

**No. 10-35555**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**OSU STUDENTS ALLIANCE and WILLIAM ROGERS,**

*Plaintiffs-Appellants,*

**v.**

**ED RAY, MARK MCCAMBRIDGE, LARRY ROPER, and  
VINCENT MARTORELLO,**

*Defendants-Appellees.*

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**On Appeal from the United States District Court  
for the District of Oregon**

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**BRIEF *AMICUS CURIAE* OF  
THE NATIONAL LEGAL FOUNDATION,  
in support of Plaintiffs-Appellants  
Urging Reversal**

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**FRAP RULE 26.1 DISCLOSURE STATEMENT**

*Amicus Curiae*, The National Legal Foundation has not issued shares to the public, and it has no parent companies, subsidiaries, or affiliates that have issued shares to the public. Thus, no publicly held company can own more than 10% of stock.

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### **INTEREST OF *AMICUS CURIAE***

The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, especially those in Oregon, are vitally concerned with the outcome of this case because of the effect it will have on speech protected by the First Amendment. NLF has been litigating First Amendment cases in both state and federal courts since 1985, seeking to protect the minority voice in the public square.

This Brief is filed pursuant to consent of all parties.

### **SUMMARY OF THE ARGUMENT**

Your *Amicus* makes two arguments that present alternative means by which this Court can reverse the court below. First, this Brief shows that Oregon State University Students Alliance's ("OSUSA") Complaint met the pleading standard from *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), because various detailed paragraphs in the Complaint link the Defendants to the constitutional violation. Second, this Brief shows that the court abused its discretion by not allowing OSUSA to amend its Complaint as to the named defendants and by not allowing OSUSA to add one or more "John Doe" defendants.

## ARGUMENT

As OSUSA concedes, the court below properly dismissed certain claims as either unavailable because the Defendants were protected by Eleventh Amendment sovereign immunity or because subsequent actions by the Defendants rendered the claims moot. Thus, OSUSA has focused its Brief on the court's errors below concerning proper adjudication of the damages questions before it—namely that OSUSA has made out plausible claims against the Defendants in their individual capacities for both compensatory and nominal damages. Your *Amicus* augments OSUSA's arguments by explaining in section I below that OSUSA has more than adequately met its pleading standard for nominal damages arising out of the university's constitutional violations. Further, assuming *arguendo* that OSUSA's pleading was deficient, section II below demonstrates why the court was obligated to grant OSUSA leave to amend its Complaint.

### **I. THE COURT BELOW ERRED WHEN IT HELD THAT OSUSA HAD NOT MET THE PLAUSIBILITY STANDARD SET FORTH IN *ASHCROFT V. IQBAL*.**

OSUSA has stated a claim for nominal damages against the individual defendants that satisfies *Iqbal*'s plausibility standard under a theory of supervisory liability. To survive a motion to dismiss, a complaint must allege sufficient factual matter 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)). “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.” *Id.* This plausibility standard for liability does not rise to the level of a “probability requirement,” but simply means that the plaintiff’s allegations suggest more than a “sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting and citing *Twombly*, 550 U.S. at 556). Here, OSUSA’s Complaint amply sets forth a claim for supervisory liability of the four named Defendants, plausibly connecting them to the constitutional violations both directly and indirectly through their own actions and by their ratification and acquiescence of violations committed by others.

**A. OSUSA Has Plausibly Alleged Supervisory Liability When It Alleged That the Defendants Implemented a Policy That Was the Moving Force for a Constitutional Violation.**

As OSUSA has set forth more fully in its Brief, it need not allege the direct *participation* of the Defendants in the constitutional harm to properly allege their liability. (Appellants’ Br. at 48.) Although supervisory liability may not rest upon a theory of vicarious liability, a supervisor is liable if there exists a “sufficient causal connection between the supervisor’s wrongful conduct and the constitutional violation.” *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989).

This Court noted that “[s]upervisory liability exists even without overt personal participation in the offensive act” when a supervisory official “implement[s] a policy so deficient that the policy ‘itself is a repudiation of constitutional rights’ and is ‘the moving force of the constitutional violation.’” *Hansen*, 885 F.2d at 646 (quoting *Thompkins v. Belt*, 828 F.2d 298, 304 (5th Cir. 1987)). Therefore, OSUSA simply must plausibly allege that the Defendants’ “set[] in motion a series of acts by *others* which the actor knows or reasonably should know would cause others to inflict the constitutional injury.” *Kwai Fun Wong v. United States*, 373 F.3d 952, 966 (9th Cir. 2004) (emphasis added). And OSUSA has made such allegations.

OSUSA alleged that its distribution bins were wrongfully taken without notice by representatives of Oregon State University. (R. 1, Compl. at ¶¶ 33-36.) OSUSA connected this allegation of wrongful taking to a university policy. Specifically, Joe Majeski of the Facilities Department tacitly admitted the university took the bins and newspapers (“If you would like to retrieve your bins for other uses you can pick them up in the University storage yard . . . .”) and “OSUSA’s bins were removed because the Facilities Department was finally ‘catching up’ with the policy.” (R. 1, Compl. at ¶¶ 36 & 38.) Further, Majeski

explicitly admitted the University took the bins and newspapers pursuant to a 2006 university policy. (R. 1, Compl. at ¶ 38.)

OSUSA followed its allegations of wrongful taking by the university pursuant to a university policy with allegations of *who* created, implemented, and enforced the policy. Specifically, “Defendant Ed Ray is the President of OSU, . . . and is responsible for overseeing campus administration and creating, implementing, and/or administering university policies, including the policies and procedures challenged herein.” (R. 1, Compl. at ¶ 10.) “Defendant Mark McCambridge is the Vice President of Finance and Administration of OSU, . . . and is responsible for overseeing campus administration and creating, implementing, and/or administering university policies, including the policies and procedures challenged herein.” (R. 1, Compl. at ¶ 11.) “Defendant Larry Roper is the Vice Provost for Student Affairs of OSU, . . . and is responsible for overseeing campus administration related to Student Affairs and creating, implementing, and/or administering university policies, including the policies and procedures challenged herein.” (R. 1, Compl. at ¶ 12.) And finally, “Defendant Vincent Martorello is *Director of Facilities Services* at OSU, . . . and is responsible for overseeing campus administration related to *Facilities* and creating, implementing,

and/or administering university policies, including the policies and procedures challenged herein.” (R. 1, Compl. at ¶ 13 (emphasis added).)

In sum, OSUSA has specifically alleged that each of the named defendants either created, implemented, or administered a university policy that directly led to a violation of OSUSA’s constitutional rights. Not only is their liability plausible under the facts as set forth in the Complaint, *see Iqbal*, 129 S. Ct. at 1949, their liability is probable.

**B. OSUSA Has Plausibly Alleged Supervisory Liability When It Alleged That the Defendants Condoned and Approved a Policy That Was the Moving Force for a Constitutional Violation.**

OSUSA’s Complaint does not stop with allegations of direct supervisory liability, however. OSUSA alleges liability for the Defendants’ actions subsequent to the constitutional violation because, by continuing to enforce the 2006 policy, they either ratified the violation or wrongfully acquiesced to it.

A supervisor may be liable for a constitutional violation by his “inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivation[;] or for conduct that showed a reckless or callous indifference to the rights of others.” *Blankenhorn v. City of Orange*, 485 F.3d 463, 485 (9th Cir. 2007) (quoting *Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th

Cir. 1998)). Such behavior demonstrates that the supervisor “condoned” or “ratified” the violation itself. *Id.* at 486.

Again, examining OSUSA’s Complaint, the allegations clearly tie the Defendants to acquiescence demonstrating condonation and ratification of the 2006 policy and its implementation against OSUSA. Specifically, the Complaint alleges OSUSA informed President Ray of the violation, and Mr. Ray immediately involved other Defendants. (R. 1, Compl. at ¶ 51.) Mr. Ray was then copied on an email from Defendant McCambridge asserting the university’s prerogative to control OSUSA’s distribution process and directing OSUSA to Defendant Martorello for follow-up. (R. 1, Compl. at Ex. 8). Mr. Ray later received an email from Plaintiff Rogers concerning attempts to remediate the unconstitutional policy (R. 1, Compl. at Ex. 17). Mr. Ray communicated with legal counsel concerning a specific email from Mr. Rogers and authorized legal counsel to be the future point of contact for the university with regard to Mr. Rogers’s concerns. (R. 1, Compl. at ¶ 88.) All of these allegations place President Ray in the position of (1) knowing of the constitutional violations and (2) acquiescing or condoning their existence. *See Blankenhorn*, 485 F.3d at 485-86.

OSUSA alleged similar connections to the acquiescence or condonation of the constitutional violations to the other Defendants. Defendants McCambridge

and Roper were named by Mr. Ray as contact points for Mr. Rogers. (R. 1, Compl. at ¶ 51.) Mr. McCambridge emailed Mr. Rogers concerning the disputed policy and copied Mssrs. Ray and Roper on the email. (R. 1, Compl. at Ex. 8.) McCambridge and Roper also received the email referenced above concerning Mr. Rogers's attempt to remediate the unconstitutional policy. (R. 1, Compl. at Ex. 17.)

Finally, Defendant Martorello received and sent several phone calls and emails from and to Mr. Rogers concerning the policy and its implementation, plainly demonstrating his condoning and acquiescence in the policy. (R. 1, Compl. at ¶¶ 52-58, 61-63, 67-71, Ex. 17.) Mr. Martorello was also copied on Mr. McCambridge's email to Mr. Rogers referenced above. (R. 1, Compl. at Ex. 8.) Significantly, not one allegation suggests *anything but* the Defendants' acquiescing to and condoning the unconstitutional policy.

Therefore, for the reasons set forth above, OSUSA has met the *Iqbal* pleading standard, and the court below should be reversed.

**II. EVEN IF, ARGUENDO, OSUSA FAILED THE *IQBAL* PLEADING STANDARD, THE COURT BELOW ERRED WHEN IT FAILED TO GRANT LEAVE TO AMEND THE COMPLAINT.**

As argued more fully above, and as OSUSA has capably argued in its Brief, OSUSA has satisfied the pleading standard set forth in *Iqbal*. (Appellants' Br. at

58-59.) However, should this Court disagree that OSUSA has met the *Iqbal* pleading standard, then OSUSA should be permitted to amend its pleading. Additionally, OSUSA should be permitted to name one or more “John Doe” defendants if this Court believes the named defendants could not plausibly be tied to OSUSA’s actual damages.

**A. The Court Below Abused Its Discretion When It Refused To Grant OSUSA Leave to Amend Its Complaint.**

Whether to grant a plaintiff leave to amend a complaint is a discretionary matter for the District Court. Thus, this Court reviews decisions not to grant leave to amend for abuse of discretion. *United States v. Smithkline Beecham Clinical Labs.*, 245 F.3d 1048, 1051 (9th Cir. 2001). However, this Court has made clear in recent cases with similar facts to the instant case that the failure to grant leave to amend *is* an abuse of discretion “unless *it is clear*, upon *de novo* review, that the complaint could not be saved by any amendment.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008) (emphasis added). “An outright refusal to grant leave to amend without a justifying reason is, however, an abuse of discretion.” *Id.* at 1034 (quoting *Leadsinger v. BMG Music Publ’g*, 512 F.3d 522, 532 (9th Cir. 2008)). Further, this Court reaffirmed this deferential standard for amendment less than one month ago in *Schneider v. Verizon Internet Servs.*, 2010 U.S. App. LEXIS 19974 at \*10 (9th Cir. Sep. 27, 2010).

As the record shows, the court below did precisely what the *Manzarek* Court forbade. It simply refused to allow OSUSA to amend its complaint and gave no reason for its denial. In its opinion, the court concluded as follows:

Defendants' motion for summary judgment on plaintiffs' claims for injunctive and prospective declaratory relief is granted. Defendants' motion to dismiss on all remaining claims for relief, including retrospective declaratory relief and damages, is also granted. Defendants' request for oral argument is denied as unnecessary. This case is dismissed and all pending motions are denied as moot. IT IS SO ORDERED.

*OSU Students Alliance v. Ray*, 692 F. Supp. 2d 1278, 1287 (D. Or. 2010). Neither did the court countenance amendment in its accompanying separate judgment. (R. 57, Order.)

OSUSA subsequently filed a Motion to Alter, Amend, and/or Reconsider the Judgment from February 22, 2010, in which OSUSA, *inter alia*, specifically requested leave to amend. (R. 58 & 59, Mot. to Alter.) The court again failed to grant leave to amend or explain why it was denying such leave. Instead, the court entered an order on the docket which, in its entirety, reads as follows:

ORDER: Plaintiffs' motion to alter, amend and/or reconsider this court's Feb. 22, 2010 Judgment granting defendants' motion to dismiss and for summary judgment 58 is denied. Plaintiffs' request for oral argument is denied as unnecessary. Ordered by Chief Judge Ann L. Aiken. (lae) (Entered: 05/19/2010)

(R. 63, Order.) Therefore, because the court below failed to grant leave to amend the Complaint or explain why it was denying leave, it abused its discretion, and the case should be remanded with instructions for the court to grant leave for OSUSA to amend its Complaint.

**B. The Court Below Erred When It Failed To Allow OSUSATo Add One or More “John Doe” Defendants.**

Although this Court disfavors naming “John Doe” defendants, naming such defendants is necessary under certain circumstances. *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980). Further, unless “it is clear that discovery would not uncover the identities, or that the complaint would be dismissed on other grounds,” a plaintiff should have opportunity to discover the unknown defendants. *Id. See also, Wakefield v. Thompson*, 177 F.3d 1160, 1163 (9th Cir. 1999) (same).

For instance, in *Gillespie*, the plaintiff alleged various abuses and deprivations on the part of prison personnel during the time of the plaintiff’s transporting and incarceration. *Id.* However, the plaintiff lacked knowledge of the identities of the U.S. Marshals and superintendants with whom he came in contact. *Id.* at 642-43. The district court dismissed the plaintiff’s complaint without allowing limited discovery to be completed in order to ascertain the identities of these defendants. *Id.* at 643. This Court noted the District Court’s abuse of discretion and reversed. Specifically, this Court noted

[i]t was very likely that the answers to the interrogatories [plaintiff served on the named defendants] would have disclosed the identities of the “John Doe” defendants. With those disclosures, the allegations contained in appellant’s complaint, if proven, could possibly have provided bases for relief on appellant’s Bivens-type actions against the unnamed United States Marshals and the unnamed federal superintendents and guards; § 1985(3) claims against the unnamed United States Marshals and the unnamed superintendents and guards; and § 1983 claims against the unnamed local superintendents and guards.

*Id.* This Court then remanded the matter for limited discovery to “uncover the identities” of unnamed defendants. *Id.*

Here, as in *Gillespie*, a similar result is appropriate. Counsel for OSUSA specifically informed the court that the lack of discovery and cooperation on the part of the Defendants had made it impossible to articulate certain facts that would have otherwise been supportive of its theory of the case. (R. 28, Hacker Aff. at esp. ¶ 6.) Thus, OSUSA was *unable* to connect the actual physical removal and damaging of the distribution bins to any individual.

OSUSA’s Opening Brief reiterated that OSUSA did not know precisely who wrongfully removed or damaged *Liberty’s* distribution bins. (Appellants’ Br. at 47.) Yet OSUSA does have reason to believe and it has pled to the effect that university staff was responsible for their removal. (R. 1, Compl. At ¶¶ 31-36.) As OSUSA has set forth more fully in its Brief, if the court below was dissatisfied with the link between the allegations of wrongdoing and the named defendants,

allowing OSUSA to amend the Complaint to name one or more John Doe defendants would have readily cured that defect.

### **CONCLUSION**

For the foregoing reasons, and for additional reasons stated in the Appellants' Brief, the judgment of the District Court should be reversed.

Respectfully submitted,  
this 19th day of October, 2010

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,710 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in fourteen-point Times New Roman.

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### **CERTIFICATE OF SERVICE**

I hereby certify that on October 19, 2010, I have electronically filed the foregoing Brief *Amicus Curiae* of The National Legal Foundation in the case of *OSU Students Alliance, et al. v. Ray, et al.*, No 10-35555, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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