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In the
Supreme Court of the United States

ROCK FOR LIFE-UMBC, et al.,

Petitioners,

v.

FREEMAN HRABOWSKI, et al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The University of Maryland, Baltimore County (UMBC) maintains and enforces a sexual harassment policy that prohibits, among other things, speech that has the purpose or effect of creating an "offensive" environment. Additionally, it maintained and enforced policies that prohibited speech that allegedly harmed, among other things, a student's "emotional" safety. These policies were used to force Petitioners to relocate a pro-life display and have chilled Petitioners' free speech thereafter.

A clear circuit split exists regarding the following questions:

1. Does a student whose protected speech is objectively chilled by his university's comprehensive speech code have Article III standing to challenge the policy facially under the First Amendment?

2. In the alternative, do students so affected by such policies have standing under the overbreadth doctrine to assert the rights of others not before the Court?

PARTIES TO THE PROCEEDING

Petitioners are Rock for Life-UMBC (RFL),[1] Olivia Ricker, and Miguel Méndez.

Respondents Freeman A. Hrabowski, Charles J. Fey, Nancy D. Young, Lynne Schaefer, Lee A. Calizo, Joseph Regier, Eric Engler, and Antonio Williams.[2]

CORPORATE DISCLOSURE STATEMENT

Petitioner Rock for Life-UMBC does not have parent companies and is not publicly held.

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[1] In March 2009, Rock for Life-UMBC formally changed its name to UMBC Students for Life. The Fourth Circuit denied a joint motion to change the caption. As the parties and both lower courts have used Rock for Life-UMBC throughout the litigation, this petition will do likewise.

[2] Respondents either are or were officials at the University of Maryland, Baltimore County and will be referred to collectively as the "University" or "UMBC."

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STATEMENT OF JURISDICTION

The Fourth Circuit issued its decision on December 16, 2010. No petition for re-hearing was filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

Article III, Section 2 of the United States Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution. . . .

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the

> people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant portions of the UMBC policies being challenged in this case are set forth in App. 104–11a (¶¶19–24, 29–31, 34–36, 39–43).

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

This petition is one of two concurrently-filed petitions requesting that this Court resolve a deep and square circuit split regarding the standing of students to mount facial challenges to university "speech codes." Students attending universities in the Third and Sixth Circuits have standing to challenge university speech restrictions when they provide evidence that their speech is "chilled." By contrast, students in the Fourth and Ninth Circuits do not. Those students may not challenge speech codes until those codes have been formally enforced against them. Uncontradicted evidence of an objectively reasonable chilling effect does not confer standing on these students, nor do explicit threats of enforcement. That mistaken doctrine blurs the line between facial and as-applied challenges, ignores precedents from this Court, and radically undervalues core protected speech.

In a campus environment rife with speech-restrictive policies, this split threatens to stifle (further) the marketplace of ideas on campus and to cause college students to self-censor rather than risk punishment under manifestly unconstitutional speech policies. This Court should grant certiorari to eliminate confusion among the Circuits and to confirm a simple proposition: a student whose speech is chilled by his university's speech code has standing to challenge that code under the First Amendment.

A. UMBC MAINTAINS A BROAD SPEECH CODE.

Students attending UMBC were subject to a battery of overlapping policies that regulated speech on campus. These speech codes used similar language, shared the same goals (*i.e.*, protecting students' emotional sensibilities), and punished the same behavior and expression. Petitioners—a student organization and its student members—were subject to these restrictions every moment they were on campus, and these policies—by their very existence—chilled (and continue to chill) student speech.

At the start of this litigation, the Code of Student Conduct, the Residential Life Policies (*a.k.a.*, *Guide to Community Living*), and the Code of Student Organization Conduct all featured overlapping speech codes. App. 106–11a. Each prohibited "behavior which jeopardize[d] the emotional . . . safety of self or others." App. 107–10a. These "emotional safety" provisions outlawed "intimidation," "emotional harassment," and "sexual harassment," even though they did not define "intimidation" or "emotional harassment." *Id.* UMBC enforced these policies against Petitioners, but after Petitioners brought this suit, UMBC substantially modified the policies in an attempt to comply with the First Amendment.

A fourth speech code, however, was not amended to comply with the First Amendment and remains in effect. The UMBC Sexual Harassment Policy broadly prohibits "verbal . . . conduct of a sexual nature when [s]uch conduct has the purpose or effect of . . . creating an intimidating, hostile, or offensive . . . environ-

ment."[3] App. 105a. This policy (like the other, remediated speech codes) subjects students to a range of penalties, including expulsion. App. 104–11a.

UMBC officials routinely enforce all of their speech code policies. UMBC's police chief testified that campus police investigate harassment incidents involving speech. And "offensive comment[s], "derogatory statements," "disrespectful references," "intolerant phrase[s]," and "intolerable statement[s]" all count as harassment. App. 125–27a. When campus police investigate these "he said, she said" incidents, they determine the existence of harassment "typically" by merely asking "if the victim perceives it to be harassing." J.A. 450–52.

B. UMBC ENFORCED ITS PAST AND CURRENT SPEECH CODES AGAINST PETITIONERS AND CHILLED PETITIONERS' SPEECH.

In the fall semester of 2006, RFL invited the Genocide Awareness Project (GAP) to display its pro-life message on campus the following spring. The GAP display is a "traveling photo-mural" that "compares the contemporary genocide of abortion to historically recognized forms of genocide." App. 4a, 116a. The display's creators—the Center for Bioethical Reform—bring this display of graphic pictures to campuses "to show as many students as possible what abortion actually does to unborn children" because they understand that "[u]ntil injustice is recog-

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[3] UMBC's Sexual Harassment Policy threatens all students with sanctions without requiring any complaining student to show an actual adverse effect on his educational experience by the allegedly "harassing" speech. App. 104–06a.

nized, . . . it cannot be eradicated." App. 116–17a.

At the time, UMBC policies dictated that the University review campus space reservation requests "based on room appropriateness and on a first come, first served basis." App. 4a, 112–13a. And they authorized UMBC to "move an event to a different location without notice." *Id.*

On April 17, 2007, Mr. Vernet, an officer in RFL, visited the Office of Student Life to reserve the University Center Plaza (Plaza) for the GAP display. The Plaza is located at the center of several academic buildings, and Mr. Vernet hoped to maximize the number of students and faculty who would see the display. The Plaza was available on April 30th, and Mr. Vernet reserved the space for the GAP display. App. 4–5a, 42a, 117–18a.

Before the event, Mr. Vernet learned, that the GAP display had sparked vandalism and violence at other campuses, and he sent a letter requesting campus security to deter similar misconduct at UMBC. App. 42a, 119a. Upon reviewing the letter, UMBC's Acting Director of Student Life, Ms. Lee Calizo, became concerned about the size of the GAP display signs and e-mailed (erroneous) dimensions to her supervisor, Mr. Fey. App. 5a, 43a.

In turn, Mr. Fey asked Ms. Calizo to research whether there were any "restrictions on posting/display on campus." He also requested that they meet and discuss the GAP display "before final approval is given," and insisted that UMBC could "limit access by time, place and manner" and that

the GAP signs "are[] [a] manner." J.A. 1156, 1216–20, 1612–13.

On April 25th, Mr. Fey met with Ms. Calizo and others to discuss their concerns and concluded that the Commons Terrace—a large patio area described as the "hub of student life," App. 7a—would be a suitable substitute location for the GAP display. J.A. 1155, 1159, 1170–71, 1176–77, 1218–19, 1615. Ms. Calizo met with Mr. Vernet later that day, and suggested that the Terrace would be a "viable" venue because it had hosted "vigils [and] other displays." J.A. 1170–71, 1616; App. 7a, 121a. Mr. Vernet agreed to the Terrace location because it would guarantee exposure to a large number of students. App. 7a, 43a, 121–22a; J.A. 1013. On April 26th, Ms. Calizo informed her supervisors that RFL had accepted the Terrace location. J.A. 1621, 1160–64.

UMBC's in-house counsel, Mr. Tkacik, however, still had questions regarding the GAP display. On April 27th, he met with Mr. Parsell, a Leadership Institute representative helping RFL coordinate the GAP display, to discuss RFL's "controversial exhibit." J.A. 1622. During the meeting, Mr. Tkacik defended UMBC's right to move the GAP display without notice and, referencing the speech codes, expressed concern that students would feel "emotionally harassed" by the display. He wanted to protect students' "emotional well-being" and to prevent them "from becoming emotionally distraught." App. 5a, 77a, 120a; J.A. 1479–82. In expressing his concern that RFL display might be "emotionally harassing" to students, Mr. Tkacik—who served not only as UMBC's attorney but also as director of the office

that enforces the Codes, J.A. 1803–04, 1807–10, 1868–70—invoked speech code provisions that UMBC specifically defines to include "sexual harassment." App. 5–6a, 106–10a.

UMBC officials subsequently decided to move GAP from the Terrace to the North Lawn, a large vacant field between the Commons and the Library. RFL did not learn of this decision until 8:00 a.m. on the day of the display, when Mr. Vernet and other RFL members were unloading the GAP signs on the Terrace. A UMBC official accompanied by uniformed UMBC police announced that GAP had been moved to the North Lawn. Mr. Parsell mentioned Mr. Tkacik's assurances, but the officers invoked UMBC's right to move events without notice, and insisted that the display be moved to the North Lawn. App. 7–8a, 44–46a, 78a, 122–23a; J.A. 250, 1116–17.

The last-minute move to the North Lawn severely hampered RFL's ability to express its pro-life message. RFL rarely saw more than a handful of students around the GAP display at any given time, and its goal of reaching "the largest number of students with its sanctity of life message" was thwarted, rendering the event a failure. App. 8a, 46a, 78–79a, 123–24a; J.A. 301, 331–34, 338–46, 1023–24, 1066–67.

In November 2007, RFL again invited the GAP display to UMBC, attempted to reserve the Terrace, and was again relegated to the North Lawn. After RFL filed this lawsuit (and a motion for preliminary injunction), however, UMBC approved its request to reserve the Terrace for the GAP display in October 2008, and the event was held without incident. App.

8–9a, 46–48a, 124–25a.

UMBC's policies, its credible threats to enforce them, and its *actual* enforcement actions unquestionably chilled RFL's and its members' expression. Because of the University's policies and actions, RFL and its student members were forced to "rethink and reduce their expressive activities on campus and to question whether engaging in free speech at UMBC is worth the risk of possible punishment and discriminatory treatment." App. 127a. They "fear[ed] that discrimination and prosecution under the other speech codes"—including the Sexual Harassment Policy—"[would] occur at any time." App. 128a.

During their depositions, the RFL student-members explained that the Sexual Harassment Policy chilled and inhibited their expression because speech on topics they wished to address was covered by that policy. J.A. 1731–39, 1742–62, 1766–94. The abortion debate, for example, inevitably involves issues of "reproduction, reproductive rights, sex," and "gender." J.A. 1734, 1792; *accord* J.A. 1742–44, 1789–90. And pro-life speech often offends and even intimidates people. J.A. 1733–34; *accord* J.A. 1744, 1758–61, 1788–90, 1793–94, App. 127a.

Further, RFL members testified that "UMBC's several policies against various forms of harassment, including sexual harassment, . . . inhibited [them] from expressing [their] beliefs and opinions on topics of reproductive freedom and the right to life, topics that inextricably involve issues of gender and sex." J.A. 454–63. These concerns were heightened when they planned RFL activities, due to the controversial

and public nature of these events. *Id.*

II. PROCEDURAL BACKGROUND

After filing suit on April 2, 2008, RFL moved for a preliminary injunction against UMBC's Sexual Harassment Policy, its various Codes of Conduct, and its Facilities Use Policy. At the August 8th preliminary injunction hearing, UMBC announced plans to eliminate a portion of the unconstitutional language from the Codes but refused to revise its Sexual Harassment Policy. The lower court denied RFL's injunction without prejudice as moot, without addressing its claims against the Sexual Harassment Policy. Shortly thereafter, RFL amended its complaint to seek injunctive relief against the Sexual Harassment Policy and damages for the enactment and enforcement of the now-repealed sections of the Codes. App. 8–10a, 48–50a, 73a n.1.

On January 26, 2009, the district court partially granted that UMBC's motion for judgment on the pleadings. It concluded that RFL lacked standing to challenge the Codes of Conduct and Sexual Harassment Policy, but that its as-applied claims against the Facilities Use Policy could proceed. App. 87–93a.

Thereafter, UMBC moved for summary judgment on RFL's remaining claims. RFL moved for summary judgment on its facial challenge to the Facilities Use Policy. On July 8, 2009, the district court denied RFL's motion as moot. App. 51–54a. But it granted UMBC's motion on the as-applied claims, concluding that UMBC applied content-neutral time, place, and manner regulations in moving the GAP

display and that its officials were entitled to qualified immunity. App. 54–72a.

RFL appealed both district court rulings, and a panel of the Fourth Circuit affirmed the lower court in an opinion issued on December 16, 2010. The panel concluded that RFL had not demonstrated a credible threat of enforcement from the Sexual Harassment Policy or the various Codes of Conduct, and thus, it lacked standing to challenge either. App. 12–17a. It concluded that RFL's challenge to the Facilities Use Policy was moot. App. 17–20a. And it ruled that UMBC was entitled to qualified immunity on the as-applied challenges. App. 26–31a.

REASONS FOR GRANTING THE WRIT

At present, college students live under at least two distinctly different standing regimes. In the Third and Sixth Circuits, students enjoy the normal First Amendment rule that an objectively reasonable allegation of a chill is sufficient to allow a student facially to challenge his university's speech code. In the Seventh Circuit, high school students have the same ability to challenge facially school policies that chill their speech.

In the Fourth and Ninth Circuits, however, students can provide uncontradicted evidence of chill and even evidence of threatened and actual enforcement and *still* not have standing to challenge manifestly unconstitutional policies. Indeed, a credible as-applied case based on the invocation, but not ultimate enforcement, of the policy in response to particular speech seems to count against standing in

those Circuits, rather than confirming the seriousness of the chill.

This case is of exceptional constitutional importance. College students depend on free and open inquiry to enjoy fully the "marketplace of ideas" on campus. The widespread adoption of speech codes—enacted as overbroad anti-harassment, nondiscrimination, or even civility policies—threatens to close that marketplace. Indeed, no federal court has ever upheld these policies on their merits,[4] and they have even fallen at high schools.[5] Yet the pervasive confusion among the Circuits undermines student free speech, and casts doubt on this Court's long-held standing rules applicable to facial challenges.

This Court should grant certiorari in this case and in *Lopez v. Candaele* (filed Mar. 16, 2011) to resolve this circuit split. The Court's intervention is

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[4] *McCauley v. Univ. of V.I.*, 618 F.3d 232 (3d Cir. 2010); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008); *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968 (9th Cir. 1996); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995); *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993); *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003); *Booher v. Bd. of Regents of N. Ky. Univ.*, No. 2:96-cv-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

[5] *See e.g.*, *Zamecnik v. Indian Prarie Sch. Dist. #204*, __ F.3d __, 2011 WL 692059 (7th Cir. Mar. 1, 2011); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001) (Alito, J.); *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243 (3d Cir. 2002).

urgently needed to resolve the Circuit split and to reaffirm a simple and straightforward rule: a student whose speech is objectively chilled by the speech code of the university he attends has standing to challenge it to vindicate the First Amendment.

I. THE FOURTH CIRCUIT SQUARELY CONFLICTS WITH THE THIRD AND SIXTH CIRCUITS, AND EVEN WITH HIGH SCHOOL PRECEDENT IN THE SEVENTH CIRCUIT, BY IMPROPERLY RESTRICTING STUDENT STANDING TO CHALLENGE SPEECH RESTRICTIONS.

The Fourth Circuit's conclusion that RFL and its members lack standing to challenge any of the speech codes on their face, presents a square circuits split with the Fourth and Ninth Circuits on one side and the Third, Sixth, and Seventh Circuits on the other. The Fourth Circuit refused to grant standing based on students' claims that their speech had been chilled by applicable speech codes because "absent any substantiating action taken by UMBC," "mere allegations of a chilling effect . . . cannot establish . . . standing."[6] App. 17a. That holding violates this Court's precedents and conflicts with the holdings of other Courts of Appeals.

A. THE FOURTH CIRCUIT REQUIRES RFL AND ITS MEMBERS TO SHOW FORMALISTIC ENFORCEMENT OF EACH PROVISION TO HAVE STANDING.

Even though the terms of the challenged policies

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[6] The Ninth Circuit applies a similar standard. (App. 14a (citing, *inter alia*, *Lopez v. Candaele*, 630 F.3d 775, 785–86 (9th Cir. 2010).) A petition for writ of certiorari in *Lopez* is also pending before this Court.

plainly cover all students, the Fourth Circuit insisted that RFL and its members show that "[they] suffer an individual injury from the existence of the contested provision." App. 14a. The students were required to show that each plaintiff was subject to a "credible threat of enforcement" and that each "challenged regulation [] present[s] a credible threat of enforcement." App. 13a. "A plaintiff," the Fourth Circuit wrote, "must establish such a threat with respect to each of the provisions it seeks to challenge, as standing regarding one aspect of a policy cannot be bootstrapped into standing as to the rest." *Id.* (citations omitted).

In applying its new standard, the Fourth Circuit disregarded evidence that the speech codes, by their terms and application, encompassed RFL's speech. The Court concluded that "no aspect of the GAP display is readily applicable to the policy's definition of 'sexual harassment.'" App. 15a. But the GAP display and the conversations surrounding it clearly qualify as "verbal or physical conduct." App. 105a. Discussing abortion, as RFL's members testified, inevitably involves issues of sex and gender roles. J.A. 1734, 1742–44, 1789–92. More fundamentally, RFL's entire *goal* was to create an "offensive environment" by bringing students face to face with the horrors of abortion through its graphic photographs. App. 4a, 116–17a.

Indeed, Mr. Vernet and others at RFL requested security precisely because they feared students would react negatively to the display. App. 44a, 118–21a. Mr. Tkacik similarly feared students would become "emotionally distraught." App. 5a, 77a, 120a; J.A. 1479–82. UMBC's own police chief readily admitted

that pro-life advocacy could constitute "harassment" in the eyes of the University, with the determinative factor being how the listener reacted. J.A. 450–52.

Most important for purposes of this petition, RFL and its members introduced clear evidence that their speech was chilled, but the Fourth Circuit required "substantiating action taken by UMBC." App. 17a. RFL not only pleaded that the speech codes chilled their expression, App. 127–29a; its members also testified to this, specifying how each policy made them more "careful" and "hesitant" to advance a pro-life message. J.A. 1742–43; *accord* J.A. 1732–36, 1742–44, 1758–61, 1770–72, 1779–80, 1782–94. And they showed that UMBC not only investigates as "harassment" student speech it deems "offensive," "disrespectful," "derogatory," "intolerant," and "intolerable," but it chronicles these investigations on its website. App. 125–27a. Ignoring all of this, the Fourth Circuit dismissed the students' testimony that their speech had been chilled because "absent any substantiating action taken by UMBC," "mere allegations of a chilling effect . . . cannot establish . . . standing." App. 17a.

RFL and its members also introduced evidence that UMBC officials threatened to enforce the speech codes against them, but even that was not enough. Mr. Tkacik quoted from—or at the very least, paraphrased—the actual language from the speech codes when he expressed concern that students would feel "emotionally harassed" or become "emotionally distraught" due to the GAP display. App. 5a, 77a, 120a; J.A. 1479–82. And he quoted or paraphrased provisions that specifically prohibit "sex-

ual harassment." App. 107–10a. But because he did not use the magic words "sexual harassment," RFL cannot challenge that policy. App. 15a.

RFL and its members introduced evidence that UMBC enforced its speech codes against other students; yet the Fourth Circuit denied standing. UMBC's police log unmistakably shows that it considers "offensive," "disrespectful," "derogatory," "intolerant," and "intolerable" speech to be "harassment." App. 125–27a. And its decision to refer students to "Student Judicial Programs" shows that these investigations have teeth. App. 126a.

Finally, not even evidence of actual enforcement *against RFL* was sufficient to grant standing. Not only did Mr. Tkacik tell them that the GAP display would "emotionally harass" students, App. 5a, 77a, 120a, J.A. 1479–82, but throughout this lawsuit, the University has maintained that it moved the display precisely to avoid a strong student reaction. App. 23–26a. Hence, RFL and its members were more than justified in pleading that UMBC's speech codes played a part in its reaction to GAP. App. 120a, 127–29a (¶¶ 99–105). On a motion for judgment on the pleadings, this should have sufficed, App. 10–11a, and it would have in the Third and Sixth Circuits, but not in the Fourth.

B. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S FIRST AMENDMENT JURISPRUDENCE.

The Fourth Circuit's substantiating-action-taken-by-the-University test is contrary to this Court's case

law. To invoke the jurisdiction of the federal courts, a plaintiff must establish Article III standing to sue, which consists of an injury-in-fact, causation, and the likelihood that a decision will redress his injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). While some contexts present additional prudential obstacles to standing, in the First Amendment context, prudential principles and the values underlying the First Amendment itself all favor finding standing for someone whose speech is objectively chilled. Thus, the general standing principle in the First Amendment context is clear: When a law is aimed at restricting the speech of the plaintiff and he suffers a chill as a result, he has suffered an injury sufficient to merit standing. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392–93 (1988).

For Article III standing purposes, an injury can be established by the desire to speak and the potential for punishment. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298–301 (1979). While "subjective 'chill'" alone does not confer standing to bring a facial challenge against policies that burden expressive freedoms, an objectively reasonable chill—*viz.*, a credible statement by the plaintiff of intent to commit a prohibited act and the "'conventional background expectation' that the government will enforce the law"—does suffice. *See Act Now to Stop War & End Racism Coalition (ANSWER) v. District of Columbia*, 589 F.3d 433, 435–36 (D.C. Cir. 2009).

Moreover, in the context of speech codes, the identity of the proper plaintiff is obvious—a student whose speech is chilled by the code. In the university

context, a student who depends on the university for his grades and continuing good standing is certainly entitled to indulge the conventional background assumption that the university takes its speech code seriously and will enforce it. Despite the clear answer provided by this Court's precedents a circuit split has developed, in which some courts, exemplified by the decision below, have erected artificial barriers to standing that preclude a student chilled by his own school's speech code from raising a challenge.

C. In the Third Circuit, RFL and its members would have standing simply because the policies govern them.

The Fourth Circuit's substantiating-action-taken-by-the-University test also stands in stark contrast with decisions of the Third Circuit. The Third Circuit has twice upheld Article III standing for university students to challenge speech codes based on their chilling effect. And in two others, it has done the same for high school students, meaning that minors in the Third Circuit are better positioned to protect their freedoms than adult students in the Fourth.

In *DeJohn v. Temple Univ.*, 537 F.3d 301, 305 (3d Cir. 2008), a graduate student challenged a sexual harassment policy virtually identical to UMBC's. To establish standing, he pleaded that as a student, he was subject to the policy, which was contained in the student code of conduct. *Id.* He also pleaded that "he felt inhibited in expressing his opinions in class concerning women in combat and women in the military" because he "found himself engaged in conversations and class discussions regarding issues he be-

lieved were implicated by the policy." *Id.* He was "concerned that discussing his social, cultural, political, and/or religious views regarding these issues might be sanctionable by the University." *Id.* Thus, the "policy had a chilling effect on his ability to exercise his constitutionally protected rights." *Id.*

Temple never identified DeJohn's intended statements as the "'conduct of a sexual nature' covered by the policy" or "threatened to punish [his] speech as sexual harassment." App. 15a. Nor did any Temple official—unlike Mr. Tkacik—ever orally reference the policy when considering whether he could speak. *Id.* Nor was "there any suggestion that disciplinary enforcement of the sexual harassment policy was discussed at any point." *Id.* Nor did DeJohn ever identify a specific instance where he would have spoken up but for the policy. App. 15–16a. Nor did he ever "demonstrate an injury-in-fact through the application of [Temple's sexual harassment policy]." App. 16a. In fact, "[Temple] never undertook a 'concrete act' to investigate or sanction [him] for violation of the [policy]." App. 17a.

Instead, DeJohn alleged that he was subject to a policy that chilled his speech. He felt "inhibited" because "he believed" his comments would implicate Temple's policy. *DeJohn*, 537 F.3d at 305. RFL and its members are subject to UMBC's speech codes, and they pleaded—and testified—that they are "careful" and "hesitant" to speak because they believe their pro-life speech implicates those speech codes. J.A. 1742–43, 1786–90, App. 127–29a; *accord* J.A. 1758–60, 1770–72, 1779–80.

Most recently, in *McCauley v. Univ. of V.I.*, 618 F.3d 232, 238 (3d Cir. 2010), the Third Circuit again held that a student had standing to challenge facially certain provisions of the university's speech code because those provisions had "the potential to chill protected speech." Importantly, McCauley had testified that he had never suffered a deprivation based on those provisions of the policy, had never been charged with their violation, and that his speech was not in fact "chilled." *Id.* at 237–38 & n.3.

After receiving notice that the University of the Virgin Islands was charging him with violating Paragraph E of the Student Code of Conduct, which prohibited causing "physical or mental harm" to another person, McCauley filed a lawsuit against the university, challenging not only Paragraph E of the Code, but also Paragraphs B, H, and R, which prohibited, respectively, "lewd or indecent conduct"; conduct that caused "emotional distress"; the "display of unauthorized or offensive signs" at sports events, concerts, and social-cultural events. *Id.* at 237–39.

The Third Circuit held McCauley had Article III standing to challenge Paragraphs B, H, and R on their face, despite McCauley's concessions that he suffered no deprivations from these policies and despite the fact that he had not been charged with their violation. *Id.* at 237–38. "Paragraphs B, H, and R," the Third Circuit held, "all have the potential to chill protected speech." *Id.* at 238. As such, "under the 'relaxed' rules of standing for First Amendment overbreadth claims, McCauley has standing to assert facial challenges to those paragraphs." *Id.* at 239 (citation omitted).

In reaching its conclusion, the Third Circuit found that standing was conferred by the "judicial prediction or assumption" that the statute's very existence "may cause others not before the court to refrain from constitutionally protected speech or expression," *id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)), and recognized the "critical importance" of free speech in public universities, *id.* at 242 (quoting *DeJohn*, 537 F.3d at 314; citing *Healy v. James*, 408 U.S. 169, 180 (1972)); *id.* at 247 (noting that university students often "remain subject to university rules at almost all hours of the day").[7] Thus, even though McCauley was never threatened with punishment under the policies, never articulated how they chilled his speech, and even testified that he had not self-censored, the Third Circuit still found he had standing to challenge the policies on their face. *Id.* at 238–39.[8]

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[7] *See also G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1076 (6th Cir. 1994) ("It is well-settled that a chilling effect on one's constitutional rights constitutes a present injury in fact."); *Levin v. Harleston*, 966 F.2d 85, 89–90 (2d Cir. 1992) (finding in professor's case against university, "[i]t is the chilling effect on free speech that violates the First Amendment, and it is plain that an implicit threat can chill as forcibly as an explicit threat.").

[8] The Third Circuit even applies these standing principles to high school students to whom free speech protections apply less robustly. *See Saxe*, 240 F.3d at 202–04 (permitting pre-enforcement facial challenge to high school anti-harassment policy because they "feared that they were likely to be punished under the Policy for speaking out about their religious beliefs"); *Sypniewski*, 307 F.3d at 250–52 (permitting high school student to challenge a racial harassment policy that was never mentioned to him, let alone enforced against him); *see also McCauley*, 618

The Fourth Circuit's reasoning is diametrically opposed to the Third Circuit's. Whereas, the Fourth Circuit inveighs against "bootstrapping" by requiring students to identify the threat of enforcement for "each of the provisions" they challenge, App. 13a, the Third Circuit allowed McCauley to challenge Paragraphs B, H, and R when the university only charged him with violating Paragraph E. *McCauley*, 618 F.3d at 237–39. The Fourth Circuit requires students to show how each policy injured them and was applied to them, painstakingly differentiating among various mutations of "harassment" to do so. App. 14–16a. In the Fourth Circuit, chill alone is insufficient "absent a[] substantiating action taken by [the university]." App. 17a. In the Third Circuit, no such substantiating official reaction is required. *McCauley*, 618 F.3d at 238. The background presumption that a school enforces applicable policies suffices. *See ANSWER*, 589 F.3d at 435–36.

In its opinion, the Fourth Circuit accentuates this circuit split by specifically criticizing *McCauley* for granting standing "absent evidence of chilling effect to the particular speaker before the court." App. 14–15a. It rejects this approach saying that "*Broadrick*, however, cannot be read so broadly" and accusing the Third Circuit of diluting Article III standing requirements. *Id.*

In short, the Third Circuit would have granted RFL and its members Article III standing based solely on the fact that they are subject to and chilled

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F.3d at 242–47 (detailing five legally significant differences between universities and high schools); *DeJohn*, 537 F.3d 315–16.

by UMBC's speech codes. The Fourth Circuit's failure to do so conflates as-applied and facial challenges. Indeed, it is as if the Fourth Circuit viewed evidence that stopped just short of an as-applied challenge—from the police chief's testimony, to Mr. Tkacik's threats, to the police harassment investigations, to UMBC's actions against GAP—as a reason to deny RFL the ability to raise a facial challenge. A stark circuit split exists, and this Court should resolve it.

D. In the Sixth Circuit, RFL and its members would have standing because UMBC's policies chilled their speech.

The Fourth Circuit's substantiating-action-taken-by-the-University test also conflicts squarely with the Sixth Circuit, which applies the straightforward rule suggested by this Court's cases: a student subject to a college policy that restricts his speech has standing to challenge that policy. And unlike the Fourth Circuit, the Sixth considers enforcement against others, even non-students, as demonstrating a threat of enforcement sufficient to confer Article III standing.

In *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1181 (6th Cir. 1995), five basketball players challenged the university's discriminatory harassment policy facially after the university fired their coach (a university employee with fewer speech rights than students) for using a racial epithet. The university had not threatened to enforce the policy against the students or taken any concrete steps to do so, and the students did not plead that they intended to violate university policy. *Id.* at 1181–83. They only pleaded that they had used the word that resulted in

the coach's dismissal. *Id.* at 1180.

Nevertheless, the Sixth Circuit found the students had standing because the "overbreadth doctrine . . . allows parties *not yet affected* by a statute to bring actions under the First Amendment based on a belief that a certain statute is *so broad as to 'chill' the exercise of free speech and expression*." *Id.* at 1182 (emphasis added). In so doing, it upheld the district court which concluded: "These players, who are also students at the university, have standing to challenge the constitutionality of the discriminatory harassment policy on its face since *they might be subjected to it* such that 'the challenged conduct . . . threaten[s] to cause a direct injury.'" *Dambrot v. Cent. Mich. Univ.*, 839 F. Supp. 477, 480 (E.D. Mich. 1993) (emphasis added, citations omitted). Hence, in the Sixth Circuit students must simply show (1) that the policy governs them, and (2) that it chills their expression. And showing that the university enforced the policy against someone else—even a non-student—demonstrates chill.

Once again, there is a legal chasm between the circuits. The *Dambrot* students could point to no enforcement actions against them or "similarly-situated parties" (*i.e.*, students). App. 14a. Nor could they identify any "facts suggesting that [university] officials ever threatened to punish their speech as [discriminatory] harassment." App. 15a. Nor could they show "an injury-in-fact through the application of that [policy]," App. 16a, or a "concrete act to investigate or sanction them" for violating it. App. 17a. In direct conflict with the Fourth Circuit, the Sixth Circuit found that the students' "mere allegations of

a chilling effect, absent any substantiating action taken by [the university]" sufficed for standing. *Id.* Why? Because the students' alleged chill was based on their "belief" that the policy covered their speech, *Dambrot*, 55 F.3d at 1182, and that they "might be subjected to it." *Dambrot*, 839 F. Supp. at 480.

Hence, RFL and its members would easily clear the Sixth Circuit's standing hurdle. They are students whose pro-life advocacy addresses sexual topics in ways that some could find offensive and who reasonably believed that the policy might be applied to them. Indeed, UMBC's police chief noted that their activities could constitute harassment, J.A. 450–52, and its attorney feared the GAP display would "emotionally harass[]" students or cause them to become "emotionally distraught." App. 5a, 77a, 120a; J.A. 1479–82. Further, the students put forth evidence that UMBC enforces the speech codes against other students for "offensive," "disrespectful," "derogatory," "intolerant," and "intolerable" speech. App. 125–27a; *see Dambrot*, 55 F.3d at 1182–83 (concluding that enforcement action against the coach showed the possibility of such against students). There can be no question that Petitioners met the normal First Amendment rule (applied by the Sixth Circuit in *Dambrot*) that a student whose speech is chilled by applicable policies may facially challenge those policies.

E. In the Seventh Circuit, RFL and its members would have standing even in a high school because UMBC's policies chilled their speech.

Just days ago, the Seventh Circuit issued a deci-

sion that also diverges from the Fourth Circuit's substantiating-action-taken-by-the-University test for standing. Like the Sixth, the Seventh Circuit recognizes that students—even in high school—have Article III standing if the school policies govern their behavior and chill their speech.

In *Zamecnik v. Indian Prairie Sch. Dist. #204*, __ F.3d __, 2011 WL 692059 (7th Cir. Mar. 1, 2011) (Posner, J.), the Seventh Circuit upheld Andrew Nuxoll's standing to challenge his high school's speech code even though it had never been enforced against him. When a different student, Heidi Zamecnik, wore a t-shirt in 2006 that said, "Be Happy, Not Gay," school officials inked out "not gay" because it violated the school's policy prohibiting "derogatory comments" that refer to, *inter alia*, "sexual orientation." *Id.* at *1; *Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668, 670 (7th Cir. 2008). During the 2007 school year Nuxoll decided against wearing "a shirt that contained the phrase, or otherwise tr[ying] to counter [a gay rights event], for fear of being disciplined." *Nuxoll*, 523 F.3d at 670.

Yet despite the fact that school officials never enforced the "derogatory comments" policy against Nuxoll or even threatened to do so, the Seventh Circuit not only entertained a facial challenge, but later upheld a permanent injunction and damages award.[9]

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[9] Like the Third Circuit, the Seventh recognizes that universities have less leeway to restrict the speech of their adult students than high schools have for their minor students. *Nuxoll*, 523 F.3d at 674–75 ("This particular restriction, it is true, would not wash if it were being imposed on adults. . . ." (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992); *Rosenberger*

Nuxoll, 523 F.3d at 670, 675; *Zamecnik*, 2011 WL 692059, at *4, 8. The Court found Article III standing because "Nuxoll's desire to wear the T-shirt on multiple occasions in 2007 was thwarted by fear of punishment." *Id.* at *8.

This fear of punishment came not from any "credible threat of enforcement against [Nuxoll]," App. 13a, for the school never threatened him. It came not by showing that school officials discussed enforcing the policy against him, App. 15a, because there is no record of this. It came because Nuxoll read the policy, realized that it governed him and barred his speech, and saw that the school had enforced the policy against other students.

RFL and its members were in the same position as Nuxoll. They read UMBC's speech codes and realized that those policies governed their behavior as students and a student organization. App. 104–10a. Not only did they plead this, but they testified detailing how the policies chilled their speech. App. 125–27a; J.A. 454–63, 1732–36, 1742–44, 1786–94; *accord* J.A. 1759–61, 1771–72, 1779–80, 1782–85. UMBC's police chief confirmed that their speech could violate the harassment policies, J.A. 450–52, and its attorney told them the GAP display violated, at the very least, the "emotional safety" speech codes. App. 5a, 77a, 120a; J.A. 1479–82. And they showed how UMBC enforces harassment policies against other students who engage in "offensive," "disrespectful," "derogatory," "intolerant," and "into-

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v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995))); *Zamecnik*, 2011 WL 692059, at *2.

lerable" speech. App. 125–27a.

In the Seventh Circuit, high school students with equivalent evidence do not just have Article III standing; they get affirmative relief. In the Fourth Circuit, college students do not even get a hearing on the merits. The approaches could not be more divergent.

In sum, when it comes to whether students have standing to challenge school policies that govern their conduct and restrict their expression, at least two distinct legal regimes exist. The Fourth and Ninth Circuits require students to show substantiating enforcement action for each precise provision. The Third, Sixth, and Seventh Circuits simply look to see if the policies govern students and chill their speech, and how the universities treat other students is a factor that can contribute to chill. Student rights should not depend on the location of their school. Only this Court can resolve such a stark divergence in judicial opinion.

II. THE FOURTH CIRCUIT'S DECISION CREATES PRACTICAL PROBLEMS FOR UNIVERSITY STUDENTS NATIONWIDE.

Besides diverging from the Third, Sixth, and Seventh Circuits, the Fourth Circuit's decision also creates at least two anomalies. It immunizes patently unconstitutional policies from First Amendment scrutiny. And it sets up for university students standing requirements that are far more stringent than those for plaintiffs with less protected speech.

A. THOUGH SPEECH CODES ARE UBIQUITOUS AT UNIVERSITIES, THE FOURTH CIRCUIT IMMUNIZES THEM FROM CONSTITUTIONAL CHALLENGES.

Once challenged on First Amendment grounds, no federal court has ever upheld university speech codes on their merits. And an ever increasing number of courts nationwide have struck them down.[10] (*See supra* note 4–5 and accompanying text.) Yet they remain ubiquitous on university campuses. According to the non-partisan Foundation for Individual Rights in Education, at least 67% of the surveyed public universities maintain speech code policies that "clearly and substantially restrict[] freedom of speech."[11] And another 29% have policies that could be interpreted to do so or that restrict "narrow categories" of protected speech.[12] And as "university students . . . often reside in dormitories on campus, . . . they remain subject to university rules at almost all hours of the day." *McCauley*, 618 F.3d at 247. So virtually all—96%—public university students are subject all the time to pervasive policies that govern their every interaction and that either blatantly or potentially restrict their First Amendment freedoms.

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[10] *See generally* Azhar Majeed, *Defying the Constitution: The Rise, Persistence, and Prevalence of Campus Speech Codes*, 7 GEO. J.L. & PUB. POL'Y 481 (2009).

[11] FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., SPOTLIGHT ON SPEECH CODES 2011: THE STATE OF FREE SPEECH ON OUR NATION'S CAMPUSES, at 4, 6–7, *available at* http://thefire.org/public/pdfs/312bde37d07b913b47b63e275a5713f4.pdf?direct (last visited Mar. 11, 2011).

[12] *Id.*

Yet the Fourth Circuit's decision gives universities a "playbook" on how to immunize these policies from constitutional attack. It boils down to two essential principles that UMBC embodied:

1. Establish multiple overlapping, largely redundant, but slightly different speech-restrictive policies; and
2. *Never* identify the policy (or policies) being enforced.

To avoid "bootstrapping," the Fourth Circuit requires students to identify the precise policy that sparked the university's actions. App. 13a. And even this is not enough; students must identify which provision of the policy caused their injury. App. 14a (requiring students to show "individual injury from the existence of the contested provision"). Hence, having multiple policies makes it virtually impossible to guess which one is being enforced. And making them overlapping but slightly different means even if an administrator accidentally quotes policy language, it will be hard to trace the quote just to one policy, thus giving the university plausible deniability. App. 15–16a (distinguishing between sexual and emotional harassment). And if administrators never identify the policies justifying their actions, this tracing exercise becomes absolutely impossible.

Hence, though speech codes represent a pervasive national problem, the Fourth Circuit's decision effectively bars students in that circuit from the courtroom, incentivizing universities to maintain and multiply these policies. If universities follow UMBC's example, they can erect a veritable firing squad of

unconstitutional policies. Students must endure the repression until they can identify which policy fired the fatal bullet. As long as administrators remain mum, this can never happen.

B. Though First Amendment rights are at their zenith at universities, the Fourth Circuit gives students less ability to vindicate those freedoms than citizens in less protective contexts.

The Fourth Circuit's decision also means that it is harder to show standing in a context where the First Amendment applies with full force than it is in contexts where its reach is more attenuated. Under its decision, students on campus, whose freedoms are at their apex, do not have standing to challenge speech code provisions facially unless they prove actual enforcement in the most formalistic manner. Yet it (like other circuits) does not apply the same scrutiny to plaintiffs in other settings where government can regulate more freely or where the First Amendment barely reaches.

This Court has long recognized how the First Amendment applies with particular force on public university campuses. Ever since 1972, it has declared that "state colleges and universities are not enclaves immune from the sweep of the First Amendment." *Healy*, 408 U.S. at 180; *accord Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981). Indeed, "the precedents of this Court leave no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large." *Healy*, 408 U.S. at 180; *accord*

Papish v. Bd. of Curators of Univ. of Mo., 410 U.S. 667, 670–71 (1973). Our "Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas." *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967) (citations omitted); *accord Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Thus, not only does "the First Amendment . . . not tolerate laws that cast a pall of orthodoxy over the classroom," *Keyishian*, 385 U.S. at 603, but this Court has been particularly cognizant of the unique danger that First Amendment violations pose in the university context, given the "background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger*, 515 U.S. at 835.

Not only were RFL and its members speaking in a location where their freedoms were at their zenith (*i.e.*, the UMBC campus), but their expression constituted quintessentially protected speech. As they addressed abortion—one of the most contentious social and political issues of our day—their speech was "at the heart of the First Amendment's protection," "occupy[ing] the highest rung of the hierarchy of First Amendment values." *Snyder v. Phelps*, __ U.S. __, 2011 WL 709517, *5 (Mar. 2, 2011) (citations omitted). That their graphic abortion photographs might have "emotionally harassed" students or caused them to become "emotionally distraught," App. 5a, 77a, 120a, J.A. 1479–82, is constitutionally irrelevant because the First Amendment exists to protect "upsetting," "offensive," or "even hurtful" speech. *Id.* at *9 (citations omitted); *accord id.* at *11 ("As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that

we do not stifle public debate.").

So UMBC interfered with speech on the First Amendment's hallowed ground, covering issues at the core of its protections, pursuant to feelings-based speech codes that no court has ever upheld. But to the Fourth Circuit, none of that matters unless RFL and its members can prove with picayune detail (to the point of teasing out "sexual harassment" from "emotional harassment") that UMBC applied each of the speech codes to them. App. 13–17a.

Yet such rigorous standing requirements do not govern in situations where the First Amendment protections are far more attenuated or where such protections barely reach at all. For example, the government has far more leeway to restrict speech in the form of political contributions than it does on a university campus. *See, e.g.*, *F.E.C. v. Beaumont*, 539 U.S. 146, 161 (2003) (characterizing such restrictions as "marginal" because "contributions lie closer to the edges than to the core of political expression"). Yet, political action committees regularly challenge these laws long before they are ever enforced, even in the Fourth Circuit. *See, e.g.*, *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 11–12 (1st Cir. 1996); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 709–11 (4th Cir. 1999); *Va. Soc'y for Human Life, Inc. (VSHL) v. F.E.C.*, 263 F.3d 379, 386–90 (4th Cir. 2001); *N.C. Right to Life v. Leake, Inc.*, 525 F.3d 274, 278 (4th Cir. 2008); *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 659–61 (5th Cir. 2006); *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 485–86 (8th Cir. 2006); *Vt. Right to Life Comm. Inc. v. Sorrell*, 221 F.3d 376,

380–81 (2d Cir. 2000).

In this context, courts explicitly reject the "no enforcement, no standing" policy the Fourth Circuit imposes on university students.[13] Instead, "[a] nonmoribund statute that 'facially restrict[s] expressive activity by the class to which the plaintiff belongs' presents . . . a credible threat, and a case or controversy thus exists in the absence of compelling evidence to the contrary," especially if "the presence of a statute tends to chill the exercise of First Amendment rights."[14] *Bartlett*, 168 F.3d at 710 (quoting *Gardner*, 99 F.3d at 15); *accord Leake*, 525 F.3d at 279 n.2. This presumption particularly holds when the government has not officially disavowed enforcing the policy. *Gardner*, 99 F.3d at 14; *Bartlett*, 168 F.3d at 711; *Gaertner*, 439 F.3d at 485–86. And this threat of enforcement remains if the government does not intend to enforce the law, *Sorrell*, 221 F.3d at 383, or even if it has a codified policy of non-enforcement. *VSHL*, 263 F.3d at 386–89.

Similarly, sexually oriented businesses, particularly those featuring nude dancing, are just "marginally" within the "outer perimeters of the First

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[13] *See, e.g.*, *Gardner*, 99 F.3d at 12–17; *Carmouche*, 449 F.3d at 659–61; *Bartlett*, 168 F.3d at 710–11; *Gaertner*, 439 F.3d at 484–87; *Sorrell*, 221 F.3d at 383–84.

[14] *See also Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003) (noting in a different factual setting that a "plaintiff who mounts a pre-enforcement challenge to a statute that he claims violates his freedom of speech need not show that the authorities have threatened to prosecute him; the threat is latent in the existence of the statute," even if it only "arguably" covers his speech (citations omitted)).

Amendment," and the dancing itself contains "only the barest minimum of protected expression" which "might be entitled to First . . . Amendment protection under some circumstances." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–66 (1991). Yet, once again, these businesses challenge obscenity statutes without waiting for threatened or actual enforcement and without showing some "concrete" or "substantiating" governmental act. App. 19a. *See, e.g.*, *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 493–94 (1985); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66–68 (1963); *Am. Booksellers Ass'n*, 484 U.S. at 392–93; *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1152–56 (9th Cir. 2000). And they do so even in the Fourth Circuit. *Legend Night Club v. Miller*, __ F.3d __, 2011 WL 541136, *1 (4th Cir. Feb. 17, 2011).

In this context, all that is required for standing is that the statute governs the business' actions. And this Court even defers to the business' interpretation of the challenged law. *See, e.g.*, *Am. Booksellers Ass'n*, 484 U.S. at 392 (finding that the injury-in-fact "requirement is met here, as the law is aimed directly at plaintiffs, who, *if their interpretation of the statute is correct*, will have to take significant or costly compliance measures or risk criminal prosecution." (emphasis added)). For sexually oriented businesses, veiled references to applicable policies amply constitute threatened enforcement. *See, e.g.*, *Bantam Books*, 372 U.S. at 68–69. And the standing analysis does not focus on whether the challenged ordinance was actually enforced but on whether the plaintiff falls within the class of people whose conduct the ordinance governs.

For example, in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 233 (1990), this Court did not ask whether the parties had been denied permits. It looked at whether they *could* have been denied permits under the challenged ordinances. *Id.* at 233–36. One ordinance prohibited people who lived with someone who had been denied a license from receiving one. But "the record does not reveal that any party before us was living with an individual whose license application was denied or whose license was revoked." *Id.* at 233. Another ordinance barred people from getting a license if their spouse had been convicted of certain crimes. But none of the parties "could be disabled under this provision." *Id.* at 233–34. Because the ordinance did not govern them, they had no standing. Yet the Fourth Circuit grants these businesses standing even if they do not intend to engage in conduct covered by the statute. *Legend Night Club*, 2011 WL 541136, at *3 ("Consequently, even if Plaintiffs have no intention of offering artistic performances at their establishments, they are entitled to mount the instant facial challenge to the statute to protect the rights of those who wish to do so.").

In short, the Fourth Circuit's decision in this case makes it harder to vindicate free speech rights in our nation's public universities, where those rights are at their strongest. On campus, students must show some "concrete" university action enforcing a policy. App. 17a. Off campus, the statute's existence suffices. On campus, students must show how administrators interpret university policies. App. 15–17a. For strip clubs, courts defer to the club's interpretation. On campus, quoting university speech codes is not a threat of enforcement. App. 15a. For sexually

oriented businesses, friendly reminders are ominous threats. *Bantam Books*, 372 U.S. at 68–69. On campus, students must show actual steps towards enforcement, even if they want to engage in protected conduct that the speech codes obviously restrict. App. 15–17a. But strip clubs have standing even if they do not want to engage in restricted conduct. *Legend Night Club*, 2011 WL 541136, at *3. Standing doctrine should not produce such upside-down results.

CONCLUSION

As stated above, students should not enjoy different constitutional rights based solely on the location of their college. RFL's petition for certiorari should be granted, and this Court should intervene to establish uniform standing guidelines that afford maximum protection for the marketplace of ideas on campus.

Respectfully submitted,

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March 16, 2011

APPENDIX CONTENTS

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-1892

ROCK FOR LIFE-UMBC, an unincorporated student association, for itself and its individual members; OLIVIA RICKER, individually and as an officer of Rock for Life-UMBC; MIGUEL MÉNDEZ, individually and as an officer of Rock for Life-UMBC,

Plaintiffs-Appellants,

v.

FREEMAN A. HRABOWSKI, individually and in his capacity as President of University of Maryland, Baltimore County; CHARLES J. FEY, in his individual capacity as former Vice President of Student Affairs at University of Maryland, Baltimore County; NANCY L. YOUNG, individually and in her official capacity as Interim Vice President of Student Affairs at the University of Maryland, Baltimore County; LEE A. CALIZO, individually and in her official capacity as Acting Director of Student Life at University of Maryland, Baltimore County; JOSEPH REIGER, individually and in his official capacity as Executive Director of the Commons at University of Maryland, Baltimore County; ERIC ENGLER, individually and in his official capacity as Acting Director of the Commons at University of Maryland, Baltimore County; LYNNE SCHAEFER, individually and in her official capacity as Vice President of Administration and Finance at the University of Maryland, Baltimore County;

ANTONIO WILLIAMS, individually and in his official capacity as Chief of Police for the University of Maryland, Baltimore County Police Department,

Defendants-Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, District Judge. (1:08-cv-00811-JFM)

Argued: September 21, 2010
Decided: December 16, 2010

Before NIEMEYER and KING, Circuit Judges, and Robert J. CONRAD, Jr., Chief United States District Judge for the Western District of North Carolina, sitting by designation.

Affirmed by unpublished opinion. Judge Conrad wrote the opinion, in which Judge Niemeyer joined. Judge King wrote a separate opinion concurring in part, dissenting in part, and concurring in the judgment.

ARGUED: David Austin French, ALLIANCE DEFENSE FUND, Columbia, Tennessee, for Appellants. Sally Lotz Swann, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellees.

ON BRIEF: Joseph J. Martins, Travis C. Barham, ALLIANCE DEFENSE FUND, Columbia, Tennessee; Steven L. Tiedemann, JPB ENTERPRISES, INC., Columbia, Maryland, for Appellants. Douglas F. Gansler, Attorney General, Anne L. Donahue, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellees.

OPINION

Unpublished opinions are not binding precedent in this circuit.

CONRAD, Chief District Judge:

Rock for Life-UMBC, a registered student organization at the University of Maryland, Baltimore County ("UMBC") and two of its former student-members appeal an award of summary judgment and judgment on the pleadings to the defendants, UMBC officials, on several First Amendment claims brought under 42 U.S.C. § 1983. For the reasons that follow, we affirm.

I.

UMBC is a public honors university located in Baltimore, Maryland, with an enrollment of approximately 13,000 undergraduate and graduate students. Rock for Life is a registered student organization at UMBC with a stated mission "to defend the right of the unborn and to awake consciousness and awareness in the UMBC community about the catastrophic effects of abortion for all persons involved and our moral duty to stop its practice." Joint Appendix ("JA") 17.[1] In April 2007, Rock for Life

[1] At oral argument, counsel for the defendants informed the Court that Rock for Life is as of recently no longer a registered student organization at UMBC. Because the evidence supporting this factual development was not made clear, nor is Rock for Life's current status at UMBC material to a number of its claims, we assume for purposes of this decision that Rock for

submitted a request to UMBC to reserve non-academic campus space in order to display a series of posters known as the Genocide Awareness Project (the "GAP display"). The display is described by its sponsor, the Center for Bio-Ethical Reform, as

> a traveling photo-mural exhibit which compares the contemporary genocide of abortion to historically recognized forms of genocide. It visits university campuses around the country to show as many students as possible what abortion actually does to unborn children and get them to think about abortion in a broader historical context.

Id. at 253, 254–55. There are twenty-four different GAP posters, and each comes in a six-foot by thirteen-foot "standard" or four-foot by eight-foot "mini-GAP" display size.

At the time of Rock for Life's initial request, UMBC operated under a facilities use policy designed to provide recognized student organizations with access to academic and non-academic university property. UMBC evaluated requests based on "room appropriateness," and it reserved the right to deny any request "dependent upon circumstances." *Id.* at 234. The policy also stated that "[s]cheduling may move an event to a different location without notice. UMBC is not responsible for any costs incurred by a user resulting from a change in location." *Id.* at 235.

Rock for Life initially sought permission to

Life continues to operate as a registered student organization.

present the GAP display at the University Center Plaza, a facility located at the center of several academic buildings on the western side of campus. The request was first sent to Lee Calizo, director of student life, for approval. On April 24th, Calizo emailed then-acting Rock for Life president Alex Vernet to inform him that she had viewed a website associated with GAP and was concerned that placing "7 ft tall by 22 ft wide" signs in front of the Plaza entrance would restrict access to the building. *Id.* at 824. In fact, Rock for Life only planned to display four-foot by eight-foot "mini-GAP" signs. However, it does not appear that Rock for Life brought this discrepancy to Calizo's or any other UMBC official's attention during their subsequent negotiations.

As word spread of Rock for Life's request to show the GAP display, UMBC officials discussed how best to handle the controversial nature of the event. The plaintiffs allege Chris Tkacik, UMBC's in-house counsel, stated that students might feel "emotionally harassed" by the display, and UMBC had a right to prevent such harassment. The plaintiffs contend this alleged comment implicated two additional UMBC speech policies then in place. The first is former Article V, Paragraph B(2)(f) of the Code of Student Conduct, which prohibited "physical or emotional harassment," although this term was not further defined. *Id.* at 62. The second is UMBC's prohibition against sexual harassment, defined as

> unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

> (1) Such conduct has the purpose or effect of unreasonably interfering with an individual's academic or work performance, or of creating an intimidating, hostile, or offensive educational or working environment; or
>
> (2) Submission to such conduct is made either explicitly or implicitly a term or condition of employment or for participation in a UMBC-sponsored educational program or activity; or
>
> (3) Submission to or rejection of such conduct by an individual is used as the basis for academic or employment decisions.

JA 51. A violation of either provision subjects a student to a range of possible disciplinary measures, including suspension and expulsion from the university.

During a meeting between UMBC, Rock for Life, and the Leadership Institute,[2] Rock for Life presented UMBC with a letter requesting a uniformed police presence during the GAP display due to "numerous unprovoked physical attacks from pro-abortion students" during previous exhibitions. *Id.* at 270. Further, it was Rock for Life's position that the First Amendment required UMBC to pay the cost of this security measure. The parties, however, never reached a definite agreement on whether police should be assigned to the event, and if so, who should pay for the costs.

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[2] The Leadership Institute is a non-profit organization that assisted Rock for Life in bringing the GAP display to UMBC.

On April 25th, 2007, Calizo informed Rock for Life that the GAP display would not be allowed at the University Center Plaza, but could be held at the Commons Terrace instead. The Commons Terrace is a patio area adjacent to the Commons, described as the "hub of student life on campus," and its positioning within the campus makes it a "congestion point" between residence halls and other campus buildings. *Id.* at 835, 1356. Rock for Life found the Terrace to be a desirable location and agreed to this compromise. However, Joseph Reiger, Executive Director of the Commons, soon expressed concern that the Terrace was also an inappropriate place for the GAP display. He described steps on the Terrace as hazardous because they are not in a "known sight line." (JA 1356). He further stated that like Calizo, he understood the GAP display to include about twelve five-foot by thirteen-foot signs. Based on these circumstances, Reiger thought the Terrace was an unsuitable venue for three reasons: (1) the GAP signs were too much of a "visual barrier" for that location; (2) the GAP display would not leave adequate space for pedestrians wishing to access the Commons through the Terrace entrance; and (3) the area would become too congested if students had to "flee" from a violent altercation resulting from the display. *Id.* at 1363. Reiger further stated that his concern about violence arose because of Rock for Life's letter requesting security, not his past experience with the group or UMBC's student body.

Based largely on Reiger's recommendation, Charles Fey, Vice President of Student Affairs, decided to move the GAP display once more from the Commons Terrace to the North Lawn, an open space

between the Commons, residence halls and main library. Rock for Life members were informed of this decision by Eric Engler, acting director of the Commons, on the morning of April 30th as they attempted to set up the GAP display on the Commons Terrace. Rock for Life then moved the display to the North Lawn, where it was held without a police presence and without incident. The plaintiffs contend that surveillance footage from that day indicates the North Lawn saw less foot traffic than the Terrace, and thus fewer students were able to view the GAP display and its message.

In November 2007, Rock for Life made a second attempt to reserve the Commons Terrace for an exhibition of the GAP display. UMBC responded that as before, the GAP display would be permitted only on the North Lawn. Rock for Life decided not to hold the event.

The plaintiffs later filed suit under 42 U.S.C. § 1983 in the District of Maryland, alleging that UMBC had violated their right to free expression through the enforcement of its sexual harassment policy, its policy prohibiting emotional harassment and, most directly, its facilities use policy. Calizo, Reiger, Engler and Fey were named in both their individual and official capacities, as were Freeman Hrabowski, President of UMBC, Nancy Young, successor to Fey as Vice President of Student Affairs, Lynne Schaeffer, Vice President of Administration and Finance and Antonio Williams, University Chief of Police.[3] The complaint sought permanent injunc-

[3] The district court held that Hrabowski, Young, Schaeffer,

tive relief against enforcement of all three policies as well as nominal and punitive damages. UMBC later agreed, however, to partially address the plaintiffs' claims by striking "emotional harassment" from the list of prohibitions in its code of conduct and replacing it with "failure to cease repetitive unwanted behavior directed toward a particular individual or individuals." JA 81. UMBC also revised its facilities use policy by adding specific criteria for denying or moving an event, but the sexual harassment policy remained unchanged. After the facilities use policy was revised, Rock for Life made a third request in October 2008 to reserve the Commons Terrace for an exhibition of the GAP display. UMBC granted this request, and the GAP display was held on the Commons Terrace without incident.

In light of these developments, the plaintiffs filed an amended complaint withdrawing their claims for injunctive relief against enforcement of UMBC's code of conduct and facilities use policy. The amended complaint alleged five causes of action under § 1983, better expressed in terms of the speech policies they challenged: (1) First Amendment and Due Process claims against UMBC's sexual harassment policy, seeking injunctive relief as well as monetary damages; and (2) First Amendment, Due Process and Equal

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and Williams were immune from liability because the plaintiffs failed to present any evidence of their personal or supervisory involvement in the state action giving rise to this lawsuit. *See Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994) (only a supervisor who exhibits "deliberate indifference to or tacit authorization of" a subordinate's constitutional violations may be held responsible under § 1983). The plaintiffs do not challenge this finding on appeal.

Protection claims against UMBC's code of conduct and facilities use policy, seeking monetary damages only.

Finding that the plaintiffs lacked standing to assert claims for injunctive relief against the code of conduct and sexual harassment policy, the district court granted judgment on the pleadings to the defendants on those claims under Federal Rule of Civil Procedure 12(c). *Rock for Life-UMBC v. Hrabowski*, 594 F. Supp. 2d 598 (D. Md. 2009) (hereafter *"Rock for Life I"*). After discovery, the parties filed cross-motions for summary judgment on the plaintiffs' remaining claims. The district court awarded judgment to the defendants, finding that the plaintiffs' facial challenge to the former facilities use policy was moot, and the policy had been applied without regard to content as a reasonable time, place, and manner regulation of their speech. *Rock for Life-UMBC v. Hrabowski*, 643 F. Supp. 2d 729 (D. Md. 2009) (hereafter *"Rock for Life II"*).

The plaintiffs timely appealed the district court's orders granting judgment on the pleadings and summary judgment to their First Amendment claims only. We have jurisdiction pursuant to 28 U.S.C. § 1291.

II.

We review a district court's decision to grant judgment on the pleadings under Rule 12(c) de novo. *Independence News, Inc. v. City of Charlotte*, 568 F.3d 148, 154 (4th Cir. 2009). "In reviewing an award of judgment on the pleadings, we assume the facts alleged in the relevant pleadings to be true, and we draw all reasonable inferences therefrom."

Volvo Const. Equip. N. Am., Inc. v. CLM Equip., Inc., 386 F.3d 581, 591 (4th Cir. 2004).

We also review an award of summary judgment de novo under the same standard applied by the district court. *See Canal Ins. Co. v. Distrib. Servs., Inc.*, 320 F.3d 488, 491 (4th Cir. 2003). Summary judgment shall be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When ruling on a summary judgment motion, a court must view the evidence and any inferences from the evidence in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "'Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.'" *Ricci v. DeStefano*, 129 S. Ct. 2658, 2677 (2009) (quoting *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

Because the plaintiffs' § 1983 claims seek to recover damages, they must establish not only that the defendants deprived them of a constitutional right, but also that the defendants, state actors sued in their individual capacities, are undeserving of qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 808–09 (1982). Whether a government official is deserving of qualified immunity from personal liability is a two-pronged inquiry that requires us to determine: (1) whether the official violated a constitutional right; and if so (2) whether the right was "clearly established" at the time of its violation.

Saucier v. Katz, 533 U.S. 194, 201 (2001). Recently the Supreme Court overruled *Saucier* in part to hold that the traditional two-step inquiry into qualified immunity is not mandatory; "the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 129 S. Ct. 808, 813, 818 (2009). In this case, the district court addressed step one of the inquiry and, after concluding that the plaintiffs failed to present sufficient evidence of a constitutional violation, found it unnecessary to address step two.

III.

We begin with the district court's conclusion that the plaintiffs lack standing to challenge UMBC's sexual harassment policy and code of conduct. "[S]tanding jurisprudence contains two strands: Article III standing, which enforces the Constitution's case-or-controversy requirement . . . and prudential standing, which embodies judicially self-imposed limits on the exercise of federal jurisdiction." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004). Article III standing requires a plaintiff to show: (1) injury-in-fact; (2) a causal connection or traceability; and (3) redressability. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992). The injury-in-fact criteria contemplates that the alleged injury-in-fact is both "concrete and particularized and actual or imminent." *Id.* at 560. The term "particularized" means that "the injury must affect the plaintiff in a personal and individual way." *Id.* at 560 n.1. In addition,

"there must be a causal connection between the injury and the conduct complained of . . . ." *Id.* at 560. Stated differently, the injury must be "fairly traceable" to action by the defendant. *Id.* Finally, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (internal quotation marks omitted).

A regulation that burdens speech creates a justiciable injury if on its face it restricts expressive activity by the class to which the plaintiff belongs, or if its presence otherwise tends to chill the plaintiff's exercise of First Amendment rights. *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999). However, fears of enforcement that are "imaginary" or "wholly speculative" are insufficient to confer standing. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979). To establish a plaintiff's standing under Article III, the challenged regulation must present a credible threat of enforcement against the party bringing suit. *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999). A plaintiff must establish such a threat with respect to each of the provisions it seeks to challenge, as standing regarding one aspect of a policy cannot be bootstrapped into standing as to the rest. *See Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 429–30 (4th Cir. 2007).

A.

The plaintiffs argue that their standing to challenge UMBC's sexual harassment policy is rooted in its unconstitutional overbreadth. However, while the overbreadth doctrine permits a plaintiff to "challenge

a statute on its face because it also threatens others not before the court[,]" *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987); *accord Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973), it does not circumvent the requirement that a plaintiff suffer an individual injury from the existence of the contested provision to begin with. *Burke v. City of Charlestown*, 139 F.3d 401, 405 n.2 (4th Cir. 1998); *Gilles v. Torgersen*, 71 F.3d 497, 501 (4th Cir. 1995) (citing *Sec'y of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 958 (1984)). To demonstrate a credible threat that a sexual harassment policy is likely to be enforced in the future, a history of threatened or actual enforcement of the policy against the plaintiff or other similarly-situated parties will often suffice. *See Lopez v. Candaele*, __ F.3d __, 2010 WL 3607033, at *6 (9th Cir. Sept. 17, 2010); *Booher v. Bd. of Regents*, No. 2:96cv135, 1998 U.S. Dist. LEXIS 11404, at *19–20 (E.D. Ky. July 21, 1998); *Doe v. Univ. of Michigan*, 721 F. Supp. 852, 859–60 (E.D. Mich. 1989).

The plaintiffs cite the recent Third Circuit decision *McCauley v. University of the Virgin Islands*, __ F.3d __, 2010 WL 3239471 (3d Cir. Aug. 18, 2010), for the proposition that *Broadrick* and its progeny confer standing to challenge speech regulations absent evidence of a chilling effect to the particular speaker before the court. *See id.* at *3 (holding that a plaintiff had standing to challenge a university's sexual harassment policy despite the fact that he failed to assert that "his speech . . . was chilled by the Code."). *Broadrick*, however, cannot be read so broadly. While the overbreadth doctrine relaxes prudential limitations on standing that would normally prevent a plaintiff from vindicating the constitu-

tional rights of other speakers, it does not dispense with the "obligat[ion] as an initial matter to allege a distinct and palpable injury as required by Article III." *Burke*, 139 F.3d at 405 n.2; *accord Canatella v. State of California*, 304 F.3d 843, 854 & n.14 (9th Cir. 2002) (*Broadrick* relaxes prudential, but not Article III, standing requirements).

Upon review of the facts alleged in the plaintiffs' amended complaint, nothing suggests that the plaintiffs face a credible threat of disciplinary action under UMBC's sexual harassment policy. As the district court noted, no aspect of the GAP display is readily applicable to the policy's definition of "sexual harassment," which is limited to "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . ." Although the GAP display seeks to convey a message related to abortion, which necessarily touches upon issues related to gender and reproduction, this type of speech is simply not "conduct of a sexual nature" covered by the policy. Moreover, the plaintiffs do not allege facts suggesting that UMBC officials ever threatened to punish their speech as sexual harassment. Even if Tkacik expressed concern, as the amended complaint alleges, that students would feel "emotionally harassed" by the GAP demonstration, he did not express concern that students would feel sexually harassed, nor is there any suggestion that disciplinary enforcement of the sexual harassment policy was discussed at any point. More to the point, Rock for Life has now shown the GAP display on campus twice and has not faced threatened or actual disciplinary action for sexual harassment. Although the plaintiffs claim a chilling effect to their speech,

they were unable at oral argument to name any form of expressive activity that Rock for Life or its members wish to engage in, but refrain from in fear of violating UMBC's sexual harassment policy. We hold, therefore, that the plaintiffs have not demonstrated a credible threat of enforcement under UMBC's sexual harassment policy and are without standing to challenge its constitutionality.

B.

Tkacik's alleged comment had more relevance to UMBC's code of conduct, which prohibited "emotional harassment" until that phrase was excised from the code during the course of this litigation. As a result, the plaintiffs concede that the code of conduct is no longer unconstitutionally vague or overbroad. Nevertheless, the plaintiffs assert standing to sue for monetary damages on the theory that Tkacik's mention of the phrase caused them to chill their own speech.

We have recognized that an actual chilling of protected speech is a discrete infringement of First Amendment rights that gives rise to a claim under § 1983 for at least nominal damages. *See Reyes v. City of Lynchburg*, 300 F.3d 449, 453 (4th Cir. 2002). However, the plaintiffs may not assert claims for damages against a speech policy that was never actually applied to them. In order to establish their standing to challenge UMBC's code of conduct, the plaintiffs must first demonstrate an injury-in-fact through the application of that provision. *Covenant Media of S.C., LLC v. City of North Charleston*, 493 F.3d 421, 429–30 (4th Cir. 2007) (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230 (1990)). While the

plaintiffs claim that the code of conduct caused them to chill their own speech, "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm. . . ." *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972). "[F]or purposes of standing, subjective chill requires some specific action on the part of the defendant in order for the litigant to demonstrate an injury-in-fact." *Morrison v. Board of Educ.*, 521 F.3d 602, 609 (6th Cir. 2008).

In this case, UMBC never undertook a "concrete act" to investigate or sanction the plaintiffs for violation of the code of conduct. *Id.* at 610. Nor can the plaintiffs characterize the defendants' decision to move the GAP display to the North Lawn as a non-disciplinary enforcement of the code. If the defendants considered the display to be emotional harassment, then it was equally so on either the North Lawn or the Commons Terrace. Any subjective fear of disciplinary measures that the plaintiffs might have felt never materialized into an actual, objective harm. Nor is there a credible threat of enforcement in the future, as the sexual harassment policy has been revised so that it now prohibits specific conduct the plaintiffs have never sought to engage in. The plaintiffs' mere allegations of a chilling effect, absent any substantiating action taken by UMBC, cannot establish their standing to challenge the constitutionality of a now-defunct speech regulation.

IV.

Unlike UMBC's sexual harassment policy and its code of conduct, UMBC actually applied its facilities use policy to regulate the plaintiffs' speech. As such,

they have standing to challenge its constitutionality. The plaintiffs assert a facial challenge to the policy, alleging that its "dependent upon circumstances" and "move without notice" provisions failed to create "narrow, objective, and definite standards to guide the licensing authority," *Green v. City of Raleigh*, 523 F.3d 293, 300 (4th Cir. 2008) (quoting *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992)), as well as an as-applied challenge to the defendants' decision to remove the GAP display from the Commons Terrace.

A.

Citing our decision in *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112 (4th Cir. 2000), the district court held that the plaintiffs' facial challenge to the facilities use policy was moot in light of its permanent revisions, which the plaintiffs concede are sufficient to render the policy facially constitutional. *Rock for Life II*, 643 F. Supp. 2d at 740–41. In *Valero*, which addressed the mootness of a plaintiff's claim for injunctive relief against enforcement of several state regulatory statutes, we held that "statutory changes that discontinue a challenged practice are 'usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed.'" 211 F.3d at 116 (quoting *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994)). *Valero*, however, is inapposite to a claim brought under § 1983 to recover damages—either compensatory or nominal—resulting from a prior suppression of speech. In this context, we have held that even permanent remedial measures will not moot the claim. *See Covenant Media*, 493 F.3d at 429

n.4 (citing *Henson v. Honor Comm. of the Univ. of Va.*, 719 F.2d 69, 72 n.5 (4th Cir. 1983)); *Reyes*, 300 F.3d at 453. But while the plaintiffs' cause of action for damages remains live, their claim that the policy was facially unconstitutional is moot.

We addressed a similar issue in *Reyes*, where a plaintiff sought to recover nominal damages after being charged with violating a subsequently repealed parade ordinance, arguing among other things that the ordinance was facially overbroad. 300 F.3d at 452. We found the plaintiff's overbreadth challenge to the ordinance mooted by its repeal, observing that "the repealed parade ordinance cannot now, if it ever did, reach any amount of constitutionally protected conduct. The question of overbreadth does not present a live case or controversy for this court." *Id.* at 453 (footnote omitted). We reached this result because a facial challenge premised on overbreadth is necessarily forward-thinking: it petitions the court to invalidate an overbroad speech regulation because it has the potential to support "a substantial number of impermissible applications . . . ." *New York v. Ferber*, 458 U.S. 747, 771 (1982). When a facially overbroad regulation is subsequently narrowed within constitutional boundaries, the inherent threat of content-based discrimination becomes null.

Here, the plaintiffs allege the former facilities use policy was facially unconstitutional because it delegated "unbridled discretion" to UMBC to grant or deny requests. App.Br. at 55. This, too, is a facial challenge premised on overbreadth. *See Forsyth*, 505 U.S. at 129 ("[T]he Court has permitted a party

to challenge an ordinance under the overbreadth doctrine in cases where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker[.]"). The injury alleged by the plaintiffs is not that Rock for Life's request was actually denied based on the content of its speech, for "[f]acial attacks on the discretion granted a decisionmaker are not dependent on the facts surrounding any particular permit decision." *Id*. at 133 n.10 (citing *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770 (1988)). Rather, it is an assertion by the plaintiffs that the facilities use policy granted UMBC such broad discretion that it created a potential chilling effect on all protected expression on campus, including their own. *Id.* at 129. If the policy was indeed facially overbroad, UMBC's permanent revisions cured this defect and removed any threat of content-based enforcement in the future. The justiciable issue that remains before us is not whether Rock for Life's permit was denied pursuant to a facilities use policy that gave UMBC unduly broad discretion, *i.e.*, a policy that could have been applied unconstitutionally, but whether impermissible content-based discrimination did in fact occur. Because the facilities use policy no longer poses an inherent threat of content-based discrimination, the plaintiffs' facial challenge to the policy is moot notwithstanding the fact that it seeks the recovery of damages rather than injunctive relief.

B.

Turning to the plaintiffs' as-applied challenge, the district court correctly determined that the facili-

ties use policy regulated access to a limited public forum, and an "internal standard" applied because the policy was designed to provide access to recognized student organizations such as Rock for Life. *Rock for Life II*, 643 F. Supp. 2d at 744–45. Under this standard, content-neutral regulations of speech are permissible if they are "limited to 'reasonable restrictions on time, place, or manner . . . [,] provided the restrictions . . . are narrowly tailored to serve a significant government interest, and . . . leave open ample alternative channels for communication of the information.'" *Warren v. Fairfax Cnty.*, 196 F.3d 186, 193 (4th Cir. 1999) (en banc) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). A narrowly tailored regulation of speech "need not be the least restrictive or least intrusive means of" effectuating the government's interests, *Ward*, 491 U.S. at 798, but it may not "burden substantially more speech than is necessary to further [those] . . . interests." *Id.* at 799. To be sure, "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). However, the plaintiffs contend that whether the facilities use policy was applied in a content-neutral manner is a question of fact for the jury. We agree, although the question is a much narrower one than the plaintiffs suggest.

The defendants' stated reasons for moving the GAP display because of its size and shape are content-neutral criteria for time, place and manner restrictions, *see Am. Legion v. City of Durham*, 239 F.3d 601, 608 (4th Cir. 2001) ("Size . . . is not a con-

tent criterion."), and the plaintiffs fail to demonstrate sufficient evidence that these stated reasons were pretext. The defendants believed the size and shape of the signs would have created a visual barrier obscuring steps and slopes on the Commons Terrace, which Calizo characterized as an "oddly shaped area." JA 715. They developed this concern after their own internet research about the GAP project led them to believe that Rock for Life planned to display a row of approximately twelve six-foot by thirteen-foot GAP signs. In fact, Rock for Life's display only included eight four-foot by eight-foot "mini-GAP" signs, which could be arranged in any shape to accommodate floor space limitations. However, whether the defendants' decision was motivated by the content of the GAP display depends on the circumstances as the defendants believed them to be, not as they actually were. The emails exchanged between the parties should have alerted the plaintiffs to this mistake and the defendants' resulting concerns for visibility and safety. The plaintiffs never attempted to correct this misunderstanding during the challenged enforcement of the facilities use policy, nor have the plaintiffs otherwise shown that the defendants arrived at their conclusions about the GAP signs in bad faith. Although the plaintiffs have presented sufficient evidence that the defendants were mistaken about the size of the GAP signs, this is not evidence relevant to the issue before us: whether their decision was motivated by the content of the plaintiffs' speech rather than its manner of presentation.

The plaintiffs also suggest that the defendants' above-stated logistical concerns are pretext for con-

tent-based discrimination because numerous other events that posed similar concerns were permitted on the Commons Terrace. We note that "[o]nce a limited or designated public forum is established the government cannot exclude entities of a similar character to those generally allowed." *ACLU v. Mote*, 423 F.3d 438, 443 (4th Cir. 2005). From 2003 to 2008, a number of events with varying attendance have been held on the Terrace during normal school hours.[4] But of these events, none were shown to include large signs similar to those UMBC believed it was dealing with. Thus, there is a content-neutral basis to distinguish these other events from the GAP display.

A different matter is presented by the defendants' stated reason that they moved the GAP display to provide adequate space for students to flee in the event of a violent altercation. This concern was raised by UMBC in response to a request from Rock for Life to provide a police presence at the GAP display, due to "numerous unprovoked physical attacks" during prior exhibitions at other campuses. The dis-

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[4] These events include a free concert held from 1:00 p.m. to 2:00 p.m., attended by 50 people; an outdoor prayer service held from 1:00 p.m. to 1:45 p.m., attended by 75 people; a student involvement festival held from 11:00 a.m. to 2:00 p.m., attended by 1,500 people; a study abroad fair held from 10:00 a.m. to 3:00 p.m., attended by 200 people; a "Bealtaine Barbeque" (a Gaelic pagan festival) held from 12:00 p.m. to 2:00 p.m., attended by 25 people; a display erected by the sailing club from 10:00 a.m. to 3:00 p.m.; a "Teeter Totter-a-thon" fundraising event held for 24 hours, attended by 60 participants; and an environmental fair held from 2:00 p.m. to 10:00 p.m., attended by 50 people and featuring an electric car placed at the South entrance of the Terrace. JA 1673–90.

trict court determined that the defendants had not acquiesced to a "heckler's veto" by moving the GAP display because their concerns about crowd violence were first raised by the plaintiffs. *Rock for Life II*, 643 F. Supp. 2d at 746–47. However, regardless of who raises the issue, "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth*, 505 U.S. at 134. It is difficult if not impossible to characterize UMBC's heightened interest in providing escape routes from the Commons Terrace as anything but content-based. *See Ovadal v. City of Madison*, 416 F.3d 531, 537 (7th Cir. 2005) (a content-based restriction of speech is likely when "every proffered justification" for the restriction is "directly related to the reactions" of the audience). While an interest in public safety is a content-neutral basis to regulate speech, *see Davenport v. City of Alexandria*, 710 F.2d 148, 151 (4th Cir. 1983) (en banc), safety concerns arising from a prediction of how listeners might react to speech cannot be effectively decoupled from speech content. Although, as the district court noted, the defendants "should not be faulted for taking seriously the concerns raised by [the plaintiffs]," *Rock for Life II*, 643 F. Supp. 2d at 747, those concerns arose from the content of the plaintiffs' message.

Viewing the evidence in a light most favorable to the plaintiffs, it appears the defendants were motivated by both content-based and content-neutral reasons when they denied Rock for Life access to the Commons Terrace. A content-based restriction of speech withstands constitutional scrutiny only when narrowly tailored and necessary to serve a compelling state interest. *Arkansas Educ. Television*

Comm'n v. Forbes, 523 U.S. 666, 677 (1998). Even were we to find UMBC's interest in protecting the safety of its students compelling, acquiescence to a heckler's veto would still fail under strict scrutiny, for the defendants must employ the least restrictive means available to further that interest. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). Providing a security presence at the Commons Terrace would have been a less restrictive means of ensuring student safety. This is especially true in light of the fact that the defendants decided to move the event before the GAP display was even set up, permitting them no opportunity to make an assessment of how students actually reacted to the plaintiffs' speech. The defendants could not have been certain that any real threat of violence existed. Given that Rock for Life has now held the GAP display twice on campus without incident, it most likely did not.

Although Rock for Life was permitted to present the GAP display on the North Lawn, where its message was heard by students walking across campus, "[a] tax based on the content of speech does not become more constitutional because it is a small tax." *Forsyth*, 505 U.S. at 136. The plaintiffs have therefore demonstrated a violation of their First Amendment rights unless the defendants could show, by a preponderance of evidence, that absent any concerns of violence they would still have moved the GAP display because of its size and shape. *See Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287 (1977) (a First Amendment violation must be the "motivating factor" behind a challenged state action; no constitutional violation occurs if the government can show by a pre-

ponderance of the evidence that it would have taken the same action for other, constitutionally proper, reasons); *see also Daker v. Ferrero*, 506 F. Supp. 2d 1295, 1309 (N.D. Ga. 2007) (applying the *Mt. Healthy* "proximate cause" framework to a prisoner's First Amendment claim for suppression of speech).

Because the plaintiffs have demonstrated a triable issue of fact on their as-applied challenge to the facilities use policy, we hold that the district court erred by awarding summary judgment to the defendants at the first prong of the *Saucier* test for qualified immunity.

V.

Although the district court erred in this regard, we may nevertheless affirm summary judgment if we determine as a matter of law that the plaintiffs fail to demonstrate a violation of a constitutional right that was clearly established. This is a "purely legal question . . . ." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). It requires the court to identify "the specific right allegedly violated," and then decide if "at the time of the alleged violation the right was clearly established." *Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. "To determine whether a federal right was clearly established at the time of the defendants' alleged conduct, we focus not upon the right at its most general or abstract level, but at the level of its application to the specific

conduct being challenged." *Jackson v. Long*, 102 F.3d 722, 728 (4th Cir. 1996) (internal quotation marks omitted). We are advised to resolve the issue of qualified immunity at the "earliest possible stage" of litigation. *Pearson*, 129 S. Ct. at 815.

The plaintiffs argue that the we may not address the issue of qualified immunity while material issues of fact remain concerning the defendants' conduct or their intent. Generally speaking, "summary judgment on qualified immunity grounds is improper as long as there remains any material factual dispute regarding the actual conduct of the defendants." *Buonocore v. Harris*, 65 F.3d 347, 359–60 (4th Cir. 1995) (citing *Pritchett*, 973 F.2d at 313). In *Jackson*, however, we recognized that "[i]f . . . resolution of the factual dispute is immaterial to whether immunity is to be afforded," we may address the question of qualified immunity while fact issues remain outstanding. 102 F.3d at 727.

Here, the only issue of fact relevant to the plaintiffs' as-applied challenge that would survive summary judgment is whether the defendants' violence-related safety concerns were the proximate cause of their decision to remove the GAP display from the Commons Terrace. While this is a fact issue relevant to whether the plaintiffs have suffered a deprivation of their First Amendment rights, it is one that we may resolve in their favor for purposes of determining whether the defendants are entitled to qualified immunity. The defendants maintain that they became concerned about the potential for violence after Rock for Life presented UMBC with a letter asking for security and describing violent encounters

on other campuses. The plaintiffs have not shown this concern was exaggerated or otherwise not sincerely held.[5] Assuming, then, that the defendants made an impermissible content-based restriction of the plaintiffs' speech because they anticipated a hostile reaction from listeners, we exercise our discretion under *Pearson* to examine whether this violated a constitutional right of the plaintiffs' that was, at the time, clearly established.

"Historically, one of the most persistent and insidious threats to first amendment rights has been that posed by the 'heckler's veto,' imposed by the successful importuning of government to curtail 'offensive' speech at peril of suffering disruptions of public order." *Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985). Courts have recognized a heckler's veto as an impermissible form of content-based speech regulation for over sixty years. *See Terminiello v. City of Chicago*, 337 U.S. 1 (1949). Repeatedly, courts have emphasized the state's responsibility to permit unpopular or controversial speech in the midst of a hostile crowd reaction. *See*, *e.g.*, *Ovadal*, 416 F.3d at 537; *Smith v. Ross*, 482 F.2d 33, 37 (6th Cir. 1973); *Grider v. Abramson*, 994 F. Supp. 840, 845–46 (W.D. Ky. 1998), cited in Cheryl A. Leanza, *Heckler's Veto Case Law as a Re-*

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[5] In briefing submitted to the district court, the plaintiffs suggested that the defendants' concern of violence was not "real." Doc. No. 60-1 at 37. The plaintiffs supported this contention by showing that UMBC refused to pay for a security presence at the GAP display. *Id.* However, whether UMBC agreed to pay for security is a separate question from whether it had concerns for student safety.

source for Democratic Discourse, 35 HOFSTRA L. REV. 1305, 1311 n.49 (2007). In the abstract, at least, the impermissibility of a heckler's veto is clearly established by First Amendment jurisprudence.

Our inquiry, however, is not meant to be performed in the abstract. "Put simply, context matters." *Henry v. Purnell*, __ F.3d __, 2010 WL 3720411, at *11 (4th Cir. Sept. 24, 2010). As the United States Supreme Court has stated,

> if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading. Such an approach, in sum, would destroy "the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties," by making it impossible for officials "reasonably [to] anticipate when their conduct may give rise to liability for damages."

Anderson v. Creighton, 483 U.S. 635, 639 (1987) (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)). Our inquiry into whether the defendants violated a clearly established right of the plaintiffs' not to be silenced by a heckler's veto must account for the fact

that it was the plaintiffs who issued a warning of crowd violence to the defendants in the first place. Although it does not render the defendants' conduct permissible under the First Amendment, the letter bears upon context and the circumstances as the defendants perceived them.

The plaintiffs' letter warned that the GAP display had encountered "numerous unprovoked physical attacks from pro-abortion students on the first few campuses it visited. . . ." JA 270. Public universities are taxed with a dual responsibility to permit the free expression of ideas on campus while providing for the safety and security of their students, *see S.U.N.Y. v. Fox*, 492 U.S. 469, 475 (1989), and the plaintiffs' security concerns put these interests at odds. The proposed location for the GAP display, the Commons Terrace, posed in the defendants' minds an additional safety hazard in the event of crowd violence. The plaintiffs' apparent expectation that such violence would occur must have left the defendants uniquely on edge.

In hindsight, we think the defendants were required by the First Amendment to address these additional safety concerns by providing a security presence at the GAP display, or watching the event closely to determine whether security was truly necessary. However, "[t]he concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular [government] conduct." *Saucier*, 533 U.S. at 205. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). If the de-

fendants secured campus safety at too high a cost to the plaintiffs' right to free expression, we do not believe they should be made to pay for this mistake from their own pockets.

VI.

In summary, we conclude that all claims except the plaintiffs' as-applied challenge to UMBC's facilities use policy were properly dismissed on standing or mootness grounds. Although the district court erred by holding that the plaintiffs failed to demonstrate a triable issue of fact whether the defendants regulated their speech based on its content, the defendants are nevertheless entitled to qualified immunity from 42 U.S.C. § 1983 claims brought against them in their individual capacities.

AFFIRMED

KING, Circuit Judge, concurring in part, dissenting in part, and concurring in the judgment:

I write separately to confirm my concurrence in—and admiration for—most of Judge Conrad's well-crafted majority opinion, with the exceptions of Parts IV.B and V. Although I fully agree with the majority that the defendants are entitled to qualified immunity on the plaintiffs' as-applied challenge to UMBC's policy on facilities use, I would resolve that issue solely on the first prong of the *Saucier* test. More specifically, I would rule that the defendants are entitled to qualified immunity because no constitutional violation has been shown. I therefore dissent as to Part IV.B of the majority opinion, which addresses the first prong of *Saucier* (the constitutional violation prong), and have no reason to reach the second prong of *Saucier* (the clearly established prong) addressed in Part V of the majority opinion.

I.

The test formulated by the Supreme Court in *Saucier v. Katz* required a two-pronged "order of battle" assessment of a qualified immunity claim. *See* 533 U.S. 194, 201 (2001). After *Saucier* was rendered in 2001, a reviewing court was obliged to assess the two prongs in sequence, asking first whether the plaintiff had sufficiently established a constitutional violation. If the court's answer on the first prong was "no," then it could not proceed to or address the second prong. But if the answer was "yes," then the court was obliged to decide whether the violation was of a clearly established constitutional right. In 2009, however, in *Pearson v. Callahan*, the Supreme Court

unanimously receded from *Saucier*'s mandatory "order of battle," deciding that a reviewing court was no longer required to address the two prongs of the *Saucier* analysis in sequence, but could exercise its "sound discretion" to decide the proper order of assessment. *See* 129 S. Ct. 808, 813, 818 (2009).

The *Pearson* rule was in large measure predicated on the Court's recognition that "[a]dherence to *Saucier*'s two-step protocol departs from the general rule of constitutional avoidance." 129 S. Ct. at 821 (citing, inter alia, *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.")). The *Pearson* rule, however, also responded to another substantial and valid concern that arose from *Saucier*'s mandatory sequence protocol—that a defendant could suffer an adverse decision on the constitutional violation prong, prevail on the clearly established prong (and thus secure a favorable judgment), but yet be unable to seek and secure appellate review on the adverse constitutional violation ruling. *Id.* at 820.

A.

In this case, the majority's ruling on *Saucier*'s first prong—the constitutional violation question addressed in Part IV.B—is patently incorrect. Before elaborating, however, I must emphasize and address a more fundamental flaw in the majority's resolution of this appeal. Put simply, the majority's ruling on *Saucier*'s first prong constitutes unnecessary dicta

on a constitutional question, contravening the principles spelled out in *Pearson*. Indeed, the majority recognizes in Part V of its opinion (under *Saucier*'s second prong) that the constitutional right it identifies in Part IV.B is not clearly established. Under the *Pearson* rule, therefore, the majority should not have addressed the merits of the constitutional violation issue (under *Saucier*'s first prong) absent some good reason, such as a compelling need to "promote[] the development of constitutional precedent." 129 S. Ct. at 818. In my view, no such compelling need or other good reason is present here. Thus, the proper course for the majority was simply to assume that a constitutional violation had occurred, and then proceed to address the "clearly established" prong of *Saucier*, granting qualified immunity and summary judgment on the basis of its Part V ruling. In proceeding as it does, however, the majority has departed from the post-*Pearson* settled practice. *See Walker v. Prince George's Cnty.*, 575 F.3d 426, 429 (4th Cir. 2009) (O'Connor, J.) ("Here, we think it is plain that [the] constitutional right . . . is not clearly established. We thus decline to invest a substantial expenditure of scarce judicial resources by engaging in the essentially academic exercise of determining whether that right exists at all.").[1]

To make matters worse, the majority's unwar-

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[1] *Cf. Doe ex rel. Johnson v. S.C. Dep't of Soc. Servs.*, 597 F.3d 163, 169–70 (4th Cir. 2010) ("Because we believe this case will clarify and elaborate upon our prior jurisprudence in important and necessary ways, we will first address [plaintiffs'] constitutional rights . . . prior to addressing whether any such rights were clearly established at the time of the alleged wrongdoing.").

ranted constitutional discussion in Part IV.B will deny UMBC any meaningful opportunity to seek or secure appellate review of the adverse constitutional violation ruling made by the majority. As the Supreme Court explained in *Pearson*, the "procedural tangle" created by the *Saucier* rule "ar[ises] from the Court's settled refusal to entertain an appeal by a party on an issue as to which he prevailed below, a practice that insulates from review adverse merits decisions that are locked inside favorable qualified immunity rulings." *Pearson*, 129 S. Ct. at 820 n.2. As Justice Alito explained for the unanimous *Pearson* Court, "the 'prevailing' defendant [here, UMBC] faces an unenviable choice: comply with the lower court's *advisory dictum* without an opportunity to seek appellate or certiorari review, or defy the views of the lower court, adhere to practices that have been declared illegal, and thus invite new suits and potential punitive damages." *Id.* at 820 (emphasis added).

B.

The majority's Part IV.B assessment of the constitutional violation question is not only "advisory dictum," *see Pearson*, 129 S. Ct. at 820, but also (as previously noted) patently incorrect. Simply put, the relevant facts fail to show a constitutional violation, and I would therefore resolve this case on *Saucier*'s first prong only. Unlike the majority's approach, such a resolution would not result in the "procedural tangle" created by *Saucier*, where the constitutional violation ruling is "insulate[d] from review" by the determination that the asserted constitutional right was not clearly established. *See Pearson*, 129 S. Ct. at 820 n.2.

Turning to the merits of the majority's ruling on the constitutional violation issue, the six words on which these plaintiffs rely are much too thin a supporting reed for their as-applied First Amendment challenge. Indeed, that challenge hinges on a single line in an electronic Google Desktop notice, reminding Mr. Tkacik, UMBC's in-house counsel, of a meeting scheduled with Mr. Vernet, the student president of Rock for Life, on April 27, 2007. That line contains only these six words: "re: controversial exhibit; Rock for Life." J.A.1622. I reject the view that these words provide sufficient support for a First Amendment violation.

As the district court correctly recognized, "reference to the exhibit as controversial arose from Plaintiffs' letter alerting Defendants to the controversial nature of the display and the need for security." *Rock for Life-UMBC v. Hrabowski*, 643 F. Supp. 2d 729, 746 (D. Md. 2009). The letter to which Judge Motz referred was first delivered by the plaintiffs to the UMBC police department on April 19, 2007, and was faxed to Mr. Tkacik in advance of the April 27 meeting.[2] The plaintiffs' letter asserted that, "because [the Center for Bio-Ethical Reform, one of Rock for Life's 'supporting organizations'] suffered

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[2] In this regard, the majority recognizes only that the letter was given to Mr. Tkacik at the April 27, 2007 meeting. *See ante* at 6. There is, however, more to the story. Although Tkacik may have been provided with an additional copy of the letter at the April 27 meeting, the record reflects that he received the letter beforehand. Specifically, the letter was provided to the UMBC police department on April 19, *see* J.A.821, 1148, and it was faxed to Tkacik by the police department on either April 24 or April 26, *see id.* at 1454, 1457.

numerous unprovoked physical attacks from pro-abortion students on the first few campuses it visited, [it] now transport[s] and employ[s] [its] own crowd-control barricades." J.A.821. Put simply, I wholeheartedly agree with Judge Motz that the "Defendants should not be faulted for taking seriously the concerns raised by Plaintiffs." *Rock for Life-UMBC*, 643 F. Supp. 2d at 746–47.

By dismissing as irrelevant the fact that it was the plaintiffs who first raised the security issue, the majority has also created something akin to a "reverse heckler's veto." Under the Part V ruling, an educational institution has no choice but to address a student group's security concerns.[3] But in addressing those concerns, under the Part IV.B ruling the institution risks being seen as engaging in a content-based speech restriction—inevitably creating a jury question when the institution asserts an alternative content-neutral reason for its conduct. The educational institution is thereby faced with a Hobson's choice: (1) violate the First Amendment by not addressing a student group's security concerns; or (2) lose any chance of prevailing on summary judgment by addressing such concerns. By preventing an educational institution from prevailing on summary judgment, the majority's rule tramples on the settled principle that the issue of qualified immunity should be resolved "at the earliest possible stage of litiga-

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[3] Pursuant to Part V of the majority opinion, an educational institution in this Circuit is now "required by the First Amendment to address th[e] additional safety concerns by providing a security presence . . . or watching the event closely to determine whether security [is] truly necessary." *Ante* at 34.

tion." *Pearson*, 129 S. Ct. at 815. This result also inappropriately impinges on an educational institution's manifest interest in the security of its students. *See Healy v. James*, 408 U.S. 169, 184 (1972) ("[A] college has a legitimate interest in preventing disruption on the campus.")

II.

Consistent with the foregoing, I agree with the majority that we should award qualified immunity to the defendants on the as-applied First Amendment challenge to UMBC's policy on facilities use, but I would get there by a different route—namely, by concluding that a First Amendment violation has not been shown. Because there was no constitutional violation, I would rely solely on *Saucier*'s first prong and award qualified immunity to the defendants on that basis.

United States District Court,
D. **Maryland**.

ROCK FOR LIFE-UMBC, *et al.*,
Plaintiffs,

v.

Freeman A. HRABOWSKI, *et al.*,
Defendants.

Civil No. JFM 08-0811.
July 8, 2009

OPINION

J. FREDERICK MOTZ, District Judge:

On April 2, 2008, Plaintiffs Rock for Life-UMBC ("Rock for Life"), Olivia Ricker, and Miguel Mendez (collectively "Plaintiffs") filed suit under 42 U.S.C. § 1983 against several University of Maryland, Baltimore County ("UMBC") officials (collectively "Defendants") alleging violations of their First and Fourteenth Amendment rights. (Verified Compl., Dkt. No. 1; Am. Compl. ¶ 100.) Plaintiffs challenged the validity of several UMBC policies. On January 26, 2009, 594 F. Supp. 2d 598 (D. Md. 2009), I ruled on Defendants' motion for judgment on the pleadings, finding in Defendants' favor on all but Plaintiffs' third and fifth causes of action in Plaintiffs' amended complaint,[1] which seek nominal damages and declaratory

[1] The third and fifth causes of action arise, respectively, from an alleged violation of Plaintiffs' right to free speech and assembly under the First Amendment, and Plaintiffs' Fourteenth Amend-

relief for the allegedly unconstitutional enactment and application of UMBC's former Policy on Facilities Use. Now before me are the parties' cross-motions for summary judgment as to these claims.

The issues have been fully briefed and no hearing is deemed necessary. Local Rule 105.6 (D. Md. 2008). For the reasons stated below, Defendants' motion for summary judgment is granted, and Plaintiffs' cross-motion for summary judgment is denied.

I.

Plaintiff Rock for Life is an unincorporated registered student association at UMBC.[2] (Am. Compl. 4.) Rock for Life's self-declared mission is "to defend the right of the unborn and to awake consciousness and awareness in the UMBC community about the catastrophic effects of abortion for all persons involved and our moral duty to stop its practice." (*Id.*) Plaintiffs bring suit against various officials of UMBC[3] in both their individual and official capaci-

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ment right to equal protection. (Am. Compl. ¶¶ 116, 122.)

[2] Plaintiffs Ricker and Mendez are UMBC students and members of Rock for Life who have served as the organization's vice president and secretary, respectively. (Pls.' Mem. Supp. Pls.' Cross-Motion for Summ. J. and Response to Defs.' Mot. for Summ. J. ("Pls.' Cross-Motion") 1–2.)

[3] Defendants are: Freeman A. Hrabowski, UMBC President; Charles J. Fey, Vice President of Student Affairs; Nancy Young, Interim Vice President of Student Affairs; Lee Calizo, Acting Director of Student Life; Joseph Reiger, Executive Director of the Commons; Eric Engler, Acting Director of the Commons; Antonio Williams, Chief of Police at UMBC; and Lynne Schaefer, Vice President of Administration and Finance.

ties.[4] (Am. Compl. ¶¶ 9–16.)

A.

This lawsuit arises out of Rock for Life's requests to set up a poster display on UMBC's campus in April 2007, November 2007, and October 2008. The poster display, designed as part of a pro-life advocacy program known as the Genocide Awareness Project ("GAP"), is distributed by an organization called the Center for Bio-Ethical Reform. (*Id.* ¶¶ 58–60.) The GAP is

> a traveling photo-mural exhibit which compares the contemporary genocide of abortion to historically recognized forms of genocide. It visits university campuses around the country to show as many students as possible what abortion actually does to unborn children and get them to think about abortion in a broader historical context.

(*Id.* Ex. P.) The GAP display comes in two versions: a full size version with signs measuring six feet by thirteen feet and a "mini-GAP" display with four foot by eight foot signs. (Pls.' Cross-Motion 9.) While Plaintiffs state in their amended complaint that the GAP display consists of twenty-four of the smaller signs (Am. Compl. ¶ 78), they now clarify that not all twenty-four signs were used in their April 2007 GAP

(Am. Compl. ¶¶ 9–16.)

[4] There is one exception: Defendant Charles Fey is sued only in his individual capacity, presumably because he is no longer employed by UMBC. (Am. Compl. ¶ 10.)

display and estimate that approximately eight of the smaller signs were ordered for that display. (Pls.' Cross-Motion 9.)

Alexander Vernet, Rock for Life's treasurer at the time, played the lead role in organizing the event. (*Id.*) He initially sought to reserve the University Center Plaza for the GAP display, which he thought would maximize the number of students and faculty who would see the display. (*Id.*) Upon learning from the Office of Student Life that the desired location was available, Mr. Vernet reserved it for the morning and afternoon of April 30, 2007.[5] (*Id.*)

Plaintiffs allege that shortly thereafter, Ms. Sheryl Gibbs, office supervisor for the Office of Student Life, became aware of the subject matter of the GAP display and intervened to raise security concerns. (*Id.* 10.) According to Plaintiffs, Mr. Vernet was directed to the UMBC police department, who would determine whether and what level of security would be needed and who informed Mr. Vernet that Rock for Life would have to pay for the security. (*Id.*) Plaintiffs allege that, upon learning that UMBC intended to charge Rock for Life for security, Mr. Vernet presented a letter to the UMBC Police Department stating that Rock for Life believed it should not bear the security costs for the GAP display. (*Id.* 10–11.)

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[5] The reservation process begins when a student makes a verbal request to reserve a campus facility to a student staff member of the Office of Student Life, who enters the information into an events request database. (Pls.' Cross-Motion Ex. 8, Gibbs Dep. 9:6–20, Nov. 21, 2008.) The request is then submitted to the office of scheduling. (*Id.*)

On April 24, 2007, Defendant Calizo, Acting Director of Student Life, e-mailed Mr. Vernet to express logistical and security concerns regarding the April 30 display. (*Id.* Ex. 19.) Defendant Calizo stated that she had not realized the size of the signs until she viewed the GAP website. (*Id.*) She asked Mr. Vernet to confirm the size of the signs and noted that Rock for Life may need to rethink the space for the display because it cannot block pedestrian traffic.[6] (*Id.*) Mr. Vernet responded only by stating the shape in which Rock for Life planned to arrange the signs. (*Id.* Ex. 20.)

Defendant Calizo concluded that the GAP display was "too big" to have in front of the University Center Plaza, as it would "block access to and from buildings." (Defs.' Mem. Supp. Mot. for Summ. J. (Revised) ("Defs.' Mem.") Ex. 2, Calizo Dep. 60:9–16, Nov. 21, 2008.) Defendant Calizo met with Mr. Vernet on April 25, 2007 to inform him of her concerns that the display would impede building access and create a fire hazard, and to discuss moving the display to the Commons Terrace, a location which Mr. Vernet was happy with because of the "large amount of traffic and student presence there." (Pls.' Cross-Motion 13; Defs.' Mem. Ex. 8, Vernet Dep. 87:14–15, Jan. 23, 2009.)

However, the issue of security remained unre-

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[6] In her email, Defendant Calizo incorrectly stated that the signs were seven feet by twenty-two feet. (Pls.' Cross-Motion Ex. 19.) However, Mr. Vernet's email in response does not address Defendant Calizo's questions about the size of the display and does not correct her misunderstanding. (Pls.' Cross-Motion Ex. 20.)

solved. (Pls.' Cross-Motion 15.) According to Defendants, UMBC's practice is to require student groups who host events on campus to pay for security if required by the university or if the group wants to have security. (Defs' Mem. 7; Defs.' Mem. Ex. 2, Calizo Dep. 35:20–36:2.) Based on his experience with previous displays on other campuses in which attempts were made to damage or cover up the signs, Mr. Leif Parsell, a Leadership Institute[7] representative who was instrumental in bringing the GAP display to the UMBC campus, believed security would be necessary for the April 30, 2007 GAP display at UMBC. (Defs.' Mem. Ex. 5, Parsell Dep. 53:18–54:23, Feb. 9, 2009.) In a meeting with Chris Tkacik, UMBC's University Counsel, Mr. Parsell[8] presented Mr. Tkacik with a letter that again stated Rock for Life's position that UMBC's policy of charging student organizations for security was unconstitutional. (Pls.' Cross-Motion 16.) Mr. Parsell understood Mr. Tkacik's "cordial" response during the meeting to mean that the university would waive the cost of security for the GAP display. (Pls.' Cross-Motion Ex. 5, Parsell Dep. 57:16–22.)

Despite the earlier agreement between Mr. Vernet and Defendant Calizo that the Commons Terrace would be an appropriate alternative location for the

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[7] Mr. Parsell describes the Leadership Institute as an organization that, among other things, trains college students for single—issue political activism and helps the students run their events. (Defs.' Mem. Ex. 5, Parsell Dep. 13:5–16, Feb. 9, 2009.)

[8] Mr. Parsell attended the meeting in Mr. Vernet's stead because a medical emergency prevented Mr. Vernet from attending. (Pls.' Cross-Motion 15–16.)

GAP display, the location was changed again to the North Lawn late in the week prior to April 30. (Pls.' Cross-Motion 17.) Plaintiffs allege that this decision was made by Defendants Fey, Reiger, and Engler. (*Id.*) Defendant Reiger, Executive Director of the Commons, believed that the GAP display was "too large" for the Commons Terrace. (Defs.' Mem. Ex. 6, Reiger Dep. 131:3, Nov. 20, 2008.) He described the Terrace as a congested area with greater demand than anticipated and with steps that are hazardous as they are not in "a known sight line." (*Id.* 130:3–14.) Defendant Reiger states that while some tabling, fundraising, and other student activities have been held on the Terrace, his concerns with allowing the GAP display to be placed there were "the breadth of this display, the amount of square feet and then the obscuring nature of putting up a visual barrier." (*Id.* 131:3–16.) He also expressed concern in response to security issues raised by Plaintiffs that, should an altercation arise, pedestrians would not have enough space to maneuver around the event. (*Id.* 131:21–132:3.)

Defendant Fey, Vice President of Student Affairs, believed the North Lawn was the best location for the GAP display, both for safety reasons and for visibility. (Defs.' Mem. 9.) The North Lawn is located between the residence halls, which house four thousand students, and the Commons, the Library, and the campus's main academic buildings. (*Id.*) It is also positioned such that anyone traveling from the largest parking structure on campus to the Library or main academic buildings would pass the GAP display on the North Lawn. (*Id.*)

Plaintiffs claim that Mr. Vernet was not aware of the relocation to the North Lawn until the morning of April 30 when he and other members of Rock for Life began unloading signs to set up on the Commons Terrace. (Pls.' Cross-Motion 18.) Plaintiffs allege that Defendant Engler along with "several uniformed UMBC police officers" emerged from the Commons to inform them of the move to the North Lawn, which Plaintiffs describe as "a sparsely traveled field" far from the "hub of student life." (*Id.* 18–19.) Plaintiffs state that while on the North Lawn, there were extended periods of time with no students passing near the display, and there was rarely more than a "handful of students nearby." (*Id.* 19.) According to Plaintiffs, this relocation rendered the event a failure. (*Id.* 20.) Defendants note, however, that Rock for Life has held other events it considered successful on Erickson Field, which is contiguous to the North Lawn. (Defs.' Mem. 10.)

Plaintiffs claim that after approximately two hours, Rock for Life was able to move the GAP display closer to the sidewalks where students occasionally passed, but were prevented by UMBC police from displaying the signs on the other side of the walkway. (Pls.' Cross-Motion 19.) Plaintiffs also note that although UMBC police escorted Rock for Life to the North Lawn, the display did not have a constant security presence because Rock for Life did not pay the associated fees. (*Id.* 18.)

B.

In early November 2007, Rock for Life again attempted to reserve the Commons Terrace for the

GAP display. (Pls. Cross-Motion 20.) Rock for Life again delivered to UMBC a letter outlining what Rock for Life believed were UMBC's constitutional obligations toward Rock for Life. (*Id*. 21.) Plaintiffs allege that Mr. Vernet initially attempted to follow the normal reservation procedure, but was later informed that his reservation request had been forwarded to the Vice President of Student Affairs due to the display's controversial nature, and that his request would only be confirmed if he accepted the North Lawn instead of the Commons Terrace. (*Id*.) Plaintiffs point to a chain of emails in which Mr. Tkacik and Defendants Young and Reiger discussed the proposed display. (Pls.' Cross-Motion Ex. 32.) Defendant Reiger described the exhibit as "large billboard sized images of partial abortions" and stated that the group "approached passersby with literature and wanted to engage in dialogue." (*Id*.) He also confirmed that there were no other conflicting events already scheduled and stated, "I only offered the north lawn site and he accepted it." Mr. Tkacik responded, in part:

> O[ffice of] G[eneral] C[ounsel] is comfortable sticking hard to that lawn spot on the Erickson Field side. I recall last time that they pressed up against the walkway. If possible, it would be nice to back off the walkway, allowing for continued traffic pattern in case the display attracted a large number of people.

(*Id*.) When Mr. Vernet was informed on November 16 that his request to use the Commons Terrace had been denied and that all future similar displays would also be assigned to the North Lawn, Rock for

Life decided to cancel the GAP display planned for November 2007 because they believed this area did not allow the display to reach a sufficiently large number of students. (Pls. Cross-Motion 22.)

C.

Plaintiffs attempted a third time to reserve the Commons Terrace in October 2008. (Pls.' Cross-Motion 22.) Unlike in April and November 2007, their October 2008 reservation request was granted and the GAP display was successfully exhibited on the Commons Terrace. (*Id*. 23.) Plaintiffs allege that the granting of their request was a result of their lawsuit filed in April 2008. (*Id*.) Defendants point alternatively to the deposition testimony of Plaintiff Mendez stating that after the earlier reservation requests were denied, Rock for Life became more "careful" in explaining to the administration the specific details of the event, such as exactly where and when they wanted to set up the display, the estimated crowd, and the size of the display. (Defs.' Mem. 12; Defs.' Mem. Ex. 4, Mendez Dep. 109:3–110:10.)

D.

The remaining policy at issue in this lawsuit is UMBC's Policy on Facilities Use, which enumerates the rules governing the use of campus facilities and the procedures for the application for such use. (Am. Compl. Ex. L, at I.2.) At a preliminary injunction hearing held August 8, 2008, UMBC informed the Court of revisions it intended to make to several of the policies challenged by Plaintiffs, including the Policy on Facilities Use. (Defs.' Opp'n to Pls.' Mot.

for Leave to File First Am. Ver. Compl. 1.) The former Policy on Facilities Use stated, "Requests . . . are scheduled based on room appropriateness and on a first come, first served basis. Campus Scheduling has the final authority on scheduling all non-academic requests and has the right to deny requests dependent upon circumstances."[9] (Am. Compl. Ex. L, at V.5.) The former policy also stated, "Scheduling may move an event to a different location without notice. UMBC is not responsible for any costs incurred by a user resulting from a change in location." (*Id*. at V.11.) The revised Policy on Facilities Use, in effect since approximately September 19, 2008, specifies:

> Scheduling may move an event (display, facility or table reservation) to a different location upon the occurrence of:
>
> > a. circumstances beyond the control of the University, such as facility infrastructure disruption and/or weather related conditions, or
> > b. unanticipated needs of the University for use of the space, and to best utilize space and resources, or

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[9] Plaintiffs challenge the constitutionality of the phrases "room appropriateness" and "dependent upon circumstances" in the former Policy on Facilities Use, but because I am herein dismissing their facial challenge as moot and because the provision of the former policy containing these phrases was not applied to Plaintiffs, I will not address this issue. *See Gilles v. Torgersen*, 71 F.3d 497, 501 (4th Cir. 1995) ("[The overbreadth] doctrine . . . only assists plaintiffs who have suffered some injury from application of the contested provision to begin with.").

> c. substantial changes in the needs or size of the scheduled event, or
> d. subsequent disruption to concurrent events.
>
> However, if the event (display, facility or table reservation) interferes with traffic flow or access to buildings, the University will make reasonable efforts to control traffic flow and access to buildings before moving an event. If a move becomes necessary, the University will move the event to either an agreed-to location or the nearest suitable location. UMBC is not responsible for any costs incurred by a user resulting from a change in location.

(Am. Compl. Ex. M, at V.11.)

II.

A summary judgment motion should be granted when the record establishes that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A material fact is one that may affect the outcome of the suit. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A dispute as to a material fact is "genuine" if the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* A party opposing a motion for summary judgment may not rest upon the mere allegations in his pleading, but must set forth specific facts that show there is a genuine issue for trial. *Id.* The non-movant "cannot create a genuine issue of material fact through mere

speculation or the building of one inference upon another." *Runnebaum v. NationsBank of Md., N.A.,* 123 F.3d 156, 164 (4th Cir. 1997) (internal quotations omitted). "When cross-motions for summary judgment are submitted to a district court, each motion must be considered individually, and the facts relevant to each must be viewed in the light most favorable to the non-movant." *Mellen v. Bunting*, 327 F.3d 355, 363 (4th Cir. 2003).

III.

Plaintiffs have moved for summary judgment on their facial challenge to the former Policy on Facilities Use, alleging the policy in effect in April and November 2007 "is facially unconstitutional because it grants unbridled discretion to UMBC officials to discriminate based on the content of the speech and the viewpoint of the speaker." (Pls.' Cross-Motion 24.) They do not challenge UMBC's current Policy on Facilities Use.

Defendants argue that Plaintiffs' facial challenge to the former Policy on Facilities Use is moot. (Defs.' Mem. in Response to Pls.' Cross Motion for Summ. J. and Reply to Pls.' Response to Defs.' Mot. for Summ. J. ("Defs.' Response") 1.) This Court only has jurisdiction to adjudicate actual cases and controversies, and must dismiss for lack of subject matter jurisdiction a case that becomes moot. U.S. Const. art. III, § 1 et seq.; *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980). "[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Ariz.*, 520

U.S. 43, 67, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997). "A case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000) (internal quotations omitted).

UMBC no longer operates under the former Policy on Facilities Use because it voluntarily revised its policy during the course of this litigation. The Supreme Court has stated that "voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S. Ct. 1070, 71 L. Ed. 2d 152 (1982). However, the Fourth Circuit has clarified:

> Based on our review of the post-*Mesquite* caselaw, however, we are convinced that *Mesquite* is generally limited to the circumstance, and like circumstances, in which a defendant openly announces its intention to reenact "precisely the same provision" held unconstitutional below. 455 U.S. at 289 and n. 11, 102 S. Ct. 1070. In other words, we remain satisfied that statutory changes that discontinue a challenged practice are "usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed." *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994) (citing cases).

Valero Terrestrial Corp. v. Paige, 211 F.3d 112, 116 (4th Cir. 2000); *see also Bahnmiller v. Derwinski,*

923 F.2d 1085, 1089 (4th Cir. 1991) ("Withdrawal or alteration of administrative policies can moot an attack on those policies."). A district court addressing a similar facial challenge to a university's prior policy on student conduct found the issue to be moot "[b]ecause the University has adopted less restrictive interim policies, and was in fact formulating those policies prior to the incident involving Plaintiff, and because there is no indication that the University has any intention of reverting to its former policies." *Roberts v. Haragan*, 346 F. Supp. 2d 853, 858 n. 5 (N.D. Tex. 2004). Here, UMBC adopted a policy that addresses Plaintiffs' facial constitutional challenge, namely by revising the policy to no longer allow university administrators to relocate an event for any reason. Additionally, and more importantly in light of the Fourth Circuit's reasoning in *Valero*, there is no evidence in the record that UMBC has any intention to reenact its former Policy on Facilities Use. "Defendants have made the [revised Policy on Facilities Use] as public and as permanent as possible" by formally changing the policy, alerting the Court to the revision, and updating their public website to include the revised policy. *Alpha Iota Omega Christian Fraternity v. Moeser*, No. 1:04 CV00765, 2006 WL 1286186, at *4, 2006 U.S. Dist. LEXIS 28065, at *16 (M.D.N.C. May 4, 2006) (unpublished) (recognizing that the court would be engaging "in purely advisory, theoretical analysis if it were to enter a declaratory judgment on the constitutionality of a non-existent policy," and refusing to do so, at *4, 2006 U.S. Dist. LEXIS 28065 at *26–27). Accordingly, Plaintiffs' motion for summary judgment on its facial challenge to the constitutionality of

UMBC's former Policy on Facilities Use is denied and their claim is dismissed as moot.

IV.

Defendants move for summary judgment on Plaintiffs' as-applied challenge to UMBC's former Policy on Facilities Use. Defendants contend that they are entitled to qualified immunity under 42 U.S.C. § 1983, precluding Plaintiffs' suit against them in their individual capacities. (Defs.' Mot. for Summ. J. 2.) "Qualified immunity shields government officials performing discretionary functions from personal-capacity liability for civil damages under § 1983, 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Ridpath v. Bd. of Governors Marshall Univ.,* 447 F.3d 292, 306 (4th Cir. 2006) (quoting *Wilson v. Layne*, 526 U.S. 603, 609, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999)). It is undisputed that the decisions made regarding the location of the GAP display were discretionary.

A.

As an initial matter, "[t]he doctrine of respondeat superior generally does not apply to § 1983 suits." *Baker v. Lyles*, 904 F.2d 925, 929 (4th Cir. 1990) (internal quotations omitted). A supervisor may only be held liable for the constitutional violations committed by his subordinate if a plaintiff can show that the supervisor tacitly authorized, or was deliberately indifferent to, the subordinate's actions. *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994). In order to

establish supervisory liability under Section 1983, a plaintiff must establish three elements:

> (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices; and (3) that there was an affirmative causal link between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff.

Id. at 799 (internal quotations omitted). To satisfy this test, a plaintiff generally must produce evidence that the conduct complained of is "widespread, or at least has been used on several different occasions," as well as evidence of the supervisor's "continued inaction" in the face of such abuses. *Id.* Defendants Hrabowski, Young, Schaefer, and Williams allege that they are entitled to immunity from liability under Section 1983 because they were not personally involved in deciding on the location of the GAP display in April 2007 or November 2007 and because Plaintiffs have failed to establish supervisory liability. (Defs.' Mem. 20.)

Plaintiffs' allegations against Defendant Hrabowski, President of UMBC, are based on Defendant Hrabowski's ultimate responsibility for all policies promulgated by UMBC. (Pls.' Cross-Motion 2.) Because Plaintiffs have failed to show personal partici-

pation by Defendant Hrabowski or to produce any evidence to support a finding of supervisory liability, Defendant Hrabowski is entitled to qualified immunity from Plaintiffs' claims against him in his individual capacity.

Defendant Young was appointed Vice President for Student Affairs in July 2007, and therefore had no role in the relocation of the April 2007 GAP display. (Defs.' Response 16.) Plaintiffs allege Defendant Young "oversaw the division, reviewed proposed policy changes, and oversaw supervised [sic] the Director of the Commons (who implements the Facilities Use Policy)." (Pls.' Cross-Motion 2.) Plaintiffs have not provided evidence of a direct connection between Defendant Young and the allegedly unconstitutional actions. The fact of her supervisory role alone is insufficient, and Defendant Young is immune from Plaintiffs' claims against her in her individual capacity.

Defendant Schaefer is the Vice President for Administration and Finance. (Defs.' Response 16.) Defendant Williams is UMBC's Chief of Police.[10] (*Id.* 18.) Plaintiffs have failed to provide any evidence that these defendants had any personal involvement in the GAP display location decisions or any supervisory role over those who were involved in the decisions. Accordingly, Defendants Schaefer and Wil-

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[10] Defendant Williams was not employed by UMBC until June 2007, and therefore could not have had any role in the administrative decisions related to Plaintiffs' April 2007 display. (Pls.' Cross-Motion Ex. 11, Williams Dep. 8:18, 9:9–11, Nov. 19, 2008).

liams are also entitled to qualified immunity.

B.

The remaining defendants who were involved in the GAP display location decisions, Defendants Calizo, Reiger, Fey, and Engler, contend that they are also immune from Plaintiffs' suit against them in their individuals capacities. (Defs.' Response 18.) These defendants are entitled to qualified immunity unless the following two-prong test is satisfied by Plaintiffs' Section 1983 claim: "(1) the allegations underlying the claim, if true, substantiate the violation of a federal statutory or constitutional right; and (2) this violation was of a clearly established right of which a reasonable person would have known."[11] *Ridpath*, 447 F.3d at 306 (internal quotations and citations omitted). I will address the merits of Plaintiffs' First and Fourteenth Amendment claims in turn, determining whether the facts, when viewed in the light most favorable to Plaintiffs, show that the Defendants' conduct violated a constitutional right, and, if so, whether the right was clearly established.

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[11] The Supreme Court recently reversed its prior holding in *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct.S. Ct. 2151, 150 L. Ed. 2d 272 (2001), that the first of these two prongs must be addressed as a threshold question before reaching the second prong. *Pearson v. Callahan*, 129 S. Ct.S. Ct. 808, 813, 172 L. Ed. 2d 565 (2009). Although the procedure is no longer regarded as inflexible, the Court acknowledged that it is often still appropriate to address the prongs in the order previously mandated by *Saucier*. *Id*. at 818. Such is the case here. Because I find no violation of a federal statutory or constitutional right, it follows a fortiori that Defendants are entitled to qualified immunity.

(1)

In evaluating Plaintiffs' First Amendment claim,[12] I must first determine whether Plaintiffs have engaged in protected speech.[13] *Goulart v. Meadows*, 345 F.3d 239, 246 (4th Cir. 2003) (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985)). It is undisputed that the GAP display constituted protected speech under the First Amendment. Next, I must "identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." *Cornelius*, 473 U.S. at 797, 105 S. Ct. 3439. Finally, I "must assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard." *Id.*

(a)

There are three different types of forums in First Amendment cases: traditional public forums, nonpublic forums, and limited public forums. *ACLU v. Mote*, 423 F.3d 438, 443 (4th Cir. 2005). In a traditional public forum, such as a public street, sidewalk, or park, the government must accommodate

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[12] The First Amendment is binding on state and local governments through the Fourteenth Amendment. *Edwards v. City of Goldsboro*, 178 F.3d 231, 245 n. 10 (4th Cir. 1999).

[13] "With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities." *Widmar v. Vincent*, 454 U.S. 263, 268–69, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981).

all speakers and can only restrict the time, place, or manner of speech "if the restriction is content-neutral, is narrowly drawn to serve a significant state interest, and leaves open ample channels of communication of the information." *Id.* (citations omitted). Any content-based restriction on speech in a traditional public forum is subject to strict scrutiny and may only be enforced if the regulation is "necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983).

A non-public forum, by contrast, is one that has not traditionally been open to the public, and in which the government may impose restrictions on speech, even content-based restrictions, if the restrictions are viewpoint neutral and reasonable "in light of the purpose of the forum and all the surrounding circumstances." *Cornelius*, 473 U.S. at 809, 105 S. Ct. 3439.

"The third type of forum, a limited or designated public forum, is one that is not traditionally public, but the government has purposefully opened to the public, or some segment of the public, for expressive activity." *Mote*, 423 F.3d at 443. The *Mote* court discussed the two standards that apply to limited public forums: internal and external. *Id.* An external standard, which "applies if the person excluded is not a member of the group that the forum was made generally available to," utilizes the same criteria as are used in the non-public forum analysis. *Id.* "An internal standard applies and the restriction is subject to strict scrutiny 'if the government excludes a speaker

who falls within the class to which a designated [limited] public forum is made generally available. . . .'" *Id.* (quoting *Warren v. Fairfax County*, 196 F.3d 186, 193 (4th Cir. 1999)) (alterations in original). In other words, for the class for which the government has purposefully opened the forum for expressive activity, the limited public forum is treated as a traditional public forum. *Warren*, 196 F.3d at 193. "So, for instance, a University may not exclude certain student speakers from meeting space or university funding otherwise available on a generalized basis to students and student groups." *Id.* at 193–94.

While the Supreme Court has recognized that "[a] university differs in significant respects from public forums such as streets or parks or even municipal theaters," *Widmar v. Vincent*, 454 U.S. 263, 267 n. 5, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981), the Court also noted that "the campus of a public university, at least for its students, possesses many of the characteristics of a public forum." *Id.* I find, given the facts of this case, that the outdoor areas of the UMBC campus are limited public fora. This is consistent with the Fourth Circuit's finding in *Mote* that the University of Maryland's College Park campus is a limited public forum. 423 F.3d at 444; see also *Gilles v. Garland*, 281 Fed. Appx. 501, 511 (6th Cir. 2008) (following the "great weight of authority" in finding that the open areas on a public university campus are limited public fora). In *Mote*, the court stated that "the campus is not akin to a public street, park, or theater, but instead is an institute of higher learning that is devoted to its mission of public education." 423 F.3d at 444. UMBC, a constituent institution within the University System of Maryland, shares this mission. (Defs.'

Mem. 3; Am. Compl. Ex. L, at III.)[14]

(b)

Because Plaintiffs in the present case are a registered student association of UMBC and two of its student members, the limited public forum internal standard applies. Under this standard, UMBC cannot exclude a student or student group speaker from the open areas of campus "unless the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Warren*, 196 F.3d at 197 (internal quotations and citations omitted). Content-neutral regulation of speech in these areas of campus by UMBC is "limited to 'reasonable restrictions on the time, place, or manner . . . provided the restrictions . . . are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Id.* (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989)). Content-based regulations must be narrowly tailored to

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[14] UMBC's Policy on Facilities Use states:

> UMBC gives usage priority to recognized University organizations, groups, departments, and faculty, staff or student activities. Beyond this, UMBC recognizes its role as a public institution in the state and the local community, and can make appropriate facilities available for events sponsored by other groups so long as those events do not conflict with institutional priorities or adversely impact the University's resources.

(Am. Compl. Ex. L, at III.) This statement is consistent with the characterization of UMBC's open spaces like the Commons Terrace and North Lawn as limited public fora.

accomplish a compelling government interest. *Perry*, 460 U.S. at 45, 103 S. Ct. 948. Which test applies depends upon whether UMBC's actions under the former Facilities Use Policy were content-based or content-neutral.

> The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. . . . A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.

Ward, 491 U.S. at 791, 109 S. Ct. 2746.

The parties dispute whether Defendants' actions under the policy were content neutral. Defendants have presented several content-neutral reasons for the relocation of the April 2007 GAP display to the North Lawn, most of which are based on the size and format of the display. Defendants allege that they believed the large display was ill-fit for the oddly shaped Commons Terrace and that the large billboards of the display would block visibility, obscure elevation changes, and interfere with ingress and egress in this crowded location. (Defs.' Mem. 8.) Defendants also state that because of security concerns raised by Mr. Parsell based on his past experience presenting the display on other campuses, they believed the Terrace was an inappropriate location as there would not be room for students to move away from any altercation that may arise in response to the display. (*Id.* 7–8.)

Plaintiffs challenge the validity of Defendants' content-neutral reasons. They claim that Defendants incorrectly assumed, based on Defendant Calizo's visit to the GAP website, that the signs to be used in the April 2007 GAP display were larger than the signs Plaintiffs actually planned to use. (Pls.' Cross-Motion 38.) However, as noted by Defendants, Defendant Calizo raised her concern about the size of the signs in an email exchange with Mr. Vernet, and Mr. Vernet did not refute Defendant Calizo's misunderstanding. (Defs.' Mem. 6.)

Plaintiffs also claim that the size concerns raised by Defendant Calizo could not have been the true motivation for moving the display from the Commons Terrace to the North Lawn[15] because Defendant Calizo expressed approval of the Commons Terrace location for the display while she was under the impression the large signs would be used. (Pls.' Cross-Motion 13.) This characterization somewhat misconstrues Defendant Calizo's deposition testimony. Defendant Calizo stated that she viewed the Commons Terrace as a more suitable location than the University Center Plaza, Plaintiffs' initial request, because the Commons Terrace "is a reservable area, other events happen there." (Pls.' Cross-Motion Ex. 6, Calizo Dep. 60:3–4.) She also stated, "the display was too big, it would block access to and from buildings over in the [University Center Plaza] and we needed to make sure we didn't do the same over here [at the Commons Terrace]." (*Id.* 60:13–16.)

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[15] I note that Defendant Calizo was not actually involved in the decision to relocate the GAP display from the Commons Terrace to the North Lawn. (Pls.' Cross-Motion Ex. 6, Calizo Dep. 71:12–15.)

This testimony indicates that Defendant Calizo believed the Commons Terrace was a more appropriate location than the University Center Plaza for a student event reservation, but that concerns based on the size of the GAP display still needed to be addressed. Defendant Calizo similarly stated in her April 24, 2007 email to Alex Vernet, "Depending on how many [signs] you plan to have, we may need to rethink the space as it can't block the pedestrian access way. . . . There are still many questions that we need to resolve to make this happen." (Pls.' Cross-Motion Ex. 19.) Furthermore, Defendant Calizo, upon visiting the GAP website, would have become aware of the content of the display at the same time she learned about its size. Therefore, that Defendant Calizo still considered the Commons Terrace a viable option at that point indicates that her opinion was not altered by the content of the display.

Plaintiffs additionally challenge the validity of Defendants' stated reasons related to visibility, blocking of ingress and egress, and obscuring changes in elevation. Plaintiffs claim that these and other size-related concerns are unpersuasive because UMBC has allowed numerous other events that would implicate the same concerns to be held on the Commons Terrace. (Pls.' Cross-Motion 39.) The various events have featured anticipated crowds of up to two thousand and have required equipment including tables, chairs, sound systems, lighting, generators, cars, boats, dunk tanks, and teeter-totters. (*Id.*) Defendants distinguish the GAP display from these other events based on the size and format of the GAP signs. None of the events cited by Plaintiffs involved signs that were equal in size to either the full-size GAP display or the

mini-GAP display. (Defs.' Response Ex. 1, ¶ 3.) The equipment used in the events cited by Plaintiffs did not create the same form of visual barrier as the large billboards Defendants anticipated would be used in the GAP display. (Defs.' Response 15.) Though a Hummer vehicle was used in one event, it was not parked on the Terrace. (*Id.*) Similarly, several of the events cited by Plaintiffs as highly attended did not take place on the Commons Terrace, but the Terrace was reserved to maintain an open space outside the Commons during the events. (*Id.* 14–15.) Plaintiffs now explain that "as each GAP sign stands on its own, the entire display is modular, meaning that the size of the overall display and its footprint can be adjusted to accommodate the available space." (Pls.' Cross-Motion 9.) However, Plaintiffs have provided no evidence that this information was conveyed to Defendants prior to the April 2007 display or that any effort was made to correct Defendants' misunderstanding of the actual size of the display.

Plaintiffs point to Mr. Tkacik's reference to the display as a "controversial exhibit" as evidence that Defendants' actions were content-based. (Pls.' Cross-Motion 39.) Plaintiffs claim that the decision to move the display to the North Lawn as a response to security concerns was based on the controversial content of the display and that Defendants should have installed uniformed police officers while the display was exhibited at the Terrace, rather than succumbing to a "heckler's veto." *See Startzell v. City of Philadelphia,* 533 F.3d 183, 200 (3d Cir. 2008) ("A heckler's veto is an impermissible content-based restriction on speech where the speech is prohibited due to an anticipated disorderly or violent reaction of the

audience."). However, reference to the exhibit as controversial arose from Plaintiffs' letter alerting Defendants to the controversial nature of the display and the need for security.[16] Defendants should not be faulted for taking seriously the concerns raised by Plaintiffs. Furthermore, Plaintiffs were provided the opportunity to have security at their event if, in accordance with UMBC's policy for all student events, Plaintiffs paid for the security.

I find that Defendants' actions were taken "without reference to the content of the regulated speech." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984). Because the regulation of Plaintiffs' speech was content-neutral, it is constitutional if it is "narrowly tailored to serve a significant governmental interest, and . . . leave[s] open ample alternative channels for communication of the information." *Id.*

The interests expressed by Defendants include concerns regarding safety and traffic flow based on the size and dimensions of the GAP display. (Defs.' Mem. 8.) Defendants state that they were also alerted to security concerns by Mr. Parsell based on responses to prior GAP displays at other campuses. (*Id.* 7.) Defendants have explained that the area in front of the Commons Terrace is highly trafficked

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[16] For example, the April 19, 2007 letter from Rock for Life to UMBC states that "because [the Center for Bio-Ethical Reform, one of Rock for Life's 'supporting organizations'] suffered numerous unprovoked physical attacks from pro-abortion students on the first few campuses it visited, they now transport and employ their own crowd-control barricades." (Pls.' Cross-Motion Ex. 18.)

and have stated the need for clear pathways and unobstructed visibility.

Safety and security are legitimate interests of a university. *See Healy v. James*, 408 U.S. 169, 184, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972) ("[A] college has a legitimate interest in preventing disruption on the campus."); *Heffron v. Int'l Soc. for Krishna Consciousness*, 452 U.S. 640, 650–51, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981) ("[A] State's interest in protection the safety and convenience of persons using a public forum is a valid governmental objective. Furthermore, consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved.") (internal quotations and citations omitted); *Roberts v. Haragan*, 346 F. Supp. 2d at 864 (finding that a University's request that plaintiff change the location of his speech by approximately twenty feet due to vehicular and safety concerns near a major campus entrance was a legitimate, viewpoint-neutral location consideration that was narrowly tailored to meet a significant University interest). Concern about the display's large posters on a crowded and oddly shaped Commons Terrace presents significant interests of the university.

Plaintiffs contend that the relocation of the GAP display was not narrowly tailored to serve these government interests. (Pls.' Cross-Motion 46.) A regulation of speech is narrowly tailored when it does not "burden substantially more speech than is necessary to further the government's legitimate interests."

Ward, 491 U.S. at 799, 109 S. Ct. 2746. As stated by the Supreme Court, "restrictions on the time, place, or manner of protected speech are not invalid simply because there is some imaginable alternative that might be less burdensome on speech." *Id.* at 797, 109 S. Ct. 2746 (internal quotations and citations omitted). "The validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted." *Id.* at 800, 109 S. Ct. 2746 (internal quotations and citations omitted).

I find as a matter of law that Defendants' actions in this case were narrowly tailored to serve UMBC's significant interests. Plaintiffs were not excluded from delivering their protected speech on the UMBC campus at the time and manner of their choosing. Plaintiffs were only restricted from presenting their large exhibit in their preferred location on campus, but were permitted to present the exhibit at another location, the North Lawn, where Plaintiffs would still have access to their intended audience, but where Defendants' size and safety concerns would be alleviated. Defendants' actions in relocating the display were directly related to protecting their interests in safety, visibility, and security.

Plaintiffs argue that the North Lawn was an unacceptable alternative to the Commons Terrace. While it is clear from the record that the North Lawn is a less trafficked area of campus during the hours in which Plaintiffs presented the GAP display, it is still a location through which students and

other individuals pass and which is located near the library and the student residences. "While the alternatives may not be plaintiffs' first choice of expression, 'the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired.'" *Students Against Apartheid Coalition v. O'Neil*, 671 F. Supp. 1105, 1107 (W.D. Va. 1987) (*quoting Heffron*, 452 U.S. at 647, 101 S. Ct. 2559); *see also Ward*, 491 U.S. at 802, 109 S. Ct. 2746 ("That the city's limitations on volume may reduce to some degree the potential audience for respondent's speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate."). Given the anticipated size and format of Plaintiffs' display, the North Lawn was an acceptable alternative channel.

In sum, I find that Defendants' actions under the former Facilities Use Policy in April 2007 constituted a content-neutral reasonable time, place, and manner restriction on Plaintiffs' protected speech. Because the facts alleged, taken in the light most favorable to the party asserting the injury, do not show that Defendants' conduct violated a constitutional right, I do not need to proceed to the second prong of the qualified immunity analysis. Defendants are entitled to qualified immunity from Plaintiffs' First Amendment claims.

The same analysis is applicable to Plaintiffs' November 2007 request to reserve the Commons Terrace for their GAP display. While Defendants' size and safety concerns may have been lessened upon viewing the April 2007 display, these concerns still existed

and the relocation to the North Lawn was still a reasonable time, place, and manner regulation of Plaintiffs' protected speech. According to Defendants, it was not until the October 2008 reservation request that Plaintiffs explained to the administration the specific details of their planned event or expressed a willingness to and interest in adjusting the display to fit the space available on the Terrace. (Defs.' Mem. 12; Defs.' Mem. Ex. 4, Mendez Dep. 109:3–110:10, Jan. 22, 2009; Pls.' Cross-Motion Ex. 10, Tkacik Dep. 142:3–16, Nov. 21, 2008.) At that point, the parties were able to collaboratively plan for a GAP display on the Commons Terrace that was sensitive to Defendants' concerns based on the size and format of the display and the nature of the Terrace.

(2)

Plaintiffs also contend that Defendants violated the Equal Protection Clause of the Fourteenth Amendment, which states that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. In analyzing an equal protection claim, a court must apply strict scrutiny if the challenged action or regulation burdens a suspect class or a fundamental right. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973). If it does not, it must be examined "to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment." *Id.*

Because I find that Defendants' actions "did not

unconstitutionally burden [Plaintiffs'] First Amendment rights, rational basis review is appropriate." *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89, 99, n. 11 (3d Cir. 2009) (unpublished); *see also Johnson v. Robison*, 415 U.S. 361, 375 n. 14, 94 S. Ct. 1160, 39 L. Ed. 2d 389 (1974) ("Unquestionably, the free exercise of religion is a fundamental constitutional right. However, since we hold . . . that the Act does not violate appellee's right of free exercise of religion, we have no occasion to apply to the challenged classification a standard of scrutiny stricter than the traditional rational-basis test."); *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1019 (9th Cir. 2002) ("[R]ational basis review is appropriate unless the restriction unconstitutionally burdens a fundamental right, here, the right to free speech. Because we conclude that the restrictions do not unconstitutionally burden *Rubin*'s right of free speech, we find that neither do they violate his Equal Protection right."). Accordingly, because I find that Defendants' actions rationally further legitimate, articulated purposes, I find no equal protection violation.

As I find no genuine issue of material fact as to Plaintiffs' First Amendment or Fourteenth Amendment claim, Defendants' motion for summary judgment on Plaintiffs' as-applied claims is granted.

A separate order effecting the rulings made in this opinion is being entered herewith.

ORDER

For the reasons stated in the accompanying Opinion, it is, this 8th day of July, 2009,

ORDERED:

1. Defendants' motion for summary judgment is granted;

2. Plaintiffs' cross-motion for summary judgment is denied; and

3. Judgment is entered in favor of Defendants.

United States District Court,
D. **Maryland**.

ROCK FOR LIFE-UMBC, *et al.*,
Plaintiffs,

v.

Freeman A. HRABOWSKI, *et al.*,
Defendants.

Civil No. JFM 08-0811.
Jan. 26, 2009.

MEMORANDUM

Plaintiffs Rock for Life-UMBC ("Rock for Life"), Olivia Ricker, and Miguel Mendez have filed suit against the University of Maryland, Baltimore County ("UMBC") and several UMBC officials alleging violations of their First and Fourteenth Amendment rights. Plaintiffs challenge the constitutionality of a number of UMBC's former and current policies. Defendants contest Plaintiffs' ability to bring their claims due to issues of standing and mootness. Now pending is Defendants' motion for judgment on the pleadings.[1]

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[1] There are two other pending motions in this case. First, Plaintiffs have moved to amend their complaint. At a preliminary injunction hearing on August 8, 2008, Defendants notified the Court that the parties had negotiated revisions to several of the UMBC policies challenged in Plaintiffs' original complaint, and that the revised policies would take effect for the 2008–2009 school year. (Pls.' Mem. Supp. Pls.' Mot. for Leave to File First Am. Ver. Compl. ("Pls.' Mem. Supp. Mot. to Amend") at 3.) Plaintiffs' motion for preliminary injunction was then dismissed without prejudice as moot. (*See* Order, Sept. 22, 2008.)

The issues have been fully briefed and no hearing is deemed necessary. Local Rule 105.6 (D.Md. 2008). For the reasons stated below, Defendants' motion is

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Subsequent to this hearing and in light of further discovery, Plaintiffs now seek to amend the complaint to add two more UMBC officials as defendants, to correct the facts as to the size of the signs in Plaintiffs' display, to incorporate UMBC's policy changes, and to limit their claims for relief in response to the policy changes. (*See* Am. Compl.)

Plaintiffs initially sought injunctive, declaratory, and monetary relief from all the challenged UMBC policies (Compl. 24) and continue to do so for the Sexual Harassment Policy, which was not revised. Plaintiffs have removed from the proposed amended complaint their prayer for injunctive relief from the other challenged UMBC policies. The proposed amended complaint indicates that Plaintiffs still seek declaratory relief as to the previous versions of the revised policies (Am. Compl. 29), but Plaintiffs' moving papers state that they only seek monetary damages for the claims involving these policies. (Pls.' Mem. Supp. Mot. to Amend 4; Pls.' Reply Supp. Pls.' Mot. to Amend 4.)

I will grant Plaintiffs' motion to amend the complaint as there is no undue delay, bad faith, dilatory motive, or other inappropriate conduct on Plaintiffs' part in seeking to amend. *See Foman v. Davis,* 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). The amended complaint does not present new theories or claims for relief, does not prejudice Defendants' preparation of their defense, and is responsive to the developments surrounding the preliminary injunction hearing. This opinion will therefore render judgment on the pleadings in the amended complaint.

Also pending is Defendants' motion for protective order under Rule 26(c) of the Federal Rules of Civil Procedure. Defendants contest Plaintiffs' standing to challenge UMBC's Policy on Sexual Harassment and they therefore seek to prevent discovery related to the development and enforcement of the policy and any complaints filed under it. (Defs.' Mem. Supp. Mot. for Protective Order 3.) Because I find that Plaintiffs do not have standing to challenge this policy, I will grant Defendants' motion for protective order.

granted in part and denied in part.

I. Facts

For purposes of this motion, "[t]he factual allegations in Plaintiff[s'] complaint must be accepted as true and those facts must be construed in the light most favorable to the plaintiff[s]." *Edwards v. City of Goldsboro,* 178 F.3d 231, 244 (4th Cir. 1999). Plaintiff Rock for Life is an unincorporated association and registered student organization at UMBC.[2] (Am. Compl. ¶ 6.) Rock for Life's self-declared mission is "to defend the rights of the unborn and to awake consciousness and awareness in the UMBC community about the catastrophic effects of abortion for all persons involved and our moral duty to stop its practice." (*Id.*) Plaintiffs bring suit against various officials of UMBC[3] in both their individual and official capacities.[4] (Am. Compl. ¶¶ 9–16.)

This lawsuit arises out of Rock for Life's decision to

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[2] The other two plaintiffs, Olivia Ricker and Miguel Mendez, are current students at UMBC, and officers of Rock for Life. (Am. Compl. ¶¶ 7–8.)

[3] Defendants are: Freeman A. Hrabowski, UMBC President; Charles J. Fey, Vice President of Student Affairs; Nancy Young, Interim Vice President of Student Affairs; Lee Calizo, Acting Director of Student Life; Joseph Reiger, Executive Director of the Commons; Eric Engler, Acting Director of the Commons; and two defendants added in the amended complaint, Antonio Williams, Chief of Police at UMBC, and Lynne Schaefer, Vice President of Administration and Finance. (Am. Compl. ¶¶ 9–16.)

[4] There is one exception: Defendant Charles Fey is sued only in his individual capacity, presumably because he is no longer employed by UMBC. (Am. Compl. ¶ 10.)

set up a poster display on UMBC's campus. The poster display, designed as part of a pro-life advocacy program known as the Genocide Awareness Project ("GAP"), is distributed by an organization called the Center for Bio-Ethical Reform. (*Id.* ¶¶ 58–60.) The GAP is

> a traveling photo-mural exhibit which compares the contemporary genocide of abortion to historically recognized forms of genocide. It visits university campuses around the country to show as many students as possible what abortion actually does to unborn children and get them to think about abortion in a broader historical context.

(*Id.* Ex. P.) The GAP display is made up of twenty-four signs measuring four feet by eight feet in size. (Am. Compl. ¶ 78.)

In March 2007, Rock for Life—with the support of Leif Parsell, a representative of the Leadership Institute, a conservative advocacy organization—began planning to bring the GAP to UMBC. (*Id.* ¶ 64.) Rock for Life met with a UMBC employee in the Office of Student Life to request use of the space "directly in front of the University Center" in order "to maximize the number of students and faculty who would see the display." (*Id.* ¶ 65.) Rock for Life was informed that this space was available, and reserved the space for April 30, 2007. (*Id.* ¶ 66.) At the same time, Rock for Life was informed that, "due to the nature of the GAP display," Rock for Life would be required to have security at the event. (*Id.* ¶ 67.) Rock for Life was told by the UMBC police department that the "content of the GAP display's signs" necessitated a "uniformed officer

rather than a student marshal," (*id.* ¶ 68) and that Rock for Life would be responsible for the $50.00 per hour fees associated with this level of security.[5] (*Id.* ¶ 69.) In response to this news, Rock for Life, through its legal counsel, submitted a letter which stated that UMBC could not constitutionally charge Rock for Life for the cost of security. (Am. Compl. Ex. T.)

Shortly thereafter, Parsell, on behalf of Rock for Life, met with Chris Tkacik, UMBC's University Counsel. At that meeting, Tkacik "expressed concern that students would feel 'emotionally harassed' due to the GAP display and indicated that UMBC had the right to prevent such feelings." (Am. Compl. Ex. N ¶ 13.) Tkacik stated that while UMBC was a public university, it had the authority to move events without notice. (Am. Compl. ¶ 72; *see also id.* Ex. N ¶ 13.) Tkacik also stated that the GAP display should be moved from the space in front of the University Center to the patio of the Commons, which Parsell accepted as a suitable alternative since the patio was also a high-traffic area.[6] (Am. Compl. Ex. N ¶ 14.)

Around this time, UMBC's Associate Director of Student Life, defendant Lee Calizo, announced that

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[5] A student marshal would have cost $15.00 per hour. (Am. Compl. ¶ 69.)

[6] Rock for Life alleges that UMBC has allowed other groups to use the area in front of the University Center. (*See* Am. Compl. ¶ 77 (listing permitted events including political events, club solicitations, and "organizations holding up signs for various events and causes on campus").) However, Rock for Life does not indicate whether any of these exhibits were similar in size to the GAP display.

Rock for Life did *not* need security at the event. (Am. Compl. ¶ 75.) The UMBC Police Department did not, however, change their security recommendation. (*Id.*) Plaintiffs also allege that Calizo decided to move the GAP display to the patio area of the Commons with the justification that "the original location posed a fire hazard because the large signs might obstruct the exits of the surrounding buildings." (*Id.* ¶ 76.) Rock for Life challenges this rationale, explaining that the signs "were not going to be placed in front of the exits." (*Id.* ¶ 78.)

When Rock for Life began setting up the GAP display on the patio the day of the planned event, April 30, 2007, defendant Eric Engler, Director of the Commons, approached with several uniformed police officers. (*Id.* ¶ 81.) Engler informed Rock for Life that defendant Charles Fey, UMBC's Vice President of Student Affairs, had decided the previous Friday "that the [GAP] display had to be moved yet again to the large vacant field behind the Commons." (*Id.* ¶ 81–82.) According to Rock for Life,

> [t]he part of the field on the north side of the Commons where Rock for Life [ ] was ordered to set up the GAP display was well away from the sidewalks where students occasionally passed by. . . . Due to the much lower level of foot traffic through this area, the move substantially impaired Rock for Life['s] ability to confront students and faculty with its message. . . .

(*Id.* ¶ 84, 85.) After approximately two hours, Rock for Life was permitted to move its display "closer to the north side of the Commons so as to be closer to the sidewalks where students occasionally passed, but it

was never allowed to move to the patio area of the Commons." (*Id.* ¶ 88.) The day ended without further incident.

In November 2007, Rock for Life began plans for a second GAP display. (*Id.* ¶ 91.) Rock for Life asked UMBC for permission to set up the display on the patio area of the Commons, believing that their first choice site, the aforementioned space in front of the University Center, would be denied to them. (*Id.*) On November 16, 2007, Rock for Life's request was denied by UMBC's University Counsel. (*Id.* ¶ 93.) Rock for Life was informed that any future displays would be permitted to occur *only* on the north side of the Commons. (*Id.*) Because Rock for Life was displeased with this location, they cancelled plans for the second GAP display.[7] (*Id.*)

Plaintiffs' legal challenges focus on UMBC's internal policies as well as their decision-making with respect to facilities use. At the preliminary injunction hearing on August 8, 2008, Defendants informed the Court that UMBC was voluntarily changing its Code of Student Conduct, Code of Student Organization Conduct, and Residential Life policies (collectively, "Codes of Conduct") to remove the terms "intimidation," "emotional harassment," and "emotional safety" which Plaintiffs challenged as unconstitutionally vague and overbroad. (Defs.' Opp'n to Pls.' Mot. for Leave to File First Am. Ver. Compl. 1.) Defendants

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[7] Rock for Life also highlights in comparison Involvement Fest, an event held by UMBC on September 5, 2007 on the patio area of the Commons, which allegedly involved "substantially more space than Rock for Life [ ] required for the GAP display." (Am. Compl. ¶ 90.)

also informed the Court at that time of changes to UMBC's Policy on Facilities Use, which now specifies the circumstances under which a scheduled event can be moved. (*Id.* 1–2.) Plaintiffs' claims are directed at the former versions of these policies, as well as the unrevised Policy on Sexual Harassment. The policies challenged by Plaintiffs are outlined below.

A. The Policy on Facilities Use

UMBC's former policy on use of university facilities provided, in relevant part, that:

> The Registrar's and Summer and Winter Programs Offices reserve the right to make changes to academic space assignments at any time. . . . Nonacademic space is scheduled through Campus Scheduling and Guest Services. Requests must be submitted appropriately through the web-based form and are *scheduled based on room appropriateness and on a first come, first served basis.* Campus Scheduling has *the final authority on scheduling all non-academic requests and has the right to deny requests dependent upon circumstances.*

(Am. Compl. Ex. L at 2 (emphasis added).) The former Policy on Facilities Use allowed for UMBC to "move an event to a different location *without notice*" and provided that UMBC would not be "responsible for any costs incurred by a user resulting from a change in location." (*Id.* at 3 (emphasis added).) The revised Policy on Facilities Use delineates specific circumstances when an event can be moved. (Am. Compl. Ex. M at 3.)

Students could be punished for "unauthorized entry or presence in or on University property," including "failure or refusal to leave University grounds, or a specific portion thereof, or a University facility when requested by an authorized University official." (Am. Compl. ¶ 52.) Punishment for violation of this provision ranged from disciplinary reprimand to suspension or dismissal. (*Id.* ¶ 53.)

B. The Codes of Conduct

Although these policies have since been revised, Plaintiffs challenge the validity of and seek damages from the former versions of the Code of Student Conduct, the Residential Life Policies, and the Code of Student Organization Conduct. The former Code of Student Conduct stated:

> This rule prohibits, but is not limited to, the following:
>
> . . .
>
> e) intimidation;
>
> f) physical or emotional harassment;
>
> g) sexual harassment or misconduct. . . .

(Am. Compl. Ex. E at 7–8.) The former Residential Life Policies and the former Code of Student Organization Conduct provided that students must not engage in "Behaviors Which Jeopardize the Emotional or Physical Safety of Self or Others," including "intimidation," "physical or emotional harassment," and "sexual harassment or misconduct. . . ." (Am. Compl. Ex. G at 49; Ex. I at 4.) The Codes of Conduct enumerated potential consequences for violations of any of these policies, including reprimand, probation, suspension, dis-

missal, and termination of the student housing contract. (Am. Compl. Ex. E at 12–13; Ex. G at 49; Ex. I at 7.) The former Codes of Conduct did not define the terms "intimidation," "emotional harassment," or "emotional safety." (*See generally* Am. Compl. Ex. E, G, I.)

C. The Policy on Sexual Harassment

Plaintiffs challenge the constitutionality of UMBC's Policy on Sexual Harassment, arguing that its definition of sexual harassment is vague and overbroad. (Am. Compl. ¶ 105.) The Policy states:

> For the purposes of this Policy, sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:
>
> > 1. Such conduct has the purpose or effect of unreasonably interfering with an individual's academic or work performance, or of creating an intimidating, hostile, or offensive educational or working environment. . . .

Am. Compl. Ex. C at 1. The potential consequences for violation of the Policy on Sexual Harassment are as follows:

> Sanctions against UMBC faculty and staff for violation of this sexual harassment policy may range from formal reprimand to termination. Likewise, sanctions against UMBC students, for violations of this sexual harassment policy, may range from formal reprimand to suspension or expulsion from UMBC educational programs or

extra curricula [sic] activities.

(*Id.*)

* * * * *

Plaintiffs claim that UMBC's policies have violated their First Amendment rights of freedom of speech and assembly and their Fourteenth Amendment rights of due process and equal protection. In their motion for judgment on the pleadings, Defendants contest Plaintiffs' standing to challenge these policies.

II. Standard of Review

Under Rule 12(c), a party may move for judgment on the pleadings "[a]fter the pleadings are closed but within such time as not to delay the trial." Fed. R. Civ. P. 12(c). A district court applies the same standard in evaluating a Rule 12(c) motion for judgment on the pleadings as it applies in evaluating a motion to dismiss pursuant to Rule 12(b)(6). *Burbach Broad. Co. v. Elkins Radio Corp.*, 278 F.3d 401, 405 (4th Cir. 2002). This standard requires the court to assume that the facts alleged in the complaint are true and to draw all reasonable factual inferences in the nonmoving party's favor. *Id.* The purpose of a Rule 12(b)(6) or 12(c) motion is to test the sufficiency of a complaint, not to "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party v. Martin,* 980 F.2d 943, 952 (4th Cir. 1992). "Judgment should be entered when the pleadings, construing the facts in the light most favorable to the non-moving party, fail to state any cognizable claim for relief, and the matter can, therefore, be de-

cided as a matter of law." *O'Ryan v. Dehler Mfg. Co.*, 99 F. Supp. 2d 714, 717–718 (E.D. Va. 2000) (*citing Zeran v. America Online, Inc.*, 129 F.3d 327, 329 (4th Cir. 1997)).

III. Standing

"[T]he irreducible constitutional minimum of standing contains three elements": (1) an "injury in fact," meaning an injury that is "concrete and particularized" and "actual or imminent"; (2) a "causal connection between the injury and the conduct complained of," meaning that the injury is "fairly traceable" to the defendant's actions; and (3) a likelihood that the injury "will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (internal quotation marks omitted). These prudential limitations are sometimes relaxed "because they are outweighed by competing considerations. Among those weightier considerations within the context of the First Amendment is the danger of chilling free speech." *Burke v. City of Charleston*, 139 F.3d 401, 405 n. 2 (4th Cir. 1998).

Normally, a plaintiff may only bring claims on his own behalf and not for injuries incurred by some third party. However, the standing doctrine allows plaintiffs who bring First Amendment overbreadth claims to challenge a statute, even where it is constitutional as applied to that particular plaintiff, based on "a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93

S. Ct. 2908, 37 L. Ed. 2d 830 (1973) ("[T]he Court has altered its traditional rules of standing to permit—in the First Amendment area—'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'") (*quoting Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965)). "[The overbreadth] doctrine, however, only assists plaintiffs who have suffered some injury from application of the contested provision to begin with." *Gilles v. Torgersen*, 71 F.3d 497, 501 (4th Cir. 1995).

Under the relaxed First Amendment standing doctrine, a plaintiff may meet the injury in fact requirement if she can make one of two showings. First, she may satisfy the injury in fact requirement if she has alleged an "intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by the statute, and there exists a credible threat of prosecution." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979). Second, she may also satisfy the requirement if she can demonstrate that she "is chilled from exercising her right to free expression or forgoes expression in order to avoid enforcement consequences." *N.H. Right to Life PAC v. Gardner*, 99 F.3d 8, 13. (1st Cir. 1996). However, each of these showings "requires a credible threat—as opposed to a hypothetical possibility—that the challenged statute will be enforced to the plaintiff's detriment if she exercises her First Amendment rights." *Ramirez v. Ramos*, 438 F.3d 92, 98 (1st Cir. 2006). "A party's subjective fear that she may be prosecuted for engaging in expressive activity will not be held to constitute an injury for

standing purposes unless that fear is objectively reasonable." *N.H. Right to Life,* 99 F.3d at 14.

There is "no doubt that the First Amendment rights of speech and association extend to the campuses of state universities." *Widmar v. Vincent,* 454 U.S. 263, 268-69, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981). However, as the Court stated in *Widmar*:

> A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.

454 U.S. at 268 n. 5, 102 S. Ct. 269. Because UMBC has created a forum generally open to student groups (Am. Compl. ¶ 77), it may not seek to enforce content-based exclusion of a particular student group's speech; its regulation of speech must be content-neutral. 454 U.S. at 277, 102 S. Ct. 269.

Here, Plaintiffs allege injuries stemming from several of UMBC's allegedly unconstitutional current and former student policies: (A) the former Policy on Facilities Use; (B) the former Codes of Conduct; and (C) the Policy on Sexual Harassment. I will address Plaintiffs' standing to challenge each of these policies in turn.

A. Policy on Facilities Use

Plaintiffs challenge the former Policy on Facilities Use on both First and Fourteenth Amendment grounds. They claim a First Amendment violation because the policy created an unreasonable time, place, and manner restriction on their speech by giving University officials unbridled discretion to deny requests for the use of campus facilities and to move Plaintiffs' events and displays without notice or reimbursement. (Am. Compl. ¶ 116.) They claim that the policy also created a chilling effect on their constitutionally protected speech as a result of their fear of discrimination and prosecution under this and other policies. (*Id.* ¶ 102.) Plaintiffs' Fourteenth Amendment Equal Protection claim rests upon the discriminatory application of the policy that they allege occurred when University officials instructed them to move their GAP display to a "nearly deserted area of campus" and when the officials told Plaintiffs that any such events in the future would also be assigned to that area. (*Id.* ¶¶ 2, 102.) Plaintiffs argue that Defendants used the former Policy on Facilities Use "to treat Plaintiffs' student organization differently than similarly situated student organizations" and "to favor speech and assembly of other less controversial and more politically favored groups." (*Id.* ¶ 122.)

Defendants argue that Plaintiffs' claims based on the former Policy on Facilities Use are moot since the policy has been changed to address their concerns. (Defs.' Mot. J. on the Pleadings 1.) While this would be true as to Plaintiffs' claims for injunctive relief (which have been removed from the Amended Complaint), it is not true with respect to Plaintiffs' claims

for compensatory and nominal damages based on the application of the policy to them. *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 429 n. 4 (4th Cir. 2007). Because Plaintiffs allege a personal injury (namely, the relocation of their GAP display first from the University Center to the patio of the Commons, and then again to the north lawn of the Commons, as well as the assignment of any similar future events to the north lawn) that was caused by UMBC's allegedly unconstitutional application of the former Policy on Facilities Use and that is redressable by damages, Plaintiffs are a proper party to bring a suit challenging that policy. Regardless of whether Plaintiffs' claim would ultimately succeed on the merits, they have met the requirements for standing. *See Warth v. Seldin*, 422 U.S. 490, 500, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975) ("[S]tanding in no way depends upon the merits of the plaintiff's contention that particular conduct is illegal. . . ."). Defendants' motion for judgment on the pleadings is therefore denied as to Plaintiffs' claims for damages with respect to UMBC's Policy on Facilities Use.

B. Codes of Conduct

Since the terms "emotional harassment," "harassment," and "intimidation" have been removed from UMBC's Codes of Conduct, Plaintiffs no longer seek injunctive relief with respect to these policies, nor do they challenge the revised Codes of Conduct as unconstitutionally vague or overbroad. (Pls.' Mem. Supp. Mot. to Amend Compl. 2.) Plaintiffs maintain their claim for damages for alleged violations of their rights to free speech, assembly, and due process of law under the former Codes of Conduct. (Am. Compl. 29.) They

allege that the former Codes violated the First Amendment by allowing viewpoint discrimination and by failing to provide "any objective guidelines by which Plaintiffs could guide their behavior." (*Id.* ¶¶ 115, 114.) Their Fourteenth Amendment due process claim is based on the alleged vagueness and overbreadth of the former Codes of Conduct. (*Id.* ¶ 120.)

Plaintiffs do not allege that they were punished under the Codes of Conduct, but they allege a realistic fear of enforcement of these policies against them. (*Id.* ¶ 102.) This fear is based on the discrimination Plaintiffs allege they were subjected to under the former Policy on Facilities Use, as discussed above, as well as the comment made by Defendant Tkacik to Parsell that he was concerned students would feel "emotionally harassed" because of the GAP display. (*Id.* ¶¶ 102, 73.)

Defendants contest Plaintiffs' ability to show standing based on "one ambiguous factual reference in the Complaint to 'emotional harassment',. . . ." (Defs.' Mem. Supp. Mot. for J. on the Pleadings 8.) Even viewing the facts in the light most favorable to Plaintiffs, as is required at this stage of the litigation, Plaintiffs have still failed to satisfy the injury-in-fact element required to show standing to challenge these policies. In *Morrison v. Board of Education,* the court analyzed the issue of "what 'more' might be required to substantiate an otherwise-subjective allegation of chill, such that a litigant would demonstrate a proper injury-in-fact." 521 F.3d 602, 609 (6th Cir. 2008). The court provided the following non-exhaustive list of examples of injury-in-fact: *County Sec. Agency v. Ohio Dep't of Commerce*, 296 F.3d 477, 482-83 (6th Cir. 2002) (the issuance of a temporary restraining order); *Howard*

Gault Co. v. Tex. Rural Legal Aid, Inc., 848 F.2d 544, 558 (5th Cir. 1988) (same); *White v. Lee*, 227 F.3d 1214, 1226, 1228 (9th Cir. 2000) (an eight-month investigation into the activities and beliefs of the plaintiffs by Department of Housing and Urban Development officials); *Nat'l Commodity and Barter Ass'n v. Archer*, 31 F.3d 1521, 1530 (10th Cir. 1994) ("numerous alleged seizures of membership lists and other property"). The court in *Morrison* concluded that "[e]ven this abbreviated list confirms that for purposes of standing, subjective chill requires some specific action on the part of the defendant in order for the litigant to demonstrate an injury-in-fact." 521 F.3d at 609.

In the present case, Plaintiffs have not been subjected to any specific action by Defendants in relation to the Codes of Conduct. Defendant Tkacik's comment does not rise to the level of a concrete threat of prosecution, and the relocation of the GAP display was carried out under the Policy on Facilities Use, not the Codes of Conduct. (*See* Am. Compl. ¶ 102.) Standing to challenge the former Policy on Facilities Use does not "provide [ ] a passport to explore the constitutionality" of other UMBC policies, such as the Codes of Conduct. *Covenant Media of S.C.*, 493 F.3d at 429. "Although there is broad latitude given facial challenges in the First Amendment context, a plaintiff must establish that he has standing to challenge each provision of an ordinance by showing that he was injured by application of those provisions." *Id.* at 430 (internal citations and quotations omitted).

Plaintiffs have failed to show that they suffered an injury-in-fact through the application or threat of application of the former Codes of Conduct beyond sub-

jective chill. They therefore lack standing to challenge the constitutionality of the policies.

C. Policy on Sexual Harassment

Plaintiffs seek damages as well as injunctive and declaratory relief from UMBC's allegedly unconstitutional Policy on Sexual Harassment. (Am. Compl. 29.) However, Defendants' motion for judgment on the pleadings is granted as to these claims because Plaintiffs do not have standing to challenge this policy. They do not allege injury as a result of the Policy on Sexual Harassment being applied to them. Nor do they meet the relaxed standing requirements applied in the context of a facial First Amendment challenge. They have therefore failed to show that they suffered any injury in fact that is actual or imminent.

Plaintiffs have not shown that any UMBC official, in relocating the GAP display or in any other interaction with Plaintiffs, applied or threatened to apply UMBC's Policy on Sexual Harassment. Nor have they shown that any other student has been punished or has been threatened with punishment under this policy for activity similar to Plaintiffs'. The only evidence Plaintiffs provide to support their claim of a chilling effect on their speech based on a realistic fear of prosecution under the Policy on Sexual Harassment is a "Weekly Crime Log" listing incidents investigated by UMBC campus police. (Am. Compl. Ex. Y.) The log includes investigations into incidents classified as "harassment" and "acts of intolerance." (*Id.*) The log does not refer to the Policy on Sexual Harassment or dis-

cuss punishment for any of the incidents listed.[8] (*Id.*) It sheds no light on the likelihood of enforcement of the Policy on Sexual Harassment against Plaintiffs or the objective reasonableness of Plaintiffs' fear of punishment under the policy. This evidence therefore provides no support for Plaintiffs' claim.

Because Plaintiffs have "never stated an intention to engage in any activity that could reasonably be construed to fall within the confines of" the Policy on Sexual Harassment, they have "failed to satisfy even the relaxed standing requirements reserved for facial First Amendment challenges." *Ramirez*, 438 F.3d at 99. None of Plaintiffs' activities, including the GAP display and other speech expressing their anti-abortion message, constitute sexual harassment under a straightforward reading of the UMBC policy's prohibition of "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. . . ." (Am. Compl. Ex. C.) As none of Plaintiffs' activities are even arguably within the policy's reach, Plaintiffs lack standing to challenge the constitutionality of the Policy on Sexual Harassment.[9]

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[8] These incidents range from racially offensive remarks being written on student message boards to a complaint of offensive emailing to "isolated incidents of harassment by a UMBC student organization's members and affiliates." (Am. Compl. Ex. Y.)

[9] I note that these plaintiffs' inability to challenge the constitutionality of the UMBC Policy on Sexual Harassment due to lack of standing is not a decision on the merits of their claim. Similar university sexual harassment policies have been found unconstitutional in cases brought by appropriate plaintiffs. *See, e.g., DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (finding Temple University's similar sexual harassment policy un-

A separate order effecting the rulings made in this opinion is being entered herewith.

ORDER

For the reasons stated in the accompanying Opinion, it is, this 26th day of January, 2009,

ORDERED:

1. Defendants' motion for judgment on the pleadings on Plaintiffs' first, second, and fourth causes of action is granted;

2. Defendants' motion for judgment on the pleadings on Plaintiffs' third and fifth causes of action is granted as to UMBC's Codes of Conduct, but denied as to UMBC's Policy on Facilities Use;

3. Plaintiffs' motion to amend the complaint is granted; and

4. Defendants' motion for protective order is granted.

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constitutionally overbroad in a challenge brought by a student who had standing because his class discussions of women in the military were chilled by Temple's policy).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED: JANUARY 7, 2011

No. 09-1892
(1:08-cv-00811-JFM)

ROCK FOR LIFE-UMBC, an unincorporated student association, for itself and its individual members; OLIVIA RICKER, individually and as an officer of Rock for Life-UMBC; MIGUEL MÉNDEZ, individually and as an officer of Rock for Life-UMBC,

Plaintiffs-Appellants,

v.

FREEMAN A. HRABOWSKI, individually and in his capacity as President of University of Maryland, Baltimore County; CHARLES J. FEY, in his individual capacity as former Vice President of Student Affairs at University of Maryland, Baltimore County; NANCY L. YOUNG, individually and in her official capacity as Interim Vice President of Student Affairs at the University of Maryland, Baltimore County; LEE A. CALIZO, individually and in her official capacity as Acting Director of Student Life at University of Maryland, Baltimore County; JOSEPH REIGER, individually and in his official capacity as Executive Director of the Commons at University of Maryland, Baltimore County; ERIC ENGLER, individually and in his official capacity as Acting Director of the Commons at University of Maryland, Baltimore County; LYNNE SCHAEFER, individually and in her official capacity as Vice President of Administration and Finance at the University of

Maryland, Baltimore County; ANTONIO WILLIAMS, individually and in his official capacity as Chief of Police for the University of Maryland, Baltimore County Police Department,

Defendants-Appellees.

MANDATE

The judgment of this Court, entered December 16, 2010, takes effect today.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/ Patricia S. Connor, Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
BALTIMORE DIVISION

ROCK FOR LIFE-UMBC, an unincorporated student association, for itself and its individual members;

5405 Old Frederick Road
Baltimore, Md. 21229
Baltimore County

OLIVIA RICKER, individually and as an officer of Rock for Life-UMBC;

13 North Rolling Road
Baltimore, Md. 21228
Baltimore County

MIGUEL MÉNDEZ, individually and as an officer of Rock for Life-UMBC,

1203 Martin Ct., Apt. L
Baltimore, Md. 21229
Baltimore County

Plaintiffs,

vs.

FREEMAN A. HRABOWSKI, individually and in his official capacity as President of University of Maryland, Baltimore County; **CHARLES J. FEY**, in his individual capac-

CASE NO.: 1:08-cv-00811-JFM

THE HONORABLE J. FREDERICK MOTZ

FIRST AMENDED VERIFIED COMPLAINT;

EXHIBITS A–Y;

DEMAND FOR JURY TRIAL

ity as former Vice President of Student Affairs at the University of Maryland, Baltimore County; **NANCY L. YOUNG**, individually and in her official capacity as Interim Vice President of Student Affairs at the University of Maryland, Baltimore County; **LYNNE SCHAEFER**, individually and in her official capacity as Vice President of Administration and Finance at the University of Maryland, Baltimore County; **LEE A. CALIZO**, individually and in her official capacity as Acting Director of Student Life at University of Maryland, Baltimore County; **JOSEPH REIGER,** individually and in his official capacity as Executive Director of the Commons at University of Maryland, Baltimore County; **ERIC ENGLER**, individually and in his official capacity as Acting Director of the Commons at University of Maryland, Baltimore County; **ANTONIO WILLIAMS**, individually and in his official capacity as Chief of Police for the University of Maryland,

Baltimore County Police Department,

1000 Hilltop Circle
Baltimore, Md. 21250
Baltimore County

Defendants.

FIRST AMENDED VERIFIED COMPLAINT

COME NOW PLAINTIFFS, Rock for Life-UMBC, Olivia Ricker, and Miguel Méndez, by and through their counsel, and for their Complaint against Defendants Freeman A. Hrabowski, President of the University of Maryland, Baltimore County (UMBC); Charles J. Fey, former Vice President of Student Affairs at UMBC; Nancy L. Young, interim Vice President of Student Affairs at UMBC; Lynne Schaefer, Vice President of Finance and Administration at UMBC; Lee A. Calizo, Acting Director of Student Life at UMBC; Joseph Reiger, Executive Director of the Commons at UMBC; Eric Engler, Acting Director of the Commons at UMBC; and Antonio Williams, Chief of Police at UMBC, hereby allege and aver as follows:

INTRODUCTION

1. The University of Maryland, Baltimore County (University or UMBC) holds itself out as a dynamic "honors university" in the University System of Maryland. This reputation leads many men and women—young and old—to study at its campus. But when students matriculate, they enter an environment that squelches their First Amendment freedoms to speak, associate, and assemble. The University

threatened to expel, suspend, or sanction any student or student organization that engages in speech that constitutes "intimidation," a term that UMBC does not define. It also prohibits any speech that "has the purpose or effect . . . of creating an intimidating, hostile, or offensive educational or working environment" without defining those terms and without placing any reasonable or objective limits on their scope. Thus, any speech that the University deems to be "offensive" or to have an "offensive" purpose can be punished, regardless of whether or not it actually disrupts the campus. As a result, UMBC students such as Plaintiffs have less freedom to speak and express themselves on the UMBC campus than do children at most public secondary schools.

2. In addition to sanctioning disfavored speech, the University claimed the unchecked right to regulate the location of student expression and assembly on campus. According to University policies, although a student or student organization may reserve a campus facility to hold an event on campus, UMBC officials "may move an event to a different location without notice." Thus, the University claimed unlimited discretion to change an event's location without notice to the student-organizers and without reimbursing them for the costs resulting from the change. In fact, when Plaintiff Rock for Life-UMBC attempted to hold a pro-life event on campus, Defendants used this unbridled discretion to engage in blatant viewpoint discrimination by moving the event to an undesirable, nearly deserted area of campus, and they informed Plaintiffs that any future such events will also be assigned to this nearly deserted area. By creating and implementing these policies, Defendants have established a

system by which they can selectively promote favored student expression and impede, restrict, or eliminate disfavored expression.

JURISDICTION & VENUE

3. This Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and the Civil Rights Act of 1871, 42 U.S.C. §§ 1983 and 1988.

4. This Court has jurisdiction to award damages pursuant to 28 U.S.C. § 1343, declaratory relief pursuant to 28 U.S.C. § 2201, injunctive relief pursuant to 42 U.S.C. § 1983 and Fed. R. Civ. P. 65, and attorneys fees and costs pursuant to 28 U.S.C. § 1988.

5. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because Defendants reside in this district and/or all of the acts described in this Complaint occurred in this district.

PLAINTIFFS

6. Plaintiff Rock for Life-UMBC is an unincorporated student association at the University of Maryland, Baltimore County. Rock for Life-UMBC is a student organization founded to defend the right of the unborn and to awake consciousness and awareness in the UMBC community about the catastrophic effects of abortion for all persons involved and our moral duty to stop its practice. Rock for Life-UMBC is a registered student organization (RSO) of the University of Maryland, Baltimore County, and is thereby entitled to all the rights, privileges, and benefits that accompany that status. Rock for

Life-UMBC brings this action on its own behalf and on behalf of its individual student members.

7. Plaintiff Olivia Ricker is a rising senior at UMBC. During the 2007–08 school year, she serves as Vice-President of Rock for Life-UMBC. Ms. Ricker brings this action on her own behalf and as an officer of Rock for Life-UMBC.

8. Plaintiff Miguel Méndez is a rising third year graduate student at UMBC. During the 2007–08 school year, he serves as Secretary of Rock for Life-UMBC. Mr. Méndez brings this action on his own behalf and as an officer of Rock for Life-UMBC.

DEFENDANTS

9. Defendant Freeman A. Hrabowski is, and was at all times relevant to this Complaint, the President of the University of Maryland, Baltimore County, a public university organized and existing under the laws of the State of Maryland. As such, Defendant Hrabowski is responsible for overseeing campus administration and policy-making, including the policies and procedures contained herein. Defendant Hrabowski is sued both in his individual and official capacities.

10. Defendant Charles J. Fey was at some of the times relevant to this Complaint, Vice President of Student Affairs at the University of Maryland, Baltimore County. As such, Defendant Fey was responsible for overseeing campus administration and policy-making, including the policies and procedures contained herein. Defendant Fey is sued in his individual capacity.

11. Defendant Nancy Young is, and was at some of the times relevant to this Complaint, the Interim Vice President of Student Affairs at the University of Maryland, Baltimore County. As such, Defendant Young is responsible for overseeing campus administration and policy-making, including the policies and procedures contained herein. Defendant Young is sued both in her individual and official capacities.

12. Defendant Lynne Schaefer is, and was during some of the times relevant to this Complaint, the Vice President of Administration and Finance at the University of Maryland, Baltimore County. As such, Defendant Schaeffer is responsible for overseeing campus administration and policy-making, including the policies and procedures contained herein. Defendant Schaefer is sued both in her individual and official capacities.

13. Defendant Lee Calizo is the Acting Director of Student Life at the University of Maryland, Baltimore County. As such, Defendant Calizo is responsible for overseeing campus administration, including the policies and procedures contained herein. During some of the times relevant to this Complaint, Ms. Calizo served as Associate Director of Student Life at UMBC. Defendant Calizo is sued both in her individual and official capacities.

14. Defendant Joseph Reiger is, and was at all times relevant to this Complaint, the Executive Director of the Commons at the University of Maryland, Baltimore County. As such, Defendant Reiger is responsible for overseeing campus administration, including the policies and procedures contained herein. Defendant Reiger is sued both in his individual and

official capacities.

15. Defendant Eric Engler is, and was at all times relevant to this Complaint, the Acting Director of the Commons at the University of Maryland, Baltimore County. As such, Defendant Engler is responsible for overseeing campus administration, including the policies and procedures contained herein. Defendant Engler is sued both in his individual and official capacities.

16. Defendant Antonio Williams is, and was during at least some of the times relevant to this Complaint, the Chief of Police at the University of Maryland, Baltimore County. As such, Defendant Williams is responsible for overseeing campus administration and policy-making and for enforcing campus policies, including the policies and procedures contained herein. Defendant Williams is sued both in his individual and official capacities.

FACTUAL BACKGROUND

I. UNIVERSITY POLICIES

A. UNIVERSITY MISSION & VISION

17. The University of Maryland, Baltimore County purports to be "a dynamic public research institution integrating teaching, research and service to benefit the citizens of Maryland." As an Honors University in the University System of Maryland, UMBC claims that it offers "academically talented students a strong undergraduate liberal arts foundation that prepares them for graduate and professional study, entry into the workforce, and community service and leadership." In its mission statement, UMBC also states that it is "dedi-

cated to cultural and ethnic diversity, social responsibility and lifelong learning." A copy of UMBC's mission statement is attached as Exhibit A to the Complaint.

18. In its vision statement, UMBC states that it "seeks to become the best public research university of [its] size by combining the traditions of the liberal arts academy, the creative intensity of the research university, and the social responsibility of the public university." It also seeks to "be known for integrating research, teaching and learning, and civic engagement so that each advances the others for the benefit of society." A copy of UMBC's vision statement is included as part of Exhibit A.

B. UNIVERSITY SEXUAL HARASSMENT POLICY

19. In 1992, the University System of Maryland (USM) Board of Regents adopted a policy condemning sexual harassment and declaring that it is "inconsistent with commitment to the goals of quality, access and choice that characterize the activities of the System and its constituent institutions." This policy mandated that constituent institutions develop procedures for prohibiting sexual harassment. A copy of the University of Maryland System Policy on Sexual Harassment is attached as Exhibit B to this Complaint.

20. In response, UMBC adopted a "policy and commitment . . . to maintain a campus environment which is free of discrimination and permits equal access and opportunity for all campus members. Sexual harassment, a form of sex discrimination, is prohibited." A copy of UMBC's Policy on Sexual Harassment is attached as Exhibit C to this Complaint.

21. On information and belief, Defendant Hrabowski or one of his predecessors authored, approved, or supervised the creation of this sexual harassment policy.

22. UMBC's Policy on Sexual Harassment applies to everyone associated with the University, and violating this policy can result in expulsion from University activities:

> Sanctions against UMBC faculty and staff for violations of this sexual harassment policy may range from formal reprimand to termination. Likewise, sanctions against UMBC students, for violations of this sexual harassment policy, may range from formal reprimand to suspension or expulsion from UMBC educational programs or extracurricular activities.

(Compl. Ex. C at 3.)

23. UMBC defines sexual harassment the same way for students, faculty, staff, and other employees:

> For the purposes of this Policy, sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:
>
> > 1. Such conduct has the ***purpose or effect*** of unreasonably interfering with an individual's academic or work performance, or ***of creating an intimidating, hostile, or offensive educational or work environment***; . . .

(Compl. Ex. C at 3 (emphasis added).)

24. To date, Defendants' sexual harassment policy has not changed.

C. UNIVERSITY SPEECH CODE POLICIES

25. Until approximately 19 September 2008, Defendants maintained several repressive speech code policies. These policies are delineated *infra* Parts I.C.1.a, I.C.2.a, I.C.3.a.

26. On 8 August 2008, this Court held a hearing on Plaintiffs' Motion for Preliminary Injunction. At this hearing, Defendants agreed to revise portions of their unconstitutional speech code policies, subject to the approval of UMBC officials.

27. On 19 September 2008, Defendants confirmed that UMBC had accepted in substance the policy revisions the parties negotiated on 8 August 2008. These new policies are delineated *infra* Parts I.C.1.b, I.C.2.b, I.C.3.b.

1. UMBC's Code of Student Conduct

28. In 1990, the USM Board of Regents adopted a policy empowering the presidents of the constituent institutions to establish rules governing student affairs, including rules governing residential life and student organizations. This policy provides:

> Each President shall establish rules for the administration of student affairs, including, but not limited to, resident life, student discipline, and the handling of student grievances at the institution. Such rules shall serve to further educational and cultural objectives through

> student government and activities. Student organizations, including fraternities and sororities, may be established at each institution subject to applicable policies of the Regents and of the institution.

A copy of the USM Policy on Student Affairs is attached as Exhibit D to this Complaint.

a. UMBC's Former Code of Student Conduct

29. On information and belief, Defendants Hrabowski, Fey, Young, Calizo, or their predecessors in office drafted, adopted, approved, or supervised the creation of UMBC's Code of Student Conduct pursuant to the USM Board of Regents policy referenced in paragraph 28. A copy of the UMBC Code of Student Conduct in effect until approximately 19 September 2008 is attached as Exhibit E to this Complaint.

30. Until about 19 September 2008, all students had to comply with UMBC's former Code of Student Conduct, under which a student could have been sanctioned for engaging in "***behavior which jeopardize[d] the emotional*** or physical ***safety of self or others***." (Capitalization altered.) Prohibited behavior included, but was not limited to: ". . . e) ***intimidation***; f) physical or ***emotional harassment***; [or] g) sexual harassment." (*See* Compl. Ex. E at 13–14 (emphasis added).) This policy did not define "intimidation" or "emotional harassment."

31. Under the UMBC Code of Student Conduct, students who committed the offenses described in paragraphs 28–30 above could have received sanctions

ranging from disciplinary reprimand to probation to suspension to dismissal. (Compl. Ex. E at 18–19.)

b. UMBC's Revised Code of Student Conduct

32. On or about 19 September 2008, UMBC officials approved and adopted changes to the Student Code of Conduct that substantively reflected the negotiations of the parties in this suit on 8 August 2008. A copy of the revised UMBC Code of Student Conduct is attached as Exhibit F to this Complaint.

33. This revised Code of Student Conduct now prohibits "behavior which jeopardizes the health or safety of self or others." (Capitalization altered.) The list of prohibited behavior now includes "failure to cease repetitive unwanted behavior directed toward a particular individual or individuals" in place of "intimidation," eliminates any reference to "physical or emotional harassment," and still prohibits "sexual harassment." (*See* Compl. Ex. F at 32–33.)

2. UMBC's Residential Life Policies

a. UMBC's Former Residential Life Policies

34. Pursuant to the UMBC Code of Student Conduct, students could also be punished for "violations of residential life policies, rules and regulations," which were contained in the *Guide to Community Living* and the Residential Life contract (herein "Residential Life Policies"). (Compl. Ex. E at 16.) A copy of the UMBC Residential Life Policies in effect until approximately 19 September 2008 is attached as Exhibit G to this Complaint.

35. On information and belief, Defendants Hrabowski, Fey, Young, Calizo, or one of their predecessors, authored, approved, or supervised the creation of these Residential Life Policies.

36. Pursuant to the *Guide to Community Living* in effect until approximately 19 September 2008, students faced "the administrative or judicial termination of the Housing Contract and possible suspension or expulsion from UMBC" for engaging in "***behaviors which jeopardize[d] the emotional*** or physical ***safety of others***." (Capitalization altered, emphasis added.) These behaviors included, but were not limited to, the following: "***intimidation***; physical or ***emotional harassment***; and sexual harassment or misconduct." (*See* Compl. Ex. G at 71 (emphasis added).)

b. UMBC's Current Residential Life Policies

37. On or about 19 September 2008, UMBC officials approved and adopted changes to the Residential Life Policies that substantively reflected the negotiations of the parties in this suit on 8 August 2008. A copy of UMBC's *Residential Life Community Living Guide 2008–2009* is attached as Exhibit H to this Complaint.

38. The revised Residential Life Policies (embodied in the *Residential Life Community Living Guide 2008–2009*) now prohibits "behavior which jeopardizes the safety of self or others. (Capitalization altered.) The list of prohibited behavior now includes "refusal to cease unwanted or repetitive behaviors" in place of "intimidation," eliminates any reference to "physical or emotional harassment," and still prohibits "sexual harassment." (*See* Compl. Ex. H at 135.)

3. UMBC's Code of Student Organization Conduct

a. UMBC's Former Code of Student Organization Conduct

39. Defendants or their predecessors in office have also drafted and adopted the UMBC Code of Student Organization Conduct. A copy of the UMBC Code of Student Organization Conduct in effect until approximately 19 September 2008 is attached as Exhibit I to this Complaint.

40. All UMBC student organizations, including Plaintiff Rock for Life-UMBC, are subject to the provisions of the UMBC Code of Student Organization Conduct. In fact, "Student Organizations are responsible for the misconduct of its [sic] members, whether or not those members are currently students." (*See* Compl. Ex. I at 158.)

41. Under the UMBC Code of Student Organization Conduct in effect until approximately 19 September 2008, student organizations were prohibited from engaging in "***behavior which endanger[ed] the emotional*** or physical ***safety of self or others***." (*See* Compl. Ex. I at 161 (capitalization altered, emphasis added).) Prohibited behavior included, but was not limited to, "e) ***intimidation***; f) physical or ***emotional harassment***; g) sexual harassment or misconduct." (*Id.* (emphasis added).)

42. The UMBC Code of Student Organization Conduct also prohibited student organizations from violating "Residential Life policies, rules, or regulations,

as provided in the *Guide to Community Living* and the Residential Life contract." (Compl. Ex. I at 163.)

43. According to the UMBC Code of Student Organization Conduct, if a student organization—or any of its members—violated the rules listed in paragraphs 39–42 above, then it faced a range of discipline from a disciplinary reprimand to probation to suspension to permanent expulsion. (Compl. Ex. I at 164.)

b. UMBC's Revised Code of Student Organization Conduct

44. On or about 19 September 2008, UMBC officials approved and adopted changes to the Code of Student Organization Conduct that substantively reflected the parties' negotiations on 8 August 2008. A copy of the revised UMBC Code of Student Organization Conduct is attached as Exhibit J to this Complaint.

45. This revised Code of Student Organization Conduct now prohibits "behavior which jeopardizes the health or safety of self or others. (Capitalization altered.) The list of prohibited behavior now includes "failure to c[e]ase repetitive unwanted behavior directed toward a particular individual or individuals" in place of "intimidation," eliminates any reference to "physical or emotional harassment," and still prohibits "sexual harassment." (*See* Compl. Ex. J at 173–74.)

D. UNIVERSITY SPEECH ZONE POLICY—UNIVERSITY POLICY ON FACILITIES

46. In 1990, the USM Board of Regents adopted a policy which instructs the presidents of the constituent

institutions to create rules for the use of facilities at each campus. This policy provides: "Each president will be responsible for adopting rules governing the use of its facilities, and procedures for the application for such use." A copy of the USM Policy on the Use of the Physical Facilities of the University System for Public Meetings is attached as Exhibit K to this Complaint.

47. Until approximately 19 September 2008, Defendants maintained and enforced a repressive speech zone policy. This policy is delineated *infra* Parts I.D.1.

48. On 8 August 2008, this Court held a hearing on Plaintiffs' Motion for Preliminary Injunction. At this hearing, Defendants agreed to revise portions of their unconstitutional speech zone policy, subject to the approval of UMBC officials.

49. On 19 September 2008, Defendants confirmed that UMBC had accepted in substance the policy revisions the parties negotiated on 8 August 2008. This new policy is delineated *infra* Part I.D.2.

1. UMBC's Former Speech Zone Policy

50. Under the UMBC Policy on Facilities Use in effect until 19 September 2008, students and student organizations could reserve non-classroom space subject to the following process:

> The Registrar's and Summer and Winter Program Offices reserve the right to make changes to academic space assignments at any time. Events approved through the Campus Scheduling and Guest Services Office may be moved to

> accommodate changes in the class schedule. Nonacademic space is scheduled through Campus Scheduling and Guest Services. ***Requests must be submitted appropriately through the web-based form and are scheduled based on room appropriateness and on a first come, first served basis. Campus Scheduling*** has the final authority on scheduling all non-academic requests and ***has the right to deny requests dependent upon circumstances***. (Emphases added.)

A copy of the UMBC Policy on Facilities Use in effect until approximately 19 September 2008 is attached as Exhibit L to this Complaint.

51. The UMBC Policy on Facilities Use in effect until approximately 19 September 2008 also provided: "Scheduling may move an event to a different location ***without notice***. UMBC is not responsible for any costs incurred by a user resulting from a change in location." (Compl. Ex. L at 187.)

52. Under the UMBC Code of Student Conduct, students could be punished for "unauthorized entry or presence in or on University property." (Capitalization altered.) This offense includes "failure or refusal to leave University grounds, or a specific portion thereof, or a University facility when requested by an authorized University official." (Compl. Ex. E at 15.)

53. Under the UMBC Code of Student Conduct, students who were guilty of "unauthorized entry or presence in or on University property" could receive sanctions ranging from disciplinary reprimand to probation

to suspension to dismissal. (Compl. Ex. E at 18–19.)

54. On information and belief, Defendants Hrabowski, Fey, Young, Calizo, Reiger, Engler, or one of their predecessors, authored, approved, or supervised the creation of these facility use policies.

2. UMBC's Revised Events Policy

55. On or about 19 September 2008, UMBC officials approved and adopted changes to the UMBC Policy on Facilities Use that substantively reflected the negotiations of the parties in this suit on 8 August 2008. A copy of the revised UMBC Policy on Facilities Use is attached as Exhibit M to this Complaint.

56. Under the revised UMBC Policy on Facilities Use, UMBC officials can no longer move a student organization's activities without warning for any reason. The new policy provides:

> Scheduling may move an event (display, facility or table reservation) to a different location upon the occurrence of:
>
> a. circumstances beyond the control of the University, such as facility infrastructure disruption and/or weather related conditions, or
>
> b. unanticipated needs of the University for use of the space, and to best utilize space and resources, or
>
> c. substantial changes in the needs or size of the scheduled event, or

d. subsequent disruption to concurrent events.

However, if the event (display, facility or table reservation) interferes with traffic flow or access to buildings, the University will make reasonable efforts to control traffic flow and access to buildings before moving an event. If a move becomes necessary, the University will move the event to either an agreed-to location or the nearest suitable location. UMBC is not responsible for any costs incurred by a user resulting from a change in location.

(*See* Compl. Ex. M at 194.)

II. DEFENDANTS' DISCRIMINATION AGAINST ROCK FOR LIFE-UMBC'S SPEECH AND ASSEMBLY

57. In the fall of 2006, Mr. Alexander Vernet, then Treasurer of Plaintiff Rock for Life-UMBC, and other members of Rock for Life-UMBC were looking for ways to communicate the pro-life message to the campus community.

58. Through Mr. Leif Parsell, the senior field representative for the Leadership Institute's Campus Leadership Program, Mr. Vernet learned of the Genocide Awareness Project as a possible way to accomplish this goal. An affidavit from Mr. Parsell describing his work with Rock for Life-UMBC is attached as Exhibit N to this Complaint. (*See* Compl. Ex. N ¶¶ 3, 7–9.)

59. During the spring semester of the 2006–2007 academic year, Rock for Life-UMBC invited the Genocide Awareness Project to come to the UMBC campus

as part of its continuing efforts to share its pro-life message with students and faculty.

60. GAP is an outreach of the Center for Bio-Ethical Reform (CBR). CBR exists "to establish prenatal justice and the right to life for the unborn, the disabled, the infirm, the aged and all vulnerable peoples through education and the development of cutting edge educational resources." It is "strictly-nonviolent," and it "operates on the principle that abortion represents an evil so inexpressible that words fail us when attempting to describe its horror. Until abortion is seen, it will never be understood." An overview of the Center for Bio-Ethical Reform is attached as Exhibit O to this Complaint. (**CAUTION:** This exhibit contains graphic abortion images.)

61. As part of CBR's mission, it has created the Genocide Awareness Project (GAP). GAP's purpose is relatively simple:

> The Genocide Awareness Project (GAP) is a traveling photo-mural exhibit which compares the contemporary genocide of abortion to historically recognized forms of genocide. It visits university campuses around the country to show as many students as possible what abortion actually does to unborn children and get them to think about abortion in a broader historical context.

A summary of the Genocide Awareness Project's purpose is attached as Exhibit P to this Complaint.

62. Recognizing that the images in its display are

unpleasant, GAP has strict rules for how its volunteers and staff conduct themselves:

> It is our policy to treat everyone who approaches the GAP display with respect. We do not yell or use amplified sound. CBR holds staff and volunteers to strict rules of engagement. We know that the images we display are not pleasant. They represent an injustice of such magnitude that words alone fail us. Until injustice is recognized, however, it cannot be eradicated. We place our images in the public square because it is the last mass-media venue available to us. For all the people who will not take the time to be educated about abortion themselves, we bring the education to them.

(*See* Compl. Ex. P.)

63. The images in GAP's display illustrate the parallels between abortion and other forms of genocide throughout history to "expand the context in which people think about abortion." (Compl. Ex. P.) In particular, the display focuses on how various groups of human beings—including the unborn—have been categorized as less than human to justify killing them. (*Id.*) A copy of the signs used in the GAP display is attached as Exhibit Q to this Complaint. (**CAUTION:** This exhibit contains graphic images of abortion and other atrocities.)

64. Beginning in the second or third week of March 2007, Rock for Life-UMBC began preparing to bring GAP to the UMBC campus. Mr. Parsell assisted in this effort by helping Mr. Vernet work with campus

officials to arrange a time and place for the display. (*See* Compl. Ex. N ¶ 9.)

65. On April 17, 2007, Mr. Vernet and Rock for Life-UMBC approached Ms. Sheryl Gibbs, the office supervisor for the Office of Student Life, to reserve space on campus for the display on April 30, 2007. They wanted to reserve a location directly in front of the University Center to maximize the number of students and faculty who would see the display. This location is a sizeable open area bounded by the University Center, the Mathematics and Psychology Building, and the Meyeroff Chemistry Building on the UMBC campus. A map of the UMBC campus is attached as Exhibit R to this Complaint, with the University Center area marked with a boxed "1." Photographs of the UMBC campus, including the University Center area, are provided as Exhibit S to this Complaint. (*See* Compl. Ex. S at 209–10 (depicting the area in front of the University Center).)

66. A student employee in the Office of Student Life informed Rock for Life-UMBC's representatives that this area in front of the University Center was open and that Rock for Life-UMBC could reserve it. Rock for Life-UMBC reserved this location for the morning and afternoon of April 30, 2007.

67. Ms. Gibbs also stated that due to the nature of the GAP display, Rock for Life-UMBC would need some security at the event. To arrange for this, she referred Mr. Vernet and Rock for Life UMBC to the UMBC Police Department to determine the required level of security.

68. Mr. Vernet went to the UMBC campus police station and spoke with Lt. Ernest Howe to arrange security for the GAP display. Because of the content of the GAP display's signs, the UMBC Police Department determined that the display would require a uniformed officer rather than a student marshal. (*See also* Compl. Ex. N ¶ 10.)

69. As a consequence of the UMBC Police Department's decision, Mr. Vernet learned that Rock for Life-UMBC would be charged $50.00 per hour for security (in contrast to $15.00 per hour for a student marshal). (*See also* Compl. Ex. N ¶ 10.) This would equate to a $400.00 charge for holding the eight-hour event.

70. Mr. Vernet provided the UMBC Police Department with information from Rock for Life-UMBC's legal counsel documenting that UMBC could not constitutionally charge Rock for Life-UMBC for the security. A copy of the information that Mr. Vernet provided is attached as Exhibit T to this Complaint.

71. Shortly thereafter, Mr. Parsell met with Mr. Chris Tkacik, UMBC University Counsel, and discussed the constitutionality of charging Rock for Life-UMBC for the security costs surrounding the GAP display. (Due to a medical emergency, Mr. Vernet could not attend this meeting.) Mr. Parsell provided Mr. Tkacik with a letter from Rock for Life-UMBC's legal counsel which demonstrated that UMBC's policy of charging student organizations for security based on the content of their speech and expression was unconstitutional and outlined UMBC's constitutional duty to protect Rock for Life-UMBC from outside interference. (*See also* Compl. Ex. N ¶¶ 12–13.)

72. During this conversation, Mr. Tkacik conceded that UMBC was a public university, but he indicated that it was not subject to all of the constitutional requirements that apply to public universities. Hence, he claimed that UMBC had the authority to move events without notice. He also stated that the letter Mr. Parsell gave him was not specific enough to affect UMBC, and thus, he concluded: "We are not obligated to do any of this." (*See also* Compl. Ex. N ¶ 13.)

73. Mr. Tkacik also expressed concern that UMBC students would feel "emotionally harassed" because of the GAP display, and he stated that UMBC had the right to prevent this alleged offense. (*See also* Compl. Ex. N ¶ 13.)

74. Mr. Tkacik stated that the GAP display should be moved from the front of the University Center to the patio area of the Commons (*i.e.*, just to the south of the Commons). (*See* Compl. Ex. N ¶ 14; Compl. Ex. R, boxed "2" (denoting the patio area of the Commons); Compl. Ex. S at 211–14 (depicting the patio area of the Commons).) Seeking an accommodation, Mr. Parsell reluctantly conceded. (*See* Compl. Ex. N ¶ 14.)

75. Shortly thereafter, Defendant Lee Calizo, then the Associate Director of Student Life,[10] announced that Rock for Life-UMBC would not need to have security at the GAP display. However, the UMBC Police Department informed Mr. Vernet that the Police Department had not changed its security recommendation. Instead, the University had arbitrarily and unilaterally changed its requirements rather than bear

[10] Ms. Calizo now serves as the Acting Director of Student Life.

the security costs, in apparent disregard of its perceived obligation to protect Rock for Life-UMBC participants at the display.

76. On April 25, 2007, Ms. Calizo also decided that the GAP display would be moved from the front of the University Center to the patio area of the Commons (*i.e.*, on the south side of the Commons). (*See* Compl. Ex. R, boxed "2" (denoting the patio area of the Commons); Compl. Ex. S at 211–14 (depicting the patio area of the Commons).) She justified this arbitrary and unilateral change by saying that the original location posed a fire hazard because the large signs might obstruct the exits of the surrounding buildings. A copy of Ms. Calizo's handwritten note directing that the GAP display be moved to the Commons patio is attached as Exhibit U to this Complaint.

77. Upon information and belief, UMBC has allowed other organizations, groups, and events to put up displays in the area in front of the University Center, including displays involving stand-alone signage. The list of permitted displays includes, but is not limited to, political campaigns, organizations setting up tables to solicit members or participants in other extracurricular events, and organizations holding up signs for various events and causes on campus. (*See also* Compl. Ex. N ¶ 11.)

78. The twenty-four signs in the GAP display were not going to be placed in front of the exits and measure only four (4) feet by eight (8) feet in size.

79. In view of the presence of some foot traffic passing along the long patio area in front of the Com-

mons, and out of a desire to reach an accommodation, Rock for Life-UMBC acquiesced in this change. (*See also* Compl. Ex. N ¶¶ 13–14.)

80. At approximately 8:00 a.m. on April 30, 2007, Mr. Vernet met the trucks transporting the signs and materials for the GAP display. Rock for Life-UMBC members and staff from the GAP display began setting up the display as planned along the patio in front of the Commons.

81. Almost immediately, Defendant Eric Engler emerged from the Commons accompanied by several uniformed UMBC police officers. He informed Mr. Vernet that the display had been moved yet again to the large vacant field behind the Commons (*i.e.*, on the north side of the Commons between the Commons and the library), an area through which few students travel. (*See* Compl. Ex. R, boxed "3" (denoting the vacant field); Compl. Ex. S at 215–21 (depicting the vacant field).)

82. According to Defendant Engler, Defendant Fey, the Vice President of Student Affairs, made the decision to move the GAP display on Friday, April 27, 2007. A document, dated April 27, 2007, noting this decision to move the GAP display once again is attached as Exhibit V to this Complaint.

83. Shortly after Defendant Engler's announcement, two uniformed UMBC police officers repeated this instruction to Mr. Vernet and Mr. Parsell. Mr. Parsell attempted to explain the accommodation he had made with Mr. Tkacik to hold the event at the Commons, but the police indicated that the GAP display was supposed to be in the field and that UMBC re-

tained the right to determine where in that field the display would be located. (*See* Compl. Ex. N ¶¶ 15–16.)

84. As a consequence of Defendant Engler's arbitrary and capricious decision, Rock for Life-UMBC was forced to move its GAP display to a far more deserted area of campus. The part of the field on the north side of the Commons where Rock for Life-UMBC was ordered to set up the GAP display was well away from the sidewalks where students occasionally passed by. Photographs of the GAP display on April 30, 2007—showing the deserted location, the low numbers of passersby at the display, and the much higher level of foot traffic at the patio area of the Commons—are attached as Exhibit W to this Complaint.

85. Due to the much lower level of foot traffic through this area, the move substantially impaired Rock for Life-UMBC's ability to confront students and faculty with its message of the sanctity of human life and to persuade them of the pro-life perspective. (*See also* Compl. Ex. N ¶¶ 15, 21; Compl. Ex. W.)

86. After helping to assemble the GAP display, Mr. Vernet went to the Office of Student Life to discuss the matter with Ms. Gibbs. Ms. Gibbs stated that Mr. Tkacik had told her that the GAP display would be moved to the north side of the Commons, but no one provided Mr. Vernet with any explanation for the sudden change in location.

87. Sometime after the GAP display was set up, Mr. Tkacik visited the area to inspect the GAP display and ensure that it was in the proper location. (*See* Compl. Ex. N ¶ 18.)

88. After approximately two hours, Rock for Life-UMBC was able to move the GAP display closer to the north side of the Commons so as to be closer to the sidewalks where students occasionally passed, but it was never allowed to move to the patio area of the Commons. (*See* Compl. Ex. N ¶ 19.)

89. At one point, members of Rock for Life-UMBC attempted to place some of the GAP signs across the walkway from the main GAP display, but UMBC police officers who were patrolling the area regularly ordered that these signs be taken down. (*See* Compl. Ex. N ¶ 20; Compl. Ex. W.)

90. On September 5, 2007, the University sponsored Involvement Fest and placed it in the patio area of the Commons (*i.e.*, on the south side of the Commons). Involvement Fest reserved substantially more space than Rock for Life-UMBC required for the GAP display.

91. In November 2007, Rock for Life-UMBC again asked UMBC officials to allow the GAP display on campus. In view of the anticipated negative response from the University, and in the interest of accommodation, Plaintiffs requested to set up on the Commons patio area, rather than the most-traveled University Center area.

92. Again, Plaintiffs sought to bring the smaller version of the GAP display to campus. These smaller posters measure four feet by eight feet, rather than the larger size of six feet by thirteen feet. Descriptions of this smaller GAP display are attached as Exhibit X to this Complaint.

93. Through University Counsel, the University refused Rock for Life-UMBC's request on November 16, 2007, insisting that any future similar displays would have to take place on the field on the north side of the Commons. In view of the futility of trying to convey its pro-life message to students in that location, Rock for Life-UMBC canceled this display.

III. THE ENFORCEMENT OF UMBC'S HARASSMENT POLICIES

94. The UMBC Police Department, under the leadership of Defendant Williams, is responsible for enforcing UMBC policies, investigating violations of those policies, and preserving law and order on the UMBC campus.

95. In fulfilling these duties, Defendant Williams reports to Defendant Schaefer.

96. Pursuant to the Clery Act, 20 U.S.C. § 1092(f), the UMBC Police Department posts "Weekly Crime Logs" to its website at http://www.umbc.edu/police/ under the link "Weekly Crime Logs." These logs chronicle the incidents that UMBC police officers investigate in any given week.

97. From at least 2001 through the present, officers of the UMBC Police Department have investigated, *inter alia*, alleged violations of UMBC policies prohibiting all "harassment" and "acts of intolerance." Select portions of UMBC Police Department Weekly Crime Logs, reproducing accounts of investigations into "harassment" and "acts of intolerance" are attached to this Complaint as Exhibit Y.

98. In investigating alleged "harassment" and "acts of intolerance," UMBC police investigated many incidents that merely involved speech, including but not limited to the following:

- "A UMBC student reported isolated incidents of harassment by a UMBC student organization's members and affiliates."

- "An ORL staff member reported that person(s) unknown wrote in black marker an offensive comment on the balcony of Susquehanna Hall."

- "UMBC staff member provided information related to a publicly posted text making disrespectful references. Investigation concluded no violation of law. The incident is referred to Student Judicial Programs for further review."

- "A UMBC student reported that he discovered literature on the floor of the above location. The literature included items of racial hatred."

- "Person(s) unknown wrote derogatory statements on walls, and a dorm door at Chesapeake hall."

- "A UMBC Staff person while on rounds discovered that an unknown person(s) wrote on two bulletin boards and one dry erase board the phrase with derogatory comment."

- "A UMBC staff member reported that there were some offensive phrases and comments written on some flyers that were in the Commons."

- "An ORL staff member reported that while she was making her rounds she noticed an intolerant phrase written on a message board."

- "A student reported that unknown individual(s) had written an intolerable statement on the 3rd floor message board."

(*See* Compl. Ex. Y.)

IV. THE IMPACT OF DEFENDANTS' UNCONSTITUTIONAL POLICIES AND ACTIONS ON ROCK FOR LIFE-UMBC AND UMBC STUDENTS

99. Plaintiffs Ricker and Méndez are officers and members of Rock for Life-UMBC, a politically-interested, expressive student organization which holds (and seeks to advance) opinions and beliefs regarding issues of race, gender, politics, and religion that may be objectionable or offensive to other students and sanctionable under applicable University speech codes.

100. By moving Rock for Life's event several times without reason and without reasonable notice, Defendants violated rights guaranteed to Plaintiffs by the First and Fourteenth Amendments to the United States Constitution.

101. Defendants' discrimination against Rock for Life-UMBC's speech have caused it and its members, including Ms. Ricker, Mr. Méndez, and Mr. Vernet, to rethink and reduce their expressive activities on campus and to question whether engaging in free speech at UMBC is worth the risk of possible punishment and discriminatory treatment. Defendants' movement of

Rock for Life-UMBC's GAP display, a protected activity, had a chilling effect on the rights of Ms. Ricker, Mr. Méndez, Mr. Vernet, and other Rock for Life-UMBC members to engage freely and openly in appropriate discussions of their viewpoints, theories, ideas, and political and religious beliefs. These rights are clearly established by well-known legal authority, and Defendants' violations were knowing, intentional, and without justification.

102. The University's speech codes contained in the Policy on Sexual Harassment and the editions of the Code of Student Conduct, the Code of Student Organization Conduct, the *Guide to Community Living*, and the Policy on Facilities Use that were in effect before approximately 19 September 2008 had a chilling effect on Plaintiffs' rights to engage freely and openly in appropriate discussions of their viewpoints, theories, ideas, and political and religious beliefs. Plaintiffs have already been subjected to discrimination under the former edition of the Policy on Facilities Use, and based on the University's treatment of their constitutionally protected expression, they realistically fear that discrimination and prosecution under the other speech codes may occur at any time.

103. By adopting these speech codes and speech zones, Defendants have violated rights guaranteed to the Plaintiffs—and to all UMBC students—by the First and Fourteenth Amendments to the United States Constitution. These rights are clearly established by governing legal authority, and Defendants' violations are knowing, intentional, and without justification.

104. The speech code and zone policies in effect

prior to approximately 19 September 2008 are vague, overbroad, discriminate on the basis of religious and political viewpoint, interfere with the rights of free association, impose unconstitutional conditions on the receipt of state benefits, and constitute an illegal prior restraint on Plaintiffs' rights of free speech and assembly. These speech policies are therefore facially invalid and invalid as applied under the Free Speech Clause of the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

105. The sexual harassment policy outlined above is vague, overbroad, discriminates on the basis of religious and political viewpoint, and constitutes an illegal prior restraint on Plaintiffs' rights of free speech. This sexual harassment policy is therefore invalid facially and as applied under the Free Speech Clause of the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. So long as these speech policies remain in effect, the Defendants are causing ongoing and irreparable harm to Plaintiffs and to every student and student organization at the University.

CAUSES OF ACTION

I. CAUSES OF ACTION REGARDING CURRENT POLICIES

A. FIRST CAUSE OF ACTION

First Amendment Freedoms of Speech and Assembly (42 U.S.C. § 1983)

106. Plaintiffs repeat and reallege each of the fore-

going allegations in this Complaint.

107. UMBC's Policy on Sexual Harassment conditions compliance on the subjective emotional experiences of listeners, and it limits and prohibits speech without providing any objective guidelines by which Plaintiffs may guide their behavior.

108. UMBC's Policy on Sexual Harassment explicitly and implicitly discriminates on the basis of viewpoint.

109. Defendants, acting under color of state law, have enacted and enforced regulations that are both vague and overbroad, discriminate on the basis of viewpoint, and grant Defendants unbridled discretion to regulate speech on the UMBC campus. In so doing, they have deprived Plaintiffs of their clearly established constitutional rights to freedom of speech and freedom of expression guaranteed by the First Amendment to the Constitution of the United States, entitling Plaintiffs to the relief prayed for below.

B. SECOND CAUSE OF ACTION

Fourteenth Amendment Right to Due Process of Law (42 U.S.C. § 1983)

110. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

111. UMBC's Policy on Sexual Harassment conditions compliance on the subjective emotional experiences of listeners, and it limits and prohibits speech without providing any objective guidelines by which Plaintiffs may guide their behavior.

112. Defendants, acting under color of state law, have enacted and enforced regulations that are both vague and overbroad, and therefore, they have deprived Plaintiffs of their clearly established constitutional rights to due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, entitling Plaintiffs to the relief prayed for below.

II. CAUSES OF ACTION REGARDING PAST POLICIES

A. THIRD CAUSE OF ACTION

First Amendment Freedoms of Speech and Assembly (42 U.S.C. § 1983)

113. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

114. The Speech Code policies described above—including, but not limited to, the editions of the Code of Student Conduct, *Guide to Community Living*, and Code of Student Organization Conduct in effect before approximately 19 September 2008—conditioned compliance on the subjective emotional experiences of listeners, and they limited and prohibited speech without providing any objective guidelines by which Plaintiffs could guide their behavior.

115. The Speech Code policies described above—including, but not limited to, the editions of the Code of Student Conduct, *Guide to Community Living*, and Code of Student Organization Conduct in effect before approximately 19 September 2008—explicitly and implicitly discriminated on the basis of viewpoint.

116. By enacting the UMBC Policy on Facilities Use in effect before approximately 19 September 2008, described above, Defendants enacted an unreasonable time, place, and manner restriction on Plaintiff's speech, by giving University officials unbridled discretion (1) to deny requests for campus facilities, and (2) to move Plaintiff's events and displays without notice or reimbursement.

117. Defendants, acting under color of state law, have enacted and enforced regulations that are both vague and overbroad, discriminate on the basis, of viewpoint, and grant Defendants unbridled discretion in granting or denying access to public fora on the UMBC campus. In so doing, they have deprived Plaintiffs of their clearly established constitutional rights to freedom of speech and freedom of expression guaranteed by the First Amendment to the Constitution of the United States, entitling Plaintiffs to the relief prayed for below.

B. FOURTH CAUSE OF ACTION

Fourteenth Amendment Right to Due Process of Law (42 U.S.C. § 1983)

118. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

119. The speech restrictive policies described above—including, but not limited to, the editions of the Code of Student Conduct, *Guide to Community Living*, and Code of Student Organization Conduct in effect before approximately 19 September 2008—conditioned compliance on the subjective emotional expe-

riences of listeners, and they limited and prohibited speech without providing any objective guidelines by which Plaintiffs could guide their behavior.

120. Defendants, acting under color of state law, have enacted and enforced regulations that are both vague and overbroad, and therefore, they have deprived Plaintiffs of their clearly established constitutional rights to due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, entitling Plaintiffs to the relief prayed for below.

C. FIFTH CAUSE OF ACTION

Fourteenth Amendment Right to Equal Protection of the Law (42 U.S.C. § 1983)

121. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

122. By enforcing the UMBC Policy on Facilities Use in effect before approximately 19 September 2008, described above, Defendants have enacted an unreasonable time, place, and manner restriction on Plaintiff's speech, by giving University officials unbridled discretion (1) to deny requests for campus facilities, (2) to move Plaintiffs' events and displays without notice or reimbursement, and (3) to treat Plaintiffs' student organization differently than similarly situated student organizations. Defendants have in fact administered their regime for access to the traditional, designated and/or limited public fora on the UMBC campus in an arbitrary, capricious, and viewpoint discriminatory manner to favor speech and assembly of other less

controversial and more politically favored groups.

123. Defendants, acting under color of state law, have enacted and enforced these speech code and facilities use regulations in a manner that deprive Plaintiffs of their right to equal protection of the law and have therefore deprived Plaintiffs of rights established and secured by the Fourteenth Amendment to the Constitution of the United States.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Rock for Life-UMBC, Olivia Ricker, and Miguel Méndez respectfully request a jury trial, that the Court enter judgment against Defendants Hrabowski, Fey, Young, Schaefer, Calizo, Reiger, Engler, and Williams, and that the Court provide Plaintiffs with the following relief:

(A) A declaration that UMBC's speech code policies—including, but not limited to UMBC's Policy on Sexual Harassment and the editions of the Code of Student Conduct, *Guide to Community Living*, and Code of Student Organization Conduct in effect before approximately 19 September 2008—violated the Plaintiffs' rights to free speech and assembly, due process of law, and equal protection of the law;

(B) A declaration that the UMBC Policy on Facilities Use in effect before approximately 19 September 2008 violated Plaintiffs' rights to the due process of law, free speech, and equal protection;

(C) A permanent injunction invalidating and restraining enforcement of UMBC's Policy on Sexual

Harassment;

(D) Damages (including nominal and punitive damages) in an amount to be determined by the Court;

(E) Plaintiffs' reasonable attorneys' fees, costs, and other disbursements in this action pursuant to 42 U.S.C. § 1988; and

(F) All other further relief to which Plaintiffs may be entitled.

Respectfully submitted this 22nd day of October, 2008.

s/ Steven H. Aden
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DEMAND FOR JURY TRIAL

COME NOW, Plaintiffs, and hereby demand trial by jury of all matters so triable herein.

Respectfully submitted this 22nd day of October, 2008.

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VERIFICATION OF COMPLAINT

I, Alexander J. Vernet, a citizen of the United States and resident of the State of Maryland, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that I have read the foregoing First Amended Verified Complaint and the factual allegations therein, and the facts as alleged are true and correct.

Executed this 21st day of October, 2008, at Baltimore, Maryland.

/s/ Alexander J. Vernet
Alexander J. Vernet

VERIFICATION OF COMPLAINT

I, Olivia Ricker, a citizen of the United States and resident of the State of Maryland, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that I have read the foregoing First Amended Verified Complaint and the factual allegations therein, and the facts as alleged are true and correct.

Executed this 20th day of October, 2008, at Baltimore, Maryland.

/s/ Olivia Ricker
Olivia Ricker

VERIFICATION OF COMPLAINT

I, Miguel Méndez, a legal resident of the United States and the State of Maryland, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that I have read the foregoing First Amended Verified Complaint and the factual allegations therein, and the facts as alleged are true and correct.

Executed this 20th day of October, 2008, at Baltimore, Maryland.

/s/ Miguel Méndez
Miguel Méndez

TABLE OF COMPLAINT EXHIBITS

A. UMBC's Mission Statement and Vision Statement

B. University of Maryland System Policy on Sexual Harassment

C. UMBC's Policy on Sexual Harassment

D. USM Policy on Student Affairs

E. UMBC Code of Student Conduct, effective prior to approximately 19 September 2008

F. UMBC Code of Student Conduct, effective since approximately 19 September 2008

G. UMBC Residential Life Policies (*i.e.*, *Guide to Community Living* and the Residential Life contract), effective prior to approximately 19 September 2008

H. UMBC's *Residential Life Community Living Guide 2008–2009*

I. UMBC Code of Student Organization Conduct, effective prior to approximately 19 September 2008

J. UMBC Code of Student Organization Conduct, effective since approximately 19 September 2008

K. USM Policy on the Use of the Physical Facilities of the University System for Public Meetings

L. UMBC Policy on Facilities Use, effective prior to approximately 19 September 2008

M. UMBC Policy on Facilities Use, effective since approximately 19 September 2008

N. Affidavit of Leif Parsell

O. Overview of the Center for Bio-Ethical Reform

P. Summary of the Genocide Awareness Project's purpose

Q. Signs used in the GAP display

R. UMBC Campus Map

S. Photographs of UMBC Campus

T. Letter from Rock for Life-UMBC's legal counsel regarding the security cost issue

U. Handwritten note of Defendant Lee Calizo directing that the GAP display be moved to the Commons Patio

V. A document, dated April 27, 2007, moving the GAP display to the north of the Commons

W. Photographs of the GAP display at UMBC on April 30, 2007

X. Descriptions of the smaller GAP display

Y. Select portions of UMBC Police Department Weekly Crime Logs