IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:16-cv-00318-RM-CBS

DANIELE LEDONNE,

Plaintiff,

v.

DR. BEVERLEE MCCLURE, in her official capacity as President of Adams State University and in her individual capacity; and PAUL GROHOWSKI, in his official capacity as Chief of Adams State Police Department and in his individual capacity,

Defendants.

PLAINTIFF'S OPPOSITION TO DEFENDANTS' PARTIAL MOTION TO DISMISS

Plaintiff, Daniele Ledonne, by and through his undersigned counsel, states as follows in opposition to Defendants' Partial Motion to Dismiss ("Motion") (Dkt. #45):

INTRODUCTION

Ledonne is a videographer, filmmaker, and photographer who worked at Adams State University ("ASU"), first as an adjunct, then as a visiting professor, over a four-year period. In early 2015, he began raising serious questions about ASU's hiring practices concerning adjunct professors. After his University employment ended, he ultimately started a website publishing articles critical of ASU's administration. ASU's response took a mallet to a mosquito: it permanently banned him from campus (the "No Trespass Order"). This changed his legal status from invited member of the public to a trespasser subject to arrest. Ledonne had no notice of any

allegations against him, nor was he given, contrary to ASU's *persona non grata* policy at the time, any meaningful opportunity to be heard. When Ledonne and others brought ASU's failure to provide him the requisite notice to the administration's attention, Defendants President McClure and Chief Grohowski made numerous statements at Faculty Senate meetings, in meetings with ASU students, and to the local press, falsely accusing Ledonne of, among other things, "terrorism" against ASU's former and current Presidents and making "direct and indirect" violent threats against ASU.

The Constitution forbids Defendants' conduct: they cannot retaliate against Ledonne for his legitimate exercise of his First Amendment rights; they cannot curtail, without due process, Ledonne's First Amendment right, as a member of the public, to receive information and ideas from ASU's public library and cultural events; they are forbidden from publicly defaming him, without notice or opportunity to be heard, when effecting an adverse change in his legal status; and they cannot treat him differently than any other member of the public. This Court should therefore deny Defendants' Motion.

PERTINENT FACTUAL BACKGROUND

In his First Amended Complaint ("FAC"), Ledonne brings claims for: (1) violation of his right to procedural due process as to three separate liberty or property interests; (2) retaliation for exercise of his First Amendment rights; (3) violation of his right to equal protection; and (4) violation of his First Amendment right to access information. (*Id.*, ¶ 95-154.) Ledonne seeks declaratory, injunctive, and monetary relief. (*Id.* at 30-31.) Defendants answered the second claim. Pursuant to Rule 12(b)(6), Defendants moved to dismiss Ledonne's first, third, and fourth claims. (Mot. at 1.)

LEGAL STANDARD

Motions to dismiss are disfavored and rarely granted. *Lone Star Indus., Inc. v. Horman Family Trust*, 960 F.2d 917, 920 (10th Cir. 1992); *see also Wrenn v. Kansas*, 561 F.Supp. 1216, 1220 (D. Kan. 1983) ("Rule 12(b)(6) motions may be granted only in the clearest of cases . . . ."). To withstand a motion to dismiss, a complaint must contain enough factual allegations "to state a claim to relief that is plausible on its face." *Bell Atl. v. Twombly*, 550 U.S. 544, 570 (2007) (stating plaintiff must "nudge [his] claims across the line from conceivable to plausible"); *see also Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008) (defining plausibility to mean not that "the factual allegations must themselves be plausible," but simply that "relief must follow from the facts alleged.").

This Court's function on a Rule 12(b)(6) motion is "not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1201 (10th Cir. 2003). In so doing, this Court takes all the complaint's well-pleaded allegations as true and must construe them in a light most favorable to the plaintiff. *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007); *see also Erickson v. Paradus*, 551 U.S. 89, 93 (2007) ("Specific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the grounds on which it rests.") (internal quotations omitted).

ARGUMENT

I. LEDONNE'S FOURTH CLAIM SHOULD NOT BE DISMISSED BECAUSE THE NO TRESPASS ORDER VIOLATES LEDONNE'S FIRST AMENDMENT RIGHT TO ACCESS ASU'S PUBLIC LIBRARY AND CULTURAL EVENTS

Ledonne's fourth claim is premised on ASU's infringement of his First Amendment right

to access information and ideas. In denying that the First Amendment guarantees Ledonne such rights, Defendants' perfunctory argument ignores over 70 years of precedent.[1]

It is well-established that the First Amendment includes the right to receive information and ideas. *Doe v. City of Albuquerque*, 667 F.3d 1111, 1118 (10th Cir. 2012); *see also Bd. of Educ. Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 866 (1982) ("Our precedents have focused not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.") (internal quotations omitted); *Stanley v. Georgia*, 394 U.S. 557, 563 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."); *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143 (1943) ("The right of freedom of speech and press has broad scope" including the right to distribute and receive literature); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) ("I think the right to receive publications is . . . a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and not buyers."); *Armstrong v. Dist. of Columbia Pub. Library*, 154 F.Supp.2d 67, 75 (D.D.C. 2001) ("It is well-established and can hardly be disputed that the Constitution protects the right to receive information and ideas.") (quotations omitted). Indeed, the right of freedom of speech and press "includes not only the right to utter or to print," but, as pertinent here, the "right to receive,

[1] At the outset, Defendants' argument is conclusory and undeveloped. Defendants have therefore waived this Court's consideration of it. *See Perez v. Astrue*, No. 10-CV-698-PJC, 2012 WL 609934, at *9 (N.D. Okla. Feb. 24, 2012) (applying *Wall v. Astrue*, 561 F.3d 1048 (10th Cir. 2009), to conclude "perfunctory and undeveloped" arguments were waived).

the right to read and freedom of inquiry, freedom of thought, and freedom to teach—indeed, the freedom of the entire university community." *Griswold v. Conn.*, 381 U.S. 479, 482 (1965).

The general right to receive culture and information specifically "includes the right to some level of access to a public library," an institution viewed often as "the quintessential locus of the receipt of information." *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1255 (3d Cir. 1992) ("[T]he First Amendment . . . encompasses the positive right of public access to information and ideas."). The Tenth Circuit relied on *Kreimer* (and other authorities) "in which courts have specifically recognized the right to receive information in the context of restrictions involving public libraries." *Doe*, 667 F.3d at 1119-20; *Neinast v. Bd. of Trs. of Columbus Metro. Library*, 346 F.3d 585, 591 (6th Cir. 2003) (citing *Kreimer* and concluding right exists to some level of access); *Armstrong*, 154 F.Supp.2d at 75 (characterizing First Amendment right to receive information and ideas as "long-standing" and observing "this right's nexus with access to public libraries"); *Rihm v. Hancock Cty. Pub. Library*, 954 F.Supp.2d 840, 855 (S.D. Ind. 2013) (affirming and adopting *Kreimer's* rationale).

"[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Griswold*, 381 U.S. at 482. Accordingly, under Tenth Circuit precedent, a plaintiff states a First Amendment claim when he alleges that the government excluded him from a public library without justification—precisely what Ledonne alleges here. *See Doe*, 667 F.3d at 1118-19.

Moreover, Ledonne's fourth claim is not—as Defendants mischaracterize—limited to solely ASU's deprivation of access to ASU's public library. (Mot. at 18-19.) The No Trespass Order also infringes, without justification, Ledonne's First Amendment right to access ASU's

"educational and cultural facilities," including lectures, performing arts events, and other cultural productions. (FAC, ¶ 143-54.) ASU is the "center of the cultural and intellectual life of the San Luis Valley, ideas and information freely flow from the programs that regularly occur on campus," and ASU regularly invites the public to participate in and benefit from these programs.[2] (*Id.*, ¶¶ 63, 145-46.) The No Trespass Order indefinitely bars Ledonne from that cultural and intellectual life. (*Id.*, ¶ 36-37, Ex. 2.) Given ASU's standing invitation to the public to attend these programs and, as a result, ASU's status as a designated public forum, Defendants have failed to provide any facts that justify Ledonne's "indefinite" exclusion from the "hub of intellectual and cultural life in Alamosa"—the ASU campus.[3] (*Id.*, ¶¶ 58-63;146-52.)

In any case in which the government seeks to restrict First Amendment rights, the government bears the burden of demonstrating that its restriction complies with the Constitution. *ACORN v. Municipality of Golden,* 744 F.2d 739, 746 (10th Cir. 1984) ("[T]hough duly enacted laws are ordinarily presumed constitutional, when a law infringes on the exercise of First Amendment rights, its proponent bears the burden of establishing its constitutionality."); *see Doe*, 667 F.3d at 1131 (citing same); *see also Speiser v. Randall*, 357 U.S. 513, 526 (1958) ("Due process commands that no man shall lose his liberty interest unless the Government has

[2] Indeed, ASU boasts on its website that as "the Regional Education Provider for southern Colorado, Adams State University is crucial to enhancing the area's education opportunity, economic development, and cultural enrichment." (FAC, ¶ 60.)

[3] Defendants cannot credibly dispute that ASU's library is open to the public. ASU is a Federal Depository Library. (*See* https://www.adams.edu/library/about/policies.php (stating "library gives public assistance and access to anyone who wishes to access documents considered government information.") The public's access is statutorily mandated. *See* 44 U.S.C. § 1911 ("Depository libraries shall make Government publications available for the free use of the general public . . . ."); http://www.fdlp.gov/about-the-fdlp/federal-depository-libraries ("Federal depository libraries **must** offer free, public access to their Federal collections, even if the depository library is part of a private academic institution.") (emphasis in original).

borne the burden of producing the evidence and convincing the factfinder of his guilt."). As the Tenth Circuit teaches, it is Defendants, not Ledonne, who therefore bear the burden of producing facts that purportedly justify Ledonne's exclusion from a public library and other cultural and intellectual attractions to which the public is invited. If Ledonne supposedly poses a threat or otherwise meets some substantive standard that allows the government to restrict his access to public events,[4] it is ASU's burden to come forward with those facts. *See Doe*, 667 F.3d at 1129-31 (concluding public library is designated public fora and therefore government bears burden of proving constitutionality of exclusion). Defendants have not even attempted to meet their burden, and Ledonne therefore clearly states a First Amendment claim.

II. DEFENDANTS VIOLATED LEDONNE'S DUE PROCESS RIGHTS AND HIS FIRST CLAIM FOR RELIEF SHOULD NOT BE DISMISSED

The Fourteenth Amendment's Due Process Clause "protects persons against deprivations of life, liberty, or property." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). To prevail on a procedural due process claim, a plaintiff need show (1) the deprivation of a liberty or property interest; and (2) that the state followed constitutionally insufficient procedures. *Swarthourt v. Cooke*, 562 U.S. 216, 219 (2011).

Defendants indisputably failed to afford Ledonne <u>any</u> meaningful process.[5] Defendants

[4] Defendants' argument that Ledonne may, effectively, seek his cultural enrichment elsewhere (i.e., the Alamosa public library) is equally incredible under well-established Supreme Court precedent. *See Grant v. Meyer*, 828 F.2d 1446, 1453 (10th Cir. 1987), *aff'd* 486 U.S. 414 ("[O]ne is not to have the exercise of his liberty in appropriate places abridged on the plea that it may be exercised in some other place.") (citing *Schneider v. State*, 308 U.S. 147, 163 (1939)).

[5] Defendants do not—and cannot—argue otherwise. *See Anderson v. United States Dep't of Labor*, 422 F.3d 1155, 1182 n.51 (10th Cir. 2005) (failure to raise argument in principle brief waives review); *see also United States v. Mora*, 293 F.3d 1213, 1216 (10th Cir. 2002) ("Nor do we consider arguments raised for the first time in a reply brief."). Nor could they credibly do so. The No Trespass Order was issued without notice, without a hearing, and prior to any other

argue only that Ledonne has no protected interest. Because Ledonne has established three separate liberty interests—each of which requires procedural due process protections—Defendants' Motion must be denied.

A. Ledonne's First Amendment Right is a Protected Liberty Interest

When the First Amendment protects an activity, procedural due process protects against government-imposed restrictions. The First Amendment's guarantee of access to communications and information is "plainly a liberty interest within the meaning of the Fourteenth Amendment."[6] *Procunier v. Martinez*, 416 U.S. 396, 418 (1974) (qualified liberty interest to prisoners' communications), *overruled on other grounds*, *Thornburgh v. Abbott*, 490 U.S. 401; *see also Jacklovich v. Simmons*, 392 F.3d 420, 433 (10th Cir. 2004) (recognizing right to procedural due process for inmates and publishers under First Amendment where publications rejected); *see also* section I, *supra*. More specifically, Ledonne enjoys a liberty interest in his right to access ASU's public library and public programming. *See*, *e.g.*, *Hunt v. Hillsborough Cty.*, No. 8:07-CV-1168-T-30TGW, 2008 WL 4371343, at *3 (M.D. Fla. Sept. 22, 2008) ("Plaintiff had a fundamental right to access the Law Library and receive the information provided therein."); *Doyle v. Clark Cty. Pub. Library*, No. C-3-07-0003, 2007 WL 2407051, at *5 (S.D. Ohio Aug. 20, 2007) ("The right of the public to use the public library is best characterized as a protected liberty interest created directly by the First Amendment."); *Wayfield*

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opportunity to be heard. (FAC, ¶¶ 39, 114-20.) Ledonne was "[w]ithout notice of the precise allegations or an explanation of the evidence against him," and any post-deprivation appeal was therefore meaningless. (*Id.*, ¶¶ 43, 116-17.) The second element is satisfied.

[6] Defendants offer no argument to the contrary and, by failing to affirmatively address the issue in their Motion, have waived the ability to do so. *See Anderson*, 422 F.3d at 1182 n.51; *Mora*, 293 F.3d at 1216.

v. Town of Tisbury, 925 F.Supp. 880, 885 (D. Mass. 1996) (four-month suspension of library privileges implicated protectable liberty interest).

Because Ledonne has a liberty interest, it is "protected from arbitrary governmental invasion." *Procunier*, 416 U.S. at 418. Accordingly, "opportunity for a fair adversary hearing must precede" any deprivation of that right. *Bd. of Regents v. Roth*, 408 U.S. 564, 575 n.14 (1972); *Speiser*, 357 U.S. at 521 (holding when government restrains First Amendment right, "it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights–rights which we value most highly and which are essential to the workings of a free society.").

Watson v. Board of Regents of University of Colorado, 512 P.2d 1162 (Colo. 1973), is an early recognition and articulation of this fundamental liberty. The Colorado Supreme Court there recognized the intersection between an institution's educational, cultural, and community benefits—i.e., a person's First Amendment right—and the public's right to access those benefits. *Id*. at 1164-65 (recognizing university campus as "focal point" for discussion of public questions, cultural events, recreational activities, and general educative functions); *see also City of Boulder v. Regents of Univ. of Colo.*, 501 P.2d 123, 126 (Colo. 1972) (cited in *Watson* and stating "[w]hen academic departments of the University . . . sponsor lectures, dissertations, art exhibitions, concerts and dramatic performances . . . these functions become a part of the educational process. This educational process is not merely for the enrolled students of the University, but it is a part of the educational process for those members of the public attending the events."). In recognition of that intersection *Watson* requires "due process of law under the Fourteenth Amendment" to deny a non-student the right to access state university public

functions and facilities. 512 P.2d at 1165. Ledonne has thus established a protected liberty interest—and Defendants do not argue otherwise in their motion.

B. Ledonne Has a Protected Interest in Accessing the ASU Campus on the Same Terms as Other Members of the Public

"A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty' or it may arise from an expectation or interest created by state laws or policies." *Wilkinson*, 545 U.S. at 221 (holding state prison policy concerning assignment to Supermax prison created protected liberty interest); *Estate of DiMarco v. Wyo. Dept. of Corr., Div. of Prisons*, 473 F.3d 1334, 1339 (10th Cir. 2007) (same in context of policy of placing prisoners in administrative segregation).

As described above, the Colorado Supreme Court in *Watson* sets forth Colorado's recognized policy that, as result of the intersection between an institution's educational, cultural, and community benefits—i.e., a person's First Amendment right—and the public's right to access those benefits, a non-student's right to access the campus cannot be permanently deprived without due process of law. 512 P.2d at 1164-65. Other courts have also recognized that liberty interest. *See State v. Clark*, No. 43077, 2016 WL 699238, at *3 (Idaho Ct. App. Feb. 23, 2016) (citing *Watson* and noting several courts "have found infringement of a protected liberty interest where a governmental entity's order excluded an individual from public property that was otherwise open to the public and thereby interfered with the individual's exercise of a fundamental right"); *Williams v. W. Va. Univ. Bd. of Governors*, 782 F. Supp. 2d 219, 229 (N.D. W. Va. 2011) (finding plaintiff's procedural due process rights violated when he was excluded from campus: "There was no hearing, and no burden placed on the WVU officers to show that plaintiff was properly excluded from campus."); *Dunkel v. Elkins*, 325 F. Supp. 1235, 1245 (D.

Md. 1971) (holding university has right to exclude people from campus but "powers of control should not be exercised, without a prior administrative hearing, to deprive any person, as an individual, of access to a state university campus."). Accordingly, both by state policy and the Constitution, Ledonne has a protected liberty interest in his right to access ASU's public university functions and facilities. *See Catron v. City of St. Petersburg*, 658 F.3d 1260, 1266 (11th Cir. 2011) (holding plaintiffs had constitutionally protected liberty interest to be in city lands of their choosing that are open to public generally and that trespass order prohibiting access to same deprived them that interest).

Defendants' invitation to simply reject *Watson* as non-binding precedent should be declined. (Mot. at 3.) Ledonne does not, as Defendants mischaracterize, assert this Court is bound to follow *Watson* because the Colorado Supreme Court's interpretation of the Constitution requires it to do so. Rather, this Court cannot dismiss his section 1983 claim because *Watson* reflects Colorado's law and policy that due process protects Ledonne's right to access ASU's campus for the purpose of exercising his First Amendment right to access information and ideas. Defendants' cited cases are therefore irrelevant and distinguishable because they do not address the First Amendment principles upon which *Watson* is based. (Mot. at 3-8.)

Ledonne has also properly pled a protected property interest in accessing public areas of ASU's campus. A protected property interest is created and defined by rules or understandings from state law that "secure certain benefits and that support claims of entitlement to those benefits." *Roth*, 408 U.S. at 577 (holding property interests "are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement

to those benefits."). Property interests subject to procedural due process protection are not limited by a "few rigid, technical forms" but include a "broad range of interests that are secured by existing rules or understandings." *Perry v. Sindermann*, 408 U.S. 593, 601(1972) (internal quotations omitted). A person's interest is a benefit for due process purposes "if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." *Id*.

Perry is instructive here. In *Perry*, a state junior college professor's contract was not renewed. He sued the junior college and alleged, among other things, that the college's failure to provide him an opportunity to be heard concerning the nonrenewal violated his Fourteenth Amendment guarantee of procedural due process. *Id*. at 594-96. In reversing the district court's grant of summary judgment in the college's favor, the Supreme Court concluded that the professor had alleged sufficient facts demonstrating a property interest to "be given an opportunity to prove the legitimacy of his claim . . . in light of 'the policies and practices of the institution.'" *Id*. at 604 (emphasis added). Specifically, the professor alleged that his protected property interest (continued employment) arose from (a) an "understanding fostered by the college administration" concerning a de facto tenure program set forth in a provision of the college's official Faculty Guide and (b) legitimate reliance upon the Coordinating Board of the Texas College and University System's guidelines providing that teachers employed within that system for seven or more years had some form of job tenure. *Id*. at 599-600. The Supreme Court concluded "unwritten 'common law' in a particular university that certain employees shall have the equivalent to tenure" was further evidence of "rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement" to continued

employment (i.e., a property interest). *Id*. at 602-3.

Here, Ledonne has alleged the existence of rules and understandings, promulgated and approved by Defendants, that justify his legitimate claim to be present on campus on the same terms as other members of the public. Specifically, ASU's Student Handbook includes a "Non-Student Policy," in force during October 2015 (when the No Trespass Order was issued), permitting non-students and non-employees access to campus and requiring them to adhere to the Code of Conduct (the "Policy"). (FAC, ¶ 45; Ex. 4.) The Policy would be unnecessary if the general public did not have a right to be on campus. Under the Policy, a non-student, non-employee is permitted on campus so long as he complies with the Code of Conduct. (*Id*., Ex. 4 at 19.) Further, ASU extended an affirmative invitation to the public. It fostered an understanding that it was "crucial to enhancing the area's education opportunity, economic development, and cultural enrichment" that welcomed and included non-student, non-employees. (*Id*., ¶ 60-62; *see also* ¶ 59 (describing ASU's public library as "the primary means" for members of the public to access information and describing ASU's policy of permitting community members to borrow materials); http://www.adams.edu/community/ (defining ASU as "an integral partner in the communities it serves.").)

These factual allegations demonstrate a protected property interest in Ledonne's right to access ASU. (*Id*., ¶ 95-102.) Indeed, these allegations establish no less of a legitimate entitlement to a property interest—and corresponding right to procedural due process—than *Perry's* understanding, guidelines, and unwritten "common law." 408 U.S. at 599-600, 603. *Perry* thus entitles Ledonne to an opportunity to prove his claim.

C. Ledonne Has a Protectable Interest in His Reputation

Where a person's "good name, reputation, honor, or integrity is at stake because of what the government is doing to him, a protectable liberty interest may be implicated that requires due process in the form of a hearing to clear his name." *Gwinn v. Awmiller*, 354 F.3d 1211, 1216 (10th Cir. 2004). To demonstrate the government has violated the Due Process Clause by impugning his reputation, a plaintiff must meet the "stigma-plus standard" (i.e., demonstrate the existence of a protected interest) by showing the following: (1) governmental defamation, publicly disseminated, and (2) an alteration in legal status. *Martin Marietta Materials, Inc. v. Kansas Dep't of Transp.*, 810 F.3d 1161, 1184 (10th Cir. 2016); *Guttman v. Khalsa*, 669 F.3d 1101, 1125 (10th Cir. 2012) (same). Ledonne satisfies both elements.

As to the first element, Ledonne alleges Defendants "disseminated false public statements about [him] that are sufficiently stigmatizing and derogatory to injure his reputation and good name in the Alamosa community." (FAC, ¶ 104.) Specifically, Defendants' false statements include (but are not limited to) allegations that Ledonne was a public safety concern, has committed "terrorism" against Defendant McClure, threatened violence against individuals and ASU, and that the No Trespass Order was necessary because of the "need to safeguard the community against the frequency of mass violence on campuses and elsewhere."[7] (*Id.*, ¶ 64-70.)

As to second element, the No Trespass Order was a significant adverse change in Ledonne's legal status. Before the order, he enjoyed the right to freely use the library and to access numerous public educational and cultural events on campus. Now he is subject to arrest as a trespasser. (FAC, ¶ 37.) This is sufficient to show a significant alteration in legal status in

[7] A further listing of Defendants' defamatory statements is set forth in paragraphs 64-73.

connection with government defamation. *Paul v. Davis*, 424 U.S. 693, 711 (1976) (holding plaintiff must show "as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished."); *see also Guttman*, 669 F.3d at 1125 (second element requires "an alteration in legal status" incident to defamation).

In *Paul*, the Supreme Court examined *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), in which it had previously stated: "Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Id*. at 437 (emphasis added). The *Constantineau* plaintiff sought to have a Wisconsin statute declared unconstitutional after the police chief–acting on the statute's authority and without hearing or notice to the plaintiff–"caused to be posted a notice in all retail liquor outlets in Hartford that sales or gifts of liquors to [the plaintiff] were forbidden for one year." *Id.* at 435. *Paul* held that the phrase "because of what the government is doing to him" referred to the fact that "the governmental action taken in that case deprived the individual of a right previously held under state law[:] the right to purchase or obtain liquor in common with the rest of the citizenry." *Paul*, 424 U.S. at 708. The *Constantineau* defendant's conduct "significantly altered [the plaintiff's] status as a matter of state law, and it was that alteration of legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards." *Paul*, 424 U.S. at 708-09 (emphasis added). The No Trespass Order has changed Ledonne's legal status as a matter of state law—he now will be arrested for trespass if he goes on campus—a status different from the "rest of the citizenry." *Id*.

The change in legal status need not be "entangled" with a "federal constitutionally protected interest" in order to support a stigma-plus claim. (*See* Mot. at 8-9.) Indeed, *Paul's*

explanation of *Constantineau* makes this apparent—there is no constitutionally-protected interest in purchasing liquor. Defendants' argument omits critical language (emphasized below) from *Allen v. Denver Public School Board*, 928 F.2d 978, 982 (10th Cir. 1991), *overruled on other grounds*, *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220: "To the extent this claim attempts to allege a liberty interest, it is necessary that the alleged stigmatization be entangled with some further interest, <u>such as the ability to obtain future employment</u>." Defendants' *Allen* citation stands for nothing more than the proposition that stigmatization by itself is insufficient to support a section 1983 claim. *See id*. Moreover, the Tenth Circuit and others have repeatedly <u>upheld</u> stigma-plus claims where the changed legal status is not to a federal constitutionally protected interest. *See McDonald v. Wise*, 769 F.3d 1202, 1211-12 (10th Cir. 2014) (holding at-will employee had no constitutionally protected interest in job with Denver mayor's office, but finding viable stigma-plus claim where false defamatory statements accompanied firing); *Al-Turki v. Tomsic, et al.*, Case No. 15-cv-524-REB-KLM, 2016 WL 1170442, at *3 (D. Colo. Mar. 25, 2016) (concluding change from approval to disapproval of prison transfer application sufficient change in legal status to support stigma-plus claim); *Kroupa v. Nielsen*, 731 F.3d 813, 819 (8th Cir. 2013) (inability to participate in 4-H). Indeed, if a federal constitutionally protected interest were necessary, there would be no need for the stigma-plus doctrine. The simple deprivation without due process of a federally protected constitutional interest is actionable by itself, without proof of government defamation. Ledonne has suffered an adverse change in his legal status that satisfies the second element of the stigma-plus standard, and this Court must deny Defendants' motion.[8] *See Al-Turki*, at *3 (denying motion to dismiss where sufficient

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[8] Even were a federal constitutionally protected interest required, Ledonne has met that

change in legal status demonstrated).[9]

III. LEDONNE'S THIRD CLAIM MAY NOT BE DISMISSED BECAUSE ASU INTENTIONALLY TREATED LEDONNE DIFFERENTLY FROM THOSE SIMILARLY SITUATED WITHOUT A RATIONAL BASIS

A. The Class-of-One Theory Applies to Defendants' Actions

To prevail on an equal protection claim under a class-of-one theory, a plaintiff need show that (1) he has been intentionally treated differently from others similarly situated and (2) there is no rational basis for the difference in treatment. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *see also Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1216 (10th Cir. 2011) (same). The government's action is without a rational basis when it is "irrational and abusive, and wholly unrelated to any legitimate state activity." *Kansas Penn Gaming,* 656 F.3d at 1216 (internal citations omitted).

Initially, Defendants' argument that Ledonne's equal protection claim fails as a matter of law because Defendants' actions were discretionary—and therefore immune from a class-of-one challenge—is wrong. First, *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591, 598 (2008), applies solely in the public employment context. *Id*. at 607 ("[T]he class-of-one theory of equal protection has no application in the public employment context—and that is all we decide . . . .") (emphasis added). Because this is not a public employment action, *Engquist* is altogether

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standard as well. *See* sections I and II.A, *supra*.

[9] Defendants' cited cases require no different outcome. Here, unlike the plaintiff in *Phelps v. Witchita Eagle-Beacon*, 886 F.2d 1262, 1268 (10th Cir. 1989), Ledonne has alleged present harm to his ability to access the campus. *Id*. at 1269 (holding stigma-plus claim arises where status and existing legal rights are "significantly altered"). And *Uzoukwu v. Prince George's Comm. Coll. Bd. of Trs.*, Civ. Action No. DKC 12-3228, 2013 U.S. Dist. LEXIS 115262, at 32 (D. MD. Aug. 15, 2013), does not involve First Amendment allegations, as the case does here.

inapplicable.

Second, even were *Engquist* to apply, it is distinguishable. In *Engquist*, the Supreme Court held that a class-of-one theory was inapplicable to public employment claims because the outcome of an employment decision (i.e., hiring or firing) is "quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify." *Id*. at 604 ("To treat employees differently is not to classify them in a way that raises equal protection concerns. Rather, it is simply to exercise the broad discretion that typically characterizes the employer-employee relationship."). *Id*. at 605.

Here, Ledonne's equal protection claim is not, as Defendants misunderstand, based on the <u>outcome</u> of Defendants' application of the Policy. Rather, it is based on Defendants' intentional failure to follow the Policy in the first place.[10] (*See* FAC, ¶ 137.) Because Defendants enjoyed no discretion in whether to follow that Policy and afford Ledonne a minimum level of process before banning him from campus, *Engquist* (and Defendants' other cited cases) are distinguishable.

B. Ledonne's Allegations Satisfy *Twombly* and *Iqbal*

Here, Ledonne has stated an equal protection claim. Specifically, as to the first element, Ledonne alleges that ASU historically followed one of two procedures before banning an

[10] Alternatively, Ledonne has alleged that even when Defendants did not follow the Policy as to others, Defendants sought an order restricting access to campus by obtaining a protective order in state court. (FAC, ¶ 138.) This is a procedural distinction without a difference, because under either scenario, the alleged "trespasser" was provided with the requisite notice and opportunity to be heard. The crux of Ledonne's claims here is that Defendants intentionally failed to provide him with either procedural mechanism. Thus, even if there are similarly situated individuals like Ledonne for whom Defendants did not follow the Policy, but who, as Ledonne alleges, were provided a state court remedy, Ledonne has still alleged a plausible claim.

allegedly disruptive non-student and non-employee from the University campus. (FAC, ¶ 138.) ASU would either abide by its Policy in the Student Handbook (a policy that was in effect at the time of Ledonne's banishment from campus), or ASU would seek a protective order from the local state court. (*Id.*, ¶¶ 137-38.) Here, Defendants issued the No Trespass Order without notice, without an opportunity to be heard (actions directly in conflict with the Policy), and no proceeding in a local state court. (*Id.*, ¶ 39.) These facts demonstrate Defendants' intentionally different treatment from others similarly situated. *See Olech*, 528 U.S. at 564.

That Ledonne does not "identify any similarly situated individual who received different treatment under similar circumstances" is not dispositive. (Mot. at 18.) Ledonne has alleged that other members of the public receive meaningful process before their access to campus is permanently denied. (FAC, ¶ 137-38.) Whether or not Defendants failed to provide other non-student, non-employees with the due process required by the law and Policy is information necessarily (and solely) within Defendants' possession and to which Ledonne is entitled to further discovery. Defendants' Motion must therefore be denied. *United States v. Tynan*, 776 F.2d 250, 252 (10th Cir. 1985) ("[W]hen the evidence necessary to prove a plaintiff's case is necessarily in the possession of a defendant, a judgment of dismissal may not be entered until the plaintiff has had an opportunity through discovery to determine whether such evidence exists."); *see also Twombly*, 550 U.S. at 556 (holding standard "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" of alleged facts, not any probability of success).

As to the second element, Ledonne alleges that he was "specifically singled out … due to the animosity of President McClure, Chief Grohowski, and others in the Adams State University

administration." (FAC, ¶ 139.) Ledonne further alleges that he was intentionally treated differently "because of his research in uncovering information critical of the University administration, the launching of the Watching Adams website, and his public statements challenging, among other things, Adams State University's hiring practices and academic salaries . . . ." (*Id.*, ¶ 83.) There is no rational basis for this selective discriminatory treatment.

IV. DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

The doctrine of qualified immunity does not shield public officials from damages actions where their "conduct was unreasonable in light of clearly established law." *Elder v. Holloway*, 510 U.S. 510, 512 (1994). The court's first task is to determine whether the plaintiff's allegations state the deprivation of a constitutional right. *Wilson v. Layne*, 526 U.S. 603, 609 (1999). As set forth above, Ledonne has satisfied this element.

The next inquiry is whether the constitutional right was "clearly established" at the time of the alleged violation. If the Supreme Court or the Tenth Circuit has precedent that is on-point, then plaintiffs need only direct the court to it. *Lundstrom v. Romero*, 616 F.3d 1108, 1119 (10th Cir. 2010). When no such mandatory on-point authority is available, plaintiffs overcome a qualified immunity defense by demonstrating "clearly established weight of authority from other courts finding the law to be as the plaintiff maintains." *Id.*

The Supreme Court has "shifted the qualified immunity analysis from a scavenger hunt for prior cases with precisely the same facts toward the more relevant inquiry of whether the law put officials on fair notice that the described conduct was unconstitutional." *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004). Government officials must make "reasonable applications of the prevailing law to their own circumstances." *Currier v. Doran*, 242 F.3d 905, 923 (10th

Cir. 2001). They "can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). "The key to the analysis is notice–an official somehow must be on notice that the conduct in question could violate the plaintiff's constitutional rights." *DeSpain v. Uphoff*, 264 F.3d 965, 979 (10th Cir. 2001) (emphasis added).

Here, at the time Defendants issued the No Trespass Order, the law applicable to each of Ledonne's challenged claims was clearly established. Specifically, as to Ledonne's First Amendment claim,[11] it is indisputable that both the Supreme Court and Tenth Circuit (as well as other courts) have repeatedly held the First Amendment protects the right to receive ideas and information. *See* section I, *supra*.

As to Ledonne's due process claim, Defendants do not invoke qualified immunity with respect to Ledonne's allegation that the right to receive information establishes a liberty interest; as such, Defendants waive qualified immunity at this stage. *See Anderson*, 422 F.3d at 1182 n.51.

As to Ledonne's other alleged liberty and property interests, in the absence of mandatory authority that is on all fours, district courts may look to any source of judicial precedent, including state courts. *See Prison Legal News, Inc. v. Simmons*, 401 F. Supp. 2d 1181, 1191 (D. Kan. 2005) ("a district court may consider any source of judicial precedent . . . ."). Here, under both *Watson* and the Policy, it was clear that issuing the No Trespass Order without granting Ledonne an opportunity to be heard would violate Ledonne's constitutional rights. Defendants

[11] Defendants' argument is also conclusory and undeveloped; as such, they have waived this Court's consideration of it. *See Perez*, at *9.

were thus on notice that their conduct could and did violate Ledonne's clearly established rights. *See Hope*, 536 U.S. at 743-44 (permitting reliance on department of corrections regulation, federal circuit precedent, and a Department of Justice report to determine defendants were not entitled to qualified immunity and further holding that a "course of conduct that tends to prove that the [existing policy] was merely a sham, or that respondents could ignore it with impunity, provides equally strong support for the conclusion that they were fully aware of the wrongful character of their conduct."). As in *Hope*, Defendants' course of conduct here shows they ignored the Policy and were fully aware of the wrongful character of their conduct. Defendants cannot credibly argue that they did not know, or should not have known, that Ledonne had a constitutional right to access the campus on the same terms as other members of the public, which could not be denied without due process of law. Defendants are not entitled to qualified immunity.

As to Ledonne's due process claim under the stigma-plus theory, it is indisputable that the stigma-plus claim is clearly established by the Supreme Court and in the Tenth Circuit. *See Paul*, 424 U.S. at 708-09 ("[I]t was the alteration of legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards."); *Guttman*, 669 F.3d at 1125 (elements of a stigma-plus claim are as follows: "(1) governmental defamation and (2) an alteration in legal status."). Furthermore, it is clearly established by the Supreme Court and in the Tenth Circuit that the change in legal status need not be of constitutional magnitude. *See Paul*, 424 U.S. at 708-09 ("'Posting,' therefore, significantly altered her status <u>as a matter of state law</u> . . . .") (emphasis added); *McDonald*, 769 F.3d at 1211-12 (employee had no constitutional right to continued employment but finding viable stigma-plus claim where false

defamatory statements were publicly disseminated after the firing). Defendants are not entitled to qualified immunity for Ledonne's stigma-plus claim.

Finally, as to Ledonne's equal protection claim, the Supreme Court has clearly established that the Equal Protection Clause's "core concern" is to protect individuals from arbitrary classifications. *Engquist*, 553 U.S. at 598. The Supreme Court and Tenth Circuit have also clearly established that the government may not intentionally treat a person differently from others similarly situated absent a rational basis for doing so. *See* section III, *supra*. Ledonne need not, as Defendants argue, specifically demonstrate that it was clearly established that a class-of-one theory applied to the public accessing a public university campus to defeat a claim of qualified immunity. (Mot. at 18.) Rather, Defendants intentionally treated Ledonne differently in issuing the No Trespass Order than others similarly situated as a result of his protected First Amendment activities; a reasonable official would have understood these actions to violate Ledonne's constitutional rights. Accordingly, Defendants are not entitled to qualified immunity as to this claim.

V. LEDONNE IS ENTITLED TO PURSUE INJUNCTIVE RELIEF

Ledonne alleges—at great length, in over 150 allegations—the manner in which Defendants have violated his constitutional rights. (*See generally* FAC.) These allegations demonstrate, as a matter of law, that Ledonne has suffered—and continues to suffer—irreparable injury sufficient to merit injunctive relief.[12] *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 269 F.3d 1149, 1156-57 (10th Cir. 2001) (loss of reputation constitutes irreparable harm because "no remedy could repair the damage" to plaintiff's credibility and reputation); *Pac.*

[12] Defendants' characterization of Ledonne's allegations as targeting solely past harm or lacking specificity is simply inaccurate. (*See* Mot. at 14-15; FAC, ¶¶ 52-57.)

Frontier v. Pleasant Grove City, 414 F.3d 1221, 1225 (10th Cir. 2005) ("loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes 'irreparable injury'"); *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) ("When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). It is "always in the public interest to prevent a violation of a party's constitutional rights." *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012).

Furthermore, injunctive relief is a remedy—not a claim—and cannot be dismissed via a Rule 12(b)(6) motion. Fed. R. Civ. P. 12(b)(6) ("failure to state a <u>claim</u> upon which relief may be granted) (emphasis added); *Oaster v. Robertson*, No. 15-CV-00871-KLM, 2016 WL 1247803, at *2 n.5 (D. Colo. Mar. 28, 2016) ("[I]njunction is a remedy, not a cause of action."). And because Ledonne alleges valid claims for relief, he is entitled to pursue the appropriate remedies. *Halpern v. PeriTec Biosciences, Ltd.*, 383 F.App'x 943, 948 (Fed. Cir. 2010) ("[A]n injunction is an equitable remedy for a violation of a right, and any injunction therefore must be predicated on a viable cause of action.").

<u>CONCLUSION</u>

Ledonne respectfully requests that this Court, for the reasons set forth above, deny Defendants' Partial Motion to Dismiss and award him any further relief as justified.

Dated: May 19, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE (CM/ECF)

I HEREBY CERTIFY that on May 19, 2016, I electronically filed the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANTS' PARTIAL MOTION TO DISMISS** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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