UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CENTER FOR BIO-ETHICAL REFORM, INC.; *et al.*,

Plaintiffs,

No. 1:13-cv-00581-RJA

v.

DENNIS R. BLACK, in his official capacity as Vice President for University Life & Services, State University of New York at Buffalo ("SUNY-Buffalo"); *et al.*,

Defendants.

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs Center for Bio-Ethical Reform, Inc. ("CBR"), Gregg Cunningham, Darius Hardwick, Christian Andzel, Matthew Ramsey, and UB Students for Life (collectively referred to as "Plaintiffs"), by and through their undersigned counsel, hereby file this opposition to Defendants' motion to dismiss (hereinafter "Defendants' motion"). As demonstrated further below, Defendants' motion misapprehends the nature of this lawsuit and its legal basis.[1] Consequently, the motion fails to address the applicable facts and law and must therefore be denied.

The Supreme Court has "long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003). Accordingly, "American schools" are "peculiarly the 'marketplace of ideas.'" *Healy v. James*, 408 U.S. 169, 180 (1972). But this "marketplace of ideas" only exists so long as the government doesn't take sides in debates on controversial public issues by allowing one side to engage in disruptive and unlawful conduct to monopolize the "market." *See generally R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992) (noting that the government has <u>no</u> "authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules"). Consequently, government officials may <u>not</u> ratify and effectuate a heckler's veto nor may they join a disruptive mob intent on suppressing ideas. Instead, they have a constitutional <u>duty</u> to protect persons exercising their constitutional rights. *See Glasson v. Louisville*, 518 F.2d 899, 906 (6th Cir. 1975) (emphasis added).

[1] Defendants incorrectly focus on the "state-created danger" doctrine, which seeks to impose liability on state actors under a *due process* argument for failing to protect a private citizen from a known or created danger. (*See* Defs.' Br. at 6-11). Consequently, Defendants fail to address the *First Amendment* issues that are relevant here.

Here, instead of fostering the free exchange of ideas in the "marketplace of ideas" (the clear objective of SUNY-Buffalo's expressive rights policies, rules, and regulations), Defendants urged and facilitated aggressively hostile acts to end a debate on a controversial public issue. As a result, Defendants' actions chill the expression of disfavored ideas—ideas that run counter to the orthodoxy of ideas prescribed by Defendants—which might eventually prove socially valuable if permitted to be tested in the crucible of intellectually honest public debate.

In the final analysis, Defendants—turning a blind eye to their own regulations that are designed to ensure the free exchange of ideas on campus—joined a raucous mob intent on suppressing Plaintiffs' constitutionally protected speech based on its message and thus denied Plaintiffs' access to a public forum for their speech based on its content and viewpoint in violation of the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

STANDARD OF REVIEW

In reviewing a Rule 12(b)(6) motion for failure to state a claim, the court must accept the well-pled allegations in the Complaint as true and construe each of them in the light most favorable to Plaintiffs. *Famous Horse Inc. v. 5th Ave. Photo Inc.*, 624 F.3d 106, 108 (2d Cir. 2010) ("accepting all factual claims in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor" when reviewing a motion to dismiss). To survive the motion, the Complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). To meet this standard, Plaintiffs must plead "factual content that allows the court to draw the reasonable inference that [Defendants are] liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In essence, "[a] pleading that states a claim for relief must contain . . . a short and plain statement of the

claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Plaintiffs' Complaint satisfies this standard.

STATEMENT OF FACTS

CBR is a social reform organization whose main purpose is to promote prenatal justice and the right to life for the unborn, the disabled, the infirm, the aged, and all vulnerable peoples through education and the development of innovative educational programs. One such educational program is the Genocide Awareness Project ("GAP"), which is a traveling photo-mural exhibit that compares the contemporary genocide of abortion to historically recognized forms of genocide, such as the Holocaust. The GAP display uses graphic images to demonstrate the irrefutable truth that abortion is a violent act that results in the death of an innocent human life. (Compl. at ¶¶ 17-19).

CBR's GAP display visits university campuses around the country to show as many students as possible what abortion actually does to unborn children and to get the students to think about abortion in a broader historical context unlikely to be considered in typical university classrooms. (Compl. at ¶ 20).

A number of significant public opinion polls indicate substantial confusion in the public mind as to the humanity of the unborn child and the inhumanity of the act of abortion. CBR's graphic images address both areas of confusion. (Compl. at ¶ 21).

Graphic and horrifying images of injustice have long been a part of modern social reform. Throughout our nation's history, social reform has often been achieved through the use of graphic pictures designed to dramatize injustice and prick the collective conscience of the culture. Examples of this phenomenon include the abolition of child labor, the civil rights movement, anti-war movements, and environmental causes. Many of these disturbing images

are well known, and it is widely acknowledged that these images were indispensable in changing public opinion at the levels necessary to create the political consensus required for social reform. Similarly, CBR uses graphic images as part of its educational programs, including GAP, to demonstrate the injustice of abortion in order to effect social change. (Compl. at ¶¶ 22-23).

CBR works with university-sanctioned student groups, such as UB Students for Life, when it displays GAP on university campuses. (Compl. at ¶ 24).

In December 2012, Plaintiff Andzel, acting on behalf of UB Students for Life and pursuant to SUNY-Buffalo (hereinafter also "University") procedures, rules, and regulations, officially requested through the Department of Student Affairs the use of the area outside of the Student Union to display GAP on April 15, 2013 and again on April 16, 2013. Plaintiff Andzel completed the online reservation form for this location. (Compl. at ¶ 25).

The area requested by Plaintiff Andzel had been approved by University officials, including Defendants, in the past for use by student organizations to engage in a myriad of activities, including free speech activities. Consequently, *this area has been designated a public forum by University officials, including Defendants, for use by student organizations for free speech activity*, such as the GAP display. (Compl. at ¶ 26).

The GAP display at this requested (and ultimately reserved) location outside of the Student Union would not (and did not) block nor interfere with pedestrian traffic, and it would (and did) provide an ideal location to expose a large number of students to CBR's graphic images, which provide irrefutable visual evidence of the injustice of abortion. Consequently, this location was important to Plaintiffs because it would allow them to effectively engage in their free speech activity. (Compl. at ¶ 27).

In late March 2013, Ms. Elizabeth Hladczuk from the Student Life Department contacted Plaintiff Andzel via email, asking him to "come in for a meeting with [her] and Tom Tiberi, the Director of Student Life." Ms. Hladczuk explained that "[w]e would like some additional information about the Genocide Awareness event, and *have some concerns that need to be addressed*." (Compl. at ¶ 28) (emphasis added).

During this meeting with Plaintiff Andzel, which was held early in the week of April 8, 2013, Ms. Hladczuk and Defendant Tiberi, acting on behalf of the University, *expressed their "concerns" about the graphic content of the GAP pictures and how they did not want people to be forced into seeing them*. Consequently, Defendants did not want to allow Plaintiffs to use the requested site outside of the Student Union for the GAP display. Instead, Defendants wanted to move Plaintiffs to a remote location that would have lessened the impact—and thus the effectiveness—of Plaintiffs' speech. (Compl. at ¶ 29).

On or about April 11, 2013, Plaintiff Cunningham sent an email to Defendant Tiberi, threatening to file a lawsuit if the site was not approved, noting that "[t]he display site we have proposed is routinely used by other organizations for their activities," and stating that "[w]e will not tolerate discrimination against CBR or its co-sponsors." Defendant Tiberi relented and approved the site location for the GAP signs to be displayed on April 15, 2013, and again on April 16, 2013. However, during the April 15th walk-through with Plaintiff Hardwick, the on-site representative for CBR, *Defendant Tiberi tried to reduce the size of the GAP display in order to reduce its visual impact*. Plaintiff Hardwick resisted these efforts by showing Defendant Tiberi photographs of other large student events that Defendants had previously permitted at this very location. (Compl. at ¶¶ 30-31).

Reluctantly, Defendant Tiberi permitted the GAP display at the Student Union location. True and accurate photographs of the GAP display at the Student Union location on April 15, 2013 and April 16, 2013, are attached to the Complaint as Exhibit 1. (Compl. at ¶¶ 32 [Doc. No. 1-1]).

In light of the resistance University officials were showing toward Plaintiffs' speech activity, it was evident that the University did not approve of Plaintiffs' message. (Compl. at ¶ 33).

During the first day (April 15th) of the GAP display, approximately 20 to 30 protestors gathered at the site of the display. Initially, the protestors stayed approximately 20 feet away from the GAP signs, thereby allowing Plaintiffs to engage in their free speech activity without interference. However, later in the day—and after observing the effectiveness of Plaintiffs' abortion photo display—the protestors formed a barricade directly in front of the display, purposefully blocking Plaintiffs' signs and thereby unlawfully interfering with Plaintiffs' free speech activity. (Compl. at ¶ 34).

Plaintiff Hardwick told two University police officers who were present at the site that this disruptive conduct was unacceptable. However, because Plaintiffs were disassembling the display for the evening, Plaintiff Hardwick did not pursue it further, but *he did inform the officers that Plaintiffs would not tolerate such disruptive behavior* if it happened again tomorrow, the second day of the display. (Compl. at ¶¶ 35).

Pursuant to University policies, rules, and regulations, "All members of a University community must share the responsibility for *maintaining a climate in which diverse views can be expressed freely and without harassment*. The University at Buffalo has traditionally supported the right of its students, faculty and staff to peaceful protest. Always implicitly is the

understanding that *demonstrators will not interfere with or violate the rights of others*." (Compl. at ¶ 36).

Plaintiffs resumed the GAP display outside of the Student Union on April 16, 2013. At about 10:00 a.m., protestors started to gather around the display. Initially, approximately 4 protestors stood directly in front of Plaintiffs' signs, purposely trying to block them from the view of other students. Plaintiff Hardwick informed the University police officers present that this was unacceptable. The officers approached the disruptive protestors, and two of them departed. (Compl. at ¶ 37).

Upon seeing how effective the 4 protestors were at blocking the signs and disrupting Plaintiffs' speech activity, a larger group of protestors decided to form a solid row in front of the display to completely block the signs and disrupt Plaintiffs' speech. In fact, when Plaintiffs attempted to raise the GAP signs above the disruptive protestors, the protestors held up umbrellas and bed sheets to further block Plaintiffs' signs. True and accurate photographs of the protestors disrupting Plaintiffs' speech activity are attached to the Complaint as Exhibits 2. (Compl. at ¶ 38 [Doc. No. 1-2]).

Plaintiff Hardwick *requested that the University police officers present at the scene stop the protestors' unlawful and disruptive conduct and thus protect Plaintiffs' free speech activity. Indeed, Plaintiffs had reserved this location (and thus had a permit to use it) for their speech activity*. *The officers refused*. (Compl. at ¶ 39). *Plaintiff Hardwick then approached a University police officer who appeared to be the senior officer present and requested that he stop the unlawful disruption of Plaintiffs' speech activity*. *The officer refused*. (Compl. at ¶ 40).

It was evident that the University police officers were now under orders to allow the protestors to disrupt Plaintiffs' speech activity. In fact, *a University police officer told Plaintiff*

Ramsey that the officers were under orders not to stop the pro-abortion protestors' disruptive conduct. (Compl. at ¶ 41).

Because the University police officers were now condoning, facilitating, and in fact encouraging the disruptive behavior of protestors who were intent on suppressing Plaintiffs' speech, Plaintiff Hardwick demanded to speak with the Chief of Police. (Compl. at ¶ 42).

Shortly after Plaintiff Hardwick made his demand, *the Chief of Police, Defendant Schoenle, arrived at the scene and confirmed to Plaintiff Hardwick that University police officers were not going to stop the pro-abortion protestors from disrupting Plaintiffs' speech activity*. (Compl. at ¶ 43).

Defendant Tiberi was also at the scene and observed the protestors disrupting Plaintiffs' speech activity. However, *Defendant Tiberi similarly refused to take any action that would stop the disruption and protect Plaintiffs' right to free speech*. In fact, *Defendants Tiberi and Schoenle conferred and agreed that they were not going to stop the protestors' disruptive conduct*. (Compl. at ¶ 44).

Following his conversation with Defendant Schoenle, Plaintiff Hardwick spoke with Plaintiff Cunningham, who called for an update. Plaintiff Hardwick explained that the situation was rapidly deteriorating because the University police were unwilling to protect Plaintiffs' speech activity. As a result of this update, Plaintiff Cunningham requested to speak with Defendant Schoenle by phone. Plaintiff Hardwick obliged, sought out Defendant Schoenle, and promptly handed him his phone. (Compl. at ¶ 45).

During the conversation with Defendant Schoenle, *Plaintiff Cunningham told the Chief of Police that the University was violating its own regulations which prohibited conduct that limited the exercise of expressive rights of others*. Plaintiff Cunningham informed Defendant

Schoenle that, based on his (Plaintiff Cunningham's) extensive experience with the GAP display and dealing with protestors, the best police practice was to separate contending factions when confrontations between demonstrators threatened to escalate. *Plaintiff Cunningham further stated that it was improper for the University police to condone the misconduct of the protestors by permitting it*. Plaintiff Cunningham concluded by pointing out that *the University police were improperly taking sides instead of enforcing the law as neutral arbiters of order*. (Compl. at ¶ 46).

During this conversation, Defendant Schoenle became visibly agitated at Plaintiff Cunningham's comments and his request that the University police protect Plaintiffs' speech. As a result, Defendant Schoenle attempted to abruptly hang up the phone, but failed and instead thrust the phone back into Plaintiff Hardwick's hands. (Compl. at ¶ 47).

During their disruptive conduct, the protestors were carrying signs and making statements that clearly demonstrated to any reasonable onlooker that they (the protestors) opposed Plaintiffs' message. Indeed, the protestors were intentionally engaging in conduct that was designed to interfere with and disrupt Plaintiffs' peaceful speech activity *because* they opposed Plaintiffs' message. In sum, the protestors were hecklers who were intent on suppressing Plaintiffs' speech. (Compl. at ¶ 48).

While the protestors were engaging in disruptive conduct designed to interfere with, disrupt, and suppress Plaintiffs' message, Defendant Schoenle and his police officers stood by, literally with arms folded, and allowed the hecklers to unlawfully disrupt Plaintiffs' speech activity. True and accurate photographs of Defendant Schoenle, standing *with arms folded*, and his officers refusing to stop the disruptive protestors are attached to the Complaint as Exhibit 3. (Compl. at ¶ 49 [Doc. No. 1-3]).

Plaintiffs want to return GAP to the SUNY-Buffalo campus, including during the upcoming school year (2013-2014). However, Plaintiffs reasonably fear that if they do, Defendants will again permit the protestors to engage in disruptive and disorderly conduct designed to suppress Plaintiffs' message. (Compl. at ¶ 55).

Plaintiffs reasonably fear that Defendants will again refuse to perform their constitutional duty to protect Plaintiffs and their free speech activity from the disruptive behavior of protestors who are intent on suppressing Plaintiffs' speech. Consequently, Plaintiffs fear returning GAP to the SUNY-Buffalo campus absent a court order enjoining Defendants from continuing their pattern of illegal and unconstitutional conduct. (Compl. at ¶ 56).

ARGUMENT

I. Plaintiffs' Speech Rests on the Highest Rung of the Hierarchy of First Amendment Values and Is Entitled to Special Protection on the SUNY-Buffalo Campus.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Plaintiffs' First Amendment right to freedom of speech is protected from infringement by States and their political subdivisions, such as Defendants, by operation of the Fourteenth Amendment. *See Cantwell v. Conn.*, 310 U.S. 296, 303 (1940).

In *Connick v. Myers*, 461 U.S. 138 (1983), the Supreme Court emphasized that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to *special* protection." *Id.* at 145 (internal quotations and citations omitted) (emphasis added); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) ("[Speech] concerning public affairs is more than self-expression; it is the essence of self-government.") (citations omitted).

Moreover, the Supreme Court has repeatedly admonished that colleges and universities "play a critical role in exposing students to the 'marketplace of ideas' and, as a result, First Amendment protections must be applied with *particular vigilance* in that context." *Husain v. Springer*, 494 F.3d 108, 122 n.11 (2d Cir. 2007) (emphasis added). In *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835-36 (1995), for example, the Court stated:

> [The] danger . . . to speech from the chilling of individual thought and expression . . . is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophical tradition. . . . For the University . . . to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.

Here, Plaintiffs' speech addresses an exceedingly important public issue (abortion) on a state university campus—a vital center for the Nation's intellectual life. Consequently, Plaintiffs' speech must be accorded the greatest—indeed "*special*"—protection under the Constitution.

II. Defendants Violated Plaintiffs' Right to Freedom of Speech.

Plaintiffs' free speech claim is examined in essentially three steps. First, the court must determine whether the speech in question—Plaintiffs' GAP display—is protected speech. Second, the court must conduct an analysis as to the forum in question to determine the proper constitutional standard to apply. And third, the court must then determine whether the alleged speech restriction comports with the applicable standard. *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 880 F. Supp. 2d 456, 466 (S.D.N.Y. 2012) (analyzing a free speech claim in "three parts"); *Saieg v. City of Dearborn*, 641 F.3d 727, 734-35 (6th Cir. 2011) (same).

A. Plaintiffs' GAP Display Constitutes Protected Speech.

As noted above, the first question is easily answered: Plaintiffs' sign displays are protected by the First Amendment. *See Hill v. Colo.*, 530 U.S. 703, 714-15 (2000) (holding that "sign displays . . . are protected by the First Amendment"); *see also United States v. Grace*, 461 U.S. 171, 176-77 (1983) (demonstrating with signs, banners or other devices constitutes protected speech under the First Amendment). And "[t]he fact that the messages conveyed by [the sign displays, including "bloody fetus signs,"] may be offensive to their recipients does not deprive them of constitutional protection." *Hill*, 530 U.S. at 715 & 710 n.7. Rather, this fact enhances the constitutionally protected status of the speech. As noted by the Supreme Court, "The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (citations omitted); *see also Terminiello v. City of Chicago*, 337 U.S. 1, 4-5 (1949) (famously stating that speech "best serve[s] its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger").

B. The Student Union Location Is a Public Forum for Plaintiffs' Speech.

"The [Supreme] Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for [expressive] purposes." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985). Forum analysis has traditionally divided government property into three general categories: traditional public forums, designated public

forums, and nonpublic forums. *Id*. at 800. Once the forum is identified, the court must then determine whether the speech restriction is justified by the requisite standard. *Id.*

In the Second Circuit, another category of forum, known as the limited public forum, has alternately been analyzed as a subset of the designated public forum and as a type of nonpublic forum opened up for discrete purposes. *See Byrne v. Rutledge*, 623 F.3d 46, 55 n.8 (2d Cir. 2010) ("[T]he law of [the Second Circuit] describes a limited public forum as both a subset of the designated public forum and a nonpublic forum opened to certain kinds of speakers or to the discussion of certain subjects.") (internal quotation marks and citation omitted). Limited public forums are property that the government has opened up for speech, "but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects." *Husain*, 494 F.3d at 121 (internal quotations and citations omitted).

Common examples of limited public forums include "state university meeting facilities opened for student groups, open school board meetings, city-leased theaters, and subway platforms opened to charitable solicitations." *Hotel Emps. & Rest. Emps. Union v. City of N.Y. Dep't of Parks & Rec.*, 311 F.3d 534, 545 (2d Cir. 2002) (internal citations omitted). "Once the state has created a limited public forum, however, *it must respect the boundaries that it has set*. It may not 'exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it *discriminate* against speech on the basis of its viewpoint.'" *Husain*, 494 U.S. at 121 (quoting *Rosenberger*, 515 U.S. at 829) (emphasis added).

In a series of decisions, the Supreme Court has emphasized that the First Amendment precludes public universities from infringing a student organization's access to a school-sponsored forum because of the group's viewpoint. *See Rosenberger*, 515 U.S. at 819; *Widmar v. Vincent*, 454 U.S. 263 (1981); *Healy*, 408 U.S. at 169. Moreover, while the First Amendment

prohibits university officials from *directly* restricting speech in a limited public forum, *indirect* action which has a chilling effect on such speech is similarly prohibited. *See Husain*, 494 U.S. at 132 (stating "that actions taken by a college official that chilled protected speech within [a limited public forum] violated the First Amendment" and holding "that the *nullification* of an election on the basis of views expressed by a student newspaper violated the First Amendment where such nullification chilled future speech").

In this case, the Student Union location is, at a minimum, a limited public forum. It has been used in the past by student organizations to engage in a wide array of free speech activities. (Compl. at ¶¶ 25-27). Additionally, University officials permitted Plaintiff UB Students for Life, through its officer at the time, Plaintiff Andzel, to officially reserve this location for the GAP display.[2] (Compl. at ¶¶ 31-32). Consequently, Plaintiffs engaged in their speech activity outside of the Student Union pursuant to a permit from the University. That is, Plaintiffs reserved this location for ***their*** use and for expressing ***their*** message—much like a permit authorizing a parade organizer to conduct a parade on a city street. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995) (upholding the right of a parade organizer to exclude participants from the parade based on "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message"); *see also Grider v. Abramson*, 180 F.3d 739, 751 (6th Cir. 1999) (noting that "the formally slated speakers [*i.e.*, those who had a permit to speak at the rally] possessed a ***protected interest*** in addressing their audience under orderly and audible conditions") (emphasis added). By allowing

[2] The University initially resisted granting Plaintiffs permission to use the Student Union location because its officials, including Defendant Tiberi, objected to Plaintiffs' message (*i.e.*, Plaintiffs' use of graphic imagery to express their anti-abortion viewpoint). It was only ***after*** Plaintiffs threatened the University with a lawsuit did the officials relent and grant permission. (Compl. at ¶¶ 29-32).

the pro-abortion protestors to intervene in Plaintiffs' permitted demonstration (*i.e.*, placing bed sheets, signs, and umbrellas over Plaintiffs' signs to block and thus interfere with Plaintiffs' message), Defendants deprived Plaintiffs of their "autonomy to choose the content of [their] own message," in violation of the First Amendment.

C. Defendants Breached Their Constitutional Duty to Protect Plaintiffs' Speech.

It is a clearly established principle of constitutional law that "[a] police officer has the duty not to ratify and effectuate a heckler's veto nor may he join a moiling mob intent on suppressing ideas. Instead, he must take reasonable action to protect . . . persons exercising their constitutional rights." *Glasson*, 518 F.2d at 906; *Smith v. Ross*, 482 F.2d 33, 37 (6th Cir. 1973) ("[T]he Supreme Court has often emphasized in related contexts [that] state officials are not entitled to rely on community hostility as an excuse not to protect, by inaction or affirmative conduct, the exercise of fundamental rights."); *see also Cox v. La.*, 379 U.S. 536 (1965) (holding that constitutional rights may not be denied simply because of hostility to their assertion or exercise). Consequently, "Section 1983 imposes an *affirmative duty* upon police officers to protect speakers who are airing opinions which may be unpopular." *Dunlap v. City of Chicago*, 435 F. Supp. 1295, 1298 (N.D. Ill. 1977) (emphasis added); *Manfredonia v. Barry*, 401 F. Supp. 762, 767-68 (E.D.N.Y. 1975) ("The federal Civil Rights Act, 42 U.S.C. § 1983, 'imposes on the states and their agents certain obligations and responsibilities. A police officer has a duty not to ratify and effectuate a heckler's veto nor may he join . . . [those] intent on suppressing ideas.'") (quoting *Glasson*, 518 F.2d at 899); *see generally Peck v. United States*, 470 F. Supp. 1003, 1016 (S.D.N.Y. 1979) (noting that 42 U.S.C. § 1983 does not apply to claims against federal officials but acknowledging that the case law "speak[s] of a duty of local law enforcement officers owed to private citizens to protect them in the exercise of their constitutional rights of expression"

under § 1983 "inasmuch as *failure to protect would be state action interfering with plaintiff's constitutional rights*") (emphasis added).

In *Cottonreader v. Johnson*, 252 F. Supp. 492 (M.D. Ala. 1966), for example, the federal court issued an injunction that ordered police officers to protect the demonstrators for racial equality from violent actions threatened by persons opposed to their cause. In granting the requested injunction, the Alabama federal court stated, "Thus, the threat of violence or public hostility to the views of those exercising First Amendment liberties does not of itself justify denial of the right, but rather is grounds for injunctive relief." *Id.* at 497.

The cases cited by Defendants do not address this affirmative duty *under the First Amendment*. Specifically, Defendants rely heavily upon *Dwares v. City of N.Y.*, 985 F.2d 94 (2d Cir. 1993). (Defs.' Br. at 7-9). However, a close reading of *Dwares* supports finding a constitutional violation in this case.

In *Dwares*, the court held that the individual officers could be liable under the Due Process Clause for the violence inflicted against the plaintiff because the officers, *inter alia*, "aided and abetted the depravation of Dwares's civil rights by allowing him to be subjected to prolonged assault *in their presence without interfering with the attack*." *Id*. at 99 (emphasis added). Consequently, the court distinguished between "an allegation simply that police officers had failed to act *upon reports of past violence*," which would not result in a due process violation, and an "allegation that the officers *in some way* had assisted in creating or increasing the danger to the victim," such as being present at the scene of the violence and condoning the violence through inaction, which *would* result in a violation. *Id*. (emphasis added). In fact, in reaching this conclusion, the Second Circuit cited with favor the Eight Circuit's decision in

Freeman v. Ferguson, 911 F.2d 52 (8th Cir. 1990). The Second Circuit described the holding in the *Freeman* case as follows:

> In *Freeman,* the court considered the matter of a woman killed by her estranged husband *after the chief of police had directed his officers to ignore her pleas that they stop the husband*, who was the police chief's friend, from threatening and intimidating her. The Eighth Circuit concluded that *DeShaney* [*v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989)] would not bar a § 1983 claim asserting that the violence complained of "was not solely the result of private action, but that it was also the result of *an affirmative act by a state actor to interfere with the protective services which would have otherwise been available in the community*—with such interference increasing the vulnerability of [the victim] to the actions of [the private individual] and *possibly ratifying or condoning such violent actions on his part*. . . . Without such affirmative actions on the part of the chief of police, the danger faced by the [victim] would have arguably been less." 911 F.2d at 54-55.

Dwares, 988 F.2d at 99 (emphasis added). While Plaintiffs' free speech claim arises under the First Amendment and not the Due Process Clause of the Fourteenth Amendment, it is quite evident that Defendants cannot escape liability under either provision of the Constitution. In this case, University officials—specifically including Defendant Tiberi, the Director of Student Life, and Defendant Schoenle, the Chief of Police—were present at the scene of the violation and ratified and condoned the disruptive tactics of the pro-abortion protestors. Similar to the chief of police in *Freeman*, Defendant Schoenle is liable here in that he directed his officers to ignore the pleas of Plaintiffs to stop the disruptive pro-abortion protestors (*see* Compl. at ¶¶ 39-49), thus resulting in "*an affirmative act by a state actor to interfere with the protective services which would have otherwise been available in the community*."

Moreover, "[t]he right of free speech does not encompass the right to cause disruption, and that is particularly true when those claiming protection of the First Amendment cause actual disruption of an event covered by a permit." *Startzell v. City of Phila.*, 533 F.3d 183, 198 (3d Cir. 2008). Consequently, the pro-abortion protestors who were engaging in unruly and

disruptive conduct to interfere with and ultimately silence Plaintiffs' message do not have a right to do so by claiming that their unruly conduct is protected by the First Amendment. Similarly, Defendants cannot justify their support for this disruptive behavior by claiming that it is protected by the First Amendment. (*See* Defs.' Br. at 16 [claiming Defendants were "allowing contending factions to voice their views"]). Quite simply, "the right of free speech . . . does not embrace a right to snuff out the free speech of others." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 387 (1969).

In their brief, Defendants give short shrift to the heckler's veto, and they do so principally by ignoring the facts and falsely asserting that Defendants "allow[ed] contending factions to voice their views in a raucous but non-violent manner" and that "defendants allowed both sides to argue their views." (Defs.' Br. at 16). Permitting the pro-abortion protestors to block and obstruct Plaintiffs' signs and thus silence Plaintiffs' message is not "allowing contending factions to voice their views." Rather, it is taking sides in a debate and allowing the pro-abortion side to engage in unruly and obstructionist conduct—conduct that directly violates the University's very own regulations regarding expressive conduct on campus (*see* Compl. at ¶¶ 36, 43-54)—to "snuff out the free speech of" the anti-abortion side (*i.e.*, Plaintiffs' speech). *Red Lion Broad. Co.* 395 U.S. at 387.

In sum, by approving, condoning, and ratifying the disruptive behavior of the pro-abortion protestors and thus disapproving of Plaintiffs' message—all of which is evidenced by Defendants' words and actions—and by refusing to take any action to protect Plaintiffs' exercise of their constitutional rights, but instead taking affirmative action to direct the police officers at

the scene to ignore Plaintiffs' pleas for protection, Defendants deprived Plaintiffs of their right to freedom of speech guaranteed by the First Amendment.[3] *Glasson*, 518 F.2d at 906.

III. Defendants Violated the Equal Protection Clause.

In *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972), the Supreme Court described the applicable principle of law as follows: "under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *See also Carey v. Brown*, 447 U.S. 455, 461-62 (1980) (discriminating among speech-related activities in a forum violates the Equal Protection Clause).

Here, the University has a clearly stated policy that applies to the forum at issue: "All members of a University community *must share the responsibility for maintaining a climate in which diverse views can be expressed freely and without harassment*. The University at Buffalo has traditionally supported the right of its students, faculty and staff to peaceful protest. Always implicitly is the understanding that *demonstrators will not interfere with or violate the rights of others*."[4] (Compl. at ¶ 36) (emphasis added). By permitting the pro-abortion protestors to

[3] Permitting, condoning, and indeed encouraging the protestors to purposefully block Plaintiffs' signs and thus silence Plaintiffs' message is no different than if Defendants themselves tore down the signs. The outcome is precisely the same: Defendants did not like Plaintiffs' message from the very beginning and wanted to hide the graphic signs from viewers. Defendants achieved their illicit objective by breaching their constitutional duty to protect Plaintiffs' right to freedom of speech and thus siding with the pro-abortion protestors, who were violating the law and violating with impunity the University's own policies regarding the rights of students on campus to engage in free speech without interference.

[4] Contrary to Defendants' argument, Plaintiffs are not basing their claims on a *violation* of any University rule or regulation. (*See* Defs.' Br. at 15). Rather, Plaintiffs' claims are based on the fact that Defendants *discriminated* against them based on the viewpoint of their message in *violation* of the First and Fourteenth Amendments. Defendants, by policy and practice, permit student groups to engage in free speech activity on campus without interference. Here, Defendants discriminatorily applied their own policy (*i.e.*, they failed to protect Plaintiffs' speech and thus denied Plaintiffs equal access to the campus to express their views), which

interfere with and silence Plaintiffs' anti-abortion message, Defendants deprived Plaintiffs of their right to freely engage in their speech activity in this forum based on the viewpoint of their speech. Not only does this violate the Free Speech Clause of the First Amendment, but it also violates the Equal Protection Clause of the Fourteenth Amendment. *See also Dwares*, 985 F.2d at 99 (finding sufficient factual allegations for a violation under the Equal Protection Clause where the defendant officers intentionally permitted the plaintiff to be beaten and thus denied the plaintiff protection "because of the plaintiff's expression of ideas which are otherwise lawfully protected activity under the First Amendment") (internal quotations and citation omitted).

IV. Defendants Are Liable under § 1983.

Defendants argue that "[p]ersonal involvement of a defendant in an alleged constitutional deprivation is a prerequisite to an award for damages under § 1983." (Defs.' Br. at 13). Insofar as Defendants are claiming immunity, that claim will be addressed in further detail below.

In responding to Defendants' "personal involvement" argument, it is important to highlight the fact that Plaintiffs have asserted damage claims only against Defendants Tiberi and Schoenle in their individual capacities (*see* Compl. at Prayer for Relief)—the two Defendants

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resulted in the depravation of Plaintiffs' rights protected by the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. *See Rosenberger*, 515 U.S. at 829 ("Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set."); *see also Widmar*, 454 U.S. at 263 (holding that the university's exclusionary policy violated the fundamental principle that a state regulation of speech should be content-neutral in a case in which members of a registered religious group at a state university challenged as violative of the First Amendment a university policy of excluding religious groups from the university's open forum policy whereby university facilities were generally available for activities of registered student groups). Thus, the basis for Plaintiffs' claims is not the violation of a University rule or regulation—it's the discriminatory treatment that deprives Plaintiffs of their constitutional rights. Indeed, Defendants' "affirmative duty . . . to protect speakers who are airing opinions which may be unpopular" arises out of the Constitution, not a University regulation. In short, it is the Constitution that prohibits Defendants from allowing students to express a pro-abortion viewpoint with impunity, but then refusing to provide equal access to those expressing an anti-abortion viewpoint on campus.

who were actively involved in the matter and who were at the scene, directing the actions that deprived Plaintiffs of their constitutional rights. (Compl. at ¶¶ 29-32, 42-50). In short, Plaintiffs are seeking nominal damages against the two defendants who were *personally* involved in the violation of Plaintiffs' constitutional rights.[5] Therefore, insofar as Defendants' claim is that neither Defendant Tiberi nor Defendant Schoenle had any personal involvement in the violations at issue, that claim can be dispensed with quickly since it is simply incorrect as a matter of fact and law. (*See* Secs. II, III, *supra*). We will now turn to the issue of immunity.

While the University itself enjoys Eleventh Amendment immunity, *see Dube v. SUNY*, 900 F.2d 587, 594 (2d Cir. 1990), University officials acting in their official capacities may be sued in federal court to enjoin conduct that violates the Constitution, "notwithstanding the Eleventh Amendment bar," *see id.* at 595.[6] And "[t]he Eleventh Amendment . . . provides no immunity for state officials sued in their personal capacities." *Id.*

Furthermore, government officials are protected from personal liability for damages and thus enjoy qualified immunity only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). However, "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held

[5] Upon finding a constitutional violation, Plaintiffs are entitled to nominal damages as a matter of law. *See Carey v. Piphus*, 435 U.S. 247, 266-67 (1978); *Smith v. Coughlin*, 748 F.2d 783, 789 (2d Cir. 1984) (holding that a civil rights plaintiff "is entitled to an award of nominal damages upon proof of violation of a substantive constitutional right").

[6] A claim against a government official in his or her official capacity is a claim against the governmental entity to which he or she represents. *See Kentucky v. Graham*, 473 U.S. 159 (1985); *see also Brandon v. Holt*, 469 U.S. 464, 471-72 (1985) (holding that "a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents"). However, a claim for prospective relief against an official acting in his or her official capacity is a well-established exception to Eleventh Amendment immunity. *See Ex Parte Young*, 209 U.S. 123 (1908) (holding that prospective injunctive relief provides an exception to Eleventh Amendment immunity)

unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (internal citation omitted); *see Husain*, 494 F.3d at 132 (reversing grant of qualified immunity for university president and stating that "although no court had specifically held at the time that the *nullification of an election* on the basis of views expressed by a student newspaper violated the First Amendment where such nullification chilled future speech, the 'unlawfulness' of [the president's] actions was 'apparent in light of pre-existing law'").

Moreover, qualified immunity does not protect a defendant against claims for declaratory and injunctive relief. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998) (noting that qualified immunity is unavailable "in a suit to enjoin future conduct"); *Cannon v. City & Cnty. of Denver*, 998 F.2d 867, 876 (10th Cir. 1993) (stating that "there is no qualified immunity to shield the defendants from claims" for "declaratory and injunctive relief"); *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 527 (9th Cir. 1989) ("Qualified immunity . . . does not bar actions for declaratory or injunctive relief.").

In this case, Defendants Tiberi and Schoenle, who were acting under color of state law, deprived Plaintiffs of their clearly established constitutional rights by joining a "raucous" mob intent on suppressing Plaintiffs' speech and by failing to protect Plaintiffs in the exercise of their constitutional rights, as it was their duty to do. (*See* Compl. at ¶¶ 43-50). Additionally, because Defendants' actions have chilled the future exercise of Plaintiffs' constitutional right to engage in anti-abortion speech on campus through the display of graphic abortion imagery, Plaintiffs are entitled to declaratory and injunctive relief to ensure that they will be permitted to engage in such speech free from any future disruption. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes

irreparable injury."); *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 127 (2d Cir. 1998) ("[I]f New York Magazine were correct as a matter of law that MTA's action unlawfully abridged its freedom of speech as guaranteed by the First Amendment, New York Magazine established irreparable harm. The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *see also Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod*). Defendants Black and Ricotta, in their official capacities, are the responsible officials at the University for making and enforcing the policies, practices, and procedures with respect to student groups and student group speech activities on the campus, including the enforcement of the relevant rules and regulations governing such speech activities by University officials, including the University police department. (Compl. at ¶¶ 13-14). Defendants Tiberi and Schoenle have similar authority. (Compl. at ¶¶ 15, 16). *See Monell v. N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658, 694-95 (1978) (holding that government entities are liable under 42 U.S.C. § 1983 if a policy or custom was the "moving force" behind the alleged unconstitutional action and "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury . . . the government as an entity is responsible under § 1983"); *see also Pembaur v. City of Cincinnati*, 475 U.S. 469, 478, 480 (1986) (stating that "*Monell* is a case about responsibility" and holding "that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances" and "[i]f the decision to adopt [a] particular course of action is properly made by the government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood").

Consequently, Defendants Black and Ricotta are responsible University officials and thus proper parties in this case, and so too are Defendants Tiberi and Schoenle, who are the University's "authorized decisionmakers" for the actions at issue here.[7]

CONCLUSION

For the reasons set forth above, Defendants' motion to dismiss should be denied.

Respectfully submitted,

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[7] Indeed, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, if either Defendant Black or Defendant Ricotta (who were sued in their official capacities only) died, resigned, or otherwise ceased to hold office, his or her successor in office would be substituted automatically as a party and the case would proceed. Fed. R. Civ. P. 25(d) ("An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party."). Unlike *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), this is not a case in which Plaintiffs are seeking to hold these two public officials *personally* liable for any damage claims. (*Contra* Defs. Br. at 14 [incorrectly comparing this case to *Iqbal*]).

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2013, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system.

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