. C.A. App. 914-16; ASU Resolution 19-02, Ex. B to Defs.' Mot. To Dismiss Based on Mootness, ECF No. 57-2 (Mar. 15, 2019) ("ASU Resolution 19-02"). Respondents then moved to dismiss on mootness grounds. C.A. App.

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[6] Petitioner also alleged a due process claim, which the district court dismissed. App. 57a-58a. Petitioner did not challenge that determination on appeal, *see* Appellants' C.A. Br. 18 n.12, and does not raise the claim in her petition.

914-16. After completing discovery, the parties filed cross-motions for summary judgment. *Id.* at 96-99, 339-41, 1005-06.

3. The district court granted respondents' motion to dismiss in substantial part. App. 35a. The court found that the FORUM Act mooted all of petitioner's prospective claims and dismissed "all claims except the [as-applied] claim against [respondents] in their individual capacities for nominal damages." App. 27a.

As to that remaining claim, the district court granted summary judgment to respondents. App. 58a-59a. The court found that no respondent "was present at the incident," "received, processed, or denied a request by [petitioner] to use the area," or otherwise "directly or indirectly ordered [petitioner] and Parry to cease their activities." App. 37a. The court thus dismissed the claim against the ASU administrators, concluding that "[n]othing in the record shows that [they] w[ere] individually involved" in causing petitioner's alleged constitutional injury. App. 39a. The court similarly found that petitioner had not pointed to "any specific actions" the Trustees had taken, "other than generally failing to repeal" the Campus and System Policies. App. 42a.[7] The court, however, assumed for purposes of resolving the motion that the Trustees "were personally involved" in causing petitioner's alleged constitutional injury. App. 43a. The court entered judgment in favor of the Trustees, finding they were "entitled to summary judgment on the basis of qualified immunity," *id.*,

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[7] The district court found that some evidence suggested then-Trustee Ron Rhodes was involved in the adoption of the System Policy in 2009. App. 41a-42a. However, the court did not make a similar finding in connection with the Tabling Policy – the only policy at issue here.

because petitioner did not meet her "burden to demonstrate that the right at issue was clearly established," App. 54a-55a.

4. Petitioner appealed. She conceded that her "facial challenge was rendered moot by the [FORUM] Act and ASU's resulting repeal of its speech policies." Appellants' C.A. Br. 18 n.12. Petitioner appealed only the grant of summary judgment on the as-applied claim for nominal damages against respondents in their individual capacities. *See id.* at 2.

The Eighth Circuit affirmed. App. 3a. As a threshold matter, the court found that only the "Tabling Policy was enforced against [petitioner], and thus, only the Tabling Policy's constitutionality [wa]s properly at issue." App. 10a. The court then concluded that the Heritage Plaza patio was a "'limited designated public forum,' in which speech restrictions must be 'reasonable' and 'viewpoint neutral.'" *Id.* (quoting *Bowman v. White*, 444 F.3d 967, 976 (8th Cir. 2006)). Because petitioner did "not allege viewpoint discrimination," and because, "as applied to her, the Tabling Policy was not viewpoint-discriminatory," the court focused on "the Tabling Policy's reasonableness." App. 11a.

The panel majority opined that the Tabling Policy was unreasonable and violated the First Amendment as applied to petitioner. App. 16a-18a. But the panel unanimously concluded that respondents were entitled to qualified immunity because petitioner's rights under the First Amendment "were not clearly established" at the time of the incident. App. 18a-21a (majority opinion); App. 21a-22a (Loken, J., concurring).

Judge Loken concurred in the judgment without reaching the First Amendment issue because petitioner "presented insufficient evidence" that any respondent had the necessary "personal involvement"

in her alleged constitutional injury to give rise to personal liability under § 1983. App. 22a (Loken, J., concurring). The panel majority had not found otherwise, concluding instead that it "need not decide" the personal-involvement question "because all [respondents] are entitled to qualified immunity." App. 6a n.4.

REASONS FOR DENYING THE PETITION

I. THE EIGHTH CIRCUIT CORRECTLY AFFIRMED THE JUDGMENT BY GRANTING QUALIFIED IMMUNITY TO RESPONDENTS

Respondents were entitled to qualified immunity because the Tabling Policy as applied to petitioner was objectively reasonable in light of clearly established law. State officials "are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)). Only the second prong – whether the law was "clearly established" – is at issue in the petition.[8]

A. Respondents Are Entitled To Qualified Immunity Unless It Was "Clearly Established" That The Tabling Policy Was Unreasonable

The law is "clearly established" if "[t]he contours of the right [are] sufficiently clear that a reasonable official would have understood that what he [or she] is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). That is, "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731,

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[8] Respondents dispute the panel majority's conclusion that the Tabling Policy violated petitioner's First Amendment rights. *See infra* Part III.B.2.

741 (2011). This objective standard "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions" and "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* at 743 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

The scrutiny applied to restrictions of constitutionally protected speech on government property "depend[s] on the character of the property at issue." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983). The Eighth Circuit concluded – and petitioner does not dispute – that the Heritage Plaza patio is a "'limited designated public forum,' in which speech restrictions must be 'reasonable' and 'viewpoint neutral.'" App. 10a (quoting *Bowman v. White*, 444 F.3d 967, 976 (8th Cir. 2006)). It is undisputed that petitioner did not suffer viewpoint discrimination, so only the Tabling Policy's reasonableness is at issue. *See* App. 10a-11a.

B. Under Prevailing Eighth Circuit Precedent, The Tabling Policy Was Reasonable, So It Was Not "Clearly Established" That Enforcing That Policy Would Violate Petitioner's First Amendment Rights

The Tabling Policy as applied to petitioner was objectively reasonable in light of two binding circuit cases: *Ball v. City of Lincoln*, 870 F.3d 722 (8th Cir. 2017), and *Bowman v. White*, *supra*. Both cases upheld speech restrictions. *See Ball*, 870 F.3d at 737; *Bowman*, 444 F.3d at 983.

Ball closely resembles the circumstances of this case. *Ball* involved speech restrictions on a plaza outside the arena that served "as the home court" to the University of Nebraska's basketball teams. 870 F.3d at 727-28. Use of the plaza was limited to arena

tenants. *Id.* at 728.[9] The Eighth Circuit addressed the policy as applied to Ball, a non-tenant who handed out leaflets on the plaza in a "peaceful and respectful" manner. *Id.* at 737. The court concluded that the policy was lawful "[v]iewed in light of the commercial and safety purposes served by the [p]laza [a]rea." *Id.* The court also noted that "nearby areas" were "open for expressive activity," which further supported its holding. *Id.* The Tabling Policy therefore was objectively reasonable in light of *Ball*.[10]

The Tabling Policy also was objectively reasonable in light of *Bowman*. There, the Eighth Circuit upheld more onerous speech restrictions in *unlimited* designated public fora on a college campus under strict scrutiny. *See Bowman*, 444 F.3d at 976, 983. The policy in *Bowman* required speakers to obtain a permit three business days before "speaking, carrying signs, handing out literature, or sitting silently" in any outdoor campus space. *Id.* at 972. The policy also banned speakers from expressive activity during study days and exam periods. *Id.* at 972-73. The Tabling Policy, by contrast, restricted only the use of tables by groups other than registered student organizations and ASU

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[9] Although the plaza was a "nonpublic forum," *Ball*, 870 F.3d at 736, rather than a limited public forum, restrictions in both are reviewed for reasonableness and viewpoint neutrality. *Compare*, *e.g.*, *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 808 (1985) (nonpublic forum), *with Christian Legal Soc'y Chapter of Univ. of California, Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 679 (2010) (limited public forum).

[10] The district court relied on both *Ball* and *Bowman*. App. 54a-55a. Although the Eighth Circuit focused on *Bowman*, *Ball* also supports the Eighth Circuit's holding. *See Elder v. Holloway*, 510 U.S. 510, 516 (1994) (whether the law "was clearly established at a particular time" is a "question of law" that "must be resolved *de novo* on appeal").

departments in "a more loosely-scrutinized *limited* public forum." App. 19a. Because the restrictions in *Bowman* survived strict scrutiny, any reasonable official would believe the Tabling Policy would survive the less-stringent standard that applied to the Heritage Plaza patio.

Petitioner ignores *Ball*, and her claim that *Bowman* clearly established that the Tabling Policy violated the First Amendment ignores that the case upheld more burdensome requirements under a stricter level of scrutiny. *See Cornelius*, 473 U.S. at 799-800 ("protected speech is not equally permissible in all places"); *Christian Legal Soc'y*, 561 U.S. at 681 (holding that applying strict scrutiny to speech restrictions in limited public fora "would, in practical effect, invalidate a defining characteristic of limited public forums – the State may 'reserv[e] [them] for certain groups'") (quoting *Rosenberger v. Rector & Visitors at Univ. of Virginia*, 515 U.S. 819, 829 (1995)) (alterations in *Christian Legal Soc'y*). Petitioner thus fails, as she failed below, to present any case clearly establishing her alleged constitutional injury. Instead, as the Eighth Circuit noted, petitioner relies on "inapposite" cases with constitutionally dispositive attributes: higher scrutiny; "a content-based restriction"; "overly-broad discretion to enforce speech restrictions"; and lack of "a forum analysis." App. 19a-20a.

II. THERE IS NO CIRCUIT SPLIT WARRANTING THIS COURT'S REVIEW

A. Courts Consistently Consider Legal Reasoning From Binding Precedent

Petitioner claims (at 3, 8) that circuits "are sharply divided" over whether "legal reasoning" in prior cases – as opposed to "holdings" only – can clearly establish the law. But petitioner's alleged circuit split is based

on a mischaracterization of the Eighth, Fifth, and Tenth Circuit cases that purportedly compose one side of this split. Instead, those circuits – like the Sixth, Seventh, Ninth, and Eleventh Circuits – all consider the reasoning as well as the holdings of prior cases. In any event, both the reasoning and the holding of *Bowman* supported the Eighth Circuit's qualified-immunity ruling, so resolution of this illusory split in petitioner's favor would not alter the judgment below.

1. Petitioner mischaracterizes Eighth Circuit law

Petitioner is incorrect (at 13-14) that the Eighth Circuit considers only ultimate "results" from prior cases. As support for this claim, petitioner cites (at 14-18) the decision below, a dissent in *Robinson v. Hawkins*, 937 F.3d 1128 (8th Cir. 2019), and "dueling concurrences" in *Dillard v. O'Kelley*, 961 F.3d 1048 (8th Cir. 2020) (en banc), *cert. denied*, 141 S. Ct. 1071 (2021). Neither a dissent nor a debate among judges in concurring opinions – on which the majority did not take a position – can create a circuit split. And the *Robinson* majority found that the unconstitutionality of a police officer's conduct *was* clearly established by the reasoning of its prior decision in *Richmond v. City of Brooklyn Center*, 490 F.3d 1002 (8th Cir. 2007). *See Robinson*, 937 F.3d at 1137-38 (explaining that, although "the search [in *Richmond*] had not violated clearly established law because the [male] suspect had been searched in the privacy of his hotel room by male officers," *Richmond*'s reasoning made clear that the strip search of Robinson – in a "not hygienic" location and in the presence of an officer "not of the same sex as Robinson" – did violate clearly established law). The majority in *Dillard* held that "the asserted due process right to informational privacy was not clearly

established," as it was a right this Court "has only assumed may exist, and [the Eighth Circuit] has never held to be violated." 961 F.3d at 1050, 1053-55. Neither majority opinion relied on a distinction between holdings and reasoning for its qualified-immunity decision.

Nor did the panel below look only at *Bowman*'s "result," i.e., the "judgment in favor of school officials." Pet. 7. *Bowman*'s reasoning involved the application of strict scrutiny to restrictions on the speech of a disruptive non-student in unlimited designated public fora, and the court upheld those restrictions. *See* 444 F.3d at 976, 980-83. Thus, as petitioner recognized below, *Bowman* involved an "as-applied challenge [that] is distinguishable from [petitioner's]" and "inapposite" reasoning. Appellants' C.A. Reply Br. 2-3; *see id.* at 20 n.7 (arguing *Bowman* "is distinguishable"). The panel below looked to *Bowman*'s reasoning and correctly found that nothing in *Bowman* clearly established that the result would have been different under the less-stringent standard at issue in this case. App. 19a; *see also Cornelius*, 473 U.S. at 810 (state officials "need not wait until havoc is wreaked" to enact a reasonable speech policy); *Ball*, 870 F.3d at 737 (upholding regulation as reasonable even though plaintiff was peaceful "at all times"). The reasoning in *Bowman* – no different from its holding – did not establish "beyond debate" that the Tabling Policy was unreasonable. *al-Kidd*, 563 U.S. at 741.

2. The Fifth and Tenth Circuits also do not look only at case results

Petitioner is also incorrect (at 13) in identifying the Fifth and Tenth Circuits as courts that consider "only the outcome" of prior cases, rather than their reasoning, in applying qualified immunity. Neither *Morrow*

v. Meachum, 917 F.3d 870 (5th Cir. 2019), nor *Leiser v. Moore*, 903 F.3d 1137 (10th Cir. 2018), does so.

The Fifth Circuit in *Morrow* affirmed the grant of qualified immunity to a police officer involved in a high-speed car chase. 917 F.3d at 873. The court held that the law was not clearly established by evaluating the reasoning in "three lines of cases": a case that involved a police roadblock, excessive-force cases involving gunshots, and out-of-circuit motorcycle-chase cases. *Id.* at 874-80. The court considered the reasoning in the roadblock case but concluded that it did not clearly establish the law because the case "said nothing about whether the officers could be held personally liable" for setting up a roadblock, "about qualified immunity," or "about the reasonableness of the seizure." *Id.* at 877-78 (emphasis omitted). Similarly, the court looked at the reasoning in the "cases involving gunshots" when concluding those cases were "too factually dissimilar." *Id.* at 879. Finally, the court held that the only way the motorcycle-chase cases could have clearly established the law was "to identify the constitutional issue from a bird's-eye view – an approach [this Court] has rejected time and again." *Id.* at 880.

The Tenth Circuit in *Leiser* also did not look only to results and ignore the reasoning in prior cases. *Leiser* involved a prisoner's allegation that jail officials "violated his constitutional rights by disclosing medical information about him" without his permission. 903 F.3d at 1138. The Tenth Circuit held that decisions from this Court had undermined the reasoning that led to holdings in prior Tenth Circuit cases. *Id.* at 1143-45. Thus, the privacy right at issue was "an open question," and "it c[ould] no longer be said"

that "clearly established" law in the Tenth Circuit supported the plaintiff's claim. *Id.* at 1144.

All of the circuits petitioner identifies consider both holdings and reasoning when determining if the law is clearly established in the context of qualified immunity. Petitioner's claim of a circuit split is contrived and without merit.

B. There Is No Circuit Split As To The Level Of Deference Owed To School Officials

Petitioner's assertion (at 22) of a generalized conflict about "whether school officials should be held to a higher standard than other state officials" is also illusory. The only case petitioner identifies that purportedly established a different and less-deferential standard for school officials is *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1278 (11th Cir. 2004). *See* Pet. 22. But *Holloman* adopted no such rule.

There, the Eleventh Circuit found that this Court's decisions in seminal cases like *Barnette*,[11] *O'Brien*,[12] and *Tinker*[13] (as well as their progeny) clearly established a student's right not to participate in the Pledge of Allegiance and to engage in silent, non-disruptive speech during the Pledge. *See Holloman*, 370 F.3d at 1269-78. Only after lengthy discussion of those precedents that clearly established the law did the Eleventh Circuit note, in passing, that it was not "unreasonable to expect the defendants," who happened to be school officials, "to be able to apply such a standard." *Id.* at 1278. The court thus did not hold that the

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[11] *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

[12] *United States v. O'Brien*, 391 U.S. 367 (1968).

[13] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

law was clearly established *because* the defendants were educators (but would not have been had the defendants held some other profession).

The Eleventh Circuit also does not treat *Holloman* as establishing a special standard applicable only to school officials. Instead, that court regularly applies *Holloman* in cases that do not involve school officials. *See*, *e.g.*, *Smith v. LePage*, 834 F.3d 1285, 1291, 1297 (11th Cir. 2016) (citing *Holloman* in excessive-force case); *Cook v. Gwinnett Cty. Sch. Dist.*, 414 F.3d 1313, 1316-17, 1320 (11th Cir. 2005) (citing *Holloman* in case brought by a school bus driver complaining about anti-union activity by her management); *Davila v. Marshall*, 649 F. App'x 977, 981 (11th Cir. 2016) (per curiam) (citing *Holloman* in prisoner's rights case implicating Free Exercise Clause). Here, too, there is no conflict warranting the Court's plenary review.

C. This Case Does Not Necessitate Clarification Of The Required Level Of Factual Specificity In A Prior Case To Clearly Establish The Law

Petitioner argues (at 19) that this Court's plenary review is needed to clarify "how much factual specificity in a prior case is required" for qualified immunity to apply. But no higher or lower degree of specificity would have saved petitioner's case. This case is materially at odds with the most analogous binding circuit precedent, *see supra* Part I.B, including the Eighth Circuit case that petitioner claims is most helpful to her, *see supra* Part II.A.1. Indeed, even the panel majority – which found a constitutional violation in favor of petitioner – noted that petitioner had to resort to citing a variety of "inapposite" cases in an effort to find a case purportedly factually similar to hers. App. 19a.

III. THIS CASE IS A POOR VEHICLE AND NOT OF SUFFICIENT IMPORTANCE FOR THIS COURT TO ADDRESS THE BROAD QUALIFIED-IMMUNITY QUESTIONS PRESENTED IN THE PETITION

A. This Case Presents No Issue Of Continuing Importance

After Arkansas enacted the FORUM Act, ASU repealed all of the policies petitioner challenged, including the Tabling Policy. C.A. App. 914-16, 1043; ASU Resolution 19-02. Petitioner "just want[ed] the polic[ies] changed," C.A. App. 141 (Tr. 159:9), and got the relief she requested. Notably, petitioner mentions the FORUM Act and policy changes only in passing, *see* Pet. 6, and identifies no issue of continuing importance in this narrow, fact-bound, as-applied challenge to a superseded policy that used to govern a limited designated public forum.[14] Because of that policy change, the as-applied challenge still at issue would make any ruling by this Court applicable only in this unique circumstance.

B. The Court Would Need To Resolve Additional Issues To Reverse The Judgment

Even if the petition presented a qualified-immunity question warranting this Court's review, the Court would have to resolve two additional issues in

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[14] At various points, petitioner argues as though the Campus and System Policies are still at issue in this case, *see*, *e.g.*, Pet. 2, 21, 23-24, as do her *amici*, *see*, *e.g.*, Found. for Individual Rights in Educ. Amicus Br. 4; Ctr. for Am. Liberty Amicus Br. 2. But, as the Eighth Circuit found and petitioner does not challenge, those policies were not enforced against her. App. 10a. Only the Tabling Policy's constitutionality and respondents' alleged liability for others' enforcement of that policy against petitioner are at issue. *Id.*

petitioner's favor to reverse the judgment: (1) whether respondents were sufficiently involved in the alleged constitutional injury to be held individually liable under § 1983, and (2) whether the Tabling Policy as applied to petitioner violated the First Amendment. Neither question involves any circuit splits or otherwise warrants this Court's plenary review, and neither should be resolved in petitioner's favor.

1. The high-ranking school officials petitioner sued were not personally involved in her alleged constitutional injury

To hold respondents individually liable, petitioner must show that each of them violated the Constitution "through [their] own individual actions." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). But no court below found that any respondent had the requisite personal involvement to hold them individually liable. Quite the opposite, Judge Loken concluded that petitioner "presented insufficient evidence of [respondents'] personal involvement in denying her access to the [Heritage Plaza patio]." App. 22a (Loken, J., concurring). The district court similarly found that no respondent "was present at the incident," "received, processed, or denied a request by [petitioner] to use the area," or otherwise "directly or indirectly ordered [petitioner] and Parry to cease their activities." App. 37a. And the court dismissed petitioner's claims against the ASU administrators because "[n]othing in the record shows that [they] w[ere] individually involved" in "caus[ing] a deprivation of [petitioner's] constitutional rights." App. 39a. The panel majority did not reach this question, reasoning that it "need not decide" the matter because all respondents were entitled to qualified immunity. App. 6a n.4.

Petitioner does not mention Judge Loken's concurrence or the district court's findings about respondents' lack of personal involvement. Nor does she otherwise address this critical threshold question. But the record supports the district court's findings and Judge Loken's conclusion. Respondents did not enforce the Tabling Policy against petitioner. *See* Pet. 25 (conceding petitioner "did not even seek relief against the officer and employees who told her to stop speaking"). And petitioner points to no evidence that respondents created – or even were aware of – the Tabling Policy. Quite the opposite, she claims the Tabling Policy "'emerged from the bureaucratic aether,'" conceding its origin cannot be attributed to any particular respondent. Pet. 6 (quoting App. 14a).

In sum, petitioner sued the wrong state officials and seeks to impose personal liability on ASU's highest-ranking Trustees and administrators for "a single episode in which their underlings applied [the] Tabling Policy to deny [her] use of a table." App. 23a (Loken, J., concurring). Because she cannot show the named respondents "caused" her alleged "deprivation of a federal right," *Kentucky v. Graham*, 473 U.S. 159, 166 (1985), petitioner's remaining claim for nominal damages fails on the merits independent of any question of qualified immunity.

2. The Tabling Policy did not violate the First Amendment

As the Eighth Circuit correctly concluded – and petitioner does not dispute – the Heritage Plaza patio is a limited designated public forum and, therefore, speech limits on the patio pass constitutional muster if they are reasonable and viewpoint neutral. App. 10a. Because petitioner did not suffer viewpoint discrimination, the Tabling Policy's constitutionality depends only on its reasonableness. App. 11a.

The Tabling Policy as applied to petitioner meets this test because it was "reasonable in light of the purpose which the [Heritage Plaza patio] serves," and "substantial alternative channels" remained open for petitioner to communicate her message. *Perry Educ. Ass'n*, 460 U.S. at 49, 53. This Court has upheld against a First Amendment challenge a law school's requirement that student organizations register with the law school to receive certain benefits, such as the ability to "apply for permission to use the [l]aw [s]chool's facilities for meetings and office space." *Christian Legal Soc'y*, 561 U.S. at 670. There, unlike here, the law school had denied a student group's registration application because the group's bylaws did not comply with the school's "all-comers policy." *Id.* at 670-71. The policy required student groups to "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [his or her] status or beliefs." *Id.* at 671. The Court held that the policy reasonably advanced the law school's interests, including its interest in "encourag[ing] tolerance, cooperation, and learning among students." *Id.* at 689. The policy also was "all the more creditworthy in view of the 'substantial alternative channels'" of communication available to the student group, such as the availability of chalk-boards and bulletin boards at the law school and "electronic media and social-networking sites." *Id.* at 690-91 (quoting *Perry Educ. Ass'n*, 460 U.S. at 53).

Christian Legal Society illustrates why the Eighth Circuit's statements about the Tabling Policy's reasonableness did not fully account for this Court's precedent. *First*, the court failed to consider that ASU's content-neutral registration process was simple and straightforward. *See id.* at 685 (courts must consider "'all the surrounding circumstances'")

(quoting *Cornelius*, 473 U.S. at 809). Petitioner needed only five student members, one faculty or staff advisor, a constitution, and a completed three-page application. C.A. App. 65. She had notice of these requirements but, unlike the student group in *Christian Legal Society*, did not attempt to register prior to the incident and was never denied registration status by ASU. *See id.* at 107-08 (Tr. 24:13-25:24). When she did attempt to register, ASU promptly processed and approved the application. *Id.* at 254, 259-61. Petitioner thus cannot show that her ability to set up a table on the Heritage Plaza patio was "seriously impinged" by the registration requirement. *Perry Educ. Ass'n*, 460 U.S. at 53.

Second, the court improperly "infer[red] . . . that the availability of [petitioner]'s alternative communicative channels depended on the 'offensiveness' of [her] speech." App. 14a-15a. The court made this finding by discussing a series of hypothetical scenarios while failing to account for a material undisputed fact: the ASU officials' conduct was not motivated by the content of petitioner's speech. C.A. App. 135 (Tr. 135:1-4), 967 (Tr. 50:23-25).

The record also shows that petitioner could have set up the table in a Free Expression Area regardless of the content of her speech, but she chose not to do so. Students were able to reserve Free Expression Areas on a first-come, first-served and same-day basis, regardless of content or viewpoint. *Id.* at 254. These areas could be reserved by email, telephone call, or walk-in, without any advance notice. *Id.* The record showed that ASU officials had not denied a reservation request, *id.*, and ASU authorized all types of organizations to use the Free Expression Areas regardless of the nature of the event or organization, *see*

id. at 286-308 (confirmed organizations included, for example, "Americans for Prosperity," "Jehovah's Witnesses," "The Atheist Group," "Gideons on Campus," "Arkansans for Compassionate Care," and "Young Americans for Liberty"). The court's inference that ASU discriminates on the basis of the speech's "offensiveness" is thus contrary to the evidence and petitioner's concession that she suffered no content discrimination. *See id.* at 135 (Tr. 135:1-4) ("Q. Did anyone from ASU that day complain about the content of your speech or suggest it was a problem or an issue? A. No."), 967 (Tr. 50:23-25) ("There's no claim that [respondents] specifically targeted [petitioner] for the content of [her] speech.").[15]

Third, the court correctly recognized that petitioner "could have approached individual students practically anywhere on campus to discuss . . . Turning Point," but incorrectly concluded that this amounted to an ability to "associate with her peers to discuss politics," not to "an alternative forum." App. 15a. Petitioner's ability to communicate with students about Turning Point through means other than by placing a table on the Heritage Plaza patio is a textbook example of the availability of alternative channels. *See Christian Legal Soc'y*, 561 U.S. at 690 (citing

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[15] In an apparent reference to the deposition testimony of Vice Chancellor Stripling, the court asked: "Can two students sitting at a [Heritage Plaza patio] table talk to other students passing by? According to one defendant, it depends on whether their speech is 'offensive.'" App. 14a. But Stripling was testifying about how ASU investigates potential violations of the Student Code of Conduct – which is not at issue in this case – not how ASU enforced the Tabling Policy. *See* C.A. App. 466-471. And, "[w]hatever force [hypothetical situations] might have in the abstract, they are beside the point" in this as-applied challenge. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 22 (2010).

Perry Educ. Ass'n, 460 U.S. at 53). And that availability was not hypothetical. Petitioner admitted that nobody from ASU told her that she could not communicate her message on campus; ASU officials "just said [she] couldn't do it *that way*," i.e., by setting up a table on the Heritage Plaza patio. C.A. App. 135 (Tr. 135:5-9) (emphasis added). It is also undisputed that petitioner and Parry talked to students about Turning Point on the Heritage Plaza patio the day of the incident after removing the table. *See* Phipps Video at 05:50-06:32, 09:20-12:25; C.A. App. 883. The Tabling Policy is thus "all the more creditworthy" in light of the alternative channels that remained available to petitioner. *Christian Legal Soc'y*, 561 U.S. at 690; *see id.* at 691 (rejecting argument that "nonrecognition of a student organization is equivalent to prohibiting its members from speaking").

Fourth, the court correctly concluded that ASU had a "legitimate university interest" in ensuring "that students should feel comfortable in the space in which they eat, meet, and socialize." App. 16a. But it improperly supplanted ASU's reasonable policy choice to achieve that interest with its own preferred policy. According to the court, excluding only "non-University individuals from" setting up tables on the Heritage Plaza patio would have been a more reasonable approach, which led the court to find that the Tabling Policy bore "no rational relationship" to ASU's asserted interest. App. 13a, 16a. As this Court has "repeatedly stressed," however, "a State's restriction on access to a limited public forum 'need not be the most reasonable or the only reasonable limitation.'" *Christian Legal Soc'y*, 561 U.S. at 692 (quoting *Cornelius*, 473 U.S. at 808). By restricting the Heritage Plaza patio to registered organizations and ASU departments, the Tabling Policy reasonably advanced

ASU's asserted interest to some degree, which is all that is required.[16]

C. This Case Is A Poor Vehicle For Addressing Broad Questions Of Qualified Immunity

The Court should not use this case to make broad changes to its qualified-immunity doctrine. This case concerns an isolated episode in which ASU officials applied a now-repealed policy limiting the ability to set up tables outside a student union to registered student organizations. This highly fact-bound First Amendment case is thus neither the appropriate vehicle nor sufficiently important to deserve review by this Court, let alone to establish the transformative and consequential doctrinal changes that petitioner seeks.

Complex questions of qualified immunity are better resolved in the Fourth Amendment context, where cases present "tense, uncertain, and rapidly evolving" encounters with the police. *Graham v. Connor*, 490

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[16] *Amicus* Speech First erroneously describes the Tabling Policy as "an unconstitutional prior restraint" that "gave officials unbridled discretion to approve or deny student expression." Speech First Amicus Br. 8-10. The Tabling Policy limited petitioner's use of the Heritage Plaza patio based on her student organization's registration status. That is not a prior restraint; it is part of the "necessities of confining a [limited] forum" to its intended purposes by "reserving it for certain groups." *Rosenberger*, 515 U.S. at 829. But, even if the Tabling Policy were a prior restraint, it would not help petitioner. Claims that a prior restraint "plac[es] unbridled discretion in the hands of a government official" can be "effectively test[ed]" only through "a facial challenge," rather than an as-applied challenge. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757-58 (1988). Petitioner's facial challenge to the Tabling Policy, however, is moot and long abandoned. *See* Appellants' C.A. Br. 18 n.12. In addition, the officials petitioner sued did not enforce the Tabling Policy against her and, therefore, exercised *no* discretion in its enforcement.

U.S. 386, 396-97 (1989). Contrary to petitioner's suggestion (at 20, 23-25), the nature of Fourth Amendment claims does not support establishing a novel and unique qualified-immunity doctrine for First Amendment cases. Instead, the "rapidly evolving" nature of citizen-police encounters shows that ongoing guidance by this Court in the Fourth Amendment context is highly useful for training officers who deal with fact-specific encounters when making "split-second judgments." *Graham*, 490 U.S. at 396-97. Here, on the other hand, petitioner's moot and unique First Amendment case does not warrant this Court's review because it will not serve to provide any useful guidance to ASU officials, let alone government officials more broadly.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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