Case No. 26-6052

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MEGAN HSIEH
Appellee/Plaintiff

v.

DAVID A. SURRATT, KALYN CAVAZOS, and TERRY SCHOFIELD
Appellants/Defendants

APPEAL FROM THE UNITED STATED DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
HONORABLE BERNARD M. JONES, DISTRICT JUDGE
Case No. CIV-2025-1160-J

APPELLEE'S BRIEF

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SUMMARY OF ARGUMENT

In *Counterman v. Colorado*, the Supreme Court clearly established that whenever government actors penalize someone for making true threats, the government "must show that the [speaker] consciously disregarded a substantial risk that his communications would be viewed as threatening violence"—i.e., government officials must establish that the speaker had a subjective *mens rea* of recklessness, which is in contrast to a mere objective negligence standard. 600 U.S. 66, 69, 79 & n.5 (2023). This burden on the government applies when "school administrators…discipline individuals who make true threats," and the subjective recklessness standard "can make all the difference in some cases," including when a "delusional speaker may lack awareness of the threatening nature of her speech." *Id.* at 120 (Barrett, J., dissenting).

In this lawsuit, Plaintiff has asserted that her statements do not constitute true threats [App. Vol. 1 at 38-39, 41; App. Vol 3 at 454-58]—which is not contested on this appeal[1]—but that even if her statements are considered to

[1] Defendants failed to secure a ruling and assign error on appeal to a failure to rule on whether Plaintiff's statements constituted true threats at all. Therefore, any argument by Defendants that Plaintiff's statements constituted true threats is deemed waived and not to be considered on appeal. *Richison v. Ernest Group, Inc.*, 634 F.3d 1123, 1127-28 (10th Cir. 2011). Thus, at issue in this appeal is only whether Plaintiff had a subjective reckless *mens rea* when making the statements, assuming they constitute threats. Even if this Court were to rule in Defendants' favor on the *mens rea* issue, Defendants could still be denied qualified immunity for punishing Plaintiff for statements which did not constitute true threats—indeed,

constitute true threats, Defendants failed to establish that she had a reckless *mens rea* as required by the First Amendment under *Counterman*. [App. Vol. 1 at 39-41; App. Vol 3 at 458-63]. Rather, Defendants proved the opposite, as the University Hearing Panel's decision letter stated that the "panel finds that the testimony and documentary evidence showed that [Plaintiff] *was in an emotional crisis*, and she was using the tools available to her to stay safe." [App. Vol. 1 at 33-34]. Additionally, Plaintiff explicitly alleged that she did not have a reckless *mens rea*. [App. Vol. 1 at 40-41].

On a Motion to Dismiss where all of Plaintiff's allegations are taken as true, Defendants cannot disprove Plaintiff's allegations about her own subjective mental state, even if Defendants may dispute that later in the litigation and even if a court incorrectly thinks that Plaintiff's allegations are improbable or that recovery is remote and unlikely. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). Plaintiff needs to plead "only enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. Plaintiff's allegations that she lacked a reckless *mens rea* and yet was still punished for her confidential statements while seeking help from a 988 Suicide and Crisis Lifeline counselor during an emotional crisis establishes a First Amendment violation, satisfying the first prong of the qualified immunity

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prior to punishing Plaintiff, even Defendant Schofield correctly stated that Plaintiff's statements were "*not…a threat…*, *it's free speech*." [App. Vol. 1 at 15-16 (emphasis added)].

analysis. And the requirement for all government actors, which includes Defendants, to establish that a speaker had a reckless *mens rea* when expressing a true threat prior to penalizing the speaker had been clearly established by *Counterman*, satisfying the second prong. Therefore, Plaintiff has alleged a First Amendment violation which was clearly established at the time of Defendants' actions, and the district court's findings on that and denial of qualified immunity should be affirmed.

Defendants argue a novel theory without any authority that the First Amendment somehow applies different standards of protection for the same speech based on whether the government categorizes the penalty or proceeding as civil or criminal, and therefore Defendants claim that the reckless *mens rea* standard from *Counterman* only applies to criminal cases. But that is simply incorrect, because the First Amendment does not apply differing standards for the same speech. *Counterman*, 600 U.S. at 76 (for incitement, "the First Amendment precludes punishment, whether civil or criminal, unless" there is intent); *id.* at 80 (for defamation, the "recklessness rule," which is the same required of true threats, is "applicable in both civil and criminal contexts").

Defendants also raise an entirely new defense and argument, which they never raised in the district court prior to this appeal: that their punishment of Plaintiff was justified based on an alleged "disruption" caused by her speech under

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969). Not once prior to this appeal did Defendants ever claim that they were punishing Plaintiff for any disruption caused by her speech, nor did Defendants ever cite *Tinker* or any other related disruption case. Defendants' justification has always solely been that Plaintiff's speech constituted true threats and therefore was not protected speech and could be punished. Defendants have thus waived and/or forfeited any justification based on a disruption under *Tinker* and cannot now raise that "*post hoc* in response to litigation" or for the first time on appeal. *See Kennedy v. Bremerton Sch. Dist.*, 142 S.Ct. 2407, 2432 n.8 (2022) (refusing to address a school's alternative justification for adverse action against its football coach based on an alleged disruption under *Tinker* because "the [School] District never raised concerns along these lines in its contemporaneous correspondence with [plaintiff]," and "[g]overnment justifications for interfering with First Amendment rights must be genuine, not hypothesized or invented *post hoc* in response to litigation").

Even if Defendants could raise this *Tinker* disruption argument, the U.S. Supreme Court has made clear that *Tinker*'s substantial disruption doctrine as a grounds for penalizing or restricting *speech* (being distinct from disruption as a grounds for penalizing or restricting *conduct*) does not apply to colleges and universities:

> the precedents of this Court leave no room for the view that, because of the acknowledged need for order, 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) (emphasis added).

Tinker's substantial disruption doctrine as to speech does not apply to universities because under the principle of *in loco parentis*, *Tinker* allows primary and secondary schools to essentially surrender to a hecklers' veto by minor students and prohibit what is otherwise *protected speech*. *Mahanoy Area Sch. Dist. v. B.L.*, 141 S.Ct. 2038, 2044-45, 2047 (2021). But *Tinker*'s substantial disruption doctrine is not for true threats, because true threats are not protected speech and no material or substantial disruption is needed for a school to restrict and penalize unprotected speech.

Defendants claim that it is unclear which framework to apply; but it is simple and straightforward. If a school punishes a student for making true threats (unprotected speech), then officials must establish that the student had a reckless *mens rea* in making the threats as required by *Counterman*. But if a school punishes a student for protected speech, then officials must establish that the speech caused or was reasonably expected to cause a material disruption to classwork or substantial disorder (but this is not an option for university officials). Even if a disruption justification was not waived and/or forfeited by Defendants and applied to universities, on this record and Motion to Dismiss—viewing all reasonable inferences in Plaintiff's favor, *Lucas v. Turn Key Clinics, LLC*, 58 F.4th

1127, 1136 (10th Cir. 2023)— there are no grounds for finding that Plaintiff's speech "*materially* disrupt[ed] *classwork* or involve[d] *substantial disorder*." *Tinker*, 393 U.S. at 513 (emphasis added).

Thus, in order to punish Plaintiff for making alleged threats, it was clearly established that Defendants must show that Plaintiff had a subjective reckless *mens rea* when making the statements. Plaintiff has alleged that Defendants failed to do so and therefore violated her First Amendment rights, for which Defendants are not entitled to qualified immunity.

ARGUMENT

I. Standard of Review

Defendants' appeal arises from the denial of qualified immunity in their Motion to Dismiss. [App. Vol. 3 at 632, 666]. While motions to dismiss based on qualified immunity are reviewed *de novo*, "all well-pleaded allegations in the complaint must be accepted as true and viewed in the light most favorable to the plaintiff." *Luethje v. Kyle*, 131 F.4th 1179, 1187 (10th Cir. 2025). Thus, "asserting a qualified immunity defense via a Rule 12(b)(6) motion subjects the defendant to a more challenging standard of review…because the court analyzes only the defendant's conduct as alleged in the complaint," *id.* (cleaned up), and the court "liberally construe[s] the pleadings," *Lucas*, 58 F.4th at 1136.

Defendants incorrectly claim throughout their Brief that Plaintiff must establish a First Amendment violation and her lack of a reckless *mens rea* "as a matter of law." [Appellants' Br. at 21, 24, 26]. But that is *not* the standard. Rather, to survive a motion to dismiss, Plaintiff needs to plead "only enough facts to state a claim to relief that is plausible on its face," *Twombly*, 550 U.S. at 570, or to merely "allege facts sufficient to show the defendant plausibly violated his or her constitutional rights." *Matthews v. Bergdorf*, 889 F.3d 1136, 1144 n.2 (10th Cir. 2018).

II. Plaintiff has sufficiently alleged a clearly established First Amendment right which each Defendant violated by retaliating against and punishing her based upon her speech while seeking help from a mental health counselor.

a. *Counterman* applies to all situations—civil and criminal—where a government actor penalizes a speaker for making true threats.

In *Counterman*, the U.S. Supreme Court held that in order to penalize someone based on threatening speech, government officials "must show that the [speaker] consciously disregarded a substantial risk that his communications would be viewed as threatening violence"—i.e., government officials must establish that the speaker had a subjective *mens rea* of recklessness, which is in contrast to a mere objective negligence standard. 600 U.S. at 69, 79 & n.5.

There is nothing to indicate or suggest that *Counterman*'s holding is somehow confined and only applicable to criminal prosecutions simply because

Counterman happened to be a criminal case. Rather, it is clear from the analysis and statements in *Counterman* itself that the same reckless *mens rea* standard required to penalize true threats applies in both criminal and civil contexts and that the First Amendment does not apply differing standards for the same type of speech based on whether the proceeding or penalty is criminal or civil. As the Court explained in *Counterman*, for incitement, "the First Amendment precludes punishment, whether civil or criminal, unless" there is intent. *Id.* at 76. And the Court likewise explained that, for defamation, the "recklessness rule"—which is the same standard required to penalize someone for true threats—is "applicable in both civil and criminal contexts." *Id.* at 80.

Defendants claim that "[*m*]ens *rea* is inherently a criminal concept." [Appellants' Br. at 15 n.2]. But that completely ignores the fact that the Supreme Court has explicitly applied the same *mens rea* standards in civil cases, as just stated above. Defendants also claim without any authority that "criminal punishment demands heightened culpability." [*Id*. at 15]. But Defendants are apparently mistaking culpability with a heightened burden of proof beyond a reasonable doubt as a safeguard of due process to reduce risk of error when one's liberty is at stake. *See*, *e.g.*, *Addington v. Texas*, 441 U.S. 418, 423-24 (1979). Either way, Defendants' argument here likewise ignores the fact that the Supreme Court has explicitly applied the same *mens rea* standards in both criminal and civil

cases. Having the same culpability standard makes sense because the purpose is to prevent a chilling effect. *Counterman*, 600 U.S. at 75. And there is little if any less chilling effect on speech arising from a criminal punishment as from a civil punishment which ruins someone's career for the rest of their life, as Defendants' have imposed upon Plaintiff here.

Further, when the Supreme Court wants to differentiate between criminal and civil standards or confine the scope of its holdings, it clearly and expressly says so. In *Addington*, for example, the Court made clear that due process requires different standards of proof between criminal cases and civil cases. 441 U.S. at 428, 432 ("the 'beyond a reasonable doubt' standard historically has been reserved for criminal cases" and is a "unique standard of proof" and therefore "we should hesitate to apply it too broadly or casually in noncriminal cases"); *see also*, *e.g.*, *Williams v. Reed*, 145 S.Ct. 465, 468, 470, 473 (2025) ("On that narrow ground, we reverse;" "this narrow category of § 1983 claims;" "as we have emphasized, our opinion today is narrow"). There is no such language in *Counterman* claiming that its holding is narrow or limited and only applies to criminal prosecutions.

If the Court had intended to so limit *Counterman*, then the majority certainly would have said so and clarified in response to Justice Barrett's dissent, which correctly acknowledged that "this case [*Counterman*] is about the scope of the First Amendment…. Accordingly, the Court's holding affects the *civil* consequences for

true threats just as much as it restricts criminal liability." 600 U.S. at 118-19 (Barrett, J., dissenting) (emphasis in original). Justice Barrett went on to explain the obvious consequences and impact of the Court's holding by stating that the burden on the government to establish and prove that a speaker had a subjective reckless *mens rea* applies when "school administrators…discipline individuals who make true threats"—just like the situation in the case here—and that "can make all the difference in some cases," including when a "delusional speaker may lack awareness of the threatening nature of her speech." *Id.* at 120 (Barrett, J., dissenting).

Defendants state that "a dissent joined by one other Justice cannot clearly establish the law" and that the dissent somehow "proves the question was contested rather than resolved." [Appellants' Br. at 37]. The dissent does not clearly establish the law—the Court's opinion does—but the dissent (and the lack of any disagreement from the majority on the point) acknowledges and further proves the obvious impact of the Court's decision: that the *mens rea* standard applies to all types of situations, including school discipline. The dissent therefore adds even more clarity that Plaintiff's right was clearly established.

Additionally, Justice Sotomayor later stated that *Counterman*'s holding applied to a negligence claim for personal injury caused by a third party in a civil case brought by a police officer against a protest leader. *Mckesson v. Doe*, 144

S.Ct. 913, 913 (2024) (mem.) (statement of Sotomayor, J., respecting the denial of certiorari). Justice Sotomayor explained that in *Counterman* the Court "*made clear that the First Amendment bars the use of 'an objective standard' like negligence for punishing speech*." *Id.* at 914 (citing *Counterman*, 600 U.S. at 78, 79, n.5) (emphasis added). Despite this, Defendants claim Justice Sotomayor's statement somehow indicates the exact opposite—that this was not "made clear" by *Counterman*. [Appellants' Br. at 35-36]. But Justice Sotomayor expresses no doubt about the application of *Counterman*'s standard outside of the criminal context and even outside of a true threats case.

Defendants further state that the Fifth Circuit on remand "concluded that *Counterman* does not apply" despite Justice Sotomayor's statement. [Appellants' Br. at 34, 36 n.5]. But *Mckesson* does not involve true threats, and instead deals with conduct resulting from incitement. Therefore, the Fifth Circuit focused on the even higher *mens rea* standard of intent, which is required for incitement, and pointed to *Counterman* for support:

> *Counterman* held that a speaker can be held *civilly* accountable for his speech *if* his "words were '*intended*' (not just likely) to produce imminent disorder." A jury can find that a protest leader who directs protestors to "interfere with traffic upon the public streets" *intends* to produce disorder because blocking a road represents an "immediate threat to public safety, peace, or order."

Ford v. McKesson, 171 F.4th 332, 343 (5th Cir. 2026) (emphasis added); *see also id.* at 353 (King, J., dissenting) (noting that "[o]f these [unprotected speech]

categories, the closest one to the facts at hand would be incitement," and therefore asking what Mckesson "intended" with his speech). Since the Fifth Circuit applies the highest subjective intent *mens rea* standard for Mckesson's speech, there is little if any risk of its decision running contrary to *Counterman*'s bar against an objective negligence standard, even if it then applies a negligence standard to the foreseeability of the resulting *conduct* caused by the inciting speech. Therefore, the Fifth Circuit held that under its "rule of orderliness," *Counterman* was not ultimately dispositive of the case and did not "nullif[y] this court's prior decision" earlier in the case. *Id.* at 342. Nothing about that ruling indicates *Counterman* does not apply to true threats in a civil context.

Defendants also point to several other cases which never reached a ruling on *Counterman*'s application. [Appellants' Br. at 33-36]. Defendants seem to imply that a lack of a ruling in those cases (many of which do not even involve true threats) somehow indicates that *Counterman* does not apply outside the criminal context.

But several courts, including this Circuit, have applied *Counterman*'s *mens rea* standard to civil cases. *See*, *e.g.*, *Czajkowski v. Richardson*, No. 24-1064, 2024 U.S. App. LEXIS 27067, at *7 (10th Cir. Oct 25, 2024) (per curiam) (unpublished) (dismissing civil case as a sanction for threats, and noting plaintiff made no claim that he lacked subjective awareness as required under *Counterman*); *de Laire v.*

Voris, No. 21-CV-131-JL, 2023 WL 5096150, at *1, *6 (D.N.H. Aug. 9, 2023) (applying *Counterman* to civil defamation); *Cider Riot, LLC v. Patriot Prayer USA, LLC*, 544 P.3d 363, 370 (Or. Ct. App. 2024) (holding in a civil case that *Counterman* "unequivocally rejected a negligence standard for the imposition of liability arising out of speech"); *Kindschy v. Aish*, 8 N.W.3d 1, 8 (Wis. 2024) (holding that "*Counterman* applies to civil harassment injunctions premised on true threats").

Even one of the cases Defendants cite applies *Counterman* to a civil school matter. [Appellants' Br. at 34]. In *Leroy v. Livingston Manor Central School District*, the Second Circuit held that the student's speech was protected and considered the student's subjective intent and understanding, quoting *Counterman* to explain that courts are "to avoid…a chilling effect, even when doing so 'shield[s] some otherwise proscribable' speech." 158 F.4th 414, 427-28 (2d Cir. 2025). The concurrence further explained that "to avoid overstepping the limits on their power…, [schools] may only regulate speech made with some degree of…'culpable mental state,'" *Id.* at 431 (Pérez, J., concurring) (quoting *Counterman*, 600 U.S. at 75).

Therefore, Plaintiff's First Amendment right was violated when Defendants retaliated and punished her for making alleged true threats when she lacked a reckless *mens rea*, which Defendants failed to prove. Without any statement or

principle limiting *Counterman*'s holding to criminal prosecutions, and there being instead statements and principles clearly showing that *Counterman*'s holding was not limited to criminal prosecutions, Defendants had no excuse, reason, or grounds to wrongly assume that *Counterman* was so limited and would not apply to taking disciplinary action against Plaintiff. Acting on such an assumption would be "plainly incompetent." *See Luethje*, 131 F.4th at 1187.

b. Plaintiff's right not to be punished for alleged true threats without a reckless *mens rea* was clearly established.

i. A right does not require an identical case directly on point to be clearly established.

Government actors are not entitled to qualified immunity if "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *District of Columbia* v. *Wesby*, 583 U.S. 48, 62–63 (2018). As this Circuit has explained concerning the second prong:

> A right is clearly established when a Supreme Court or Tenth Circuit decision is on point…. The relevant precedent is considered on point if it involves materially similar conduct or applies with obvious clarity to the conduct at issue. A case directly on point is not necessary if existing precedent has placed the statutory or constitutional question beyond debate. Thus, general statements of the law can clearly establish a right for qualified immunity purposes if they apply with obvious clarity to the specific conduct in question. As such, [the court's] analysis is not a scavenger hunt for prior cases with precisely the same facts, and a prior case need not be exactly parallel to the conduct here for the officials to have been on notice of clearly established law.

Luethje, 131 F.4th at 1187 (cleaned up).

Therefore, requiring a precedent on point to clearly establish a right "is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Anderson* v. *Creighton*, 483 U. S. 635, 640 (1987). It does "not require a case *directly* on point" for a law to be clearly established. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (emphasis added). As such, the outward attributes of a case before a court do not have to be "fundamentally similar" or "materially similar" to those in previous precedents. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Government officials "can still be on notice that their conduct violates established law *even in novel factual circumstances*" when "general statements of the law" provide fair warning and "may apply with obvious clarity to the specific conduct in question." *Id*. (emphasis added). For this reason, a court's "rigid, overreliance on factual similarity" to deny qualified immunity is improper. *Id*. at 742.

For example, in *Taylor v. Riojas*, the Supreme Court summarily reversed the Fifth Circuit for its unduly narrow view of the clearly established inquiry in a case involving unconstitutional prison conditions. 141 S.Ct. 52, 53-54 (2020) (per curiam). The Court was untroubled by the absence of a prior case establishing that the specific conditions at issue in *Taylor* were unconstitutional. *Id*. Instead, the "obviousness of Taylor's right" was apparent from the "general constitutional rule"

barring deliberate indifference under the Eighth Amendment. *Id*. at 53-54 & n.2 (quoting *Hope*, 536 U.S. at 741).

Similarly, this Circuit held that a First Amendment right to film police in public was clearly established "beyond debate," even though neither the U.S. Supreme Court nor this Circuit itself had formally recognized such a constitutional right, and this Circuit therefore denied qualified immunity to a police officer who had obstructed a civilian's recording. *Irizarry v. Yehia*, 38 F.4th 1282, 1288, 1293-95 (10th Cir. 2022). And in this case, the U.S. Supreme Court has formally recognized the constitutional right which Plaintiff asserts.

Defendants argue that Plaintiff's right in this case was not clearly established by pointing to cases involving excessive force claims, like *Sanchez v. Guzman*, 105 F.4th 1285 (10th Cir. 2024). But Defendants fail to recognize that while "specificity is especially important in the Fourth Amendment context, where it is sometimes difficult for an officer to determine how the relevant legal doctrine, [such as] excessive force, will apply to the factual situation the officer confronts," *Packard v. Budaj*, 86 F.4th 859, 868 (10th Cir. 2023) (internal quotation marks omitted), such specificity is less important in the First Amendment context here. More specificity is needed in the Fourth Amendment context due to "the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is

necessary in a particular situation," *id.* at 866, but such circumstances are not involved in First Amendment cases like the one here.

In this case, Defendant Schofield and Cavazos did not respond to 988's reports of Plaintiff's alleged threats on April 27th until four days later on May 1st, and Plaintiff had been on campus without any concern or incident during that time. [App. Vol. 1 at 28-29]. Over a month later, the University's disciplinary panel hearing was held on June 4th. [*Id.* at 25]. At the disciplinary panel hearing, Defendant Cavazos had the assistance and representation of University deputy general counsel, and the Hearing Panel had its own University senior attorney as an advisor. [App. Vol. 2 at 214-16]. Several days later, the Hearing Panel issued its decision on June 7th. [App. Vol. 1 at 33]. Several weeks later, the appeal from the Hearing Panel's decision was decided by Defendant Surratt on June 28th. [*Id.* at 34-35; App. Vol. 2 at 400-02]. Two months later, the same deputy general counsel for Defendant Cavazos was still negotiating with Plaintiff's attorney and was informed of the First Amendment concerns with the University's discipline of Plaintiff in light of *Counterman* [App. Vol. 3 at 599-601]—even though all government officials are expected to already know and follow clearly established law, especially when they apply a rule or policy prohibiting threats and punish a person based on her speech, despite what Defendants imply by their statements that they were not informed of the First Amendment requirements [Appellants' Br. at 9, 29,

47], which their own attorneys should have informed them of if Defendants were unaware. Thus, despite Defendants characterizing themselves as having to "react quickly and decisively to address a threat of physical violence" [Appellants' Br. at 40-41], the district court was correct in stating that "*Sanchez* does not create a bright line rule that Supreme Court precedent cannot clearly establish the law—particularly where, as is the case here, the violation is *not the product of a split-second decision*." [App. Vol. 3 at 648 n.9 (emphasis added)].

And even in the Fourth Amendment split-second decision context, "[plaintiffs] need not present 'a case precisely on point.'" *Budaj*, 86 F.4th at 868-69. In *Budaj*, the defendant police officers argued that the "framework" used in the analysis by the courts was "ill-suited" for their situation and a "practical impossibility" to apply. *Id.* at 867. While this Circuit acknowledged that "[i]t is true, as the Defendants contend, neither [precedent] present facts identical to those here," this Circuit found that the "factual difference is of little import under the circumstances" and that the law had been clearly established. *Id.* at 869-70; *see also Luethje v. Kyle*, 131 F.4th 1179 (10th Cir. 2025) (affirming denial of qualified immunity in excessive force case); *Epps v. Christian*, 173 F.4th 1236 (10th Cir. 2026) (same).

Defendants claim that the Supreme Court's recent decision in *Zorn v. Linton* requires a high degree of specificity even "outside the split-second setting."

[Appellants' Br. at 43-44]. But that is an incorrect characterization. *Zorn* involved 29 protestors staging a sit-in with their arms interlocked at a state capitol building after it had closed at night. 146 S.Ct. 926, 928-29 (2026) (per curiam). After police warned the protestors they would be arrested for trespassing, some still resisted and "refused to stand and had to be lifted to their feet or dragged out." *Id.* at 929. Police having to figure out how much force they can use in order to clear a large crowd of resistant protestors from a state capitol building to ensure safety falls squarely within "split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary." Thus, the Court's finding in *Zorn* that a right not to be subjected to the force used in that particular case was not clearly established has no bearing on Plaintiff's First Amendment claim here.

ii. *Counterman* is on point and/or applies with obvious clarity to clearly establish that Defendants must have proven that Plaintiff had a reckless *mens rea* to penalize her for alleged true threats.

Over fifty years ago, the Supreme Court made clear that "state colleges and universities are not enclaves immune from the sweep of the First Amendment," explaining that

> the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses *than in the community at large*.

Healy, 408 U.S. at 180 (1972) (emphasis added). The next year, the Court again held that "the First Amendment leaves no room for the operation of a *dual standard* in the [state university] academic community with respect to the content of speech." *Papish v. Board of Curators of University of Missouri*, 410 U.S. 667, 671 (1973) (per curiam) (emphasis added). Therefore, whatever First Amendment protections for the freedom of speech apply "in the community at large" also apply with equal force on college campuses because there is no "dual standard" between the two.

Because the *mens rea* standard from *Counterman* protects the speech of those in the community at large who do not recklessly or intentionally express true threats, *Counterman* protects the same speech of public university students, like Plaintiff, on campus from university discipline. Plaintiff does not claim a vague right generally under the First Amendment's Free Speech Clause. Rather, Plaintiff claims the specific right and protection set forth in *Counterman* that government officials "must show that the [speaker] consciously disregarded a substantial risk that his communications would be viewed as threatening violence"—i.e., government officials must establish that the speaker had a subjective *mens rea* of recklessness, which is in contrast to a mere objective negligence standard. 600 U.S. at 69, 79 & n.5.

The Supreme Court's decision in *Counterman* is "on point" because "it involves materially similar conduct or applies with obvious clarity to the conduct at issue" here. *Luethje*, 131 F.4th at 1187. Counterman was punished for making alleged true threats. Plaintiff was also punished for making alleged true threats. The First Amendment required Counterman to have a reckless *mens rea* to be punished. There is no question or doubt that same constitutional right and protection applies with equal force to Plaintiff.

Additionally and/or alternatively, the "general statements of the law" in *Counterman* "clearly establish [Plaintiff's] right" because "they apply with obvious clarity to the specific conduct in question" here. *Luethje*, 131 F.4th at 1187. Thus, *Counterman* "has placed the statutory or constitutional question beyond debate" that Plaintiff must have a reckless *mens rea* to be punished for any alleged true threats. *Id*. As such, Defendants were "on notice that their conduct violate[d] established law *even in novel factual circumstances*" because *Counterman* provided them with fair warning and "appl[ied] with obvious clarity to the specific conduct in question" here. *Hope*, 536 U.S. at 741 (emphasis added).

This is not complicated or confusing, nor is it a "close case" as Defendants claim the district court characterized it [Appellants' Br. at 12, 41]. It is unclear what part of the First Amendment claim the district court considered to constitute a "close case" [App. Vol. 3 at 645, 659], yet Defendants assume the district court

was referring to whether Plaintiff's right was clearly established. Either way, Defendants cite no authority for how such a comment indicates that they have qualified immunity despite the district court finding they do not. And even if the district court was referring to this part as being a "close case," that could simply be because Plaintiff's asserted right could be even more clearly established such as if there had been a prior Supreme Court case explicitly ruling that the standard from *Counterman* applies to all university students who are civilly disciplined for making true threats, having "precisely the same facts" and "be[ing] exactly parallel to the conduct here"—but such specificity is not required for Plaintiff's right to be clearly established. *Luethje*, 131 F.4th at 1187. The right is sufficiently clear for a reasonable official to have understood that punishing someone, like Plaintiff, for true threats without establishing that she had a reckless *mens rea* violated the First Amendment. It would be "plainly incompetent" for any official to act otherwise.

Defendants, however, claim that they "acted on [a]…chain of professional assessments…, each of which independently flagged the statements as concerning. Officials acting on that basis had, at minimum, a plausible justification for their response, and that is enough to defeat obvious clarity." [Appellants' Br. at 45]. Defendants cite to this Circuit's decision in *Colbruno v. Kessler* for support and claim it stands for a principle that the "existence of plausible legitimate purpose creates 'relevant ambiguity' foreclosing obvious clarity." [*Id.*]. But *Colbruno*

denied qualified immunity and recognized that "not every constitutional violation has factual antecedents," and thus it is proper for courts to "rely on the general proposition that it would be 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted even though existing precedent does not address similar circumstances.'" 928 F.3d 1155, 1165 (10th Cir. 2019). The court then cautioned to "be careful not to [rely on that general proposition] when there are any relevant ambiguities, *such as whether physical force is justified* for a particular purpose or in a particular context," and gave examples of excessive force cases. *Id.* (emphasis added). That is inapposite here, and Defendants once again fail to appreciate the distinction between First Amendment cases, like this one, and the need for more specificity in Fourth Amendment excessive force cases. Additionally, *Counterman* is also "on point," so there are no such "relevant ambiguities" here.

Defendants also cite to this Circuit's decision in *Lowe v. Raemisch*, which likewise acknowledged that "[e]ven when no precedent involves facts 'materially similar' to ours, the right can be clearly established if a precedent applies with 'obvious clarity.'" 864 F.3d 1205, 1210 (10th Cir. 2017). But the court simply found that a prisoner's right to outdoor exercise was not clearly established. *Id.* at 1212. As with *Colbruno*, that is inapposite here.

Defendants thus provide no authority for their asserted principle that third-parties flagging statements "as concerning" somehow gives them qualified immunity or negates the clearly established right for their particular situation. The Supreme Court addressed and rejected this excuse in *Counterman*:

> the First Amendment may still demand a subjective mental-state requirement shielding some true threats from liability. … Such a requirement comes at a cost: It will shield some otherwise proscribable (here, threatening) speech because the State cannot prove what the [speaker] thought. But the added element reduces the prospect of chilling fully protected expression.

600 U.S. at 75.

Requiring Defendants to have had established that Plaintiff had a reckless *mens rea* before punishing her with formal discipline does not necessarily mean that Defendants or other school officials could not have responded at all to reports of her allegedly "concerning" statements. Perhaps Defendants could have taken temporary safety measures, such as restricting Plaintiff from campus until they could clarify with Plaintiff and 988 exactly what she said and assess if Plaintiff posed any actual risk or threat, and then implemented any other necessary safety precautions for Plaintiff's return to campus. That would have been the common-sense approach and might have still complied with the First Amendment.

For example, in *Lavine v. Blaine School Dist.*, the Ninth Circuit upheld the temporary removal of a student from high school based upon what the school perceived to be an implied threat of violent harm until the school determined that

the student was not a threat. 257 F.3d 981, 983, 986 (9th Cir. 2001). But the court still found that the school violated the First Amendment by placing and maintaining negative documentation of the incident in the student's record because the "school need not permanently blemish [the student's] record and harm his ability to secure future employment" after the perceived threat had subsided and the student returned to classes. *Id.* at 992.

iii. Plaintiff has plausibly alleged a claim that each Defendant violated her clearly established right by not having proven that she had a reckless *mens rea* when making the statements she was punished for.

Plaintiff has alleged that even if her statements are considered to constitute true threats, Defendants failed to establish that she had a reckless *mens rea* as required by the First Amendment under *Counterman*. [App. Vol. 1 at 39-41; App. Vol 3 at 458-63]. Plaintiff explicitly alleged that she did not have a reckless *mens rea*. [App. Vol. 1 at 40-41].

On a Motion to Dismiss, the "allegations in the complaint must be accepted as true and viewed in the light most favorable to the plaintiff." *Luethje*, 131 F.4th at 1187. Thus, Defendants cannot disprove Plaintiff's allegations about her own subjective mental state, even if Defendants may dispute that later in the litigation and even if a court incorrectly thinks that Plaintiff's allegations are improbable or that recovery is remote and unlikely. *Twombly*, 550 U.S. at 555-56. Plaintiff needs to plead "only enough facts to state a claim to relief that is plausible on its face."

Id. at 570. Plaintiff's allegations that she lacked a reckless *mens rea* and yet was still punished for her confidential statements while seeking help from a 988 Suicide and Crisis Lifeline counselor during an emotional crisis establishes a First Amendment violation under *Counterman*.

Additionally, *Counterman* made clear that the burden of proof is on the government to show the speaker's reckless mental state: "*the State must prove* in true threats cases that the defendant had some understanding of his statements' threatening character." 600 U.S. at 73 (emphasis added). Specifically, "[*t*]*he State must show* that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence." *Id.* at 69 (emphasis added). Thus, the lack of a reckless *mens rea* is not something which must be raised or proven by the speaker, but it is an element which must be established *by the government* at or before the time of punishment, not afterwards in response to litigation, as the "[g]overnment justifications for interfering with First Amendment rights must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Kennedy*, 142 S.Ct. at 2432 n.8 (cleaned up).

Rather than establishing that Plaintiff had a reckless *mens rea*, the University established the opposite and its Hearing Panel stated in its decision letter that the "panel finds that the testimony and documentary evidence showed that [Plaintiff] *was in an emotional crisis*, and she was using the tools available to her to stay

safe." [App. Vol. 1 at 33-34 (emphasis added)]. Indeed, because of Plaintiff's undisputed mental health crisis, she was obviously not thinking clearly and lacked awareness of any threatening nature of her speech. Plaintiff testified to the Hearing Panel and explained that she was having a "mental breakdown," "panic attacks," "thoughts of wanting to hurt [her]self and a lot of frustration with the school at the time." [*Id.* at 31]. Yet, even then, Plaintiff made clear in both calls with 988 that she had no plan, no intent or means of harm, but was just frustrated and was not going to harm anyone. [*Id.* at 31, 40]. Plaintiff also testified to explain the non-threatening meaning she intended and meant to convey in her statements to 988. [*Id.* at 31-33].

Even if Defendants thought Plaintiff was no longer in a mental health crisis during the phone call from 988 to her on May 1st under the direction of Defendant Schofield, Plaintiff made clear at the panel hearing that she was answering the 988 counselor's questions about what happened four days earlier on April 27th, and not her current feelings or thoughts, which is confirmed by the 988 call transcript, and Plaintiff also explained what she intended and understood her statements to mean. [*Id.* at 11-12, 32-33]. Thus, even if any of Plaintiff's statements are considered to be true threats, she has plausibly alleged that she had no subjective awareness and did not consciously disregard a substantial risk that her communications would be viewed as threatening violence.

Defendants assert that, despite all of the facts in the record to be construed in the light most favorable to the Plaintiff, Plaintiff "satisfies *Counterman's* threshold" for a reckless *mens rea* "[a]s a matter of law" simply because of her acknowledgement to a 988 counselor on May 1st that she had experienced "harmful thoughts" back on April 27th and her understanding of the duty-to-warn framework. [Appellants' Br. at 22-23].

But Plaintiff's comment to 988 does not indicate a reckless *mens rea*. She testified that on April 27th, she was having a "mental breakdown," "panic attacks," "thoughts of wanting to hurt [her]self and a lot of frustration with the school at the time." [App. Vol. 1 at 31]. Simply acknowledging on May 1st that she had "harmful thoughts" during a past emotional crisis does not indicate that her statements were true threats or that she consciously disregarded a substantial risk that her communications would be viewed as threatening violence. "True threats" are "serious *expressions*"—not thoughts—"*conveying* that a speaker means to commit an act of unlawful violence." *Counterman*, 600 U.S. at 74 (cleaned up) (emphasis added). Even if those thoughts are expressed, a person can still state their "harmful thoughts" to a counselor without seriously "conveying that [she] means to commit an act of unlawful violence" and/or without having any subjective awareness that those statements might be misinterpreted as threats. And having "harmful thoughts" of wishing someone was dead, as 988 claimed Plaintiff did [App. Vol. 1

at 26], is not a threat to commit an act of unlawful violence. Even Defendant Schofield understood and acknowledged that, as he stated: "saying [']I wish someone was dead,['] even though that is ugly and not right to say, it's not…a threat…it's not hate speech, it's free speech" [*Id.* ¶ 16].

Thus, Plaintiff's acknowledgement to 988 on May 1st that she had "harmful thoughts" during her previous call on April 27th does nothing to indicate or establish a reckless *mens rea*. Even the University's Hearing Panel, which knew that 988 had reported to Schofield that Plaintiff had "thoughts of harm" [*Id.* at 27], still concluded that the "panel did not find compelling evidence to believe that [Plaintiff] used the word 'kill' *or implied the word 'kill' at any time*," and the panel never indicated that Plaintiff expressed any threat, yet Defendants still punished her [*Id*. at 33-34 (emphasis added)].

Defendants incorrectly claim that Plaintiff argues she did not have a reckless *mens rea* simply because she expected the 988 calls to be confidential. [Appellants' Br. 24-26]. Rather, Plaintiff argues that she never expected her statements to be reported by 988 *because* Plaintiff had no subjective awareness which she consciously ignored of any risk that her statements would be mistakenly perceived as threatening, and *because* her statements did not constitute threats in the first place. As Defendants acknowledge:

> a medical student who calls 988 merely to discuss feelings of sadness or academic stress has not "consciously disregarded" anything, because those statements carry no objectively threatening character.

[*Id*. at 24]. Because Plaintiff did not think her statements carried any threatening character, she did not have a reckless *mens rea*.

Defendants then distort *Counterman* to essentially apply an objective standard for punishing a speaker for threats based on the views of others rather than the speaker's own subjective understanding. [*Id*. at 25]. Defendants cite pre-*Counterman* cases from the Fifth and Eighth Circuits, claiming that courts are to assess "threatening speech based on its *objective* capacity to convey a risk of school violence," and that "*listener reactions* to threatening student speech confirm its character," further claiming that "*Counterman* adopted a recklessness formulation consistent with this principle." But *Counterman* explicitly "rejected" any such objective standard, explaining that would constitute a negligence *mens rea* and that

> [a] person acts negligently if he is not but should be aware of a substantial risk—here, that others will understand his words as threats. That makes liability depend not on what the speaker thinks, but instead on what a reasonable person would think about whether his statements are threatening in nature.

600 U.S. at 79 & n.5. Justice Sotomayor emphasized this further when she later wrote in her statement that in *Counterman* the Court "made clear that the First Amendment bars the use of 'an objective standard' like negligence for punishing

speech." *Mckesson*, 144 S.Ct. at 914 (statement of Sotomayor, J., respecting the denial of certiorari). Despite the Supreme Court's explicit rejection of such an objective/negligence standard, Defendants still present arguments on those grounds.

Because Plaintiff did not have any personal subjective awareness that her statements would be perceived as threats to others, she had no expectation or awareness that her statements would be reported by 988 under any alleged duty to warn (and again, as part of her First Amendment claim, Plaintiff disputes that any of her statements constitute true threats, which Defendants did not raise in this appeal). Plaintiff testified at the panel hearing of an example of what constituted a duty to report "when somebody was grudgingly brought in and said that he was going to shoot his roommate at 5:00 p.m. tomorrow when he came home from work with his gun." [App. Vol. 2 at 353].

Plaintiff's statements to 988 were in stark contrast to that, as she did not say she was "going to" harm anyone at any specific time or location, nor in any specific way or with any specific means; and she clarified that she had no intent or means to harm anyone. So, clearly, Plaintiff would not have expected her statements to trigger a duty to warn.

This is further confirmed by the 988 supervisor's own confusion and hesitation about whether he should even report Plaintiff's statements, which he did

out of an overabundance of caution as he explained that Plaintiff did not have "the means" to cause any harm, "it's kind of a 51/50, but we have a duty to warn you guys. So...," he "think[s] she was just trying to express some feelings of frustration," "we [988] get a lot of these calls," "even though we don't think that she was serious about the threats, we just don't want to leave any stone unturned," "in [his] opinion, . . . she's not an immediate threat to herself or anybody else," and Plaintiff was "talking in terms of like *just wanting*"—not that Plaintiff was threatening or planning any actual harm. [App. Vol. 1 at 13-14 (emphasis added)]. If the 988 supervisor was so hesitant and confused about whether to report, then Plaintiff certainly would have lacked any expectation that her statements would be reported.

Since Plaintiff was unaware that her statements to 988 on April 27th were reported [App. Vol. 1 at 13-14], she also had no expectation that the 988 counselor calling her under the guise of a "follow-up" on May 1st was going to report her statements answering the counselor's questions about a past mental health crisis from four days earlier, especially since Plaintiff did not think any of the previous or current statements would be perceived as threatening violence. [*Id.* at 17-18].

Plaintiff being generally aware of a duty to warn in some circumstances does not help Defendants show that they had established that Plaintiff had consciously disregarded a subjective awareness of a "substantial risk" that her communications

would be viewed as threatening violence. Obviously, if Plaintiff was anxious and depressed because she was already worried that the University was trying to expel her and end her medical career [*Id.* at 11-13, 23], and she knew there was a duty to warn, then she would not have made any statements which she thought would be viewed as threatening violence because she would have been worried about triggering a duty to warn and that the University would then use that warning to punish her and ruin her career (which is exactly what the University did). If Plaintiff had such a subjective awareness, then she obviously would have avoided contacting 988. Therefore, contrary to Defendants' argument, Plaintiff's awareness of a duty to warn further confirms that she did not think her statements would be viewed as threatening violence.

iv. Plaintiff's statements did not constitute true threats.

Another reason why Plaintiff did not think her statements would be viewed as threatening violence is because her statements did not threaten any violence and were not true threats. "True threats" are "*serious* expressions conveying that a speaker *means to* commit an act of *unlawful violence*." *Counterman*, 600 U.S. at 74 (cleaned up) (emphasis added). In *Watts v. United States*, the U.S. Supreme Court held that a statute which prohibited threats against the President of the United States was unconstitutional as applied against the defendant's protected speech,

which was not a "true threat." 394 U.S. 705, 707-08 (1969) (per curiam). Watts was frustrated about the draft, and vented to a discussion group at a public rally:

> I have already received my draft classification as 1—A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I *want* to get in my sights is [President] L.B.J. They are not going to make me kill my black brothers.

Id. at 706 (emphasis added). Watts was charged and convicted by a jury for threatening the President. *Id.* The U.S. Supreme Court reversed and ordered an acquittal. *Id.* at 708.

The Court explained that even though "the statute under which [Watts] was convicted is constitutional on its face," it "must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech." *Id.* at 707. The Court concluded that when "taken in context," the statement could not be interpreted as a true threat, despite the jury's finding. *Id.* The Court explained that:

> debate on public issues should be uninhibited, robust, and wide open, and that *it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials*. The language of the political arena, like the language used in labor disputes, is *often vituperative, abusive, and inexact*. We agree with [Watts] that his only offense here was a kind of very crude offensive method of stating a political opposition to the President.

Id. (emphasis added) (internal citations and quotation marks omitted).

Similar to Watts, who was expressing his frustration with the future impact on his life from the President's policies and said "the first man I *want* to get in my sights is L.B.J.," but did not say that he was actually "going to" do that, *id.* at 706 (emphasis added), Plaintiff never said she was "going to" do anything—rather, she only said she felt like she "*wanted* to" do something (but not "an act of unlawful violence") [App. Vol. 1 at 25-27 (emphasis added)].

And Watts's statement was even more of a threat than anything which Plaintiff said, because Watts explicitly stated that he wanted to commit an act of unlawful violence by putting the President in the sights of his rifle and also gave ultimatums: "If they ever make me carry a rifle . . .," and "They are not going to make me kill my black brothers." 394 U.S. at 706. Here, however, the University's own Hearing Panel acknowledged that the phrases "end it all," "take the administrators with her," "yeet them all," and "I want her to pay in one way or another" [App. Vol. 1 at 25-27], could not be considered to refer to or imply any acts of "unlawful violence," but, as Plaintiff testified, meant "I want her to lose her career, lose her reputation, like I want to expose her" [App. Vol. 1 at 32-33], which is why Plaintiff told 988 she wanted to "post it to the news and publish it to all medical schools" [App. Vol. 1 at 25-27].

It is significantly more clear that Plaintiff's statements do not constitute true threats than Watts's statements because Watts did not explicitly state or clarify that

he would not actually harm the President; however, Plaintiff explicitly stated that she did not plan, intend, or "mean to" commit any unlawful violent act, and the 988 counselor specifically told Schofield in the recording presented at the University's panel hearing that Plaintiff "said she has nothing to do it with." [App. Vol. 1 at 25-27].

And in *Hess v. Oakland County*, the Sixth Circuit held that the plaintiff was likely to succeed on the merits of his First Amendment claim because his statement to a third party to "hang [an election official] for treason" likely did not constitute a true threat, even though "some facts cut against [the plaintiff]" and "even if the jury might reach a contrary verdict" later. No. 25-1784, 2026 U.S. App. LEXIS 13012, at *2, *16-21 (6th Cir. May 5, 2026). The Sixth Circuit noted that the election official "never heard the threat directly" and that "distance between the speaker and recipient may tend to diminish a statement's threatening nature" when it is communicated to a third party. *Id.* at *19. Even though the plaintiff made the statement in a "place where [the election official], other officials, or the public could have overheard his speech, [the plaintiff] apparently intended to address [the third party] privately." *Id.* at *21. The Sixth Circuit concluded that "most listeners would likely consider [the plaintiff's] comment hyperbole rather than 'a serious expression of an intent to commit an act of unlawful violence.'" *Id*. As in *Hess*, the context of Plaintiff's statements, including that she intended to address mental health counselors privately,

shows that most listeners would not likely consider her statements to be serious expressions of an intent to commit violence. *See also Accountability Now USA v. Griess*, No. 1:26-cv-01385, 2026 U.S. Dist. LEXIS 120556, at *13-25 (D.D.C. June 1, 2026) (finding that displaying a flag which states "8647" is not a "true threat").

Defendants claim that simply because the Student Code provision for "threatening behavior," which they held Plaintiff in violation of, "mirrors the true-threats definition articulated in *Counterman* and *Virginia v. Black* nearly verbatim," there can be no constitutional violation. [Appellants' Br. at 20-21]. The Student Code prohibits "threatening behavior," which it defines as:

> A serious expression of intent to commit an act of unlawful violence against a particular individual, identifiable group, or damage to property. The threatening violence, including intimidation, causes reasonable fear of injury to the health or safety of any person, group, or property.

[App. Vol. 1 at 24].

But Plaintiff does not raise a facial challenge to the Code provision—the issue is whether the Code provision was applied constitutionally to Plaintiff. The Code can correctly state the definition of a "true threat," but because Plaintiff's statements do not meet that definition and she was penalized regardless, then that is a violation of the First Amendment, which is another argument of Plaintiff's claim not raised by Defendants in this appeal. And even if Plaintiff's statements do meet the definition of a true threat, then Defendants still had to establish that she

had a reckless *mens rea*, which is not something stated in the Student Code, contrary to Defendants' claim that "the Student Code draws the same line *Counterman* draws" [Appellants' Br. at 21].

v. Plaintiff has plausibly alleged a claim that each Defendant violated her clearly established right by not having proven that her statements constituted true threats or that she had a reckless *mens rea* when making the statements she was punished for.

Defendants claim that it was not identified what constitutional violation each Defendant committed. [Appellants' Br. at 26-30, 47-48]. But there is only a First Amendment Freedom of Speech constitutional claim at issue and Plaintiff has plausibly set forth the role of each Defendant in punishing Plaintiff for her speech despite her statements not constituting true threats and her not having a reckless *mens rea*. [App. Vol. 1 at 8-42]. Defendants raised no defenses or arguments in their Motion to Dismiss as to separate grounds of qualified immunity for each Defendant, and rather simply argued that "all individual Defendants" collectively have qualified immunity from liability due to generally applicable defenses of failing to plead a constitutional violation since Plaintiff's statements were not protected speech and there was no clearly established right under *Counterman*. [App. Vol. 2 at 425-28, 431-33]. Despite the Defendants' collective argument, it was still also sufficiently clear from the district court's Order denying Defendants' Motion how each Defendant allegedly acted in violation of the constitution, and

the district court did not state or imply that it was ruling on the Defendants' collectively. [App. Vol. 3 at 632-36, 645-49, 654].

Defendant Schofield, as the Deputy Chief of OUHSC Police for the medical school, was responsible for investigating and reporting alleged violations. [App. Vol. 1 at 10]. In referring to Plaintiff's initial alleged statements reported by 988 on April 27th, Schofield noted in his testimony at the University's Hearing Panel that "[Plaintiff] didn't say ['']I'm going to kill Kate Stanton.['] She said, ['']I wish Kate Stanton was dead,['']" [*Id.* at 26], and Schofield also knew and expressed to 988 that Plaintiff's statements were "not…a threat…not hate speech, it's free speech" [*Id.* at 15-16, 39]. Despite correctly understanding the constitutionally protected nature of Plaintiff's speech and identifying the distinctions in her words that she did not threaten to commit an act of unlawful violence, Schofield nevertheless contacted and directed a 988 counselor to call Plaintiff back four days later on May 1st, essentially as a *de facto* informant to elicit additional statements and report back to him, even though there had been no concerns while Plaintiff had been on campus during that time since her initial 988 call. [*Id.* at 15-17, 29]. And even though on May 1st Plaintiff was "expressing past emotional distress from April 27th" [*Id.* at 17-18, 32]—i.e., still "not…a threat…not hate speech, it's free speech" [*Id.* at 15-16, 39]—Schofield nonetheless retaliated and/or sought to punish Plaintiff for her speech and have her removed from the University, as he expressed

his disappointment by stating that otherwise "nothing is going to happen to [Plaintiff]. I mean…I've already confirmed that. They're just going to let her go on" despite her having been one of the suspects for allegedly sending anonymous defamatory emails to other students [*Id.* at 10, 16-27].

In addition to knowing that Plaintiff's statements did not constitute true threats, Schofield also knew Plaintiff had called 988 in an emotional crisis and yet did not establish that she had a reckless *mens rea* before Schofield reported and sought disciplinary action against Plaintiff for her speech in violation of the First Amendment and *Counterman*. As part of this, Schofield reported on Plaintiff's 988 statements to the University's Threat Assessment Review Committee (TARC) [*Id.* at 15-16, 21; App. Vol. 2 at 291, 303], at which Kate Stanton was present along with Defendant Cavazos as the Director of Student Conduct and Assistant Dean of Students "due to this being a potential code violation" [App. Vol. 2 at 290, 300].

Defendant Cavazos reviewed the evidence and allegations against Plaintiff, decided to initiate disciplinary proceedings, imposed sanctions, and then argued for those disciplinary sanctions before the Hearing Panel and on appeal before Defendant Surratt. [App. Vol. 1 at 9-10]. Cavazos was aware of Plaintiff's alleged statements through the TARC meeting with Defendant Schofield and Kate Stanton [App. Vol. 2 at 290, 300] and through collecting and presenting the evidence to the Hearing Panel and to Surratt [App. Vol. 1 at 24-30]. Although Plaintiff's statements

did not constitute true threats and Plaintiff clearly did not have a reckless *mens rea*, as Cavazos acknowledged and argued to the Hearing Panel "that [Plaintiff] was experiencing a mental health break" [*Id.* at 30-31] and to Surratt that "a mental health defense [is] not sufficient to overcome…the obligation of the University to hold students who make threats accountable" after the Hearing Panel had found "that the testimony and documentary evidence showed that [Plaintiff] was in an emotional crisis, and she was using the tools available to her to stay safe," Cavazos still sought to retaliate and/or punish Plaintiff for her speech in violation of the First Amendment and *Counterman*. [*Id.* at 30-31, 34]. Initially, Cavazos issued an interim suspension and a trespass warning under a Direct Administrative Action [*Id.* at 22-23]. Soon thereafter, Cavazos found Plaintiff in violation of the Student Code provision against "threatening behavior" and made the decision to expel Plaintiff from the University [*Id.* at 24], which she also pursued on appeal to Surratt [*Id.* at 34]. If Cavazos had determined that the alleged conduct would not violate the Student Code, then she was to conclude the matter without further proceedings [*Id.* at 9], which is what Cavazos should have done because the Student Code must comply with the First Amendment and *Counterman*, yet Cavazos punished Plaintiff for her speech.

Defendant Surratt was the Vice President for Student Affairs and Dean of Students, and thus responsible for making the final decision in Plaintiff's

disciplinary Student Conduct Proceedings after reviewing the evidence, findings, and decision of the University's Hearing Panel. [*Id.* at 8-9] Like Cavazos, Surratt was fully aware of Plaintiff's alleged 988 statements and the Hearing Panel's decision letter which stated that the "panel did not find compelling evidence to believe that [Plaintiff] used the word 'kill' or implied the word 'kill' at any time," did not find that Plaintiff made any true threat, and further stated that the "panel finds that the testimony and documentary evidence showed that [Plaintiff] was in an emotional crisis, and she was using the tools available to her to stay safe." [*Id.* at 33-35]. Despite this, Surratt upheld the disciplinary action, retaliating against and/or punishing Plaintiff for her speech in violation of the First Amendment and *Counterman*. [*Id.* at 35].

Therefore, Plaintiff has plausibly alleged that each Defendant failed to establish that Plaintiff consciously disregarded a substantial risk that her communications would be viewed as threatening violence, and has plausibly alleged that Defendants violated her First Amendment right to free speech.

III. *Tinker*'s substantial disruption doctrine as to speech does not apply or affect the application of *Counterman*.

a. There is no conflict or confusion between *Counterman* and *Tinker* because they address different types of speech.

In an attempt to avoid and confuse the clear establishment of Plaintiff's right under *Counterman* almost one year prior to Defendants' actions at issue in this

case, Defendants now claim for the first time on appeal that they punished Plaintiff under *Tinker*'s substantial disruption doctrine as to speech, and that *Tinker* and *Counterman* provide two conflicting frameworks for which there is no clear guidance. Despite this apparent confusion, Defendants confidently assert that it is *Tinker*'s substantial disruption doctrine which applies here, not *Counterman*. [Appellants' Br. at 17, 20]. But Defendants claiming to be confused about which framework to apply does not mean that the right they violated was not clearly established, especially when their confusion is unwarranted.

There is no question about which "doctrinal framework" applies to Plaintiff's case. Defendants punished Plaintiff for making true threats under the Student Code provision specifically prohibiting threatening behavior. [App. Vol. 1 at 24]. Defendants did not punish Plaintiff for any alleged disruption caused by her speech.

This is simple and straightforward. If a school punishes a student for making true threats (unprotected speech), then officials must establish that the student had a reckless *mens rea* as required by *Counterman*. But if a school punishes a student for protected speech, then officials must establish that the speech caused or was reasonably expected to cause substantial disorder or a material disruption to classwork (but this ground for punishment is not an option for university officials, like Defendants).

Defendants incorrectly claim that

> Plaintiff asserts that *Counterman* disrupts the well-established principle that schools can discipline students for disruptive speech. According to Plaintiff, unless the school can prove that Plaintiff's threatening speech meets the criminal *mens rea* test set forth in *Counterman*, then a student's conduct is beyond the reach of the school.

[Appellants' Br. at 14].

But Plaintiff has never asserted that *Counterman* "disrupts" or interferes with *Tinker*, because those two cases deal with two completely separate grounds for addressing different types of speech: *Counterman* addresses unprotected threats, while *Tinker* addresses protected speech which is substantially disruptive to primary and secondary public schools. Nor has Plaintiff asserted that primary or secondary public school officials cannot prohibit speech for being disruptive under *Tinker* "unless" the school proves a speaker has a reckless *mens rea*, because, again, those are completely separate analyses which deal with two different types of speech. Even Defendants acknowledge that these are "independent grounds on which [a school] may discipline" a student for speech. [Appellants' Br. at 16].

Defendants now raise a new theory under *Tinker* for the first time on appeal because the district court briefly and improperly raised it *sua sponte* in its Order denying Plaintiff's Motion for a Preliminary Injunction. [App. Vol. 3 at 660-61]. But that is not the Order appealed from here [*Id.* at 666], nor does it address qualified immunity. However, because the district court indicated *sua sponte* that it

might be favorable toward Defendants under the *Tinker* theory, Defendants have of course now tried to adopt and advance that new theory.

b. Defendants are barred from raising a new theory under *Tinker*.

The district court, without the benefit of any briefing by the parties on *Tinker*, incorrectly thought that Defendants could raise such an alternative justification, and therefore thought Plaintiff was not likely enough to prevail for a preliminary injunction. [App. Vol. 3 at 660-61].

Defendants never previously claimed that they suspended Plaintiff because her speech caused any disruption at the school, and it is too late for Defendants to now raise a new justification on those grounds. The U.S. Supreme Court rejected such an attempt in *Kennedy v. Bremerton Sch. Dist.*, 142 S.Ct. 2407 (2022).

In *Kennedy*, a public high school disciplined a football coach because he knelt at midfield after games to offer a quiet prayer of thanks. *Id.* at 2415. The school justified its reasoning at the time solely on Establishment Clause grounds, because it mistakenly thought allowing Coach Kennedy to visibly pray could lead a reasonable observer to conclude that the school endorsed Coach Kennedy's religious beliefs. *Id.* at 2416, 2420. But after being sued, the school added in a different justification for punishing Coach Kennedy under *Tinker* due to the disruption caused, but the Court rejected that effort:

> Failing under its coercion theory, the [School] District offers still another backup argument. It contends that it had to suppress Mr.

> Kennedy's protected First Amendment activity to ensure order at Bremerton football games. But the [School] District *never raised concerns along these lines in its contemporaneous correspondence with Mr. Kennedy*. And unsurprisingly, neither the District Court nor the Ninth Circuit invoked this rationale to justify the [School] District's actions. Government justifications for interfering with First Amendment rights must be genuine, not hypothesized or invented *post hoc* in response to litigation.

Id. at 2432 n.8 (cleaned up) (emphasis added). The dissent further confirmed the majority's stance on this:

> The Court [majority] also ignores the severe disruption to school events caused by Kennedy's conduct, viewing it as irrelevant because the Bremerton School District (District) stated that it was suspending Kennedy to avoid it being viewed as endorsing religion.

Id. at 2434 (Sotomayor, J., dissenting); *see also Fox v. Washington*, 949 F.3d 270, 283 (6th Cir. 2020) (directing that on remand, the state department of corrections "will be limited to raising the justifications it cited at the time it made the decision to deny plaintiffs' request for recognition of [their religion]").

Just as the school district in *Kennedy* could not raise a new argument based upon a substantial disruption under *Tinker* to justify its punishment of Coach Kennedy after it had already punished him on the basis of other grounds and had been sued, neither can Defendants raise that or any other new argument or justification here.

Additionally, Defendants cannot "assert[] on appeal a ground for a request or objection that [they] did not bring to the district court's attention…'even when [the

new legal theories] fall under the same general rubric as an argument presented to the district court.'" *United States v. Capps*, 112 F.4th 887, 891 (10th Cir. 2024).

If Defendants were even able to raise this new legal theory for the first time on appeal, they would have to do so based upon a showing of plain error, but "[i]n civil cases this often proves to be an 'extraordinary, nearly insurmountable burden.'" *Richison v. Ernest Group, Inc.*, 634 F.3d 1123, 1127-28, 1130 (10th Cir. 2011). And further, Defendants "did not argue plain error in their opening brief, so…th[at] argument [is] to also be waived on appeal." *C&M Resources, LLC v. Extraction Oil and Gas, Inc.*, 159 F.4th 755, 764 (10th Cir. 2025). Thus, "the failure to argue for plain error and its application on appeal—surely marks the end of the road for an argument for reversal not first presented to the district court." *Richison*, 634 F.3d at 1131. Regardless, Defendants could not show plain error and have not shown any error.

c. *Tinker*'s substantial disruption doctrine does not apply to universities.

Even if Defendants are not barred from raising a *Tinker* theory, *Tinker*'s substantial disruption doctrine *as to speech* does not apply to universities. While the Supreme Court has applied some principles from *Tinker* to universities, the Court did not apply *Tinker*'s substantial disruption doctrine as it relates to *speech*. In *Healy*, the Court applied the First Amendment *rights* noted under *Tinker* to colleges:

> state colleges and universities are not enclaves immune from the sweep of the First Amendment. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

408 U.S. at 180 (quoting *Tinker*, 393 U.S. at 506). But the Court also explained that *Tinker*'s substantial disruption doctrine as to restricting speech does not apply to colleges:

> the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force *on college campuses than in the community at large*.

Id. (emphasis added). First Amendment protections apply with less force in elementary and secondary schools than in the community at large. *Mahanoy*, 141 S.Ct. at 2047 (discussing *Morse* and *Fraser*). But *Healy* explicitly said that is not so with college campuses.

Healy dealt with a student group being denied official recognition by a public college because of concerns that the organization would likely cause disruption. 408 U.S. at 179. The Court did not decide the ultimate issue "[b]ecause of th[e] ambiguous state of the record," and gave guidance to lower courts on remand. *Id.* at 185. In that guidance, the Court repeatedly stressed the "distinction between advocacy and *action*," and the "line between permissible speech and impermissible *conduct*," noting that "inciting…imminent lawless action" can be prohibited, and "[a]lso prohibitable are *actions* which '*materially and substantially*

disrupt the *work and discipline* of the school.'" *Id.* at 188-89 (quoting *Tinker*, 393 U.S. at 513) (emphasis added).

Healy emphasized that "the critical line for First Amendment purposes must be drawn between *advocacy, which is entitled to full protection*, and *action*, which is not." *Id.* at 192 (emphasis added). Therefore, colleges can of course regulate student *conduct* which causes disruption—but colleges cannot impose content- or viewpoint-based prohibitions on protected speech for such disruptions beyond what is permitted in the community.

Then in *Papish*, the Court reversed the expulsion of a grad student based on "the disapproved content" of a newspaper she distributed on campus because:

> the First Amendment leaves *no room for the operation of a dual standard in the academic community with respect to the content of speech*….

410 U.S. at 670-71 (emphasis added).

It does not appear that this Circuit has addressed whether *Tinker*'s disruption doctrine applies to colleges. While this Circuit analyzed *Tinker*'s disruption doctrine in a college context in *Thompson v. Ragland*, 23 F.4th 1252, 1259-60 (10th Cir. 2022) (finding no substantial disruption), the applicability of *Tinker*'s disruption doctrine was assumed and asserted by the plaintiff-student in that case, *Thompson v. Ragland*, No. 21-1143, 2021 WL 2521636, at *9-10, 12 (10th Cir. June 10, 2021) (Appellant's Opening Brief), and was thus not questioned or ruled

on by this Circuit, but was assumed. *See Olivier v. City of Brandon*, 146 S.Ct. 916, 921 n.2, 923, n.3 (2026) (noting that where the parties proceed on an incorrect legal premise, the Court "treat[s] any contrary argument as forfeited and proceed[s] in the same way" under the parties' assumption). Similarly, the Eleventh Circuit case, which Defendants cite, states that "Supreme Court precedent does not clearly indicate whether *Tinker* applies in the university setting," does not analyze the issue, and assumes *Tinker* applies. *Damsky v. Summerlin*, No. 25-14171, 2026 U.S. App. LEXIS 623, at *6 n.4 (11th Cir. Jan. 8, 2026). But *Healy* and *Papish* made clear that *Tinker*'s substantial disruption doctrine as it relates to speech does not apply to colleges.

Thus, *Tinker*'s substantial disruption doctrine as it relates to speech is only applied to elementary and secondary schools where First Amendment protections apply with less force than in the community at large, because those schools stand *in loco parentis* for minor children. *Mahanoy*, 141 S.Ct. at 2044-45. As such, *Tinker* allows elementary and secondary schools to essentially surrender to a heckler's veto from other students when it "*materially* disrupts *classwork* or involves *substantial disorder*." *Tinker*, 393 U.S. at 513 (emphasis added). But that is not an option for Defendants here to prohibit speech in a university setting.

d. There was no substantial disruption here.

Even if Defendants are not barred from raising a *Tinker* theory and it applies to universities, on this record and at a Motion to Dismiss—viewing all reasonable inferences in Plaintiff's favor, *Lucas*, 58 F.4th at 1136 (10th Cir. 2023)—there are no grounds for finding that Plaintiff's speech "*materially* disrupt[ed] *classwork* or involve[d] *substantial disorder*," *Tinker*, 393 U.S. at 513 (emphasis added), or that any disruption would "meet *Tinker*'s demanding standard," *Mahanoy*, 141 S.Ct. at 2048.

The alleged "disruption" of merely sending *some nonessential* student affairs staff home and restricting access to only the Student Union building for part of a day, and cancelling an option for individual graduate photos by a sign near the building for that evening and not other days was not due to a reaction of students provoked by Plaintiff's speech and did not disrupt any classwork or interfere at all with keeping students disciplined and in order. [App. Vol. 1 at 21-22]. And the University ultimately took those actions because of its own official's significantly distorted, mischaracterized, exaggerated, and inaccurate report of Plaintiff's statements—not because of Plaintiff's actual statements or what was reported by 988. [*Id.*].

In *Mahanoy*, the U.S. Supreme Court held that school officials violated the First Amendment when they suspended a high school student for a year from the cheerleading team in response to the student having sent statements to her friends

on social media while outside of school, expressing her anger and frustration with the school. 141 S.Ct. at 2042-43. Even though the student's social media posts were then shared with others, and "several cheerleaders and other students approached the cheerleading coaches 'visibly upset' about B. L.'s posts," and the school's "discussion of the matter took, at most, 5 to 10 minutes of an Algebra class 'for just a couple of days,'" the Court found "no evidence in the record of the sort of 'substantial disruption'" which would "meet *Tinker*'s demanding standard" to justify the school's disciplinary action. *Id.* at 2043, 2047-48; *see also C1.G ex rel. C.G. v. Siegfried*, 38 F.4th 1270, 1274, 1279, 1282 (10th Cir. 2022) (finding no substantial disruption from response to student's off-campus social media post which stated "Me and the boys bout to exterminate the Jews;" and finding student properly alleged a First Amendment violation for the school's disciplinary actions). Even less than the minor disruptions in *Mahanoy*, the one-time, partial-day restriction of access to and around one building and sending some non-essential staff home which occurred here does not constitute a "substantial disruption of or material interference with school activities." *See Tinker*, 393 U.S. at 514.

Thus, in order to punish Plaintiff for making alleged threats, it was clearly established that Defendants must show that Plaintiff had a subjective reckless *mens rea* when making the statements. This is not a difficult or complicated task for university administrators.

CONCLUSION

This Court should affirm the denial of qualified immunity.

Even if this Court were to find that qualified immunity applies on this claim, the Court cannot instruct the district court to fully "dismiss this matter as to the Individual Defendants in their individual capacities," as Defendants request [Appellants' Br. 48], because the Individual Defendants can still be held liable in their individual capacities on Plaintiff's other First Amendment claim that her statements did not constitute true threats at all, which is not affected by her *mens rea* and which is not contested on this appeal by Defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on the 3rd day of June 2026, I electronically filed the foregoing using the Court's CM/ECF system, which will send notification of such filing to the following counsel of record:

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Dated: June 3, 2026

s/ Rand C. Eddy
Rand C. Eddy

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Dated: June 3, 2026

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