APPEAL NO. 20-3029

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

YOUNG AMERICA'S FOUNDATION, STUDENTS FOR A CONSERVATIVE VOICE, and BEN SHAPIRO,

Plaintiffs-Appellants,

v.

MICHAEL BERTHELSEN, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Minnesota
The Honorable Susan Richard Nelson
Case No. 0:18-cv-01864(SRN/HB)

APPELLANTS' OPENING BRIEF

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Appellants Young America's Foundation, Students for a Conservative Voice, and Ben Shapiro request oral argument. In this case, the University of Minnesota denied the students' requests to host Shapiro in available venues that the University holds open to all speakers on all subjects and routinely offers to speakers with liberal political views. The University expressly claimed that it denied the students' requests and relocated the event to a smaller, remote venue for security reasons, but their own security assessments showed no credible threat. The University presumed that a security risk existed solely because they expected Shapiro's speech to meet a cold reception on campus. The district court erroneously accepted this unsupported justification for restricting speech.

This case presents important questions about the force of the constitutional prohibitions on prior restraints and vague speech restrictions on university campuses, along with the rules against unique scrutiny and the heckler's veto. Because of the central constitutional liberties at stake, the nuanced legal issues, and the substantial record on appeal, Appellants request oral argument of 15 minutes per side.

CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1 and 8th Cir. R. 26.1A, the undersigned counsel hereby certifies that Appellants Young America's Foundation, Students for a Conservative Voice, and Ben Shapiro have no parent corporation.

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JURISDICTIONAL STATEMENT

Plaintiffs' complaint and amended complaint both raise federal questions under the U.S. Constitution and 42 U.S.C. § 1983. The United States District Court for the District of Minnesota exercised federal-question jurisdiction under 28 U.S.C. §§ 1331 and 1343.

On February 26, 2019, the district court granted in part Defendants' motion to dismiss. Addendum at 44–45. On August 28, 2020, the district court granted Defendants' motion for summary judgment. Addendum at 111. On August 31, 2020, it issued a Judgment for Defendants disposing of all claims. Addendum at 112. On September 29, 2020, Plaintiffs filed a timely notice of appeal from the February 26 order, August 28 order, and August 31 judgment. 17JA3945. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

This appeal raises three issues:

1. Whether the district court erred in granting defendants' motion to dismiss plaintiffs' facial challenges under the First Amendment and the Due Process Clause of the Fourteenth Amendment.

   Shuttlesworth v. Birmingham, 394 U.S. 147 (1969)

   Lewis v. Wilson, 253 F.3d 1077 (8th Cir. 2001)

   Bowman v. White, 444 F.3d 967, 980 (8th Cir. 2006)

   Stephenson v. Davenport Cmty. Sch. Dist., 110 F.3d 1303, 1308 (8th Cir. 1997)

2. Whether the district court erred in granting summary judgment to all defendants.

   Madel v. FCI Marketing, Inc., 116 F.3d 1247 (8th Cir. 1997)

3. Whether the district court erred in denying plaintiffs' motion for summary judgment on plaintiffs' as-applied First Amendment claims.

   Gerlich v. Leath, 861 F.3d 697 (8th Cir. 2017)

   Burnham v. Ianni, 119 F.3d 668 (8th Cir. 1997) (en banc)

INTRODUCTION

This case is about whether a public university can exclude a registered student organization from an available public forum because of the organization's viewpoint and the university community's expected reaction to the organization's speech.[1] Because "[t]he first amendment knows no heckler's veto," *Lewis v. Wilson*, 253 F.3d 1077, 1082 (8th Cir. 2001), this Court should reverse the district court's ruling granting summary judgment to the University officials.[2]

On October 26, 2017, Defendant-Appellee Kaler (then-president of the University of Minnesota) received an email informing him that the students had requested to reserve Mayo Auditorium on the East Bank (i.e., central portion) of the Minneapolis campus for a talk by distinguished conservative commentator Ben Shapiro. Sixteen minutes later, President Kaler retorted: "So have they actually invited Ben Shapiro? I do not want this in the middle of campus—West Bank is a better location." 2JA0173. (emphasis added).

President Kaler sent his email four months before Shapiro's talk. 2JA0173; 7JA1519. At the time, Kaler knew only one thing about Shapiro—that he "was a right wing speaker and he made some appearances on other campuses." 10JA2264. Over the four months

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[1] From this point forward, "the students" refers to all Plaintiffs-Appellants unless context dictates otherwise.

[2] From this point forward, "the University" refers to all Defendants-Appellees unless the context dictates otherwise.

between Kaler's email and Shapiro's eventual appearance, the University denied all the students' requests for large, available venues on the Minneapolis campus and relegated the event to a less accessible and smaller venue on the remote St. Paul campus. The University routinely grants liberal speakers like Senator Bernie Sanders, Representative Ilhan Omar, or Justice Ruth Bader Ginsberg access to the same (or similar) venues they denied to the students. 11JA2406–07; 14JA3165; 15JA3333.

After tickets for the smaller venue sold out in under 24 hours, the University refused to relocate the event, even though the University previously moved events for several liberal speakers to accommodate high demand with far less notice. 14JA3199; 16JA3742. The University refused to give equal treatment to the students and Shapiro because of purported concerns with "protests related to conservative speakers," 14JA3057, while its own security assessments showed no credible threat. 14JA3054, 3059. In fact, Plaintiffs' security expert, unrebutted by Defendants, confirmed that no threat existed, and that the resources the University used to secure the St. Paul venue could have been used to secure the Minneapolis venues they denied to the students. Addendum at 125.

Because the University purposely excluded the students from larger, available venues on campus, the students were denied the opportunity to share their message with over 600 peers who wished to

attend Shapiro's talk. 13JA2855–56; 14JA3086, 3158–59. And because the University aimed to keep Shapiro out of "the middle of campus" based on unwarranted security concerns related to the students' conservative political views—not on any real threat—the University violated the students' constitutional rights. The district court's opinions dismissing the students' facial claims and granting the University summary judgment on their as-applied claims should be reversed because they authorize viewpoint discrimination in allocating available public fora.

STATEMENT OF THE CASE

I. The students invited Shapiro to the University to promote political views that differ from the prevailing campus orthodoxy.

A. The students sought to host Shapiro in a large, centrally located venue to share their political message.

Students for a Conservative Voice and Collegians for a Constructive Tomorrow, two registered student organizations, invited Ben Shapiro through Young America's Foundation to promote their conservative political views. The students sought out Shapiro because of his expertise in addressing "issues that caused frequent disagreement on campus" through talks and live Q&A. 13JA2805. One such issue is whether free speech should be protected for everyone, no matter where they stand on the "political spectrum." 13JA2824. These groups hoped that Shapiro could rebut the predominantly liberal campus views that free speech can be dangerous and should be restricted. 13JA2823–25.

The students hoped to hold their event in the largest, most central venue available on the Minneapolis campus. 8JA1626; 12JA2642; 13JA2864. Such a centrally-located, high-capacity venue was critical for the students to maximize the number of students, faculty, and staff who could hear Shapiro's important messages, and engage with him directly in the Q&A. 13JA2864.

B. There were large, centrally located venues available at the University.

The University allows registered student organizations, University departments, and the general public to use indoor and outdoor campus venues to host events. 9JA1869–74, 2037–39. On or off-campus groups may reserve classrooms, student union buildings, performance halls, or other non-classroom indoor space. 9JA1869–74. Each year the University processes more than 50,000 requests for events in the general-purpose classrooms throughout 63 buildings, 25% of which are submitted by student groups. 9JA2024, 2037–39.

There were at least two centrally-located venues available at the University on the day the students invited Shapiro to speak, Willey Hall and Mayo Auditorium.

Willey Hall is located on the Minneapolis campus' West Bank with two general-purpose classrooms combining to seat 1,058 people. 14JA3158–59. The classrooms in Willey Hall serve mainly as venues for lecture and debate. 9JA1878–79, 9JA2054–55. Other than a prohibition

on "performance activities" such as "musicals, theater and dance events" and the consumption of food and beverages, the University places no limits on the use of these classrooms. 9JA2037–39, 2054–55; 14JA3116. In approving more than 250 requests to use Willey Hall's classrooms for various events over the last five years, the University never conducted a security assessment or provided security. 5JA1021–22; 8JA1620–21; 14JA3014–36.

Mayo Auditorium, on the Minneapolis campus' East Bank, seats 455 people and is near light-rail transportation. 10JA2217, 2263, 14JA3168–71. Student and off-campus groups may request to use it via a similar process, except the use fee is waived for students. 16JA3617. Mayo Auditorium often hosts high-profile liberal speakers, including Representative Omar, Senator Franken, former Senator Durenburger, and leftist commentator and professor Dr. Marc Lamont Hill. 11JA2406–07, 16JA3736.

II. The University denied the students access to available venues.

The University denied all of the students' requests for venues on the Minneapolis campus, relegated their event to the St. Paul campus, and capped the event's size—with no legitimate justification.

A. University officials were on a mission to keep Shapiro's talk out of the middle of campus.

Four months before Shapiro's talk, after the students informed University officials that they intended to invite Shapiro, Julie

Christensen emailed President Kaler about the event. 2JA0173. Sixteen minutes later, he snapped, "So have they actually invited Ben Shapiro? I do not want this in the middle of campus – West Bank is a better location." 2JA0173.

At the time, Kaler had no information about the topic of Shapiro's speech, no information about any planned protests, and no information about the event's expected size. 10JA2222–23. All he knew was that Shapiro "was a right wing speaker and he made some appearances on other campuses." 10JA2264.

Other Defendants also acted to keep the students away from Minneapolis-campus venues. Over two months before the event, while the students' requests for Minneapolis-campus venues were pending, Defendant Clark emailed the person responsible for reserving some facilities on the St. Paul campus stating, "The admin has asked that we try to move [Shapiro's] visit to the St. Paul campus." 14JA3045. Just a few days later, that is exactly what happened. 8JA1780–81, 8JA1785.

B. The University granted requests by other groups to use large, centrally-located venues to host speaking events with far greater security concerns than the students' request.

The University regularly provides security for large events, including Golden Gophers football games in 58,000-seat TCF Bank Stadium where alcohol is served. It uses between 80 to 85 full- and part-time officers for these games. 6JA1178–80, 1237. The University has no

written policies or guidelines to determine the number of officers needed to secure an event, except for football games. 6JA1142. The University has secured events in close proximity to public transit and with access to the Skyway (an enclosed system connecting much of downtown Minneapolis for pedestrian transit in cold weather). It regularly secures events involving high-profile speakers that draw protestors. 5JA0949–50, 0999–1000; 6JA1165–68; 14JA3183–85.

For example, the University hosted an event featuring the President of Somalia, Hassan Sheikh Mohamud, in the 2,700-seat Northrop Auditorium in 2014. 5JA0949–50; 14JA3183–85; 16JA3732. Northrop Auditorium is on the East Bank of the Minneapolis campus (like Mayo Auditorium) and is near the light rail. 16JA3732, 3756–59. Before the event, President Mohamud faced assassination attempts and accusations of supporting Somali terrorist groups. 16–3755–59. University police were aware of videos showing suicide bombers attacking his palace. 5JA0949.

Appellee Buhta testified that it "was the biggest event we've ever hosted here where I felt like our safety and security was definitely going to have to be on point." JA0949–50. Buhta prepared the event's security with only one-week notice, deploying 150 officers from University police and assisting agencies to secure the event with a crowd of 100 protesting outside with signs calling President Mohamud a genocidal warlord. 5JA0950; 14JA3186–93. Despite the major security concerns and short

notice, the University *did not limit the audience size or move the event to a more isolated, less accessible venue on the St. Paul campus*.

Other examples abound. In September 2014, the University hosted the late Supreme Court Justice Ruth Bader Ginsburg in Mondale Hall. Mondale Hall connects to the Skyway through Willey Hall. 15JA3333; 16JA3671. Even though Justices of the Supreme Court are extremely high-profile (and occasionally polarizing) figures with substantial security needs, the University *did not insist on the event proceeding at a different venue because of the connection to the Skyway*.

In November 2016, Students for a Democratic Society, a student group known for its campus protests, including against the Shapiro talk, invited speaker Shaun King to speak in Willey Hall. 8JA1774; 11JA2402; 14JA3024; 16JA3749–50. King has a history of generating controversy through his activism relating to the Black Lives Matter movement. 14JA3024; 16JA3750–54. University police *did not provide any security, deny the student group's request to use Willey Hall, or restrict the event's location or crowd size*. 14JA3024.

In September 2018, University police secured an event for former Black Panther, Communist, and social justice activist Angela Davis who nearly filled 2,400-seat Northrop Auditorium to capacity. 10JA2267–69; 16JA3742. The event had originally been scheduled for Ted Mann Concert Hall but was moved to the larger Northrup Auditorium to

accommodate demand. 16JA3742. *The University did not restrict the audience size.*

The University has hosted Representative Ilhan Omar three times. In March 2017, then-state-representative Omar spoke in Mayo Auditorium. 11JA2406–07; 14JA3118–20. The University did not restrict or limit the event in any way. 11JA2384, 2391–92, 2404–08, 2419–20; 14JA3122–51. In August 2019, Rep. Omar spoke with Rep. Ayana Pressely, another member of a politically-controversial group of newly elected progressive Democrat representatives that also includes Rep. Talib and Rep. Ocasio-Cortez. 11JA2407–08. Before this, Representative Omar's public appearances sparked large protests throughout the country from citizens incensed by her anti-Semitic comments. 14JA3121–51. Three months before her appearance at the University, protesters rallied against her in cities throughout the country, numbering up to 1,000 in at least one instance. 11JA2410; 14JA3124–51. She reportedly received hundreds of death threats in the previous months. Yet *University police secured her appearance in Mayo Auditorium without incident—on one day's notice*. 5JA0999–1000; 11JA2407; 14JA3121–23. There is no record of the University placing any limitations on Representative Omar's events or suggesting they be moved to St. Paul.

In November 2019, Senator (and then-presidential candidate) Bernie Sanders held a campus rally with Rep. Omar. 14JA3165. The rally was originally scheduled for Northrop Auditorium on the East Bank of

the Minneapolis campus. Less than a week before the event, the University authorized its relocation to Williams Arena, also on the East Bank, to accommodate high demand. 14JA3199. Over 10,000 people attended the event. 14JA3165. *University police secured the event with less than a week to prepare security for the changed venue, for a speaker who had received hundreds of death threats, and against a number of protesters that was comparable to the number that gathered for the Shapiro talk*. 12JA2630–31; 14JA3199–3204.

C. University policies allow its officials to relegate disfavored speech to inadequate venues.

The University's Large Scale Events Policy ("the Policy") made it easy for them to deny conservative students access to the campus's most favorable venues. The Policy allows the University to control access to venues for any reason—including based on the viewpoint of an applicant's proposed speech—in at least four different ways.

First, the enforcement body, the Large Scale Events Committee does not even exist and the University has not required any other groups to follow the Policy. 9JA1902–04. Because the Committee does not exist, Defendant Dussault acknowledged that he does not know what the University would do with a request: "Well, I don't currently know who we would give it to . . . . I would at least give it to my supervisor, Denny, who would then *potentially* bring it forward to *whoever* from university services would consider it." 9JA1903 (emphasis added). Asked whether

he has ever handled a proposal in this manner under the Policy, Dussault said, "No." 9JA1903.

Second, the Policy defines "Large Scale Event" so broadly that the Policy's application turns entirely on the University's discretion. The Policy describes a "Large Scale Event" as a

> Student group sponsored event[ ] taking place in a large campus venue or outdoor space that will draw a significant amount of the campus population, a large off-campus crowd, or represents a significant security concern (i.e. public figure, celebrity, etc.). Events may include, but are not limited to; concerts, lectures, public appearances, performances and rallies.

Addendum at 113.

The two factors that may transform an event into a "large scale event" are size and security risk. But neither factor is defined with objective criteria. The first factor is defined by reference to terms that are part of the factor itself (a "*large* scale event" is any event that draws a "*large* off-campus crowd"). And the second is defined only as events that feature a "public figure, celebrity, etc." Addendum at 113 (emphasis added).

The Policy's vagueness exists on paper and in practice: Defendant Dussault, the Policy's author, when asked how someone would know if an event needs "to go through the large scale events process," didn't know. 9JA1897. Kaler conceded that the size and security factors "aren't quantitative. They would have to be decided by the large scale event

group on a case-by-case basis." 10JA2238–39. Even the size factor is based on the University's feelings. 10JA2241.

Third, the Policy authorizes the (non-existent) Committee to make decisions with no definite standards, allowing it to make a "determination of whether the campus can support the event taking into account issues such as; other events happening on campus, human resources needed to support the event, impact of the event to the campus community, impact of event on community surrounding campus." Addendum at 113. The Policy does not instruct the Committee how to weigh these factors, does not require the Committee to consider only these factors, nor does it require the Committee to explain its conclusions when it makes its "determination."

Fourth, the Policy requires applicants to submit information that is irrelevant to any "determination of whether the campus can support the event," 1JA0055, and openly enables the University to make decisions based on content and viewpoint. The Policy requires applicants to identify any person who will be performing or speaking at the event and to give the "Rationale for Artist Selection," defined as "information on *why* this artist was selected for an event at the University of Minnesota . . . ." 1JA0056.

In sum, the Policy authorizes the University to decide, on an *ad hoc* basis, (1) who applies the Policy, (2) when it applies, and (3) what factors

to consider, *after* (4) asking applicants why they invited a particular speaker.

D. Appellees subjected the students' requests to scrutiny they do not impose on groups with liberal views.

1. The students tried to reserve multiple rooms to ensure they could host Shapiro in a large, centrally-located venue in the fall of 2017.

Conservative Voice and CFACT began making plans with YAF to bring Shapiro to the University. They planned to host him on February 26, 2018, the only date Shapiro was available. 6JA1342–43; 7JA1519-20. They intended to hold Shapiro's talk in the largest, centrally located venue available on the Minneapolis campus to achieve their groups' goals for the event. 8JA1626; 12JA2642; 13JA2864.

On October 23, 2017, during a meeting regarding a separate event, Dussault inquired whether Conservative Voice and CFACT were planning other events. The students mentioned Shapiro. 9JA1946–47; 13JA2845; 7JA1502-03. Immediately, Dussault told the students that they would have to follow the Policy. 9JA1954–55. He also said the students were required to coordinate with his office, Student Unions and Activities, and with the University of Minnesota Police Department, 9JA1951; 13JA2845–46.

With no way to know which venues would be available, the students requested nine, all on the Minneapolis campus, hoping for one large, centrally located venue for Shapiro's talk. 5JA1002–03; 13JA2849–50;

14JA3102–06. The Minneapolis-campus location was critical: most University students live on or near the Minneapolis campus; many never make it to the St. Paul campus during their entire time at the University. That is why most student-hosted events occur on the Minneapolis campus. 8JA1787; 9JA1972; 12JA2743–44.

The Students were willing to coordinate with the University and to do any work necessary to secure the right venue. The students understood this included coordination for security because the Policy required them to specify whether security would be necessary. And Dussault told the students they would have to work through the University police and Student Unions and Activities. For that reason, the students included a note with their request to reserve Mayo Auditorium: "We will be holding the event in Mayo Auditorium. We understand there is a fee and insurance cost associated with it. That is not an issue. DO NOT relocate this event, and DO let us know the additional work we will be required to do ahead of time. The event will likely require security." 2JA0181.

2. The University imposed restrictions on the Shapiro talk it had never imposed on groups with different views.

The University used the Policy to scrutinize the students' venue requests in ways they do not scrutinize requests from groups or speakers with liberal views. For example, Dussault ordered the students to

coordinate with Student Unions and Activities and University police as soon as he learned about the Shapiro event without knowing anything about the event's size or nature. 9JA1951. Dussault also told the students they would have to comply with the Policy, 9JA1954–55, even though he had never before applied the Policy to another group or speaker, 9JA1901–03. In fact, the University has never required any other student groups hosting events on campus to comply with the Policy. 9JA1898–1903. The University has no policy to determine when an event requires security or to notify University police or any other department about a student event that may require security. 9JA1886.

President Kaler announced that Shapiro's event would not take place "in the middle of campus" before receiving any details about the event, its expected attendance, or any security issues. 2JA0173; 10JA2222–23. Yet, when asked "what was [his] role specifically in regard to large scale events," he testified: "Typically none." 10JA2210. What's more, Kaler admitted that when he learned of the students' request to host Shapiro, he had no concrete information about any potential disruption; the fact that Shapiro "was a right wing speaker" was all Kaler needed to know. 10JA2264–65.

In December, the students requested to use the adjoining rooms 175 and 125 in Willey Hall on the Minneapolis campus, two and a half months before the event. 13JA3011. Defendant Phillip Hunter did not approve the request—though he had authority—and instead notified his

superiors. 9JA2022, 102107–08. Hunter's office administers over 300 classroom spaces throughout 63 different buildings, processing over 50,000 event requests per year. 9JA2024, 9JA2039. But Hunter rarely notified his supervisors about an event being scheduled in a classroom space. 10JA2110. And when he did so here, he had no specific information about any security concerns. 10JA2112.

Hunter also required Conservative Voice to fill out a separate facility use agreement to reserve Willey Hall. But the Office of Classroom Management policy only required a student group to complete one use agreement for the entire school year, and Conservative Voice had already done so. 8JA1638; 9JA2052.

Buhta, a University police lieutenant, claimed he rejected Conservative Voice's request to use Willey Hall because of its access to the Skyway. But the University has approved myriad requests to use Willey Hall and other buildings connected to Willey Hall or to the Skyway, and never rejected requests for similarly-sized or larger events involving liberal speakers based on security concerns. *See supra* Part II.B. As Berthelsen admitted, the Skyways are typically not impacted by University events. 4JA0853.

Two months before the Shapiro event, Defendant Clark instructed, "the crowd size needs to be limited to 500 and we will probably have protestors present." 14JA3044. But the students never agreed to limit the

audience size. 8JA1626; 12JA2642; 13JA2864–65. And Buhta had never placed a size limit on any other student event. 5JA1015.

E. The University excluded the students from available venues based on the views they sought to promote, not on any security risk the event posed.

Two of the requested venues on the Minneapolis campus, Mayo Auditorium and Willey Hall, were available on the day of the Shapiro talk. But Defendants excluded the students from both. 7JA1489; 8JA1782; 9JA1967; 12JA2733, 2642.

At the time Buhta rejected the students' request for Mayo Auditorium, he had no specific information about any possible protests or threats. 5JA1003–04. Buhta did not restrict other events held in Mayo, despite those events including liberal speakers who had been publicly protested. 5JA0999–1000; 11JA2384, 2404–07.

Buhta also rejected the request to use Willey Hall stating, "Willey is not going to be a good option due to access from the skyway." 14JA3074. He rejected this request even though: (1) the University had allowed student and off-campus groups to host hundreds of other similar events there, 14JA3014–36; (2) neither he nor anyone else at University police had ever conducted a security assessment of Willey Hall, 5JA1021–22; (3) skyways are not typically impacted by such events, 4JA0853; and (4) it was more than two months before the talk. 6JA1342–43. Instead, he offered a venue on the St. Paul campus, acknowledging that it was a less desirable location. 5JA1022–23; 14JA3074.

Three times—in a report on January 5, 2018 and with updates on February 18, 2018 and February 22, 2018—a University police crime analyst, Christina Songer, assessed threat information for the event. Three times, she concluded: "There is no credible information indicating a threat to the venue, speaker, or guests." 6JA1214; 14JA3053–60. University officials denied the students' requests for venues on the Minneapolis campus because of their *own* assessment of the University community's ideology and rank speculation about the reaction to Shapiro's viewpoint, rather than on any concrete threat to the event. 6JA1216; 10JA2277–78.

III. The University kept excluding the students from available venues after tickets for the talk sold out.

A. Tickets sold out in a few hours, showing the venue's inadequacy.

After the University denied the students' requests for numerous available Minneapolis campus venues and instead relocated Shapiro's event to a remote, St. Paul venue with less than 500 seats, the students made tickets available on January 26, 2018, one month before Shapiro's talk. The students were flooded with over 700 ticket requests in the first 24 hours. 13JA2855–56. Three days later, with four weeks remaining before Shapiro's talk, Maddie Dibble emailed Dussault, notifying him the event "sold out in a few hours." 14JA3088.

B. The University ruled out moving the event to other available venues without justification.

After the University's refusals became public, Darrin Rocha, a member of the University Board of Regents, emailed the Board's Director. 14JA3050–51. Rocha, a graduate of the College of Agriculture and the law school at the University, was familiar with the North Star Ballroom on the St. Paul campus and Willey Hall on the Minneapolis campus. 14JA3051. Rocha observed that the North Star Ballroom does not have fixed seating and would have to be closed during its normal operating hours to host the event, while Willey Hall does have fixed seating and is closed in the evenings. 14JA3051. Rocha requested on behalf of the student groups that they be offered the use of Willey Hall for the event and expressed confidence in the University's ability to secure any campus venue for an event. 14JA3051.

Berthelsen and Clark discussed Rocha's email. Clark refused to move the event, suggesting the University might have to cancel the event and claiming that the University lacked personnel to secure Willey Hall. 14JA3049–50. When asked about the basis for his concerns at Willey Hall, Clark admitted that he had not "been through Willey in many, many months, if ever, so I can't tell you specifically." 6JA1207. At the time, the University's own security assessment said there was no credible threat to anyone. 14JA3053–60.

As public criticism mounted, Kaler tried to defend the University's actions at a press conference. Kaler characterized Shapiro as a

"controversial speaker" and said that officials chose the St. Paul campus location for safety reasons. 13JA2997–99. At the time, the University's own security assessment said there was no credible threat to anyone. 14JA3053–60.

On February 16, 2018, the students submitted a second formal request for Willey Hall, which was still available. The University refused to move the Shapiro talk to the larger, available venue. 10JA2123–24; 14JA3076–78. Hunter rejected the request for Willey Hall the morning he received it, with no information from UMPD regarding potential protests, and without checking if a larger venue was necessary. 10JA2123–24.

On February 19th, Maggie Towle emailed Berthelsen about the possibility of moving the Shapiro talk due to high demand. At that time, 1,000 were on the waiting list. 14JA3076–77. Berthelsen refused to even consider this request, though Ms. Songer's updated security report continued to show no credible threat to anyone. 4JA0891–93; 6JA1217–18; 14JA3054–60, 3076–77.

While the University refused to consider moving the Shapiro talk, it granted requests to move events with left-leaning speakers to accommodate demand, even on short notice. The University relocated the event for Sen. Sanders and Rep. Omar from the 2,700-seat Northrop Auditorium to Williams Arena, eventually welcoming an audience of over 10,000. 14JA3165, 3199. The University made this accommodation with

less than a week to go before the event. 05JA0999–1000. The University also moved Angela Davis's event from Ted Mann Concert Hall to Northrop Auditorium to make room for a larger audience. 10JA2267–69; 16JA3742.

Approximately 450 people attended Shapiro's talk. 8JA1634; 12JA2644–45; 14JA3106. But the University prevented the students from delivering their message to over 600 more by limiting the talk's size and location. 13JA2855–56; 14JA3086, 3158–59. Although the University employed between 100 to 120 officers to provide security for the talk (in comparison to the 80 to 85 it deploys to football games), it did not actively use 65 to 75 of those officers because they were unnecessary. 5JA1031–32; 6JA1224–25. Those officers sat in the cafeteria in the St. Paul Student Union because they were not needed. 6JA1224–25. Between two dozen to 60 peaceful protestors gathered outside the event. 6JA1224–25; 12JA2630–32, 2644.

IV. The District Court's ruling

The students sued, alleging that the University violated their First and Fourteenth Amendment rights by denying them access to available public fora on the Minneapolis campus and refusing to relocate the Shapiro talk after tickets sold out.

On September 9, 2019, the district court granted the University's motion to dismiss the students' facial claims. The district court held that the Policy operates in a limited public forum because it only governs

large-scale events. Addendum at 22–24. The district court held the Policy met the limited public forum standard. Addendum at 24–33.

The district court also rejected the students' facial challenge under the Due Process Clause of the Fourteenth Amendment, concluding that the vagueness doctrine "applies with less force, if at all" to the Policy because it does not impose any serious consequences for noncompliance. Addendum at 39–41.

On August 28, 2020, the district court granted the University summary judgment on all remaining claims. The district court relied on subsequent deposition testimony from all Defendants explaining away their statements in contemporaneous emails to hold that the "undisputed facts" showed that Defendants did not discriminate on the basis of viewpoint or subject the students' speech to a heckler's veto by denying them access to large, centrally-located, available venues. Addendum at 86–109. The opinion ignored the two cases that provide the controlling framework (and that the district court cited in its opinion on the motion to dismiss): *Gerlich v. Leath*, 861 F.3d 697 (8th Cir. 2017), and *Burnham v. Ianni*, 119 F.3d 668 (8th Cir. 1997) (en banc).

SUMMARY OF ARGUMENT

The district court erred in granting in part Appellees' motion to dismiss and their motion for summary judgment by authorizing University officials to engage in viewpoint discrimination in determining access to available public fora.

In granting the motion to dismiss the students' facial challenges to the University's Policy, the district court improperly evaluated the Policy with the limited public forum standard when the Policy governs designated public fora. In fact, the Policy is an unconstitutional prior restraint in any forum. The district court also held that the unbridled discretion doctrine does not apply with full force in limited public fora on the University's campus. But viewpoint discrimination is unconstitutional in *all* fora, and the unbridled discretion doctrine is part of the rule against viewpoint discrimination. Thus, the district court's rule authorizes policies that allow viewpoint discrimination on public university campuses. The district court made a similar error in dismissing the facial claims under the Fourteenth Amendment, concluding that the vagueness doctrine does not apply to the Policy even though the Policy directly regulates speech and there are penalties for noncompliance.

In granting summary judgment, the district court improperly drew inferences in favor of the moving party, allowing Appellees to explain away in subsequent deposition testimony their contemporaneous email statements showing that they restricted the students' speech because of its viewpoint and because of the expected reaction to the speech. The district court also ignored unrebutted evidence that showed that the University's security rationale for denying the students access to available venues was false from the beginning.

In denying summary judgment to students, the district court ignored the controlling standards that it previously identified: this Court's decisions in *Gerlich* and *Burnham*. Applying these decisions to the undisputed facts show that the students are entitled to summary judgment because the University enforced an unconstitutional prior restraint, subjected the students to "unique scrutiny" in evaluating their requests, enforced a "heckler's veto" against them by relegating them to a smaller, remote venue with no evidence of a credible threat of disruption, and unconstitutionally prevented them from sharing their message with over 600 interested students.

STANDARD OF REVIEW

Appellants appeal the district court's grant of a motion to dismiss, its grant of a motion for summary judgment, and its denial of a motion for summary judgment. This Court reviews all these decisions *de novo*. *Owen v. General Motors Corp.*, 533 F.3d 913, 198 (8th Cir. 2008) (motion to dismiss); *Mensie v. Little Rock*, 917 F.3d 685, 688 (8th Cir. 2019) (granting summary judgment); *Capps v. Olson*, 780 F.3d 879, 883 (8th Cir. 2015) (denying summary judgment).

ARGUMENT

I. The district court wrongly dismissed the students' facial claims.

A. The students plausibly pleaded that the University's Policy facially violates the First Amendment.

The district court erred in dismissing the students' facial First Amendment claims by improperly concluding that the Policy governed speech in a limited public forum and that it satisfies the corresponding standard. Yet this policy is a facially unconstitutional prior restraint in any forum and does not satisfy the applicable public forum standard.

1. The Policy is an unconstitutional prior restraint in any forum.

Any policy "subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969). The University's Policy is a prior restraint on speech because it requires groups to receive approval from the Large Scale Events Committee before using any "large campus area or outdoor space" for any activity, including protected speech, that the University in its unfettered discretion deems to be a large scale event. Addendum at 113.

A prior restraint on speech is presumptively unconstitutional unless it (1) does not delegate overly broad licensing discretion to officials; (2) contains only content- and viewpoint-neutral, reasonable time, place, and manner restrictions; (3) is narrowly tailored to serve a

significant governmental interest; and (4) leaves open ample alternative means for communication. *See Bowman v. White*, 444 F.3d 967, 980 (8th Cir. 2006). These requirements apply to prior restraints on speech regardless of the forum in which the restraint applies. *See Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001). The University's Policy breaches all of these requirements.

a. The Policy confers unbridled discretion on University officials.

Speech restrictions must "contain narrow, objective, and definite standards to guide" officials. *Shuttlesworth*, 394 U.S. at 153. Their application must not involve the "appraisal of facts, the exercise of judgment, and the formation of an opinion." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992). To prevail on a facial challenge alleging unbridled discretion, a challenger "need show only that there was nothing in the ordinance to prevent the [official] from denying her [application] because of her viewpoint." *Lewis*, 253 F.3d at 1080.

The students alleged that there is nothing in the Policy to prevent the University from denying the students' applications because of their viewpoint. 1JA0119–23. But the Policy demands that students obtain permission from a non-existent Committee for their events. And in the absence of a formal Committee, Defendant Dussault testified that he would forward requests to his supervisor, "who would then *potentially*

bring it forward to *whoever* from university services would consider it." 9JA1903 (emphasis added).

University officials also have unfettered discretion to determine when the Policy applies. The terms "significant amount of the campus population," "large off-campus crowd," and "significant security concern" are undefined in the Policy. Dussault, the Policy's author, could not define these terms, 9JA1897-1900, and no internal training or criteria exist to guide University officials on when the Policy applies. 9JA1899–1900.

The Policy has no standard for whether officials will approve or disapprove an event. The closest provision approximating a standard is the section outlining the (nonexistent) Large Scale Events Committee's process, which states that the "group is charged with determining if the campus is able to support proposed large scale events." Addendum at 113. Nothing prevents the Committee—which doesn't actually exist—from denying an application based on a group's viewpoint, since nothing constrains the Committee's determination about whether the campus may support the event. Rather, the (nonexistent) Committee's analysis may take "*into account* issues *such as*; other events happening on campus, human resources needed to support the event, impact of the event to the campus community, [and] impact of event on community [sic] surrounding campus." Addendum at 113 (emphasis added).

And, far from preventing viewpoint discrimination, the Policy encourages it, by requiring groups to provide, not only the identity of any outside performers they invite, but their "Rationale for Artist Selection" which is "information on *why* this artist was selected for an event at the University of Minnesota." Addendum at 114. And the University exercised its discretion to relegate the Shapiro event to an unfavorable venue despite moving heaven and earth to provide large, centralized campus venues for liberal speakers—even at the very last minute.

The district court erred in analyzing the students' unbridled discretion claims in two ways: in assessing the scope of the unbridled discretion doctrine and in applying the doctrine.

First, the district court erroneously held that "it is unclear to what extent this 'unbridled discretion' case law even applies in the educational setting." Addendum at 30. The district court cited this Court's opinion in *Victory Through Jesus Sports Ministry Found. v. Lee's Summit R-7 Sch. Dist.*, 640 F.3d 329 (8th Cir. 2011) for the proposition that "it is not clear that the Eighth Circuit even applies [unbridled discretion] law in the educational setting." Addendum at 29 n.2.

But *Victory Foundation* concerned regulations at an elementary school. 640 F.3d at 332. This case is about University regulations, where the government does not enjoy the leeway in regulating student speech that elementary-school officials have. Rather, the Supreme Court has held that its "precedents . . . leave no room for the view that . . . First

Amendment protections should apply with less force on college campuses than in the community at large." *Healy v. James*, 408 U.S. 169, 180 (1972). The rule against speech-restricting policies that confer unbridled discretion on enforcing public officials is one such "First Amendment protection." *Id.* Indeed, the danger of viewpoint discrimination is "at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 763 (1988). In dismissing the students' facial challenge to the Policy, the district court held that a core protection against viewpoint discrimination—which is unconstitutional in all fora—applies "with less force on college campuses than in the community at large." *Healy,* 408 U.S. at 180. This is legal error that this Court must correct.

Second, the district court erred in applying the unbridled discretion doctrine. The district court rejected the students' claim that the Policy constrains "any" event because it "is only limited to 'student group sponsored large-scale events.'" Addendum at 30 (quoting the Policy, Addendum at 113). But University officials have unbridled discretion to determine what a "student group sponsored large-scale event" *is*. 9JA1897, 1903. The district court said that the terms "significant amount of the campus population," "large off-campus crowd," or "presents a significant security concern" were "specific examples of [the covered] events." Addendum at 30. This was wrong as a matter of law at the

motion to dismiss stage, and it has been proven false by deposition testimony.

The legal standard is "'whether there is anything in the ordinance to prevent'" the public official from discriminating on the basis of viewpoint. *Roach v. Stouffer*, 560 F.3d 860, 869 (8th Cir. 2009)(quoting *Forsyth Cty.*, 505 U.S. at 133 n.10). The inclusion of some examples in the definition of a large-scale event does not prevent viewpoint discrimination, and at least one of the terms, "significant security concern," facilitates such discrimination, since public officials often invoke security or public safety to cover for viewpoint discrimination. *See Lewis*, 253 F.3d at 1080-81. Kaler and Dussault both admitted there is no consistent standard for determining whether an event qualifies as a large scale event under the Policy. 9JA1899–1900; 10JA2238–39, 2241.

The district court also erred in holding that the Policy "provides sufficient criteria to guide" the (non-existent) Committee's decision. Addendum at 31. The court, again citing *Victory Foundation*, said that the ability to consider factors like "other events happening on campus," "human resources needed to support the event," "the impact of the event on the campus community" and "the impact of the event on the surrounding community," "rather than a binary 'yes/no' permit" "is not particularly troubling" because the Policy outlines a "collaborative process." Addendum at 31. The district court's application misunderstands how the Policy functions and relies on inapposite

authority. The Policy allows the University to make "yes/no" decisions on requests for access to public fora on the University. That is what happened in this case—students requested multiple fora they wanted to use and at least two of those fora were available, but the University denied them access to those fora. The fact that the University said "yes" to another forum does not erase the fact that it said "no" to other available fora. There is not "anything in the ordinance to prevent" an official from denying an applicant's request to use a forum on the basis of viewpoint. *Roach*, 560 F.3d at 869. Therefore, the policy is facially unconstitutional. *Id.*

b. The Policy is not content- or viewpoint-neutral.

Rules that confer unbridled discretion on officials "to determine who may speak based on the viewpoint of the speaker" also contravene the Constitution's prohibition on viewpoint discrimination. *Roach,* 560 F.3d at 870 (8th Cir. 2009). A law that allows unbridled discretion, including unbridled discretion in determining who may access a forum, is facially unconstitutional regardless of the type of forum it regulates. *Id.* at 868 n.4.

In addition, the policy is facially content-based because it requires applicants to give a "Rationale for Artist Selection" which the (non-existent) Committee considers in "determining if the campus is able to support" based in part on the "impact of the event to the campus

community." Addendum at 114. This is a content-based consideration and unconstitutional. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 548 (1975) (recognizing unconstitutional prior restraint where directors of a municipal theater determined access to the theater based on their "determin[ation] that the production would not be 'in the best interest of the community'").

c. The Policy is not narrowly-tailored to achieve any significant governmental interest.

The Policy's requirement that groups give the "Rationale for Artist Selection" is not narrowly-tailored to serve *any* legitimate, let alone significant, state interest. Addendum at 114. Forcing groups to explain their reasons for wanting to engage in expressive activity as a condition of being able to engage in that activity is reason enough to find the policy facially unconstitutional. It serves no legitimate interest, and it enables "government officials [to] one day wield such [policies] to suppress disfavored speech." *Reed v. Gilbert*, 576 U.S. 155, 167 (2015).

The Policy also fails the narrow-tailoring prong because the absence of objective criteria to guide the (non-existent) Committee in determining whether "the campus is able to support proposed large scale events," Addendum at 113, results in the denial of available venues when no interest justifies the denial. For example, in *Bowman*, this Court held that a five-day cap on the use of facilities by off-campus groups was not narrowly tailored to the university's interest in avoiding the

monopolization of space since it applied even if the requested space was not being used. 444 F.3d at 982. Here, the range of considerations the Policy allows the (non-existent) Committee to consider gives it discretion to deny requests even where venues are available, as here. Accordingly, the Policy is "an unnecessary abridgement" of students' speech rights, "and therefore unconstitutional." *Id.*

d. The Policy does not leave open ample alternative means for communication.

The district court held that the Policy supplies ample alternative channels because, "on its face, the LSEP only sets forth a bureaucratic requirement for a particular kind of campus speech Plaintiffs wish to engage in, i.e., hosting a large-scale event on University property." Addendum at 27–28. This holding is erroneous because the two factors that determine whether speech is subject to the policy—the size of the event and the identity of the speaker—are both determined by enforcing officials with unbridled discretion. And the University never applied the Policy to anyone until the students tried to host Shapiro. 9JA1901–03.

Once the University determines that an event is subject to the Policy, it may be prohibited outright or relegated to any venue the University determines the "campus is able to support." Addendum at 113. That is precisely what the University did for the Shapiro talk while not doing so for liberal (and far more controversial) speakers. These "limits do not give the plaintiffs enough opportunity to direct their intended

message at their intended recipients" and are therefore not "ample" *Kirkeby v. Furness*, 92 F.3d 655, 662 (8th Cir. 1996).

2. The Policy governs speech in a designated public forum.

The district court evaluated the Policy "under the 'limited public forum' standard of review." Addendum at 22. In its mind, the relevant question was whether the University opened the facilities governed by the policy "with respect to *hosting* large-scale events . . . for indiscriminate use by the general public." Addendum at 23 (cleaned up). According to the district court, "in the forum analysis, the state's intention controls over all else." Addendum at 23. That analysis was backwards: it used the policy to define the forum, rather than analyzing the property in which the policy operates. *See OSU Student Alliance v. Ray*, 699 F.3d 1053, 1063 (9th Cir. 2012) ("If speech restrictions in a designated public forum automatically constituted limitations on the scope of the forum itself, then the concept of the 'designated public forum' would merge entirely with that of the limited public forum.").

"The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending *on the character of the property at issue*." *Perry Ed. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 44 (1983) (emphasis added). The proper steps are to determine the nature of the forum, *then* to determine the standard that applies to any restrictions on speech within that forum.

The Policy applies to every "large campus venue *or outdoor space*." Addendum at 113 (emphasis added). These are areas that "traditionally and historically serve as places specifically designated for the free exchange of ideas." *Bowman*, 444 F.3d at 980; *accord Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981) ("the campus of a public university, at least for its students, possesses many of the characteristics of a public forum"). For purposes of the facial challenge, the court should have applied the designated public forum standard since the Policy applies to many areas that are undoubtedly designated public fora. *Bowman*, 444 F.3d at 980 (stating that a "modern university contains a variety of fora" but finding that "[h]aving concluded that the outdoor areas in question are unlimited designated public fora, we must ascertain whether the Policy impermissibly restrains free expression").

The district court erred again in applying the limited-public-forum standard because Willey Hall and Mayo Auditorium are undeniably public fora. When determining the type of forum, this Court considers four factors: "the traditional use of the property, the objective use and purposes of the space, . . . the government intent and policy with respect to the property, . . . [and] the presence of any special characteristics regarding the environment in which the area in question exists." *Ball v. City of Lincoln*, 870 F.3d 722, 731 (8th Cir. 2017) (quotation omitted).

All four factors show that the requested areas like Willey Hall and Mayo Auditorium (and the North Star Ballroom that the students

ultimately used) are designated public fora. The traditional and objective use of these halls has been public discussion on unrestricted subjects by student groups, University departments, or outside groups—that is to say, anyone at all. 9JA1869–74, 2037.

The government has not by policy or practice limited these venues by group identity or by subject matter either—until the Shapiro talk. From January 2014 until February 2018 (the month of the Shapiro talk), Willey Hall hosted at least 261 events for on- and off-campus groups, ranging from the Somali Student Association to the Panhellenic Council to the Midwest Mountaineering Reel Rock Film Festival, and including lectures, mock trial activities, film screenings, and more. 14JA3014–36.

So too for Mayo Auditorium: the University allows any on or off-campus speaker, from television personalities to politicians to former comedians, use the venue to speak on any topic. The University does not dedicate the auditorium to discussion of any particular topic.

There are also no "special characteristics" of these venues that affect the forum analysis. *Bowman*, 444 F.3d at 978 (noting that there are "special characteristics" applicable to secondary schools under *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) but not finding any characteristic special to the university).

This Court offered a helpful example in *Bowman*: "For example, a university concert hall might be considered a 'limited public forum,' designated for particular speech by university-supported musicians. An

'unlimited' designated public forum is a forum designated for expressive conduct by the government but not limited to a particular type of speech or speaker." *Id.* at 976. Here, any speaker may use the venues, and they may speak on any subject. The only applicable restrictions in Willey Hall are the *prohibitions* on performance events or the consumption of food or beverages. 14JA3116. These are manner restrictions, and when the venue is otherwise open to any speaker on any subject, they are an unlimited, designated public forum under *Bowman*, not like the limited public forum that would exist in a concert hall limited to one type of activity (musical performance) by one group of people (university-supported musicians). 444 F.3d at 976. The fact that the University arbitrarily applied its policies to allow any controversial liberal speaker while denying a request for a conservative speaker does not change these designated public fora into limited public fora.

Therefore, the district court erred by applying the limited public forum standard to the students' facial challenge to the policy, since the outdoor and indoor venues it regulates are designated public fora.

3. The Policy is an unconstitutional regulation in a designated public forum.

Since the Policy regulates speech in a designated public forum, it must "be content-neutral and narrowly tailored to serve a significant government interest." *Id.* at 980. The Policy is unconstitutional if it fails either one of these two prongs. But it fails both. The Policy is not content-

or viewpoint neutral because it is inherently viewpoint-based and facially requires the consideration of an applicant's proposed speech. *See supra* Part II.A.1.b. And the Policy is not narrowly-tailored to serve a significant government interest. *See supra* Part II.A.1.c.

The students' allegations that the Policy is facially unconstitutional in any forum were sufficient to "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007). Therefore, the district court erred in dismissing the students' facial challenge under the First Amendment.

B. The students plausibly pleaded that the University's Policy facially violates the Fourteenth Amendment.

A regulation is void-for-vagueness if it "forbids or requires the doing of an act in terms so vague that [students] of common intelligence must necessarily guess at its meaning and differ as to its application." *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1308 (8th Cir. 1997). This doctrine "prevents arbitrary and discriminatory enforcement." *Id.*

The students sufficiently pled facts showing that the Policy fails this standard. Here, "a more stringent vagueness test should apply" as these policies "interfere[] with the right of free speech." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *accord Stephenson*, 110 F.3d at 1308-09.

As an initial matter, the district court did not even reach these factors but dismissed the students' due-process claim with prejudice anyway. In doing so, it relied not on the pleadings—which it was required to accept as true—but took Defendants' word that their policy "provides for no sanctions for failure to comply." Addendum at 40 (quotation omitted). Sanctions are not a requirement for a due process claim against a policy that chills speech.

Besides, per the Complaint, these assurances are not true. Plaintiffs are subject to discipline under the University's policies if Plaintiffs hold an event that the University subsequently deemed to fall under the Policy. Under the University's Student Conduct Code, unauthorized use of University facilities and violating any "posted or published" rules is a "disciplinary offence."[3] These offenses expose students to sanctions ranging from academic sanction to expulsion, and withholding an earned degree.[4] The Policy is a posted and published university rule and Plaintiffs may be subject to sanction if they fail to adhere to its vague provisions. After all, if the students hosted an event like the Shapiro talk without permission, the University would doubtlessly punish them. Yet the guidelines for avoiding sanction and

[3] Board of Regents Policy Student Conduct Code, Section IV, Subd.13 & 19, Oct. 13, 2017, https://regents.umn.edu/sites/regents.umn.edu/files/2020-01/policy_student_conduct_code.pdf.

[4] *Id.* Section V.

obtaining that permission, whether in the Policy or elsewhere, are unconstitutionally vague.

First, the Policy itself is vague as to when it applies. It uses undefined terms such as "large campus venue or outdoor space," "significant amount of campus population," "large off-campus crowd," and "significant security concern." Addendum at 113. Is a large campus venue one that holds 80 people, 800, or 8,000? What is a "significant amount" of campus population on a campus of over 50,000 students? Is 1% significant? President Kaler felt like 500 is large. 10JA2241. But due process requires more than a feeling—it requires "a reasonable opportunity to *know* what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (emphasis added).

Second, the Policy lacks "explicit standards for those who apply [it]." *Grayned*, 408 U.S. at 108–09. As pled in the Complaint, the University has unbridled discretion to impose restrictions on any event such as the location, time, size, and whether to charge security fees, etc. 1JA0034, 0037, 0041. Because of this, students cannot know how to structure their requests to hold a speaking event, and the University can grant or deny requests in a discriminatory way, as happened here. 1JA0025–29.

Third, because of the vague standards and having to guess at what may be deemed controversial, Students for a Conservative Voice "modified, self-censored, and suppressed its speech because of the Speech

Suppression Policy by choosing not to invite certain speakers to campus whose content and viewpoint Defendants or other members of the campus community will consider to be more objectionable or controversial than other speakers." 1JA0044.

The pleadings in support of the due process claim met the minimal standard for plausible pleading. The district court erred by dismissing them out of hand with prejudice and taking the University's assurances rather than students' reasonable, sworn allegations as true.

II. The district court wrongly granted the University summary judgment.

A. The district court erred by making inferences in favor of the moving party in granting the University's motion for summary judgment.

On summary judgment, a court must "construe[] the evidence in the light most favorable to the nonmoving party and draw[] all reasonable inferences in the nonmoving party's favor." *Capps*, 780 F.3d at 883. In granting summary judgment to the University, the district court did the opposite, *making* inferences in the *moving party*'s favor. The district court made erroneous findings of fact where disputes existed or in direct contradiction to undisputed facts with respect to Kaler, Berthelsen, Clark, Buhta, and Dussault.

1. The district court drew improper inferences concerning President Kaler in favor of the moving party.

First, the district court repeatedly relied on Appellees' deposition testimony to explain away their prior contemporaneous statements in written email correspondence. That is an inappropriate basis for granting summary judgment. *Madel v. FCI Marketing, Inc.*, 116 F.3d 1247, 1252 (8th Cir. 1997) (where "Plaintiffs have presented evidence . . . from which a jury could conclude that [an improper consideration] was a determinative factor in Defendant's decision," the district court cannot credit "Defendant attempts to explain away these statements" in granting summary judgment).

But the district court did it anyway. Sixteen minutes after learning that the students planned to invite Shapiro, Kaler wrote that he did "not want this in the middle of campus . . . ." 2JA0173. At least five different times, the district court relied on his deposition to ignore the viewpoint discrimination evident in his email:

1. "[Kaler] *testified* that his concern was based on his knowledge that Shapiro 'had spoken at other campuses and there were protests at those campuses.'" Addendum at 87 (emphasis added).

2. "Moreover, Kaler *explained* that he was aware that the initial venue requested by SCV was the Mayo Auditorium—in the center of the East Bank—and because '[SCV] indicated that security would likely be required' for Shapiro's event, the possibility of a disruption occurring led him to believe that having the event 'in a place that was a little more distant from the center of campus' would be preferable." Addendum at 87 (emphasis added).

3. "[Kaler] *noted* that he believed such a move would be appropriate 'so that if there was a disruption it would have a minimal effect on the thousands of people who come to the university for reasons besides protesting.'" Addendum at 87 (emphasis added).

4. "[Kaler] *expressly denied* that his comments were in anyway based on the fact that Shapiro was a conservative speaker." Addendum at 88 (emphasis added).

5. "Indeed, [Kaler] *noted* his concerns related strictly to safety and would apply to the potential for protest activity for both left- and right-leaning speakers." Addendum at 88 (emphasis added).

Relying on an official's self-serving testimony, given years after the fact and after hours of consultation with legal counsel, to rebut evidence that a jury could rely upon is legal error and grounds for reversal.

In addition, the district court's explanations are simply incorrect. For example, Kaler admitted that he *did* consider Shapiro's views as a basis for asserting he presented a security risk. *See* 10JA2264 (Kaler knew "just that [Shapiro] was right wing speaker and he made some appearances on other campuses"). Kaler held a press conference to respond to public criticism about the University's decision, where he explained that he thought Shapiro was a "controversial speaker" and that University officials chose the St. Paul campus for security reasons, even though the University assessments revealed no credible security threat. 13JA2997–99; 14JA3053–60. And he admitted that his security concerns are actually *assumptions* based on viewpoint—Kaler said his concerns do *not* apply to all speakers, because students are not likely to protest a speaker perceived as leftist. 10JA2278 ("I don't recall a leftist speaker's visit being brought forward as a safety issue.").

Kaler's testimony, then, supports Students' claims for summary judgment, not the inferences that the district court made in favor of University's claim. And, making inferences in the moving party's favor was inappropriate in any event.

2. The district court drew improper inferences concerning Appellee Berthelsen in favor of the moving party.

The district court held that it was "undisputed" that Appellee Berthelsen's involvement in excluding the students from an available public forum "was, at best, minimal." Addendum at 90. Yet Appellee Clark admitted that he discussed the location of the students' event with Appellee Berthelsen, 6JA1201, and the district court acknowledged this admission. Addendum at 91. Appellee Berthelsen admitted that he was aware of the large number of students on the waitlist for the event after tickets sold out, and that he personally made the decision to deny the students' request for Willey Hall even though it was available. 4JA0891–93. The district court acknowledged that it was "Berthelsen's decision not to move" the students' event, Addendum at 91, and Appellee Berthelsen admitted that he had ruled out moving the event to a larger venue without discussing it with anyone else. 4JA0891–93. Far from the district court's assessment of Appellee Berthelsen's involvement in denying the students access to an available public forum as "minimal," Addendum at

90, the undisputed facts show that Berthelsen made determinative decisions.

3. The district court drew improper inferences concerning Appellee Clark in favor of the moving party.

Before the University denied the students' requests for available venues on the Minneapolis campus, Appellee Clark sent an email stating, "the admin has asked that we try to move [Shapiro's] visit to the St. Paul campus" and that "the crowd size needs to be limited to 500 and we will probably have protestors present." 14JA3044–45. The district court erroneously concluded that "it is undisputed that Clark's statements in the email at issue were based on his understanding that Buhta, Dussault, and [the students] had reached an agreement as to crowd size and venue." Addendum at 95. But the students never agreed to a 500-attendee limit. 8JA1626; 12JA2642; 13JA2864–65. As with Appellee Kaler's documented statements, the district court generated this "undisputed" fact by making inferences about Clark's meaning in his emails based on his subsequent deposition testimony and ignoring other evidence on the record.

Appellee Clark's email said, "the admin has asked that we try to move [Shapiro's] visit to the St. Paul campus." 14JA3045. This is undisputed. Asked, "Who in the admin asked you to move this to the St. Paul campus?" Clark later said, "No one." 6JA1199. Appellee Clark later

said that when he said "the *admin* has *asked*" he really meant "Troy Buhta, Eric Dussault, and the student[s]" had *agreed*. 6JA1199–1201 (emphasis added). The district court took this subsequent explanation, not just as credible (despite its inconsistency with undisputed emails), but as the "undisputed" fact. Addendum at 95. This was error. *Madel*, 116 F.3d at 1252.

4. The district court drew improper inferences concerning Appellee Buhta in favor of the moving party.

The district court found that "the record evidence" contradicts "Plaintiffs' argument that Buhta engaged in viewpoint discrimination by rejecting both the Mayo Auditorium and Willey Hall" because "*there is no evidence* that either Willey Hall or the Mayo Auditorium were the best venue options *given the significant security concerns*." Addendum at 107 (emphasis added). Yet undisputed testimony from Appellee Buhta shows that his security concerns were not "significant" and, therefore, there was "record evidence" of his viewpoint discrimination.

Appellee Buhta testified that he never conducted an assessment of Willey Hall to determine what would be required to secure the venue. 5JA1021–22. Further, both Clark and Buhta admitted that University police could have secured Willey Hall or Mayo Auditorium for the Shapiro talk. 5JA0981, 0986, 0999–1000; 6JA1237. And the district court completely ignored the unrebutted expert report showing that the

University could have secured Willey Hall with the same resources it used to secure the North Star Ballroom. Addendum at 125. Since Willey Hall is on the Minneapolis campus, has a larger capacity, and could be secured with available resources, the district court's finding that "there is no evidence" that Willey Hall was a better venue option was erroneous. Addendum at 107.

5. The district court drew improper inferences concerning Appellee Dussault in favor of the moving party.

The district court held that none of Appellee Dussault's "decisions related to Shapiro's speech were based on his political viewpoints or beliefs." Addendum at 106. Yet the undisputed facts show that two months prior to the event, with no evidence of protests, on a campus that receives and processes over 50,000 requests per year, Dussault advised the Office of Classroom Management not to approve the students' venue request because "I'm not sure how we are going to find a venue on campus to accommodate this event but will need to start working on it immediately." 13JA3010. The undisputed facts also show that Dussault does not typically hold requests this way, nor does he instruct all student groups to coordinate with University police, Student Unions and Activities, or to comply with the Policy, as he did the students. 9JA1901–03, 1954–55. This is evidence of viewpoint discrimination under this

Court's precedent, *see infra* Part III.A–B, and the district court erred in finding otherwise.

B. The district court ignored unrebutted evidence refuting the moving party's claims.

The district court wrongly made inferences for the University by ignoring unrebutted evidence from the students' expert. It concluded that "there is *no evidence* that either Willey Hall or Mayo Auditorium were the best venue options *given the significant security concerns*." Addendum at 107 (emphasis added). This finding rests on two errors.

First, it ignores all of the undisputed evidence about the myriad events that occurred in both Willey Hall and Mayo Auditorium that the University did not move or restrict because of "security concerns." *See supra* Part II.C.3.

Second, the district court did not even mention the students' expert report, completely unrebutted by the University, that explained that there were no "significant security concerns" justifying the refusal to deny the students' request for those exact same venues. *See* Addendum at 116–27. The students offered a report by Michael Verden, who served for 21 years in the Presidential Protective Division for the United States Secret Service. Addendum at 118–19. Verden found that the venues that the University denied to the students had been secured for other events with "higher risk levels." Addendum at 123. He also found that the resources the University devoted to securing the Shapiro event on the St.

Paul campus could have been used to secure the venues the students requested on the Minneapolis campus that the University denied. Addendum at 125. Appellees did not rebut this evidence and the district court ignored it and made findings that contradict this unrebutted evidence.

Additionally, the University admitted that its police can secure any venue on campus (including Willey Hall), 5JA0981, and they did not conduct a security assessment of Willey Hall. 5JA1021–22. Thus, there is zero evidence in the record contradicting any of Verden's findings.

But the district court made contrary findings that there were actually "significant security concerns" with hosting Shapiro in Willey Hall. Addendum at 107. These erroneous and unsupported findings are central to the district court's holding, since it found that, in order to show that the University's proffered justifications were pretext for viewpoint discrimination, "Plaintiffs must provide evidence showing that Defendants treated other groups that are similarly situated to Plaintiffs differently, or that Defendants' proffered explanation for their actions lacked any basis in fact . . . ." Addendum at 92–93. Assessing these elements, the court said, "No such evidence was offered." Addendum at 93.

In fact, substantial evidence for both elements was offered. The district court just ignored it. For disparate treatment, Verden showed that requests for the same venues that the University denied to the

students were granted to groups hosting speakers with as high *or higher* risk levels. Addendum at 123. And Verden showed that the "proffered explanation for their actions"—the claim that the event must be held in St. Paul for security reasons—"lacked any basis in fact," meeting the standard the district court identified, Addendum at 93, because the same resources used to secure the North Star Ballroom could have secured either Willey Hall or Mayo Auditorium. Addendum at 125.

Therefore, the district court erred in granting summary judgment to the University by relying on inferences in favor of the moving party and disputed facts.

III. The district court wrongly denied the students' motion for summary judgment.

While the district court relied on improper inferences or at least disputed facts in granting summary judgment for the University, the undisputed facts show that the district court erred in denying the students' motion for summary judgment.

In its opinion granting in part the motions to dismiss, the district court cited this Court's decisions in *Gerlich*, and *Burnham* for the controlling standards on whether the government has imposed "unique scrutiny" on a request to use a forum or has enforced a heckler's veto in regulating speech. Addendum at 78–81. But when the undisputed evidence showed Appellants satisfied those standards, the court granted summary judgment to Appellees without even discussing those cases. In

fact, the district court completely ignored *Burnham* and only cited *Gerlich* to recite the standard for regulations in a limited public forum, completely ignoring *Gerlich*'s controlling "unique scrutiny" analysis.

A. The University unconstitutionally subjected the students' speech to unique scrutiny.

In denying Appellees' motion to dismiss Appellants' as-applied First Amendment claim, the district court correctly held Appellants had stated a claim under *Gerlich's* "unique scrutiny" analysis:

> the Complaint alleges that numerous well-known liberal speakers were allowed to speak in centrally-located University spaces connected to the skyway (all of whom had some need for security by virtue of their celebrity), while Mr. Shapiro, a well-known conservative speaker, was barred from doing so, based in large part on the purported "security concerns" raised by Willey Hall's "access to the skyway." (*See* Am. Compl. ¶¶ 114-30.) Taken as true, this kind of "unique scrutiny" raises a plausible allegation of viewpoint discrimination, given the Eighth Circuit's recent holding that "imposing" "unique scrutiny" on a campus speaker with a particular viewpoint, as compared to other speakers who do not share that viewpoint, potentially suggests that impermissible viewpoint discrimination is afoot. *See Gerlich*, 861 F.3d at 705–07 . . . .

Addendum at 80–81.

Discovery revealed that the allegations in the Complaint were true and undisputed. Many well-known, liberal speakers were allowed to speak in venues connected to the skyway. *See supra* Part II.B. These speakers needed security "by virtue of their celebrity." Addendum at 35.

Yet the University barred Shapiro from these same venues based on 'security concerns' related to Willey Hall's connection to the skyway. 14JA3074. The University acted on these claimed concerns to deny the students' requests even though they did not conduct a security assessment of Willey Hall and their own assessments for Shapiro's speech showed no credible threat to the speaker or venue. 14JA3053–60. None of these facts are in dispute. Therefore, under the district court's articulation of the *Gerlich* standard, it erred in denying the students' motion for summary judgment.

This case closely follows *Gerlich* because Appellees denied the students access to fora on the Minneapolis campus based on the viewpoint of Appellants' event in juxtaposition to Appellees' understanding of the prevailing views on campus. University officials referred to Shapiro as "conservative" at least twice. 6JA1216; 14JA3054. They labeled Shapiro "controversial" at least five times. 6JA1181–82; 10JA2277; 12JA2746–47; 14JA3042; 16JA3728. One even called Shapiro "alt-right," even though he is Jewish and is himself frequently targeted by alt-right provocateurs. 13JA3003.

In *Gerlich*, one piece of evidence that showed the university's unconstitutional "unique scrutiny" was the president's statement: "in a state as conservative as Iowa on many issues, . . .[the use of the ISU trademark to promote marijuana legalization] was going to be a problem." *Id.* at 707. Similarly, in this case, Appellee Kaler said that (1)

he knew Shapiro was a "right-wing speaker and he made some appearances on other campuses," 10JA2264, (2) that he "consider[ed] [Shapiro] controversial in the fact that his speeches tend to attract protesters of opposite points of view," 10JA2277,and (3) that he did not want Shapiro to speak "in the middle of campus," 2JA0173 ostensibly for safety reasons but (4) "I don't recall a leftist speaker's visit being brought forward as a safety issue" and therefore the safety concerns he had with Shapiro did not pertain. 10JA2278–79. He might as well have said, "on a campus as liberal as [Minnesota] on many issues, . . . [hosting Ben Shapiro] was going to be a problem."

"Another example of [unconstitutional] unique scrutiny imposed on [a student group] is that the group was required to obtain approval from" officials when other groups were not. *Gerlich*, 861 F.3d at 705. In this case, the University required the students to work with the University, University police, and to comply with the Policy when they do not force other student groups or outside groups to do the same thing. 9JA1898–1903; 11JA2393.

Gerlich prohibits a university from assuming that disagreement equals disruption or using politics as a proxy for a threat. Here, the undisputed evidence provided by the University's own assessments revealed no credible threat. 14JA3054, 3059. Appellants' unrebutted expert demonstrated the requested venues could have been secured with the same resources used to secure the venue in St. Paul. Addendum at

125. All that remains is Appellees' *assumption* that a "controversial" speaker would generate protest based on their assessment of the speaker's views and the prevailing views on campus. Denying access to an available venue on the basis of viewpoint-based assumptions is unconstitutional "unique scrutiny." *Gerlich*, 861 F.3d at 706.

B. The University unconstitutionally enforced a heckler's veto.

The district court repeated the error it made in ignoring *Gerlich* by also ignoring *Burnham*. In denying the motion to dismiss Appellants' First Amendment as-applied claim, the district court correctly stated:

> the Complaint alleges that "Defendants decided to move the event to the St. Paul campus two months before the event and in the absence of any specific information regarding the event at the University." (Am. Compl. ¶ 109.) This allegation matters because, "in the absence of any specific information" about planned protests in response to Mr. Shapiro, or other potentially disruptive behavior, it is plausible that Defendants' decision to move the speech to the St. Paul campus may have been based merely on concerns that some "persons on the [] campus objected to [Mr. Shapiro's] viewpoint," which, the Eighth Circuit has held, is not a "constitutionally valid reason" to prohibit someone from speaking in an otherwise-available limited public forum like Willey Hall. *See Burnham*, 119 F.3d at 676 . . . .

Addendum at 34–35.

The undisputed facts substantiate the allegations the district court said would establish liability under *Burnham*. The University did, in fact, deny the students' requests for available fora on the Minneapolis campus

and did move the event to St. Paul two months before the event. The undisputed facts show that the University made its decision without any specific information about a credible threat to the event, the audience, or Shapiro. 14JA3054, 3059. Instead, the University's asserted security rationale rested "merely on concerns that some 'persons on the [] campus objected to [Mr. Shapiro's] viewpoint.'" Addendum at 34 (quoting *Burnham*, 119 F.3d at 676); This, in the district court's words, "is not a constitutionally valid reason' to prohibit someone from speaking in an otherwise-available limited public forum like Willey Hall." Addendum at 34–35 (quoting *Burnham*, 119 F.3d at 676). The district court never cited *Burnham* in its opinion granting Appellees' motion for summary judgment. Since the University can point only to "an unestablished ambiance of fear" as the basis for denying Appellants' requests, 119 F.3d at 679, excluding the students from an available public forum on that basis is an unconstitutional heckler's veto. *Id.* at 676; *Lewis*, 253 F.3d at 1082.

CONCLUSION

The University excluded the students from large, centrally-located, available venues, moved the talk to a remote location, and capped their audience at 500, two months before the event, with no credible threat to the event, based only on their assessment of Shapiro's speech as "controversial" because of his political viewpoint. The University's decision prevented the students from sharing their message with at least

600 students. The district court erred in sanctioning the University's application of a facially unconstitutional policy to discriminate against the students and restrict their speech. Therefore, Appellants ask this Court to reverse, and instruct the lower court to enter summary judgment in their favor or to remand for trial.

Respectfully submitted this 19th day of November, 2020.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 12,893 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f), as determined by the word counting feature of Microsoft Office 365.

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Pursuant to Local Rule 28A(h)(2), I also certify that this brief has been scanned for viruses utilizing the most recent version of a commercial virus scanning program, Traps Version 4.1.2., and is virus-free.

Dated: November 19, 2020.

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