NO. 299PA12 JUDICIAL DISTRICT FIFTEEN-A

SUPREME COURT OF NORTH CAROLINA

****

NICK OCHSNER,

Plaintiff-Appellant,

v.

ELON UNIVERSITY and
NORTH CAROLINA ATTORNEY
GENERAL ROY COOPER,

Defendants-Appellees.

From Alamance County
No. 11 CVS 981

From Court of Appeals
No. 11-1571

****

BRIEF *AMICUS CURIAE* OF THE STUDENT PRESS LAW CENTER, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE SOCIETY OF PROFESSIONAL JOURNALISTS, INVESTIGATIVE REPORTERS & EDITORS, INC., AND THE VTV FAMILY OUTREACH FOUNDATION

****

INDEX

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Other Authorities

NO. 299PA12 JUDICIAL DISTRICT FIFTEEN-A

SUPREME COURT OF NORTH CAROLINA

****

NICK OCHSNER,

Plaintiff-Appellant,

v.

ELON UNIVERSITY and
NORTH CAROLINA ATTORNEY
GENERAL ROY COOPER,

Defendants-Appellees.

From Alamance County
No. 11 CVS 981

From Court of Appeals
No. 11-1571

****

BRIEF *AMICUS CURIAE* OF THE STUDENT PRESS LAW CENTER, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE SOCIETY OF PROFESSIONAL JOURNALISTS, INVESTIGATIVE REPORTERS & EDITORS, INC., AND THE VTV FAMILY OUTREACH FOUNDATION

****

INTRODUCTION

When a citizen reports a crime to a law enforcement agency, that report creates a paper trail that advances essential public accountability and oversight purposes. The importance of public access to information about crimes and arrests is so well understood that the law of every state, including North Carolina, provides for disclosure of the salient details about each incident reported to police,

even if those involved might prefer to keep the information secret. The ruling of the Court of Appeals below creates a unique and unwarranted exception to this principle of transparency, designating the campuses of private colleges as "accountability-free zones," where police exercising state arrest powers to enforce state laws under the supervision of the state Attorney General can transact sensitive state business behind closed doors. Additionally, this ruling denies campus communities access to critically important information they need to make informed decisions about their own safety and that is available to all other citizens, including those on the campuses of public colleges and universities.

Because the ruling below opens a dangerous loophole clearly contrary to the intent of the North Carolina Public Records Act, producing the absurd result of a class of "secret police" wielding state authority, this Court should reverse.

INTEREST OF *AMICI*

Amici curiae are nonprofit associations representing news-gatherers and crime victims, two classes of people with a unique and acute interest in timely and reliable information about crime on college campuses.

The Student Press Law Center ("SPLC") is a nonprofit advocate providing legal assistance in support of those working in the student media nationwide. The SPLC was founded in 1974 to assist student journalists and their advisers in

overcoming the barriers that keep them from gathering and reporting news effectively.

The Reporters Committee for Freedom of the Press ("RCFP") is a voluntary, unincorporated association of reporters and editors nationwide that works to defend the First Amendment rights and freedom-of-information interests of the news media.

The Society of Professional Journalists ("SPJ") is a nonprofit membership organization dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, with the mission of encouraging the free practice of journalism and stimulating high standards of ethical behavior.

Investigative Reporters & Editors, Inc., ("IRE") is a grassroots nonprofit membership organization dedicated to improving the quality of investigative reporting. IRE was formed in 1975 to create a forum in which journalists throughout the world could help each other by sharing story ideas, newsgathering techniques and news sources.

The VTV Family Outreach Foundation is a non-profit organization established by families and survivors directly impacted by the April 16, 2007, tragedy at Virginia Tech. Determined to prevent a similar tragedy, the Foundation advocates for campus safety and security by focusing on issues of mental health,

bullying, privacy laws and information sharing, and supporting programs to create positive change in behavior.

Amici's interest in this case is in assuring that the North Carolina Public Records Act be applied in a common-sense manner that gives effect to its intent of providing the public with the essential information they need to protect their safety and hold their government accountable. The individuals and organizations represented by *Amici* frequently rely on open records laws to observe and scrutinize the conduct of public officials and the public's business. To that end, they have an ongoing stake in ensuring such laws remain robust and are not abused in an effort to conceal safety hazards or official misdeeds from scrutiny. Because *Amici* deal regularly with these concerns at the national level, *Amici* can offer the Court a unique perspective as to the vital role of police records in keeping citizens informed about threats to public safety.

FACTUAL AND LEGAL BACKGROUND

Defendant-Appellee Elon University operates a police department that—except for its refusal to comply with the North Carolina Public Records Act[1]—functions in every other material way indistinguishably from a city or county police department. In North Carolina, police departments are obligated to make

[1] N.C. Gen. Stat. § 132-1.

their business records available for public inspection upon request.[2]

The Public Records Act entitles the public to information from police departments. Section 132-1.4 of the Act specifically sets forth the elements of law enforcement records that must be made available to the public, and those elements include (among others):

> (1) The time, date, location, and nature of a violation or apparent violation of the law reported to a public law enforcement agency.
>
> (2) The name, sex, age, address, employment, and alleged violation of law of a person arrested, charged, or indicted.
>
> (3) The circumstances surrounding an arrest, including the time and place of the arrest, whether the arrest involved resistance, possession or use of weapons, or pursuit, and a description of any items seized in connection with the arrest.
>
> . . .
>
> (6) The name, sex, age, and address of a complaining witness.

N.C. Gen. Stat. § 132-1.4(c).

The Public Records Act defines a police agency that is subject to the disclosure duties of Section 132-1.4(c) as follows: "a municipal police department, a county police department, a sheriff's department, a company police agency commissioned by the Attorney General pursuant to G.S. 74E-1, et seq., and any

[2] The Public Records Act defines "public records" as any documents "made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions." *See id.*

State or local agency, force, department, or unit responsible for investigating, preventing, or solving violations of the law." N.C. Gen. Stat. § 132-1.4(b)(3).

The Elon University Police Department is commissioned by the Attorney General of the State of North Carolina to exercise in full the police powers equivalent to those exercised by a city or county police department, pursuant to the Campus Police Act. *See* N.C. Gen. Stat. § 74G(2) ("[T]he Attorney General is given the authority to certify a private, nonprofit institution of higher education . . . as a campus police agency and to commission an individual as a campus police officer."). These powers specifically include the power to arrest. *See* N.C. Gen. Stat. § 74G-1(b)(6). The stated purpose of the Campus Police Act is "to protect the safety and welfare of students, faculty, and staff in institutions of higher education by fostering integrity, proficiency, and competence among campus police agencies and campus police officers." § 74G-2(a). In exercising their state-conferred arrest power, certified campus police departments are directed to apply "standards established by State and federal law only"—in other words, not to apply their own institutional standards or to arrest people for violating the rules and policies of the institution. *See* N.C. Gen. Stat. § 74G-1(b)(6). The very same statute also is the source of authority for *public* educational institutions to obtain certification from the Attorney General to operate full-fledged police departments with arrest powers.

See N.C. Gen. Stat. § 74G-1(c). The powers and duties of police at private colleges thus are equivalent in every respect to those at public colleges.

The Campus Police Act specifically makes "*all*" records of the Campus Police Program the property of the state:

> (a) *The Attorney General is the legal custodian of all books, papers, documents, or other records and property of the Campus Police Program.*
>
> (b) Any papers, documents, or other records that become the property of the Campus Police Program and are placed in a campus police officer's personnel file maintained by the Attorney General are subject to the same restrictions concerning disclosure as set forth in Chapters 126, 153A, and 160A of the General Statutes for other personnel records.
>
> (c) Notwithstanding the provisions of subsection (b) of this section, the Attorney General may disclose the contents of any records maintained under the authority of this Chapter to the Criminal Justice Education and Training Standards Commission, the Sheriff's Education and Training Standards Commission, or any other criminal justice agency for certification or employment purposes.

N.C. Gen. Stat. § 74G-5 (emphasis added). The Public Records Act, N.C. Gen. Stat. § 132-6(a), sets forth the duties of a custodian of public records:

> Every *custodian* of public records shall permit any record in the custodian's custody to be inspected and examined at reasonable times and under reasonable supervision by any person, and shall, as promptly as possible, furnish copies thereof upon payment of any fees as may be prescribed by law.

Id. (emphasis added). Notably, Section 132-6(a) applies regardless of whether the document is in the physical possession of the custodian. What matters is whether

the custodian has legal custody of the document. *See Womack Newspapers v. Town of Kitty Hawk*, 181 N.C. App. 1, 6, 639 S.E.2d 96, 100 (2007) (document held by private attorney on behalf of city government was a public record regardless of its physical location).

Plaintiff-Appellant Nick Ochsner initiated this case while working as a broadcast journalist with a student-run television news station at Elon University for one simple reason: Because he was unable to fully discharge his duty as a journalist to inform the campus community without access to the basic information about campus crime that would have readily been available from *any police department in North Carolina* other than one operating on the campus of a private college.

In attempting to find out the circumstances of a March 2010 arrest by the Elon University Campus Police Department, Ochsner filed a written request pursuant to the North Public Records Act, N.C. Gen. Stat. § 132-1.4, asking almost *verbatim* for the information that the Public Records Act requires all police departments to disclose.

Ochsner requested the following information (with emphasis added):

> 1. The time, date, location, and nature of a violation or apparent violation of the law reported to a public law enforcement agency.
>
> 2. The name, sex, age, address, employment, and alleged violation of law of a person arrested, charged, or indicted.

> 3. *The circumstances surrounding an arrest*, including the time and place of the arrest, whether the arrest involved resistance, possession or use of weapons, or pursuit, and a description of any items seized in connection with the arrest.

The Elon University Police Department declined to provide information responsive to Section 132-1.4(c) concerning the circumstances of the arrest. Ochsner then initiated this action to enforce his rights under the Public Records Act.

The trial court dismissed Ochsner's complaint on the basis of its conclusion that the University's response contained all of the information to which Ochsner was entitled under Section 132-1.4(c). On appeal, the Court of Appeals decided the case on a rationale neither addressed by the trial court below nor fully briefed by the parties on appeal—that, because Section 132-1.4(b)(3) does not explicitly refer to "private colleges" by name, they are categorically exempt from the Public Records Act regardless of the public nature of the function they are performing.[3]

Amici believe that Ochsner's entitlement to public records from the Elon University Police Department is plain from the face of the aforementioned statutes.

---

[3] In fact, the Court of Appeals' ruling can be read to exempt *all* college police—public as well as private—from the Public Records Act. *See Ochsner v. Elon Univ.*, --- N.C. App. ---, 725 S.E.2d 914 (2012) ("We believe if the legislature had intended for campus police departments to be subject to the Public Records Act, it could have listed campus police departments as public law enforcement agencies."). To the extent that the ruling purports to apply even to police at public colleges, the ruling is plainly erroneous, as it is beyond dispute that police departments at public colleges—even though not explicitly named in the Public Records Act—must comply with the same disclosure obligations as city or county police.

The Public Records Act extends the duty of disclosure to "any State or local agency, force, department, or unit responsible for investigating, preventing, or solving violations of the law." N.C. Gen. Stat. § 132-1.4(b)(3). The Elon University Police Department plainly is a "force" or "department," and Sections 74G-1(b)(6)-(b)(8) make the Police Department responsible for investigating, preventing and solving violations of state and federal law. The Elon University Police Department defines its mission as follows: "to provide a safe and secure community in which the university may carry out its mission."[4] The Department has a "Mutual Aid Agreement" under which its officers may provide backup to officers in neighboring jurisdictions, and vice-versa.[5]

If Section 132-1.4(b)(3) does not apply on its face to a private college such as Elon University, then the statute's catch-all definitional phrase "any State or local agency, force, department, or unit responsible for investigating, preventing, or solving violations of the law" is, at the very least, ambiguous and susceptible to being applied to the Elon Police Department. When an ambiguity exists, it is the duty of the Court to give effect to the legislative intent behind the statute and to make certain that no element of the statute is interpreted to be meaningless or to produce an absurd result. *See Comr. of Insurance v. Automobile Rate Office*, 294

[4] http://www.elon.edu/e-web/bft/safety (last viewed Sept. 18, 2012).

[5] http://www.elon.edu/e-web/bft/safety/police.xhtml (last viewed Sept. 18, 2012).

N.C. 60, 68, 241 S.E.2d 324, 329 (1978). In this case, reading private college police out of Section 132-1.4(b)(3) would render the catch-all phrase a nullity, as there appear to be no other type of police that would not already be covered by one of the preceding definitional phrases. It would produce the absurd result that a private *college* must reveal much less information about how its police carry out state business than a private *corporation*—even though their police are in every other respect identically situated.[6]

Amici will not recapitulate in detail the statutory interpretation argument raised by Ochsner in his Petition for Discretionary Review. *Amici* write separately to highlight the essential public accountability purposes that can be served only with the benefit of complete information from campus police, and the fact that private college police (and entities analogous to private college police) routinely are held to the same legal standards as full-fledged government agencies when, as here, they perform core governmental functions under the ultimate supervision of the state.

---

[6] Further supporting Ochsner's position, the Campus Police Act itself goes out of the way to carve out police personnel records as confidential. N.C. Gen. Stat. § 74G-5(b). If it were not understood that the public would normally have access to records generated by agencies commissioned under the Campus Police Act, then subsection 74G-5(b) would be superfluous.

ARGUMENT

I. POLICE AT PRIVATE COLLEGES ARE PERFORMING A CORE GOVERNMENTAL FUNCTION.

There is no more uniquely "governmental" function than the police power, which carries with it the power to deprive citizens of their freedom and, when necessary, even to use deadly force. The notion that a state could "outsource" its most sensitive function to private actors who are immune from public accountability is without precedent or parallel in the law. Our country does not entrust its safety to "private armies."

The role of police in American society is so uniquely sensitive that the public's ability to keep watch on how police power is used has been recognized as rising to the level of a constitutionally protected right. Both the First and Seventh Circuits recently have recognized a First Amendment right to audiotape and videotape police performing their duties in public. *Glik v. Cuniffe*, 655 F.3d 78 (1st Cir. 2011) ; *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012). The court in *Glik* well-summarized the vital public interest in being informed about the way police wield their arrest powers:

> Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs. . . . Moreover, as the Court has noted, freedom of expression has particular significance with respect to government because it is here that the state has a special incentive to repress opposition and often wields a more

> effective power of suppression. . . . This is particularly true of law enforcement officials, who are granted substantial discretion that may be misused to deprive individuals of their liberties.

655 F.3d at 82 (internal quotes, brackets and citations omitted).

The public accountability that necessarily accompanies the ultimate state power cannot be lightly "privatized away." As this Court recognized last year, the only reason that it is tenable for the State of North Carolina to allow private religious colleges to exercise governmental police powers is that the state—through the Attorney General—retains ultimate supervisory authority over the colleges' officers. *See State v. Yencer*, 365 N.C. 292, 303, 718 S.E.2d 615, 622 (2011) ("The statute grants only limited supervisory powers to Davidson College, while ultimate control of the police power—which the individual officers alone exercise—remains in the hands of the State.").

If the Attorney General's "ultimate control" means anything, it must necessarily mean that the Attorney General has the right to demand records from the police agencies that he certifies. Otherwise, there would be little way to carry out supervision meaningfully. And as the Court of Appeals has held, records are covered by the Public Records Act so long as a government agency has *legal* custody of them; *physical* custody is unnecessary. *Womack*, 181 N.C. App. at 6-14, 639 SE 2d at 100-05. Additionally, the Attorney General as supervisor must necessarily have *residual* custody of campus police records if a college decides it

will no longer operate a police force, as the records of police departments are a public asset that are used in the prosecution of crimes. It would be unthinkable that a university could simply box up, or shred, the arrest reports of a police department as it would with purely private records.

The power to arrest is regarded in the eyes of the law as a uniquely important and sensitive one, requiring continuing public vigilance that can be exercised effectively only if the public has complete and timely information. The opinion below insulates police departments at private colleges from accountability to a degree that would be regarded as intolerable at any comparable police agency.

II. THE RECORDS OF ENTITIES DELEGATED STATE POWER TO EXERCISE CORE GOVERNMENTAL FUNCTIONS ARE TRADITIONALLY OPEN FOR PUBLIC INSPECTION.

When the state delegates authority to a private actor to carry out a state function, the disclosure duties accompanying that responsibility must travel with the authority. To hold otherwise would enable the State of North Carolina to offload core governmental duties onto "shell corporations" that evade public accountability.

Courts routinely require private corporations such as Elon University to abide by open-records laws if they are performing a traditional state function that has been delegated to them by the state. "[W]hen a public entity delegates a statutorily authorized function to a private entity, the records generated by that

private entity's performance of that duty become public records." *B & S Utilities v. Baskerville-Donovan, Inc.*, 988 So.2d 17, 22 (Fla. Dist. Ct. App. 2008) (requiring engineering firm that oversaw management of municipal wastewater plant to abide by Florida public records act). *See also SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029 (Pa. 2012) (corporate manager of minor-league baseball park was subject to Pennsylvania's open-records act because it was "deputized as agent" of government and "performed an essential government function"); *Clarke v. Tri-Cities Animal Care & Control Shelter*, 181 P.3d 881 (Wash. App. 2008) (corporation became "functional equivalent" of state agency for purposes of Washington's public records act, when its officers took an oath to enforce state and local animal-control laws and assumed police powers).

It is indisputable that, in the absence of an Elon University Police Department, the task of enforcing state law on the premises of Elon University would fall to a city or county police agency in the community. (Indeed, the existence of a Mutual Aid Agreement indicates that the duty at times *does* fall to, or is shared with, a city or county police agency.) Law enforcement is not a function that the state government has discretion to perform or not perform; it is a core governmental duty.

As the Court of Appeals has held, government agencies may not circumvent the Public Records Act by delegating governmental functions to private actors. The

Court of Appeals rejected this very argument when a city government claimed that documents prepared on behalf of the city by a private attorney were not public records:

> If an argument such as this were to prevail there would be nothing to prevent municipalities and other governmental agencies from skirting the public records disclosure requirements simply by hiring independent contractors to perform governmental tasks and to have them retain all documents in conjunction with the performance of those tasks that municipalities and agencies chose to shield from public scrutiny.

Womack, 181 N.C. App. at 14, 639 S.E.2d at 105.

That Elon University police do not receive financial compensation from the State is not conclusive of their status for purposes of the Public Records Act. Time and again, courts have held that privately employed police are "state actors" governed by the same constitutional standards as any other police when they are delegated full arrest powers, as they are by the Campus Police Act. *See, e.g.*, *Romanski v. Detroit Ent'mt*, *LLC*, 428 F.3d 619 (6th Cir. 2005) (applying "public function test," private security guards licensed by the state and given plenary police powers by statute were state actors for purposes of § 1983 civil-rights claim); *Payton v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 184 F.3d 623 (7th Cir. 1999) (hospital security guards commissioned under state statute as "special officers" with full police powers were state actors for purposes of § 1983 civil-rights claim); *United States v. Hoffman*, 498 F.3d 879 (7th Cir. 1974) (railroad

police statutorily commissioned to exercise full police powers could be convicted under statute criminalizing use of state authority to violate civil rights); *compare United States v. Day*, 591 F.3d 679 (4th Cir. 2010) (for purposes of motion to suppress fruits of illegal search, private security guards whose limited statutory arrest power was no greater than that of any other citizen were not "state actors").

It is well-accepted that police at private colleges are governed by the same legal standards that apply to police everywhere else, without exception. *See, e.g.*, *Finger v. State*, 799 N.E.2d 528 (Ind. 2003) (police at private university in Indiana were subject to the same constitutional standards as are municipal police when exercising state-delegated police power); *Torres v. Univ. of Notre Dame*, No. 3:11-CV-209 (N.D. Ind. March 23, 2012) (same); *Boyle v. Torres*, 756 F. Supp. 2d 983 (N.D. Ill. 2010) (police at private Illinois college were acting "under color of state law" when they used statutorily delegated arrest powers, for purposes of § 1983 civil-rights claim); *Scott v. Northwestern Univ. School of Law*, No. 98 CV 6614, 1999 WL 134059 (N.D. Ill. March 8, 1999) (same). Just as it would be untenable for Elon University police to attempt to exempt themselves from any other legal obligation of general application to police, it is untenable for them to claim that they alone among North Carolina police agencies may transact the public's business in secret.

The State of Connecticut Freedom of Information Commission ruled in 2008 that Yale University was required to disclose police incident reports under the same terms as any other police agency in the State of Connecticut, because Yale officers exercised full police authority under a state statute legally indistinguishable from North Carolina's Campus Police Act. *In re Perrotti v. Chief, Police Dept., Yale Univ.*, No. FIC 2007-370 (Conn. FOI Comm'n Feb. 13, 2008). The Commission's analysis in the *Perrotti* case is instructive, as the facts in that case closely parallel those at bar. As Elon University did here, Yale University argued that it was not subject to the state public-records law because it did not receive direct public funding. But the Commission did not treat the matter of government funding as conclusive. Rather, it looked to the indirect benefits that Yale received—both generally, as a tax-exempt institution, and directly in support of its police force, including support from local police by way of a Mutual Aid Agreement just like the one in force at Elon University. The Commission also found persuasive the fact that Yale police exercised the full range of police power under a statutory grant of authority from the state, beyond that of an ordinary "security guard" force. *See id.,* ¶¶ 12, 15 (noting that "law enforcement is traditionally a function of the government" and that "the police power given to the YUPD, with its accompanying power to detain and arrest, is a fundamental governmental function that is capable of having a profound impact on private

individuals"). Notably and instructive by way of distinction, the Massachusetts Supreme Court decided in 2006 that Harvard University did not have to abide by the Massachusetts open-records law, because its police force did not have the same breadth of arrest powers as those at traditional police agencies. *Harvard Crimson, Inc. v. President and Fellows of Harvard College*, 840 N.E2d 518 (Mass. 2006).

Here, the Campus Police Act confers full police powers on Elon University police well beyond those associated with security guards, including the power to make the very arrest about which Ochsner attempted to inquire. As the Court of Appeals held in *State v. Ferebee*:

> Under N.C. Gen. Stat. § 74G *et seq.,* the Campus Police Act, campus police officers have *the same statutory authority* granted to municipal and county police officers to make arrests for both felonies and misdemeanors and to charge for infractions within their jurisdictions. N.C. Gen. Stat. § 74G-6(b) (2005). As such, they qualify as "public officers" pursuant to N.C. Gen. Stat. § 14-223.

177 N.C. App. 785, 788, 630 S.E.2d 460, 462 (2006) (emphasis added). While details as to how the Elon University Police Department uses its authority in practice (*e.g.*, the contents of the Mutual Aid Agreement between Elon and surrounding police departments) are matters that would benefit from discovery, this counsels against summary dismissal of Ochsner's complaint. *See Johnson v. Univ. of San Diego*, No. 10CV0504-LAB, 2011 WL 4345842 (S.D. Cal. Sept. 16,

2011) ("Typically, the question whether private police or security officers are state actors is one of fact that cannot be resolved at the motion to dismiss stage.").

This Court has not hesitated in other contexts to recognize the "public" status of private entities that perform state-delegated functions. For instance, in *Coats v. Sampson County Memorial Hospital, Inc.*, 264 N.C. 332, 141 S.E.2d 490 (1965), the Court decided that a venue statute applicable to "public officers" applied to a private company operating a public hospital, even though the corporation did not meet the literal statutory definition of a "public officer." Because North Carolina law stated that the operation of a county hospital was a government function and the county had delegated its authority to the company, the defendant was a "public officer" for venue purposes. *See id.* This type of common-sense functional test—which has been regularly applied to open-records statutes elsewhere—should apply where, as here, a nominally private entity is delegated to carry out a traditional governmental function.

III. ACCESS TO POLICE RECORDS IS ESSENTIAL FOR PUBLIC ACCOUNTABILITY.

The public's ability to oversee how governmental authority is used depends on access to complete and reliable information. The public's interest in this information, at least as it involves the performance of a function as crucial as the exercise of police arrest powers, is of constitutional dimension. As the Seventh Circuit stated in striking down eavesdropping charges against a person accused of

unlawfully recording police in the performance of their duties, "the First Amendment goes beyond protection of the press and self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *Alvarez*, 679 F.3d at 597 (*quoting First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978)).

Several courts have recognized that access to the information in police incident reports—the information that Ochsner sought from Elon University—is guaranteed by the First Amendment. In *Houston Chronicle Pub. Co. v. City of Houston*, the Texas Court of Civil Appeals held that the First Amendment precluded an interpretation of the state open-records law that would allow police to withhold information such as a narrative description of each crime. As the court said there:

> The importance of these records to the press for use in the reporting of crimes of interest to the public is undisputed. The record is replete with the expert opinion of highly qualified editors and criminal news reporters that reporting of crime to the interested public would be damaged, hindered, and hampered by the unavailability of these records. … [T]he press has an obligation to the public to inform them of police activities. In order to accomplish this it must obtain the news. When a paper can no longer obtain the news it cannot remain a successful newspaper. The Offense Reports represent a handy vehicle at a central location which enables a reporter on a criminal beat to evaluate the newsworthiness of the crime in question, the newsworthiness of the persons involved, and the effectiveness of our law enforcement agencies and ultimately our judicial processes.

531 S.W.2d 177, 180-81 (1975). The court concluded that the First Amendment entitles the public to the following information from police incident reports: "the offense committed, location of the crime, identification and description of the complainant, the premises involved, the time of the occurrence, property involved, vehicles involved, description of the weather, a detailed description of the offense in question, and the names of the investigating officers." *Id*. at 187.

Similarly, in *Bauer v. Kincaid*, 750 F. Supp. 2d 575 (W.D. Mo. 1991), a federal district court held that interpreting a predecessor of the current federal student privacy statute to cover campus police reports would infringe the public's First Amendment right of access to information. The court held that the limited disclosure provided by police at Southwest Missouri State University—essentially the same limited information that Elon University provided here—was constitutionally inadequate, both because it denied the public essential information about crime, and because it created a disadvantaged class of college students who are denied the same level of safety information about their communities as citizens of any other community. *See id.* at 592-93.

The North Carolina legislature recognized the importance, and constitutional implications, of public access to complete and reliable information about the way police perform their duties by codifying in the Public Records Act the types of information that law enforcement agencies must provide on request. These

include—beyond the minimal information that Ochsner was able to obtain—the "circumstances surrounding an arrest, including the time and place of the arrest, whether the arrest involved resistance, possession or use of weapons, or pursuit, and a description of any items seized in connection with the arrest" as well as the "name, sex, age, and address of a complaining witness." N.C. Gen. Stat. § 132-1.4(c).

If the Public Records Act does not apply to police at private colleges, then the only information to which the public is entitled by statute is that legally required by the federal Jeanne Clery Act, 20 U.S.C. § 1092(f). The Clery Act requires private colleges that receive federal funds to make public a log briefly describing the nature of any crime to which campus police respond, along with a general location. While Clery Act information is better than no information at all, the information on a Clery Act log is far less detailed than what the Public Records Act requires from all other police agencies, including those at public colleges. Significantly, Clery Act logs need not include such information as the names of victims or witnesses, a description of the circumstances of the crime, or the employment of any arrested person—all of which the Public Records Act requires.

Notably, Clery disclosure requirements extend not just to "police" but to any type of campus safety office, even an agency with no arrest powers. If the Court of Appeals' opinion stands, citizens in North Carolina will be entitled to no greater

information from a full-fledged police department with state-delegated arrest powers than from a "campus security" agency exercising no governmental authority. This cannot be the law.[7]

The underreporting of crime on Clery Act reports is well documented. A study by the Office of State Victim Advocate for Connecticut found that, in 2009, the Clery Act filings by six large universities showed among them a total of four completed rapes and one attempted rape, far below what national statistics suggest should be the case for an area with such a large concentration of young people.[8] On June 1 of this year, the U.S. Department of Education imposed a $110,000 fine on Texas' Tarleton State University for omitting three sex offenses, 35 burglaries,

---

[7] Because campus police respond to *all* crimes on campus, there is no "student privacy" justification that categorically justifies treating campus police differently from all other police. For example, if a 50-year-old non-student breaks into a vehicle on the Elon University campus, that person will be arrested just as readily as would a 20-year-old sophomore. Notably, Congress exempted reports compiled for law enforcement purposes from the federal student privacy statute. 20 U.S.C. § 1232(g)(4)(B)(ii) (exempting from definition of "education records" made confidential by federal law any records "maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement"). Consequently, the federal government has recognized that there is an unusually compelling public interest in being fully informed about crime on campus that justifies making exceptions to normal privacy principles.

[8] Testimony of Michelle Cruz, State Victim Advocate, to the Connecticut Legislature Higher Education and Employment Advancement Committee, Feb. 10, 2001, *available at* http://www.cga.ct.gov/2011/HEDdata/Tmy/2011SB-00847-R000210-Michelle%20Cruz,%20State%20Victim%20Advocate-TMY.PDF (last viewed Sept. 17, 2012).

22 drug arrests and multiple other crimes from its public Clery Act filings.[9] Significantly, the failings in Tarleton State's Clery disclosures came to light only because student journalists were able to verify the accuracy of the university's Clery filngs against the original crime reports compiled by Tarleton campus police.[10] If denied that access under the narrow view of N.C. Gen. Stat. § 132-1 urged by Defendants, reporters will be unable to perform the same type of essential accountability journalism on which the public relies, and crime at private college campuses inevitably will go underreported.

A search of the Clery Act data self-reported to the U.S. Department of Education by Elon University during the three most recent available years (2008-2010) shows that the University, with an enrollment of nearly 6,000 students, reported a total of two sexual assaults during that three-year period, no robberies and no auto thefts.[11] While there is no proof that these statistics are incomplete, that is exactly the point—there *is* no proof, because, unlike at any comparable

---

[9] *In re Tarleton State Univ.*, Docket No. 09-56-SF Decision of the Secretary and Order of Remand (U.S. Dept. of Ed., June 1, 2012), *available at* http://oha.ed.gov/secretarycases/2009-56-SF.pdf (last viewed Sept. 21, 2012).

[10] *Light of Day Student Project Leads to Major Precedent Setting Ruling*, Freedom of Information Foundation of Texas blog post, June 11, 2012, *available at* http://www.foift.org/?p=2398 (last viewed Sept. 21, 2012).

[11] Information available through the U.S. Department of Education's *Campus Safety and Security Data Analysis Cutting Tool*, http://ope.ed.gov/security/index.aspx.

public college in North Carolina, the public must simply take the University's unverifiable word at face value.

Access to police records is essential to informed media coverage of crime and police activity. Reporters use records such as those made public by § 132-1 each and every day to better inform the public about trends in crime happening in their communities. *See, e.g.*, Hurst Laviana, *Police statistics show where, when Old Town violence happens*, The Wichita Eagle, Sept. 16, 2012, *available at* 2012 WLNR 19673420 (describing the nature of violent incidents happening in a high-crime section of the community); Jonathan Oosting, *Are more drunken drivers 'super drunk'?: 44 percent are more than twice the legal limit*, The Bay City Times, Sept. 13, 2012, *available at* 2012 WLNR 19597997 (using police incident reports to analyze details of DUI arrests and determining that increasingly those arrested by police have higher blood-alcohol levels than in the past). The informative level of detail that journalists were able to bring to the public in these recent public-service stories—and many more like them—is possible only if the public has access to information beyond a generic one-line entry in a chronological log.

CONCLUSION

The Court of Appeals reached to decide an issue not properly before it, without the benefit of factual development and briefing needed before making such

a sweeping pronouncement affecting the public's right to know—potentially including the rights of those at *public* colleges as well. The decision below should be vacated and, if it is not reversed entirely, should be remanded to the trial court for factual development as to the extent to which police commissioned under the Campus Police Act stand in the shoes of state police, and the extent of the Attorney General's supervisory authority over the Campus Police Program.

Respectfully submitted, this the 24th day of September, 2012.

Electronically Submitted
Adam H. Charnes (N.C. Bar No. 32039)

N.C. App. R. 33(b) Certification: I certify that the attorneys listed below have authorized me to list their names on this brief as if they had personally signed.

Electronically Submitted
Richard D. Dietz (N.C. Bar No. 28496)

KILPATRICK TOWNSEND & STOCKTON LLP
1001 West Fourth Street
Winston-Salem, North Carolina 27101
Telephone: (336) 607-7300
Email: ACharnes@KilpatrickTownsend.com
RDietz@KilpatrickTownsend.com

Counsel for Student Press Law Center, the Reporters Committee for Freedom of the Press, the Society of Professional Journalists, Investigative Reporters & Editors, Inc., and the VTV Family Outreach Foundation

OF COUNSEL:

Frank D. LoMonte
Executive Director
Student Press Law Center
1101 Wilson Boulevard, Suite 1100
Arlington, VA 22209

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 24, 2012 the foregoing **BRIEF *AMICUS CURIAE* OF THE STUDENT PRESS LAW CENTER, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE SOCIETY OF PROFESSIONAL JOURNALISTS, INVESTIGATIVE REPORTERS & EDITORS, INC., AND THE VTV FAMILY OUTREACH FOUNDATION** was served upon the following by first class mail:

Christopher W. Jones
Beth T. Jones
Amanda G. Ray
WOMBLE CARLYLE SANDRIDGE & RICE, PLLC
150 Fayetteville Street, Suite 2100
P.O. Box 831
Raleigh, NC 27602

Roy Cooper
David L. Elliott
Narcisa Woods
NORTH CAROLINA DEPARTMENT OF JUSTICE
P.O. Box 629
Raleigh, NC 27602

Ann C. Oschner
WHITLEY LAW FIRM
2424 Glenwood Avenue, Suite 201
Raleigh, NC 27608

Electronically Submitted
Adam H. Charnes
KILPATRICK TOWNSEND & STOCKTON LLP
1001 West Fourth Street
Winston-Salem, North Carolina 27101

ADDENDUM OF UNPUBLISHED CASES

In re Perrotti v. Chief, Police Dept., Yale Univ.,
No. FIC 2007-370 (Conn. FOI Comm'n Feb. 13, 2008)

Johnson v. Univ. of San Diego,
No. 10CV0504-LAB, 2011 WL 4345842 (S.D. Cal. Sept. 16, 2011)

Scott v. Northwestern Univ. School of Law,
No. 98 CV 6614, 1999 WL 134059 (N.D. Ill. March 8, 1999)

Torres v. Univ. of Notre Dame,
No. 3:11-CV-209 (N.D. Ind. March 23, 2012)

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by	FINAL DECISION
Janet R. Perrotti and State of Connecticut, Office of the Public Defender,	
Complainants	
against	Docket #FIC 2007-370
Chief, Police Department, Yale University,	
Respondent	February 13, 2008

The above-captioned matter was heard as a contested case on September 27, 2007, at which time the complainants and the respondent appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. It is found that by letter dated June 25, 2007, the complainants requested complete copies of the personnel files of two officers of the Yale University Police Department ("YUPD").

2. It is found that by letter dated July 13, 2007, the respondent denied the complainants' request, stating, "Yale University and its police department are private entities and are not subject to the Freedom of Information ("FOI") Act."

3. It is found that by letter dated June 25, 2007 and filed June 27, 2007, the complainants appealed to this Commission, alleging that the respondent violated the FOI Act by failing to provide copies of the records described in paragraph 1, above. It is found that the complainants renewed their appeal with the filing of a supplemental letter to the Commission on July 27, 2007.

4. It is found that the first issue before the Commission is whether the respondent police department is a public agency, within the meaning of §1-200(1)(B), G.S.

5. Section §1-200(1), G.S., provides, in relevant part:

> "Public agency" or "agency" means: (A) Any executive, administrative or legislative office of the state or any political subdivision of the state and any state or town agency, any department, institution, bureau, board, commission, authority or official of the state or of any city, town, borough, municipal corporation, school district, regional district or other district or other political subdivision of the state, including any committee of, or created by, any such office, subdivision, agency, department, institution, bureau, board, commission, authority or official …; (B) Any person to the extent such person is deemed to be the functional equivalent of a public agency pursuant to law… ."

6. The test for determining whether an entity such as the respondent is the functional equivalent of a public agency within the meaning of §1-200(1)(B), G.S., is set forth in Board of Trustees of Woodstock Academy v. FOI Commission, 181 Conn. 544 (1980), and consists of the following four criteria:

a. whether the entity performs a governmental function;

b. whether the entity was created by government;

c. the extent of government involvement or regulation; and

d. the level of government funding.

7. The Supreme Court in Connecticut Humane Society v. FOI Commission, 218 Conn. 757, 761 (1991), advocated a case-by-case application of the Woodstock criteria, and established that all four of the foregoing criteria are not necessary for a

finding of "functional equivalence." Rather "[a]ll relevant factors are to be considered cumulatively, with no single factor being essential or conclusive."

8. With respect to whether the YUPD performs a government function, it is found that P.A. 83-466, §3[*], gives to the YUPD "*all* the powers conferred upon municipal police officers for the City of New Haven (emphasis added)." By contrast, it is found that Yale University Department of Security, which is a different organization than the YUPD, is comprised of security officers and management personnel whose duties are limited to providing safety and security services to Yale University facilities and the university community.

9. It is found that the YUPD's police powers extend beyond the boundaries of Yale University to the borders of the City of New Haven. It is found that officers of the YUPD, like New Haven police officers and all other Connecticut police officers, have the power to make felony arrests anywhere within Connecticut. It is further found that the arrest of the complainants' client that precipitated the request for records described in paragraph 1, above, did not occur on Yale University property.

10. It is found that the legislative history of P.A. 83-466, §3, reveals lawmakers' assumption that permitting the YUPD to take on the duties of the New Haven police department would permit the municipal police department to function more effectively.

11. It is found that the YUPD's performance of law enforcement activities is subject to governmental review. It is found that Yale University police officers' power to detain and arrest is subject to constitutional protections. It is found that Yale University police officers investigate and testify about their enforcement actions in court. It is found that Yale University police officers must be re-certified on a schedule set by the state, according to state standards. It is found that the City of New Haven has the right to terminate its agreement with the YUPD.

12. It is found that Connecticut Humane Society, supra, at 764, concluded that law enforcement is traditionally a function of the government.

13. The respondent analogizes the YUPD to the organization under consideration in Connecticut Humane Society, which held that the organization was not a public agency despite its performance of the governmental function of law enforcement.

14. It is found, however, that the Humane Society played a small role in the state's overall law enforcement activities directed at preventing the cruel treatment of animals. Connecticut Humane Society, supra, at 765. In contrast, the YUPD, by the express terms of P.A. 83-466, §3, exercises full police powers, co-extensive with those of the police department of the City of New Haven.

15. It is concluded, therefore, that the police power given to the YUPD, with its accompanying power to detain and arrest, is a fundamental governmental function that is capable of having a profound impact on private individuals.

16. With respect to whether the YUPD was created by government, it is found that the origin of the YUPD dates to 1894, when the New Haven Police Department, a public agency within the meaning of §1-200(1)(A), G.S., agreed to assign two of its police officers to patrol the Yale University campus to quell sometimes violent disturbances between city residents and university students. It is found that the two New Haven police officers eventually resigned from the city force and were appointed as special constables.

17. The Commission takes administrative notice of the YUPD website, which implies that special constables were appointed to patrol Yale University until the enactment, in 1983, of §3 of P.A. 83-466. It is unclear from the record in this matter what the exact nature was of the relationship between the YUPD and the New Haven Police Department in the intervening years.

18. It is found that the Connecticut legislature formalized the relationship between the New Haven Police Department and Yale University in 1983, by enacting §3 of P.A. 83-466, which permitted the City of New Haven to "appoint persons designated by Yale University to act as Yale University police officers." It is found that the City of New Haven is a public agency, within the meaning of §1-200(1)(A), G.S.

19. Accordingly, it is found that the YUPD was effectively created by the City of New Haven in 1894, when the New Haven Police Department assigned two police officers exclusively to patrol the Yale University campus. It is further found that the subsequent appointment of special constables assigned exclusively to patrol Yale University reinforced YUPD's status as a law enforcement agency distinct from, but dependent upon, the City of New Haven. It is also found that the YUPD's current jurisdiction and authority was enabled by the State of Connecticut in 1983, through §3 of P.A. 83-466.

20. With respect to the extent of government involvement or regulation, it is found that Yale University is not required by state statute to have a police force. It is also found that Yale University is not required by state statute to perform any of the activities to which it agreed in a Memorandum of Understanding between YUPD and the City of New Haven.

21. It is found that officers of the YUPD are employees of Yale University. It is further found that the YUPD handles all

disciplinary matters concerning its employees and Yale University pays all compensation. It is further found that YUPD officers are not members of a "paid police department" for government retirement benefits or for purposes of receiving workers' compensation survivor benefits pursuant to §7-433b, G.S.

22. Nevertheless, it is found that YUPD's disciplinary authority is derived from the Memorandum of Understanding between the City of New Haven and YUPD. It is further found that YUPD has control over disciplinary matters only by agreement with the City of New Haven.

23. P.A. 83-466, §3, states that YUPD officers "shall be deemed for all purposes to be employees and agents of Yale." It is found that the status of YUPD officers as employees and agents of Yale concerns personnel matters and questions of immunity to suit. It is found that the status of YUPD officers as employees and agents of Yale University for purposes of private employment and liability issues does not determine, alone, whether YUPD officers are employees of an entity that is the functional equivalent of a public agency, within the meaning of the FOI Act and Woodstock, supra. "The purpose of the FOIA is to provide public access to governmental information while the purpose of the doctrine of sovereign immunity is to protect the state from liability for private litigation that may interfere with the functioning of state government and may impose fiscal burdens on the state." Gordon v. HNS Management Co., 272 Conn. 81, 106 ftn. 15 (2004).

24. It is found that P.A. 83-466, §3, also requires all police officers of Yale University to be appointed by the City of New Haven, acting through its board of police commissioners.

25. It is found that P.A. 83-466, §3, requires that any such officer appointed by the City of New Haven to have qualified under §7-294d, G.S., which specifies certification and training requirements of municipal police officers.

26. It is found that the legislative history of P.A. 83-466, §3, indicates lawmakers' intention not to relinquish control over Yale University police officers' training and certification.

27. It is found that P.A. 83-466, §3, expressly states that the YUPD is "subject to such conditions as may be mutually agreed upon by the city of New Haven, acting through its board of police commissioners, and Yale University." It is found that P.A. 83-466, §3, permits the City of New Haven to exercise as much regulatory control or involvement as it deems appropriate. It is found that if YUPD did not agree to the regulation or involvement demanded by the City of New Haven, then the City of New Haven would have the option, under P.A. 83-466, §3, to withdraw its regulated delegation of police powers to the Yale University police force.

28. It is found that the City of New Haven, through its police department, is involved in the "day-to-day" activities of the YUPD. Domestic Violence Services v. FOI Commission, 47 Conn.App. 466, 478 (1998). It is found that Appendix A of the Memorandum of Understanding details such day-to-day involvement. The New Haven Police Department provides criminal investigation follow-up and supervision of major cases; arrest and case file processing, crime scene services, assignment of case numbers, prisoner transportation and detention; prisoner processing; tracking and recordkeeping of court dispositions; property and evidence services, juvenile offender services, joint patrols and other specialized police services.

29. It is further found that the YUPD must adhere to federal and state constitutional protections and civil rights laws in exercising its delegated duties.

30. It is found, therefore, that the extent of government involvement and regulation in the YUPD is significant.

31. With respect to the level of government funding, it is found that the YUPD receives minimal direct government funding. It is found that its annual operating budget of approximately $10.3 million is drawn almost entirely from Yale University funds.

32. It is found, however, that the YUPD receives significant in-kind law enforcement services and assistance from the City of New Haven and the city's police force.

33. It is also found that the YUPD benefits financially from its property tax exempt status. It is found that the YUPD's headquarters was assessed at over $5.6 million in 2007.

34. It is found that, for at least the past three years, Yale University has made annual payments of approximately $4.2 million to the City of New Haven in lieu of taxes. It is found, however, that those payments are wholly voluntary and within Yale University's total discretion and control.

35. In his post-hearing brief, the respondent cites Connecticut Humane Society to support his argument that federal tax-exempt status is not the equivalent of government funding. It is found, however, that Connecticut Humane Society did not address the organization's tax status in concluding that the group did not receive public funds.

36. It is found, moreover, that in Williams and the Manchester Journal Inquirer v. Enfield Fire Chiefs Association, Docket

FIC2005-164, the respondent's federal tax-exempt status as a private charity was a factor in the Commission's finding that the respondent received government funding.

37. The respondent cites two other cases in support of his argument that tax-exempt status is not the equivalent of government funding. It is found, however, that only one of those cases concerns tax-exempt status. Contrary to the respondent's assertion, that case states, "In most respects such financial support [from government funds] can be viewed the same as a tax exemption." Greenya v. George Washington University, 512 F.2d 556, 560 (D.C. Cir. 1975). The issue in Greenya was whether tax-exempt status was sufficient government involvement to make an otherwise private entity into a state actor for constitutional purposes. It is found that in Greenya, the court found no difference in analysis between tax-exempt status and financial support in concluding that those factors, alone, are not substantial enough government involvement to demonstrate state action to support the plaintiff's constitutional claims.

38. It is concluded that the level of government funding of the YUPD is significant, although the level of private funding is also significant.

39. Based on all the factors, especially the YUPD's exercise of full police powers throughout the City of New Haven, it is concluded that the YUPD is a public agency within the meaning of §1-200(1)(B), G.S.

40. With respect to whether the records described in paragraph 1, above, are subject to disclosure, §1-200(5), G.S., defines "public records or files" as:

> Any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, … whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

41. Section 1-210(a), G.S., provides in relevant part that:

> Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to . . . receive a copy of such records in accordance with section 1-212.

42. Section 1-212(a), G.S., provides in relevant part that "any person applying in writing shall receive, promptly upon request, a plain or certified copy of any public record."

43. It is found that the records described in paragraph 1, above, are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

44. It is found that the respondent does not dispute that the copies of the records described in paragraph 1, above, would not be exempt from disclosure under the FOI Act, were the Commission to conclude that the respondent police department is a public agency within the meaning of §1-200(1)(B), G.S.

45. Accordingly, it is concluded that the respondent violated the FOI Act by failing to disclose the records described in paragraph 1, above.

The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint:

1. The respondent shall forthwith provide a copy of the records described in paragraph 1, above, to the complainants, free of charge.

Approved by Order of the Freedom of Information Commission at its regular meeting of February 13, 2008.

_____

Petrea A. Jones
Acting Clerk of the Commission
PURSUANT TO SECTION 4-180(c), G.S., THE FOLLOWING ARE THE NAMES OF EACH PARTY AND THE MOST RECENT MAILING ADDRESS, PROVIDED TO THE FREEDOM OF INFORMATION COMMISSION, OF THE PARTIES OR THEIR AUTHORIZED REPRESENTATIVE.

THE PARTIES TO THIS CONTESTED CASE ARE:

Janet R. Perrotti and
State of Connecticut,

Office of the Public Defender
121 Elm Street
New Haven, CT 06510

Chief, Police Department
Yale University
c/o Robert M. Langer, Esq. and
Aaron S. Bayer, Esq.
Wiggin and Dana, LLP
One City Place
185 Asylum Street
Hartford, CT 06103-3402

_____
Petrea A. Jones
Acting Clerk of the Commission

FIC/2007-370FD/paj/2/20/2008

---

* Section 3 of P.A. 83-466 is uncodified in the Connecticut General Statutes. It provides: "The city of New Haven, acting through its board of police commissioners, may appoint persons designated by Yale University to act as Yale University police officers. Such officers having duly qualified under section 7-294d of the general statutes, and having been sworn, shall have all the powers conferred upon municipal police officers for the city of New Haven. They shall be deemed for all purposes to be agents and employees of Yale University, subject to such conditions as may be mutually agreed upon by the city of New Haven, acting through its board of police commissioners, and Yale University."

Not Reported in F.Supp.2d, 2011 WL 4345842 (S.D.Cal.)
(Cite as: 2011 WL 4345842 (S.D.Cal.))

Only the Westlaw citation is currently available.

United States District Court,
S.D. California.
Trumaine JOHNSON, Plaintiff,
v.
UNIVERSITY OF SAN DIEGO, et al., Defendants.

No. 10CV0504–LAB (NLS).
Sept. 16, 2011.

Trumaine Johnson, Houston, TX, pro se.

Kari D. Searles, Michael Cody Sullivan, Paul Plevin Sullivan and Connaughton, Donald F. Shanahan, Office of the City Attorney, San Diego, CA, for Defendants.

ORDER ON MOTION TO DISMISS

LARRY ALAN BURNS, District Judge.

***1** Trumaine Johnson, a student at the University of San Diego, accuses the university, its president (Lyons), its affirmative action director (Batey), its basketball coach (Grier), and a public safety officer (Baker) of racial discrimination in violation of both United States and California law. An allegedly wrongful stop and arrest on February 8, 2009 appears to fuel Johnson's accusations and be the ultimate source of his claims.

Johnson sues on his own behalf, and also as a representative of

> all African Americans, professors and students alike, who since November 2008, have been or will be stopped while walking or driving, detained, interrogated, or subjected to a search (either of person or vehicle) while on USD campus by USD security guards.

(Compl.¶ 34.) The Court has serious doubts as to the class certifiability of Johnson's claims, *see, e.g., White v. Williams,* 208 F.R.D. 123 (D.N.J.2002) (denying class certification of claims alleging racial profiling on the New Jersey Turnpike), but it will address that issue when, and if, Johnson presents it. Now before the Court is the individual Defendants' motion to dismiss.

I. Causes of Action

Johnson brings sixteen causes of action against the Defendants. It will help to list them. The first six arise under United States law, the next four arise under California law, and the remaining six allege common law torts.

The first cause of action, which Johnson brings under 42 U.S.C. § 1983, alleges a violation of Title XI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which forbids racial discrimination in federally funded programs and activities.

The second cause of action, which is also based upon an alleged violation of § 2000d, seeks to impose liability under that statute directly, rather than under § 1983. Johnson concedes that this cause of action can be dismissed against the individual Defendants, however, because "[t]he proper defendant in a Title VI case is an entity rather than an individual." *Farmer v. Ramsay,* 41 F.Supp.2d 587, 592 (D.Md.1999).

The third cause of action, brought under § 1983, alleges a violation of the Fourteenth Amendment.

The fourth cause of action, brought under § 1983, alleges a violation of the Fourth and Fourteenth Amendments.

The fifth cause of action alleges a violation of 42 U.S.C. § 1981, which guarantees equal rights under the law.

The sixth cause of action alleges a conspiracy to violate Johnson's civil rights. Johnson concedes that this cause of action is barred by the applicable statute of limitations.

The seventh cause of action alleges a violation of Cal. Gov.Code § 11135, which is California's analogue to 42 U.S.C. § 2000d; it prohibits racial discrimination in programs and activities that are run or funded by the state.

The eighth cause of action alleges a violation of

Article I, Section 7 of the California Constitution, which is roughly analogous to Section 1 of the Fourteenth Amendment to the United States Constitution.

***2** The ninth cause of action also alleges a violation of the California Constitution: Article I, Section 13, which is analogous to the Fourth Amendment to the United States Constitution.

The tenth cause of action seeks relief under California Civil Code § 52.1 for the alleged violations of California law. Section 52.1 is very similar to 42 U.S.C. § 1983.

The eleventh cause of action alleges the intentional infliction of emotional distress.

The twelfth cause of action alleges the negligent infliction of emotional distress.

The thirteenth cause of action alleges false imprisonment.

The fourteenth cause of action alleges assault and battery.

The fifteenth cause of action alleges negligent supervision and employment.

The sixteenth cause of action seeks relief in the form of a declaration that Defendants violated Johnson's rights under United States and California law.

II. Legal Standard

A rule 12(b)(6) motion to dismiss for failure to state a claim challenges the legal sufficiency of a complaint. *Navarro v. Block,* 250 F.3d 729, 732 (9th Cir.2001). In considering such a motion, the Court accepts all allegations of material fact as true and construes them in the light most favorable to Johnson. *Cedars–Sinai Med. Ctr. v. Nat'l League of Postmasters of U.S.,* 497 F.3d 972, 975 (9th Cir.2007). To defeat a 12(b)(6) motion, a complaint's factual allegations needn't be detailed, but they must be sufficient to "raise a right to relief above the speculative level ...." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). However, "some threshold of plausibility must be crossed at the outset" before a case can go forward. *Id.* at 558 (internal quotations omitted). 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." *Ashcroft v. Iqbal,* 556 U.S. ——, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

While the Court must draw all reasonable inferences in Johnson's favor, it need not "necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Warren v. Fox Family Worldwide, Inc.,* 328 F.3d 1136, 1139 (9th Cir.2003) (internal quotations omitted). In fact, the Court does not need to accept any legal conclusions as true. *Iqbal,* 129 S.Ct. at 1949. A complaint does not suffice "if it tenders naked assertions devoid of further factual enhancement" (*Id.* (internal quotations omitted)), nor if it contains a merely formulaic recitation of the elements of a cause of action. *Bell Atl. Corp.,* 550 U.S. at 555.

III. Discussion

A. Johnson's Second, Sixth, and Thirteenth Causes of Action

Johnson submits that his second, sixth, and thirteenth causes of action can be dismissed. They are **DISMISSED WITH PREJUDICE.**

B. Johnson's First, Third, Fourth, Eighth, and Ninth Causes of Action

***3** Defendants argue that Johnson's claims under § 1983 for alleged violations of 42 U.S.C. § 2000d, the Fourteenth Amendment, and the Fourth Amendment, along with his claims under Sections 7 and 13 of Article I of the California Constitution, cannot be maintained because the Defendants are not state actors.[FN1] Johnson argues that the individual Defendants are, in fact, state actors for the purposes of liability under § 1983 and the California Constitution.

> FN1. The Court has some doubts as to whether Johnson can seek relief under § 1983 for an alleged violation of § 2000d when the individual Defendants cannot be liable under § 2000d in the first place. More than that, there is some indication in the case law that plaintiffs cannot resort to § 1983 to assert

> Title VI rights. *See* *Gensaw v. Del Norte Count Unified School Dist.*, No. C 07–3009, 2008 WL 1777668 at *11 (N.D.Cal. Apr.18, 2008) Defendants don't raise this issue, however, so the Court will pass on it. There also appears to be some disagreement in the case law on the question whether Title VI subsumes any claims that may be brought under § 1983 for violation of the Fourteenth Amendment. *Compare* *Alexander v. Underhill*, 416 F.Supp.2d 999, 1007 (D.Nev.2006) ("a remedy under section 1983 for conduct within the scope of Title VI would be incompatible with Title VI") with *Gensaw*, 2008 WL 1777668 at *10 ("Title VI does not preclude § 1983 equal protection claims based on the same facts."). Again, the defendants don't raise this issue, and so the Court will look past it.

To state a claim for relief under section 1983, Johnson must plead two essential elements: (1) that the individual defendants acted under color of state law; and (2) that they caused him to be deprived of a right secured by the Constitution and laws of the United States." *Johnson v. Knowles*, 113 F.3d 1114, 1117 (9th Cir.1997). A person acts under color of state law if he "exercise[s] power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " *West v. Atkins*, 487 U.S. 42, 49, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941)).

Section 1983 "excludes from its reach merely private conduct, no matter how discriminatory or wrongful." *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999) (citation and internal quotation marks omitted). Indeed, "[p]rivate parties are not generally acting under state law." *Price v. Hawaii*, 939 F.2d 702, 707–08 (9th Cir.1991). But there are exceptions to this general rule, *see* *Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir.2002), and courts must engage in a fact-intensive inquiry to determine when they apply—and the conduct of private parties amounts to government action for the purposes of § 1983. *Howerton v. Gabica*, 708 F.2d 380, 383 (9th Cir.1983). Over time, four tests have been developed to facilitate this inquiry: (1) the public function test; (2) the joint action test; (3) the governmental compulsion test; and (4) the governmental nexus test. *See* *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835–36 (9th Cir.1999) (citing *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 939, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982)).

Johnson relies initially on the public function test, under which a private entity may qualify as a state actor for § 1983 purposes where it exercises "powers traditionally exclusively reserved to the State." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974). It's hard to see, though, how Lyons, Batey, and Grier, in their respective capacities as USD president, affirmative action director, and basketball coach, were exercising powers traditionally reserved to California when Johnson's constitutional rights were allegedly violated by safety officer Baker on February 8, 2009. Indeed, it's hard to see how they were even involved. Johnson may respond that they weren't, but that they are liable for other conduct: Lyons for continuing to employ and failing to train Baker (and "maintaining a custom of segregation at the school"), Batey for dismissing a discrimination complaint that Johnson filed after his arrest, and Grier for twice suspending Johnson from the basketball team (and defaming him in related press releases). Be this as it may, Johnson still fails to explain how their respective positions are "traditionally and exclusively governmental" for the purposes of satisfying the public function test and exposing them to liability under § 1983. *Kirkley v. Rainey*, 326 F.3d 1088, 1093 (9th Cir.2003) (citing *Lee v. Katz*, 276 F.3d 550, 554–55 (9th Cir.2002)).

***4** The other problem with this rebuttal is that Johnson's actual claims, as pled, revolve entirely around his February 8, 2009 stop and arrest, even though he stitches into his complaint these other allegations of racial bias. He may allege in his complaint that USD's commitment to diversity is abysmal (Compl.¶¶ 18–20), and that Batey rejected his complaint that his arrest was racially motivated, and that Grier twice suspended him for "rules violations", but these are extraneous grievances that Johnson fails to incorporate into his causes of action. The crux of Johnson's first cause of action—a § 1983 action for violation of Title VI—is that "[t]he policy employed by USD to approach, stop and question, and sometimes arrest students and employees of African American decent [sic] have [sic] a discriminatory

impact on people of color traveling through California ....” (Compl.¶ 11.) His third cause of action, for violation of the Fourteenth Amendment, alleges that “defendants have caused plaintiff, and the class and subclass he seeks to represent, to suffer deprivation of their fundamental rights to liberty and to be free from unlawful searches, detentions, seizures and education on account of their race and/or national origin.” (Compl.¶ 56.) His fourth cause of action, for violation of the Fourth Amendment, alleges that the defendants “institute, authorize, tolerate, ratify, permit and acquiesce in policies, practices and customs of detentions, interrogations, searches and seizures without probable cause or reasonable, articulable suspicion of crime, in their provision of law enforcement services.” (Compl.¶ 61.) These charges fail to incorporate the allegedly wrongful conduct of Lyons, Batey, and Grier.

Failing the public function test, the individual defendants may also face § 1983 liability under the joint action test if “the state has so far insinuated itself into a position of interdependence with the private entity that it must be recognized as a joint participant in the challenged activity.” *Parks Sch. of Bus., Inc. v. Symington,* 51 F.3d 1480, 1486 (9th Cir.1995). Private actors can be considered state actors, in other words, if they were “willful participant[s] in joint action with the State or its agents.” *Dennis v. Sparks,* 449 U.S. 24, 27, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980); *see also Brunette v. Humane Soc'y of Ventura County,* 294 F.3d 1205, 1211 (9th Cir.2002). A private party is liable under this theory only if its actions are “inextricably intertwined” with those of the government. *Id.* (citing *Mathis v. Pac. Gas & Elec. Co.,* 75 F.3d 498, 503 (9th Cir.1996)). Johnson fails to explain, or for that matter even properly allege, how the individual Defendants joined with *another* state actor to violate his rights. At best, Johnson accuses Baker—not even a primary state actor himself—of violating his rights on February 8, 2009, and the individual Defendants of exacerbating and compounding his alleged injuries: Lyons for doing nothing about them, Batey for not taking Johnson's discrimination complaint seriously, and Grier for suspending him from the basketball team. But Johnson doesn't allege that Baker's conduct was obvious state action—as opposed to that of a private actor performing a public function—and he doesn't allege that the individual Defendants were “willful participants” in it.

***5** Johnson's reliance on *McGrath v. Dominican Coll. of Blauvelt, New York,* 672 F.Supp.2d 477 (S.D.N.Y.2009), is misplaced. In that case, the plaintiff alleged that several named individuals collaborated with a police detective, also an employee of the defendant college, to brush sexual assaults under the rug. *Id.* at 489. There is no allegation here, however, that Lyons, Batey, and Grier collaborated with Baker to stop and arrest Johnson, or that they collaborated with one another to discriminate against him. The Court is also not moved by *Back v. Hastings on Hudson Union Free School District,* 365 F.3d 107 (2d Cir.2004), which Johnson cites for the principle that inaction or deliberate indifference in response to a rights violation may constitute personal involvement in the violation that triggers liability under § 1983. This principle speaks to how state actors can be liable under § 1983, not how private individuals can qualify as state actors in the first place. Indeed, the individual defendants in *Back* were state employees, so the question whether they were state actors for the purposes of § 1983 wasn't really in dispute. *Id.* at 122–23. Likewise, *Warwick v. Univ. of the Pac.,* No. C 08–3904, 2008 WL 5000218 at *5 (N.D.Cal. Nov.21, 2008), is of no help to Johnson because the individual defendants (Miller and Romero) were undeniably state actors. The passage that Johnson relies on concerns liability under § 1983 assuming an individual is a state actor. His effort to place Grier, Baker, Batey, and Lyons into one of four categories of individual liability under § 1983 is therefore misguided from the start.

Johnson may believe that Lyons, Batey, and Grier are guilty of racial discrimination, but the allegation is legally insignificant unless he can show they are state actors within the ambit of § 1983. Johnson must overcome the presumption that § 1983 does not reach the conduct of private parties, and he cannot do that. He has not alleged facts sufficient to show that Lyons, Batey, and Grier, as a university president, affirmative action director, and basketball coach, perform a traditionally public function, nor has he pleaded facts to show that they acted jointly and consciously with a state actor to deprive him of his constitutional rights. Instead, he tells a story that may leave one with the impression that the University of San Diego, for a host of reasons, is inhospitable to African Americans, but the racial climate on campus, as manifested in the alleged conduct of the individual defendants, is not “fairly attributable to the State.” *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 937, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). Johnson's first, third, fourth,

eighth, and ninth causes of action are **DISMISSED WITH PREJUDICE** as against Lyons, Batey, and Grier.

Baker calls for a separate analysis because, as a public safety officer on campus, he plausibly qualifies as a state actor under the public function test; law enforcement, unlike university leadership, the promotion of diversity, and basketball coaching, is a function historically performed by government. *See Flagg Bros., Inc. v. Brooks,* 436 U.S. 149, 163, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978) (leaving open question whether private police forces may be considered state actors). Just as important, it's Baker's conduct that has the most direct relationship to Johnson's grievances and claims; it was the February 8, 2009 stop and arrest, after all, that really set this case into motion. Public safety officers are the quintessential public-private actors whose conduct can expose them to liability under § 1983. *See, e.g., United States v. Aukai,* 497 F.3d 955, 960–61 (9th Cir.2007) (private security guards implementing airport security program ordered by President are state actors); *see also West v. Atkins,* 487 U.S. at 49–51 (private correctional employees under contract with North Carolina amenable to suit under § 1983 for providing inadequate medical care).

***6** Johnson argues that Baker is a state actor for § 1983 purposes under the public function test, because "the City of San Diego has handed over enforcement of misdemeanor crimes to USD security." (Opp'n Br. at 6.) He cites, as support, the following language from USD's website:

> The University of San Diego is a private university and is considered private property. The USD Department of Public Safety is charged with the primary responsibility of maintaining a safe campus environment at USD .... A written agreement is also granted to USD Public Safety by the San Diego Police Department (SDPD) through a Memorandum of Understanding that permits USD Public Safety to investigate misdemeanor crimes occurring on USD property. However, the San Diego Police Department is the primary reporting and investigating agency for any violent crime that might occur on USD property.

(*Id.*) Defendants point out, however, that the Memorandum of Understanding is far from a delegation of police authority to USD. Indeed, Johnson's complaint alleges that "Baker called the San Diego Police Department and caused a citizen's arrest to be made against Trumaine Johnson, claiming Mr. Johnson assaulted him." (Compl.¶ 26.) Under the Memorandum, the San Diego Police Department "will be the primary reporting and investigating agency for ALL violent crimes (willful homicide, forcible rape, robbery, aggravated assault) occurring on USD property." (Barnett Decl. Ex. A.) It further provides that "[University of San Diego Department of Public Safety] may call upon [San Diego Police Department] to assist with misdemeanor crimes occurring on USD property." (*Id.*) Finally, it provides that "USDDPS will advise SDPD of any all violent crimes and assist if needed or requested by SDPD." (*Id.*). Larry Barnett, the Assistant Vice President for Public Safety at USD, declares that "members of the Public Safety department are private security and are not sworn peace officers under California law."

Johnson leads with some cases that simply aren't analogous to this one. For example, in *Stokes v. Northwestern Mem'l Hosp.,* the court allowed that Northwestern University police could be considered state actors, but only because the Code of the City of Chicago "delegated all police powers" to them. 74 N.Y.2d 666, 543 N.Y.S.2d 409, 541 N.E.2d 438, 1989 WL 84554 at *2 (N.D.Ill. July 24, 1989) ("Plaintiff has alleged, in essence, that Northwestern's police exercise all the powers of Chicago police and that they are, de facto, the police force for a particular location, that is, the buildings and public streets between them that comprise Northwestern's facilities."). The Memorandum of Understanding between the San Diego Police Department and USD, by contrast, simply is not a total delegation of police powers. Similarly, in *Payton v. Rush–Presbyterian St. Luke's Med. Ctr.,* the Court held that hospital security guards who were "special Chicago police officers" could be regarded as state actors because a Chicago ordinance delegated "all of the powers of the regular police patrol" to them. 184 F.3d 623, 630 (7th Cir.1999) ("We conclude that for purposes of determining whether Freeman and Murray could be state actors in this case, no legal different exists between a privately employed special officer with full police powers and a regular Chicago police officer."). The court even noted that the power of making a citizen's arrest—which Johnson alleges Baker exercised in this case—is not a power typically reserved to the police for the purposes of the state actor analysis. *Id.* at 629.[FN2] The principle that

emerges in *Stokes* and *Payton*—and which does not help Johnson here—is that security or safety personnel are state actors only "where the state delegate[s] its *entire* police power" to them. *Johnson v. LaRabida Children's Hosp.*, 372 F.3d 894, 898 (7th Cir.2004) (internal quotations omitted) (emphasis added).

> FN2. *See also Okununga v. Yakima County*, 2008 WL 2937560 at *4–6 (E.D.Wash. July 23, 2008) (private security guards were not state actors because they had to call the local police to make an arrest); *Hodges v. Holiday Inn Select*, 2008 WL 1945532 at *3–4 (E.D.Cal. May 1, 2008) (same). *But see Walker v. City of Hayward*, 2008 WL 2357249 at *3–4 (N.D.Cal. June 6, 2008) (refusing to dismiss § 1983 claim against restaurant security guard where plaintiff alleged substantial degree of cooperation with local police).

***7** Several courts have applied this very principle to campus security. *See, e.g., Boyle v. Torres*, 756 F.Supp.2d 983, 993–95 (N.D.Ill.2010) (University of Chicago police were state actors pursuant to Illinois law giving them "the powers of municipal officers and county sheriffs"); *Harper v. Franklin & Marshall College*, 2011 WL 2746644 at *5 (E.D.Penn. July 14, 2011) (mere fact that campus police were "appointed as Private Police under the Pennsylvania Private Police Act" did not clothe the campus police with state authority); *Scott v. Northwestern University School of Law*, 1999 WL 134059 at *5 (N.D.Ill. Mar.8, 1999) (campus police officers were state actors because Illinois statute gave them the same powers as municipal police officers); *Henderson v. Fisher*, 631 F.2d 1115, 1118 (3d Cir.1980) (finding state action on the part of University of Pittsburgh police because "the Pennsylvania legislature has delegated to the campus police ... the very powers which the municipal police force of Pittsburgh possesses").

Typically, the question whether private police or security officers are state actors is one of fact that cannot be resolved at the motion to dismiss stage. *Harper* at *5; *see also Klunder v. Brown University*, 2011 WL 2790178 at *7 (D.R.I. July 13, 2011). This case is different because Johnson alleges no facts in the first place to even support the assertion that Baker is a state actor, or that USD security was delegated police authority by the State of California or City of San Diego. He does argue in his opposition brief that "[t]he San Diego Police Department, though a memorandum of understanding, relinquished its historically exclusive right to investigate misdemeanor crimes on USD's campus to the USD security guards," but that only hurts his argument. The Memorandum of Understanding, at best, establishes that the City of San Diego and USD's Department of Public Safety are collaborators in law enforcement. It is not, in any way, the kind of legislative or statutory endowment of full police powers that gave rise to state action in cases like *Stokes, Payton, Boyle, Harper, Scott,* and *Henderson.* Johnson argues that, in the Memorandum, "the City of San Diego has handed over enforcement of misdemeanor crimes to USD security," but that's simply not true. (Opp'n Br. at 6.) The Memorandum merely says that USD's Department of Public Safety can ask the San Diego Police Department for help with misdemeanor crimes. That is not a delegation of authority, and it does not cloak USD campus safety officers with governmental authority.

Exposure to § 1983 liability arises "when private individuals or groups are endowed by the State with powers or functions governmental in nature" such that they are "agencies or instrumentalities of the State." *Evans v. Newton*, 382 U.S. 296, 299, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966). On the facts pled, and on the Memorandum of Understanding that Johnson concedes is the operative document specifying the role of USD police vis-a-vis San Diego Police, Baker cannot be considered a state actor. There is an insufficient nexus between Baker and the City of San Diego such that his action "may be fairly treated as that of the State itself." *Villegas v. Gilroy Garlic Festival Ass'n*, 541 F.3d 950, 954–55 (9th Cir.2008) (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001)).

***8** Johnson's first, third, fourth, eighth, and ninth causes of action as against Baker are **DISMISSED WITH PREJUDICE.**

C. Johnson's Fifth Cause of Action

Johnson's fifth cause of action accuses all Defendants of violating 42 U.S.C. § 1981. That civil rights statute provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and

> Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Specifically, Johnson alleges that "Defendants, acting under color of law and in concert with one another, have denied plaintiffs their rights to full and equal benefit of the laws." (Compl.¶ 64.) Defendants argue for dismissal on the ground that Johnson has failed to plead sufficient facts under *Iqbal.*

Johnson does not specify which of the Defendants' alleged transgressions inspire his § 1981 claim, but presumably the answer is all of them, because in stating his fifth cause of action he simply incorporates and re-alleges all of his previous allegations. Unfortunately, none of those allegations support an inference of discrimination. For example, Johnson alleges that in December of 2008 he was falsely accused of vandalizing the car of a white USD student, suspended from the basketball team, and defamed in the media by Grier. (Compl.¶ ¶ 21–24.) Aside from the allegation that the car Johnson was accused of vandalizing belonged to a white student, he pleads no facts to support the inference that his treatment surrounding this episode was racially motivated—and that allegation by itself in insufficient.

Similarly, Johnson alleges few facts to suggest that his February 8, 2009 stop and arrest by Defendant Baker was racially motivated. (Compl.¶¶ 25–29.) He alleges in a completely conclusory manner that Baker profiled him before tackling, kneeing, and pepper spraying him, but he offers no facts to support the profiling allegation. (Compl.¶ 25.) He alleges that the police neglected to take the reports of favorable witnesses, but nothing about this allegation suggests racial animus directed at Johnson. He alleges that Baker fabricated events and made false statements to the San Diego police, but again, nothing about that allegation suggests racial animus. The factual allegations become a bit clearer in Johnson's opposition brief, in which he says that he was walking with a white basketball teammate, Matt Dorr, and that he was attacked while Dorr was left alone. There are a couple of problems with this additional information. First, Johnson does not say in his complaint that he and Dorr were walking together when the episode with Baker took place; he merely says that "Dorr witnessed the entirety of Baker's attack." (Compl.¶ 26.) Second, Johnson doesn't allege any additional facts to suggest that he and Dorr were acting the same such that they should have been treated the same. He just makes the suspiciously cagey allegation that he was with a white teammate, and Baker and the San Diego police left the white teammate alone. But he doesn't say what the stated basis was for *his* apprehension (or that there was none), he doesn't say what he and Dorr were doing that would make their differential treatment suspicious, and he doesn't state any facts that can rule out the possibility that Baker had a reason for treating Johnson and Dorr differently. Without these additional facts, there cannot be an inference that racial animus was afoot.

***9** Next to consider is Johnson's allegation that following the February 8, 2009 run-in with Baker and the San Diego Police Department, he was "suspended for violating 'unspecified team rules.' " (Compl.¶ 30.) The only basis Johnson offers for his charge of discrimination is that Dorr "also violated 'team rules' " and was not suspended. (*Id.*) But here, again, without additional factual allegations showing that the differential treatment was unjustified, this allegation is too speculative under *Iqbal* to sustain a § 1981 claim. There is surely more to Johnson's story than the simple fact that he was suspended for violating the basketball team's rules while Dorr was not, and Johnson should be able to allege a richer set of facts than he does to support this discrimination claim.

Johnson also suggests that the rejection of his complaint against Baker by Affirmative Action Director Batey was racially motivated. (Compl. ¶ 32; Opp'n Br. at 10.) But according to Johnson, Dorr filed a complaint, too, and Dorr's complaint was also rejected. Johnson alleges no additional facts surrounding the rejection of his complaint that give rise to an inference of discrimination, and the mere fact that his complaint was rejected is woefully insufficient. Were it otherwise, Batey would expose himself to a lawsuit every time he rejected the complaint of a minority student.

Finally, Johnson alleges that on the same day he was arrested, several other campus crimes involving non-African American students were treated less severely; whereas Johnson was arrested, these other

students merely received a "judicial referral." (Compl.¶ 32.) Johnson does not, however, articulate any of the exact circumstances surrounding his arrest to support the inference that he received disproportionate treatment. Taking his complaint at face value, the allegation appears to be that Baker simply committed a random act of violence against him: "On February 8, 2009 Mr. Johnson was unlawfully stopped, racially profiled, tackled to the ground by Defendant Baker, kneed in the back, pepper sprayed in the face and then wrongfully arrested by Baker." (Compl.¶ 25.) But Johnson needs to either make that allegation explicitly or explain what the stated justification was for his arrest in order to support the inference that it was baseless and discriminatory.

The bigger problem here is that Johnson simply misunderstands the standard for pleading a claim that can survive a 12(b)(6) motion to dismiss. He cites *Swierkiewicz v. Sorena,* 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), and argues he "need not set forth circumstances supporting an inference of discrimination." (Opp'n Br. at 10.) The Supreme Court indeed held in *Swierkiewicz* that "a complaint in an employment discrimination lawsuit [need] not contain specific facts establishing a prima facie case of discrimination under the framework set forth in *McDonnell Douglas." Swierkiewicz,* 550 U.S. at 569.[FN3] But the governing standard now comes from *Iqbal,* which requires that Johnson "plead[ ] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 129 S.Ct. at 1949. For the reasons given above, the Court finds that he has not done that. To the contrary, the only reasonable inference the Court can draw is that Johnson isn't telling the full story. If he sincerely believes his treatment by the Defendants was discriminatory, then he needs to allege more details surrounding his February 8, 2009 arrest to show that the arrest and his subsequent treatment were racially motivated. The Court will allow him that opportunity. Johnson's fifth cause of action is therefore **DISMISSED WITHOUT PREJUDICE.**

> FN3. Defendants argue that *Swierkiewicz* was expressly overruled by *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929. (Reply Br. at 6 n. 4.) Actually, the Supreme Court in *Twombly* rejected the argument that its analysis ran counter to *Swierkiewicz,* noting that in that case it reversed the Second Circuit for imposing a heightened pleading standard, while in Twombly it was only requiring "enough facts to state a claim to relief that is plausible on its face." *Id.* at 569.

D. Johnson's Tenth Cause of Action

***10** Johnson's tenth cause of action accuses the Defendants of violating Cal. Civ.Code § 52.1, which prohibits the interference with constitutional or statutory rights by threatening, intimidating, or coercive means. *See Jones v. Kmart Corp.,* 17 Cal.4th 329, 334, 70 Cal.Rptr.2d 844, 949 P.2d 941 (Cal.1998) ("section 52.1 does require an attempted or completed act of interference with a legal right, accompanied by a form of coercion"); *see also Venegas v. County of Los Angeles,* 32 Cal.4th 820, 842, 11 Cal.Rptr.3d 692, 87 P.3d 1 (Cal.2004) (provisions of § 52.1 "are limited to threats, intimidation, or coercion that interferes with a constitutional or statutory right").

The Court sees two problems with this cause of action. First, Johnson doesn't specify which rights, under the United States or California constitutions (or United States or California laws), Defendants have interfered with. He merely incorporates by reference all of the preceding allegations in his complaint and then says "Defendants' above-described conduct interfered and/or attempted to interfere with plaintiffs' exercise and/or enjoyment of their rights as secured by the United States Constitution and/or California Constitution, in violation of California Civil Code § 52.1." (Compl.¶¶ 78–79.) Second, Johnson doesn't allege how the Defendants' interfered with those rights by threats, intimidation, or coercion. He claims Grier wrongfully suspended and defamed him, and that Batey rejected his complaint against Baker, but he doesn't allege any facts to support the inference that this conduct was a threatening, intimidating, or coercive interference with his rights. Johnson's attempt in his opposition brief to argue that he has alleged sufficient facts is completely unsatisfying; in essence, he conflates the violations themselves, which he claims were intimidating, with the exercise of constitutional and statutory rights that is protected by § 52.1. (*See* Opp'n Br. at 12.) These are square peg allegations for a round hole of a statute. Johnson's § 52.1 claims against Grier and Batey are therefore **DISMISSED WITH PREJUDICE.** Johnson concedes he cannot maintain a § 52.1 claim against Lyons, and Defendants do not

challenge Johnson's ability to state such a claim against Baker.

E. Johnson's Eleventh Cause of Action

Johnson accuses all individual Defendants of the intentional infliction of emotional distress, again by merely incorporating all previous allegations in his complaint and then just reciting the elements of the cause of action: "Defendants' above-described conduct was extreme and outrageous. Said conduct was done intentionally and with conscious disregard of plaintiffs' rights, and directly and proximately caused plaintiffs humiliation, mental pain and suffering. (Compl.¶ 81.)

The intentional infliction of emotional distress requires conduct that is "so extreme and outrageous as to exceed all bounds of that usually tolerated in a civilized society." *Bosetti v. U.S. Life Ins. Co. in City of New York,* 175 Cal.App.4th 1208, 1242, 96 Cal.Rptr.3d 744 (Cal.Ct.App.2009) (internal quotations omitted). The Defendants do not dispute that Johnson has pled a plausible claim against Baker. The question is whether he has pled one against Lyons, Grier, and Batey. The Court finds that he has not and cannot. Johnson's only argument is that his "arrest, suspension, and termination from the basketball team and the loss of his scholarship was racially motivated," from which he presumably wishes to urge the point that whatever is discriminatory is extreme and outrageous. That argument has problems. First, it does not in any way implicate Batey's rejection of Johnson's complaint. Second, to the extent it might, at best Johnson alleges a genuine dispute with Batey's decision; he falls far short of alleging facts to show that the mere rejection of his complaint was extreme and outrageous. Third, Johnson alleges no facts to suggest that Lyons, as President of USD, acted toward Johnson in a manner that was extreme and outrageous; in fact, he alleges no facts to show that she was even personally involved in Johnson's arrests and related suspensions from the basketball team. Or, as Defendants put it, "[h]e does not allege that Lyons took any active role in anything having to do with him." (Br. at 15.) Fourth, as to Grier, Johnson again only alleges facts sufficient to show that he disputes the basketball coach's decisions to suspend him from the team for rules violations. That is insufficient. *See Bosetti,* 175 Cal.App.4th at 1242, 96 Cal.Rptr.3d 744 (genuine disputes foreclose possibility of extreme and outrageous conduct).

***11** Johnson's intentional infliction of emotional distress claim against Baker can stand. His claims against Lyons, Grier, and Batey cannot, and they are **DISMISSED WITH PREJUDICE.**

F. Johnson's Twelfth Cause of Action

Johnson accuses all individual Defendants of the negligent infliction of emotional distress. As with his cause of action for the *intentional* infliction of emotional distress, Johnson doesn't plead the particular facts underlying the claim. He merely incorporates and realleges all preceding paragraphs and then states conclusorily "Defendants above-described conduct constituted a breach of defendants' duty of care to plaintiffs to ensure that defendants did not cause unnecessary or unjustified harm to plaintiffs. It was reasonably foreseeable to all defendants that a breach of that duty by defendants would cause emotional distress to plaintiffs." (Compl.¶ 83.)

The negligent infliction of emotional distress is not an independent tort, but a tort of negligence to which the traditional elements of duty, breach of duty, causation, and damages apply. *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.,* 48 Cal.3d 583, 588, 257 Cal.Rptr. 98, 770 P.2d 278 (Cal.1989). Johnson makes no effort to plead those elements, or, more specifically, the factual bases for them. Perhaps he can. Perhaps Johnson's argument is that Grier owed him a duty of care in his suspension decisions, and that Grier failed to fulfill that duty by rushing to judgment in his suspension decisions and announcing Johnson's suspension in a manner that was defamatory. Perhaps Johnson's argument with respect to Batey is similar—that his complaint against Baker was owed a duty of reasonable care, and that Batey dismissed it for nefarious reasons that he should have known would cause Johnson emotional distress. But whatever the argument, Johnson needs to allege the requisite facts; he can't simply rely on the conclusory assertion that he was discriminated against, and the frivolous argument that because discrimination is bad he must be entitled to relief under any number of legal theories.

Johnson's negligent infliction of emotional distress claims against Grier and Batey are **DISMISSED WITHOUT PREJUDICE.** The Court sees no basis for a negligent infliction of emotional distress claim against Lyons, and that claim is **DISMISSED WITH PREJUDICE.** The Defendants do not dispute that he

has stated a claim against Baker, so that claim survives their motion to dismiss.

G. Johnson's Fifteenth Cause of Action

Johnson accuses Lyons of negligently employing and supervising Baker. He alleges that "Lyons as an executive officer of USD knew or in the exercise of due care should have known that Defendant[ ] Baker ... had a propensity, character trait, and practice, while purporting to act under color of law, for bigotry and/or violence, and/or dishonesty and/or prevarication." (Compl.¶ 92.) He also alleges that Lyons "negligently, carelessly and recklessly, hired, employed, retained and failed to properly supervise, train and control Baker." (Compl.¶ 93.)

***12** A negligent hiring claim arises when an employer had some antecedent reason to believe that hiring a particular individual would create an undue risk of harm. *Federico v. Superior Court,* 59 Cal.App.4th 1207, 1213, 69 Cal.Rptr.2d 370 (Cal.Ct.App.1997). An employer's duty of reasonable care is breached "only when the employer knows, or should know, facts which would warn a reasonable person that the employee presents an undue risk of harm to third persons *in light of the particular work to be performed." Id.* at 1214, 69 Cal.Rptr.2d 370.

The sole basis for Johnson's negligent hiring claim is that Baker was previously a zookeeper at the San Diego Zoo. This is woefully inadequate. It does not even begin to allow for "the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 129 S.Ct. at 1949. It would be different if Johnson could allege that Baker had proven himself to be a loose cannon in a prior job that was comparable to his work as a USD security officer, but the mere fact that he was previously a zookeeper is insufficient as a matter of law to support the inference that it was negligent of USD to hire him in the first instance. This claim is **DISMISSED WITH PREJUDICE.**

IV. Conclusion

Some of Johnson's claims survive the Defendants' motion to dismiss, but most do not. Johnson's second, sixth, and thirteenth causes of action are **DISMISSED WITH PREJUDICE.** He concedes they should be.

His first, third, fourth, eighth, ninth, and fifteenth causes of action are also **DISMISSED WITH PREJUDICE.**

His tenth and eleventh causes of action are **DISMISSED WITH PREJUDICE** as to Lyons, Grier, and Batey. They survive as to Baker.

His fifth cause of action is **DISMISSED WITH PREJUDICE.**

His twelfth cause of action is **DISMISSED WITH PREJUDICE** as to Lyons, **DISMISSED WITHOUT PREJUDICE** as to Grier and Batey, and survives as to Baker.

His fourteenth cause of action against Baker survives; the Defendants do not challenge it.

Johnson's counsel has withdrawn from the case, and he has indicated a willingness to proceed pro se. He has three weeks to amend his complaint from the date this Order is entered. If he fails to do so, the claims that have been dismissed without prejudice will be dismissed with prejudice and only his tenth, eleventh, twelfth, and fourteenth causes of action against Baker will remain. Defendants should notify the Court telephonically if, at the three-week mark, Johnson has failed to amend his complaint.

The Defendants' motion to strike Johnson's class action demand is **DENIED WITHOUT PREJUDICE.** It may be that none of the remaining claims may even proceed on a class-wide basis, but the Court does not rule out this possibility now, nor does it rule out the possibility that Johnson may retain counsel to help him litigate this case going forward. Once Johnson amends his complaint and it is clear whether he has counsel, and what claims he is asserting, the Defendants may renew their motion to strike.

***13** Finally, the City of San Diego and Christina Berg's motion for leave to file an amended answer is **GRANTED,** although they should wait for Johnson to file an amended complaint before filing their amended answer.

IT IS SO ORDERED.

S.D.Cal.,2011.
Johnson v. University of San Diego
Not Reported in F.Supp.2d, 2011 WL 4345842 (S.D.Cal.)

END OF DOCUMENT

Not Reported in F.Supp.2d, 1999 WL 134059 (N.D.Ill.)
(Cite as: 1999 WL 134059 (N.D.Ill.))

United States District Court, N.D. Illinois, Eastern Division.
Damon Maurice SCOTT, Plaintiff,
v.
NORTHWESTERN UNIVERSITY SCHOOL OF LAW, Northwestern University Police Department, Northwestern University, Thomas Branick in both his official and individual capacities, John Doe # 1 in both his official and individual capacities, and John Doe # 2 in both his official and individual capacities, Defendants.

No. 98 C 6614.
March 8, 1999.

MEMORANDUM OPINION
KOCORAS, District J.

***1** This matter is before the Court on Northwestern University's Rule 12(b)(1) and 12(b)(6) motions to dismiss. For the following reasons, the motions are granted in part and denied in part.

BACKGROUND

Plaintiff Damon Maurice Scott brings this action seeking monetary damages against defendants Northwestern University School of Law, Northwestern University Police Department, Northwestern University (the "University" or "Northwestern"), Thomas Branick, and two unnamed police officers of the Northwestern University Police Department for alleged violations of 42 U.S.C. § 1983 and Illinois law.

For the purposes of this motion to dismiss, we accept the complaint's factual allegations as true. Scott alleges that on October 21, 1997, at approximately 9:10 a.m., he entered the Northwestern University School of Law Library. Scott was not a student of the Northwestern University School of Law. While school policy restricts access to the library to Northwestern students during final examination periods, October 21, 1997, was not a final examination period at the law school.

At approximately 4:20 p.m. on October 21, 1997, two police officers from the Northwestern University Police Department approached Scott and requested his identification. After Scott produced his identification, he was informed by the officers that he fit the description of a man suspected of a theft in the library. Scott was placed under arrest. Subsequently, the police officers questioned certain faculty and students of Northwestern University about some of Scott's belongings, but no one identified any of Scott's belongings as stolen property. Despite this fact, the police officers took Scott to the Northwestern University Detention Center. While at the Detention Center, Scott was informed he was arrested as a suspect of theft; however, Scott was charged only with criminal trespass to the School of Law Library. Scott was then turned over to the Chicago Police Department where he was imprisoned for over seventeen hours.

Subsequent to these events, Scott filed a complaint with the Director of Minority Affairs at the School of Law. Scott received a letter from the Dean of the Northwestern University School of Law characterizing the events as a case of "mistaken identity" and encouraging Scott to continue to use the School of Law library. In addition, the charge of criminal trespass was later stricken from Scott's record.

The Illinois legislature, by statute, has entrusted the Board of Trustees of a private college or university to appoint members to a campus police department. According to the statute, 110 ILCS 1020/1, these campus officers "have the powers of municipal peace officers and county sheriffs.... provided, however, that such powers may be exercised only on college or university property." The Northwestern Universtity Campus Police Department was organized under this statute.

Scott has filed suit against the defendants alleging that his civil rights were violated under 42 U.S.C. § 1983. Scott claims that the defendants acted under the color of state law to deny him his rights under the Fourteenth Amendment of the United States, and additionally violated his right to equal protection of the laws. The defendants seek to have this case dismissed under Federal Rule of Civil Procedure 12(b)(1) for lack of jurisdiction and Rule 12(b)(6) for failure to

state a claim upon which relief may be granted.

LEGAL STANDARD

***2** Rule 12(b)(1) provides for dismissal of claims over which the federal court lacks subject matter jurisdiction. Jurisdiction is the "power to decide" and must be conferred upon the federal court. *See In re Chicago, Rock Island & Pacific R.R. Co.,* 794 F.2d 1182, 1188 (7th Cir.1986). In reviewing a 12(b)(1) motion to dismiss, the court may look beyond the complaint and view any extraneous evidence submitted by the parties to determine whether subject matter jurisdiction exists. *See United Transp. Union v. Gateway Western Ry. Co.,* 78 F.3d 1208, 1210 (7th Cir.1996) (citing *Bowyer v. United States Dept. of Air Force,* 875 F.2d 632, 635 (7th Cir.1989)). The plaintiff bears the burden of establishing that the jurisdictional requirements have been met. *See Kontos v. United States Dept. of Labor,* 826 F.2d 573, 576 (7th Cir.1987). When a party moves for dismissal pursuant to Rule 12(b)(1), the nonmoving party must support its allegations with competent proof of jurisdictional facts. *See Thomson v. Gaskill,* 315 U.S. 442, 446 (1942).

The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the sufficiency of the complaint, not to decide the merits of the case. Defendants must meet a high standard in order to have a complaint dismissed for failure to state a claim upon which relief may be granted. In ruling on a motion to dismiss, the court must construe the complaint's allegations in the light most favorable to the plaintiff and all well-pleaded facts and allegations in the plaintiff's complaint must be taken as true. *See Bontkowski v. First National Bank of Cicero,* 998 F.2d 459, 461 (7th Cir.1993). The allegations of the complaint should not be dismissed for failure to state a claim "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45–46 (1957); *see also Hartford Fire Insurance Co. v. California,* 509 U.S. 764 (1993); *Sherwin Manor Nursing Center, Inc. v. McAuliffe,* 37 F.3d 1216, 1219 (7th Cir.1994). Nonetheless, in order to withstand a motion to dismiss, a complaint must allege facts sufficiently setting forth the essential elements of the cause of action. *See Lucien v. Preiner,* 967 F.2d 1166, 1168 (7th Cir.1992).

In reviewing a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court is limited to allegations in the pleading themselves. Documents incorporated by reference into the pleadings and documents attached to the pleadings as exhibits are considered part of the pleadings for all purposes. *See* Fed.R.Civ.P. 10(c). In addition, "documents that a defendant attaches to a motion to dismiss are considered a part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim." *Venture Associates Corp. v. Zenith Data Systems Corp.,* 987 F.2d 429, 431 (7th Cir.1993). It is with these principles in mind that we turn to the motion before us.

DISCUSSION

***3** The defendants in their motions to dismiss first argue that the Northwestern University School of Law and Northwestern University Police Department are non-legal entities and therefore are not amenable to this suit. The plaintiff concedes this point in his Response. Therefore, Northwestern University School of Law and Northwestern University Police Department are dismissed from this suit.

A. Amenability to Suit under § 1983

Section 1983 provides a federal remedy for deprivations of an individual's constitutional rights made by a person acting under the color of state law. Scott alleges that Northwestern University, a private institution, should be liable for the acts of its campus police department. Scott argues that the powers afforded to the Northwestern University Police Department by the state qualify it as a state actor. The United States Supreme Court has explicitly left open the question of whether "private police forces" may be considered state actors. *See Flagg Bros., Inc. v. Brooks,* 436 U.S. 149, 163 (1978). This court, therefore, is left to decide whether Northwestern University's campus police force may be deemed a state actor for the purposes of § 1983.

A private institution will be deemed to have acted as a state actor in either of two instances. The first situation includes instances where a state effectively directs or controls the actions of the private party such that the state can ultimately be held responsible for the private party's decision. *See Wade v. Byles,* 83 F.3d 902, 905 (7th Cir.1996)(citing *Flagg Bros.,* 436 U.S. at 166). The plaintiffs do not argue that this is the situation in this case. Scott's claim is based on the second general situation where a private entity can be

deemed a state actor, when "a state delegates a 'public function' to a private entity." *See id.* (citing *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982)).

Scott alleges that the functions performed by the Northwestern University police officers are so closely related with those performed by municipal police officers that they should be deemed state actors for purposes of § 1983 and the Fourteenth Amendment. That a private entity performs a function that serves the public does not transform its conduct into state action. *See Wade*, 83 F .3d at 905 (citing *Rendell–Baker v. Kohn*, 457 U.S. 830, 842 (1982)). "A private entity may be deemed a state actor, however, if it performs functions that are 'traditionally the exclusive prerogative of the State." ' *Wade,* F.3d at 905 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974)).

Scott's arguments are based in large part on the Illinois statute from which the powers of the campus police are derived. In full, that statute provides:

> The Board of Trustees of a private college or private university, may appoint persons to be members of a campus police department. The Board shall assign duties, including the enforcement of college or university regulations, and prescribe the oath of office. With respect to any such campus police department established for police protection, the members of such campus police department shall be persons who have successfully completed the Minimum Standards Basic Law Enforcement Training Course offered at a police training school established under the Illinois Police Training Act, as such Act may be now or hereafter amended. All members of such campus police departments must also successfully complete the Firearms Training for Peace Officers established under an Act in Relation To Firearms Training for Peace Officers, as such Act may be now or hereafter amended. *Members of the campus police department shall have the powers of municipal peace officers and county sheriffs, including the power to make arrests under the circumstances prescribed in Section 107–2 of the Code of Criminal Procedure of 1963, as amended, for violations of state statutes, municipal or county ordinances, provided, however, that such powers may be exercised only on college or university property, for the protection of students, employees, visitors and their property, and the property of the college or university, unless otherwise authorized by a county or municipality.* Campus police shall have no authority to serve civil process.
>
> ***4** Members of the campus police department at a private college or private university shall not be eligible to participate in any State, county or municipal retirement fund and shall not be reimbursed for training with state funds. The uniforms, vehicles, and badges of such officers shall be distinctive from those of the local law enforcement agency where the campus is located.
>
> The Board of Trustees shall provide liability insurance coverage for each member of the campus police department without cost to the member, which insures the member against any liability which arises out of or in the course of the member's employment for no less than $250,000 of coverage, unless such indemnification is provided by a program of self-insurance.
>
> For the purposes of this Section, "private college" or "private university" means: (1) any college or university which is not owned or controlled by the State or any political subdivision thereof, and (2) which provides a program of education in residence leading to a baccalaureate degree, or which provides a program of education in residence, for which the baccalaureate degree is a prerequisite, leading to an academic or professional degree, and (3) which is accredited by the North Central Association or other nationally recognized accrediting agency.
>
> 110 ILCS 1020/1 (emphasis added).

This statute thus gives the Northwestern University police "the powers of municipal peace officers and county sheriffs, including the power to make arrests ... for violations of state statutes, municipal or county ordinances," with the limitations that those "powers may be exercised only on college or university property, for the protection of students, employees, visitors and their property, and the property of the college or university" and that "[c]ampus police shall have no authority to serve civil process." *Id.*

In *Wade v. Byles*, 83 F.3d 902 (7th Cir.1996), the Seventh Circuit discussed § 1983 liability for in-house, armed security guards employed by the CHA. The CHA contracted with a private security

company, T Force, to provide security for the lobbies of CHA buildings. *See id.* at 904. These guards controlled access to CHA buildings. *See id.* They were not allowed to pursue individuals outside the building lobbies. *See id.* If an individual not permitted in the lobby refused to leave, the guard could call the police or arrest the individual and wait for the arrival of the police. *See id.* Although they were armed, they were permitted to use deadly force only in self-defense. *See id.*

These security guard were distinct from the CHA police. *See id.* at 903. Under an Illinois statute, the CHA maintained a police force with jurisdiction limited to CHA property. *See id.* The CHA police were vested with all the powers of city and state police. *See id.*

The *Wade* Court held that these private security officers were not state actors for the purposes of the Fourteenth Amendment. *See id.* at 907. Because the private security force "possessed powers no greater than those of armed security guards who are commonly employed by private companies to protect private property," the court found that the guard's "function as a lobby security guard with the aforementioned limited powers is not traditionally the exclusive prerogative of the state." *Id.* at 906.

***5** In reaching that conclusion, the court noted that it was "not faced with a situation where a state has delegated its entire police power to a private police force. Indeed, general police protection on CHA property is provided by the CHA police force, which is statutorily entrusted with 'all the powers possessed by the police of cities, and sheriffs....' 310 ILCS § 10/8.1a. The contract security guards are not a part of this public police force, nor do they participate in searches of residential units conducted by the police. Furthermore, the area of responsibility of the contract guards in this case are clearly limited to the lobbies of CHA buildings." *Id.* at 905–06. The court also noted that the Seventh Circuit had already held that "private railroad police possessing the same powers as city police act under color of state law." *Id.* at 906 n. 5 (citing *United States v. Hoffman,* 498 F.2d 879, 881 (7th Cir.1974)); *see also United States v. Shahid,* 117 F.3d 322 (7th Cir.1997) (following *Wade* in concluding for Fourth Amendment purposes that a private mall security force was not the local law enforcement).

In *United States v. Hoffman,* 498 F.2d 879, (7th Cir.1974), privately employed railroad policeman, who by state law were vested the same powers as state police, brutally beat several trespassers on railroad property. Similar to the case at bar, the jurisdiction of the railroad police was limited to railroad property. The Seventh Circuit held that the railroad police officers did act under the color of state law despite the fact they were employed by a private entity. *See Hoffman,* 498 F.2d at 882. The Court ruled that the railroad police were armed with the same powers as city police and were therefore cloaked with the authority of the state. *See Hoffman* at 882.

The Third Circuit's decision in *Henderson v. Fisher* also offers some guidance. In *Henderson,* a plaintiff brought suit under § 1983 against the University of Pittsburgh campus police. Although the University of Pittsburgh is a public institution, the Third Circuit noted that the Pennsylvania legislature's delegation to the campus police of "the very powers which the municipal police force possesses" buttressed their conclusion that the campus police act under color of state authority. *See Henderson* at 1118.

In the case at bar, the Northwestern University police are far more than security officers like those in *Wade.* They are akin to the CHA's police force, delegated the same powers as municipal officers but with a more-limited jurisdiction. By virtue of the Illinois statute, the Northwestern University police force was transformed from mere private security guards.

Because the police are vested with almost identical powers to those of county and municipal police, they exercise functions that are traditionally the exclusive prerogative of the state. Their limited geographic jurisdiction, like those of the railroad security guards in *Hoffman,* does not persuade this Court otherwise. Although the police may exercise their powers "only on college or university property, for the protection of students, employees, visitors and their property, and the property of the college or university," on University property a member of Northwestern's police force is every bit the law enforcement officer as is a member of the Chicago Police Department when one walks off the University's downtown property and onto a public thoroughfare.

***6** This is true because the state has so authorized

the Northwestern University police. By accepting this authorization, Northwestern and its police must also accept the grave responsibility to protect an individual's constitutional rights, the same responsibility that § 1983 enforces against municipal and other police forces. To permit the state to delegate its police powers to Northwestern University and then shield the Northwestern police force from liability when, in exercising these powers, it violates the rights of "students, employees, [and] visitors" would pervert the language and intent of § 1983.

For these reasons, this Court concludes that Northwestern University's police force can act under the color of state law for purposes of § 1983.

B. Eleventh Amendment Claim

Defendants argue that, if they are amenable to suit under § 1983, they are constitutionally immune from suit under the Eleventh Amendment. As a preliminary matter, this court notes that both plaintiffs and defendants have made a mess of this argument in their briefings. Defendants argue that "if this Court interprets 110 ILCS 1020/1 to impose state action onto Defendant Northwestern and Branick, then this Court finds Northwestern and Branick to be state actors." Defendant's Motion at 7. The analysis is not that easy, however, as certain entities that are subject to suit under § 1983, such as municipal corporations, may still be sued in federal court. *See, e.g., Devito v. Chicago Park District,* 83 F.3d 878, 881 (7th Cir.1996).

Not to be outdone in misunderstanding the Eleventh Amendment, Plaintiff cites *Ex parte Young,* 209 U.S. 123 (1908), for the proposition that "Eleventh Amendment immunity does *not* extend to state officials sued for violations under Federal Law. In this case, Plaintiff has clearly set forth in his complaint his Fourth and Fourteenth Amendment rights under the United States Constitution have been violated. This, in and of itself, makes the Eleventh Amendment argument inapplicable." Plaintiff's Response at 12 (emphasis in original). Plaintiffs, who are asking for damages, utterly misunderstand *Ex parte Young,* which stands for the proposition that "suits against state officials seeking prospective equitable relief for ongoing violations of federal law are not barred by the Eleventh Amendment." *Marie O. v. Edgar,* 131 F.3d 610, 615 (7th Cir.1997). *Ex parte Young* is inapplicable to the case at bar.

The Eleventh Amendment prohibits federal courts from deciding suits brought by private litigants against states or their agencies, and that prohibition extends to state officials acting in their official capacities. *See Garcia v. City of Chicago, Illinois,* 24 F.3d 966, 969 (7th Cir.1994). The Amendment bars suit against an entity which is an "an arm or alter ego of the state." *Thiel v. State Bar of Wisconsin,* 94 F.3d 399, 400 (7th Cir.1996). In deciding whether an entity qualifies for Eleventh Amendment immunity, the Seventh Circuit examines the extent of control the state has over the entity, whether the entity acted as an agent of the state, and, least importantly, whether a judgment would impact the state treasury. *See id.* at 401 (citing *Crosetto v. State Bar of Wisconsin,* 12 F.3d 1396 (7th Cir.1993)). With this framework in mind, the private Northwestern University cannot be considered an arm of the state. Northwestern no more acted as an agent of the state for Eleventh Amendment purposes than does a municipal corporation when it runs its police force. Northwestern University is not immune from suit by the Eleventh Amendment.

C. Place of Public Accommodation

***7** Defendants argue that Count II of Scott's complaint must be dismissed because the Northwestern Library is not a place of public accommodation under 775 ILCS 5/5–101. That section provides:

> 5–101. Definitions. The following definitions are applicable strictly in the context of this Article:
>
> (A) Place of Public Accommodation. (1) "Place of public accommodation" means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public.
>
> (2) By way of example, but not of limitation, "place of public accommodation" includes facilities of the following types: inns, restaurants, eating houses, hotels, soda fountains, soft drink parlors, taverns, roadhouses, barber shops, department stores, clothing stores, hat stores, shoe stores, bathrooms, restrooms, theatres, skating rinks, public golf courses, public golf driving ranges, concerts, cafes, bicycle rinks, elevators, ice cream parlors or rooms, railroads, omnibuses, busses, stages, air-

planes, street cars, boats, funeral hearses, crematories, cemeteries, and public conveyances on land, water, or air, public swimming pools and other places of public accommodation and amusement.

(B) Operator. "Operator" means any owner, lessee, proprietor, manager, superintendent, agent, or occupant of a place of public accommodation or an employee of any such person or persons.

(C) Public Official. "Public official" means any officer or employee of the state or any agency thereof, including state political subdivisions, municipal corporations, park districts, forest preserve districts, educational institutions and schools.

775 ILCS 5/5–101.

Defendants argue that a university is an institution of higher education, which the Illinois Supreme Court determined was not a place of public accommodation. Defendants cite to *Board of Trustees of Southern Illinois University v. Department of Human Rights,* 636 N.E.2d 528, 531 (Ill.1994)("SIU"), which held that "an academic program in a public institution of higher learning" was not a public accommodation under the Act. The *SIU* Court noted that "institution of higher education," "education program," and "classroom" were not contained in the list of examples of public accommodations. *See id.* Looking at legislative intent, the Court concluded that "what was anticipated by the General Assembly is a restaurant, or a pub, or a bookstore. What was not anticipated is an academic program of a higher education institution." *Id.*

A private university library is not a place of public accommodations. The university library is inextricably tied to the university's academic program. That the university permits public access to the library at various times of the year does not change its essential character as a library for the faculty and students of the university.

***8** Moreover, most of the examples of public accommodations contained in the statute are commercial enterprises, which the private library clearly is not. Unlike theaters and bookstores, university libraries are open to the public for the benefit of the public only, without profit to the university. To place university libraries in the category of public accommodations would be to encourage universities to close their libraries to the public.

For these reasons, this Court concludes that defendants' motion to dismiss Count II of plaintiff's complaint is granted.

D. Arguments Raised in Reply Brief

Defendants' request that the plaintiff's complaint be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim for which relief can be granted under *Monell v. Department of Social Services of City of New York,* 436 U.S. 658 (1978). Defendants argue this point only in their Reply brief, and this argument is therefore not properly before the Court. Defendants' motion under 12(b)(6) is therefore denied.

Defendants also argue for the first time in their reply brief that they are immune from suit under Illinois law. According to defendants, the Illinois Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/2–109 et seq. immunizes defendants if this Court holds they are amenable to suit under § 1983. Curious thought this argument may be, this Court will not address it because it is not properly before the Court.

CONCLUSION

For the foregoing reasons, defendants' motions to dismiss under Rules 12(b)(1) and 12(b)(6) are GRANTED in part and DENIED in part. Scott may proceed with a § 1983 suit against Northwestern University, but Northwestern's law school library is not a place of public accommodation.

N.D.Ill.,1999.
Scott v. Northwestern University School of Law
Not Reported in F.Supp.2d, 1999 WL 134059 (N.D.Ill.)

END OF DOCUMENT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

KAREN TORRES	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 3:11-CV-209
	)	
THE UNIVERSITY OF NOTRE DAME DU LAC, et al.,	)	
	)	
Defendants.	)	

OPINION AND ORDER

This matter is before the Court on the Motion to Dismiss, filed on July 29, 2011, by Defendants, The University of Notre Dame du Lac; Phillip Johnson, individually and in his official capacity; Frances Shavers, individually and in her official capacity; John Does 1-4, individually and in their official capacity as Notre Dame Security Officers; and Jane and John Does 1-50, individually and in their official capacity as Notre Dame 2009 Security and Commencement Committee Members (collectively "Notre Dame Defendants"). For the reasons set forth below, the motion is **DENIED.**

BACKGROUND

This lawsuit stems from the arrest of Plaintiff Karen Torres ("Torres") on May 17, 2009, as she attempted to express

her opposition to abortion through peaceful demonstration on or near the University of Notre Dame du Lac ("Notre Dame"), a Catholic university. The following facts are based on the allegations of the amended complaint, which this Court accepts as true at this stage of the litigation.

Notre Dame is a privately owned not-for-profit corporation chartered by the Legislature of the state of Indiana. (Am. Compl. at ¶¶ 5, 10). In the spring of 2009, Notre Dame announced it would honor President Barack Obama with an honorary law degree and that President Obama would be the commencement speaker at the May 17, 2009, Notre Dame Commencement. (Id. at ¶ 35). This decision was controversial and highly publicized due to President Obama's voting record and policy initiatives with regard to abortion, which Torres characterizes as "against the right to life, a core, fundamental and unequivocal teaching of the Catholic Church." (Id. at ¶ 36). Therefore, the policy makers at Notre Dame understood that this decision was likely to cause protests on or near campus leading up to, and throughout, the 2009 Commencement season. (Id. at ¶ 37).

In anticipation of President Obama's visit, Notre Dame administrators and its security police ("Notre Dame police") formed one or more security committees to address security concerns regarding the presidential visit. (Id. at ¶ 40). Torres contends that these committees met with some frequency to

develop and disseminate policies, plans and strategies for dealing with and responding to pro-life demonstrators[1] on Notre Dame's campus. (Id. at ¶ 41). Moreover, Torres contends that these committees developed and implemented a policy with specific plans to "improperly squelch and restrict" the speech of demonstrators who were identified as delivering a pro-life or anti-Obama message. (*Id.* at ¶ 43).

As expected, large numbers of both pro-life and pro-choice supporters migrated to Notre Dame's campus to demonstrate in support of their respective positions. (Id. at ¶¶ 38-39). Acting pursuant to the aforementioned policy, Notre Dame targeted and helped to facilitate the arrests of a large number of pro-life demonstrators either through its police department or by way of a symbiotic relationship with local law enforcement. (Id. at ¶ 44). Specifically, from May 1-17, 2009, Notre Dame and the Notre Dame police, on their own or with the assistance of local law enforcement, made over 100 arrests of pro-life demonstrators on the campus. (Id. at ¶¶ 47, 79). Included among those arrested and incarcerated were a Catholic priest who had been singing and praying the Holy Rosary, a Catholic nun, two Catholic seminarians, pastors, professors, students, a former U.N. Ambassador, and several other local and national pro-life

[1] The amended complaint uses the word "witnesses" to describe protestors with a pro-life or anti-Obama message and "demonstrators" to describe protestors with a pro-choice or pro-Obama message. In this Order, both groups will be referred to as demonstrators or protestors.

leaders. (Id. at ¶ 49). During this same time frame no arrests were made of pro-choice or pro-Obama demonstrators who were often exercising their free speech rights in close proximity to the pro-life persons who had been arrested. (Id. at ¶¶ 50-51, 79). In sum, Torres alleges that Notre Dame's policy had the practical effect of permitting pro-choice and pro-Obama demonstrators to engage in verbal and expressive speech through the use of clothing and signs to communicate their message, while the pro-life demonstrators, including Torres, were subject to police confrontation and incarceration for engaging in similar behavior. (Id. at ¶¶ 50-51,77).

Torres is 54 years old, a resident of Virginia, and a devout Roman Catholic and pro-life supporter. (Id. at ¶¶ 80-81). In mid-May 2009, Torres and her husband traveled to the Notre Dame campus to pray and demonstrate in support of the pro-life cause. (Id. at ¶ 82). On May 17, 2009, the day President Obama was delivering his commencement speech to the Notre Dame graduating class, Torres and her husband were on the Notre Dame campus participating in a prayer vigil during the same time as the graduation ceremonies. (Id. at ¶ 84).

After the graduation ceremonies had concluded, the Torres' began their drive back to Virginia. (Id. at ¶ 85). While still on Douglas Road, a county road that cuts through the campus, the Torres' noticed barricades that had been placed on the side of

the road because President Obama's motorcade would soon be passing through the location. (Id.). The Torres' intended to display two signs while standing on a public sidewalk near the roadside which both abutted and adjoined the Notre Dame Federal Credit Union ("Credit Union") parking lot. (Id. ¶¶ 86-87). The signs read "Shame on Notre Dame" and "Obama = Abortion." (Id. at ¶ 86).

While in the Credit Union parking lot and attempting to make her way toward the sidewalk with her two signs, Torres was approached by an unidentified Notre Dame police officer and an unidentified St. Joseph County police officer. (Id. at ¶ 89). Both of the officers informed Torres that she was on Notre Dame's private property and that she needed to leave. (Id. at ¶ 90). Upon noting that pro-Obama demonstrators were congregating in the area, on both sides of the street and on the nearby sidewalk, Torres asked the officers where she could go to display her signs. (Id. at ¶ 91). One or both of the officers responded by telling her that the entire area was private property belonging to Notre Dame and that she needed to leave or face arrest. (Id. at ¶ 92). In response to this statement Torres informed the officers that she knew her constitutional rights, and that she believed she was entitled to be on the sidewalk, which she believed to be a public right of way. (Id. at ¶ 93). One or both of the officers then called for support and, at one

point, Torres was surrounded, and prevented from moving to the sidewalk, by three unidentified Notre Dame police officers. (Id. at ¶ 94). Shortly afterward St. Joseph County Reserve Officer Ernie Bryant ("Bryant") came to the scene, and the other officers left. (Id. at ¶ 95).

Torres contends that Officer Bryant communicated with her while relying on information that he had gained from prior briefings by Notre Dame; namely the campus boundaries, the rights of protestors, and Notre Dame's policies toward those protestors. (Id. at ¶¶ 96-98). Torres further contends that Officer Bryant had not received training on topics such as viewpoint discrimination, retaliation for speech, and policing of peaceful protestors. (Id. at ¶ 98). Torres asserts that as a result of these prior briefings by Notre Dame and lack of training, Officer Bryant merely reiterated to her that she was on Notre Dame's private property and that Notre Dame required her to leave or face arrest and incarceration. (Id. at ¶ 99). Torres insisted on being able to stand and demonstrate next to pro-Obama demonstrators who were just a few feet away, which prompted Officer Bryant to call the Command Center located within the Notre Dame security building for guidance. (Am. Compl., ¶ 100).

The Command Center then called for St. Joseph's County Sergeant James Rutkowski who arrived at the scene and

effectuated the arrest of Torres for criminal trespass. (Id. at ¶¶ 101-02). Notre Dame was listed as the complaining party. (Id., at ¶ 102). Torres asserts that Sergeant Rutkowski knew to list Notre Dame as the complaining party either from a direct complaint by the Notre Dame police from within the Command Center, or as a result of information he had gained from prior briefings by Notre Dame; such as the campus boundaries as well as the rights of protestors and Notre Dame's policy towards those protestors. (Id., at ¶¶ 103-04). Additionally, Torres asserts that Sergeant Rutkowski, similar to Officer Bryant, did not receive training in topics such as viewpoint discrimination, retaliation for speech, and policing of peaceful protestors. (Id., at ¶ 105).

Torres contends that she witnessed the following events transpire prior to her arrest and removal from the route of the presidential motorcade: Notre Dame police and numerous pro-choice and pro-Obama demonstrators in the same area, and on both sides of the street, engaging in an organized demonstration; the Notre Dame police, as well as all other police officers present in the area, allowing the pro-Obama demonstrators to assemble in the very same location that she had been ordered to leave from; and Pro-Obama demonstrators walking through the Credit Union parking lot to get to the sidewalk where the organized pro-Obama demonstration was occurring. (Id. at ¶ 106).

Based on the foregoing, Torres filed a 28 page amended complaint asserting 11 different counts against the Defendants. The amended complaint includes six separate counts under 42 U.S.C. § 1983: violation of Torres' rights under the First Amendment's free speech clause (Count I); violation of her rights under the First Amendment to freely express her religion (Count II); retaliation motivated by the exercise of her First Amendments rights (Count III); false arrest and imprisonment in violation of her Fourth Amendment rights (Count IV); a violation of the Equal Protection Clause of the Fourteenth Amendment (Count V); and negligent training and supervision of the St. Joseph's County and Notre Dame police officers (Count VI). Additionally, Torres claims violations of her right to freedom of speech and religion under the Indiana Constitution (Count VII). Torres also raises a number of claims under Indiana common law: false arrest (Count VIII), false imprisonment (Count IX), malicious prosecution (Count X), and negligent training and supervision (Count XI).

In response, the Notre Dame Defendants filed the instant motion to dismiss Torres' amended complaint, asserting that it failed to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Notre Dame Defendants contend that Torres has failed to show that they were engaged in any state action in connection with her arrest that would subject them to

suit under § 1983. Moreover, the Notre Dame Defendants contend that, even if there is a finding of state action, Torres has failed to show a constitutional violation sufficient to show liability under *Monell v. Dept. of Social Services of N.Y.*, 436 U.S. 658 (1978). The Notre Dame Defendants further contend that all of Plaintiff's state law claims should be dismissed because the Court should relinquish jurisdiction after determining that all of Torres' federal law claims must be dismissed. Alternatively, the Notre Dame Defendants argue that the Indiana state common law claims should be dismissed because Notre Dame officers did not arrest, detain or prosecute Torres and the claims pursuant to the Indiana Constitution should be dismissed because Indiana's Constitution does not provide a private right of action. Plaintiff filed a brief in opposition to the motion on September 21, 2011, and the Notre Dame Defendants filed a reply brief on December 9, 2012. The motion is fully briefed and ripe for adjudication.

DISCUSSION

Federal Rule of Civil Procedure 12(b)(6) allows a complaint to be dismissed if it fails to "state a claim upon which relief can be granted." Allegations other than fraud and mistake are governed by the pleading standard outlined in Federal Rule of

Civil Procedure 8(a), which requires a "short and plain statement" that the pleader is entitled to relief.

In order to survive a Rule 12(b)(6) motion, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). All well-pleaded facts must be accepted as true, and all reasonable inferences from those facts must be resolved in the plaintiff's favor. *Pugh v. Tribune Co.*, 521 F.3d 686, 692 (7th Cir. 2008). However, a plaintiff may plead herself out of court if the complaint includes allegations that show she cannot possibly be entitled to the relief sought. *McCready v. eBay, Inc.*, 453 F.3d 882, 888 (7th Cir. 2006).

The "under color of state law" requirement of 42 U.S.C. § 1983

42 U.S.C. § 1983 states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress….

Section 1983 "does not create substantive rights; rather, 'it is a means for vindicating federal rights conferred elsewhere'."

Padula v. Leimbach, 656 F.3d 595, 600 (7th Cir. 2011) (quoting *Ledford v. Sullivan*, 105 F.3d 354, 356 (7th Cir. 1997)). Thus, in order to state a valid claim for relief under § 1983, the "[plaintiff] must establish that [she was] deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law." *American Manufacturers Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999); *Padula*, 656 F.3d at 600.

Torres' claims under the United States Constitution are based on the First, Fourth, and Fourteenth Amendment. In addition to the "under color of state law" requirement of § 1983, violations of the First, Fourth, and Fourteenth Amendments each require state action since these provisions are aimed at protecting citizens from conduct by the government and not from the conduct of purely private actors. *See Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488, U.S. 179, 191(1988); *Hallinan v. Fraternal Order of Police of Chicago Lodge No.* 7, 570 F.3d 811, 815 (7th Cir. 2009); *Pepper v. Village of Oak Park*, 430 F.3d 805, 809 (7th Cir. 2005). "If a defendant's conduct satisfies the state-action requirement . . . [that] conduct also constitutes action 'under color of state law' for § 1983 purposes." *Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n,* 531 U.S. 288, 295, n.2 (2001) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 (1982)).

"The conduct of private actors, in some instances, can constitute state action" for § 1983 purposes. *Hallinan,* 570 F.3d at 815. The Court of Appeals for the Seventh Circuit, in *Hallinan*, provides a summary of the kinds of situations where private actors can become state actors.

> Private action can become state action when private actors conspire or are jointly engaged with state actors to deprive a person of constitutional rights; where the state compels the discriminatory action; when the state controls a nominally private entity; when it is entwined with its management or control; when the state delegates a public function to a private entity; or when there is such a close nexus between the state and the challenged action that seemingly private behavior reasonably may be treated as that of the state itself.
>
> Over time, Supreme Court and Seventh Circuit precedent have revealed that these cases do not so much enunciate a test or series of factors, but rather demonstrate examples of outcomes in a fact-based assessment.

Hallinan, 570 F.3d at 815 (internal citations omitted). *See also Brentwood Academy*, 531 U.S. at 295 (2001). With all of this in mind, the Court turns to the instant case. Although the Notre Dame Defendants assert that the Plaintiff's amended complaint alleges that the Notre Dame Defendants are state actors under three separate theories, as can be seen from the Seventh Circuit's opinion in *Hallinan*, these different theories of state action overlap somewhat, and are not to be applied in a rigid, test-like manner. *See Tarpley v. Keistler*, 188 F.3d 788, 792

(7th Cir.1999) ("All of the tests, despite their different names, operate in the same fashion: [ ] by sifting through the facts and weighing circumstances.").

One of the theories that Plaintiff relies upon is the delegation of a public function that has been traditionally reserved to the State. *See Brentwood Academy*, 531 U.S. at 295; *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 626-628 (1991); *Wade v. Byles*, 83 F.3d 902, 905 (7th Cir. 1996). Plaintiff contends that police powers have been traditionally reserved to the state. While the Supreme Court has left open the question of whether private police officers can be held liable as state actors under § 1983, *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 163-64 (1978), courts in the Seventh Circuit recognized that state action can exist in some situations where state or local law delegates police powers to a private entity. *See Payton v. Rush-Presbyterian-St. Luke's Medical Center,* 184 F.3d 623, 630 (7th Cir. 1999); *U.S. v. Hoffman*, 498 F.2d 879, 881 (7th Cir. 1974); *but see Johnson v. LaRabida Children's Hosp.,* 372 F.3d 894, 897 (7th Cir. 2004).

In *Payton,* the Seventh Circuit found that a security guard at a medical center who was also a special Chicago police officer could be considered a state actor. 184 F.3d at 630. In reaching this decision, the Court noted that "no legal difference exists between a privately employed special officer

with full police powers and a regular Chicago police officer." *Id.*

The holding in *Payton* was consistent with the Seventh Circuit's earlier holding in *Hoffman. United States v. Hoffman*, 498 F.2d 879, 881 (7th Cir. 1974). In *Hoffman*, the Seventh Circuit upheld a jury verdict of guilty on a 13-count indictment charging railroad police officers with violating several individuals' constitutional rights and conspiring to violate their constitutional rights. The criminal charges required a finding that privately employed railroad policemen, also Chicago special police officers, were acting under color of law. In upholding the verdict, the Seventh Circuit noted that the defendants were "authorized on a continuing and full-time basis to search actively for criminals and trespassers and to use the powers of the state when their search [was] successful." *Id.* at 881.

In contrast, in *Johnson v. LaRabida Children's Hosp.,* the Seventh Circuit distinguished a security guard at the hospital, also a special Chicago police officer, from the officers in *Hoffman* and *Payton* because the security guard had limited authority in his role as a hospital security officer. 372 F.3d at 897. The Court noted that the officer's duties were "routine security duties only" and that the officer was not authorized to carry a firearm or to carry out the function of a police

officer. Under his employer's policy, when an individual such as the plaintiff became unruly or disruptive, the officer's only recourse was to call 911 for assistance. The officer in *Johnson* was deemed "no substitute for the police." *Id.* at 897.

In combination, these cases make clear that a finding of state action in this context requires that there be virtually no legal difference between a private actor who has been given police powers and a regular police officer employed within the state. *Payton,* 184 F.3d at 630; *Hoffman*, 498 F.2d at 881; *Johnson*, 372 F.3d at 897.

At least two district courts within this Circuit have applied these cases in the context of private university police forces. The United States District Court for the Northern District of Illinois addressed this question in 1999, in *Scott v. Northwestern Univ. Sch. of Law,* 1999 WL 134059, *3-6 (N.D. Ill. 1999). *Scott*, not a student of Northwestern University, entered the Northwestern University School of Law Library during a final examination period. The law school restricted library access to Northwestern students during final examinations. After Scott had spent several hours at the library, Northwestern University police officers approached Scott and questioned him regarding a theft. Scott was placed under arrest, taken to the University's detention center, and then turned over to the Chicago Police Department where he was imprisoned for seventeen

hours. An Illinois statute allows private universities to appoint police officers and grants these officers the powers of municipal peace officers and county sheriffs, including the power to make arrests on college or university property for the protection of students, employees, visitors and their property, and the property of the university. The Court noted that:

> [O]n University property a member of Northwestern's police force is every bit the law enforcement officer as is a member of the Chicago Police Department when one walks off the University's downtown property and onto a public thoroughfare.
>
> This is true because the state has so authorized the Northwestern University police. By accepting this authorization, Northwestern and its police must also accept the grave responsibility to protect an individual's constitutional rights, the same responsibility that § 1983 enforces against municipal and other police forces. To permit the state to delegate its police powers to Northwestern University and then shield the Northwestern police force from liability when, in exercising these powers, it violates the rights of "students, employees, [and] visitors" would pervert the language and intent of § 1983.

Id. at *5-6. Defendants' motion to dismiss for failure to state a claim was denied with regards to Plaintiff's § 1983 claim, and the claim was allowed to continue against Northwestern University.

More recently, in *Boyle v. Torres*, 756 F. Supp. 2d 983, 993-96 (N.D.Ill. 2010), the United States District Court for the Northern District of Illinois addressed this question in the

context of a summary judgment motion. The plaintiff claimed that an incident of police questioning by an officer of the University of Chicago Police Department ("UCPD") turned into a brutal beating when he asked the officer why he needed to show his identification. The Chicago Police Department ("CPD") arrived to assist, but the CPD officers allegedly watched the beating continue. When the UCPD officers were done, they brought the plaintiff to the CPD officers, who in turn transported the plaintiff to the police station and charged him with resisting arrest. Plaintiff relied on the Illinois statute conferring full police powers on the UCPD to support his argument that the UCPD officers were state actors for purposes of § 1983. The UCPD officers attempted to distinguish the case from *Scott* and others like it by claiming that they do not actually exercise full police powers. They argued that although they may have the authority to make arrests, they do not exercise that authority, but instead detain suspects and call the CPD for assistance. The court was not persuaded that the fact that they do not actually perform arrests justified an outcome different than that of *Scott*. The Court noted that:

> In any event, there can be no question that the UCPD's role is one that has traditionally been the exclusive prerogative of the state: they carry guns, they wear police uniforms, and they patrol their territory in squad cars; they have the ongoing authority to detain citizens and

> place them in handcuffs; they have the authority to demand that individuals furnish them with ID. When the ensemble of the officers' powers and functions is kept in view, there can be no doubt that they are state actors.

Id. at 995.

Indiana has a statute that is very similar to the Illinois statute at issue in *Scott* and *Boyle*. Indiana Code § 21-17-5-2 provides that:

> The governing board of an educational institution may do the following:
>
> (1) Appoint police officers for the educational institution for which it is responsible.
>
> (2) Prescribe the duties of police officers of the educational institution and direct their conduct.
>
> (3) Prescribe distinctive uniforms for the police officers of the educational institution or campus.
>
> (4) Designate and operate emergency vehicles.

I.C. § 21-17-5-2. These officers "serve at the pleasure of the appointing governing board." I.C. § 21-17-5-3. Additionally, the statute provides that "[p]olice officers appointed under this chapter have . . . [g]eneral police powers, including the power to arrest, without process, all persons who commit any offense within the view of the officer . . . ." I.C. § 21-17-5-4. These powers are limited to the "real property owned or occupied

by the educational institution employing the police officer" but an institution can expand the officer's territorial jurisdiction to the entire state, if it follows certain procedures. I.C. § 21-17-5-5. The Indiana Supreme Court has interpreted this broad statutory grant of "general police powers" as rendering the conduct of a police officer employed by a private university state action. *Finger v. State*, 799 N.E.2d 528, 532 (Ind. 2003)(concluding that that Butler University police officers are subject to constitutional restraints due to the Indiana statute conferring general police powers on university police officers).

Turning to the instant case, it is undisputed that Notre Dame is a private university. By statute, the state of Indiana has chosen to delegate its general policing powers to private universities, such as Notre Dame, that are located in the state. The broad grant of power to police officers for private universities leaves little to differentiate them from any other police officer in the state of Indiana, at least if they are on the university's property. It can be inferred from the complaint that Notre Dame accepted this delegation of power. Accordingly, the complaint sufficiently alleges state action with regards to the Notre Dame police officers when exercising the police powers granted to them by Indiana's law.

The Notre Dame Defendants argue that, even if the Notre Dame Police Officers are sometimes state actors, the Plaintiff's

amended complaint does not sufficiently allege state action because it does not allege that the Notre Dame police officers actually arrested Torres. In her amended complaint, Torres alleged that she was initially stopped by an unidentified Notre Dame security officer and an unidentified St. Joseph's County police officer. One or both of these officers informed her that she was on Notre Dame's private property and that if she did not leave she would be arrested. Torres further alleges that after she refused to leave, the Notre Dame police officer called for backup and several more unidentified Notre Dame police officers arrived at the scene and surrounded her. Communications took place between St. Joseph's County police present at the scene and the Command Center located in Notre Dame's security building. After these communications, Torres was arrested for criminal trespass by a St. Joseph County police officer, not a member of the Notre Dame police force. The Notre Dame Defendants would have this Court look at only one specific point in time while ignoring the allegedly substantial involvement of the Notre Dame police officers to help effectuate an arrest that, under Indiana law, they were empowered to make on their own. The Court is not persuaded by the Notre Dame Defendants' argument.

The Notre Dame Defendants contends that, even if the Notre Dame police officers are state actors, Plaintiff's amended

complaint does not allege any basis on which to find that the university itself, members of the Security and Commencement Committee, Phillip Johnson (Director of the Notre Dame Security Police Force), or Frances Shavers (Chief of Staff to the university's president) are also state actors. Plaintiff, however, suggests that the president and his designees are the equivalent of the chief of police for the Notre Dame officers, and that the administration's exercise of authority over its police officers makes it a state actor when those powers are exercised. In rejecting these arguments, the Notre Dame Defendants state that "*Monell* prohibits grounding constitutional liability on such remote and general assertions." (DE 26 at 11). The requirements of *Monell* are not to be confused with the requirement of state action. *Monell v. Dept. of Social Services of N.Y.*, 436 U.S. 658 (1978). The university, Phillip Johnson, Frances Shavers, and the members of the security and commencement committee can be deemed state actors, just like the police officers themselves, to the extent that they are exercising their authority to direct and supervise the conduct of the police officers. Whether *Monell* is satisfied such that liability can attach for unconstitutional acts is a different question entirely.

Because this Court has found allegations of state action sufficient based on a theory of delegation of power, this Court

need not consider Plaintiff's other theories, including that Notre Dame is a company town pursuant to *Marsh v. Alabama*, 326 U.S. 601 (1946), or that the state and the Notre Dame Defendants have a symbiotic relationship pursuant to *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). The Court's holdings in these cases have been somewhat narrowed over time, and this Court expresses doubt that the facts of this case fit squarely within either *Marsh* or *Burton*, but these questions may not need to be resolved at all, and at a minimum, given the fact sensitive nature of the issue, these questions are more appropriately addressed at a later stage of the proceedings. At this point, it is enough that the amended complaint adequately puts the Notre Dame Defendants on notice of Plaintiff's claims, and in fact, provides a good deal more detail than is required under Rule 8.[2]

Plaintiff's allegations of an unconstitutional policy or custom

The Notre Dame Defendants argue that even if this Court finds state action, Plaintiff's claims must fail because she has not sufficiently alleged a policy or custom as required by *Monell v. Dept. of Social Services of N.Y.*, 436 U.S. 658 (1978). *Monell* established that a municipality is subject to liability

[2] Plaintiff appears to have abandoned her theory that Notre Dame is transformed into a state actor by inviting President Obama to deliver its commencement address.

under § 1983 only when the violation of the plaintiff's federally protected right can be attributable to the enforcement of a municipal policy, practice, or decision of a final municipal policy maker. *Monell*, 436 U.S. 658 (1978). The rationale of *Monell* has been extended to private corporations. *See Rice ex. Rel. Rice v. Correctional Medical Services*, Nos. 09-2804, 10-2389, 2012 WL 917291, at *20 (7th Cir. March 20, 2012). Under *Monell*, a plaintiff must demonstrate that:

> [t]he unconstitutional act complained of is caused by: (1) an official policy adopted and promulgated by its officers; (2) a governmental practice or custom that, although not officially authorized, is widespread and well settled; or (3) an official with final policy-making authority.

Thomas v. Cook County Sheriff's Dept., 604 F.3d 293, 303 (7th Cir. 2009).

The Notre Dame Defendants argue that Plaintiff has not sufficiently alleged causation, as required by *Monell.* It is alleged that Notre Dame administrators and its security police formed one or more security committees to address security concerns regarding the presidential visit. The amended complaint further alleges that these committees developed and implemented a policy with a specific plan to "improperly squelch and restrict" the speech of demonstrators who were identified as delivering a pro-life or anti-Obama message. It is the carrying

out of this allegedly unlawful policy that allegedly resulted in Torres' arrest. Causation has been sufficiently alleged.

The Notre Dame Defendants also argue that the complaint does not sufficiently allege a persistent, widespread pattern of unconstitutional arrests because its allegations are limited to events occurring in an approximately two-week period. In support of this claim, Defendants cite to *Wells v. Bureau County*, 723 F.Supp.2d 1061 (C.D. Ill. 2010). In *Wells*, the Court noted that a single incident of unconstitutional activity is insufficient to impose liability on a municipality under *Monell* unless there is proof it was caused by an existing, unconstitutional municipal policy. Plaintiff alleges that over 100 arrests occurred as a result of Notre Dame's policy toward pro-life or anti-Obama demonstrators. If proved, this would support a finding that there was a widespread pattern of unconstitutional arrests. Because Torres is alleging a widespread policy or practice, she does not need to identify any particular Notre Dame official who can be considered a final policy-making officer in connection with her arrest. Torres alleges that Frances Shavers and Phillip Johnson were generally involved in the planning of security; she need not also allege, as the Notre Dame Defendants suggest, that they made any decision with respect to her arrest, or that they were even aware of it.

Torres also alleges that her arrest was the result of an official policy intended to discriminate against pro-life demonstrators. The Notre Dame Defendants contend that this is the sort of conclusory allegation that cannot stand following *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). Unlike *Iqbal*, Plaintiff's complaint provides much more than a formulaic recitation of the elements of a constitutional discrimination claim. In the absence of discovery, it is difficult to imagine what more could be expected of Plaintiff.

State Law Claims

The Notre Dame Defendants argue that this Court should relinquish jurisdiction over Torres' state law claims following the dismissal of her federal claims. While this may be the general rule, this Court has declined to dismiss Torres' federal claims at this juncture, and it is therefore inapplicable here.

Defendants also argue that Torres' claims pursuant to the Indiana Constitution must be dismissed because it does not provide for a private right of action. "No Indiana court has explicitly recognized a private right of action for damages under the Indiana Constitution," *see Thomas v. Brinker*, 2011 WL 1157622 *8 (S.D. Ind. 2011), and the Indiana Supreme Court has stated that "[i]f state tort law is generally available, even if restricted by the ITCA, it is unnecessary to find a state

constitutional tort." *Cantrell v. Morris*, 849 N.E.2d 488, 506 (Ind. 2006). This argument was not well developed by Notre Dame Defendants. Plaintiff responds by indicating that she is not seeking monetary damages under the Indiana Constitution, but instead seeks only declaratory and injunctive relief. The Notre Dame Defendants have cited no authority that shows that Plaintiff is precluded from pursuing declaratory or injunctive relief under the Indiana Constitution. It is not the Court's responsibility to research and construct the parties' arguments. *Donnelly v. Chicago Park Dist.*, 417 F.Supp.2d 992, 994 (N.D. Ill. 2006) (citing *United States v. McClee*, 436 F.3d 751 (7th Cir. 2006)). Accordingly, this Court declines to dismiss Plaintiff's claims pursuant to the Indiana Constitution at this time.

Lastly, the Notre Dame Defendants argue that Plaintiff's remaining claims under Indiana Law should be dismissed because "no Notre Dame Officer arrested, detained, or prosecuted Torres." This Court disagrees that such a conclusion can be made from the allegations in the amended complaint. This argument too is more appropriately addressed at a later stage of the proceedings.

CONCLUSION

For the reasons set forth above, the Notre Dame Defendants' Motion to Dismiss is **DENIED.**

DATED: March 23, 2012

/s/RUDY LOZANO, Judge
United States District Court