APPEAL NO. 19-3016

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

TURNING POINT USA AT ARKANSAS STATE UNIVERSITY, and ASHLYN HOGGARD,

Plaintiffs-Appellants,

v.

RON RHODES in his individual capacity (originally named in his individual and official capacity as a member of the Board of Trustees of the Arkansas State University System), TIM LANGFORD, NIEL CROWSON, STACY CRAWFORD, and PRICE C. GARDNER in their individual and official capacities as members of the Board of Trustees of the Arkansas State University System, CHARLES L. WELCH in his individual and official capacity as President of the Arkansas State University System, KELLY DAMPHOUSSE in his individual and official capacity as Chancellor of Arkansas State University, WILLIAM STRIPLING in his individual and official capacity as Vice Chancellor for Student Affairs of Arkansas State University, MARTHA SPACK, in her individual and official capacity as Director of Student Development and Leadership for Arkansas State University, and CHRISTY CLARK in her official capacity as a member of the Board of Trustees of the Arkansas State University System (originally named as Ron Rhodes),

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Arkansas – Jonesboro
The Honorable Senior District Judge J. Leon Holmes
Case No. 3:17-cv-000327-JLH

OPENING BRIEF FOR APPELLANTS TURNING POINT USA AT ASU AND ASHLYN HOGGARD

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Appellants request oral argument

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Plaintiffs-Appellants Ashlyn Hoggard and Turning Point USA at ASU sued to challenge Arkansas State University's inaptly named "freedom of expression" policies. These policies required anyone wishing to speak on campus—including students—to first obtain permission. "Offensive" speakers were directed to small "free expression areas," and officials had unbridled discretion to decide whether and how to enforce the rules. Here, officials stopped two students from speaking anywhere on campus and kicked an invited guest off campus completely.

After Plaintiffs sued, Arkansas passed the FORUM Act, forcing the officials to repeal their unconstitutional policies. On that basis, the district court held that Plaintiffs' official-capacity claims were moot. On cross-motions for summary judgment, the court held that the individual Defendants either were not personally involved or did not violate clearly established rights and thus were entitled to qualified immunity. But all Defendants had a role to play, and numerous decisions of the Supreme Court and this Court clearly establish that it is impermissible for a public university to 1) require advance permission before allowing a student to speak, and 2) give university officials unfettered discretion to decide whether and how to grant that permission.

This case concerns important First Amendment rights. Ashlyn and Turning Point respectfully request oral argument of 30 minutes.

CORPORATE DISCLOSURE STATEMENT

Turning Point USA at Arkansas State University is an unincorporated expressive association of students at Arkansas State University. It has no parent corporation and no stockholders.

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JURISDICTIONAL STATEMENT

Turning Point USA at Arkansas State University and Ashlyn Hoggard sued in the United States District Court for the Eastern District of Arkansas under 42 U.S.C. § 1983 to vindicate their rights under the First and Fourteenth Amendments to the United States Constitution. The district court exercised federal-question jurisdiction under 28 U.S.C. §§ 1331 and 1343, entering final judgment for the defendants on August 19, 2019. The plaintiffs filed their notice of appeal on September 18, 2019. This Court has jurisdiction of this appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Under clearly established First Amendment precedent, government officials may not impose a prior restraint on speech unless the restraint is content neutral, does not grant overly broad discretion to enforcement officials, is narrowly tailored to advance significant governmental interests, and leaves open ample alternative opportunities for speech. Here, university officials adopted, approved, and enforced speech policies that required even a single student to request permission before speaking anywhere on campus—including in the few areas and at the few times that the officials had designated for "free expression." The policies also granted enforcement officials broad discretion. As a result, the policies were enforced arbitrarily, and two students with their single invited guest were denied the right to speak.

This appeal raises three issues:

1. Whether ASU officials violated a student speaker's clearly established free speech rights by preventing her from speaking anywhere on campus because she did not request permission to speak in advance.[1]

2. Whether ASU officials further violated that student speaker's clearly established free speech rights by arbitrarily enforcing an unwritten policy resulting from enforcement officials' unbridled discretion.[2]

3. Whether two of the ASU officials are personally responsible for violating the student speaker's free speech rights where one of the officials was responsible for reviewing, changing, and approving the challenged policy, and where both were personally involved in implementing and enforcing the policy.[3]

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[1] *See* U.S. Const. amend. I; *Thomas v. Collins*, 323 U.S. 516, 539 (1945); *Bowman v. White*, 444 F.3d 967 (8th Cir. 2006); *Douglas v. Brownell*, 88 F.3d 1511 (8th Cir. 1996); *Rosen v. Port of Portland*, 641 F.2d 1243 (9th Cir. 1981).

[2] *See* U.S. Const. amend. I; *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Cox v. State of La.*, 379 U.S. 536 (1965); *Barrett v. Walker Cty. Sch. Dist.*, 872 F.3d 1209 (11th Cir. 2017); *Lewis v. Wilson*, 253 F.3d 1077 (8th Cir. 2001).

[3] *See* 42 U.S.C. § 1983; *OSU Student All. v. Ray*, 699 F.3d 1053 (9th Cir. 2012); *Dodds v. Richardson*, 614 F.3d 1185 (10th Cir. 2010); *Clay v. Conlee*, 815 F.2d 1164 (8th Cir. 1987); *Messimer v. Lockhart*, 702 F.2d 729 (8th Cir. 1983).

STATEMENT OF THE CASE[4]

Ashlyn decides to start a chapter of Turning Point at ASU

In fall 2017, Ashlyn Hoggard transferred to Arkansas State University as a junior majoring in political science. JA104, JA806. Earlier that year, Ashlyn had learned online about a national organization called Turning Point USA, and she had reached out to the organization's founder on Twitter. JA114. Ashlyn liked that the organization sought to educate students about the differences between capitalism and socialism, big government and small government, and the importance of free markets. JA 114.

Ashlyn learned that Turning Point did not have an active chapter at ASU, so she decided to start one. JA115–17, JA147. Ashlyn was introduced via email to Emily Parry, Turning Point's south-central regional manager, JA117, who showed Ashlyn how to complete the necessary paperwork to start the new student organization, JA123. The two of them filled out and submitted an application on Turning Point's website. JA147. And together they decided to set up a table the next day to recruit members for the new chapter. JA123.

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[4] Because Ashlyn challenges both the district court's ruling granting summary judgment for Defendants and the court's ruling denying her own motion for summary judgment, this section of the brief focuses on the relevant facts not disputed by other evidence in the record unless otherwise noted. In evaluating Defendants' summary judgment motion, all the facts must be construed in favor of Ashlyn, and all reasonable inferences must be drawn in her favor.

Ashlyn tries to recruit new members

Sometime previously, Ashlyn and another student, J.H.,[5] had gone to the Leadership Center to ask about setting up a table inside the student union. JA107–08, JA237. Officials told them they could not do so because they were not a registered student organization (an "RSO"), and they would need to recruit new members to become one. JA107–08. Another student later told Ashlyn that she could set up a table outside the union if she brought her own table, so that's what Ashlyn decided to do. JA107, JA121, JA124–25.

On October 11, 2017, Ashlyn and Emily brought a small folding table, two posters, some candy, a notebook, and their laptops to an open, outdoor area called Heritage Plaza outside the student union. JA121, JA125, JA231, JA263. Ashlyn had bought the two poster boards and written messages on them. JA125. One read, "Free Markets, Free People." JA263. And the other read, "Big Government Sucks." JA263. Both included Turning Point's website address. JA263.

Ashlyn and Emily set up off to the side of a large, paved walkway leading to the student union entrance—near a ledge they could use as a bench. JA125, JA231, JA240 JA247, JA798. They chose the location because it was out of the way. JA125. Ashlyn wanted to allow students walking past the table on their way into the student union to stop and voluntarily approach rather than soliciting them herself. JA130.

[5] Because this student is not a party, this brief uses his initials.

For 20 to 30 minutes, Ashlyn, Emily, and J.H.—who had joined Ashlyn and Emily after getting out of class—sat behind the table and spoke to students who approached expressing interest in Turning Point. JA119, JA123, JA126. About 15 interested students wrote down their names, phone numbers, and email addresses in Emily's notebook, and Ashlyn added them to her phone's group messaging app. JA119, JA126.

ASU officials thwart Ashlyn's efforts

After 20 to 30 minutes, ASU employee Sarah Ponder exited the student union and approached the table. JA119, JA236. Ponder was a Leadership Center administrative assistant, the same official who told Ashlyn and J.H. they had to recruit first, table later. JA236, JA107–08, JA119. Ponder ordered Ashlyn, Emily, and J.H. to leave. JA119. They did not do so immediately, so Ponder informed Elizabeth Rouse, the student union's Events Coordinator, that "someone [was] tabling outside who was not associated with the University," and that they had refused to leave when Ponder had confronted them. JA119, JA236–37.[6]

[6] In her deposition, Rouse initially testified that Ponder relayed to her that she had reviewed university policies with the group and their "abilities" and "opportunities" to "do what they're doing but not in that location." JA220, JA236. But when asked to elaborate, Rouse backtracked, admitting that she had not been present, Ponder "didn't specify" whether she had discussed the relevant policies, and that Rouse "should have said" merely that Ponder had reported that she "had a dialogue with this group about their abilities and when they were not compliant, [Ponder] came and got [her]." JA236–37.

Rouse called campus police. JA240, JA717. Rouse then confronted Ashlyn, Emily, and J.H., arriving at their table shortly before Officer Terry Phipps, a patrol lieutenant with the university police force. JA119, JA708, JA719–20. Officer Phipps testified that he was responding to a complaint that someone was violating "the freedom of speech reservation policy." JA742, JA756. Emily recorded the conversation on her cell phone, and Officer Phipps recorded it with his body camera. JA119, JA723–26.[7]

Rouse told Officer Phipps that ASU had "policies about what is appropriate." Emily's Video at 00:03–13. Ashlyn responded that they had been told they could set up outside the student union if they brought their own table because they were working on becoming registered. *Id.* at 00:14–19. Rouse answered that she "wouldn't have spoken that," admitted that she did not know what Ponder had said, then explained, "We have places to do exactly what you're doing. But they're called freedom of speech areas." *Id.* at 00:27–40. Emily answered that they were familiar with such policies—which Turning Point opposed—and that they had been ruled unconstitutional in many places across the country, including Arizona and West Virginia. *Id.* at 00:41–01:05. Rouse countered, "But it's not here yet." *Id.* at 01:05–06.

[7] The parties filed both videos as exhibits to their summary judgment pleadings in the district court. JA264–67, JA344–47. For convenience, the videos are included on a DVD in the joint appendix. JA344, JA346.

Emily explained they were trying to form a student group called Turning Point USA, and that they had been told they could not reserve a table inside the student union unless they were registered. *Id.* at 01:08–18. Rouse confirmed five students were required to become registered. *Id.* at 01:20–25. Emily asked, "So how can we find students who are interested without, you know, being able to talk?" *Id.* at 01:30–35. Referencing Ponder, Emily explained that "she also said that we can't even go in the free speech area without reserving it." *Id.* at 01:35–38. After a false start, Rouse agreed, "Oh, without reserving it, yes, absolutely." *Id.* at 01:41–43.

"So we can't even be in the free speech area?" Emily asked. *Id.* at 01:43–45. Rather than answer, Rouse suggested that university police officers have to know who students are and what their purpose is before ASU will allow them to speak. *Id.* at 01:46–2:02.

Pointing out another individual who was speaking nearby, Emily asked, "How come no one's telling him he can't be there?" *Id.* at 02:06–09. Rouse answered, "Because that is a reserved space. He has . . . reserved it. We know who he is." *Id.* at 02:09–14. "Yeah, we know in advance," Officer Phipps added. In response, Emily began to ask, "Ok, so how far in advance do we have to tell you," when Rouse interrupted, answering, "24 hours." *Id.* at 02:15–18. Finishing her question, Emily asked, "that we can be anywhere on this property?" *Id.* at 02:18–19. "You cannot be anywhere," Rouse answered. *Id.* at 02:19–20. "We can't

be anywhere without telling you?" Emily asked. *Id.* at 02:20–22. "No," Rouse and Officer Phipps both answered. *Id.* at 02:21–22. "We have designated areas," Rouse added. *Id.* at 02:22–24.

Emily and Officer Phipps proceeded to have a discussion about whether the group would be arrested if they declined to leave. *Id.* at 02:25–04:55. After initially suggesting no, *id.* at 02:27–31, Officer Phipps changed his tune and cautioned that he had been "given the power by the state of Arkansas to ban anyone [he saw] fit that's causing a disturbance." *Id.* at 02:40–46. When Emily asked if their table and candy were a disturbance, Officer Phipps warned, "Any time I get called and you're violating state policy, you're not following the rules, I have been enforced with the ability to ban you until you figure out what the policies are and until you agree to follow those policies." *Id.* at 02:47–03:09. With the assistance of a second university police officer, Officer Phipps filled out and issued a *persona non grata* against Emily, threatening that until it had been lifted, any violation would constitute criminal trespass. *Id.* at 03:23–05:00, 08:54–09:37.[8] The form declared Emily in "violation of [the] free speech area policy." JA745–46, JA774.

[8] Officer Phipps later testified, "[I]f I know that they're a non-student and they've told me they're a visitor non-student, but then they're going to be argumentative with me, I don't have time. I issue a *persona non grata* until they get their stuff straight." JA744.

Officer Phipps also demanded Ashlyn's and J.H.'s identification. Officer Phipps's Video at 04:20–28, 05:10–41. He explained they were "bound by ASU student conduct policy to follow the rules," and if they were "found to be out [there] not following policies, not following the rules, [they could] be referred for that violation." *Id.* at 04:29–43.

Finally, after Rouse finished speaking with Ashlyn and J.H. and began walking back toward the student union, Officer Phipps stopped her and asked for her name for his report. *Id.* at 06:33–46. Rouse gave her name and told the officer, "I'm the events coordinator in this building. And our role is to, to book those spaces." *Id.* at 07:04–11. Officer Phipps assured Rouse, "Yeah, we're not gonna start putting up with people just coming out here and starting stuff on their own." *Id.* at 07:11–18. Rouse agreed, stating, "Well, we're not in a position to be able to do that. I need to know who's on campus." *Id.* at 07:17–22.

After talking to Rouse, Officer Phipps returned Emily's identification, had her sign the *persona non grata*, and gave her a copy of it. *Id.* at 08:10–53. As the officers watched, Ashlyn and Emily folded up the table, packed their things, and left. *Id.* at 08:54–12:43.

ASU's system-wide speech policy

Arkansas State University is a four-year public university in Jonesboro, Arkansas—one of six campuses within the larger Arkansas State University System. JA82, JA847–48. In 1998, before the larger university system existed, ASU adopted a "Freedom of Expression"

policy for the Jonesboro campus ("campus speech policy"). JA45–48, JA416–17. When the ASU System was formed, the State gave the Board of Trustees authority to adopt policies governing various aspects of that larger system. JA391, JA849. In 2009, the Board adopted a system-wide "Freedom of Expression" policy governing all six campuses ("system speech policy"). JA41–43, JA850.

Defendants Dr. Tim Langford, Niel Crowson, Stacy Crawford, and Price Gardner are Board of Trustees members and have been since before October 11, 2017. JA18, JA82, JA849, JA1009. Defendant Ron Rhodes was a member of the Board of Trustees when it adopted the system speech policy in 2009 (even moving for its approval), and he was still on the board on October 11, 2017, and at the time this lawsuit began. JA849, JA1009, JA1024. He was replaced on the board by Defendant Christy Clark during this litigation. JA849, JA1009.

The Board of Trustees adopted the system speech policy in 2009 to "move [the campus speech policy] from previous existence at the campus level into the system level." JA1024. The system policy requires "[e]ach campus [to] establish procedures to govern Freedom of Expression by faculty, staff, students, student organizations, and visitors" in four areas: 1) speeches and demonstrations, 2) distribution of written material, 3) marches, and 4) time, place, and manner restrictions. JA41–42.

The system policy requires each campus to designate "Free Expression Areas" for "speeches" and "demonstrations," times when those areas can be used, and a "method for scheduling use" of those areas. JA41, JA418. Requests to use "other areas of the campus and other times for speeches and demonstrations" have to be submitted to the vice chancellor of student affairs (or his designee) "at least 72 hours in advance." JA41–42. The policy also tasks each campus with designating "any time, place, and manner restrictions specific to that campus" governing "speeches, demonstrations, distribution of written material, and marches." JA42. None of these terms are defined anywhere in the policy. JA41–43.

The policy purports to be content neutral. JA41–42. But the policy lists no factors that officials must consider in deciding whether to grant a request to speak in a free expression area or anywhere else on campus. JA41–42. Nor does the policy specify how far in advance requests to speak in one of the free expression areas must be made—leaving that to officials' discretion. JA41. The policy does not state whether ASU officials must approve or deny a request within a certain time frame. JA41–42. And it does not require officials to provide reasons for a denial. JA41–42.

ASU's Jonesboro-campus speech policy

Defendant Rick Stripling was the Vice Chancellor for Student Affairs at ASU in 2009 when the system speech policy was adopted, and he was still in that role on October 11, 2017. JA414, JA417–18. Stripling was responsible for ensuring the system speech policy was implemented at the Jonesboro campus. JA418. So Stripling helped review the already-existing campus policy. JA420, JA422. No changes were made at that time. JA420, JA422, JA424. Later, Stripling and other members of ASU's executive council changed and updated the locations for the free expression areas as the campus's physical layout evolved. JA427–34.

The campus speech policy mostly tracks the system speech policy, but it is more specific. JA45–48, JA421–23. The campus policy contains sections governing "speeches and demonstrations," "distribution of written material," and "marches." JA45–47. Also like the system policy, the campus policy does not define any of these terms. JA45–47. The campus policy lists eight specific time, place, and manner "stipulations." JA46–47. The entire policy applies equally to students and non-student visitors. JA45, JA589.

The campus policy designates seven "Free Expression Area[s]," and says that use of these areas "for speaking, demonstrating and other forms of expression will be scheduled through the Director of Student Development and Leadership." JA45–46. "These areas will generally be

available for this purpose between 8:00 a.m. and 9:00 p.m. Monday through Friday." JA45. Individuals and groups can request other days and times and other areas (i.e. most of campus), but such requests must be submitted to the Vice Chancellor for Student Affairs, a designee, or the Director of Student Development and Leadership "at least 72 hours in advance of the event." JA45.

Like the system speech policy, the campus speech policy purports to be content neutral. JA45–46. But again, the campus policy does not even specify how far in advance requests to speak in a free expression area must be made—leaving that to ASU officials' unbridled discretion. JA45. It also does not state whether officials must approve or deny a request within a certain time period. JA45.

Unlike the system policy, the campus policy lists eight "stipulations" that "shall apply, without exception, to any form of expression and will be used to evaluate any plan requiring approval." JA46–47. The policy does not state, though, that a request must be approved if the requester agrees to comply with all eight requirements. JA46–47. Nor does it prohibit officials from considering other factors. JA46–47. Nor does it require them to give their reasons for denying a request or to report that decision to a superior. JA45, JA438–39.

ASU officials' discretion to interpret and enforce the policies

During his deposition, Stripling testified that he understood the campus speech policy to require that a request had to be made and scheduled before the free expression areas could be used. JA440, JA443. Someone who had read the policy would "know that they would need to schedule if they're wanting to do free speech." JA510. Stripling was unaware of any denials, JA437, JA549, but he admitted that the policy does not require officials to report denials to him. JA438–39.

Stripling also testified that students who violated the campus speech policy could be punished under the code of conduct. JA452–54, JA468–69. And whenever students complained that people were "talking about something that's offensive to them," officials required the speakers "to move to a free speech zone." JA471. The policy does not explain how such rules contribute to open dialogue among students.

Stripling testified that Martha Spack—the Leadership Center Director who reported to Stripling—had the authority to grant or deny requests to use the free expression areas. JA437–38, JA578.[9] Her office also had the discretion to allow speakers who had *not* obtained prior approval before speaking in a free expression area to continue speaking there so long as the space was otherwise available. JA593–94.

[9] Spack's title had changed, but she maintained responsibility over scheduling the free expression areas because the office that handled that scheduling still reported directly to her. JA607.

Spack's enforcement responsibilities were broader than merely approving or denying requests. JA587–89. She was also responsible for working with speakers who might be violating the campus speech policy "to get them to fit within the policy." JA587–89. This included helping speakers "adjust their activity" to be able to "utilize the freedom of speech areas" and have "a more formal opportunity for those expressions." JA588, JA605.

Rouse also testified about how she interprets and enforces the campus speech policy. JA220–44, JA249–51. Rouse was responsible for reserving the designated free expression areas on campus. JA220. And if she was not available to review a request, that responsibility moved up the chain to Spack—Rouse's direct supervisor. JA222. If two groups wanted to use the same area at the same time, Rouse "could offer it to them" and "see if that's something that would appeal to them, if they would want to be there with someone else." JA222.

When determining the boundaries for the various free expression areas, Rouse admitted the boundaries are not clearly defined, so she had a map made for herself to use in trying to explain to speakers, "[H]ere's kind of the area we're talking about." JA228. That map was not published. JA228. Rouse's discretion was so broad that she could allow speakers to remain in the free expression areas even if they began using them *without* notifying Rouse beforehand. JA224–25, JA244.

ASU's alleged, unwritten RSO-only policy

No written ASU policy creates any limits as to who may host a table on the paved portion of Heritage Plaza outside the student union. JA236, JA249–51.[10] But ASU officials made up their own policy: only registered student organizations and department groups can "formalize a tabling area" there. JA234–35, JA663–64. Even Rouse could not explain what "formalized" meant. JA239. The written campus policy states, "No stand, table or booth shall be used in distribution areas except at the *Free Expression Area* and only with permission from the Director of Student Development and Leadership," which would have meant Spack. JA46, JA607. But Rouse contested whether the area outside the student union was a distribution or free expression area, so it is not clear whether that provision applies. JA235, JA239, JA245.

Moreover, the tabling provision does not distinguish between registered student organizations and other groups. JA46. But it does give Spack unfettered authority to grant or deny speakers permission to set up a table. JA46. The provision also does not provide any guidance or limitations on what Spack may consider in granting or denying a request, nor does it require her to give her reasons for denying a request or to report that decision to her superior. JA46.

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[10] *See also* Defs.' Resp. to Pls.' Mot. for Summ. J. at 8, ECF No. 47 (conceding that "the Policy on its face does not exclude any specific area of campus from freedom of expression").

As Rouse acknowledged, nothing in the written campus speech policy identified the paved area outside the student union as a space reserved for registered student organizations and department groups. JA236, JA249.[11] Nor could she identify any written policies or documents stating that such a policy existed. JA250–51. Apparently, someone made it up.

Rouse could not say who decided to adopt the phantom policy, explaining only that "part of [her] job requirement [was] to book spaces and that [was] one of the spaces that [she was] allowed to book." JA236. Rouse's duties included dealing with anyone who was not an RSO who tried to pass out literature or set up a table in that area, assuming "someone saw it and wanted to bring it to [her] attention." JA239–40.

Rouse believed that she had discretion to allow a non-RSO group of students to stay and continue tabling in the area if the group wanted. JA241. But she admitted she did not give Ashlyn and J.H. that option, nor did she give them the option of moving to the free expression area nearby. JA242. Rouse's admitted "goal" was not to allow Ashlyn and J.H. "to stay there that day." JA244.

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[11] Rouse explained that the policy "identifies only the freedom of expression area, it doesn't identify any non-freedom of expression." JA236. Immediately after using the phrase "non-freedom of expression," Rouse disavowed it, claiming she had used "a wrong word." JA236.

Ashlyn, J.H., and Emily were not causing a disturbance. JA244. They were not blocking an entrance to any building or roadway. JA244–45. And they were not using a bullhorn or loudspeakers. JA245. Rouse had not received any complaints. JA245. And they were sitting on a ledge where "[s]tudents have the ability to speak and sit." JA245. Still, ASU officials barred them from recruiting student members for their group in the location they chose, JA125, JA244, JA246, and refused even to allow them to move to a free expression area to continue speaking there, JA125, JA242; Emily's Video at 01:43–02:22.

Ashlyn files suit, both parties move for summary judgment

Ashlyn and Turning Point USA at Arkansas State University filed suit in federal court. JA15–37, JA899. Relevant here, they alleged in their complaint that the ASU Defendants' speech policies, as applied, violated their First Amendment rights by imposing a prior restraint on their speech that prevented them from speaking anywhere on campus without prior permission—including in areas of campus that were traditional or designated public forums—and by granting ASU officials unbridled discretion to enforce those policies. JA30–32.[12]

[12] To streamline this appeal, Ashlyn does not challenge the district court's holding that her facial challenge was rendered moot by the Arkansas General Assembly's passage of the Forming Open and Robust University Minds (FORUM) Act and ASU's resulting repeal of its speech policies. JA1042–44. Ashlyn also does not challenge the district court's dismissal of her due process claim. JA1064–66.

The parties cross-moved for summary judgment. JA96, JA339, JA918. At a hearing, Ashlyn's counsel explained that she was entitled to summary judgment because ASU officials had prevented her from speaking anywhere on campus. JA948–50. That prohibition included the small speech zones—which qualified as designated public forums—because Rouse had told Ashlyn and the others that they could not speak there without 24 hours' prior permission. JA948–50, JA984.[13] Moreover, the ASU officials were not entitled to qualified immunity because "the law on prior restraints has been well established by both the Supreme Court and the Eighth Circuit for numerous years." JA984.

Ashlyn's counsel also described how the speech policies were unconstitutional because they granted unbridled discretion to ASU enforcement officials. JA972–75. And that was true "even if they did enforce the RSO policy" because that policy also "grant[ed] complete discretion to the defendants in enforcing it," as Rouse's deposition testimony proved. JA973–75. Without objective criteria to limit officials' discretion, there was no "way to know whether [they] took content into account when they dealt with Ashlyn." JA972, JA975.

[13] The ASU officials conceded below that "the free expression areas on ASU's campus are unlimited designated forums." Mem. Br. in Supp. of Defs.' Mot. for Summ. J. at 23, ECF No. 36 (cited page included in the addendum to this brief at Add. 38).

District court enters summary judgment for ASU officials

Relying primarily on this Court's decisions in *Bowman v. White*, 444 F.3d 967 (8th Cir. 2006), and *Ball v. City of Lincoln*, 870 F.3d 722 (8th Cir. 2017), the district court granted the ASU officials' motion for summary judgment. JA1059–64, JA1068. First, the court held that reasonable ASU officials "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." JA1060. Second, the court held that Plaintiffs had "failed to present evidence to create a genuine dispute as to whether ASU [had] reserved Heritage Plaza . . . for speech by only certain university-affiliated speakers," rendering that part of campus a non-public forum, and therefore *Ball* "support[ed] the conclusion that the defendants did not transgress a bright line of first amendment case law when [they] failed to repeal the Policy that effectively restricted speech in the Heritage Plaza patio." JA1063.

The district court also granted summary judgment for Stripling, Spack, Charles Welch (ASU System President), and Kelly Damphousse (Chancellor of ASU), on the theory that—despite their responsibility for enforcing ASU's speech policies—the Plaintiffs had "not shown that any of these individuals caused a deprivation of their constitutional rights."

JA1051.[14] Ashlyn appeals the dismissal of her claims against Stripling, Spack, Rhodes, Langford, Crowson, Crawford, and Gardner.

SUMMARY OF ARGUMENT

Government-imposed prior restraints on speech are the most serious and least tolerable infringement on First Amendment rights. They carry a heavy presumption of unconstitutionality, and courts repeatedly strike them down. Prior restraints are decidedly indefensible as applied to a single person or small groups, as several circuit courts of appeals have expressly held, and as this Court has strongly stated. Prior restraints also must be struck down when they allocate broad discretion to enforcement officials, resulting in arbitrary enforcement and opportunities for unreviewable content-based and viewpoint-based discrimination. And that holds true even in limited public forums. All of these clearly established legal principles are at issue here.

Ashlyn challenges two ASU speech policies that, as applied to her and two others, prevented her from speaking anywhere on campus—even in unlimited designated public forums. That constitutional violation was compounded when ASU officials refused to grant Ashlyn an exception, even though they had granted other speakers exceptions in the past. The relevant constitutional standards were clearly established when officials violated Ashlyn's rights. Accordingly, the

[14] Ashlyn does not appeal the district court's decision dismissing her claims against Welch and Damphousse.

district court erred by shielding those officials from accountability when the court granted them qualified immunity, granted their summary judgment motion, and denied Ashlyn's summary judgment motion.

ARGUMENT

I. Standard of Review

This Court's review of First Amendment claims "carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 567 (1995). Accordingly, this Court "reviews First Amendment claims de novo." *Willson v. City of Bel-Nor*, 924 F.3d 995, 999 (8th Cir. 2019).

This Court also "reviews the denial of summary judgment de novo, construing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in the nonmoving party's favor." *Capps v. Olson*, 780 F.3d 879, 883 (8th Cir. 2015). Likewise, the Court "review[s] de novo a district court's grant of qualified immunity on summary judgment." *Tlamka v. Serrell*, 244 F.3d 628, 632 (8th Cir. 2001). "Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* "An issue of fact cannot result from mere denials or conclusory allegations in the pleadings but must be based on specific factual allegations." *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 798 (8th Cir. 2006).

II. The ASU officials violated Ashlyn's clearly established First Amendment rights when they prevented her from speaking anywhere on campus.

Fifty years ago, the Supreme Court reaffirmed that it could "hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Such had been "the unmistakable holding of [the Supreme] Court for almost 50 years." *Id.* Indeed, it is "axiomatic that the First Amendment must flourish as much in the academic setting as anywhere else." *Gay Lib v. Univ. of Missouri*, 558 F.2d 848, 857 (8th Cir. 1977). "In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Tinker*, 393 U.S. at 511.

Here, the district court did *not* hold that the ASU officials acted constitutionally in adopting, approving, or enforcing the challenged speech policies. Instead, the court held that the officials were entitled to qualified immunity because "the relevant binding authority did not place the constitutional question beyond debate," and therefore Ashlyn did not meet her "burden to demonstrate that the right at issue was clearly established." JA1056, JA1063.[15]

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[15] This Court has occasionally stated that *defendants* have the burden to demonstrate a right is not clearly established. *E.g.*, *Burnham v. Ianni*, 119 F.3d 668, 674 (8th Cir. 1997) (stating that the defendant "bears the burden of proving that the plaintiffs' First Amendment rights were not

In reaching that conclusion, the district court overlooked clearly established precedent from the Supreme Court, this Court, several other circuit courts of appeals, and multiple federal district courts striking down prior restraints on speech akin to the prior restraint that ASU's speech policies imposed here. And in holding that the unwritten RSO-only policy "did not transgress a bright line of first amendment case law," JA1063, the district court overlooked clearly established precedent prohibiting "the lodging of such broad discretion in a public official." *Cox v. State of La.*, 379 U.S. 536, 557 (1965). The ASU officials did not deserve qualified immunity. This Court should reverse.

A. By preventing Ashlyn from speaking in one of the free expression areas, ASU officials violated her clearly established right to speak in an unlimited designated public forum free from prior restraint.

"The Supreme Court has long adhered to the principle that any system of prior restraint of expression bears a heavy presumption against its constitutional validity." *Gay Lib*, 558 F.2d at 855 n.14

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clearly established"); *Watertown Equip. Co. v. Norwest Bank Watertown, N.A.*, 830 F.2d 1487, 1490 (8th Cir. 1987) (same). In *Davis v. Scherer*, 468 U.S. 183 (1984), the Supreme Court appears to have said otherwise. *Id.* at 197 ("A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue."). *See also Sparr v. Ward*, 306 F.3d 589, 593 (8th Cir. 2002) (same); *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1048 (8th Cir. 1989) (same). Regardless of who had the burden, Ashlyn's rights were clearly established when ASU officials violated them.

(collecting cases). "The presumption is heavier against prior restraints, and the protection therefore greater, because prior restraints on speech and publications are the most serious and the least tolerable infringement on First Amendment rights." *Rosen v. Port of Portland*, 641 F.2d 1243, 1247 (9th Cir. 1981) (cleaned up). As a result, "[p]rior restraints are traditionally the form of regulation most difficult to sustain under the First Amendment." *Bystrom By & Through Bystrom v. Fridley High Sch., Indep. Sch. Dist. No. 14*, 822 F.2d 747, 750 (8th Cir. 1987).

In *Thomas v. Collins*, the Supreme Court unequivocally stated, "Lawful public assemblies, involving no element of grave and immediate danger to an interest the state is entitled to protect, are not instruments of harm which require previous identification of the speakers." 323 U.S. 516, 539 (1945). "So long as no more is involved than exercise of the rights of free speech and free assembly, it is immune to such a restriction." *Id.* at 540.

Using language directly applicable here, the *Thomas* Court ultimately held, "We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement *is quite incompatible with the requirements of the First Amendment*." *Id.* (emphasis added). *Accord, e.g.*, *Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 165–66 (2002) ("It is offensive . . . that in the context of everyday public

discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.").

That is precisely what happened here. ASU officials prevented Ashlyn from speaking publicly to enlist support for her nascent student group, *even in the free expression areas*, because she had failed to notify ASU officials of her desire to speak there beforehand. Emily's Video at 01:35–02:18.[16] *Thomas* shows that the Supreme Court clearly established Ashlyn's right to speak in those areas free from prior restraint 75 years ago.

This Court's more recent decision in *Bowman* bolsters that conclusion. There, this Court 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." *Bowman*, 444 F.3d at 980.[17]

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[16] Those areas are "unlimited designated [public] forums," as the ASU officials conceded below. Mem. Br. in Supp. of Defs.' Mot. for Summ. J. at 23, ECF No. 36 (cited page included in the addendum to this brief at Add. 38). *See also Bowman*, 444 F.3d at 979 (holding that the "spaces at issue are unlimited designated public fora").

[17] Whether ASU's speech policies required speakers to obtain a permit, to obtain permission, or to identify themselves and provide advance notice to ASU officials before speaking makes no difference for constitutional purposes. *Thomas*, 323 U.S. at 538–41 (rejecting the State's argument that the challenged provision was constitutional because it was "merely a previous identification requirement").

As such, that "heavy presumption" can only be overcome if the challenged policy

1) "does not delegate overly broad licensing discretion to a government official,"

2) "is content-neutral,"

3) "is narrowly tailored to the University's significant governmental interests," and

4) "leaves ample alternative channels for communication."

Id.

In *Bowman*, this Court held the presumption had been overcome, but only as applied to 1) a non-student 2) attracting large crowds, and 3) disrupting the educational environment. 444 F.3d at 981. *Bowman* is the exception to the clearly established rule. Any reasonable official reading this Court's decision there should have easily recognized that applying the policy to 1) a student 2) with no crowd, and 3) no disruption does not fall under that narrow exception and is prohibited.

1. The speech policies as applied to a single student or a small group are not narrowly tailored.

"A regulation is narrowly tailored when it furthers a significant government interest that would be achieved less effectively without the regulation." *Bowman*, 444 F.3d at 980. Importantly, "[a] narrowly tailored statute 'targets and eliminates no more than the exact source of the evil it seeks to remedy.'" *Thorburn v. Austin*, 231 F.3d 1114, 1120

(8th Cir. 2000) (quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1988)). When it comes to regulating speech, public officials may not act "in such a manner that a substantial portion of the burden on speech does not serve to advance [their] goals." *Thorburn*, 231 F.3d at 1120 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

a. Unlike in *Bowman*, the university's stated interests were not implicated here.

ASU's challenged speech policies state they are intended 1) to assure "equal opportunity for all persons," 2) to preserve "order within the university community," 3) to protect "university property," and 4) to provide "a secure environment for individuals to exercise freedom of expression." JA41, JA45. But the prior-permission requirements are not narrowly tailored to accomplishing any of these alleged interests.

The first and fourth reasons given both express an alleged interest in providing opportunities for speakers to speak on campus. JA41, JA45. But *preventing* speakers from speaking does not facilitate speech. And the ASU officials' own testimony established that any concerns they might have had about groups monopolizing the free expression areas were overblown. JA642–43.

That is particularly true of a group as small as Ashlyn's. Rouse admitted there was no reason why two small groups could not share the same free expression area assuming they both wanted to speak there at the same time. JA222. And Stripling's stated fear that without "some

sort of scheduling, you could have multiple people in one location and nobody could hear anything," JA456, makes little sense for groups like Ashlyn's who pose no perceivable threat to any nearby speaker's ability to be heard.

The same goes for the second and third reasons, which concern preserving "order within the university community" and protecting "university property." JA41, JA45. Similar concerns in *Bowman* justified requiring a *non-student* speaker to obtain a permit before speaking on campus in light of his demonstrated "capacity to attract a crowd" as large as 200 people and his proven ability to "disrupt the unique educational environment." 444 F.3d at 981. Bowman's proven capacity to draw large crowds and to create a disturbance gave the university "a significant public safety interest in requiring a permit because of the time and resources necessary to accommodate the crowds" he attracted. *Id.* "Under these circumstances," and in that "as applied" challenge, this Court held that the challenged permit requirement was justified. *Id.* at 974, 981.

Not so here, though, nor for any small groups of students who wish to speak on campus with or without an invited guest. As students, the risk that Ashlyn or J.H. would "disrupt the unique educational environment," *id.* at 981, by speaking with other students was minimal. After all, the "principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of

certain types of activities," among which is "personal intercommunication among the students." *Tinker*, 393 U.S. at 512. "This is not only an inevitable part of the process of attending school; it is also an important part of the educational process." *Id.*[18]

Ashlyn also did not attract a large crowd, nor was there any reason to believe she would. In all, only about 15 students stopped by the Turning Point table during the 20 to 30 minutes before Ponder, Rouse, and university police forced the group to take down their table and issued Emily a *persona non grata* barring her from campus. That amounts to fewer than one student per minute, which is not a "crowd" of any size under any definition. JA119. Rouse testified that Ashlyn and the others were not causing a disturbance, they were not blocking an entrance to any building or roadway, they were not using a bullhorn or loudspeakers, and Rouse had not received any complaints that they had harassed anyone. JA237, JA244–45. Testifying more generally, Spack later added that she was not aware of *any* instances where student expression had *ever* disrupted classes, impeded or blocked traffic, or otherwise "impeded the academic community." JA657.

Under these very different circumstances, there was no reason to require Ashlyn to notify ASU officials before she would be allowed to

[18] *See also Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) (noting that the Court has "not held . . . that a campus must make all of its facilities equally available to students and nonstudents alike").

speak in one of the free expression areas. Emily's Video at 01:35–02:18. "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508. "Any word spoken . . . on the campus, that deviates from the views of another person may start an argument or cause a disturbance." *Id.* But our Constitution requires us to "take this risk." *Id.*

Moreover, the student code of conduct and other provisions in the speech policy fully equipped ASU officials to respond to actual disturbances or attempts to destroy university property. JA46, JA53, JA461–62, JA464–65, JA476, JA484, JA649–51. *See Cox v. City of Charleston,* 416 F.3d 281, 286 (4th Cir. 2005) ("Rather than enforcing a prior restraint on protected expression, cities can enforce ordinances prohibiting and punishing conduct that disturbs the peace, blocks the sidewalks, or impedes the flow of traffic."). "[A] free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975). If the university "determines that a permit requirement is absolutely necessary to effectuate the relevant goals, it should tailor that requirement to ensure that it does not burden small gatherings posing no threat to the safety, order, and accessibility of [campus]." *City of Charleston*, 416 F.3d at 287.

b. Several circuit courts of appeals have held that permit requirements applicable to small groups are not narrowly tailored, and this Court has strongly stated the same.

In light of the very different considerations involved, "[p]ermit schemes and advance notice requirements that potentially apply to small groups are nearly always overly broad and lack narrow tailoring." *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 608 (6th Cir. 2005). Several circuit courts of appeals have so held. *Id.* (citing cases and holding that the city's "significant interest in crowd and traffic control, property maintenance, and protection of the public welfare is not advanced by the application of the [challenged] Ordinance to small groups"); *Knowles v. City of Waco*, 462 F.3d 430, 436 (5th Cir. 2006) ("Other circuits have held, and we concur, that ordinances requiring a permit for demonstrations by a handful of people are not narrowly tailored to serve a significant government interest."); *Burk v. Augusta-Richmond Cty.*, 365 F.3d 1247, 1255 n.13 (11th Cir. 2004) (collecting cases and noting "that several courts have invalidated content-neutral permitting requirements because their application to small groups rendered them insufficiently tailored"); *Cmty. for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1392 (D.C. Cir. 1990) (holding that a regulation requiring a permit even for "two or more individuals speaking or otherwise proselytizing in the above-ground area of a Metro station" was not narrowly tailored).

"In public open spaces, unlike on streets and sidewalks, permit requirements serve not to promote traffic flow but only to regulate competing uses and provide notice to the municipality of the need for additional public safety and other services." *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1042 (9th Cir. 2006). "Only for quite large groups are these interests implicated, so imposing permitting requirements is permissible only as to those groups." *Id.*[19]

These principles have long been clearly established. Almost 40 years ago in *Rosen*, the Ninth Circuit struck down a "requirement of advance registration as a condition to peaceful pamphleteering, picketing, or communicating with the public" in an airport terminal. 641 F.2d at 1247. The ordinance required "one business day's notice of an intent to distribute literature, picket, demonstrate, or otherwise communicate with the general public." *Id.* at 1245 (cleaned up).

Citing *Thomas*'s holding "more than thirty-five years [earlier] that persons desiring to exercise their free speech rights may not be required to give advance notice to the state," and "[f]ollowing the mandates of [that decision]," the Ninth Circuit held that "persons desiring to

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[19] *See also Grossman v. City of Portland*, 33 F.3d 1200, 1207 (9th Cir. 1994) (rejecting argument "that six to eight people carrying signs in a public park constituted enough of a threat to the safety and convenience of park users . . . to justify the restrictions imposed on their speech," even though group was "demonstrating without a permit at the same time that another organization was conducting a permitted event").

exercise their free speech rights may not be required to give advance notice and to identify themselves and their sponsors to Port authorities." *Rosen*, 641 F.2d at 1247, 1252. "Even if the advance notice requirement were justified for large groups," the court added in a footnote, "it [swept] too wide in its regulation of individuals and small groups." *Id.* at 1248 n.8.

This Court staked out a similar position in *Douglas v. Brownell*, 88 F.3d 1511 (8th Cir. 1996). There, the Court struck down a residential picketing ordinance requiring a written permit from the Chief of Police for a parade, and further requiring that an application for the permit "must be submitted at least five days before the parade," holding that it was not narrowly tailored because it required notice too far in advance. *Id.* at 1514, 1523–24.

Importantly, this Court expressed its concern that the permit requirement applied "to groups of ten or more persons." *Id.* at 1524. Citing the Ninth Circuit's decisions in *Grossman* and *Rosen*, the Court "entertain[ed] doubt whether applying the permit requirement to such a small group [was] sufficiently tied to the City's interest in protecting the safety and convenience of citizens who use the public sidewalks and streets." *Id.* The plaintiffs had "not raised this issue," but the Court still felt compelled to "point out that applying the permit requirement to groups as small as ten persons compound[ed] [its] conclusion that the parade permit ordinance [was] not narrowly tailored." *Id.*

Moreover, the "precise action" in question does not "need to have been held unlawful" for the rule to have been clearly established. *Burnham*, 119 F.3d at 677 (quoting *Hayes v. Long*, 72 F.3d 70, 73 (8th Cir. 1995)).[20] Even so, in addition to the many circuits that have established these principles prohibiting prior restraint, at least two federal district courts have struck down similar campus speech policies because they were not narrowly tailored. *See Univ. of Cincinnati Chapter of Young Americans for Liberty v. Williams*, No. 1:12-CV-155, 2012 WL 2160969, at *7 (S.D. Ohio June 12, 2012) (holding that the university had "failed to narrowly tailor" its "advance notification" requirement because it had failed to "restrict its regulation to large demonstrations, or those using sound amplification, or any number of potentially justifiable criteria"); *Roberts v. Haragan*, 346 F. Supp. 2d

[20] "Instead, the unlawfulness must merely be apparent in light of preexisting law." *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 531 (8th Cir. 2009). *See also Young v. Selk*, 508 F.3d 868, 875 (8th Cir. 2007) ("[T]here need not be a case with 'materially' or 'fundamentally' similar facts in order for a reasonable person to know that his or her conduct would violate the Constitution."); *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004) (noting that the Supreme Court has "shifted the qualified immunity analysis from a scavenger hunt for prior cases with precisely the same facts toward the more relevant inquiry of whether the law put officials on fair notice that the described conduct was unconstitutional"). This Court should "not find it unreasonable to expect the defendants—who hold[] themselves out as educators—to be able to apply" the legal standards governing prior restraints on small groups of speakers described above. *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1278 (11th Cir. 2004).

853, 870 n.20 (N.D. Tex. 2004) (holding that a prior-permission requirement was not narrowly tailored and suggesting that the university could adopt a narrower provision that "would implicate the University's significant interest in controlling large gatherings that might disrupt classes, block building access, or create traffic hazards").

Against this backdrop, the district court erred when it held that Ashlyn had not met her "burden to demonstrate that the right at issue was clearly established." JA1063. "This court has taken a broad view of what constitutes clearly established law for the purposes of a qualified immunity inquiry," and courts are permitted to "look to all available decisional law including decisions of state courts, other circuits and district courts." *Burnham*, 119 F.3d at 677 (quoting *Hayes*, 72 F.3d at 73–74) (cleaned up). But even if the Court had taken a much narrower view, the Supreme Court's decision in *Thomas*, this Court's decision in *Douglas*, and the "robust consensus of cases of persuasive authority," *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) (cleaned up), described above clearly established Ashlyn's right to be free from the type of prior restraint applied to her. This Court should reverse because ASU's speech policies were not narrowly tailored.

2. The speech policies as applied to curtail speech everywhere on campus and to allow for arbitrary enforcement delegated overly broad discretion to enforcement officials and failed to provide ample opportunities for speech.

The speech policies also delegated overly broad discretion to enforcement officials and did not leave Ashlyn with "ample alternative channels for communication," *Bowman*, 444 F.3d at 980, further establishing that the policies were unconstitutional as applied.

When Rouse confronted Ashlyn to tell her she could not continue speaking outside the student union, she did not offer her an alternative location where she could continue speaking that day—not even in the so-called "free expression area" nearby. Emily's Video at 01:30–02:24; JA125, JA242. Rouse also did not offer Ashlyn the option of staying if she took down her table. JA246–47. Nor did she tell Ashlyn and J.H. that they could stay if Emily left. JA242. Instead, Rouse groused that the students' speech could only take place in "freedom of speech areas." *Id.* at 00:27–40. And Ponder and Rouse made crystal clear that a prior reservation was required even to speak there—a prior reservation that had to be requested 24 hours in advance. *Id.* at 01:35–43, 02:15–18.

Rouse seems to have made up the 24-hour prior-reservation policy on the spot, and then used it to deny Ashlyn access to the free expression areas. Nothing in the written policies imposes such a requirement. JA41–42, JA45–47. But nothing in the written policies prevented Rouse from making up that requirement either: the policies

do not require officials to respond to reservation requests within a certain time period, nor do they describe what requirements officials are allowed to impose. So Rouse had the unbridled discretion to make up a 24-hour prior-reservation policy for the free expression areas, and then to enforce that made-up policy only against Ashlyn, J.H., and Emily.

As a matter of clearly established law, such unbridled enforcement power is unconstitutional. *Southeastern Promotions*, 420 U.S. at 553–54 (collecting cases). "A government regulation that allows arbitrary application is inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (cleaned up). Stated differently, the Supreme Court "prohibits unbridled discretion because it allows officials to suppress viewpoints in surreptitious ways that are difficult to detect." *Amidon v. Student Ass'n of State Univ. of New York at Albany*, 508 F.3d 94, 103 (2d Cir. 2007).

"To curtail that risk, a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain narrow, objective, and definite standards to guide the licensing authority." *Forsyth Cty.*, 505 U.S. at 131 (cleaned up). If enforcement officials can appraise the facts, exercise judgment, and form their own opinions about whether and how to enforce prior restraint provisions,

"the danger of censorship and of abridgment of our precious First Amendment freedoms is too great to be permitted." *Id.* (cleaned up).[21]

Yet that is exactly what ASU's speech policies allowed. Rouse admitted she sometimes allowed groups to speak in the free expression areas *even if they had not reserved the space in advance*. JA224–25, JA244. But she did not give Ashlyn that option. Emily's Video at 01:30–02:24; JA242. Instead, she imposed a 24-hour prior-reservation requirement she did not normally impose. JA254. And ASU's written policies implicitly gave her that arbitrary-enforcement authority.[22]

As a result, nothing in the policies prevented Rouse from using a prior-reservation requirement as "a means of suppressing a particular point of view," *Forsyth Cty.*, 505 U.S. at 130, including Ashlyn's and Turning Point's point of view about free markets, "Big Government," and speech zones on campus. JA263; Emily's Video at 00:41–01:05.

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[21] *Accord, e.g.*, *Smith v. Tarrant Cty. Coll. Dist.*, 670 F. Supp. 2d 534, 538 (N.D. Tex. 2009) (striking down a college's permit system because it failed to "detail how the director of student services [was] to go about evaluating a request for a permit"); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575, 583–84 (S.D. Tex.), *dismissed,* 67 F. App'x 251 (5th Cir. 2003), (striking down a campus speech policy requiring prior approval for expressive activity in a certain location because the enforcement official was "not required to provide an explanation for his decision," nor was his decision reviewable).

[22] In contrast, the policy in *Bowman* gave officials "the right to deny or revoke a permit . . . only for limited reasons, such as interference with the educational activities of the institution." 444 F.3d at 981.

The policies claim to require content neutrality. JA41–42, JA45–46. But that is not enough. *See Amidon*, 508 F.3d at 104 (noting that the "bare statement" of neutrality "without meaningful protections is inadequate"). Without "narrow, objective, and definite standards" to guide enforcement officials, *Forsyth Cty.*, 505 U.S. at 131, students like Ashlyn and reviewing courts cannot determine whether the policies have been enforced in a neutral manner. An unenforceable content-neutral requirement "does nothing to help courts identify covert viewpoint discrimination." *Amidon*, 508 F.3d at 104. That is why such requirements are "insufficient to salvage" ASU's speech policies. *Id.*

Finally, by imposing a campus-wide ban on Ashlyn's speech because she did not obtain prior permission from enforcement officials, the speech policies as applied to her did not leave open "ample alternative channels for communication." *Bowman*, 444 F.3d at 980. "The Supreme Court generally will not strike down a governmental action for failure to leave open ample alternative channels of communication unless the government enactment will foreclose an entire medium of public expression across the landscape of a particular community or setting." *Colacurcio v. City of Kent*, 163 F.3d 545, 555 (9th Cir. 1998) (citing Justice Brennan's concurring opinion in

Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 525–27 (1981)).[23] But that is precisely what happened here.

Moreover, here the only "alternative means of expression [were] limited for people who [could not] comply, or who could comply only with difficulty, with the twenty-four-hour advance notice requirement." *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1038 (9th Cir. 2009) (striking down a similar regulation because it "fail[ed] to provide ample alternative means of communication for people wishing to participate in spontaneous expressive events"). Ashlyn had only a limited window of time to recruit members with Emily's assistance, nothing in the written policy would have informed her about Rouse's 24-hour prior-reservation requirement, and those factors combined prevented Ashlyn from speaking in the free expression areas. These additional circumstances cement the conclusion that ASU's speech policies were unconstitutional as applied to Ashlyn.

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[23] *See also Thorburn*, 231 F.3d at 1120 (citing "Eighth Circuit case law that held that an ordinance . . . provided ample alternative channels of communication where it implicitly allowed picketing across the street from a targeted dwelling"); *Cmty. for Creative Non-Violence*, 893 F.2d at 1393 (striking down a "permit requirement [that] *completely* exclude[d] those desiring to engage in organized free speech activity from the above-ground free areas of WMATA property unless they [had] a permit" because the requirement provided "no intra-forum alternative").

B. By preventing Ashlyn from speaking in Heritage Plaza, Rouse exercised her unbridled discretion under ASU's speech policies, and that unbridled discretion was unconstitutional regardless of the forum type.

The same clearly established law that made it unconstitutional to grant enforcement officials broad discretion to arbitrarily enforce a prior-reservation requirement also made it unconstitutional to grant the same officials broad discretion to create and arbitrarily enforce an unwritten RSO-only policy outside the student union. Relying on this Court's decision in *Ball*, the district court held that "the plaintiffs [had] failed to present evidence to create a genuine dispute as to whether ASU [had] reserved" that area "for speech by only certain university-affiliated speakers, and that it [was] not generally open for expressive activity by the public." JA1063. "In *Ball*, that the plaza was not open for expressive activity by the public informed [this Court's] holding that it was a nonpublic forum." JA1063.

But regardless of the type of forum the paved area outside the student union was, granting enforcement officials unbridled discretion to control speech that occurred there was unconstitutional. "Invariably, the [Supreme] Court has felt obliged to condemn systems in which the exercise of such authority was not bounded by precise and clear standards." *Southeastern Promotions*, 420 U.S. at 553. "The reasoning has been, simply, that the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials

have unbridled discretion *over a forum's use*." *Id.* (emphasis added). The Court's "distaste for censorship—reflecting the natural distaste of a free people—is deep-written in our law." *Id.*

Manifestly, "the dangers posed by unbridled discretion—particularly the ability to hide unconstitutional viewpoint discrimination—are just as present in other forums." *Child Evangelism Fellowship of MD, Inc. v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 386 (4th Cir. 2006). Those forums equally "do not tolerate viewpoint discrimination, so the unbridled-discretion doctrine can serve the same purpose in a limited public forum that it serves in a nonpublic forum: combatting the risk of unconstitutional viewpoint discrimination." *Barrett v. Walker Cty. Sch. Dist.*, 872 F.3d 1209, 1226 (11th Cir. 2017) (citation omitted).

"Thus, there is broad agreement that, even in limited public and nonpublic forums, investing governmental officials with boundless discretion over access to the forum violates the First Amendment." *Child Evangelism Fellowship.*, 457 F.3d at 386 (collecting cases from the Seventh, Eighth, Tenth, and Eleventh circuits). This Court explicitly endorsed that approach in *Lewis v. Wilson*, striking down a statute granting "nearly unfettered discretion" to enforcement officials *without* determining "precisely what kind of forum, if any, a personalized license plate is because," as the Court held, "the statute at issue [was] unconstitutional whatever kind of forum a license plate

might be." 253 F.3d 1077, 1080 (8th Cir. 2001). In light of this broad agreement and this Court's decision in *Lewis*, *Ball*'s type-of-forum analysis adds nothing to the unbridled-discretion analysis here.

In *Cox*, the Supreme Court struck down a statute that "*on its face* preclude[d] all street assemblies and parades." 379 U.S. at 555–56 (emphasis added). The Court began its analysis, though, by noting that it had "no occasion in this case to consider the constitutionality of the uniform, consistent, and nondiscriminatory application of a statute forbidding all access to streets and other public facilities for parades and meetings." *Id.* at 555. That was because the city officials who testified for the state had "clearly indicated that certain meetings and parades [were] permitted . . . provided prior approval [had been] obtained." *Id.* at 556. And the "statute itself provide[d] no standards for the determination of local officials as to which assemblies to permit or which to prohibit." *Id.*

Instead, the authorities were allowed to "permit or prohibit parades or street meetings in their completely uncontrolled discretion." *Id.* at 557. As a result, the statute "enable[d] a public official to determine which expressions of view [would] be permitted and which [would] not [and] to engage in invidious discrimination among persons or groups," making the statute "clearly unconstitutional." *Id.* at 557.

ASU's speech policies suffer the same constitutional defects. ASU officials were free to make up an RSO-only policy for the area outside

the student union. Even Rouse admitted that she did not know how the policy had originated, nor was it written down anywhere. JA236, JA249–51. And that's the point: the policies grant enforcement officials such broad discretion to grant or deny requests to use non-free-expression areas on campus, and such broad discretion to determine whether tables may be used, JA41–42, JA45–46, and even such broad discretion to define "speeches and demonstrations," JA45, that there really are no policy constraints at all. Nothing prevented enforcement officials from conditioning access to certain areas on additional factors not mentioned in the written speech policies, and nothing prevented officials from arbitrarily enforcing those additional factors. So they simply made up their own university policy for the area outside the student union. JA241.

On these facts, the speech policies were "clearly unconstitutional" for the same reason the statute at issue in *Cox* was struck down. *Cox*, 379 U.S. at 557. By granting officials unbridled discretion, the written policies allowed Spack, Ponder, and Rouse "to determine which expressions of view will be permitted and which will not [and] to engage in invidious discrimination among persons or groups either by use of a [policy] providing a system of broad discretionary licensing power or," as may be the case here, "the equivalent of such a system by selective

enforcement of an extremely broad prohibitory [policy]." *Id.* at 557–58.[24] On this alternative basis, the speech policies as applied to Ashlyn were clearly unconstitutional, and the district court erred by refusing to so hold and by granting the ASU officials qualified immunity.

III. Stripling and Spack were both personally responsible for violating Ashlyn's First Amendment rights.

The district court also erred when it granted summary judgment and dismissed claims against Stripling and Spack based on the court's finding that the plaintiffs had "not shown that any of these individuals caused a deprivation of their constitutional rights." JA1051.[25] While "a defendant cannot be held liable under § 1983 on the basis of the doctrine of *respondeat superior*," he still can be "responsible for his own failure to act" where he "has authority to change [the challenged] policies." *Messimer v. Lockhart*, 702 F.2d 729, 732 (8th Cir. 1983).

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[24] *See also Kunz v. People of State of New York*, 340 U.S. 290, 295 (1951) ("It is sufficient to say that New York cannot vest restraining control over the right to speak on religious subjects in an administrative official where there are no appropriate standards to guide his action."); *Saia v. People of State of New York*, 334 U.S. 558, 560–61 (1948) (striking down an ordinance placing the right to be heard "in the uncontrolled discretion of the Chief of Police" by forbidding the use of sound amplification devices except with his permission).

[25] Regardless of how the Court rules on the issue of Stripling's and Spack's personal involvement, Ashlyn was still entitled to summary judgment on her claims against the remaining defendants.

Here, Stripling testified that as a member of ASU's executive council, he participated in changing and updating the campus speech policy. JA427–34. He also participated in the review of the campus policy to make sure that it complied with the system policy. JA420, JA422. As a result of that review, no changes were made to the campus policy at that time. JA420, JA422, JA424. In light of that testimony, Stripling was personally liable for the deprivation of Ashlyn's constitutional rights for the same reasons the Board of Trustees members were personally liable. JA1053. Accordingly, the district court erred by granting summary judgment and dismissing Ashlyn's claims against him.

An official also can be personally liable in her supervisory capacity where she "creates, promulgates, implements, or in some other way possesses responsibility for the continued operation of a policy the enforcement (by the defendant-supervisor or her subordinates) of which subjects, or causes to be subjected that plaintiff to the deprivation of any rights secured by the Constitution." *Dodds v. Richardson*, 614 F.3d 1185, 1199 (10th Cir. 2010) (cleaned up). Stated differently, when "a supervisory official advances or manages a policy that instructs its adherents to violate constitutional rights, then the official specifically intends for such violations to occur." *OSU Student All. v. Ray*, 699 F.3d 1053, 1076 (9th Cir. 2012).

"[P]ersonal participation is not required for liability to attach." *Clay v. Conlee*, 815 F.2d 1164, 1170 (8th Cir. 1987). Instead, "when supervisory liability is imposed, it is imposed against the supervisory official in [her] individual capacity for [her] own culpable action or inaction in the training, supervision, or control of [her] subordinates." *Clay*, 815 F.2d at 1170.

Stripling testified that Spack had the authority to grant or deny requests to use the free expression areas. JA437–38, JA578. Spack testified that her office had the discretion to allow speakers who had not obtained prior approval before speaking in a free expression area to continue speaking there so long as the space was otherwise available. JA593–94. Spack was personally involved in responding to potential violations of the speech policies. JA587–89. And she was personally involved in enforcing the RSO-only policy outside the student union. JA232, JA663–64.

Spack also was Rouse's direct supervisor. JA222. And Spack testified that she trained her employees "on the policy and what [their] procedure [had] been and what [their] expectation [was] at the University in upholding [the] policy." JA608.

On these facts, Spack implemented and was personally responsible for the continued operation and enforcement of ASU's speech policies, including the manner in which they were enforced and applied here through her subordinates. *Dodds*, 614 F.3d at 1199.

Likewise, given that Spack reported directly to Stripling, Stripling was personally liable for the same reason. JA415–16, JA438. Accordingly, the district court further erred by granting Spack and Stripling summary judgment and dismissing Ashlyn's claims against them, and this Court should reverse.

CONCLUSION

"[F]ree speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact." *Tinker*, 393 U.S. at 513. By adopting, approving, and enforcing speech policies that funneled expressive activity into small designated areas and limited access to those and other areas through prior-permission requirements that were arbitrarily enforced, ASU officials circumscribed speech on ASU's campus to such an impermissible degree. And that conclusion directly followed from clearly established case law at the time the offending policies were adopted, approved, and enforced.

The district court erred in granting the ASU officials qualified immunity, in granting their summary judgment motion, and in denying Ashlyn's motion for summary judgment. Accordingly, this Court should hold that Ashlyn was entitled to summary judgment and reverse. At a minimum, if the Court concludes there are material disputed issues of fact, the Court should reverse the district court's decision granting summary judgment for the ASU officials and remand for trial.

Respectfully submitted,

Turning Point USA at
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Dated: December 6, 2019 By: */s/ Christopher P. Schandevel*

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,863 words, excluding the parts of the brief exempted by Fed. R. Appp. P. 32(f), as determined by the word counting feature of Microsoft Office 365.

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Pursuant to Local Rule 28A(h)(2), I also certify that this brief has been scanned for viruses utilizing the most recent version of a commercial virus scanning program, Traps Version 4.1.2., and is virus-free.

Dated: December 6, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2019, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system, which will send a notification of such filing to the below users. Yesterday I mailed the required number of copies of the Joint Appendix via UPS 2-day delivery to the Clerk of Court and to the following counsel:

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ADDENDUM

1) District Court's Opinion and Order (8/19/19);

2) Judgment (8/19/19);

3) ASU System Speech Policy;

4) ASU Campus Speech Policy; and

5) Page 23 of Memorandum Brief in Support of Defendants' Motion for Summary Judgment.