IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

YOUNG AMERICANS FOR LIBERTY AT KELLOGG COMMUNITY COLLEGE, *et al.*, *Plaintiffs*, v. **KELLOGG COMMUNITY COLLEGE**, *et al.*. *Defendants*.	Case No.: 1:17-cv-58-RJJ-RSK **THE HONORABLE ROBERT J. JONKER**

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TREATISES

INTRODUCTION

In September 2016, Defendants arrested Mrs. Gregoire and threatened to arrest Mr. Withers as they promoted their nascent student group by asking passing students about freedom and liberty and distributing the U.S. Constitution on a campus sidewalk. After defending these policies for almost a year and doing so even now, they filed this motion in a desperate effort to evade accountability.

By raising mootness, Defendants ask this Court to assume they have the purest of motives, based only on counsel's claims. Yet after being sued, Defendants changed nothing in their policies. After their answer and the scheduling conference, they changed nothing as they "believed [their] policies were in compliance with the law," Defs.' Mot. to Dismiss ("MTD") Br. at 1, PageID.447, and ignored this Court's urging to consider Grand Valley State's ("GVSU") policies. At the settlement conference they requested, they changed nothing. After the injunction motion was filed, they changed nothing and defended the policies. After Plaintiffs provided the model policies they requested, they changed nothing and reprinted the policies in the new *Student Handbooks*. At the injunction hearing, they changed nothing and defended the policies as written and enforced.

Just two weeks later, *voila*, Defendants allegedly changed everything. Why? Two Defendants and other Kellogg Community College ("KCC") officials "were all present at oral argument," heard this Court's concerns, and took this information back to KCC. *Id.* A clearer example of a less genuine tactical shift is hard to imagine. This is why "[i]t is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform," *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 n.5 (1953), especially when the new policies' status is far from clear, when Defendants could revert so easily to their original policies, when they still defend those policies and the arrests, and when their new policies could result in the same arrests all over again.

By asserting qualified immunity, Defendants insist that, in 2016, it was reasonable for them to arrest people for handing out the Constitution on a public campus sidewalk. They still insist it was reasonable for them to enforce explicitly viewpoint- and content-based prior restraints encompassing practically every form of expression the First Amendment protects. They say the same about declaring all of campus—aside from one indoor location—off-limits to student speech. They do

so despite contrary precedent on every point and a federal court in this circuit declaring virtually identical policies unconstitutional when enforced in a far less draconian fashion. *Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, 2012 WL 2160969 (S.D. Ohio Jun. 12, 2012).

In short, Plaintiffs respectfully request that this Court deny Defendants' last-minute and often conclusory motion because it still has jurisdiction and Defendants do not merit qualified immunity. Plaintiffs also request that this Court grant their preliminary injunction motion, as Defendants' desperate attempt to evade accountability shows the continued need for judicial action, especially as the school year has begun. *See* Pls.' Resp. to Defs.' Ltr., Aug. 24, 2017, PageID.472–74.

ARGUMENT

I. The Rule 12(b)(1) motion should be denied as this Court retains jurisdiction.

While Defendants' Rule 12(b)(1) motion is a factual attack, *Hirt v. Richardson*, 127 F. Supp. 2d 849, 852 (W.D. Mich. 2001), they do not contest any facts in the Complaint.[1] Rather, they rely on their August 16th policy changes, which do not affect this Court's jurisdiction.

A. Defendants' policy changes do not undermine Plaintiffs' standing.

By saying Plaintiffs "lack standing at this stage of the litigation" due to the new policies, Defs.' MTD Br. at 8, PageID.454, Defendants confuse standing and mootness. "[S]tanding concerns only whether a plaintiff has a viable claim that a defendant's unlawful conduct 'was occurring at the time the complaint was filed,' while mootness addresses whether that plaintiff continues to have an interest in the outcome of the litigation." *Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 525 (6th Cir. 2001) (quoting *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167, 184 (2000)). Plaintiffs "only need[] to establish standing at the time that [the] complaint was filed." *Id.* at 525. The type of proof needed to prove standing on a motion to dismiss differs from that needed at summary judgment, but the relevant time frame does not: "[T]he court must determine whether standing exists at the time of the filing of the complaint only." *Id.* at 526; *id.* at 524 (same); *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 580 (6th Cir. 2012) (same). Thus, Defendants' new policies do not affect Plaintiffs' standing.

[1] For a factual challenge, "there is no presumptive truth accorded the pleadings and a court must weigh the conflicting evidence" to assess subject matter jurisdiction. *Hirt*, 127 F. Supp. 2d at 852.

Plaintiffs' standing cannot be doubted.[2] Defendants arrested, jailed, and filed criminal charges against Mrs. Gregoire, saying her protected speech violated their policies. Compl. ¶¶ 150–92, Page ID.22–26. This far surpasses standing requirements. *See, e.g.*, *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014) ("[A]n actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law."); *McGlone v. Bell*, 681 F.3d 718, 729 (6th Cir. 2012) ("Plaintiffs may have standing even if they have never been prosecuted or threatened with prosecution.").

Mr. Withers stopped his expression because Defendant West threatened to arrest him. Compl. ¶¶ 182–88, PageID.25–26. This has long established standing. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (finding standing due to "warn[ings] to stop handbilling" and the "prosecution of petitioner's handbilling companion"); *Hightower*, 2017 WL 2684612, at *5 (noting the *Steffel* "plaintiff left, but his companion did not and was arrested for criminal trespass" and this "presented an actual controversy as required by Article III and the Federal Declaratory Judgment Act").[3]

In sum, Defendants' recent policy changes do not erase the arrest and threatened arrest from history, and those facts easily establish Plaintiffs' standing.

B. Defendants' policy changes do not moot any of Plaintiffs' claims for relief.

"A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emp. Int'l Union, Local 100*, 567 U.S. 298, 307 (2012) (quotations omitted). "[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* (quotations omitted). As "the party asserting mootness," Defendants have the "heavy burden" of proving mootness. *Laidlaw*, 528 U.S. at 189.

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[2] Defendants cite *Hightower v. City of Grand Rapids*, 2017 WL 2684612 (W.D. Mich. Jun. 21, 2017). Defs.' MTD Br. at 8, PageID.454. It highlighted that "no First Amendment activity is impugned in this case," *Hightower*, 2017 WL 2684612, at *6; that "this is not a First Amendment challenge," *id.* at *9; and that "the requirements for standing are more stringent" when "a statute does not chill First Amendment rights," *id.* at *7. So *Hightower* does not affect Plaintiffs' standing to bring free speech claims based partly on chilled expression due to threatened and actual arrests.

[3] As Mrs. Gregoire and Mr. Withers "have standing to sue in their own right," so does Young Americans for Liberty at KCC ("YAL"). *Cleveland Branch*, 263 F.3d at 524. Securing its members' freedoms is "germane to [YAL's] purposes," *id.*, as "an expressive association" that exists to "mobilize students to promote . . . the natural rights of life, liberty, and property." Compl. ¶¶ 14–18, PageID.4. "[N]either the claim[s] asserted nor the relief requested requires" other individual members to participate in this case. *Cleveland Branch*, 263 F.3d at 524.

1. Defendants rightfully admit that they cannot moot Plaintiffs' damages claims.

Defendants do not seek to moot Plaintiffs' damages claims that include the costs involved in getting criminal charges dismissed and the loss of liberty inherent in being handcuffed, detained, and then jailed for over seven hours. Defs.' MTD Br. at 6, PageID.452 (seeking to dismiss just "declaratory and injunctive relief" claims as moot); Compl. ¶¶ 189–93, PageID.26. The Supreme Court and Sixth Circuit have doomed such efforts. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (noting damages claim "is sufficient to preserve our ability to consider the question"); *Yoder v. Univ. of Louisville*, 526 Fed. Appx. 537, 543 (6th Cir. 2013) ("[A] claim for monetary damages ensures that this dispute is a live one. . . ."); *Akers v. McGinnis*, 352 F.3d 1030, 1035 (6th Cir. 2003) (rejecting mootness "as the plaintiffs could be entitled to money damages and the purging of their disciplinary records if the old version of the Rule were found to be unconstitutional"); *Miller v. City of Cincinnati*, 622 F.3d 524, 533 (6th Cir. 2010) (rejecting mootness for nominal damages claim); *Hood v. Keller*, 229 Fed. Appx. 393, 400–01 (6th Cir. 2007) (same for compensatory damages). In sum, "[c]laims for damages . . . automatically avoid mootness. . . ." WRIGHT & MILLER, 13C FED. PRAC. & PROC. § 3533.3 (3d ed.).

2. Defendants did not moot Plaintiffs' declaratory or injunctive relief claims.

It is well-settled that "a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013). "Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Id.*

As a mootness finding would leave Defendants "free to return to [their] old ways," *W.T. Grant Co.*, 345 U.S. at 632, this case is moot only if they prove that "[1] subsequent events have made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur, and [2] interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Cleveland Branch*, 263 F.3d at 530 (quotations omitted). Failing to prove either means the case is not moot, but Defendants fail to prove both.[4]

[4] "A court may grant declaratory relief even though it chooses not to issue an injunction." *Powell v. McCormack*, 395 U.S. 486, 499 (1969). Plaintiffs' declaratory claims remain live as "the facts

a. Defendants did not make it absolutely clear that they will not return to their original policies and conduct.

The voluntary cessation doctrine's mootness test is "stringent." *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968). Defendants' burden is "heavy," *id.*; *Cnty. of L.A. v. Davis*, 440 U.S. 625, 631 (1979); *Parents Involved*, 551 U.S. at 719, and "formidable." *Already*, 133 S. Ct. at 727; *Laidlaw*, 528 U.S. at 190. "[V]oluntary cessation . . . does not moot a case unless 'subsequent events ma[ke] it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) (emphasis added); *Laidlaw*, 528 U.S. at 189 (noting this "might" moot a case). It does not moot a case "automatically," *Already*, 133 S. Ct. at 727, or even "ordinarily," *Knox*, 567 U.S. at 307. It is a "rare instance" when "voluntary conduct moots a case," *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 473 (6th Cir. 2008); *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 712 (6th Cir. 2016), as "courts want to 'protect a party from an opponent who seeks to defeat judicial review by temporarily altering its behavior.'" *Youngstown*, 189 Fed. Appx. at 405 (quoting *United States v. City of Detroit*, 401 F.3d 448, 451 n.1 (6th Cir. 2001)).

i. Defendants cannot evade their "heavy burden" by claiming solicitude.

Defendants seek to evade their "heavy burden" by saying they are entitled to "more solicitude" as government officials. Defs.' MTD Br. at 7, PageID.453. But this "solicitude" applies only if the "self-correction . . . appears genuine." *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 981 (6th Cir. 2012) (quoting *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990)). Nothing about Defendants' policy changes appears genuine. They adopted new policies only due to this Court's questioning. Defs.' MTD Br. at 1, PageID.447. They offer no evidence that the policies that led to the actual and threatened arrests here have been repealed. They still defend those policies and the way they were enforced. They could easily revert to the original policies, especially since *Student Handbooks* containing them are already printed. And the new policies retain the terms Defendants

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alleged, under all the circumstances show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Youngstown Publ'g Co. v. McKelvey*, 189 Fed. Appx. 402, 405 (6th Cir. 2006) (quoting *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122 (1974)). *See infra* Parts I.B.2.a–b.

used to disrupt to Plaintiffs' peaceful expression, to threaten Mr. Withers, and to arrest Mrs. Gregoire. *See infra* Parts I.B.2.a.ii–v, I.B.2.b. So they are entitled to no solicitude.

And "such solicitude does not carry much of an official's burden of demonstrating that there is no reasonable expectation . . . that the alleged violation will recur." *Husted*, 838 F.3d at 713. Indeed, "the Supreme Court has declined to defer to a governmental actor's voluntary cessation," *id.* (citing *City of Mesquite v. Alladin's Castle, Inc.*, 455 U.S. 283, 289 (1982)), and has often applied this doctrine to government defendants, without offering "solicitude." *See, e.g.*, *Trinity Lutheran*, 137 S. Ct. at 2019 n.1; *Parents Involved*, 551 U.S. at 719; *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222–24 (2000); *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 661–62 (1993); *Davis*, 440 U.S. at 631–34. Thus, Defendants are not entitled to any solicitude for their tactical shift, and it would not relieve their "heavy burden."

So Defendants "still bear a heavy burden to show that [this] case is mooted," and their "burden is increased by the fact that the voluntary cessation only appears to have occurred in response to the present litigation, which shows a greater likelihood that it could be resumed." *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 342–43 (6th Cir. 2007). Here, Defendants are responding to one hearing in the "present litigation." They admit they passed these new policies in the two weeks after that hearing precisely because two Defendants and other officials "were all present at oral argument" and took "[i]nformation about the proceedings" back to KCC. Defs.' MTD Br. at 1, PageID.447. They made no move to amend their policies after being sued for arresting people for distributing the Constitution, after being urged by this Court to consider GVSU's policies, after receiving model policies and a preliminary injunction motion, or after requesting an early settlement conference. Instead, they defended their policies and actions to this Court and even printed them in this year's *Student Handbook*. Greene Decl. ¶ 6, PageID.460.

ii. Defendants did not even try to carry their "heavy burden" of showing that they will not return to their original policies and conduct.

Defendants dedicate just one paragraph of their entire brief to their extra "formidable burden" of proving that this case is moot. Defs.' MTD Br. at 7, PageID.453. But even there, they do not

even try to make it "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Trinity Lutheran*, 137 S. Ct. at 2019 n.1 (emphasis added).

Defendants try to shift their burden to Plaintiffs by saying "there is no indication that KCC's amendment of its policies is not a genuine and sincere effort" and "any suggestion that the recent amendments by KCC are disingenuous would be without merit." Defs.' MTD Br. at 7, PageID.453. But Plaintiffs are "not required to produce evidence suggesting that [Defendants] plan[] on reengaging in the allegedly illegal behavior after the resolution of the case." *Husted*, 838 F.3d at 713. "Rather, it [is]—and remains—[Defendants'] 'formidable burden' of 'showing that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* (quoting *Laidlaw*, 528 U.S. at 190); *accord Adarand*, 528 U.S. at 221 (reversing because the "Tenth Circuit confused mootness with standing, and as a result placed the burden of proof on the wrong party").

Defendants' entire argument boils down to: "Trust us. We're sincere." But assurances from Defendants' counsel does not make anything "absolutely clear." *Trinity Lutheran*, 137 S. Ct. at 2019 n.1. Nor have Defendants displayed any reason they should be trusted. They chose to arrest and charge people with trespassing because they were peacefully standing on a sidewalk, asking people about freedom and liberty, and promoting a student organization. Compl. ¶¶ 145–94, PageID.21–26. Faced with an injunction motion, they defended these policies as written and enforced. Defs.' Br. in Resp. to Pls.' Mot. for Prelim. Inj. ("MPI Resp."), PageID.326–52. They equated themselves with 1960s segregationists and chastised Plaintiffs for not accepting blatantly unconstitutional threats, arrests, jail time, and criminal charges. Tr. of Prelim. Inj. Hrg. ("Tr.") at 36–38, PageID.425–27. Defendants offered nothing to carry their burden.

Defendants did not even offer evidence proving that the original policies have been repealed. Mr. Greene says nothing about repealing policies; he just discusses the new ones. Greene Decl. ¶¶ 1–6, PageID.459–60. Counsel insists the new policies "supersede and abrogate" the challenged policies, Defs.' MTD ¶ 2, PageID.441, but "[i]t is well established that statements appearing in a party's brief are not evidence." *Washington v. Davis*, 2017 WL 3025938, *4 n.2 (W.D. Mich. Jun. 20, 2017). Providing such evidence would have been easy (*e.g.*, a resolution, a declaration from a

Defendant), but Defendants provided nothing. In fact, they still impose a prior restraint, requiring those gathering signatures to get permission from KCC first. Gregoire MTD Decl. ¶¶ 4–11.

Nor did Defendants renounce any intent to reinstate the original policies. This would not carry their heavy burden by itself. *Williams*, 2012 WL 2160969, at *2 n.1 ("While Defendants cite President Williams' affidavit that the old policies will not be reenacted as evidence that they cannot be reasonably expected to recur, the University's statement is insufficient to preclude jurisdiction."). But they never took this minimal step. Indeed, Defendants provided no evidence, relying instead on a non-party public affairs official with no policy-making or policy-enforcing authority. Greene Decl. ¶ 2, PageID.460. Faced with a government defendant who similarly "nowhere suggests that if this litigation is resolved in its favor it will not resume" the challenged policies, the Supreme Court rejected mootness, as should this Court. *Parents Involved*, 551 U.S. at 719.

iii. The timing of Defendants' policy changes provides ample reason to believe they would return to their original policies and conduct.

Defendants did not even try to fulfill their "heavy burden" of making it "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur,'" *Trinity Lutheran*, 137 S. Ct. at 2019 n.1 (emphasis added), and the timing of their policy changes gives reason to think it would recur. *Northland*, 487 F.3d at 342–43 ("[V]oluntary cessation only . . . in response to the present litigation . . . shows a greater likelihood that it could be resumed.").

In 2012, the University of Cincinnati, like KCC, amended its challenged policies. It did so during the lawsuit "and only a few weeks before the scheduled final injunction hearing." *Williams*, 2012 WL 2160969, at *2 n.1. But the court rejected mootness in part because "the timing of the University's changes leaves this court with no assurance that the challenged conduct will not be re-implemented, absent an injunction, at the conclusion of this litigation." *Id.* (citing *DeJohn v. Temple Univ.*, 537 F.3d 301, 309 (3d Cir. 2008)). This timing—just before an injunction hearing—was "significant in determining whether there is a reasonable expectation that the challenged conduct may recur." *Id.* (citing *DeJohn*, 537 F.3d at 309; *Parents Involved*, 551 U.S. at 719). Here, Defendants waited even longer—until two weeks after the injunction hearing, after defending the

policies as written and enforced, after taking this Court's temperature. Hence, there is even less reason here than in *Williams* to believe Defendants have experienced a sincere change of heart.

Nor do the circumstances surrounding the new policies inspire confidence in counsel's conclusory assurances. Defendants admit they changed these policies only because KCC officials "were all present at oral argument" and took "[i]nformation regarding the proceedings" back to KCC. Defs.' MTD Br. at 1, PageID.447. Then just days later, they filed this motion, attaching the new policies as an exhibit and raising mootness for the first time. Defs.' MTD ¶ 1, PageID.441. Last year, the Sixth Circuit rejected similar antics when the Ohio Secretary of State adopted new rules "on the same day as the parties' final merits briefs were due." *Husted*, 838 F.3d at 713. Here, Defendants waited until after all briefs were filed and oral arguments concluded. There, the Secretary attached the new policy "as an exhibit to his brief and only then present[ed] his mootness argument." *Id.* To the Sixth Circuit, this "fact makes the Secretary's voluntary cessation appear less genuine." *Id.* Defendants did the same, and so Plaintiffs' claims remain live.

To minimize this problematic timing, Defendants say KCC's Policy Committee "was formed prior to the filing of this lawsuit." Defs.' MTD ¶ 1, PageID.441. Counsel's statement is "not evidence." *Washington*, 2017 WL 3025938, at *4 n.2. Even if it were, the committee's birthday is irrelevant when Defendants admit they began changing these policies only after the hearing. Defs.' MTD Br. at 1, PageID.447. As they even printed new *Student Handbooks* containing the original policies, Greene Decl. ¶ 6, PageID.460, the new policies are of very recent vintage indeed.

iv. Defendants' stubborn and continued defense of their original policies and conduct provides ample reason to believe they would return to them.

Defendants' insincere "protestations of repentance and reform," *W.T. Grant Co.*, 345 U.S. at 632 n.5, ring hollow as they still defend their original policies and their threats and arrests. In such circumstances, the Supreme Court rejects mootness. *See, e.g.*, *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 43 (1944) (rejecting mootness as defendant "consistently urged the validity of" the prior policy "and would presumably be free to resume the use of this illegal plan were not some effective restraint made"); *Parents Involved*, 551 U.S. at 719 (same as "the district vigorously

defends the constitutionality of its race-based program" it voluntarily ceased"); *Knox*, 567 U.S. at 307 (same as "the union continues to defend the legality of the Political Fight-Back Fee").

Hence, *Williams*, 2012 WL 2160969, at *2 n.1, rejected mootness because "the University continues to defend the constitutionality of its former policy." This was "significant in determining whether there is a reasonable expectation that the challenged conduct may recur." *Id.*; *accord De-John*, 537 F.3d at 309, 311 (rejecting mootness due to policy changes because "Temple defended and continues to defend not only the constitutionality of its prior . . . policy, but also the *need* for the former policy"); *Pro-Life Cougars v. Univ. of Hous.*, 259 F. Supp. 2d 575, 581 (S.D. Tex. 2003) (same because officials "continue vigorously to defend the constitutionality of the First Policy").

Here, despite their current posturing, Defs.' MTD Br. at 1, PageID.447, Defendants vigorously defended their policies and their decision to arrest and threaten Plaintiffs at every stage, despite this Court's signals and Plaintiffs' model policies. At the settlement conference they requested, they proposed no changes. In the face of an injunction motion, they defended the policies *in toto*, deriding Plaintiffs' claims as "constitutional jargon" and absurdly predicting "[i]nstitutions of higher education would be harmed" by an injunction. Defs.' MPI Resp. at 1, 23, PageID.330, 352.

At the August 1st hearing, Defendants defended the policies as written and enforced. *See, e.g.*, Tr. at 5:11–14, PageID.394 ("So I don't have any problem defending the policy."); *id.* at 18:11–17, PageID.407 ("So you've made it clear to me I have an uphill battle, but . . . I feel strongly about my client's case, and my client feels strongly about its case. . . . [T]he question for today is not whether [KCC] could have some other policy."); *id.* at 19:1–2, PageID.408 ("The question is is the policy as it stands today unlawful? And I submit to you strongly that the answer is no."); *id.* at 20:10–17, 23:16–18, 24:4–9, PageID.409, 412–13 (insisting KCC could constitutionally restrict spontaneous speech that lacked prior permission); *id.* at 38:4–39:4, PageID.427–28 (insisting KCC could constitutionally restrict student groups' expression off-campus). They insisted KCC needs these policies. *See, e.g., id.* at 6:6–10, PageID.395 (citing "student traffic in a fairly condensed area" and KCC's "primary mission . . . to get students to classes"); *id.* at 25:1–10, PageID.414 (claiming KCC's mission is to provide environment free from spontaneous discussions); *id.* at

27:6–12, PageID.416 (justifying policies due to allegedly "closed, congested space" outdoors at KCC); *id*. at 29:3–13, PageID.418 (insisting KCC students are not "looking for a significant co-curricular experience" and this is "not [KCC's] mission"); *id.* at 32:14–21, PageID.421 (defending policies as needed to "ensure an atmosphere conducive to learning," "unobstructed access to the college," etc.). Counsel defended the arrest, faulting Mrs. Gregoire for not being willing to "pay the penalty" for what she described as "civil disobedience." *Id.* at 36:22–37:15, PageID.425–26.

After the hearing, Defendants still defend their original policies and the arrests. They still insist arresting people for handing out the Constitution on an open, expansive sidewalk was reasonable. Defs.' MTD Br. at 9–10, PageID.455–56 ("[T]here is no evidence that any of the individual Defendants acted unreasonably when they enforced the policies and eventually, Defendant West, arrested Plaintiff Gregoire."). They still insist their policies—which violate clearly established law, *see infra* Part II—were reasonable and reasonably enforced. *Id.* ("Plaintiffs allege no facts that the individual Defendants knew . . . that . . . KCC's policies were unconstitutional . . . or that any of their specific conduct violated Plaintiffs' constitutional rights by enforcing those policies.").

By stubbornly defending their decisions to arrest Mrs. Gregoire and to threaten Mr. Withers with arrest and the policies behind these decisions, Defendants give plenty of reason to think they would repeat this unconstitutional conduct absent an injunction. So Plaintiffs' claims remain live.

v. Defendants' own statements and actions show how easily they could return to their original policies and conduct.

Defendants also did not carry their "heavy," "formidable" burden to prove mootness, *Laidlaw*, 528 U.S. at 189–90, as they themselves show they could easily revert to their illegal conduct.

First, Defendants proved they can immediately change policies. Policies changed in two weeks can be changed back just as fast. KCC's trustees retain complete discretion to reinstate the original policies any time. In 2003, the Michigan Department of Corrections ("MDOC")—a far more complex government entity—changed its rules mid-litigation. The Sixth Circuit rejected mootness, saying: "[A]s the promulgation of the work rules appears to be solely within the discretion of the MDOC, there is no guarantee that MDOC will not change back to its older, stricter Rule as soon

as this action terminates." *Akers*, 352 F.3d at 1035. Defendants did not adopt a policy that "was years in the making." *Bench Billboard*, 675 F.3d at 982. They made a snap response to this Court's questioning. They give no reason to assume the change will stick once scrutiny subsides.

Second, as if to underscore the potential transience of the new policies, Defendants note that they printed *Student Handbooks* containing the original ones for all their students. Greene Decl. ¶ 6, PageID.460. So reverting back to the original policies would be as easy as pulling the "already printed" *Handbooks* out of the closet and issuing them to students. *Id.*

Third, Defendants will soon adopt more new policies, including one "regarding solicitation by non-profit groups, including . . . student organizations." *Id.* ¶ 5, PageID.460. This case is about Defendants enforcing their *Solicitation Policy* (*a.k.a.*, Speech Permit Policy) against students forming a student organization. Compl. ¶¶ 140–41, 157, 160, 167, 194, PageID.21–24, 26. A new solicitation policy could easily reinstitute those provisions. This danger is particularly acute when they act as if "solicitation" deserves less First Amendment protection, *see, e.g.*, Tr. at 9:23–24, PageID.398 ("They were not just passing out Constitutions, they were soliciting students. . . ."); *id.* at 24:8–9, PageID.413 (insisting KCC can constitutionally require permission for spontaneous discussion, as long as it constitutes solicitation); *id.* at 28:10–11, PageID.417 ("Again, I quarrel with your use of the word 'speak.' This is a solicitation policy."), although they define the term to include long-protected forms of speech. Compl. Ex. 3 at 79, PageID.126.

In short, "this is not a case in which reversing the cessation would be particularly burdensome." *Husted*, 838 F.3d at 713. Thus, Defendants have not made it "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur,'" *Trinity Lutheran*, 137 S. Ct. at 2019 n.1 (emphasis added), and thus, Plaintiffs' declaratory and injunctive claims are not moot.

b. Defendants' new policy does not correct many of the provisions that led to the threatened and actual arrest that sparked this case.

Defendants also never proved their new policies "'completely and irrevocably eradicated the effects of the alleged violation.'" *Cleveland Branch*, 263 F.3d at 530 (quoting *Davis*, 440 U.S. at 631). A "controversy does not cease to exist merely by virtue of a change in the applicable

[policy]," *Hamilton Cnty. Educ. Ass'n v. Hamilton Cnty. Bd. of Educ.*, 822 F.3d 831, 835 (6th Cir. 2016), or "defendant[s] could moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect." *Ne. Fla.*, 508 U.S. at 662. If a change "does not remove the language that gives rise to the constitutional challenge," the "claim is not moot." *Polaris Amphitheater Concerts, Inc. v. City of Westerville*, 267 F.3d 503, 508 (6th Cir. 2001). Or "where the changes in the [policy] arguably do not remove the harm or threatened harm underlying the dispute, the case remains alive." *Hamilton Cnty.*, 822 F.3d at 835 (quotations omitted); *Cam I, Inc. v. Louisville/Jefferson Cnty. Metro. Gov't*, 460 F.3d 717, 720 (6th Cir. 2006) (same).

This Court must look at the Complaint's "gravamen" to see if the new policies pose *any* of the same flaws as the original ones. *Ne. Fla.*, 508 U.S. at 662. The new policies contain flaws, and Defendants will adopt more policies that address the same issues that sparked this case. Even if "[t]he new [policies] may disadvantage [Plaintiffs] to a lesser degree than the old one[s]," they still "disadvantage them in the same fundamental way." *Id.* So Plaintiffs' claims are not moot. *Williams*, 2012 WL 2160969, at *2 n.1 ("[A] new policy that disadvantages Plaintiffs in the same fundamental way as the old one, albeit to a possible lesser degree, does not moot the case.").

First, this case arose largely because of Defendants' hyper-sensitive view of what disrupts their educational environment, and their new policies do nothing to fix this. To them, this environment collapses if three or four people stand on a sidewalk, ask people questions, collect signatures, and distribute literature, Compl. ¶¶ 149–56, PageID.21–22, especially if KCC "receive[s] a complaint from a student." Tr. at 9:24–25, PageID.398. To them, Plaintiffs "were obstructing students' education by asking them questions" they dubbed "provocative" like, "Do you like freedom and liberty?" Compl. ¶ 164–65, PageID.23. To them, even just "engaging [students] in conversation on their way to educational places" is an "obstruction to their education," *id.* ¶ 167, PageID.23–24, sufficient to justify threatened and actual arrests. *Id.* ¶¶ 175–94, PageID.25–26.

Defendants carried their erroneous view—one that would not pass muster in high school, *see infra* Part II.B.3—into their new policy, which states: "When expressive activities occur, [KCC] will work to ensure that such activities transpire without interference by the College, provided the

learning environment is not disrupted . . . by said expressive activities." Defs.' MTD Ex. 2, PageID. 461. Notably, this does not say that KCC will not interfere; it just "will work to ensure" it does not interfere. So KCC assures students: "We will try." Even this trying is contingent on the speech not disrupting the learning environment. Given Defendants' history, this is cold comfort. The new policy gives officials no guidance on what counts as a disruption, not even the minimal, *Tinker* qualifiers of "substantially and materially." So Plaintiffs could just as easily be arrested under the new policy as under the old. Thus, the new policy "disadvantage[s] them in the same fundamental way," and the case is not moot. *Ne. Fla.*, 508 U.S. at 662; *Williams*, 2012 WL 2160969, at *2 n.1.

Second, this case arose because Defendants demanded Plaintiffs get official permission before conducting expressive activities on campus. This was part of their written policies. Compl. Ex. 3 at 53, PageID.100; *id.* at 58, PageID.105; *id.* at 79 § 3.a, PageID.126. And they repeatedly faulted Plaintiffs for not getting it. *See, e.g.*, Compl. ¶¶ 157, 160, PageID.22–23; Answer ¶ 170, PageID. 232 (noting Plaintiffs "were required to register with Student Life in order to solicit on campus").

Despite what they say, Defs. MTD Br. at 1–2, PageID.447–48, Defendants still appear to require permission. A man recently collected signatures near where Mrs. Gregoire was arrested almost a year ago. Gregoire MTD Decl. ¶¶ 5–6. He had to get permission from KCC before engaging in expression almost identical to that for which she was arrested. *Id.* ¶¶ 10–11. So the prior restraint at the heart of this case continues. The new policy "disadvantage[s] [Plaintiffs] in the same fundamental way"; the case is not moot. *Ne. Fla.*, 508 U.S. at 662; *Williams*, 2012 WL 2160969, at *2 n.1.

Third, this case arose because Defendants enforced their Solicitation Policy (*a.k.a.*, Speech Permit Policy) against people seeking to recruit new members for a nascent student group. Compl. ¶¶ 140–41, 145–48, 159–60, 167, 194, PageID.21, 23–24, 26. They will soon adopt "additional policies," including one "regarding solicitation by non-profit groups, including . . . student organizations." Greene Decl. ¶ 5, PageID.460. They glibly say this has nothing to do with this case. Defs.' MTD Br. at 3 n.3, PageID.449. But there is no way that a forthcoming solicitation policy governing student groups has nothing to do with a case about enforcing a solicitation policy against people forming a student group. As Defendants have yet to unveil this policy, there is no way they

can prove it will not "disadvantage[s] [Plaintiffs] in the same fundamental way" as the one at issue here. *Ne. Fla.*, 508 U.S. at 662. So this case is not moot. *Williams*, 2012 WL 2160969, at *2 n.1.

II. The Rule 12(b)(6) motion should be denied as Defendants do not merit qualified immunity.

Coming after their Answer, Defendants' Rule 12(b)(6) motion is "untimely." *McGlone*, 681 F.3d at 728. It is really a Rule 12(c) motion for judgment on the pleadings. *Id.* But the standards for the two are identical. *Gillespie v. City of Battle Creek*, 100 F. Supp. 3d 623, 627 (W.D. Mich. 2015); *Lindsay v. Yates*, 498 F.3d 434, 437 (6th Cir. 2007). Either way, a "motion to dismiss for failure to state a claim is disfavored, especially when one's civil rights are at stake." *McGlone*, 681 F.3d at 728.

Under Rule 12(c), this Court "must take 'all well-pleaded material allegations of the [Complaint] . . . as true, and the motion may be granted only if [Defendants are] nevertheless clearly entitled to judgment.'" *Hass v. Melrose Twp.*, 2017 WL 283388, *4 (W.D. Mich. Jan. 23, 2017) (quoting *Wurzelbacher v. Jones-Kelley*, 675 F.3d 580, 583 (6th Cir. 2012)). "Matters outside the pleadings are not to be considered. . . .," *Quality Edge, Inc. v. Rollex Corp.*, 2015 WL 4392980, *1 (W.D. Mich. Jul. 15, 2015), such as Defendants' declarations and policy changes.

Defendants do not challenge the Complaint's sufficiency but insist that the "individual Defendants"—not KCC itself—merit qualified immunity.[5] Defs.' MTD Br. at 9, PageID.455. "[I]t is generally inappropriate for a district court to grant a Rule 12(b)(b) motion to dismiss on the basis of qualified immunity," rather than "resolv[ing] the issue at summary judgment." *Courtright v. City of Battle Creek*, 839 F.3d 513, 518 (6th Cir. 2016); *Kaminski v. Coulter*, 865 F.3d 339, 344 (6th Cir. 2017) (same). This motion should be denied as the Complaint "alleges facts that plausibly mak[e] out a claim that [D]efendant[s'] [policies and] conduct violated a constitutional right that was clearly established law at the time, such that a reasonable officer would have known that his conduct violated that right." *Courtright*, 839 F.3d at 518 (quotations omitted).

A. Ignorance of the law is not an excuse for receiving qualified immunity.

Defendants erroneously insist they should receive qualified immunity unless Plaintiffs prove

[5] Defendants' qualified immunity argument has no impact on Plaintiffs' declaratory and injunctive relief claims. *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 257 n.20 (6th Cir. 2015).

Defendants subjectively knew their policies, threats, and arrests violated Plaintiffs' rights. Defs.' MTD Br. at 9, PageID.455 ("Plaintiffs allege no facts that the individual Defendants knew . . . that Defendant KCC's policies were unconstitutional on their face or that any of their specific conduct violated Plaintiffs' constitutional rights by enforcing those policies."). This is clearly wrong. Qualified immunity asks whether "the constitutional right was clearly established," *Grawey v. Drury*, 567 F.3d 302, 309 (6th Cir. 2009) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)), meaning "a reasonable officer would understand that what he is doing violates that right." *McGlone*, 681 F.3d at 735. The focus is the reasonable official, not Defendants' subjective knowledge.

B. Defendants violated clearly established First Amendment freedoms.

Normally, the qualified immunity analysis first assesses if "the violation of a constitutional right has occurred." *Grawey*, 567 F.3d at 309. Defendants concede this half-heartedly. Defs.' MTD Br. at 9, PageID.455 ("[F]or the purposes of this Motion only, Defendants will acknowledge that this Court indicated its belief that KCC's policies violated Plaintiffs' First Amendment rights."). So this Court need only consider whether Plaintiffs' rights were clearly established, which they were. As courts consistently invalidate speech zones and permit policies that restrict students, reasonable officials would have known KCC's policies were defective.[6] At a minimum, reasonable college officials in 2016 knew that threatening to arrest and arresting people for peacefully distributing the Constitution on an outdoor campus sidewalk violated the First Amendment.

For the clearly established analysis, Plaintiffs need not show "the very action in question has previously been held unlawful," *Bell v. Johnson*, 308 F.3d 594, 601–02 (6th Cir. 2002), or cite "a case with the exact same fact pattern, or even 'fundamentally similar' or 'materially similar' facts," *Cummings v. City of Akron*, 418 F.3d 676, 687 (6th Cir. 2005), though we have. *Williams*, 2012

[6] *See, e.g.*, *OSU Student Alliance v. Ray*, 699 F.3d 1053 (9th Cir. 2012); *Justice for All (JFA) v. Faulkner*, 410 F.3d 760 (5th Cir. 2005); *Hays Cnty. Guardian v. Supple*, 969 F.2d 111 (5th Cir. 1992); *Grace Christian Life v. Woodson*, 2016 WL 3194365 (E.D.N.C. Jun. 4, 2016); *Williams*, 2012 WL 2160969; *Smith v. Tarrant Cnty. Coll. Dist.*, 694 F. Supp. 2d 610 (N.D. Tex. 2010); *Smith v. Tarrant Cnty. Coll. Dist.*, 670 F. Supp. 2d 534 (N.D. Tex. 2009); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004); *Pro-Life Cougars*, 259 F. Supp. 2d 575; *Khademi v. S. Orange Cnty. Cmty. Coll. Dist.*, 194 F. Supp. 2d 1011 (C.D. Cal. 2002); *Burbridge v. Sampson*, 74 F. Supp. 2d 940 (C.D. Cal. 1999).

WL 2160969. "[A]n action's unlawfulness can be apparent from direct holdings, from specific examples described as prohibited, or from the general reasoning that a court employs." *Grawey*, 567 F.3d at 313. It is not "unreasonable to expect [D]efendants—who hold themselves out as educators—to be able to apply . . . a standard, notwithstanding the lack of a case with material factual similarities." *Holloman v. Harland*, 370 F.3d 1252, 1278 (11th Cir. 2004).

To determine if a right is clearly established, this Court should "look first to the decisions of the Supreme Court, then to the decisions of [the Sixth Circuit] and other courts within our circuit, and finally to decisions of other circuits." *Hermansen v. Thompson*, 678 Fed. Appx. 321, 325 (6th Cir. 2017) (quoting *Benison v. Ross*, 765 F.3d 649, 664 (6th Cir. 2014)); *Brown v. Battle Creek Police Dep't*, 844 F.3d 556, 566–67 (6th Cir. 2016) (same). Hence, the law supporting Plaintiffs' preliminary injunction motion also shows Defendants are not entitled to qualified immunity. *See* Pls.' Mot. for Prelim. Inj. ("MPI") Br. at 7–24, PageID.292–309; Pls.' MPI Reply at 1–10, PageID.370–79.

1. Defendants' viewpoint-based policies and actions are unconstitutional in any forum.

Reasonable officials know viewpoint discrimination is not permitted anywhere. *Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834, 845 (6th Cir. 2000) ("In both designated public fora and nonpublic fora, the government may not discriminate based upon the viewpoint of the speaker."). This includes the college campus as over four decades ago the Supreme Court ruled that "state colleges . . . are not enclaves immune from the sweep of the First Amendment" and its "precedents . . . leave no room for the view that . . . First Amendment protections should apply with less force on colleges campuses than in the community at large." *Healy v. James*, 408 U.S. 169, 180 (1972).

a. Defendants' Speech Permit Policy requires viewpoint discrimination.

Reasonable officials know that viewpoint discrimination occurs "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Reasonable college officials are particularly attuned to this "axiomatic" principle, given its collegiate pedigree. *Id.*

But Defendants ignored it, banning speech KCC officials decide does not "support the mission of [KCC]" or "of a recognized college entity or activity." Compl. ¶¶ 81–82, PageID.12–13. This

policy *requires* KCC officials to examine the viewpoint of speech to see if it lines up with the College's mission. *Id.* ¶¶ 106–11, PageID.16–17.

b. Defendants silenced Plaintiffs using the unbridled discretion their policies grant.

Reasonable officials know the Supreme Court has "consistently condemned" rules that "vest in an administrative official discretion to grant or withhold a permit based upon broad criteria unrelated to proper regulation of public places." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969). Such rules are viewpoint-based. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763–64 (1988) (noting vague or non-existent criteria allow officials to "decide who may speak and who may not based upon the content of the speech or the viewpoint of the speaker"); *Matwyuk v. Johnson*, 22 F. Supp. 3d 812, 824–25 (W.D. Mich. 2014) (finding language granting unbridled discretion to be viewpoint-based); *Southworth v. Bd. of Regents of Univ. of Wis. Sys.*, 307 F.3d 566, 579 (7th Cir. 2002) ("[T]he prohibition against unbridled discretion is a component of the viewpoint-neutrality requirement."). Thus, they know permit schemes cannot involve the "appraisal of facts, the exercise of judgment, [or] the formation of an opinion," *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992), and must "contain narrow, objective, and definite standards to guide" officials. *Shuttlesworth*, 394 U.S. at 150–51; *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 621 (6th Cir. 2009) ("To avoid granting unbridled discretion, ordinances must contain precise and objective criteria on which they must make their decisions. . . .").

Reasonable officials know that policies violate the First Amendment if they *allow* viewpoint-based decisions, even if discretion is never abused. *Forsyth Cnty.*, 505 U.S. at 133 n.10 ("[T]he success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-[or viewpoint-] based way, but whether there is anything in the ordinance preventing him from doing so."); *Polaris*, 267 F.3d at 509 ("At stake is the risk that in the absence of 'narrowly drawn, reasonable and definite standards for the officials to follow,' the law invites opportunities for the unconstitutional suppression of speech."). Hence, they incorporate affirmative "protection . . . for viewpoint neutrality." *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000).

But Defendants ignored these clearly established principles. First, their Speech Permit Policy grants Defendants unfettered discretion to allow only speech they deem to be consistent with the "mission of [KCC]" or "of a recognized college entity or activity." Compl. ¶ 107, PageID.16. They give no guidelines for what this means or how to apply it. *Id.* ¶¶ 108–09, PageID.16–17.

Second, this policy grants officials "authority to approve, modify, or deny an application for solicitation in order to assure the reasonable conduct of public business, the educational process, unobstructed access to the College . . . , and to maintain College grounds," without giving objective or comprehensive criteria to those who review permit requests. Compl. ¶¶ 89–91, PageID.14. Each factor calls for "the appraisal of facts, the exercise of judgment, and the formation of an opinion." *Forsyth Cnty.*, 505 U.S. at 131. If a request satisfied all "governing conditions," officials could still deny it as nothing says these are the only reasons a request can be rejected or guarantees that requests meeting these conditions will be granted. Compl. ¶¶ 102–03, PageID.16. Thus, the policy does not limit officials' discretion over when and where students may speak. *Id.* ¶ 205, PageID.28.

Third, Defendants' unwritten Speech Zone Policy restricts students to an indoor information table, which they must reserve ten business days in advance, and provides no guidelines as to which requests to grant or deny. *Id.* ¶¶ 119–20, PageID.18. Reasonable college officials know that "[t]he fact that the 'policy' [is] not written . . . mean[s] that there [a]re no standards by which officials [can] be limited. It le[aves] them with unbridled discretion." *OSU Student Alliance*, 699 F.3d at 1064–65 (citing *Lakewood*, 486 U.S. at 760). And they know that courts have "little trouble finding constitutional violations" when such policies are enforced in ways far less egregious than throwing people in jail for distributing the Constitution on a campus sidewalk. *Id.* at 1058.

Defendants imposed and enforced policies that any reasonable official in 2016 would have known were viewpoint-based and unconstitutional anywhere. They do not merit qualified immunity.

2. Defendants enforced illegal prior restraints in designated public fora for students.

As reasonable college officials have long known, because "students enjoy First Amendment rights of speech and association on the [college] campus, . . . the 'denial of use of campus facilities . . . must be subjected to the level of scrutiny appropriate to any form of prior restraint." *Widmar*

v. Vincent, 454 U.S. 263, 267 n.5 (1981). "A prior restraint is any law forbidding certain communications when issued in advance of the time that such communications are to occur," *McGlone*, 681 F.3d at 733, or requiring government approval for private speech. *Déjà Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 274 F.3d 377, 391 (6th Cir. 2001). So they would have known that Defendants' policies, which required students to get permission before speaking on campus, were prior restraints. Compl. ¶¶ 82–93, 123–33, PageID.12–15, 18–20.

It has long been clear that there is a "heavy presumption" that prior restraints are unconstitutional, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *accord Déjà Vu*, 274 F.3d at 391, and that they "are the most serious and least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). It is well-established that rules qualify as reasonable time, place, and manner restrictions only if they (1) are content neutral, (2) are "narrowly tailored to a significant governmental interest," and (3) "leave open alternatives for communication." *McGlone*, 681 F.3d at 733. But Defendants' policies fail each test.

a. Plaintiffs' expression falls well within the First Amendment's protections.

Reasonable officials know Plaintiffs' forms of expression—which include leafleting and gathering signatures, Compl. ¶¶ 21, 24, 142–43, 149–56, 165, PageID.5, 21–23—have long enjoyed First Amendment protection, even if labeled "solicitation." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (discussing protections for handbilling); *Meyer v. Grant*, 486 U.S. 414, 421–22 & n.5 (1988) (same for circulating petitions and soliciting signatures). They know Plaintiffs' topics—"political, religious, social, cultural, and moral issues and ideas," Compl. ¶¶ 18, 21, 24–25, PageID.4–5—occupy "the highest rung of the hierarchy of First Amendment values" and are "entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011).

b. Defendants restricted speech in areas of campus that are at least designated public fora for students.

Reasonable college officials know the open, outdoor areas of campus (*e.g.*, the sidewalks where Plaintiffs were arrested and threatened) are at least designated public fora for students. After all, the Supreme Court ruled that "the campus of a public university, *at least for its students*, possesses many of the characteristics of a public forum." *Widmar*, 454 U.S. at 267 n.5 (emphasis

added). As a college need not "make all of its facilities equally available to students and nonstudents alike," *id.*, they know restrictions permissible for nonstudents may not be proper for students.

Reasonable college officials also know federal courts across the country have ruled that the open, outdoor areas of campus are designated public fora for students. *See, e.g.*, *Hays Cnty.*, 969 F.2d at 116 (finding "sidewalks and plazas are designated public fora for . . . university students"); *JFA*, 410 F.3d at 769 (holding "outdoor open areas of its campus accessible to students—such as plazas and sidewalks—[are designated] public forums for student speech"); *OSU Student Alliance*, 699 F.3d at 1062 (ruling "campus is at least a designated public forum"). In the Sixth Circuit, even for nonstudents, campus sidewalks that blend into the "urban grid" constitute traditional public fora and "other open areas . . . are designated public fora." *McGlone*, 681 F.3d at 732–33.

Defendants say their campus is a limited public forum due to a street-preacher case that predates *McGlone*. Defs.' MPI Resp. at 9, PageID.338 (citing *Gilles v. Garland*, 281 Fed. Appx. 501, 511 (6th Cir. 2008)). But reasonable officials know this was weighed and found wanting. *Williams*, 2012 WL 2160969, at *4–5 ("*Gilles* does not suggest, nor is this Court aware of any other precedent establishing, that a public university may constitutionally designate its entire campus as a limited public forum *as applied to students*."). The "public exterior areas" at issue "*remain designated public fora as to students*"; Defendants' view is "anathema to the nature of a university." *Id.*

c. Defendants enforced policies that were clearly content-based.

It is clear that policies must be content neutral to qualify as time, place, and manner restrictions, *McGlone*, 681 F.3d at 733; that policies that "permit the Government to discriminate on the basis of the content . . . cannot be tolerated under the First Amendment," *Regan v. Time, Inc.*, 468 U.S. 641, 648–49 (1984); *Bible Believers*, 805 F.3d at 248 ("[C]ontent-based restrictions . . . are anathema to the First Amendment and . . . presumptively invalid."); and that viewpoint-based policies are also content-based as viewpoint discrimination is "an egregious form of content discrimination." *Rosenberger*, 515 U.S. at 829; *see supra* Part II.B.1.

It is also clear that a policy is "content based if [it] applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227

(2015). But Defendants barred Plaintiffs from expressing themselves, Compl. ¶¶ 148–54, 160–64, 173, 180, PageID.21–25, due to the "provocative" questions they asked (*i.e.*, "Do you like freedom and liberty?"). *Id.* ¶¶ 164–66, PageID.23. This shows Defendants considered the viewpoint and content of Plaintiffs' speech. *C.E.F. of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 527 (3d Cir. 2004) (Alito, J.) ("To exclude a group simply because it is controversial or divisive is viewpoint discrimination."); *Bible Believers*, 805 F.3d at 243 (noting "distasteful and highly offensive" speech "most often needs protection under the First Amendment").

Reasonable officials know that "'[l]isteners' reaction to speech is not a content-neutral basis for regulation' or for taking an enforcement action against a peaceful speaker." *Bible Believers*, 805 F.3d at 247 (quoting *Forsyth Cnty.*, 505 U.S. at 134). Here, Defendants watched Plaintiffs and then restricted their speech due to the possible reaction of students from "rural farm areas." Compl. ¶ 169, PageID.24. Defendants wanted to "protect" students who "don't have wifi." *Id*. But "the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer." *Erznoznik v. City of Jacksonville*, 422 U.S. 215, 210 (1975). If removing speakers intent upon antagonizing a hostile mob is "decidedly content-based" such that the police were denied qualified immunity, *Bible Believers*, 805 F.3d at 247, 257–59, then Defendants here do not merit it either. Reasonable officials know that one's free speech rights do not depend on whether his listener has wifi at home.

d. Defendants' policies clearly fail both intermediate and strict scrutiny.

It is well-established that content-neutral restrictions must be "narrowly tailored" to serve a substantial government interest.[7] *McGlone*, 681 F.3d at 733. That is, they must "target[] and eliminate[] no more than the exact source of the evil [they] seek[] to remedy." *Frisby v. Schultz*, 487 U.S. 474, 475 (1988). Defendants' policies and actions clearly did not meet this standard.

Reasonable officials know "[p]ermit schemes and advance notice requirements that potentially apply to small groups are nearly always overly broad and lack narrow tailoring." *Am.-Arab Anti-*

[7] Defendants must prove that their content-based policies pass strict scrutiny (*i.e.*, "that they are narrowly tailored to serve compelling state interests"). *Reed*, 135 S. Ct. at 2226.

Discrimination Comm. v. City of Dearborn, 418 F.3d 600, 608 (6th Cir. 2005). But Defendants ban individuals or small groups (*e.g.*, three or four people) from speaking without a permit or anywhere other than a table in the Student Center. Compl. ¶¶ 83–87, 97, 116–18, PageID.13–15, 18.

Reasonable officials know requiring students to get a permit to speak "effectively ban[s]" "a significant amount of spontaneous speech," thus violating the First Amendment. *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 167–68 (2002); *McGlone*, 681 F.3d at 733–34 ("Any notice period is a substantial inhibition on speech" as "[t]he simple knowledge that one must inform the government of his desire to speak and must fill out appropriate forms and comply with the applicable regulations discourages citizens from speaking freely."). But Defendants provide no avenue for spontaneous speech. The Speech Zone Policy requires "ten (10) business days" advance notice to speak. Compl. ¶¶ 115–22, PageID.17–18. The Speech Permit Policy requires students to get a permit to speak. *Id.* ¶¶ 87, 127–29, PageID.14, 19. So students cannot address time-sensitive matters spontaneously. *Id.* ¶¶ 202–03, PageID.27. This is clearly unconstitutional at college. *Williams*, 2012 WL 2160969, at *6 ("[E]xpansive permitting schemes place an objective burden" on free speech and "essentially ban spontaneous speech").

Reasonable officials know that restricting student speech to one tiny indoor location—a table in the Student Center—is not narrowly tailored. Compl. ¶ 118, PageID.18. The Sixth Circuit ruled that limiting leafleting to a booth "does not further a substantial governmental interest" and is not narrowly tailored. *Saieg v. City of Dearborn*, 641 F.3d 727, 732, 736, 740 (6th Cir. 2011). It also ruled that banning the "soliciting of causes outside of the booth space" was "substantially broader than necessary." *Bays v. City of Fairborn*, 668 F.3d 814, 818, 822–23 (6th Cir. 2012). It noted that "*Saieg* struck down a policy that simply restricted leafleting without an information table." *Id.* at 824. Both cases involved public parks, but reasonable officials know that "restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum." *Pleasant Grove City v. Summum*, 555 U.S. 460, 469–70 (2009). It is clear that limiting student speech to one corner of one quad on a college campus, which is more than Defendants allowed, is not narrowly tailored. *Williams*, 2012 WL 2160969, at *1, 7 & n.5.

Reasonable college officials know that requiring students to seek a permit "ten (10) business days" before speaking is not narrowly tailored. Compl. ¶¶ 115–20, 129, PageID.17–19. The Sixth Circuit struck down a university policy requiring "at least fourteen (14) days (excluding weekends and holidays)" notice *from nonstudents* and cited approvingly to federal cases invalidating notice policies of thirty, twenty, seven, five, and two days. *McGlone*, 681 F.3d at 734. *Williams*, 2012 WL 2160969, at *6–7 & n.5, struck down, as not narrowly tailored, a university's three-, five-, and fifteen-day notice requirements *for students*. Reasonable college officials know it is "simply unfathomable that a [KCC] student needs to give [KCC] advance notice of an intent to gather signature[s or distribute literature]. *There is no danger to public order arising out of students walking around campus with clipboards seeking signatures [and distributing Constitutions]*." *Id.* at *7 n.5.

e. Defendants provide no ample alternative means for communication.

It is clearly established that time, place, and manner rules must "leave open alternatives for communication." *McGlone*, 681 F.3d at 733. Alternatives must allow speakers to "reach the intended audience" and provide "opportunity for spontaneity." *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1025 (9th Cir. 2008); *accord Saieg*, 641 F.3d at 740.

Defendants provide no alternatives. The Speech Permit Policy prohibits students from speaking anywhere on campus unless they get a permit first. Compl. ¶¶ 83–87, 127–29, PageID.13–14, 19. The Speech Zone Policy bans all speech anywhere, except at a table in the Student Center, *id.* ¶¶ 117–18, PageID.18, preventing Plaintiffs from reaching students, *Id.* ¶¶ 143, 176, PageID.21, 25. As students must seek a permit for a table ten days in advance, there is no "opportunity for spontaneity." *Long Beach*, 574 F.3d at 1025. Defendants say students can leave campus to speak with other students. Defs.' MPI Resp. at 16, PageID.345. But reasonable officials know "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939).

In sum, Defendants enforced content-based prior restraints that do not even pass the scrutiny for content-neutral rules, let alone strict scrutiny. Any reasonable official in 2016 would have known that these policies were illegal and that arresting people pursuant to them was unreasonable.

3. Defendants enforced policies that would be illegal in high schools or airports.

Reasonable officials know not even high schools can restrict student speech to avoid "the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969). But Defendants restrict speech to "protect" students from "rural farm areas" who "don't have wifi" from hearing "provocative" questions and being offered the Constitution. Compl. ¶¶ 165–66, 169, PageID.23–24. Reasonable officials know that, even in high school, free speech "would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots." *Tinker*, 393 U.S. at 513. But Defendants do precisely this, Compl. ¶¶ 115–22, 157, 161–63, PageID.17–18, 22–23, to placate those who might be "uncomfortable with what you guys are talking about." *Id.* ¶ 172, PageID.24. As reasonable college officials know they have "*less leeway* in regulating student speech than . . . high school administrators." *DeJohn*, 537 F.3d at 316, they do not impose rules that are unconstitutional in high schools or airports. Pls.' MPI Reply at 8–9, PageID.377–78.

4. Defendants enforced policies that are clearly overbroad.

Defendants' policies grant officials tremendous leeway to restrict almost all forms of student speech—far more than is necessary to serve any legitimate purpose—and are clearly overbroad. *See supra* Parts II.B.1, II.B.2.d; Pls.'s MPI Br. at 21, PageID.306; Pls.' MPI Reply at 9, PageID.378.

C. Defendants violated clearly established Fourteenth Amendment freedoms.

Defendants enforced vague policies in ways that violated the Equal Protection Clause's straightforward requirement. Thus, they run ignored constitutional doctrines that were clear long before 2016. Pls.' MPI Br. at 21–24, PageID.306–09; Pls.' MPI Reply at 9 n.3, PageID.378.

CONCLUSION

Plaintiffs' claims are not moot as Defendants did not make it absolutely clear they will never repeat the illegal conduct they still defend, can so easily reinstitute, and can continue under their new policies. Also, it was clear before 2016 that requiring students to get a permit before soliciting signatures, restricting them to one small location on campus, and threatening to arrest them if they went anywhere else (let alone arresting them) violated the First Amendment. *Williams*, 2012 WL 2160969. Thus, Defendants' motion should be denied, and their policies should be enjoined.

Respectfully submitted this 19th day of September, 2017,

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of September, 2017, I electronically filed a true and accurate copy of the foregoing document with the Clerk of Court using the CM/ECF system, which automatically sends an electronic notification to the following attorneys of record:

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