UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

J. MICHAEL BROWN; YOUNG AMERICANS FOR LIBERTY AT JONES COUNTY JUNIOR COLLEGE, Plaintiffs, v. JONES COUNTY JUNIOR COLLEGE; BOARD OF TRUSTEES OF JONES COUNTY JUNIOR COLLEGE; JESSE SMITH, in his individual and official capacities; MARK EASLEY, in his individual and official capacities; GWEN MAGEE, in her individual and official capacities; STAN LIVINGSTON, in his individual and official capacities, Defendants.	)	Case No.2:19-cv-127-KS-MTP

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

This is a First Amendment lawsuit challenging facially unconstitutional policies maintained by Defendant Jones County Junior College, implemented by its administrators, and enforced against Plaintiff Michael Brown to stop him from speaking to his fellow students about joining Plaintiff Young Americans for Liberty at JCJC. Brown has also brought a First Amendment retaliation claim against Defendant Stan Livingston, the chief law enforcement officer at JCJC, for intimidating Brown and threatening to arrest YAL members because of their efforts to engage JCJC students in political discussion.

On two occasions in the Spring of 2019, Brown and other YAL members were peacefully talking to students on campus when JCJC officials forced them to stop because their expressive

activity violated JCJC's policies. Each time, JCJC officials ordered Plaintiffs to stop and called JCJC police, who questioned Plaintiffs and threatened YAL members with arrest. Because of Defendants' actions, Plaintiffs have refrained from engaging in any expressive activity on campus since April 2019.

Defendants have moved to dismiss the Complaint for lack of standing under Fed. R. Civ. Pro. 12(b)(1) and failure to state a claim under Fed. R. Civ. Pro. 12(b)(6). Defendants' arguments are based upon a mischaracterization of the facts in the Complaint and improper legal standards. The factual allegations in the Complaint applied to the correct legal standards demonstrate that Plaintiffs have established standing and alleged violations of clearly established law. Therefore, this Court should deny Defendants' motion in its entirety.

STATEMENT OF FACTS

Plaintiff J. Michael Brown is a resident of Hattiesburg, Mississippi and was a student enrolled at Jones County Junior College (JCJC) at the institution's Ellisville campus between August 2018 and August 2019. Compl. ¶¶ 12, 116. In August 2018, Brown founded a JCJC chapter of Young Americans for Liberty (YAL), a libertarian youth advocacy organization with chapters on college and university campuses nationwide. *Id*. ¶ 38. YAL is an unrecognized student organization at JCJC. *Id*. ¶ 13.

Defendants are JCJC, its Board of Trustees, and individually-named JCJC administrators and police, who are sued in their official and individual capacities. *Id.* ¶¶ 14-19. The Individual Defendants are President Dr. Jesse Smith, Executive Vice President of Student Affairs Gwen Magee, Dean of Student Affairs Mark Easley, and Chief of Police Stan Livingston. *Id.* The Individual Defendants implemented JCJC's policies to deprive Plaintiffs of their constitutional rights, including supervising staff responsible for their enforcement. *Id*. Defendants Easley and

Livingston also directly enforced the policies at issue in this case to violate Plaintiffs' constitutional right to free speech. *Id.* ¶¶ 18-19.

I. JCJC Officials Force Brown and YAL to Stop Their Expressive Activities and Threaten to Arrest Two YAL Members.

On February 26, 2019, Brown and a former JCJC student, Mitch Strider, who is also a member of YAL's national organization, visited the JCJC campus to talk to students about YAL's mission in an effort to recruit new members for the chapter. *Id.* ¶ 41. Brown and Strider inflated an oversized beach ball, which they referred to as a "free speech ball." *Id.* ¶ 42. They took the ball to JCJC's central quadrangle, Centennial Plaza,[1] and, for approximately one hour, invited passing students to write messages on the ball, while Brown and Strider talked to them about issues important to YAL and encouraged them to sign up for the chapter. *Id.* ¶ 43. Brown and Strider wrote down contact information of students interested in learning more about the chapter on a sign-up sheet. *Id.* Brown and Strider's activities caused no disruption to pedestrian or vehicular traffic or in any other way disrupted JCJC's operations. *Id.* ¶ 44.

Thereafter, Brown and Strider moved with the ball to a grassy area next to the Administration Building. *Id.* ¶ 45. Once there, they were approached by an unidentified JCJC staff person, who asked if they had spoken with JCJC Dean of Students Mark Easley about their expressive activity and received permission to be on campus. *Id.* ¶¶ 47-48. Shortly thereafter, Dean Easley and another JCJC staff member, Luke Hammonds, approached. *Id.* ¶ 49. Easley informed Brown and Strider that they were not permitted to be on campus with the free speech ball because they had not followed JCJC's policies to gain administrative approval for the activity. *Id.* ¶¶ 50-51.

[1] A true and correct copy of a campus map publicly available on JCJC's website as of the date of the filing of this Complaint is attached as Exhibit D to the Complaint. ECF No. 1-5.

Dean Easley then called JCJC Chief of Campus Police Stan Livingston. *Id.* ¶ 54. While Dean Easley spoke to Livingston, JCJC staff member Hammonds stated loudly that the free speech ball had "profanity all over it." *Id.* ¶ 56. At that point, Brown asked Hammonds what would happen if he refused to remove the free speech ball from campus, and Hammonds responded that they would let Livingston "handle all that." *Id.* ¶ 57.

When Chief Livingston arrived, he ordered Brown and Strider to accompany him to his office and to leave the free speech ball outside. *Id.* ¶¶ 58-60. In his office, Livingston told Brown that if he had an "agenda" and wanted to "do this" he needed to "clear it" with Gwen Magee—then Interim Vice President of Student Affairs—and "go through her system." *Id.* ¶¶ 62-63. Although Livingston acknowledged that JCJC's policy was "ambiguous," he reiterated that Brown was not permitted to be on campus with the free speech ball until he had received permission from Magee. *Id.* ¶¶ 67-68. Livingston said that Brown would need to come back the following week to meet with Magee because she was not then on campus. *Id.* ¶ 63. Livingston also threatened to arrest Strider for trespass if he did not leave campus. *Id.* ¶¶ 64-65. Brown and Strider then deflated the ball and left campus. *Id.* ¶¶ 69.

Since then, neither Brown nor any other member of the YAL chapter or YAL's national organization has attempted to bring a free speech ball onto JCJC's Ellisville campus or any other JCJC property for fear of disciplinary action, removal from campus, or arrest. *Id.* ¶ 72. Several months later, however, on April 4, 2018, Brown visited the campus—this time without the free speech ball and joined by Brown's girlfriend, a JCJC student and YAL chapter member, and Nathan Moore, a staff member of the national YAL organization—to speak with students about YAL's mission in attempt to find students to join his YAL chapter. *Id.* ¶¶ 73-74. The trio stood on Centennial Plaza, near the entrance to JCJC's Jones Hall. *Id.* ¶ 74. Brown held up a sign inviting

students to share their thoughts on whether marijuana should be legalized. *Id.* The three carried pamphlets and pocket copies of the U.S. Constitution to give to interested students, as well as a sign-up sheet. *Id.*

Shortly after arriving, however, while they were speaking with two students, JCJC staff member Hammonds stopped Brown and Moore and asked them what they were doing. *Id.* ¶ 77. Brown explained that they were speaking with students about civil liberties and the government. *Id.* ¶ 80. Hammonds then asked if Brown had been on campus earlier with a beach ball. *Id.* ¶ 81. After Brown responded in the affirmative, Hammonds summoned JCJC campus police. *Id.* ¶ 84. The students who had been speaking to Brown and Moore then walked away. *Id.* ¶ 86. Hammonds took Brown, his girlfriend, and Moore inside the vestibule of Jones Hall to await campus police. *Id.* ¶ 87.

After approximately five minutes, JCJC campus police officer Kim Dikes arrived. *Id.* ¶ 19. Dikes said they were not permitted to engage in such activity on campus without prior administrative permission. *Id.* ¶ 90. When Brown asked Dikes what policy they had violated by their actions, she responded, "That's illegal, first of all, and you're on a school campus." *Id.* ¶¶ 90-91. Dikes ordered Brown and his girlfriend inside of Jones Hall and asked for their drivers' licenses and student identification cards. *Id.* ¶ 92. While Dikes was recording Brown and his girlfriend's personal information, Livingston arrived at Jones Hall. *Id.* ¶ 94.

Chief Livingston said that Brown knew he was not allowed to engage in expressive activity on campus without administrative permission. *Id.* ¶ 95. Livingston instructed Dikes to take Brown and his girlfriend to the Administration Building while he escorted Moore to his vehicle. *Id.* ¶ 96. As they walked out of the building, Livingston ordered Moore to provide his drivers' license. *Id.* ¶ 99. When Moore declined, Livingston ordered him to leave campus and threatened to arrest him

for trespass if he returned. *Id.* ¶ 100. Meanwhile, Dikes took Brown and his girlfriend to Livingston's office in the Administration Building and monitored them until Livingston returned. *Id.* ¶ 104.

When Livingston arrived, he told Brown that he was "smarter than that" and that Brown knew he was not allowed to engage in expressive activity on campus without administrative approval. *Id.* ¶ 106. Livingston told Brown he could not be on campus "interrupting the education process" and accused him of trying to make him "look like a fool." *Id.* ¶¶ 106-107. Brown said he thought it was the presence of the free speech ball that prompted JCJC administrators and police to stop his earlier expressive activity and that he thought he did not need prior administrative permission to simply engage fellow students in conversation. *Id.* ¶ 108. Livingston insisted that Brown must go through Magee's "process" before engaging in any expressive activity on campus and warned Brown not to cause any more "trouble" before the end of the semester. *Id.* ¶¶ 109-110. Dean Easley then entered the office at Livingston's invitation and reiterated to Brown that he must obtain prior approval before conducting any "events" on campus. *Id.* ¶¶ 111-113. Although Brown continued as a student at JCJC throughout the 2019 spring and summer semesters, neither he nor any other member of the YAL chapter or YAL's national organization engaged in expressive activity on the Ellisville campus or any other JCJC property after April 4, 2019, for fear of disciplinary action, removal from campus, or arrest. *Id.* ¶ 116.

II. JCJC's Policies Prohibiting and Requiring Pre-Approval of Speech and Expressive Activity.

JCJC's Student Handbook and Code of Conduct[2] direct all JCJC students to comply with the Conduct Code and Handbook regulations and policies and subjects them to disciplinary action for violations. *Id.* ¶ 22.

Paragraph 2.a. of the Handbook's "Student Activity Policies" provides as follows in a section labeled "Assemblies Regulations":

> Any student parade, serenade, demonstration, rally, and/or other meeting or gathering for any purpose, conducted on the campus of the institution must be scheduled with the President or Vice President of Student Affairs at least 72 hours in advance of the event. (Forms available in Student Affairs) Names of the responsible leaders of the groups must be submitted to the institution at the time of scheduling.

Id. ¶ 25. Paragraph 2.b. of the Student Activity Policies states: "Students assembling for any meeting not authorized in accordance with paragraph one [indicating paragraph 2.a.] are subject to proper disciplinary action. Students present at such unauthorized meetings are considered to be participants." *Id.* ¶ 26.

Furthermore, Paragraph 1 of the Student Activity Policies includes "Scheduling and Planning" regulations that provide, in relevant part:

> a. All college connected student activities conducted by a student organization at Jones County Junior College must be scheduled by the Vice President of Student Affairs. The Vice President of Student Affairs reserves the right to schedule or not schedule any activity. Where the activity is not scheduled, the sponsoring organization may request a hearing before the Student Affairs Committee. Only approved student organizations may conduct student activities on or off the campus.
>
> b. Permission for student activities may be obtained by completing the "Activity/Speaker Application Form" available on the myJones *Insider*. All

[2] A full copy of the 2018-2019 JCJC Student Handbook, which also contains the Code of Conduct, may be found at https://web.archive.org/web/20190710155131/http://www.jcjc.edu/studentpolicies/docs/studenthandbook.pdf.

> requests are due in the Office of the Student Affairs [*sic*] **five days** preceding the activity. […]

Id. ¶ 30 (emphasis added). Accordingly, because YAL is not an "approved" student organization, it may not conduct "student activities" on campus. *Id.* ¶ 29. And even if the organization were "approved," its student leaders would need to obtain approval from JCJC administrators that could be withheld for no reason or any reason at all, and do so at least five days before holding any activities. *Id.* ¶ 30.

Paragraph 9 of the Conduct Code also lists "actions [that] are violations of college regulations." *Id.* ¶ 23. "Disruptive activity" is listed as one of those actions and is defined to include "unauthorized events and activities of any and all segments of the college." *Id.* Paragraph 17 of the Conduct Code also lists "disorderly conduct," "lewd, indecent, or obscene conduct," and "public profanity on campus" as violations of JCJC regulations. *Id.* ¶ 24.

Finally, the Student Handbook provides that the Student Affairs Committee has authority to discipline students, like Brown, who violate these policies or any other provisions governing student conduct, by suspending or recommending the expulsion of a student. *Id.* ¶¶ 27, 31. The Vice President of Student Affairs can impose "[d]isciplinary probation, fines, or other action" for "minor infractions in lieu of an appearance before the disciplinary committee, provided the student agrees to such action as imposed." *Id.* ¶ 27.

LEGAL STANDARDS

Under Federal Rule of Civil Procedure 12(b)(1), "'[w]hen standing is challenged on the basis of the pleadings,' [the court] must 'accept as true all material allegations of the complaint and . . . construe the complaint in favor of the complaining party.'" *Ass'n of Am. Physicians & Surgeons, Inc. v. Texas Med. Bd.*, 627 F.3d 547, 550 (5th Cir. 2010) (quoting *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988) (citations and internal quotation omitted)).

"To survive a motion to dismiss under Rule 12(b)(6), 'a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Hollins v. City of Columbia*, No. 2:19-CV-28-KS-MTP, 2019 U.S. Dist. LEXIS 122381, at *3 (S.D. Miss. July 23, 2019) (Starrett, J.) (quoting *Great Lakes Dredge & Dock Co. LLC v. La. State*, 624 F.3d 201, 210 (5th Cir. 2010)). "The Court must 'accept all well-pleaded facts as true and construe the complaint in the light most favorable to the plaintiff.'" *Id.* (quoting *Great Lakes Dredge & Dock Co. LLC*, 624 F.3d at 210). "[T]he Court will not accept as true 'conclusory allegations, unwarranted factual inferences, or legal conclusions.'" *Id*. (quoting *Great Lakes Dredge & Dock Co. LLC*, 624 F.3d at 210). "Likewise, 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 417 (5th Cir. 2010)).

ARGUMENT

Plaintiffs allege that the Defendants maintain facially unconstitutional policies that operate as prior restraints and overbroad restrictions on student speech and that these policies were applied to censor their peaceful, non-disruptive on-campus speech in violation of their clearly established rights under the First and Fourteenth Amendments to the Constitution. Plaintiffs Brown and YAL also assert a claim for First Amendment retaliation. In light of their allegations, Plaintiffs are entitled to pursue damages, injunctive, and declaratory relief for these violations. The Court should therefore deny Defendants' motion to dismiss.

I. Plaintiffs Have Standing to Pursue Their Claims.

To establish Article III standing, a plaintiff must allege that: (1) he has suffered an injury-in-fact that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; (2) "the injury is fairly traceable to the challenged action of the defendant[s]"; and

(3) the injury "is likely to be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

Plaintiffs' allegations satisfy these requirements with respect to both their facial and as-applied challenges. Although Defendants' argument focuses only on Plaintiffs' alleged injury with regard to their facial rather than their as-applied challenges, *see* Defs. Mem. 4, Plaintiffs will address both types of claims in this brief.

A. Plaintiffs Have Suffered an Injury Sufficient to Support Their As-Applied Claims.

A plaintiff has standing to challenge a policy or rule that has been enforced in a way that censors his speech. *See, e.g.*, *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 659 (5th Cir. 2006) ("The contention that a party cannot challenge a statute as-applied unless the statute has been applied to him is generally correct."); *see also Gerlich v. Leath*, 861 F.3d 697, 704 (8th Cir. 2017) ("An injury is defined under 42 U.S.C. § 1983 as a 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws.'"); *Rock for Life-UMBC v. Hrabowski*, 411 F. App'x 541, 555 (4th Cir. 2010) (student group and former students had standing to bring facial and as-applied challenges to university facilities use policy that led to relocation of group's demonstration); *Shaw v. Burke*, No. 2:17-CV-02386, 2018 U.S. Dist. LEXIS 7584, at *14 (C.D. Cal. Jan. 17, 2018) (student alleging application of campus free speech policy to restrict his on-campus expression "sufficiently establishes his standing because he demonstrates a concrete injury, traceable to Defendants' conduct that could be redressed by a favorable ruling.").

Here, Plaintiffs suffered an injury that gives rise to their as-applied claims and Brown's retaliation claim because the challenged JCJC policies and practices were applied to suppress their on-campus speech on two occasions. Compl. ¶¶ 41-115. On each occasion, JCJC staff members and campus police stopped Plaintiffs' ongoing expression and informed the Plaintiffs that they

were doing so pursuant to the challenged policies and procedures. *Id.* ¶¶ 62, 68, 90, 95, 106-113. Given these allegations, there can be no reasonable dispute that Plaintiffs have alleged the kind of injury sufficient to support their as-applied challenge to Defendants' policies and Brown's retaliation claim.

B. Plaintiffs Have Suffered an Injury Sufficient to Support Their Facial Claim.

Plaintiffs likewise allege injury sufficient to support their facial challenge. Contrary to Defendants' arguments, establishing standing in a facial challenge does not require Plaintiffs to submit to JCJC's prior approval procedures or first be punished before raising a First Amendment claim. *See* Defs. Mem. 1-3, 7.

"In First Amendment facial challenges, federal courts relax the prudential limitations and allow yet unharmed litigants to attack potentially overbroad statutes — 'to prevent the statute from chilling the First Amendment rights of other parties not before the court.'" *Fairchild v. Liberty Indep. Sch. Dist.*, 597 F.3d 747, 754 (5th Cir. 2010) (quoting *Secretary of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956-58 (1984)). Thus, a plaintiff need not first apply for and be denied a license to speak in order to challenge a licensing or permitting scheme on First Amendment grounds. *Freedman v. Maryland*, 380 U.S. 51, 56 (1965) ("In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and *whether or not he applied for a license*.") (emphasis added). Nor is a plaintiff required to experience arrest, prosecution, or discipline before bringing a facial challenge. *Hous. Chronicle Publ'g Co. v. City of League City*, 488 F.3d 613, 618-19 (5th Cir. 2007) (citing *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *Int'l Soc. for Krishna Consciousness v. Eaves*, 601 F.2d 809, 818 (5th Cir. 1979)). Rather, a plaintiff need only allege that he "is

'seriously interested in' engaging 'in a course of conduct arguably affected with a constitutional interest, but proscribed by statute[.]" *Fairchild*, 597 F.3d at 755 (quoting *Eaves*, 601 F.2d at 818; *Miss. State Democratic Party v. Barbour*, 529 F.3d 538, 545 (5th Cir. 2008)). "Chilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement." *Hous. Chronicle*, 488 F.3d at 618.

The Fifth Circuit held in *Fairchild*, 597 F.3d at 754-55, that evidence a plaintiff curtailed her speech is sufficient to satisfy this requirement. There, a terminated school district employee facially challenged a rule governing public comment during district board meetings, alleging that the rules chilled public speech by forbidding disclosure of certain information during meetings. *Id*. The Fifth Circuit concluded that the injury-in-fact requirement was satisfied because the plaintiff had "reign[ed] in her own speech" during a meeting, and defendants conceded that she would not have been allowed to disclose her desired information under the rule. *Id.*; *see also Ctr. for Individual Freedom*, 449 F.3d at 661 (plaintiff non-profit demonstrated injury sufficient for facial challenge of state campaign finance disclosure law where evidence showed state interpreted law in a manner that applied to advertisements plaintiff wished to run, but had refrained from doing so); *Rock for Life-UMBC*, 411 F. App'x at 549 (plaintiffs student organization and former student members had standing to assert facial challenge to college speech codes applied to restrict plaintiffs' speech); *Bair v. Shippensburg*, 280 F. Supp. 2d 357, 365 (M.D. Pa. 2003) (student and former student alleging their speech was chilled under overbroad college speech code had standing for facial challenge).

Plaintiffs easily satisfy these requirements. Not only has Plaintiffs' speech been chilled, but the policies they challenge were actually applied to them when their peaceful, non-disruptive expressive activities in outdoor areas of campus were stopped by campus police and school

officials who cited the JCJC policies. Compl. ¶¶ 41-115.[3] Plaintiffs have also alleged facts to demonstrate they curtailed their speech on both occasions by complying with directives to stop their expressive activities in light of those policies. Compl. ¶¶ 50-52, 61-69, 87-113. Plaintiffs also allege that their speech continued to be chilled when they refrained from engaging in expressive activity after these encounters. After Brown's February 26th encounter, neither he nor any other YAL member has brought a free speech ball to the JCJC campus. Compl. ¶ 72. After the YAL members' April 4th encounter, Plaintiffs have refrained from *any* expressive activity on campus for fear of punishment, removal from campus, or arrest. Compl. ¶¶ 116, 118. Thus, Defendants err in arguing that Brown and YAL lack standing because no one was arrested or disciplined, or that Brown's and, derivatively, YAL's speech was not actually chilled. *See* Defs. Mem. at 7, 8.

C. Plaintiffs Have Standing to Challenge the 'Public Profanity' Provision of the Student Handbook.

Defendants argue that Plaintiffs lack standing to challenge JCJC's Student Handbook policy prohibiting "public profanity on campus" by students because of the lack of a credible threat of enforcement of that ban. Defs. Mem. 8. But as Plaintiffs alleged, their expressive activity on February 26, 2019 included the use of a free speech ball on which students were invited to write messages of their choice, including profanity, and at least one JCJC staff member viewed that profanity as a basis to prohibit the activity. Compl. ¶ 56. That is hardly surprising, given the

[3] Nor can there be any reasonable argument that JCJC will not enforce its policies in the future. "[P]ast enforcement against the same conduct is good evidence that the threat of enforcement is not 'chimerical.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2345 (2014) (quoting *Steffel*, 415 U.S. at 459); *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 15-16 (2010) (holding plaintiffs had standing in pre-enforcement review of statute where there was a history of enforcement and the government would not disavow potential prosecution of plaintiffs). Indeed, far from any "hypothetical" or "conjectural" threat of enforcement, JCJC administrators and campus police have explicitly stated their intention to continue to enforce their policies, and to take disciplinary action against students for non-compliance, a threat made clear by the terms of the Student Handbook. Compl. ¶¶ 20–115.

schools' explicit prohibition on "profanity on campus." Compl. ¶¶ 24, 128. Again, Plaintiffs are not required to await punishment for speech proscribed by regulation in order to raise a facial challenge to the rule. *Hous. Chronicle*, 488 F.3d at 619.

D. Plaintiffs Have Standing to Seek Damages, Injunctive Relief, and Declaratory Relief on Their Claims.

Defendants also argue that Plaintiffs lack standing to challenge JCJC's speech restrictions and profanity policies because Brown does not allege that he remains a student at JCJC, remains a member of YAL, or intends or desires to participate in student activities or assemblies or engage in profanity at JCJC. Defs. Mem. at 7, 8. But because Brown and YAL have suffered injury in the past, there can be no doubt that they have standing to pursue their claims for damages. *See, e.g., Pederson v. La. State Univ.,* 213 F.3d 858, 875 (5th Cir. 2000) (the fact that students no longer attend an institution does not moot their claims for damages where they assert past rights violations); *Clark v. Dall. Indep. Sch. Dist*., 806 F. Supp. 116, 119 (N.D. Tex. 1992) ("A [student plaintiff's] claim for damages is not rendered moot by a cessation of the original violation.") (citing *Walls v. Miss. State Dep't of Pub. Welfare*, 730 F.2d 306, 314 (5th Cir. 1984)).

Although Brown's status as a former student might normally deprive him of standing to seek injunctive and declaratory relief, this Court should hold that he and YAL have third-party standing to seek these forms of relief in the context of Plaintiffs' First Amendment overbreadth challenge. "When a party asserts a facial challenge to a statute under the First Amendment, courts may permit third-party standing when a plaintiff demonstrates that a provision that validly restricts its own speech is overbroad." *Nat'l Fed'n of the Blind of Tex., Inc. v. Abbott*, 647 F.3d 202, 210 (5th Cir. 2011). As the Supreme Court has explained:

> Even where a First Amendment challenge could be brought by one actually engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further in

> the protected activity. Society as a whole then would be the loser. Thus, when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged. "Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of 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."

Sec'y of Md. v. Joseph H. Munson Co., 467 U.S. 947, 956-57 (1984) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)).

Plaintiffs allegations invoke the important societal interests that call for relaxed prudential standing limits in First Amendment cases. JCJC's policies are facially overbroad, imposing unconstitutional prohibitions and prior restraints on any student speech anywhere on campus. Compl. ¶¶ 20-34, 36, 37, 122, 128, 161. Plaintiffs allege that these restrictions not only caused their own speech to be silenced but, by their continued existence and enforcement, they also impose an ever-present chilling effect on the speech of all JCJC students, including future YAL chapter members.[4] Compl. ¶¶ 70, 72, 114, 116-118. Indeed, the challenged policies' "very existence may cause others not before the court to refrain" from engaging in *any* spontaneous or anonymous speech anywhere on a public campus. *See* Compl ¶¶ 34, 126, 127. Judicial intervention is necessary to ensure the rights of all students not before the Court to engage in precisely the type of protected expression engaged in by Plaintiffs.

In circumstances justifying third-party standing, "the Court considers whether the third party has sufficient injury-in-fact to satisfy the Art. III case-or-controversy requirement, and whether, as a prudential matter, the third party can reasonably be expected properly to frame the

[4] It is notable that Defendants vigorously applied the policies challenged here to suppress Plaintiffs' efforts to talk to other students about YAL's mission and recruit new members to the chapter. Defendants cannot now be allowed to avoid a constitutional challenge to those policies because of their success in censoring Brown and preventing him from expanding his organization's membership.

issues and present them with the necessary adversarial zeal." *Sec'y of Md.*, 467 U.S. at 956; *see id.* at 958 (holding for-profit fundraising company had standing for First Amendment overbreadth claims for declaratory and injunctive relief challenging state law restricting charities' expenditure on fundraising expenses, even though plaintiff asserted charities' rights, not its own).

Plaintiffs easily meet these requirements. They demonstrate injury-in-fact sufficient to support Article III standing as to all of their claims, as detailed above. *See supra*, at p. 10-14. They can reasonably be expected to zealously frame and present the relevant issues for their own and all students' benefit because their facial and as-applied claims for damages raise almost entirely overlapping issues. Moreover, Plaintiffs plead that YAL has an ongoing interest in returning to campus without suffering JCJC's speech restrictions, alleging that "YAL wishes to engage in expressive activity at JCJC without seeking prior administrative approval and without having to wait at least three to five days in order to do so." Compl. ¶ 118. The Court should therefore find that Plaintiffs have standing to pursue injunctive and declaratory relief.

Because Plaintiffs properly allege standing to seek damages, injunctive, and declaratory relief, Defendants' motion to dismiss their claims pursuant to Federal Rule of Civil Procedure 12(b)(1) should be denied.

II. Plaintiffs Plead That Defendants Violated Clearly Established Law.

Government officials are entitled to qualified immunity from civil damages if "'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Hollins*, 2019 U.S. Dist. LEXIS 122381, at *6 (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). Courts apply a two-step analysis to claims of qualified immunity. *Id.* "First, the Court determines whether the defendant's 'conduct violates an actual constitutional right.' … Second, the Court must 'consider whether [the defendant's] actions were

objectively unreasonable in the light of clearly established law at the time of the conduct in question.'" *Id.* (quoting *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008)).

Defendants argue that "[a] plaintiff must satisfy a heightened pleading standard when qualified immunity is raised at the pleading stage." Defs. Mem. 10. However, this Court recently noted that the Fifth Circuit has rejected this argument: "'[W]hen, as here, a qualified immunity defense is asserted in an answer or a motion to dismiss, the district court must — as always — do no more than determine whether the plaintiff has filed a short and plain statement of his complaint, a statement that rests on more than conclusions alone.'" *Id.* at *5 (quoting *Anderson v. Valdez*, 845 F.3d 580, 589-90 (5th Cir. 2016)). As such, this Court must apply the "typical 12(b)(6) standard of review under *Iqbal*" in this case. *Id.*[5]

A. Plaintiffs Have Pled That Defendants Were Involved in the Deprivation of Plaintiffs' Clearly Established First Amendment Rights.

Defendants do not make the typical qualified-immunity argument; that is, they do not argue that the challenged policies do not violate clearly established law. Instead, applying the incorrect "heightened pleading standard," Defendants argue Plaintiffs have not alleged facts to establish that the Individual Defendants were personally involved in Plaintiffs' constitutional violations and cannot be liable for their actions as supervisors. Defs. Mem. 13. Defendants, however, grossly mischaracterize the involvement of the Individual Defendants and misstate the standard for liability against supervisors.

[5] As this Court noted, it may "insist that a plaintiff file a reply tailored to the defendant's answer or motion to dismiss pleading the defense of qualified immunity … [if Plaintiffs did not] plead specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity." *Hollins*, 2019 U.S. Dist. LEXIS 122381, at *5-6. This is not necessary, however, because Plaintiffs have pled facts to establish that Defendants violated clearly established law.

A "'supervisor may be held liable if there exists either (1) his personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation.'" *Jordan v. Wayne Cty*., No. 2:16-CV-70-KS-MTP, 2017 U.S. Dist. LEXIS 75014, at *14 (S.D. Miss. May 17, 2017) (Starrett, J.) (quoting *Thompkins v. Belt*, 828 F.2d 298, 304 (5th Cir. 1987)). Defendants appear to argue that, absent personal involvement in an alleged constitutional deprivation, a plaintiff can only establish liability against a supervisor by showing the following:

> (1) the supervisor failed to supervise or train the officer; (2) a causal connection existed between the failure to supervise or train and the violation of the plaintiff's rights; and (3) the failure to supervise or train amounted to deliberate indifference to the plaintiff's constitutional rights. *Bivens v. Forrest Cty.*, No. 2:13-CV-8-KS-MTP, 2015 U.S. Dist. LEXIS 40602, at *50 (S.D. Miss. Mar. 30, 2015) (*citing Roberts v. City of Shreveport*, 397 F.3d 287, 292 (5th Cir. 2005)).

Defs. Mem. 12. This is incorrect.

The *prima facie* standard cited by Defendants applies when the plaintiff alleges that the supervisor failed to train or supervise the individual who caused the deprivation. *Miley v. Jones Cty. Jail*, No. 2:05cv2072-KS-MTP, 2007 U.S. Dist. LEXIS 54078, at *16-17 (S.D. Miss. July 25, 2007). This Court, however, has noted that there is an alternative basis for supervisory liability when the plaintiff alleges that the supervisor implemented "'a policy so deficient that the policy 'itself is a repudiation of constitutional rights' and is 'the moving force of the constitutional violation.'" *Id.* at *16; *see also Dodds v. Richardson*, 614 F.3d 1185, 1212-1213 (10th Cir. 2010) (Tymkovich, J., concurring) (noting that "several theories of [supervisory] liability are possible" under Section 1983.) The Ninth Circuit has applied this standard in the university context and explained that "[a]dvancing a policy that requires subordinates to commit constitutional violations is always enough for § 1983 liability … so long as the policy proximately causes the harm — that is, so long as the plaintiff's constitutional injury in fact occurs pursuant to the policy." *OSU Student*

All. v. Ray, 699 F.3d 1053, 1076 (9th Cir. 2012), *cert. denied*, ___ U.S. ___, 134 S. Ct. 70, 187 L. Ed. 2d 29 (Oct. 7, 2013)).

As explained below, Plaintiffs have pled facts sufficient to establish liability under either the "failure to supervise" or "implementing an unconstitutional policy" basis of liability against Defendants Smith and Magee. Moreover, Plaintiffs have pled facts to support claims against Defendants Easley and Livingston based upon their actions as supervisors and their personal enforcement of unconstitutional policies. [6]

1. Defendants Smith and Magee Implemented Unconstitutional Policies and Failed to Supervise Subordinates Who Implemented Those Policies to Deprive Plaintiffs of Their Constitutional Rights.

Plaintiffs have pled facts to support individual liability against President Smith and Executive Vice President of Student Affairs Magee based upon their actions as supervisors.

Plaintiffs have pled that Smith and Magee are "responsible for the promulgation, implementation, and enforcement of JCJC policies, procedures, and practices, including those that were applied to deprive Brown and YAL of their constitutional rights." Compl. ¶¶ 16-17. Specifically, Plaintiffs alleged that President Smith is the college's executive officer, managing and directing all affairs of the college under policies and regulations established by the Board of

[6] The Individual Defendants are also properly joined in this action regardless of personal involvement because they are necessary to Plaintiffs' claims for injunctive relief. "A plaintiff seeking injunctive relief against the State is not required to allege a named official's personal involvement in the acts or omissions constituting the alleged constitutional violation. Rather, a plaintiff need only identify the law or policy challenged as a constitutional violation and name the official within the entity who can appropriately respond to injunctive relief." *Hartmann v. Cal. Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1127 (9th Cir. 2013) (citing *Hafer v. Melo*, 502 U.S. 21, 25 (1991)). As such, even if Defendants were not individually liable for the deprivation of Plaintiffs' constitutional rights (which they are), they would still be properly joined because they are the administrators and staff who would provide the requested relief. Compl. ¶¶ 16-19 (alleging that Defendants have policy-making and enforcement authority over the JCJC's policies).

Trustees. *Id*. ¶ 16. Smith is also responsible for preparing and recommending any policy changes he believes are necessary to the Board. *Id*. Plaintiffs allege that Vice President Magee is responsible for supervising and implementing the policies and procedures for student conduct and discipline and for coordinating student activities. *Id*. ¶ 17. Livingston expressly identified Magee as the administrator responsible for implementing the prior approval policies and procedures challenged in this action. *Id*. ¶¶ 62-63, 68, 109. Moreover, Magee is responsible for advising President Smith on administrative procedures, policies, and operational matters as a member of his Executive Cabinet. *Id*. ¶ 17.

Plaintiffs have alleged that the policies maintained and implemented by Smith and Magee are unconstitutional, and, therefore, "a repudiation of constitutional rights." *Id.* ¶¶ 122-129. Moreover, Plaintiffs have provided numerous facts detailing that these unconstitutional policies were "the moving force of the constitutional violation" because subordinates of Smith and Magee applied the policies to prevent Brown and members of YAL from engaging in expressive activities on campus. *Id.* ¶¶ 38-118. Specifically, on February 29, 2019 and April 4, 2019, individuals under the supervision of Smith and Magee told Brown and YAL members that they could not continue to engage in their recruitment efforts because they did not receive permission from Magee in accordance with JCJC's policies. *Id.* ¶¶ 62-68, 109.[7]

Plaintiffs have further alleged that Smith and Magee "knew or reasonably should have known" that the unconstitutional policies that they implemented would be enforced to deprive

[7] As alleged in paragraphs 70 and 114, Defendants Easley and Livingston as well as Luke Hammonds and Kim Dikes enforced the unconstitutional policies to deprive Plaintiffs' of their constitutional rights. Plaintiffs have alleged that Smith supervised all of these individuals as the executive officer in charge of JCJC, and Plaintiffs have alleged that Magee supervised these individuals because they were responsible for "supervising and implementing policies and procedures for student conduct and discipline and for coordinating student activities and organizations." Compl. ¶¶ 16-17.

Plaintiffs of their constitutional rights and failed to take the action necessary to avoid this deprivation with deliberate indifference to the constitutional rights of Plaintiffs. *Id.* Contrary to Defendants' assertion the Complaint only contains "boilerplate allegations about [Smith's and Magee's] job responsibilities," the foregoing establishes that Plaintiffs have sufficiently alleged that Smith and Magee "[a]dvanc[ed] a policy that require[ed] subordinates to commit constitutional violations …." *Ray*, 699 F.3d at 1076; *see also Dodds*, 614 F.3d at 1204 (affirming denial of summary judgment where "Defendant … may have deliberately enforced or actively maintained the policies in question at the jail. Plaintiff has thereby presented facts that establish personal involvement by Defendant in the alleged constitutional violation sufficient to satisfy § 1983). Alternatively, Plaintiffs have alleged that Smith and Magee failed to supervise Easley, Livingston, and other JCJC staff members with deliberate indifference to Plaintiffs' constitutional rights, and their deliberate indifference ultimately led Easley, Livingston, and other JCJC staff members to enforce the unconstitutional policies to deprive Plaintiffs of their constitutional rights.

Because Plaintiffs have alleged that Smith and Magee implemented unconstitutional policies and failed to supervise individuals who enforced those policies, this Court should deny Defendants' motion to dismiss Plaintiffs' claims against Smith and Magee in their individual capacities.

2. Defendant Easley Enforced Unconstitutional Policies and Failed to Supervise Subordinates Who Implemented Those Policies to Deprive Plaintiffs of Their Constitutional Rights.

Plaintiffs have pled facts to support individual liability against Dean of Student Affairs Easley based upon his actions as a supervisor and his personal enforcement of unconstitutional policies.

As to his actions as a supervisor, Dean Easley, like Smith and Magee, was "responsible for the promulgation, implementation, and enforcement of JCJC policies, procedures, and practices, including those that were applied to deprive Brown and YAL of their constitutional rights." Compl. ¶ 18. Specifically, Easley assists and reports to Magee and is responsible for coordinating and supervising the areas of discipline, campus safety, student activities, clubs and organizations, and coordination of facility use. *Id*. These areas encompass the policies and procedures challenged here. As noted above, Plaintiffs have alleged that these policies are facially unconstitutional, the policies were the "moving force" that caused Plaintiffs' constitutional deprivation, and that Easley acted with deliberate indifference to the constitutional rights of Brown, YAL, and all JCJC students. *Id.* ¶¶ 18, 38-118.

As to Dean Easley's personal enforcement of the policies at issue, Defendants appear to argue that Easley's actions do not violate clearly established law because he "merely informed Brown and his acquaintances about the College's policy requiring advanced scheduling of student organization events." Defs. Mem. 14. This is a gross mischaracterization of Plaintiffs' allegations. Plaintiffs have pled that Easley enforced JCJC's unconstitutional policies against Plaintiffs in order to stop their peaceful, non-disruptive expressive activity in outdoor areas of campus. *Id.* ¶¶ 47-69. Specifically, Easley told Brown and a YAL member that "they were not permitted to be present on campus with the free speech ball because they had not followed JCJC's policies to gain administrative approval for the activity." *Id.* ¶ 50. Easley then called Defendant Livingston, who ultimately stopped Brown and a YAL member from engaging in their expressive activity by ordering them to come to his office. *Id.* ¶¶ 54, 59. Moreover, on April 4, 2019, after Brown and fellow YAL members were again stopped from recruiting new members, Easley reiterated that Brown must obtain prior approval before conducting any "events" on campus." *Id.* ¶ 113. Contrary

to Defendants' argument, Easley did not simply inform Plaintiffs about JCJC's policies, he implemented those policies and forced Plaintiffs to stop their expressive activities. *Id.* ¶¶ 71, 115.

Because Easley implemented the unconstitutional policies in his supervisory role and personally enforced those policies to stop Plaintiffs from engaging in expressive activities on campus, this Court should dismiss Defendants' motion to dismiss Plaintiffs' claims against Easley in his individual capacity.

3. Defendant Livingston Enforced Unconstitutional Policies and Failed to Supervise Subordinates Who Implemented Those Policies to Deprive Plaintiffs of Their Constitutional Rights.

Plaintiffs have pled facts to support individual liability against Chief of Campus Police Livingston based upon his actions as a supervisor and his personal enforcement of unconstitutional policies.

As to his liability as a supervisor, Plaintiffs allege Chief Livingston is "responsible for implementing and enforcing JCJC policies, procedures, and practices that were applied to deprive Brown and YAL of their constitutional rights." Compl. ¶ 19. Livingston is the chief law enforcement officer at JCJC, directing all operations and supervising all campus police. *Id.* He works with Magee on matters of campus security and disciplinary actions concerning violations of college policy or regulations by students. *Id.* Livingston was aware of the unconstitutional college policies and procedures at issue here, and he was aware that an officer under his supervision, Kim Dikes, applied these policies on April 4, 2019 to stop Brown and two fellow YAL members from engaging in expressive activity. *Id.* ¶¶ 19, 73-100. As noted above, Plaintiffs have alleged that these policies are facially unconstitutional, the policies were the "moving force" that caused Plaintiffs' constitutional deprivation, and that Livingston acted with deliberate indifference to the constitutional rights of Brown, YAL, and all JCJC students. *Id.* ¶¶ 19, 38-118.

Further, Plaintiffs pled that Livingston failed to sufficiently supervise Dikes, demonstrating deliberate indifference to Plaintiffs' constitutional rights, and his deliberate indifference ultimately permitted Dikes to enforce the unconstitutional policy to deprive Plaintiffs' of their constitutional rights, including telling Plaintiffs that it was "illegal" to engage in their expressive activity "on a school campus" on April 4. *Id.* ¶¶ 19, 91, 137.

As to his personal enforcement of the policies and procedures at issue, Livingston stopped Plaintiffs from engaging in expressive activity on February 26, 2019 and April 4, 2019. *Id.* ¶¶ 41-100. On both occasions, Livingston told Brown and other YAL members that they could not continue to recruit new members because they had not obtained pre-approval from Defendant Magee in accordance with JCJC's policies. *Id.* ¶¶ 62-68, 109. Based upon Livingston's directives that Brown could not engage in recruitment for YAL without Magee's approval, Brown reasonably concluded that he had been threatened with punishment or removal from campus and was thus unable to continue his expressive activities. *Id.* ¶¶ 71, 115. Thus, Plaintiffs have pled that Livingston enforced the unconstitutional policies and stopped Plaintiffs from engaging in expressive activities on campus.

Because Livingston implemented the unconstitutional policies in his supervisory role and personally enforced those policies to stop Plaintiffs from engaging in expressive activities on campus, this Court should dismiss Defendants' motion to dismiss Plaintiffs' claims against Easley in his individual capacity.

B. Brown Has Properly Pled a Free Speech Retaliation Claim.

Brown must allege the following to state a claim for First Amendment retaliation: "(1) that []he was engaged in constitutionally protected activity, (2) that Defendants' actions caused [him] to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that

activity, and (3) that Defendants' adverse actions were substantially motivated against [his] exercise of constitutionally protected conduct." *Hollins*, 2019 U.S. Dist. LEXIS 122381, at *13 (citing *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002)). Defendants challenge only the second element by arguing that Brown did not "allege an injury that would chill a person of ordinary firmness from engaging in [his] activities … [because] any 'injury' [he] claim[s] to have suffered is too 'trivial or minor' to support a claim of retaliation." Defs. Mem. 15. Defendants appear to argue that a plaintiff must plead an *injury* that would chill a person of ordinary firmness from engaging in expressive activities. However, that is not the correct standard.

To succeed on a First Amendment retaliation claim, a plaintiff must prove that the *defendant's actions* would chill a person of ordinary firmness from engaging in expressive activities as well as an injury. For example, in *Keenan*, the Fifth Circuit found that the defendants' actions of detaining the plaintiff were "sufficiently intimidating to chill the speech of a person of ordinary firmness." *Keenan*, 290 F.3d at 259. After reaching this conclusion, the Firth Circuit then analyzed whether the plaintiffs pled that they suffered an injury, concluding that they did because the plaintiffs "curtailed their protected speech activities in response to the defendants' actions." *Id.* at 260 (reversing district court's finding that plaintiffs failed to identify an injury). Thus, at this stage of litigation, this Court must determine if Brown pled an injury and actions by the defendants that would "chill a person of ordinary firmness from engaging in expressive activities."

An officer's threat to arrest individuals or their companions in retaliation for protected expression would chill a person of ordinary firmness from continuing to engage in that expressive activity. "The law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006). Moreover, the Fifth Circuit has

explained that "'[a]ny form of official retaliation for exercising one's freedom of speech, including prosecution, *threatened prosecution*, bad faith investigation, and legal harassment, constitutes an infringement of that freedom.'" *Izen v. Catalina*, 398 F.3d 363, 367 n.5 (5th Cir. 2005) (emphasis added) (citing *Smith v. Plati*, 258 F.3d 1167, 1176 (10th Cir. 2001)); *see also Andrews v. Scott*, 729 F. App'x 804, 812 (11th Cir. 2018) (affirming motion to dismiss noting that "even the threat of arrest would likely deter a person of ordinary firmness from the exercise of First Amendment rights …."); *Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048, 1056 (7th Cir. 2004) ("The Supreme Court has often noted that a realistic threat of arrest is enough to chill First Amendment rights.") (citing *City of Hous., Tex. v. Hill*, 482 U.S. 451, 459 n.7 (1987)). Finally, retaliatory law enforcement action directed at individuals associated with a plaintiff has been found to be sufficiently chilling. *Mills v. City of Bogalusa*, 112 F. Supp. 3d 512, 517 (E.D. La. 2015) (finding that officers' harassment of plaintiff's relative and process server sufficiently chilling).

Livingston chilled Brown from engaging in expressive activities and recruiting on behalf of YAL when he responded to complaints by JCJC officials on February 26, 2019 and April 4, 2019. Compl. ¶¶ 58, 95. On both occasions, Livingston told Brown and other YAL members that they could not continue to talk to students. *Id.* ¶¶ 68, 95. Further, Livingston required Brown and other YAL members to remain in his office and chastised them. *Id.* ¶¶ 60, 95. Livingston also ordered the YAL members accompanying Brown to leave campus and *threatened to arrest them if they returned. Id.* ¶¶ 64, 100-103. Finally, Livingston insinuated that Brown would be punished for any future expressive conduct, telling him not to "cause any more 'trouble' before the end of the semester." *Id.* ¶ 111. These actions were severe enough to chill a person of ordinary firmness from continuing to engage in that activity. In fact, Livingston's actions caused Brown and other

members of YAL to refrain from engaging in expressive activity at JCJC, including any further recruitment efforts. *Id.* ¶116.

Because Brown has pled that Livingston engaged in actions that resulted in an injury and would chill a person of ordinary firmness from continuing to engage in protected activity, this Court should deny Defendants' motion to dismiss Brown's claim for First Amendment retaliation against Livingston.

C. Plaintiffs Have Sufficiently Pled a Claim for Damages.

Section 1983 provides for compensatory damages, including damages for emotional distress and mental anguish. *Carey v. Piphus,* 435 U.S. 247, 263-64 (1978). Courts across the country have held that plaintiffs who have alleged compensatory damages are entitled to discovery to substantiate their claims. *Randle v. Alford*, No. 1:09cv166, 2011 U.S. Dist. LEXIS 20614, at *3-4 (E.D. Tex. Jan. 20, 2011) (noting that "[i]t is possible that further development of the record could demonstrate that [plaintiff's injuries] were so minimal as to not support a claim for compensatory damages. However, it is not clear at this stage of the proceedings that plaintiff is barred by Section 1997e(e) from recovering compensatory damages."); *EEOC v. Stone Pony Pizza, Inc.*, 172 F. Supp. 3d 941, 958 (N.D. Miss. 2016) (noting at the summary judgment stage that "a ruling on damages is premature. Should this case proceed to trial, the parties will have the opportunity to present arguments as to specific damages, mitigation, punitive damages, bifurcation, and other relevant issues."); *see also Zlomsowitch v. E. Penn Twp.*, No. 3:11-CV-2131, 2012 U.S. Dist. LEXIS 62022, at *16-17 (M.D. Pa. May 3, 2012) (noting that the "complaint's short and plain statement regarding [plaintiff's] damages is sufficient under Rule 8(a), so the complaint will not be dismissed ….") (citing 5A Charles Alan Wright et al., Federal Practice and Procedure § 1310 (3d ed. 1998)).

Plaintiffs have pled facts to support their claims for compensatory damages. Specifically, Brown pled that he felt "distressed" by the actions of Easley and Livingston on February 26, 2019, which included a threat by Livingston to arrest his companion. Compl. ¶ 71. Brown also pled that he felt intimidated and distressed by the actions of Hammonds, Dikes, Easley, and Livingston on April 4, 2019, which again included a threat by Livingston to arrest his companion, being detained in the Chief of Police's office, and his warning to Brown that he ought not "cause any more 'trouble' before the end of the semester." *Id.* ¶¶ 103-105, 111, 116. Brown's allegations regarding his mental state after he was forced to stop his expressive activities for YAL by the police are not, as Defendants argue, "conclusory statements;" instead, these are facts that Brown should be permitted to further develop in discovery. Defs. Mem. 16.

Moreover, Defendants' argument that Plaintiffs' damages claims should be dismissed for failure to allege compensable harm also fails because Plaintiffs are, at minimum, entitled to seek nominal damages. *Carey*, 435 U.S. at 266 (a plaintiff may seek nominal damages in a Section 1983 action even in the absence of proof of actual injury). It is well established that at least nominal damage is presumed from the denial of a constitutional right. *Gore v. Turner*, 563 F.2d 159, 164 (5th Cir. 1977). Plaintiffs have alleged multiple claims for the denial of their rights under the First and Fourteenth Amendments and are therefore entitled to pursue claims for at least nominal damages. Compl. ¶¶ 119-164. Defendants' motion to dismiss Plaintiffs' damages claims on these grounds should be denied.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss Plaintiffs' claims under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) should be denied in its entirety.

DATED: November 14, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Marieke Tuthill Beck-Coon, hereby certify that a true and correct of the Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss is being served via the Court's electronic filing system on this day, November 14, 2019.

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