IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

J. MICHAEL BROWN; YOUNG AMERICANS FOR LIBERTY AT JONES COUNTY JUNIOR COLLEGE — **PLAINTIFFS**

V. — **Case No.: 2:19-cv-127-KS-MTP**

JONES COUNTY JUNIOR COLLEGE; BOARD OF TRUSTEES OF JONES COUNTY JUNIOR COLLEGE; JESSE SMITH, in his individual and official capacity; MARK EASLEY, in his individual and official capacities; GWEN MAGEE, In her individual and official capacities; STAN LIVINGSTON, in his individual and official capacities — **DEFENDANTS**

BRIEF IN SUPPORT OF MOTION TO DISMISS

Plaintiffs J. Michael Brown and Young Americans for Liberty at Jones County Junior College ("YAL") have sued the College, its Board of Trustees, and four College administrators in their official and individual capacities for alleged First Amendment violations. Plaintiffs have failed to establish standing to pursue their claims, and they have not alleged any appreciable damages. Moreover, the Individual Defendants are entitled to qualified immunity.

FACTS[1]

Brown, a resident of Hattiesburg, Mississippi, was enrolled as a student at the College between August 2018 and April 9, 2019. Compl., at ¶¶ 12, 38, 73 [Doc. 1]. YAL purports to be an "unrecognized student organization" and a "political club" started by Brown in August 2018 at the College. Id. at ¶¶ 3, 13, 38. At some point before February 2019, Brown spoke to at least one Defendant about Brown's interest in starting a YAL chapter on campus. *Id*. at ¶¶ 61-62. However, Plaintiffs do not allege YAL applied to be recognized as a student organization at the College or

[1] For purposes of this Motion only, Defendants' recitation of facts is based on Plaintiff's well-pled allegations.

that any Defendant denied such a request or suggested such a request would be denied. Between August 2018 and February 2019, Brown alleges he walked around the College's campus four times talking to fellow students about YAL and soliciting members. *Id*. at ¶ 39.

The College's Student Handbook contains "Student Activity Policies" requiring student organizations to schedule meetings, activities, and events with the Vice President for Student Affairs. *Id*. at ¶¶ 25, 30. Plaintiffs' allegations stem from these policies and from two separate YAL events on campus during the Spring 2019 academic semester. First, Plaintiffs allege Brown and Mitch Strider, a non-student acquaintance, "inflated an oversized beach ball" (referred to in the Complaint as the "free speech ball") and rolled it around to several different locations on the College campus during a YAL event on February 26, 2019. *Id*. at ¶ 42-45. As part of the "free speech ball" event, Brown and Strider stopped passing students, invited them to write messages on the ball, and solicited them to join YAL. *Id*. at ¶ 43. After moving the ball in front of the College's Administration building, Brown was approached by several College employees, including Defendant Mark Easley, the College's Dean of Students, and Defendant Stan Livingston, the College's Chief of Police. *Id*. at ¶¶ 47-60.

Easley told Brown that campus activities should be scheduled through the administration. *Id*. at ¶¶ 50-52. Livingston asked Brown to come into his office and told them campus activities should be scheduled through the office of Defendant Gwen Magee, the Vice President for Student Affairs. *Id*. at ¶¶ 62-63. Because Magee was not on campus that day, Livingston advised Brown to contact her when she returned. *Id*. at ¶ 63, 66. Brown and Strider voluntarily deflated the beach ball and left the campus. *Id*. at ¶ 69. Brown does not allege he was arrested, detained,

or disciplined in any way related to the "free speech ball" event. Brown also does not allege he ever contacted Magee to try to schedule an activity.

Second, Plaintiffs allege Brown, his girlfriend, and Nathan Moore, a non-student acquaintance, conducted another YAL activity on the patio in front of the main entrance of an academic building on April 4, 2019. *Id*. at ¶¶ 73-74. The YAL participants invited passing students to mark a sign, solicited them to sign up for YAL, and distributed pamphlets and pocket Constitutions. *Id*. at ¶ 74. Two College employees, including a campus police officer, asked Brown whether he had scheduled this second event pursuant to the College's policies, and he responded that he had not. *Id*. at ¶¶ 80-90. Defendant Livingston arrived and instructed Brown and his girlfriend to go to his office. In his office, Livingston told Brown again that campus events should be scheduled through Defendant Magee's office. *Id*. at ¶ 108. Easley also came to Livingston's office and told Brown that campus events had to be scheduled through Magee's office. *Id*. at ¶¶ 112-13. Again, Plaintiffs do not allege that Brown was arrested, detained, or disciplined as the result of Brown's activity, or that he contacted Magee to schedule an activity.

LEGAL STANDARDS

"Federal courts are courts of limited jurisdiction; without jurisdiction conferred by statute, they lack the power to adjudicate claims." *In re FEMA Trailer Formaldehyde Prods. Liab. Litig*., 668 F.3d 281, 286 (5th Cir. 2012) (citing *Kokkonen v. Guardian Life Ins. Co. of Am*., 511 U.S. 375, 377 (1994)). A court properly dismisses a claim under Rule 12(b)(1) when the court lacks the statutory or constitutional authority to adjudicate it. *Home Builders Ass'n, Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). "[T]he plaintiff constantly bears the burden of proof that jurisdiction does in fact exist." *Raj v. La. St. Univ*., 714 F.3d 322, 327 (5th Cir. 2013).

To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient factual matter, if accepted as true, to "state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. When the well-pled allegations in a complaint could not raise a claim of entitlement to relief, "this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court." *Twombly*, 550 U.S. at 558.

ARGUMENT

1. Plaintiffs lack standing to bring this action.

Plaintiffs allege the College's policies regarding student activities and events are facially unconstitutional. To establish Article III standing, a plaintiff must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision. *E.g.*, *Glass v. Paxton*, 900 F.3d 233, 238 (5th Cir. 2018) (*citing Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58 (2014). An injury must be "concrete, particularized, and actual or imminent." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010). To establish an injury sufficient to raise a First Amendment facial challenge, a plaintiff must allege an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by some regulation on speech. *Miss. State Democratic Party v. Barbour*, 529 F.3d 538, 545 (5th Cir. 2008) (*citing Speaks v. Kruse*, 445 F.3d 396, 399 (5th Cir. 2006)).

Standing cannot be conferred by a "self-inflicted" injury. *Glass*, 900 F.3d at 238 (*citing Zimmerman v. City of Austin*, 881 F.3d 378, 389 (5th Cir. 2018). "[W]hile government action that chills protected speech without prohibiting it can give rise to a constitutionally cognizable injury, … to confer standing, allegations of chilled speech or 'self-censorship must arise from a fear of prosecution that is not imaginary or wholly speculative.'" *Zimmerman* 881 F.3d at 389-90 (*citing Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 660 (5th Cir. 2006)). "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Glass*, 900 F.3d at 239 (*citing Laird v. Tatum*, 408 U.S. 1, 13-14 (1972)). Parties "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Glass*, 900 F.3d 239 (*citing Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013)).

An association has Article III standing to bring a suit on behalf of its members only when (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Funeral Consumers All., Inc. v. Serv. Corp. Int'l*, 695 F.3d 330, 343 (5th Cir. 2012) (*citing Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). To satisfy the first prong of this test, an organization must "include at least one member with standing to present, in his or her own right, the claim (or the type of claim) pleaded by the association." *Funeral Consumers All.*, 695 F.3d at 343-44 (*citing United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 555 (1996)). (*citing Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976). An organization lacks standing if it fails to adequately "'allege[] that there

is a threat of [] injury to any individual member of the association' and thus 'fail[s] to identify even one individual' member with standing." *Funeral Consumers All.*, 695 F.3d at 344 (*citing Nat'l Treasury Employees Union v. U.S. Dep't of Treasury*, 25 F.3d 237, 242 (5th Cir. 1994)).

> With respect to their future intentions, Plaintiffs have alleged as follows:
>
> Despite the fact that Brown continued as a student at JCJC throughout the 2019 spring and summer semesters, neither he nor any other member of the YAL chapter or YAL's national organization have engaged in expressive activity on the Ellisville campus or any other JCJC property since April 4, 2019, for fear of disciplinary action, removal from campus, or arrest.
>
> Defendants' policies, practices, and actions regarding student speech and expressive activity on campus have a chilling effect on Brown's and YAL's rights and the rights of all other JCJC students and student organizations to engage freely and openly in speech and expressive activity.
>
> YAL wishes to engage in expressive activity at JCJC without seeking prior administrative approval and without having to wait at least three to five days in order to do so. However, based on Brown's, other YAL members', and potential YAL members' interactions with JCJC administrators and police officers, as described in this Complaint, they are reasonably afraid of being punished, detained, or removed from campus if they do so.

Compl., at ¶¶ 116-18. As to YAL, Plaintiffs allege:

> Plaintiff Young Americans for Liberty at Jones County Junior College is an unrecognized student organization at Jones County Junior College. It is a chapter of the national organization Young Americans for Liberty, a libertarian advocacy organization with chapters on college and university campuses nationwide.
>
> ***
>
> Brown has been a member of the national organization Young Americans for Liberty since August of 2018. In August 2018, he started a YAL chapter at JCJC, which he registered with the national organization and which has since appeared on a list of chapter locations in the United States on the national organization's website, https://yaliberty.org/chapters.

Id. at ¶¶ 13; 38.

Brown has not established standing to challenge the College's policies because he does not claim to still be a student at the College to whom the "Student Activity Policies" apply, that he is still a member or officer of YAL, or that he intends or desires to participate in student activities or assemblies at the College. Brown also does not allege he or any other College student was threatened, arrested, prosecuted, or disciplined in any way as a result of the College's policies or their application to Brown.

Moreover, Plaintiffs' allegations belie their assertion that Defendants' actions chilled their speech because Brown *actually* staged another YAL event on campus after the first time Easley and Livingston told him to schedule such events through Magee's office in February 2019. Brown's allegation that the February conversations with Easley and Livingston "would have chilled a student of ordinary firmness from exercising their right to free speech," *id*. at ¶ 70, is conclusory and may be disregarded. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (holding that conclusions not supported by factual allegations "not entitled to the assumption of truth" for 12(b)(6) purposes). As Plaintiffs do not allege any Defendant threatened Brown or took any escalated action at the time of the April 2019 event, they have also failed to allege a "specific future harm" arose from that meeting.

YAL has not established standing because it does not allege it has any current members at the College or that any such members have standing to raise the instant challenge. It purports to be a chapter of a national advocacy organization and recognized as such on that organization's website, but there is no entry for "Young Americans for Liberty at Jones County Junior College" at the website listed in the Complaint. *See* Ex. "A" (web site printout dated October 29, 2019).[2]

[2] *See Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000) (holding that "documents that a

Plaintiffs do allege Defendant Livingston told Strider and Moore to leave campus and threatened to arrest them, but Plaintiffs do not allege Strider and Moore were College students to whom the "Student Activity Policies" apply or that they were members of Young Americans for Liberty at Jones County Junior College, as opposed to members of some other organization. Strider and Moore are also not parties to this action, and these Plaintiffs have no standing to seek to vindicate their rights. *U.S. v. Johnson*, 632 F.3d 912, 919-20 (5th Cir. 2011) ("Prudential standing principles require that a plaintiff 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'") (*citing Duke Power Co. v. Carolina Envt'l. Study Grp., Inc.*, 438 U.S. 59, 80 (1978).

Finally, Plaintiffs also purport to challenge a policy in the College's Student Handbook restricting "public profanity on campus" by students. Compl., at ¶¶ 24, 37, 128. Plaintiffs lack standing to maintain this challenge because Brown is not a student, because YAL has not alleged it represents any current student, because Plaintiffs do not allege an intent or desire to use public profanity on campus, and because Plaintiffs have not alleged any credible threat this policy has been or will be enforced in a way that chills student speech. Plaintiffs' only factual allegation regarding profanity is an assertion that a non-party College employee "stated loudly that the free speech ball'" had profanity all over it …." *Id*. at 56. There is no allegation Brown or any other College student suffered a redressable injury because of this statement.

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defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim." (*citing Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993)).

Plaintiffs' claims should be dismissed because their allegations, taken as true, do not establish they have standing to maintain this suit.

2. The Individual Defendants are entitled to qualified immunity.

The Court should dismiss Plaintiffs' claims against the Individual Defendants because they are barred by qualified immunity. Designed to protect "all but the plainly incompetent or those who knowingly violate the law," *Malley v. Briggs*, 475 U.S. 335, 341 (1986), the qualified immunity defense "protects public officials from suit unless their conduct violates a clearly established constitutional right." *DePree v. Saunders*, 588 F.3d 282, 287 (5th Cir. 2009) (*citing Mace v. City of Palestine*, 333 F.3d 621, 623 (5th Cir. 2003)). The qualified immunity standard "gives ample room for mistaken judgments." *DePree*, 588 F.3d 282 at 287 (*citing Malley*, 475 U.S. at 343). Where a defendant pleads qualified immunity and shows he is an official whose position involves the exercise of discretion, the plaintiff has the burden to establish that the alleged conduct violates clearly established law. *Kovacic v. Villarreal*, 628 F.3d 209, 211 (5th Cir. 2010) (*citing Thompson v. Upshur County, TX*, 245 F.3d 447, 456 (5th Cir. 2001).

To defeat a defense of qualified immunity, the plaintiff must show the official violated a clearly established constitutional right and that the official's conduct was objectively unreasonable under established law. *Linbrugger v. Abercia*, 363 F.3d 537, 540 (5th Cir. 2004). "The law is 'clearly established' if 'the contours of the right [asserted are] sufficiently clear that a reasonable official would understand that what he is doing violates that right,' that is, if 'in the light of pre-existing law[,] the unlawfulness [of the act is] apparent.'" *Tex. Faculty Ass'n v. Univ. of Tex.*, 946 F.2d 379, 389-90 (5th Cir. 1991) (*citing Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). A defendant's actions are deemed objectively reasonable "unless *all* reasonable officials

in the defendant's circumstances would have then known that the defendant's conduct violated the United States Constitution or the federal statute as alleged by the plaintiff." *Thompson v. Upshur Cty.*, 245 F.3d 447, 457 (5th Cir. 2001). If reasonable public officials could differ on the lawfulness of the defendant's actions, qualified immunity bars the claim. *Blackwell v. Barton*, 34 F.3d 298, 303 (5th Cir. 1994).

A plaintiff must satisfy a heightened pleading standard when qualified immunity is raised at the pleading stage. *Brown v. Wilkinson Cty. Sheriff's Dep't*, No. 5:16-CV-124-KS-MTP, 2017 U.S. Dist. LEXIS 61800, at *5-6 (S.D. Miss. Apr. 24, 2017) (*citing Reyes v. Sazan*, 168 F.3d 158, 161 (5th Cir. 1999)). This requires "allegations of fact focusing specifically on the conduct of the individual who caused the plaintiffs' injury." *Reyes*, 168 F.3d at 161. A "plaintiff seeking to overcome qualified immunity must plead specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity." *Backe v. Leblanc*, 691 F.3d 645, 648 (5th Cir. 2012).

Defendants Magee and Smith

Plaintiffs have failed to state a claim against College President Jesse Smith and Vice Chancellor for Student Affairs Gwen Magee because they have not alleged Smith or Magee were involved in the incidents described in the Complaint, much less that they engaged in conduct that violates a clearly established constitutional right. Plaintiffs allege President Smith:

> is, and was at all times relevant to this Complaint, the president of JCJC. Smith is the executive officer in charge of the college. Smith manages and directs all affairs of the college under policies and regulations established by the Board. Smith is responsible for the administration and enforcement of policies and regulations relating to the operation of the college. Smith is also responsible for preparing and submitting to the Board for its approval all statements of policy or programs which he believes are needed for the control and management of the college. Thus, Smith is responsible for the promulgation, implementation, and enforcement of

> JCJC policies, procedures, and practices, including those that were applied to deprive Brown and YAL of their constitutional rights. Smith knew or reasonably should have known that JCJC's policies, procedures, and practices would lead to this deprivation. Smith knew that individuals under his supervision implemented JCJC's policies, procedures, and practices that deprived Brown and YAL of their constitutional rights, and Smith, with deliberate indifference, failed to act with regard to the constitutional rights of Brown, YAL, and all JCJC students. At all times relevant to this Complaint, Smith acted under color of state law and is sued in his individual and official capacities.

Compl., at ¶ 16.

Plaintiffs allege Magee:

> is Executive Vice President of Student Affairs at JCJC. Upon information and belief, Magee held the title of Interim Vice President of Student Affairs at times relevant to this Complaint. Magee is a member of the Executive Cabinet, which advises the JCJC president on administrative procedures, policies, and operational matters. Among other duties, Magee is responsible for supervising and implementing policies and procedures for student conduct and discipline and for coordinating student activities and organizations. Thus, Magee is responsible for the promulgation, implementation, and enforcement of JCJC policies, procedures, and practices, including those that were applied to deprive Brown and YAL of their constitutional rights. Magee knew or reasonably should have known that JCJC's policies, procedures, and practices would lead to this deprivation. Magee knew that individuals under her supervision implemented JCJC's policies, procedures, and practices that deprived Brown and YAL of their constitutional rights, and Magee, with deliberate indifference, failed to act with regard to the constitutional rights of Brown, YAL, and all JCJC students. At all times relevant to this Complaint, Magee acted under color of state law and is sued in her individual and official capacities.

Id. at ¶ 17.

Plaintiffs also allege that Smith and Magee, along with Defendants Easley and Livingston:

> possess administrative and enforcement authority over JCJC's policies, regulations, and procedures and are responsible for the implementation and enforcement of the Student Handbook policies, which directly resulted in the deprivation of Plaintiffs' constitutional rights under the First Amendment to the Constitution, as applied to the states by the Fourteenth Amendment and 42 U.S.C. § 1983. Defendants knew that individuals under their supervision implemented JCJC's policies, procedures, and practices to deprive Brown and YAL of their

> constitutional rights, and Defendants, with deliberate indifference, failed to act with regard to the constitutional rights of Brown and YAL.

Id. at ¶ 138.

Finally, Plaintiffs allege Smith "is additionally responsible for preparing and submitting to the Board for its approval all statements of policy or programs which he believes are needed for the control and management of the college." *Id*. at ¶ 139.

Section 1983 does not provide for vicarious liability for supervisors based on the acts of their subordinates. *Monell v. Dep't of Soc. Svcs.*, 436 U.S. 658, 691-95 (1978); *Oliver v. Scott*, 276 F.3d 736, 742 (5th Cir. 2002). A Section 1983 plaintiff "must specify the personal involvement of each defendant." *Murphy v. Kellar*, 950 F.2d 290, 292 (5th Cir. 1992); *see also Del Castillo v. PMI Holdings N. Am. Inc.*, No. 4:14-CV-3435, 2015 U.S. Dist. LEXIS 80301, 2015 WL 3833447, at *6 (S.D. Tex. June 22, 2015) ("A complaint does not satisfy the requirements of *Iqbal* and *Twombly* by lumping together all defendants, while providing no factual basis to distinguish their conduct.").

To establish § 1983 liability against supervisors, a plaintiff must show that: (1) the supervisor failed to supervise or train the officer; (2) a causal connection existed between the failure to supervise or train and the violation of the plaintiff's rights; and (3) the failure to supervise or train amounted to deliberate indifference to the plaintiff's constitutional rights. *Bivens v. Forrest Cty.*, No. 2:13-CV-8-KS-MTP, 2015 U.S. Dist. LEXIS 40602, at *50 (S.D. Miss. Mar. 30, 2015) (*citing Roberts v. City of Shreveport*, 397 F.3d 287, 292 (5th Cir. 2005)). The "deliberate indifference standard" is stringent and requires proof that a supervisor "disregarded a known consequence of his action." *Zarnow v. City of Wichita Falls Tex.*, 614 F.3d 161, 170 (5th Cir. 2010) Moreover, "for liability to attach based on an 'inadequate training' claim, a plaintiff must allege

with specificity how a particular training program is defective." *Goodman v. Harris County*, 571 F.3d 388, 395 (5th Cir. 2009). The Fifth Circuit has noted that liability for failure to supervise typically lies "only in those situations in which there is a history of widespread abuse" such that knowledge may be imputed to a supervisory official who can be found to have caused a violation by failing to prevent it. *Bowen v. Watkins*, 669 F.2d 979, 988 (5th Cir. 1982).

Plaintiffs' boilerplate allegations about these Defendants' job responsibilities do not include any specific factual allegations that their conduct violated Plaintiffs' rights. Plaintiffs do not allege Smith or Magee ever met with or interacted with Brown or any other YAL member, took any action with respect to Plaintiffs' campus events, or denied any permit application that was submitted. In fact, by Plaintiffs' own admission, Magee was not even on campus on the day of the February 2019 campus event. Compl., at ¶ 63. Brown was invited repeatedly to consult with Magee about his campus events, but he does not allege he did so. *Id*. at ¶¶ 62, 63, 66, 68, 109, 113.

Plaintiffs allege generally that Smith and Magee (along with Easley and Livingston) "failed to supervise their subordinates to ensure that Brown and YAL were not deprived of their constitutional rights, and Defendants failed to act, with deliberate indifference to the constitutional rights of Brown and YAL." *Id*. at ¶ 138. However, Plaintiffs make no *factual* allegations as to how Smith and Magee allegedly failed to train or supervise their subordinates.

The Court should dismiss Plaintiffs' individual-capacity claims against Defendants Smith and Magee because they have failed to allege those Defendants engaged in any actionable conduct, much less conduct violative of clearly established law.

Defendant Easley

To the extent Plaintiffs' allegations against Defendant Easley consist of a recitation of his job responsibilities, those allegations are insufficient to state an individual-capacity claim against him for the reasons detailed above. In addition to those allegations, Plaintiffs allege Easley:

(1) Told Brown and Strider the February 2019 YAL event should have been scheduled with Magee. *Id*. at ¶¶ 50-52.

(2) Asked Strider his name during the February 2019 event. *Id*. at ¶ 53.

(3) Called Defendant Livingston during the February 2019 event. *Id*. at ¶ 54.

(4) Came to Livingston's office on the day of the April 2019 event and informed Brown the April 2019 event should have been scheduled with Magee. *Id*. at ¶¶ 112-13.

Plaintiffs do not allege Easley disciplined Brown, or even told him he could not participate in a YAL event on campus. Rather, Easley merely informed Brown and his acquaintances about the College's policy requiring advance scheduling of student organization events. Plaintiffs do not allege they attempted to schedule an event or that the Student Affairs procedures for doing so were burdensome, much less that Easley was involved in such a process. Plaintiffs have failed to allege facts against Easley sufficient to defeat qualified immunity.

Defendant Livingston

As is the case with the other Individual Defendants, Plaintiffs cannot state an individual capacity claim against Defendant Livingston based on generalized allegations about his job responsibilities, or unspecified acts or omissions related to training and supervision.

In addition to their as-applied challenge to the College's policies, Plaintiffs also allege Livingston retaliated against them for exercising their First Amendment rights. To state a retaliation claim, Plaintiffs must allege (1) they were engaged in constitutionally protected activity, (2) Defendant Livingston caused them to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) Livingston's adverse actions were substantially motivated against Plaintiffs' exercise of constitutionally protected conduct. *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002). A First Amendment retaliation claim "requires some showing that the plaintiffs' exercise of free speech has been curtailed." *Id*. at 259. The Fifth Circuit recognizes that "some retaliatory actions -- even if they actually have the effect of chilling the plaintiff's speech -- are too trivial or minor to be actionable as a violation of the First Amendment." *Id*. at 258; *see also Boggs v. Krum Indep. Sch. Dist.*, 376 F. Supp. 3d 714, 725 (E.D. Tex. 2019) (holding "evidence of 'concrete' injuries may chill protected speech but non-concrete injuries or injuries that are relatively minor do not").

Plaintiffs allege Livingston told Brown to schedule YAL event with Defendant Magee, required him to meet with Livingston in his office, and instructed Moore and Strider to leave campus under threat of arrest. As discussed above, Plaintiffs have failed to allege an injury that would chill a person of ordinary firmness from engaging in their activities. Moreover, any "injury" Plaintiffs claim to have suffered is too "trivial or minor" to support a claim of retaliation. Finally, as discussed above, Plaintiffs lack standing to pursue claims for alleged injuries suffered by non-parties Moore and Strider.

Plaintiffs have failed to state individual capacity claims against Smith, Magee, Easley, and Livingston that are sufficient to defeat qualified immunity. Those claims should be dismissed.

3. Plaintiffs have failed to state a claim for compensatory damages.

Among other relief, Plaintiffs seek "[m]onetary damages in an amount to be determined by the Court to compensate Plaintiffs for Defendants' unconstitutional interference with their rights under the First and Fourteenth Amendments to the Constitution of the United States." Compl., at 33 (Prayer for Relief). Even if Plaintiffs ultimately prevail on their claims, mere proof of a violation of constitutional rights does not give rise to an award of compensatory damages. *See Ryland v. Shapiro*, 708 F.2d 967, 976 (5th Cir. 1983); *see also Carey v. Piphus*, 435 U.S. 247, 257, 267 (1978) (holding that, while nominal damages might be available, compensatory damages awards under § 1983 should be governed by the principle of compensation for actual loss).

Moreover, compensatory damages for emotional distress caused by an alleged deprivation of constitutional rights must "be supported by competent evidence concerning the injury." *Brady v. Fort Bend Cty.*, 145 F.3d 691, 718 (5th Cir. 1998) (*citing Carey*, 435 U.S. at 264 n.20). To justify emotional distress damages, the Fifth Circuit requires proof of a "specific discernable injury to the claimant's emotional state" and evidence of the "nature and extent" of the harm. *Brady*, 145 F.3d at 718 (*citing Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 938, 940 (5th Cir. 1996)). While the Fifth Circuit has held that conditions such as sleep loss, weight loss, marital problems, or depression may support an award of emotional distress damages, *see Giles v. GE*, 245 F.3d 474, 488 (5th Cir. 2001), it has also recognized that "'hurt feelings, anger and frustration are part of life' and are not the types of harm that c[an] support a mental anguish award." *Brady*, 145 F.3d at 718 (*citing Patterson*, 90 F.3d at 938). Conclusory statements that a plaintiff suffered emotional distress, such as a plaintiff's claim that he was "highly upset" after his

termination or that it was the "worst thing that has ever happened to me," do not qualify as evidence of demonstrable emotional distress. *Brady*, 145 F.3d at 719.

Plaintiffs have failed to allege they suffered any kind of compensable harm as the result of Defendants' alleged actions. Plaintiffs do not allege they were physically harmed or that any of their property was damaged. Brown does not allege Defendants arrested, prosecuted, expelled, suspended, or deprived him in any other way of the benefits of his tuition dollars or his educational pursuits at the College. Brown alleges he felt "intimidated" and "distressed" by Defendants' actions because he "felt that they inhibited his ability to recruit members for YAL." Compl., at ¶¶ 71, 115. He also alleges he experienced "emotional distress, humiliation, embarrassment, and injury to his reputation" because of Defendant Livingston's alleged acts. *Id*. at ¶ 150.

Brown's generalized allegation of "distress" due to Defendants' actions is, at best, tantamount to an allegation of the type of "hurt feelings, anger, and frustration" the Fifth Circuit has held is insufficient to sustain an award of emotional distress damages. Plaintiffs' claims for damages should be dismissed.

CONCLUSION

Plaintiffs' allegations, even if true, are insufficient to establish that they have standing to bring this action. Those allegations are also insufficient to defeat the Individual Defendants' qualified immunity. Finally, Plaintiffs have not pled facts sufficient to support an award of damages. The Court should dismiss their claims with prejudice or, in the alternative, dismiss their individual capacity claims and their claim for damages.

THIS, the 31st day of October, 2019.

Respectfully submitted,

JONES COUNTY JUNIOR COLLEGE; BOARD OF TRUSTEES OF JONES COUNTY JUNIOR COLLEGE; JESSE SMITH; MARK EASLEY; GWEN MAGEE; AND STAN LIVINGSTON

/s/ Paul B. Watkins, Jr.

J. CAL MAYO, JR. (MB NO. 8492)
PAUL B. WATKINS, JR. (MB NO. 102348)
ATTORNEYS FOR DEFENDANTS

OF COUNSEL:

MAYO MALLETTE PLLC
5 University Office Park
2094 Old Taylor Road
Post Office Box 1456
Oxford, Mississippi 38655
Tel: (662) 236-0055
Fax: (662) 236-0035
cmayo@mayomallette.com
pwatkins@mayomallette.com