

No. 12-1296

In the
Supreme Court of the United States

ED RAY and MARK McCAMBRIDGE,
Petitioners,

v.

OSU STUDENTS ALLIANCE and WILLIAM ROGERS,
Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

The complaint in this case establishes that Petitioners Ed Ray and Mark McCambridge, high-ranking officials and policymakers at a public university, approved a facially unconstitutional policy regarding the placement of newspaper bins on campus which they and other university officials then applied to confiscate and discard the bins of an independent student newspaper without notice. Petitioners subsequently engaged with the student newspaper's editor directly about this issue, as well as through subordinates and legal counsel, and repeatedly approved the facially unconstitutional policy on which that taking was based, the policy's enforcement against Respondents, as well as the refusal to allow the student newspaper's bins outside of a small area of campus for almost one year.

Did the Ninth Circuit err in holding that a complaint detailing such conduct was sufficient to state First and Fourteenth Amendment claims against Petitioners under 42 U.S.C. §1983?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondent OSU Students Alliance states that it is a non-stock non-profit corporation under Oregon law, with no parent or publicly held company owning 10% or more of its stock.

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INTRODUCTION

Petitioners seek review of well-settled issues of statutory and constitutional law involving the deprivation of the constitutional rights of college students by university officials in a case in which there has been no discovery, just the precipitous dismissal of a complaint under Rule 12(b)(6). The Court should review the complaint's detailed factual allegations establishing Petitioners' approval and enforcement of a facially unconstitutional policy against Respondents, *see* Respondents' Appendix ("App.") 1-62, which Petitioners inexplicably failed to provide the Court, decline the invitation, and allow a remand to the district court for the parties to flesh out the factual and legal issues presented in this case. Particularly, where—as here—the Ninth Circuit provided Respondents with an opportunity to amend their pleading on remand to address any unforeseen deficiencies, review by this Court is premature.

The staff of *The Liberty*, an independent student newspaper at Oregon State University, discovered in early 2009 that all of the paper's outdoor distribution bins on campus were gone. After the students reported it to the police as a theft, the investigation pointed to the culprit—Oregon State University. At the direction of OSU officials, maintenance staff had thrown the newspaper bins into a heap next to a dumpster in a storage yard, damaging both the bins and the newspapers inside. The student editor contacted university officials to ascertain why the university had done this, especially since the bins of

other publications were left untouched. He urged them to allow him to place the bins back on campus.

Ultimately, the student editor's attempts were rebuffed and the newspaper bins were kept off most of the campus for one year. University officials, including Petitioners Ed Ray and Mark McCambridge, defended the taking and the continued exclusion, pointing to a policy regarding non-student publications as the reason for the exclusion.

The Ninth Circuit had "little trouble finding constitutional violations." Petitioners' Appendix ("Petitioners' App.") 2-3. It also found that the complaint adequately stated constitutional claims against Petitioners, given that it was clear they both knew about the ongoing violations and, at minimum, acquiesced in them. This holding does not conflict with any of the Court's precedent, nor does it directly conflict with other circuits' decisions. There are also procedural aspects of this case that make it unfit for the Court's review. For these reasons, the petition should be denied.

STATEMENT OF THE CASE

Respondent OSU Students Alliance ("OSUSA"), a recognized student organization ("RSO") at Oregon State University ("OSU") since 2002, publishes *The Liberty*, an independent student newspaper that it distributes to students on OSU's campus in Corvallis, Oregon. Ct. of Appeals Excerpts of Rec. ("ER") 50, App. 5, 7. Respondent William Rogers was an OSU student, president of OSUSA, and *The*

Liberty's Executive Editor from April 2009 to May 2010. ER 79, App. 5, 10.

The Liberty is entirely written by, edited by, published by, and distributed to OSU students. ER 72, 79, App. 7. Its purpose is to provide a medium for students to express conservative, libertarian, and independent thought and provide news coverage different from *The Daily Barometer*, OSU's daily student newspaper. ER 51, App. 7. *The Liberty* and the *Barometer* are the only two student newspapers at OSU, although three non-student newspapers also have distribution bins on campus. App. 9; *see also* ER 51. *The Liberty* is funded through private donations and advertising revenue. App. 8. OSUSA may receive student fees, but has chosen not to apply for those funds to maintain the publication's independence. ER 50. The *Barometer* is funded through student fees and advertising revenue. App. 9.

In 2005, OSUSA purchased eight outdoor distribution bins. ER 73, App. 8. Each newspaper bin had a logo reading, "*The Liberty*, OSU Students Alliance Publication." ER 73, App. 8. OSUSA received permission from Facilities Services to place these bins on campus, with Facilities Services showing OSUSA exactly where to place some of the bins. ER 72, 73, App. 8. OSUSA placed the bins in the high traffic areas of campus. ER 74, 80. Most of these locations already had *Barometer* bins, and OSUSA's goal was to place bins next to the *Barometer* so that students would pick up a copy of both student newspapers. ER 74, App. 8. After one

bin was stolen, OSUSA used cable locks to secure the remaining bins to nearby poles. ER 74, 80, App. 8.

The Daily Barometer had at least 24 distribution bins located throughout campus. App. 8, 28. Off-campus newspapers, including the *Corvallis Gazette-Times*, *Eugene Weekly*, and *USA Today*, also had distribution bins on campus. ER 51, App. 9. Each of these newspapers had bins chained to fixtures, such as light posts or building columns. ER 51, 74, App. 28. None of *The Liberty's* bins impeded pedestrian traffic. ER 51.

I. OSU Confiscates *The Liberty's* Distribution Bins Without Notice.

The complaint alleges that during the 2008-09 winter term, all seven of *The Liberty's* distribution bins disappeared. App. 9. Assuming they were stolen, OSUSA reported the disappearance to the State Police. After investigation, the State Police determined that Facilities Services removed the bins in an effort to “catch up” with a previously unenforced 2006 policy restricting the placement of newspaper bins on campus (the “Policy”). App. 9, 11. OSU officials did not notify OSUSA of their intentions prior to the removal of the bins, even though contact information for the editorial board is listed prominently inside the first page of every newspaper located therein. App. 9-10.

According to the complaint, Rogers, *The Liberty's* editor, then contacted Facilities staff member Joe Majeski, who stated that Facilities removed the bins because they had been placed in locations other than

those designated by OSU. He added that the students would be unable to place the bins on campus again. App. 10, 37. Two days later, Majeski told Rogers that the bins were removed pursuant to the Policy, and the bins could be placed only outside the campus bookstore and in the immediate vicinity of the Memorial Union. App. 11. But Facilities had also removed a bin that *The Liberty* placed outside the bookstore. App. 11, 38.

When Rogers went to retrieve the bins at OSU's storage yard, he found them heaped on the ground near a dumpster. App. 12, 39. The complaint details that one bin was badly damaged, the cable locks were cut on all of them, and approximately 150 copies of *The Liberty*'s latest issue were ruined. ER 79, App. 12, 40, 42-43. Rogers collected and cleaned the bins and placed two outside the Memorial Union in locations that Majeski had identified as permissible. App. 12-13.

The complaint explains that Rogers subsequently returned home and emailed Petitioner Ray, OSU President, expressing displeasure regarding OSU's actions and requesting an explanation. *Id.* Ray personally responded to Rogers' email, stating that OSU officials, including Petitioner McCambridge, OSU Vice President of Finance and Administration, would contact him directly. *Id.*

On April 23, Defendant Vincent Martorello, Director of Facilities Services, telephoned Rogers. *Id.* Martorello, as detailed in the complaint, confirmed the Policy Majeski referenced and

explained that its purpose was to regulate “off-campus newspapers” and keep the campus clean. ER 63-64, App. 13. Rogers explained *The Liberty* was *not* an “off campus newspaper,” and Martorello said he would “think about it” and discuss that with his colleagues. App. 13. Martorello also claimed that bins could not be secured to school property because they interfered with maintenance crew repair work and with Americans with Disabilities Act (ADA) requirements. ER 63-64, App. 13-14. Martorello requested information about *The Liberty*, its customary distribution quantities, and related matters. App. 14.

II. OSU Refuses to Treat *The Liberty* Like the University’s Other Student Newspaper, *The Barometer*.

The complaint details how later on April 23rd, Rogers emailed Martorello explaining *The Liberty*’s authorship, publishing frequency, previous bin locations, and where OSUSA would like bins to be relocated. App. 14. Rogers identified *The Liberty* as a student newspaper, comparing it to the *Barometer*. App. 14, 44-45. Martorello replied on April 24, saying he needed to further investigate how *The Liberty* differed from the *Barometer*. App. 14-15, 44-45.

The next day, McCambridge responded via email to Rogers’ April 17th email on behalf of Ray. App. 16. McCambridge claimed OSU removed the bins because OSU did not have the same “communication availability” with *The Liberty* since it was not funded by the Associated Students of OSU. App. 16, 46-47.

He also said that OSUSA's placement of distribution bins lacked coordination with OSU staff. *Id.* He told Rogers to work with OSU personnel to relocate the bins, "but those locations will be agreed to within the parameters that the university determines." App. 16, 46-47. McCambridge also admitted that he would continue to be involved along with Ray and that Martorello would be the "point of contact for President Ray and myself. He will keep us informed." App. 17, 47.

On April 27th, as noted in the complaint, Rogers identified two bins of other publications that were not in compliance with the purported Policy. Both were outside the areas Majeski asserted were designated for "off campus" publications, and one was chained to a concrete post. App. 18, 49. Five days later, Rogers observed a *Barometer* distribution bin chained to a light post. App. 18, 49.

On May 5th, Martorello wrote Rogers the following: "The Liberty is not in the same situation as the Barometer and will need to be located at the approved locations by the Memorial Union. Please work with Joe Majeski should you have any specific questions about the placement of the bins within the approved locations." App. 18-19, 50. Rogers responded and requested the source of OSU's Policy on this matter. App. 19. Martorello replied on May 6th: "We are not keeping the bins off campus, rather we are directing them to a specific location as we do with other publications. We now consider this matter closed." App. 19, 59.

On May 7th, the complaint alleges that Charles Fletcher, OSU Associate General Counsel, responded to Rogers and confirmed the Policy's existence. App. 19-20, 52-53. Fletcher and Martorello "consider[ed] the matter closed." App. 27, 52-53. Nevertheless, Rogers asked Fletcher to clarify what OSUSA needed to do to be considered a "student publication" like the *Barometer*. App. 20. Fletcher responded that his office "does not provide advice to students," but that "*Daily Barometer's* masthead reveals that it is 'published . . . by the Oregon State University Student Media Committee on behalf of the Associated Students of OSU.' I believe it has been the campus student newspaper since 1896." App. 21, 54. Fletcher therefore appeared to indicate that there was nothing *The Liberty* could do to obtain equal footing with the *Barometer* on campus.

On May 11th, an administrator with Housing and Dining Services ordered Rogers to remove *The Liberty's* bins from dining facilities by May 22, 2009 because of "cleaning," but did not ask the *Barometer* to remove its bins. App. 21. Rogers complied, but *Barometer* bins remained in the dining halls. ER 80, App. 21.

The complaint then describes how Rogers sought help from OSU Student Legal Services attorney Patricia Lacy, who attempted to get more information about the restriction on *The Liberty's* bins. She presented Martorello with a list of proposed locations for the placement of *The Liberty's* bins, and asked him what process to follow for obtaining approval. App. 22. Martorello referred Lacy to Fletcher. *Id.*

On May 29th, according to the complaint, Lacy emailed Fletcher inquiring about OSU's policy for locating student newspaper distribution bins on campus. App. 22-23, 55-56. Fletcher responded the same day:

My understanding is that Facilities Services has decided that *The Liberty* is distinguishable from *The Daily Barometer* and, therefore, assumes the same status as all other periodicals being distributed on campus.

App. 24, 57-58.

On June 1st, *The Liberty* published an edition focused on censorship, and detailed what OSU had done to its distribution bins. The complaint states that Rogers delivered several copies of the paper to the offices of Ray and Fletcher. App. 24-25.

Rogers then drafted a proposed policy regarding distribution bins which provided a simple basis for distinguishing between on-campus and off-campus publications and their respective placements. He hoped this would address any of the university's purported concerns about clutter while also satisfying *The Liberty's* need for distribution locations on campus. *Id.* The complaint explains that Lacy showed the proposed policy to Fletcher who refused to take it or to meet with Respondents. *Id.*

On June 9th, according to the complaint, Rogers sent an e-mail to Ray, McCambridge, Fletcher, and

Lacy, which included the proposed policy for their review. He also stated:

I just wanted to let you know that Patricia Lacy told me that Charles Fletcher declined to even take a copy of what we consider to be a starting point for compromise. Given that the University has stated in recent media interviews that it wants to continue working with us, I just wanted to make sure that his actions were representative of what you all really want... We don't approve of the fact that the University has no written guidelines for what is or is not a student publication.... [and] that university officials have arbitrarily decided to lump us in a category of "off-campus" publications that do not enjoy the same circulation as current student media outlets. University officials have also stated that even if The Liberty were to be considered a student publication, we would still be restricted to the same areas as off-campus publications which stands against the principles of diversity and equal protection...

App. 25-26, 59-60.

The complaint notes that Fletcher responded on behalf of Petitioners on June 12th to voice their position on the issue:

I have been in communication with President Ray and Vice President McCambridge about

your email of June 9, and I will be your point of communication on this issue.

The university's decisions with respect to bin placements are content neutral and do not prohibit distribution of *The Liberty* on the OSU campus by other means. Nor do they prohibit the placement of distribution bins by *The Liberty* in the permitted locations. The university values intellectual diversity and encourages student participation in the marketplace of ideas.

Please let me know if you have any questions, but as Vincent Martorello informed you by email on May 6, this matter is closed and has been since that date.

App. 27, 61-62 (emphasis added).

The complaint alleges that OSU officials refused to respond any further to Rogers or to recognize *The Liberty* as anything but an “off-campus” publication, despite knowing that the paper is entirely written, edited, and produced by OSU students. App. 27-28. As a result, Petitioners limited OSUSA’s distribution bins to a small area of campus—inside and immediately outside of the Memorial Union for almost a year, while giving true “off-campus” publications like *Eugene Weekly* and *Corvallis Gazette-Times* more preferable treatment. App. 17, 48.

III. The District Court Proceedings

OSUSA and Rogers filed their Verified Complaint for equitable and monetary relief in the United States District Court for the District of Oregon on September 29, 2009. They moved for a preliminary injunction on November 17, 2009, to allow them to restore their distribution bins on campus. On November 30, 2009, OSU moved to dismiss the complaint for failure to state a claim or, in the alternative, for summary judgment.

In response to the lawsuit, the university created a new, written outdoor bin placement policy. ER 64, 66-68, 37, 39. The new outdoor policy allows for nine distribution locations on campus, applies to all newspapers, including the *Barometer* and *The Liberty*, and allows newspapers to chain their bins to campus fixtures. ER 64. Pursuant to this new policy, OSUSA reinstalled *The Liberty's* outdoor bins on campus on January 2, 2010, around one year after they were first removed without notice by OSU staff. ER 28, 51, 56, 59-60. On January 11, 2010, based on this policy change, Respondents withdrew their motion for preliminary injunction. ER 32-33.

On February 22, 2010, the District Court granted OSU's motion for summary judgment on the injunctive and prospective declaratory relief claims and OSU's motion to dismiss on all remaining claims for relief, including retrospective declaratory relief and damages. ER 5-19. The court entered judgment the same day. ER 3. Respondents timely filed a Fed. R. Civ. P. 59(e) motion to alter, amend, and/or reconsider on March 22, 2010, which included a

request to amend the complaint. The District Court denied the motion on May 19, 2010. ER 1. Respondents timely appealed. ER 20-25.

IV. The Ninth Circuit Proceedings

The United States Court of Appeals for the Ninth Circuit (Tashima, J., and Bea, J.) issued an opinion reversing the district court's decision on October 23, 2012. The court found that Respondents had stated claims against the university defendants, including Ray and McCambridge, because factual allegations in the complaint showed that at a minimum, Ray and McCambridge were both aware of the ongoing exclusion of *The Liberty's* bins from campus and did nothing to change that fact even though they were in a position to do so. Such knowledge of and acquiescence in the deprivation of constitutional rights by a subordinate is sufficient to sustain claims for violations of the First Amendment and Equal Protection Clause.

Petitioners filed a Petition for Rehearing and Suggestion for Rehearing En Banc on November 27, 2012. The Ninth Circuit issued an order denying rehearing on January 25, 2013, with no dissent.

REASONS FOR DENYING THE WRIT**I. Certiorari Is Not Appropriate Because The Case Is Not Well Situated For Review.****A. The Case Is a Flawed Vehicle Because the Ninth Circuit Granted Respondents Leave to Amend.**

When the District Court granted Petitioners' 12(b)(6) motion, it dismissed Respondents' claims with prejudice, thereby denying them leave to amend. The Ninth Circuit held that this was an abuse of discretion. Petitioners' App. 53. That ruling is consistent with this Court's precedent, which holds that leave to amend a complaint should be "freely given" and interprets this principle as a "mandate" to lower courts. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Indeed, Petitioners do not appeal this aspect of the Ninth Circuit's decision. Pet. i.

This case is consequently a flawed vehicle for review of any of the legal issues involved, and is not suitable for certiorari at this time. As the Ninth Circuit pointed out, any deficiencies in Respondents' claims against Petitioners may be remedied through amendment on remand. Petitioners' App. 53. Thus, a ruling from this Court as to any alleged deficiencies in the complaint under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), may not have any effect on the final adjudication of this matter. The Court should therefore deny certiorari in order to allow the parties to more fully develop the factual and legal issues presented in the district court.

B. A Ruling From This Court May Not Affect The Final Outcome of the Case and May Result in Multiple Appeals.

Only Ray and McCambridge petition for review of the Ninth Circuit's ruling. The case will continue to proceed against Vincent Martorello, a separate defendant, regardless of what happens with this petition. Thus, this Court's ruling on the case at this procedural juncture will only affect part of the overall case and will result in an inefficient use of judicial resources.

Additionally, because the case will continue to proceed against Martorello, it may result in yet another appeal, thus creating the possibility of multiple appeals to this Court for the same case—a result the Court typically avoids. The Court generally disfavors “piecemeal” appeals. “To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause.” *Cobbledick v. United States*, 309 U.S. 323, 325 (1940).

Because the case will continue to proceed in the district court regardless, there is no need for the Court to review it now. It should instead allow a remand, where the factual and legal issues can be fully resolved as to all defendants at the same time. It is therefore a flawed vehicle for reviewing the legal issues Petitioners raise, and the petition should accordingly be denied.

C. The Record Is Not Sufficiently Clear to Address an Important Constitutional Question.

This Court will not grant review or will dismiss a petition when an issue is not “presented by the record” or the record is not “sufficiently clear and specific to permit decision of the important constitutional question[] involved.” Eugene Gressman et al., *Supreme Court Practice* 359 (9th ed. 2007) (quoting *Massachusetts v. Painten*, 389 U.S. 560, 561 (1968)); *see also id.* at 359-60 (citing cases). According to the question presented by Petitioners, this case does not present a sufficiently clear record for it to be decided by the Court.

Petitioners claim that this case presents the question of when a supervisor may be held liable under §1983. But the record is not sufficiently clear to resolve that issue because this case involves a Rule 12(b)(6) ruling in a situation where an unwritten Policy emerged as a “bolt out of the blue” and seemed to evolve as time went on. Petitioners’ App. 17. The complaint alleges that Ray and McCambridge were policymakers and were personally involved in the decision to approve and enforce a facially unconstitutional Policy against OSUSA, as revealed by their communications and designated spokesmen. App. 13-29.

But without discovery, Respondents are denied detailed information about the Policy, the organizational structure of OSU, and the authority each official possesses to enforce university policies. Further development of these factual issues will

clarify Petitioners' involvement in the constitutional violations, in addition to their actions as policymakers, as well as any need to reassess the level of involvement required for supervisory liability under §1983.

If this Court is inclined to clarify the doctrine of supervisory liability under §1983, it should do so in a case with a fully developed factual record, not one dismissed under Rule 12(b)(6). Only then, with the corresponding standard for unlawful activity in mind, can courts determine what kind of factual allegations are needed to state a plausible claim for relief. Because this case is not well situated to resolve such questions, the petition should be denied.

II. Certiorari is Not Appropriate Because The Decision of the Ninth Circuit Was Correct and Is Not in Conflict with the Law in Other Circuits.

Given the complaint's detailed factual allegations establishing Petitioners' plausible violation of Respondents' constitutional rights, both in approving a facially unconstitutional Policy and in applying that Policy to Respondents, the Ninth Circuit's judgment requires no alteration by this Court. The Ninth Circuit correctly applied *Iqbal*, which involved divergent constitutional claims against federal officials who are wholly different in kind than the university administrators implicated here. In addition, few courts have resolved the standard for supervisory liability post-*Iqbal*, thus rendering review by this Court premature. The petition should therefore be denied.

**A. The Facts Support Well-Pleaded Claims
Against Petitioners for Their Own
Actions.**

Supervisory liability, contrary to Petitioners' assertions, is not a prerequisite to the Ninth Circuit's judgment. Although the Ninth Circuit correctly held that the complaint establishes Petitioners' liability as supervisors, the complaint's detailed allegations regarding Petitioners' individualized conduct are alone sufficient to establish liability under § 1983.

The complaint includes allegations that Ray and McCambridge are policymakers, App. 5-6, as well as detailed evidence that OSU officials admitted the taking and subsequent ban on OSUSA's newspaper bins was due to the facially unconstitutional Policy they approved and continued to enforce long after the bins were removed. McCambridge's email shows that Martorello was acting at his and Ray's direction. App. 16-17, 46-47. When Rogers persisted in questioning Martorello about the decision to deny *The Liberty* access to the majority of the campus, Martorello referred Rogers to Fletcher for further response. App. 19-20, 52.

Fletcher admitted that he was "in communication" with Ray and McCambridge on that matter and that he was acting as the "point of contact" for them. App. 27, 61. Moreover, Fletcher's e-mail was in response to one Rogers sent to Ray and McCambridge, asking them to clarify their position. App. 25-27, 59-62. Clearly, Ray and McCambridge possessed final decisionmaking authority regarding

the approval and enforcement of the facially unconstitutional Policy, App. 5-6, which singled out *The Liberty's* distribution bins and kept them off all but a small portion of campus for almost a year, App. 27-29. Thus, Respondents adequately pleaded that Petitioners caused constitutional harm through their direct actions in approving a facially unconstitutional policy and enforcing it against Respondents. The issue of supervisory liability, while academically interesting, is consequently superfluous in this case.

B. The Ninth Circuit Was Correct In Holding That Petitioners May Be Held Liable As Supervisors.

Though the complaint included enough facts to hold Ray and McCambridge liable based solely on their personal actions, the Ninth Circuit correctly held that they are also liable as supervisors. Petitioners fail to cite a single lower court ruling that has interpreted *Iqbal* as eliminating supervisory liability altogether, and Petitioners' liability in this case is entirely consistent with the Court's reasoning in *Iqbal*.

1. *Iqbal* Did Not Eliminate Supervisory Liability Under 42 U.S.C. §1983.

Iqbal involved a detainee arrested under terrorism-related charges after 9/11 who sued numerous federal officials, including Attorney General John Ashcroft and FBI Director Robert Mueller, for allegedly harsh conditions during his confinement because of his race, religion, or national

origin. 556 U.S. 662, 666. The majority of the complaint detailed the harsh treatment Iqbal had received in prison. But the only bare-bones allegations tying Ashcroft and Mueller to the discriminatory treatment were that Ashcroft was the “principal architect” of a policy leading to the severe treatment and Mueller was “instrumental in its adoption, promulgation, and implementation.” *Id.* at 668-69.

This Court held that Iqbal’s complaint did not meet the requirements of Rule 8(a)(2) because it did not plead “sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Id.* at 678 (quotation omitted). The Court discussed what was needed to make out a claim for invidious discrimination, stating that the “factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue.” *Id.* at 676. Stating the well-settled principle that under § 1983, liability may not be established solely based on a theory of *respondeat superior* or vicarious liability, the Court reiterated that the plaintiff must plead that each official violated the Constitution with his or her own actions. *Id.* Thus, in a discriminatory treatment case, the plaintiff must plead not mere knowledge of the constitutional violation, but a discriminatory purpose in regard to each individual plaintiff. *Id.* at 677.

The problem with the plaintiff’s complaint in *Iqbal* was that it lacked any factual allegations allowing the Court to draw the plausible inference that Ashcroft or Mueller acted with a discriminatory purpose. *Id.* at 683. Of course, whether such

allegations are sufficient depends on the constitutional basis of each plaintiff's claims.

In this case, Respondents' First Amendment claims do not necessitate a showing of discriminatory purpose. This Court has never conditioned a violation of the Free Speech Clause on discriminatory intent. *Simon & Schuster, Inc., v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (illicit intent "is not the *sine qua non* of a violation of the First Amendment.").

Enforcing a policy that gives unfettered discretion to officials in granting or denying permits violates the Constitution regardless of whether the policymaker has a discriminatory purpose. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). Likewise, government officials who deny access to a public forum without adequate justification violate the First Amendment, regardless of their motives or rationale. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

Moreover, government is not even required to target expressive activity to fall afoul of the First Amendment. As the Ninth Circuit stated, "[i]t is black letter law that the government need not target speech in order to violate the Free Speech Clause." Petitioners' App. 40. A completely *neutral* government regulation that unduly curtails expressive activity can violate the Constitution just as much as a jaundiced one. *Id.* (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

This is in stark contrast to the constitutional claims Iqbal made under the Free Exercise Clause and the Fifth Amendment. Iqbal’s complaint alleged that government officials violated his rights by discriminating against him *because* of his religion, race, and/or national origin. 556 U.S. at 666. Indeed, as the Ninth Circuit pointed out, “the right not to be singled out *because of* some protected characteristic, like race or religion—calls for a specific intent requirement.” Petitioners’ App. 42.

Thus, some constitutional claims, like Iqbal’s, require a specific state of mind. It was insufficient under Rule 8 for Iqbal to make claims against Ashcroft and Mueller without alleging some facts that would plausibly suggest that they acted with a discriminatory purpose. Mere knowledge was insufficient because “[u]nder extant precedent purposeful discrimination requires more than ‘intent as volition or intent as awareness of consequences.’ It instead involves a decisionmaker, be it a supervisor or subordinate, undertaking a course of action ‘because of, not merely in spite of [the action’s] adverse effects upon an identifiable group’.” *Iqbal*, 556 U.S. at 676-77 (quoting *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

This logic does not extend to constitutional claims, such as those under the Free Speech Clause, that require no specific intent. Given this Court’s explicit observation that the pleading standard adjusts based on the constitutional provision at issue, it is simply incorrect for Petitioners to assert that *Iqbal* somehow eliminated the doctrine of supervisory liability altogether. Had the Court

intended to make such a drastic sea-change in the law, it undoubtedly would have done so in no uncertain terms.

To the contrary, this Court’s precedent makes clear that there is no contradiction between supervisory liability and § 1983’s requirement that officials be held liable only for their own conduct. In *City of Canton v. Harris*, 489 U.S. 378 (1989), the Court noted that it had previously “decided that a municipality can be found liable under § 1983 only where the municipality itself causes the constitutional violation at issue. *Respondeat superior* or vicarious liability will not attach under § 1983.” *Id.* at 385 (citing *Monell v. N.Y.C. Dep’t of Social Servs.*, 436 U.S. 658, 694-95 (1978)).

But the *Harris* Court also went on to hold that municipalities could be liable for failure to train—an omission, rather than a direct action, causing constitutional harm—where their failure indicated a “deliberate indifference” to the rights of their inhabitants. *Id.* at 388. In these circumstances, the municipalities’ policies could be fairly said to be “the moving force behind the constitutional violation,” rendering municipal liability appropriate. *Id.* at 389 (internal quotation and alteration omitted).

The same is true here. See *Carnaby v. City of Houston*, 636 F.3d 183, 189 (5th Cir. 2011) (recognizing that “liability as a supervisor is similar to that of a municipality that implements an unconstitutional policy”). Respondents’ detailed factual allegations demonstrate that the facially unconstitutional Policy Ray and McCambridge

personally approved and enforced was “the moving force behind the” unconstitutional taking and destruction of *The Liberty’s* property, as well as the subsequent restriction of its bins to a small area of campus for almost one year. App. 13-29. During this same period, other newspapers distributed on campus by both student and non-student groups received substantially more favorable treatment. App. 17-18, 21, 28-29, 48-49.

Eliminating supervisory liability in these circumstances, as Petitioners suggest, would create absurd results. Supervisors could never be liable, in that capacity, for the constitutional harms they create. But certainly we expect more of our government officials, who—after all—have an affirmative duty to ensure that both they and their subordinates adhere to the highest law of the land.

When government officials have actual knowledge that an official policy is causing constitutional injury and refuse to rectify it despite holding the clear power to do so, they should rightly be subject to liability, as their own actions cause the harm. Here, Petitioners did far more, approving the facially unconstitutional Policy and then personally enforcing it against Respondents for almost a year after the initial removal of *The Liberty’s* distribution bins took place. Their liability, as the Ninth Circuit recognized, is simply unmistakable under these facts.

2. The Ninth Circuit Correctly Held That Allegations Showing “Knowledge and Acquiescence” Were Sufficient To State A Claim Against Government Officials Under 42 U.S.C. § 1983.

Prior to *Iqbal*, the Court had primarily dealt with supervisory liability in *Rizzo v. Goode*, 423 U.S. 362, 371 (1976) and, by analogy, in *Harris*. See also *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (noting personal liability hinges on demonstrating that a government official “caused the deprivation of a federal right” (quoting *Kentucky v. Graham*, 473 U.S. 159, 166 (1985))). Following these decisions, which indicated that supervisors could be held liable where there was an “affirmative link” between the supervisor’s approval of a policy and the subordinate’s unconstitutional conduct, *Rizzo*, 423 U.S. at 371, or where the supervisor’s failure to train amounted to “deliberate indifference” to constitutional rights, *Harris*, 489 U.S. 388, lower courts proceeded to develop the doctrine of supervisory liability.

Harris indicates that, at minimum, there is no contradiction between § 1983’s requirement that liability results only for an official’s own action on one hand, and holding a supervisory entity liable for inaction where it demonstrates “deliberate indifference” on the other. In holding that supervisors may be liable when they had actual knowledge of, and affirmatively acquiesced in, a constitutional violation not requiring specific intent, the Ninth Circuit applied a more exacting standard

than that suggested in *Harris*.¹ And, as previously explained, the detailed factual allegations in the complaint establish that Petitioners did far more than know about and acquiesce in the Policy’s operation—they personally approved a facially unconstitutional policy and enforced it against Respondents. *See supra* pp. 5-11.

Petitioners imply that “knowledge and acquiescence” is such a low standard that guiltless college officials will be hauled into court regularly for the slightest of their subordinates’ offenses, but this mischaracterizes the standard and the facts. If supervisors are truly not responsible for ongoing harm, they would not have actual knowledge of its occurrence *and* have affirmatively consented to its application—neither of which is true where, as here, the supervisors enforced a policy that they were responsible for maintaining. Accordingly, there is no danger of sweeping scores of innocent officials into court. Moreover, the Ninth Circuit’s standard is higher than what many lower courts applied pre-*Iqbal*,² but there is no indication that university

¹ While the difference between these terms is somewhat “elusive,” knowledge and acquiescence is generally considered a higher standard than reckless or deliberate indifference. Kit Kinports, *The Buck Does Not Stop Here: Supervisory Liability in Section 1983 Cases*, 1997 U. Ill. L. Rev. 147, 192 n.34 (1997).

² In many circumstances, lower courts applied a standard of “reckless” or “deliberate indifference.” *See, e.g., Preschooler II v. Clark Cnty. Sch. Bd. of Trs.*, 479 F.3d 1175, 1182 (9th Cir. 2007); *Serna v. Colo. Dep’t of Corr.*, 455 F.3d 1146, 1151 (10th Cir. 2006); *Estate of Davis v. City of N. Richland Hills*, 406 F.3d 375, 381 (5th Cir. 2005); *Ottman v. City of Independence*, 341 F.3d 751, 761 (8th Cir. 2003); *Cottone v. Jenne*, 326 F.3d 1352,

officials were previously burdened with frivolous lawsuits. Petitioners do not even suggest as much.

In this case, the complaint establishes that Ray and McCambridge personally responded to Rogers' entreaties. App. 13, 16-17, 46-47. Petitioners further responded on multiple subsequent occasions through official representatives acting at their direction, individuals who continued to communicate directly with Ray and McCambridge regarding the issue. App. 13-21, 23-24, 27. Petitioners' involvement was thus far more than that Iqbal alleged on the part of Ashcroft and Mueller. What is more, Respondents provided far more than bare-faced allegations, offering actual evidence of e-mails from Ray and McCambridge and their staff regarding a facially unconstitutional policy that Petitioners personally maintained and enforced. App. 44-54, 57-58, 61-62.

It is also vastly more plausible that Ray and McCambridge, university officials who work on site and had direct communications with the victims of the unconstitutional conduct, would be directly connected to the actions of their subordinates than the Attorney General of the United States, overseer of the "world's largest law office," and central agency for enforcement of federal laws,³ and the Director of

1360 (11th Cir. 2003); *Doe v. City of Roseville*, 296 F.3d 431, 439 (6th Cir. 2002); *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 216 (3d Cir. 2001); *O'Neill v. Baker*, 210 F.3d 41, 47 (1st Cir. 2000).

³ See *USDOJ: About DOJ*,

the FBI. The fact that Ray and McCambridge both saw fit to respond directly to the e-mailed complaint of a single undergraduate student amply illustrates this point. App. 13, 16-17, 46-47.

By applying a more stringent standard than most courts applied pre-*Iqbal*, the Ninth Circuit appropriately balanced the need to protect constitutional rights with the need to insulate government officials from unwarranted liability or frivolous lawsuits. That standard fully comports with *Iqbal*. In addition, the complaint details Petitioners' enforcement of the facially unconstitutional Policy against Respondents long after the initial removal of *The Liberty's* distribution bins took place. This Court's review is therefore unwarranted and the petition should be denied.

3. The Ninth Circuit Correctly Applied *Iqbal* to the Case in Reversing the District Court.

The Ninth Circuit faithfully applied *Iqbal* in overruling the district court's preemptory dismissal of this case under Rule 12(b)(6). For instance, the district court erroneously assumed that the only constitutional violation alleged in the complaint was the taking of *The Liberty's* distribution bins. Petitioners' App. 74. Because it concluded that Ray and McCambridge were not involved in that particular action, the district court dismissed Respondents' claims.

available at <http://www.justice.gov/about/about.html> (last visited July 29, 2013).

Obviously, it is not likely that Ray or McCambridge physically took *The Liberty's* bins and threw them in a heap next to a dumpster. But the university has repeatedly acknowledged that this action was done pursuant to the Policy being challenged. *See, e.g., Dodds v. Richardson*, 614 F.3d 1185, 1195 (10th Cir. 2010) (recognizing that “[p]ersonal involvement does not require direct participation because § 1983 states ‘[a]ny official who ‘causes’ a citizen to be deprived of her constitutional rights can also be held liable” (quoting *Buck v. City of Albuquerque*, 549 F.3d 1269, 1279 (10th Cir. 2008)).

The complaint alleges, and at this stage of the case those allegations must be taken as true, *see Iqbal*, 556 U.S. at 678, that Ray and McCambridge not only approved the Policy, but also personally applied it to Respondents for approximately a year when they excluded *The Liberty* bins from all but a small portion of campus. App. 13-29. The district court’s failure to consider these factual allegations alone warranted the reversal of its judgment.

In addition to the detailed factual allegations in the complaint showing that Ray and McCambridge personally approved and enforced a facially unconstitutional Policy against Respondents, the Ninth Circuit rightly concluded that the complaint also substantiates a claim for supervisory liability. The complaint alleges that Petitioners were policy makers with responsibility for maintaining the Policy and had actual knowledge of the Policy’s unconstitutional application to Respondents. App. 5-6, 13, 16, 24-29. Although Petitioners had plenary

authority to halt this unconstitutional conduct at any time, they ratified it for almost a year, App. 5-6, 27-29, 61-62, and thus clearly incurred supervisory liability.

The complaint, for example, provides detailed evidence that subordinates operated under Petitioners' direct instructions in excluding Respondents' bins from all but a tiny fraction of campus. App. 13, 16, 19-20, 27. Multiple emails show that they responded to Rogers' continued entreaties for equal access through a legal representative, who stated that he was in communication with Ray and McCambridge and acting under their instructions. App. 19-21, 23-24, 27. This legal representative defended the legality of the Policy restricting *The Liberty's* bins to a small area of campus on their behalf. App. 27, 46-47. This was the final decision on the matter from the university's viewpoint, with university counsel stating, "this matter is closed." *Id.* Furthermore, these were more than mere allegations—they came from substantial evidence attached to the complaint. App. 37-62.

By not allowing Respondents access to the campus, a public forum for students, Petitioners violated the First and Fourteenth Amendments.⁴ Indeed, Ray and McCambridge's differential treatment of *The Liberty* undoubtedly gives rise to a

⁴ The Ninth Circuit also found that Respondents adequately pleaded an Equal Protection claim against Petitioners on the same basis as the First Amendment claims. Petitioners' App. 24-26.

plausible claim for viewpoint discrimination.⁵ Petitioners’ App. 20-24. Because the Ninth Circuit’s judgment was correct, this Court should reject Petitioners’ bid to end this case before discovery even begins.

C. There Is No Circuit Conflict On The Issues Presented In This Case.

Contrary to Petitioners’ assertions, cases noting that complaints must contain factual allegations demonstrating supervisors’ direct involvement in a constitutional violation do not conflict with the Ninth Circuit’s decision below. *See, e.g., Brown v. Rhode Island*, 511 Fed. Appx. 4, 5 (1st Cir. 2013) (unpublished) (reciting the universally accepted principle that “vicarious liability is inapplicable to ... § 1983 suits” (quoting *Iqbal*, 556 U.S. at 676)); *Elkins v. District of Columbia*, 690 F.3d 554, 564 (D.C. Cir. 2012) (repeating the longstanding maxim that officials must have personally participated in the constitutional violation to be liable); *Soto-Torres v. Fraticelli*, 654 F.3d 153, 158 (1st Cir. 2011) (reiterating the uncontroversial rule that *Bivens* actions do not allow for vicarious liability).

Indeed, the First Circuit in *Soto-Torres* explicitly declined to address the question of whether *Iqbal* altered the standard for supervisory liability, citing

⁵ Petitioners do not raise the validity of the Ninth Circuit’s conclusions as to the constitutional violations that occurred in this case; thus, they have waived any argument on that point. This Court should therefore assume that the Ninth Circuit’s analysis of the constitutional violations in this case is valid, and focus only on Petitioners’ contentions regarding causation.

the “affirmative link” standard from pre-*Iqbal* First Circuit cases. 654 F.3d at 158 n.9. Because *Soto-Torres* did not actually decide the standard for supervisory liability, Petitioners are clearly wrong to suggest that it conflicts with the Ninth Circuit’s interpretation of *Iqbal*.

The same is true of the Second Circuit’s decision in *Reynolds v. Barrett*, 685 F.3d 193, 206 n.14 (2d Cir. 2012), which recognized that the court “has not yet definitively decided which ... factors remains a basis for establishing supervisory liability in the wake of *Iqbal*.” The Second Circuit, like the First Circuit, cannot conflict with the Ninth Circuit on an issue it has yet to decide.

The Seventh Circuit’s decision in *Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012) (en banc), which like *Iqbal* involved claims regarding harsh conditions of detainment, *see id.* at 196, did interpret *Iqbal* to mean that mere knowledge of a constitutional violation is not enough to establish supervisory liability, *see id.* at 204. But that holding does not conflict with the Ninth Circuit’s decision in this case, which requires both knowledge *and acquiescence* to state a free speech claim. All *Vance* asked for, even where specific discriminatory intent was required, was that the plaintiffs show that an official intended for the harm to occur; for example, by his or her “deliberate indifference,” *id.* at 204. As noted above, the “deliberate indifference” standard is lower than that the Ninth Circuit prescribed, which requires that officials have actual knowledge of and affirmatively acquiescence in the challenged conduct to state a valid supervisory claim.

Dicta from the Tenth Circuit’s unpublished decision in *Phillips v. Tiona*, 508 Fed. Appx. 737 (10th Cir. 2013) also fails to realize Petitioners’ asserted circuit conflict. *Phillips* turned on the lack of any deliberate indifference on the part of a prison warden and other officials, who relied on the expert judgment of a physician in denying an inmate certain medical care. *See id.* at 739-44. Although prison officials, including the prison warden, were incapable of independently assessing a prisoner’s medical claims, university administrators—like Petitioners—are independently charged with assuring that Respondents’ free speech rights are respected and not openly violated for close to a year. Furthermore, the *Phillips* Court ultimately resolved the case under a pre-*Iqbal* standard, *id.* at 744, thus precluding any possible conflict with the Ninth Circuit’s decision here.

What is truly remarkable about the courts of appeals’ post-*Iqbal* decisions on supervisory liability is not their differences but their broad-based agreement. Lower courts continue to resolve the merits of supervisory liability claims based on longstanding tests used to determine whether an official was “personally involved” in particular unconstitutional conduct.

In some cases, personal involvement takes the form of an official’s implementation or continuance of an unconstitutional policy. *See, e.g., Argueta v. U.S. ICE*, 643 F.3d 60, 75 (3d Cir. 2011) (examining whether an official “adopt[ed] a facially unconstitutional policy”); *Carnaby*, 636 F.3d at 189 (inquiring whether an official “implement[ed]” or

“established” an unconstitutional policy); *Scott v. Fisher*, 616 F.3d 100, 108-09 (2d Cir. 2010) (asking whether an official “created a policy ... under which unconstitutional practices occurred” or “allowed such a policy ... to continue”); *Dodds*, 614 F.3d at 1199 (determining whether an official “creates, promulgates, implements, or in some other way possesses responsibility for the continued operation” of an unconstitutional policy).

Other circumstances require a court to examine whether the risk of a constitutional violation was so clear that an official’s failure to take preventative action necessarily gave rise to “personal involvement.” *See, e.g., Campbell v. Johnson*, 586 F.3d 835, 840 (11th Cir. 2009) (acknowledging supervisory liability may result from “a custom or policy that results in deliberate indifference to constitutional rights,” “facts that support an inference that the supervisor ... knew that the subordinates would act unlawfully and failed to stop them from doing so,” or “a history of widespread abuse that notified the supervisor of the need to correct the alleged deprivation, but he failed to do so” (internal quotations and alteration omitted)).

These inquiries harkens back to pre-*Iqbal* precedent predicating supervisory liability on an “affirmative link,” *Dodds*, 614 F.3d at 1195, or “causal connection,” *Campbell*, 586 F.3d at 839, between the official and the constitutional violation, or an official’s “knowledge” of the particular constitutional violation at hand and “acquiescence” in its continuance, *Argueta*, 643 F.3d at 70; *Dodds*, 614 F.3d at 1196. Each test is consistent with the

prevailing reading of *Iqbal* as a procedural raising of the pleading bar, not a substantive alteration of the elements of a supervisory liability claim.⁶

No conflict among the circuits thus exists for this Court to resolve. To the contrary, the detailed factual allegations of Respondents' complaint are plainly sufficient to establish that Ray and McCambridge approved a facially unconstitutional Policy and personally implemented it against Respondents, depriving them of their First and Fourteenth Amendment rights. These allegations more than satisfy the Second, Third, Fifth, Ninth, and Tenth Circuits' post-*Iqbal*, personal-liability tests and the Eleventh Circuit's as well. Indeed, it would be hard to say that Petitioners' continued maintenance and application of a facially unconstitutional policy did not show "deliberate indifference" to Respondents' constitutional rights.

CONCLUSION

Respondents' complaint adequately states claims against Petitioners, both for their direct actions and as supervisors, and the opinion below does not implicate a circuit conflict. This Court's review is

⁶ See, e.g., *Dodds*, 614 F.3d at 1202 (explaining that "*Monell* and its progeny clearly stand for the proposition that the very language of § 1983 provides for the imposition of liability where there exists an 'affirmative' or 'direct causal' link between [the] adoption or implementation of a policy and a deprivation of federally protected rights" and that "[n]othing in *Iqbal* contradicts this longstanding interpretation of § 1983's language").

consequently unwarranted. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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August 9, 2013

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Verified Complaint.....	1
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Appendix 1

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*Attorneys for Plaintiffs OSU Students Alliance and
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**Pro Hac Vice Application concurrently filed*

***Designated Local Counsel*

Appendix 2

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON**

OSU STUDENTS

ALLIANCE, a registered
student organization at
Oregon State University
and non-profit corporation
organized under section
501(c)(3) of the Internal
Revenue Code, and
WILLIAM ROGERS,

Case No. _____

**VERIFIED
COMPLAINT**

Civil Rights Action
(42 U.S.C. § 1983)
**DEMAND FOR
JURY TRIAL**

Plaintiffs,

vs.

ED RAY, individually,
and in his official capacity
as President of Oregon
State University; **MARK
MCCAMBRIDGE**,
individually, and in his
official capacity as Vice
President for Finance and
Administration of Oregon
State University; **LARRY
ROPER**, individually, and
in his official capacity as
Vice Provost for Student
Affairs at Oregon State
University; **VINCENT
MARTORELLO**,
individually, and in his
official capacity as

Appendix 3

Director of Facilities
Services for Oregon State
University,

Defendants.

Plaintiffs OSU Students Alliance and William Rogers, by and through counsel, and for their Verified Complaint against Ed Ray, Mark McCambridge, Larry Roper, and Vincent Martorello, hereby state as follows:

INTRODUCTION

1. The hallmark of a free society is the ability of people to express their ideas without government restraint. Nowhere is this freedom more critical than on America's public college campuses—the marketplace of ideas. But despite the importance of encouraging independent thought on campus, Oregon State University has instead arbitrarily limited the opportunities for its distribution. University officials targeted Plaintiffs' student newspaper, *The Liberty*, for a form of discriminatory treatment not extended to the other campus student newspaper, *The Daily Barometer*. Though the university permits *The Daily Barometer's* numerous distribution bins to be located throughout campus with no apparent restriction, university officials surreptitiously confiscated the few distribution bins belonging to *The Liberty*, and threw them in a heap in a storage yard near a dumpster. When *The Liberty's* staff eventually located their bins with the help of the Oregon State Police, they found one

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broken, and the rest covered with mud and debris, and full of ruined copies of their paper.

2. After being found out, Defendants arbitrarily classified *The Liberty* (an exclusively student-operated, on-campus publication) as an “off-campus publication,” and disallowed it to place distribution bins anywhere on campus except the immediate vicinity of the student union. Defendants refuse to explain what Plaintiffs must do to qualify as a “student publication,” and refuse to treat Plaintiffs equally with the other student publication on campus.

3. This action is brought to vindicate Plaintiffs’ fundamental constitutional rights to free speech, equal protection, and due process. Defendants’ policies and actions have deprived and will continue to deprive Plaintiffs of their rights under the United States Constitution.

JURISDICTION AND VENUE

4. This civil rights action raises federal questions under the United States Constitution, particularly the First and Fourteenth Amendments, and the Civil Rights Act of 1871, 42 U.S.C. § 1983.

5. This Court has original jurisdiction over these federal claims pursuant to 28 U.S.C. §§ 1331 and 1343. This Court has authority to award the requested damages pursuant to 28 U.S.C. § 1343; the requested declaratory relief pursuant to 28 U.S.C. § 2201; the requested injunctive relief pursuant to 28

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U.S.C. § 1343 and Fed. R. Civ. P. 65; and costs and attorneys fees under 42 U.S.C. § 1988.

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

PLAINTIFFS

7. Plaintiff OSU Students Alliance (OSUSA) is a registered student organization (RSO) at Oregon State University, and is incorporated as a non-profit corporation under 26 U.S.C. § 501(c)(3). Its members are all Oregon State University (OSU) students.

8. Plaintiff OSUSA publishes *The Liberty*, an independent student newspaper distributed to OSU students on the OSU campus in Corvallis, Oregon.

9. Plaintiff William Rogers is a student at OSU and is the president of OSUSA, as well as the Executive Editor of *The Liberty*.

DEFENDANTS

10. Defendant Ed Ray is the President of OSU, a public university organized and existing under the laws of the State of Oregon, and is responsible for overseeing campus administration and creating, implementing, and/or administering university policies, including the policies and procedures challenged herein. He is sued in both his individual and official capacities.

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11. Defendant Mark McCambridge is the Vice President of Finance and Administration of OSU, a public university organized and existing under the laws of the State of Oregon, and is responsible for overseeing campus administration and creating, implementing, and/or administering university policies, including the policies and procedures challenged herein. He is sued in both his individual and official capacities.

12. Defendant Larry Roper is the Vice Provost for Student Affairs of OSU, a public university organized and existing under the laws of the State of Oregon, and is responsible for overseeing campus administration related to Student Affairs and creating, implementing, and/or administering university policies, including the policies and procedures challenged herein. He is sued in both his individual and official capacities.

13. Defendant Vincent Martorello is Director of Facilities Services at OSU, a public university organized and existing under the laws of the State of Oregon, and is responsible for overseeing campus administration related to Facilities and creating, implementing, and/or administering university policies, including the policies and procedures challenged herein. He is sued in both his individual and official capacities.

14. Each and every act alleged herein of Defendants, their officers, agents, servants, employees, or persons acting at their behest or direction, were done and are continuing to be done

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under the color and pretense of state law and authority.

FACTUAL BACKGROUND

A. History of *The Liberty* on the Oregon State University Campus

15. OSUSA was formed in 2002 by a group of OSU students and received recognized student organization (RSO) status from the university.

16. Initially, OSUSA members created a website and published articles online. Later in 2002, OSUSA began publishing *The Liberty* in printed newspaper format and distributing it on the OSU campus.

17. OSUSA's purpose in publishing *The Liberty* was to provide a medium for students to express conservative, libertarian, and independent thought and provide news coverage that was different than that contained in *The Daily Barometer*, the daily student newspaper.

18. OSUSA was created by OSU students, and is, and always has been, wholly operated by OSU students. *The Liberty* has always been entirely written by, edited by, published by, and distributed to OSU students.

19. OSUSA incorporated as a non-profit organization under section 501(c)(3) of the Internal Revenue Code in 2002 so it could receive private donations to cover costs of publishing the paper.

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20. OSUSA also receives funds to cover the costs of publishing the paper from advertising revenue.

21. During the 2005-2006 academic year, a local businessman donated to OSUSA eight green plastic distribution bins for *The Liberty*.

22. The bins have *The Liberty*'s logo affixed to them, which reads, "The Liberty, OSU Students Alliance Publication."

23. During the 2005-2006 academic year, Luke Sheahan—then the editor of *The Liberty*—received explicit permission from OSU to place the bins in specific locations on campus.

24. After one bin was stolen during the 2005-2006 academic year, OSUSA members used thin, wire bicycle chains and padlocks to secure the remaining bins in place next to a light post or other fixture.

25. The seven green plastic distribution bins were placed around the outdoor areas of campus in locations numerous students pass on their way to class.

26. In addition to the green plastic bins, OSUSA members also use four wire bins for indoor distribution of *The Liberty* in the Memorial Union, the student union on campus, as well as two campus dining halls.

27. *The Daily Barometer* has many more distribution bins than *The Liberty* and these are

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located throughout campus, as well as at off-campus locations.

28. Upon information and belief, *The Daily Barometer* is funded solely through student fees and advertising revenue.

29. Aside from *The Liberty* and *The Daily Barometer*, there are no other newspapers created by and for students on the OSU campus.

30. Off-campus newspapers, such as the *Corvallis Gazette-Times*, *Eugene Weekly*, and *USA Today* also have distribution bins located on campus.

B. Confiscation Without Notice of *The Liberty's* Distribution Bins

31. At some point during the winter term in the 2008-2009 academic year, each of *The Liberty's* seven green distribution bins disappeared from campus.

32. *The Liberty's* departing Executive Editor, Rockne Roll, contacted the Oregon State Police, believing the bins were stolen.

33. After investigation, the State Police determined that the OSU Facilities Department had removed the bins.

34. OSU officials gave no notice of their removal intentions to any representative of *The Liberty* prior to the removal of their bins, even though the contact information for the editorial board is listed

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prominently inside the first page of every issue located in the bins.

35. Plaintiff Rogers, who assumed the position of Executive Editor of *The Liberty* in April 2009, contacted Joe Majeski of the Facilities Department in order to ascertain why the bins were removed and where they were currently located.

36. On April 15, 2009, Mr. Majeski responded to Mr. Rogers by e-mail:

You will be unable to site additional bins on the OSU Campus. We have designated areas around the Memorial Union and in around [sic] some of the dormitories designated for this purpose. I can show you these spaces if you like. All other placements will be considered unauthorized. If you would like to retrieve your bins for other uses you can pick them up in the University storage yard behind the Corvallis Fire Station at 35th and Washington. Thank you for your understanding and cooperation.

A copy of this e-mail is attached as Exhibit 1 to this Verified Complaint.

37. Mr. Rogers arranged to meet with Mr. Majeski on April 17, 2009 to discuss permissible locations for *The Liberty* distribution bins.

38. During their April 17 meeting, Mr. Majeski informed Mr. Rogers that OSU enacted a policy in 2006 that restricted the authorized placement of

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newspaper distribution bins to designated areas on campus. He said that OSUSA's bins were removed because the Facilities Department was finally "catching up" with the policy.

39. The OSU administration never gave notice to any representative of *The Liberty* that there was a change in policy regarding the placement of distribution bins, nor any notice of the recent effort to "catch up" with the purported policy.

40. Mr. Majeski also told Mr. Rogers that bins could only be placed outside the campus bookstore and in a couple of locations in the immediate area of the Memorial Union.

41. Mr. Rogers told Mr. Majeski that he recalled that one of *The Liberty's* bins had been located by the bookstore, but Mr. Majeski stated that Facilities Department personnel would not have removed the bin from that area.

42. After the meeting with Mr. Majeski, Mr. Rogers returned to the area where he recalled the distribution bin had been located near the bookstore and saw a discolored patch on the concrete that matched the size and shape of the base of *The Liberty's* bin. This confirmed his memory that one of *The Liberty's* bins was located there before OSU personnel confiscated all of them. A photograph of this discolored area is attached as Exhibit 2 to this Verified Complaint.

43. Later on April 17, Mr. Rogers also went to the storage yard where Mr. Majeski indicated *The*

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Liberty's distribution bins were located in order to retrieve them.

44. When he arrived, he found the seven green bins heaped on the ground near a dumpster. Photographs of the location of the confiscated bins are attached as Exhibit 3 to this Verified Complaint.

45. One of the bins had been badly damaged. Photographs of the damage are attached as Exhibit 4 to this Verified Complaint.

46. The wire bicycle chains that OSUSA members had used to secure the bins and prevent theft had been cut. A photograph of the cut chains and locks is attached as Exhibit 5 to this Verified Complaint.

47. Because the bins had been haphazardly thrown on the ground, some of them had fallen open. As a result, approximately 150 copies of *The Liberty's* latest issue were ruined due to water damage. Photographs of the damaged papers are attached as Exhibit 6 to this Verified Complaint.

48. Mr. Rogers later returned to the storage yard with Ben Price, Managing Editor of *The Liberty*. The two of them, over the course of several trips, loaded the bins and transported them to Mr. Rogers' house.

49. Mr. Rogers and Mr. Price cleaned the bins of the mud and debris that covered them. They returned to the OSU campus with two bins and placed them outside the Memorial Union in locations

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that Mr. Majeski had identified as permissible for OSUSA's distribution bins.

50. After Mr. Rogers returned home that evening, he wrote an e-mail to Defendant Ray expressing his displeasure at the treatment of OSUSA's property and requesting an explanation of OSU's actions.

51. The following day, April 18, 2009, Mr. Rogers received an e-mail from Defendant Ray. Defendant Ray stated that the events described by Mr. Rogers and Mr. Rogers' "activities on campus" were "news" to him, and he was copying individuals who would contact Mr. Rogers directly: Defendant McCambridge, Defendant Roper, and Jock Mills, Government Relations Director at OSU.

52. On April 23, 2009, Mr. Rogers received a voice message from Defendant Martorello. Mr. Rogers called Defendant Martorello back later that afternoon. Defendant Martorello related the existence of the policy regarding bin placement that Mr. Majeski had previously explained. Defendant Martorello also stated that the University was trying to keep the campus clean and was therefore regulating "off-campus" newspaper bins.

53. When Mr. Rogers explained to Defendant Martorello that *The Liberty* was not an "off-campus" newspaper, Defendant Martorello said that he would "think about it" and discuss with his colleagues.

54. Defendant Martorello also explained that bins could not be chained to school property because

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maintenance crews need to be able to do repair work and ADA requirements need to be considered.

55. Defendant Martorello also asked Mr. Rogers for information on the background of *The Liberty*, its customary distribution quantities, and related matters.

56. During this conversation, Defendant Martorello also offered to have representatives of the Facilities shop take a look at the damage done to the bin and to see if they could repair it.

C. OSU Officials' Arbitrary Refusal to Recognize *The Liberty* as a Student Newspaper and Permit its Distribution on an Equal Basis With Other Student Publications

57. In response to Defendant Martorello's request for information about *The Liberty*, Mr. Rogers sent him a long e-mail later on April 23, explaining the background of the paper, who writes/edits it (OSU students), where its funding comes from (advertising and private donations), how often it is published (monthly), where the distribution bins have been located, and where they would like the bins to be located.

58. Defendant Martorello's e-mail response on April 24 contained the following:

Our discussion centered on these key points:

Why the bins were removed

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Condition of the bins

Potential for adding additional bins on campus

You compared Liberty to the Barometer based on the fact that Liberty is a student paper, but not funded by ASOSU. I cannot clearly draw a distinction on how a paper is consider [sic] a student paper that is not funded by a recognized student group on campus, or uses student fees, as opposed to a paper being funded by an outside agencies or entity and using students internally for purposes of circulation. I will read through your email in more detail and discuss with some others about this, and in particular the OSU Students Alliance. It reads as the OSU Students Alliance is a tax exempt business, that relies on student volunteers to work for the paper. I will see how this differs from the Barometer.

I did mention that we would need to work through the issue of Liberty being either considered or not consider [sic] a student newspaper before I could make any determination on bin locations.

I will review this information and get back to you by the end of next week.

A copy of this e-mail is attached as Exhibit 7 to this Verified Complaint.

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59. On April 25, 2009. Mr. Rogers received an e-mail from Defendant McCambridge, responding to Mr. Rogers' April 17 e-mail to Defendant Ray:

Sorry for not getting back to you but, just as I am sure you are [aware], there is much to do and not enough time to do it.

I have looked into your concerns and have a few comments that follow.

As a newspaper that is not funded by ASOSU, we don't have the same communications availability between your paper and the University which may have caused some of the confusion surround[ing] this issue. Your paper's placement of distribution equipment on the campus lacked coordination with our staff. As with everything here at OSU, there are processes and guidelines for everything that we do, especially in the physical environment. We want to have our campus esthetically and operationally the best that it can be.

University personnel are more than willing to work with you so that your paper will have places on campus where it can be distributed, but those locations will be agreed to within the parameters that the university determines. I understand that Vincent Martorello did have an initial discussion with you late last week.

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I have asked Vincent to follow through with you and be the point of contact for President Ray and myself. He will keep us informed.

A copy of this e-mail is attached as Exhibit 8 to this Verified Complaint.

60. On April 27, 2009, while Mr. Rogers was placing new editions of *The Liberty* in their remaining distribution bins and wire racks on campus, he noticed a distribution bin for the *Corvallis Gazette-Times* chained to a concrete post and which was not located in a designated area for “off-campus” papers. A *Eugene Weekly* bin was next to it, and while not chained to anything, it was still outside of the designated areas for “off-campus” papers that Mr. Majeski identified. Mr. Rogers took pictures of the *Gazette-Times* and *Eugene Weekly* bins, and those pictures are attached as Exhibit 9 to this Verified Complaint.

61. On April 29, 2009, Defendant Martorello e-mailed Mr. Rogers and promised that he would have “something for him by the end of the week” in regard to his decision as to whether *The Liberty* was an “on-campus publication.”

62. On April 29, 2009, Mr. Rogers e-mailed Defendant Martorello in response and suggested that since Defendant Martorello was evidently having difficulty deciding whether he thought *The Liberty* was an “on-campus publication,” OSUSA would renew their RSO status with the University in order to make it even more clear that *The Liberty* was a student newspaper.

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63. Defendant Martorello never responded to this suggestion.

64. OSUSA was an RSO beginning in 2002, but did not renew its RSO status due to an oversight in 2007 or 2008.

65. Mr. Rogers applied for renewal of OSUSA's RSO status. On May 26, 2009, the university notified OSUSA that it was officially recognized as a student organization.

66. On May 2, 2009, while on campus walking to class, Mr. Rogers noticed a *Daily Barometer* distribution bin chained to a light post in violation of the purported university "policy" described by Defendant Martorello. Mr. Rogers took a picture of the bin. A copy of the picture of *The Daily Barometer* bin is attached as Exhibit 10 to this Verified Complaint.

67. On May 4, 2009, Mr. Rogers e-mailed Defendant Martorello to find out why he had not yet responded to Mr. Rogers' e-mail.

68. On May 5, 2009, Defendant Martorello responded:

Thank you for your inquiry as to where the bins containing the Liberty paper can be located on campus. The Liberty is not in the same situation as the Barometer and will need to be located at the approved locations by the Memorial Union. Please work with Joe Majeski should you have any specific

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questions about the placement of the bins within the approved locations. In addition, I have previously offered to have our shops [sic] personnel look at the bin you state is damaged to see if it can be easily repaired. Joe Majeski can help arrange this should you be interested in pursuing this.

A copy of the above e-mail is attached as Exhibit 11 to this Verified Complaint.

69. Mr. Rogers responded on May 5 and asked Defendant Martorello to identify the source of the purported “policy” that dictated where *The Liberty*’s bins could be located.

70. Defendant Martorello responded on May 6, 2009:

We are not keeping the bins off campus, rather we are directing them to a specific location as we do with other publications. We now consider this matter closed.

A copy of the above e-mail is attached as Exhibit 12 to this Verified Complaint.

71. On May 7, 2009, Ben Price, the managing editor of *The Liberty*, also e-mailed Defendant Martorello to request the source of the policy dictating bin placement on campus.

72. On May 7, 2009, Charles Fletcher, Esq., Associate General Counsel of OSU, and authorized representative of Defendants in all of his

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interactions with Plaintiffs and their agents, e-mailed a response to Mr. Rogers and Mr. Price:

Vincent Martorello forward [sic] to me the follow up questions you posed regarding the university's decision to continue its current practice of limiting placements of periodical bins. Specifically, you asked where the "policy" in that regard may be found.

There is no specific written policy that governs the placement of publication bins, and none is required. OSU's control over its grounds, buildings, and facilities -- including the placement of equipment, machines, containers, and the like -- is plenary under ORS Chapters 351 and 352, OAR Chapters 576 and 580, and management directives of the State Board of Higher Education, subject only to limited exceptions that do not apply here.

I hope this helps. Please direct any future correspondence on this issue to me. But as Mr. Martorello made clear in his earlier email, we consider the matter closed.

A copy of this e-mail is attached as Exhibit 13 to this Verified Complaint.

73. On May 7, Mr. Rogers responded, asking Mr. Fletcher to explain what *The Liberty* needs to do in order to be considered a "student publication" akin to *The Daily Barometer*.

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74. Later on May 7, 2009, Mr. Fletcher responded:

Our office does not provide advice to students. But I can tell you that The Daily Barometer's masthead reveals that it is "published . . . by the Oregon State University Student Media Committee on behalf of the Associated Students of OSU." I believe it has been the campus student newspaper since 1896.

A copy of this e-mail is attached as Exhibit 14 to this Verified Complaint.

75. On May 11, 2009, Mr. Rogers received a phone call from Peggy Duncan, an administrator with University Housing and Dining Services (UHDS). Ms. Duncan stated that UHDS was doing some "cleaning" in anticipation of visiting parents and asked that Mr. Rogers remove *The Liberty* wire bins from campus dining facilities by May 22, 2009.

76. Mr. Rogers asked Ms. Duncan whether she was also asking *The Daily Barometer* staff to remove their bins. She said she did not intend to do so. However, Ms. Duncan asked distributors of *USA Today*, the *Corvallis Gazette-Times*, and the *Eugene Weekly* to remove their bins.

77. On May 21, 2009, Mr. Rogers removed *The Liberty's* wire bins from dining facilities and gave the damaged plastic bin to Mr. Majeski for repair.

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78. As it was still unclear to OSUSA members why university officials continued to classify *The Liberty* as an “off-campus” publication after they were informed that the publication was entirely created by OSU students and distributed only on OSU’s campus, and since it appeared that Mr. Fletcher would no longer respond to OSUSA communications, Mr. Rogers sought the assistance of Patricia Lacy, an attorney with Student Legal Services at OSU.

79. Ms. Lacy attempted to get more information about the restriction on *The Liberty*’s bins by corresponding with various university officials.

80. Ms. Lacy presented to Defendant Martorello a list of proposed locations for the placement of *The Liberty*’s distribution bins, and asked him what process should be followed to obtain approval for this proposal.

81. Defendant Martorello referred Ms. Lacy to Mr. Fletcher.

82. On May 29, 2009, Ms. Lacy inquired of Mr. Fletcher the following:

Vincent Martorello referred me to you regarding a question I posed to him. There is a student-run newspaper called The Liberty that experienced the removal of their distribution bins from campus a few months ago. At that time Vincent told them they could not be on campus because they were not a student-affiliated entity. Since then

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the group has become a recognized student organization and would like to return their bins to campus. This time they know they need to follow procedure Vincent told them was put in place in 2006. We do not know what this procedure is.

Since Vincent has referred me to you, I think there may be some additional information. Could you please help me to understand what is going on with this issue?

A copy of this e-mail is attached as Exhibit 15 to this Verified Complaint.

83. On May 29, 2009, Mr. Fletcher responded:

I do have some background with this issue, and I'll provide my understanding, which admittedly may be incomplete.

The problem, as I understand it, is that The Liberty is requesting more favorable bin locations than those provided to other non-OSU periodicals being distributed on campus.

For a lot of logistical reasons (including clutter and ADA accessibility issues), all periodicals (other than the Daily Barometer) are permitted bin locations in a limited area near the MU. That's not to say those publications are not allowed to be on campus. Publications such as The Liberty may be distributed on campus. It's just a

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question of locating their distribution structures in locales that are consistent with the neutral rules Facilities Services has established.

My understanding is that the editors of The Liberty believe that any periodical with OSU students on staff is an “OSU student run newspaper” that should be permitted the same bin locations as The Daily Barometer. The university respectfully disagrees. The mere fact that The Liberty has students on staff does not mean that it is entitled to the same bin locations as The Daily Barometer. The Daily Barometer was established over 100 years ago as the OSU student newspaper. It’s published by the OSU Student Media Committee on behalf of ASOSU. The Liberty, on the other hand, is not published by OSU and receives almost all of its funding from outside sources. Its only connection to OSU is that some OSU students serve on its staff. My understanding is that Facilities Services has decided that The Liberty is distinguishable from The Daily Barometer and, therefore, assumes the same status as all other periodicals being distributed on campus.

A copy of this e-mail is attached as Exhibit 16 to this Verified Complaint.

84. On June 1, 2009, the latest edition of *The Liberty* was published. The paper’s content focused on the issue of censorship, and detailed what

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Defendants had done to *The Liberty's* distribution bins. Mr. Rogers delivered several copies of the paper to the sixth floor of the Kerr Administration building, where Defendant Ray and Mr. Fletcher have their offices.

85. Mr. Rogers drafted a sample policy regarding distribution bins which provided a simple basis for distinguishing between on-campus and off-campus publications and their respective placements.

86. Mr. Rogers met with Ms. Lacy on June 9, 2009 and showed her the draft policy. Ms. Lacy took it to Mr. Fletcher and asked if he would be willing to meet with the students, but he refused to meet with them or take a copy of the proposed policy.

87. Later on June 9, Mr. Rogers sent an e-mail to Defendant Ray, Defendant McCambridge, Mr. Fletcher, and Ms. Lacy:

I just wanted to let you know that Patricia Lacy told me that Charles Fletcher declined to even take a copy of what we consider to be a starting point for compromise. Given that the University has stated in recent media interviews that it wants to continue working with us, I just wanted to make sure that his actions were representative of what you all really want.

So to summarize the jist [sic] of both of our problems, we don't approve of the fact that the University has no written guidelines for what is or is not a student publication. In

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that university officials have arbitrarily decided to lump us in a category of “off-campus” publications that do not enjoy the same circulation as current student media outlets. University officials have also stated that even if The Liberty were to be considered a student publication, we would still be restricted to the same areas as off-campus publications which stands against the principles of diversity and equal protection.

From the University’s point of view, if The Liberty were allowed to be a student publication, other groups (both on campus and off) would demand similar access to what we are granted. The end result would be nothing but bins as far as the eye could see, regardless of if they are in use or not. In addition the chaos that would follow would bring OSU out of compliance with the ADA regulations and could potentially put OSU in violation of other laws.

Attached to this e-mail is a document that contains what we consider to be a good starting point for an effective set of rules that will allow us both to peacefully coexist. Please take a look at it and if there are any issues that you don't feel we covered, let us know what they are.

A copy of this e-mail is attached as Exhibit 17 to this Verified Complaint.

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88. Mr. Fletcher responded on June 12, 2009:

I have been in communication with President Ray and Vice President McCambridge about your email of June 9, and I will be your point of communication on this issue.

The university's decisions with respect to bin placements are content neutral and do not prohibit distribution of *The Liberty* on the OSU campus by other means. Nor do they prohibit the placement of distribution bins by *The Liberty* in the permitted locations. The university values intellectual diversity and encourages student participation in the marketplace of ideas.

Please let me know if you have any questions, but as Vincent Martorello informed you by email on May 6, this matter is closed and has been since that date.

A copy of this e-mail is attached as Exhibit 18 to this Verified Complaint.

89. Defendants lack any policy, written or unwritten, containing clear standards for determining which publications are considered "student publications" and which are considered "off-campus" publications.

90. Defendants have refused to respond any further to Mr. Rogers and refuse to recognize *The Liberty* as anything but an "off-campus" publication,

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even though they are aware that *The Liberty* is entirely written, edited, produced, and distributed by OSU students for OSU students, is published by a recognized student organization, and is not distributed anywhere outside the OSU campus.

91. As a result, OSUSA may only place *The Liberty* distribution bins in the immediate area of the Memorial Union. The Defendants have denied them permission for bin-placement in other parts of the campus, even though such permission is granted to the daily student newspaper, *The Daily Barometer*.

92. As a result, OSUSA is inhibited in its distribution efforts, and *The Liberty* cannot reach many of the students on campus.

93. The Defendants claim that their concerns about litter, aesthetic appearance, and ADA compliance require them to restrict the placement of *The Liberty* distribution bins on campus. But none of those purported concerns led Defendants to impose comparable restrictions on the distribution bins of *The Daily Barometer*, which has at least 24 bins located throughout campus.

94. Defendants allowed other publications' distribution bins to be chained to fixtures on campus, but, upon information and belief, have not removed them as they did *The Liberty's* bins.

95. Defendants allowed off-campus, non-student publications to have distribution bins located outside of "designated" areas, but, upon information and

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belief, did not remove them without notice as they did *The Liberty* bins.

ALLEGATIONS OF LAW

96. Plaintiffs have no adequate or speedy remedy at law to correct or redress the deprivations of their rights by Defendants. Unless and until the discriminatory policy announced and enforced by Defendants is enjoined, Plaintiffs will suffer and continue to suffer irreparable injury to their rights.

97. Because of Defendants' actions, Plaintiffs have suffered, and continue to suffer, economic injury and irreparable harm. They are entitled to an award of monetary damages, including punitive damages, and equitable relief.

FIRST CAUSE OF ACTION:

Violation of the Free Speech Clause of the First Amendment

98. Plaintiffs incorporate each of the foregoing allegations in this Complaint as if set forth fully herein.

99. The campus of Oregon State University is a public forum for student speech.

100. University officials may not restrict student speech on campus unless the restrictions do not grant administrators unfettered discretion, and are content-neutral, narrowly tailored to a

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significant government interest, and leave open ample alternative channels of communication.

101. By removing Plaintiffs' distribution bins from the OSU campus, restricting their distribution bins to a small area of campus, and applying unwritten, vague, and arbitrary standards to Plaintiffs' speech, Defendants, by policy and practice, have deprived Plaintiffs of their clearly established right to free speech under the First Amendment of the United States Constitution.

102. Defendants restricted Plaintiffs' distribution of *The Liberty* because of its content and viewpoint(s).

103. Defendants' policies and practices related to determining where distribution bins may be located on campus, which bins should be removed, and what publications are "student publications" are impermissibly vague and ambiguous and give unfettered discretion to Defendants to suppress and/or discriminate against publications with disfavored viewpoints, which violates Plaintiffs' clearly established right to free speech under the First Amendment of the United States Constitution.

104. Plaintiffs were deprived of their clearly established First Amendment right to free speech when Defendants confiscated their distribution bins without notice, leaving them without any distribution mechanism for that period of time, when Defendants ruined approximately 150 copies of *The Liberty* because of their negligent and careless handling of the distribution bins, and when

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Defendants prohibited Plaintiffs from using the majority of their distribution bins, severely reducing their ability to distribute their April and June 2009 issues to students on campus.

105. Plaintiffs continue to be deprived of their First Amendment right to free speech, as Defendants continue to prohibit them to place their distribution bins in locations on campus open to other student newspaper bins. Plaintiffs plan to publish their paper every month this academic year, beginning on September 28, 2009.

SECOND CAUSE OF ACTION:

Violation of the Due Process Clause of the Fourteenth Amendment

106. Plaintiffs incorporate each of the foregoing allegations in this Complaint as if set forth fully herein.

107. By confiscating Plaintiffs' property without notice, damaging said property, and depriving Plaintiffs of the use of said property, Defendants, by policy and practice, deprived Plaintiffs of their clearly established right to due process of law under the Fourteenth Amendment of the United States Constitution.

108. Defendants' policies and practices related to determining where distribution bins may be located on campus, which bins should be removed, and what publications are "student publications" are impermissibly vague and ambiguous and give

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unfettered discretion to Defendants in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

THIRD CAUSE OF ACTION:

Violation of the Equal Protection Clause of the Fourteenth Amendment

109. Plaintiffs incorporate each of the foregoing allegations in this Complaint as if set forth fully herein.

110. By confiscating Plaintiffs' distribution bins, prohibiting Plaintiffs from placing distribution bins anywhere other than around the Memorial Union, and applying unwritten, vague, and arbitrary policies and practices to deprive Plaintiffs of their constitutional rights, Defendants have treated Plaintiffs differently than similarly situated individuals and organizations and deprived Plaintiffs of their clearly established right to equal protection under the law under the Fourteenth Amendment of the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment against Defendants Ray, McCambridge, Roper, and Martorello, and provide Plaintiffs with the following relief:

- A) A preliminary and permanent injunction against the Defendants, their agents, servants, employees, officials, or any other

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person acting in concert with them or on their behalf, invalidating and restraining them from enforcing customs, procedures, codes, practices and/or policies as they pertain to the conduct made the subject of this Verified Complaint, specifically the restriction on the placement of Plaintiffs' distribution bins, or that in any way discriminate against Plaintiffs on the basis of their viewpoint or the content of their expression, or because of their exercise of fundamental rights;

- B) A preliminary and permanent injunction prohibiting the Defendants and their agents from restricting Plaintiffs' distribution bins only to the immediate area of the Memorial Union on campus;
- C) A declaration stating that the conduct of Defendants and Defendants' policies and/or practices restricting Plaintiffs' speech are unconstitutional under the First and Fourteenth Amendments;
- D) That this Court adjudge, decree, and declare the rights and other legal relations with the subject matter here in controversy, in order that such declaration shall have the force and effect of final judgment;
- E) An award of compensatory and nominal damages to Plaintiffs against the

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individual defendants in an amount to be determined by the evidence;

- F) An award of punitive damages to Plaintiffs against the individual defendants for their actions in violating their First Amendment right to freedom of speech and Fourteenth Amendment rights to due process and equal protection under law;
- G) Plaintiffs' reasonable costs and expenses of this action, including attorneys' fees, in accordance with 42 U.S.C. § 1988;
- H) All other relief this Court deems just and proper; and
- I) That this Court retain jurisdiction of this matter for the purpose of enforcing this Court's orders.

Plaintiffs request a trial by jury in this matter.

Respectfully submitted this 29th day of September, 2009.

By: /s/Jonathan A. Clark
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***Pro Hac Vice Application*
concurrently filed

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VERIFICATION OF COMPLAINT

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

Executed this 20th day of September, 2009, at Corvallis, Oregon.

/s/William Rogers
William Rogers

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EXHIBIT 1

URGENT: The Liberty's bins

Wed, Apr 15, 2009 at 1:59 PM

Majeski, Joseph

<Joe.Majeski@oregonstate.edu>

To: The Liberty Managing Editor

<theliberty.manager@[REDACTED]>

Cc: "Brown, Norm" <Norm.Brown@oregonstate.edu>

Mr. Rogers,

You will be unable to site additional bins on the OSU Campus. We have designated areas around the Memorial Union and in around some of the dormitories designated for this purpose. I can show you these spaces if you like. All other placements will be considered unauthorized. If you would like to retrieve your bins for other uses you can pick them up in the University storage yard behind the Corvallis Fire Station at 35th and Washington. Thank you for your understanding and cooperation.

Joseph Majeski
Oregon State University
Facilities Services
Landscape and Customer Service Manager
(541) 737-7646

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EXHIBIT 2



Appendix 39

EXHIBIT 3



Appendix 40

EXHIBIT 4



Appendix 41



Appendix 42

EXHIBIT 5



Appendix 43

EXHIBIT 6



Appendix 44

EXHIBIT 7

History of the Liberty

Fri, Apr 24, 2009 at 12:42 PM

Martorello, Vincent

<vincent.martorello@oregonstate.edu>

To: The Liberty Managing Editor

<theliberty.manager@[REDACTED]>

Cc: adam@thefire.org, lukes@thefire.org, "Price, Ben Tommo - ONID" <pricebe@[REDACTED]>, "Alaman, Henry" <henry.alaman@oregonstate.edu>

Will,

Our discussion centered on these key points:

- Why the bins were removed
- Condition of the bins
- Potential for adding additional bins on campus

You compared Liberty to the Barometer based on the fact that Liberty is a student paper, but not funded by ASOSU. I cannot clearly draw a distinction on how a paper is consider a student paper that is not funded by a recognized student group on campus, or uses student fees, as opposed to a paper being funded by an outside agencies or entity and using students internally for purposes of circulation. I will read through your email in more detail and discuss with some others about this, and in particular the OSU Students Alliance. It reads as the OSU Students Alliance is a tax exempt business, that relies on

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student volunteers to work for the paper. I will see how this differs from the Barometer.

I did mention that we would need to work through the issue of Liberty being either considered or not consider a student newspaper before I could make any determination on bin locations.

I will review this information and get back to you by the end of next week.

Thanks,

. Vincent

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EXHIBIT 8

Urgent: The Liberty & OSU

Sat, Apr 25, 2009 at 4:42 PM

McCambridge, Mark

<Mark.McCambridge@oregonstate.edu>

To: The Liberty Managing Editor

<theliberty.manager@ [REDACTED]>, "Ray,

Ed"<Ed.Ray@oregonstate.edu>, "Martorello,

Vincent" <vincent.martorello@oregonstate.edu>

Cc: "Roper, Larry D - ONID" roperl@onid.orst.edu

Hi Will,

Sorry for not getting back to you but, just as I am sure you are, there is much to do and not enough time to do it.

I have looked into your concerns and have a few comments that follow.

As a newspaper that is not funded by ASOSU, we don't have the same communications availability between your paper and the University which may have caused some of the confusion surround this issue. Your paper's placement of distribution equipment on the campus lacked coordination with our staff. As with everything here at OSU, there are processes and guidelines for everything that we do, especially in the physical environment. We want to have our campus esthetically and operationally the best that it can be.

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University personnel are more than willing to work with you so that your paper will have places on campus where it can be distributed, but those locations will be agreed to within the parameters that the university determines. I understand that Vincent Martorello did have an initial discussion with you late last week.

I have asked Vincent to follow through with you and be the point of contact for President Ray and myself. He will keep us informed.

Thanks

Mark

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EXHIBIT 9



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EXHIBIT 10



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EXHIBIT 11

Bins

Tue, May 5, 2009 at 12:08 PM

Martorello, Vincent

<vincent.martorello@oregonstate.edu>

To: theliberty.manager@[REDACTED]

Will,

Thank you for your inquiry as to where the bins containing the Liberty paper can be located on campus. The Liberty is not in the same situation as the Barometer and will need to be located at the approved locations by the Memorial Union. Please work with Joe Majeski should you have any specific questions about the placement of the bins within the approved locations. In addition, I have previously offered to have our shops personnel look at the bin you state is damaged to see if it can be easily repaired. Joe Majeski can help arrange this should you be interested in pursuing this.

Thanks
·Vincent

Vincent Martorello, AICP
Director, Facilities Services
111 Oak Creek Building, Corvallis, Oregon 97331
Phone – 541-737-7705 | Fax – 541-737-4810
Go Orange

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EXHIBIT 12

Bins

Wed, May 6, 2009 at 8:51 AM

Martorello, Vincent

<vincent.martorello@oregonstate.edu>

To: The Liberty Managing Editor

<theliberty.manager@[REDACTED]>

Will,

We are not keeping the bins off campus, rather we are directing them to a specific location as we do with other publications. We now consider this matter closed.

. Vincent

EXHIBIT 13

FW: Liberty Bins

Thu, May 7, 2009 at 8:52 AM

Fletcher, Charles

<Charles.Fletcher@oregonstate.edu>

To: bprice75@██████████, theliberty.manager@██████████

Cc: "Martorello, Vincent"

<vincent.martorello@oregonstate.edu>

Gentlemen:

Vincent Martorello forward to me the follow up questions you posed regarding the university's decision to continue its current practice of limiting placements of periodical bins. Specifically, you asked where the "policy" in that regard may be found.

There is no specific written policy that governs the placement of publication bins, and none is required. OSU's control over its grounds, buildings, and facilities -- including the placement of equipment, machines, containers, and the like -- is plenary under ORS Chapters 351 and 352, OAR Chapters 576 and 580, and management directives of the State Board of Higher Education, subject only to limited exceptions that do not apply here.

I hope this helps. Please direct any future correspondence on this issue to me. But as Mr. Martorello made clear in his earlier email, we consider the matter closed.

Appendix 53

Charles

Charles E. Fletcher
Associate General Counsel
Oregon State University
638 Kerr Administration Bldg.
Corvallis, OR 97331-2128
(541) 737-6262
(541) 737-0712 (fax)
charles.fletcher@oregonstate.edu

EXHIBIT 14

FW: Liberty Bins

Thu, May 7, 2009 at 1:15 PM

Fletcher, Charles

<Charles.Fletcher@oregonstate.edu>

To: The Liberty Managing Editor

<theliberty.manager@[REDACTED]>

Cc: bprice75@[REDACTED], "Martorello, Vincent"

<vincent.martorello@oregonstate.edu>

Mr. Rogers,

Our office does not provide advice to students. But I can tell you that The Daily Barometer's masthead reveals that it is "published . . . by the Oregon State University Student Media Committee on behalf of the Associated Students of OSU." I believe it has been the campus student newspaper since 1896.

Charles

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EXHIBIT 15

From: Lacy, Patricia
Sent: Friday, May 29, 2009 10:50 AM
To: Fletcher, Charles
Subject: The Liberty

*****Confidentiality Notice*****

Do not read, copy or disseminate this communication unless you are the intended addressee. This message may contain sensitive and private privileged information. If you are not the intended recipient, or if you believe you have received this message in error, please notify me immediately by reply e-mail. Please keep the contents confidential and immediately delete from your system the message and any attachments.

Hi Charles,

Vincent Martorello referred me to you regarding a question I posed to him. There is a student-run newspaper called The Liberty that experienced the removal of their distribution bins from campus a few months ago. At that time Vincent told them they could not be on campus because they were not a student-affiliated entity. Since then the group has become a recognized student organization and would like to return their bins to campus. This time they know they need to follow procedure Vincent told them was put in place in 2006. We do not know what this procedure is.

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Since Vincent has referred me to you, I think there may be some additional information. Could you please help me to understand what is going on with this issue?

Thank you,

Patricia

Patricia Lacy, J.D.
Director, ASOSU Office of Advocacy
Oregon State University
131 Memorial Union East
Corvallis, OR 97331-1616
541.737.6349 phone
541.737.6362 fax
patricia.lacy@oregonstate.edu
www.orst.edu/dept/asosu/ladvocacy

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EXHIBIT 16

From: Fletcher, Charles
Sent: Friday, May 29, 2009 11:42 AM
To: Lacy, Patricia
Subject: RE: The Liberty

Hi Patricia,

I do have some background with this issue, and I'll provide my understanding, which admittedly may be incomplete.

The problem, as I understand it, is that The Liberty is requesting more favorable bin locations than those provided to other non-OSU periodicals being distributed on campus.

For a lot of logistical reasons (including clutter and ADA accessibility issues), all periodicals (other than the Daily Barometer) are permitted bin locations in a limited area near the MU. That's not to say those publications are not allowed to be on campus. Publications such as The Liberty may be distributed on campus. It's just a question of locating their distribution structures in locales that are consistent with the neutral rules Facilities Services has established.

My understanding is that the editors of The Liberty believe that any periodical with OSU students on staff is an "OSU student run newspaper" that should be permitted the same bin locations as The Daily Barometer. The university respectfully disagrees. The mere fact that The Liberty has students on staff

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does not mean that it is entitled to the same bin locations as The Daily Barometer. The Daily Barometer was established over 100 years ago as the OSU student newspaper. It's published by the OSU Student Media Committee on behalf of ASOSU. The Liberty, on the other hand, is not published by OSU and receives almost all of its funding from outside sources. Its only connection to OSU is that some OSU students serve on its staff. My understanding is that Facilities Services has decided that The Liberty is distinguishable from The Daily Barometer and, therefore, assumes the same status as all other periodicals being distributed on campus.

Feel free to give a call if you have any questions or want to discuss this.

Charles

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EXHIBIT 17

The Liberty and OSU

11 messages

Tue, Jun 9, 2009 at 4:30 PM

The Liberty Managing Editor

<theliberty.manager@[REDACTED]>

To: "Ray, Ed" <ed.ray@oregonstate.edu>,
"McCambridge, Mark E - ONID"
<mccambrm@onid.orst.edu>

Cc: "Fletcher, Charles"
<Charles.Fletcher@oregonstate.edu>, "Lacy,
Patricia" <patricia.lacy@oregonstate.edu>, Ben
Price <pricebe@[REDACTED]>

Hey guys,

I just wanted to let you know that Patricia Lacy told me that Charles Fletcher declined to even take a copy of what we consider to be a starting point for compromise. Given that the University has stated in recent media interviews that it wants to continue working with us, I just wanted to make sure that his actions were representative of what you all really want.

So to summarize the jist of both of our problems, we don't approve of the fact that the University has no written guidelines for what is or is not a student publication. In that university officials have arbitrarily decided to lump us in a category of "off-campus" publications that do not enjoy the same circulation as current student media outlets. University officials have also stated that even if The

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Liberty were to be considered a student publication, we would still be restricted to the same areas as off-campus publications which stands against the principles of diversity and equal protection.

From the University's point of view, if The Liberty were allowed to be a student publication, other groups (both on campus and off) would demand similar access to what we are granted. The end result would be nothing but bins as far as the eye could see, regardless of if they are in use or not. In addition the chaos that would follow would bring OSU out of compliance with the ADA regulations and could potentially put OSU in violation of other laws.

Attached to this e-mail is a document that contains what we consider to be a good starting point for an effective set of rules that will allow us both to peacefully coexist. Please take a look at it and if there are any issues that you don't feel we covered, let us know what they are.

Will Rogers
Executive Editor - The Liberty / President - OSU
Students Alliance
503-810-1421
TheLiberty.Manager@gmail.com

Student Publication Draft 0.doc
29K

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EXHIBIT 18

The Liberty and OSU

11 messages

Fri, Jun 12, 2009 at 11:07 AM

Fletcher, Charles

<Charles.Fletcher@oregonstate.edu>

To: The Liberty Managing Editor

<theliberty.manager@[REDACTED]>

Cc: "Lacy, Patricia"

<Patricia.Lacy@oregonstate.edu>

Mr. Rogers,

I have been in communication with President Ray and Vice President McCambridge about your email of June 9, and I will be your point of communication on this issue.

The university's decisions with respect to bin placements are content neutral and do not prohibit distribution of The Liberty on the OSU campus by other means. Nor do they prohibit the placement of distribution bins by The Liberty in the permitted locations. The university values intellectual diversity and encourages student participation in the marketplace of ideas.

Please let me know if you have any questions, but as Vincent Martorello informed you by email on May 6, this matter is closed and has been since that date.

Best wishes.

Appendix 62

Charles

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