

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION**

LAILA DAMES, et al.,

Plaintiffs,

v.

LEE ROBERTS, et al.,

Defendants.

No. 1:25-cv-191

**REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR A
PRELIMINARY INJUNCTION**

Plaintiffs wish to gather on a public university campus with like-minded peers to demonstrate against United States foreign policy. The First Amendment protects that political expression. Defendants, however, have indefinitely banned Plaintiffs from campus, so now Plaintiffs can't do anything there until a single official—who has “unbridled and absolute power to prohibit” that expression—chooses to allow it. *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 150 (1969). That is a prior restraint subject to strict scrutiny.

In response, Defendants argue that the campus bans are not prior restraints, but merely “punishment” for past conduct. (Doc. 19 at 16). But indefinite banishment from public forums where Plaintiffs wish to gather clearly implicates future expression. And Plaintiffs haven't been convicted of anything related to the encampment—all charges were dismissed. Ms. Mohanarajah

was never even arrested. Tellingly, Defendants do not even suggest that Plaintiffs pose any ongoing threat to campus safety.

Defendants also argue that the campus bans are viewpoint-neutral and have only an incidental effect on Plaintiffs' speech. (*Id.* at 17). Even if true, such restrictions must still pass heightened or intermediate scrutiny. *Ross v. Early*, 746 F.3d 546, 552–53 (4th Cir. 2014). Indefinitely banning peaceful protestors from over 700 acres of public property does not advance any legitimate interest, and even if it did, it burdens substantially more protected activity than necessary. “Such broad restrictions are generally frowned upon even in nonpublic forums.” *Huminski v. Corsones*, 396 F.3d 53, 92–93 (2d Cir. 2005).

As for Plaintiffs' procedural due process claims, Defendants argue that Plaintiffs had no protected interest in being on UNC's campus, and the minimal procedures afforded in Plaintiffs' administrative hearings were adequate. Defendants are wrong on both counts.

Polk Place functions as a public park, open to anyone for leisure activities and political demonstration. Plaintiffs have a right to be there. And while an administrative hearing might not require the full constellation of procedural protections, Plaintiffs at least have the right to know and contest the evidence and charges against them. *Goss v. Lopez*, 419 U.S. 565, 581 (1975). But at their appeal hearing, Defendants presented no evidence or explanation whatsoever. And it was only when Defendant James *denied* Plaintiffs' appeals that they

learned of allegations against them concerning UNC's tent policy and Defendants' unexplained "other safety and security concerns."

Accordingly, Plaintiffs' motion should be granted.

I. Defendants have imposed a prior restraint on future expression protected by the First Amendment.

"A prior restraint on expression exists when the government can deny access to a forum for expression before the expression occurs." *United States v. Frandsen*, 212 F.3d 1231, 1236–37 (11th Cir. 2000). Even if content-neutral, prior restraints violate the First Amendment when government officials have "unbridled discretion in determining whether to allow protected speech." *11126 Baltimore Blvd., Inc. v. Prince George's Cnty.*, 58 F.3d 988, 994 (4th Cir. 1995) (en banc), *abrogated on other grounds, City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004).

Defendants first argue the trespass bans are merely a punishment for past conduct, not a restraint on Plaintiffs' future expression. (Doc. 19 at 16). That is wrong.

Defendants rely principally on *Alexander v. United States*, where a criminal defendant was convicted and had to forfeit assets including an adult entertainment business. 509 U.S. 544, 548 (1993). The defendant conceded that the punishment was for "unprotected speech," but argued that the forfeiture prevented future protected expression. *Id.* at 549. The Court held that the

forfeiture was not a prior restraint because it did “not *forbid* [the defendant] from engaging in any expressive activities in the future, nor does it require him to obtain prior approval for any expressive activities.” *Id.* at 550–51.

Here, Plaintiffs’ expressive activity involves assembling on UNC’s campus to communicate a message to the government and the public, and to associate with like-minded peers in a forum historically known for debate and activism. (See Doc. 10 ¶¶ 55, 61–63). Defendants do not dispute that this is protected activity.

Plaintiffs, however, cannot step foot on campus until Defendant James allows it. Unlike *Alexander*, the bans have a concrete restriction on Plaintiffs’ future protected expression. And Defendants do not argue that UNC policy provides any criteria to guide Defendant James’s decision. Defendants have therefore imposed a prior restraint. See *Occupy Fort Myers v. City of Fort Myers*, 882 F. Supp. 2d 1320, 1328 (M.D. Fla. 2011) (holding that “tenting and sleeping in the park . . . is symbolic conduct which is protected by the First Amendment[]” and prohibiting that conduct was a prior restraint).

Defendants next argue that even if the campus bans “incidentally impact speech,” they still pass muster as a viewpoint-neutral regulation. (Doc. 19 at 17). Not so. Even under this framing, Defendants must satisfy intermediate or

heightened scrutiny, yet they make no argument that the bans are narrowly tailored to a legitimate state interest.¹

In *Madsen v. Women’s Health Center*, an injunction prevented protestors from communicating their message within a certain distance of a public forum. 512 U.S. 753, 763 (1994). The injunction had an “incidental” effect on the protestors’ message and was not “content or viewpoint based.” *Id.* at 763. The Supreme Court explained, however, that unlike a generally applicable law, injunctions do not result from the legislative process and “carry greater risks of censorship and discriminatory application” *Id.* at 764. Therefore, the Court applied a “more stringent application of general First Amendment principles in this context” *Id.* at 765. “We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.” *Id.*

Courts have applied *Madsen’s* reasoning to trespass bans from public property. In *Huminski*, the plaintiff was “indefinitely and virtually completely” banned from a nonpublic forum when officials “interpreted his behavior as a

¹ Whether the campus bans better qualify as a prior restraint or another kind of restriction on speech is ultimately a “labeling dispute” that doesn’t determine whether Defendants acted lawfully. See *McDonough v. Garcia*, 90 F.4th 1080, 1094 n.9 (11th Cir. 2024), *vacated and reh’g en banc granted*, 93 F.4th 1220 (11th Cir. 2024), *and remanded on other grounds*, 116 F.4th 1319 (11th Cir. 2024) (en banc); *MacDonald v. Safir*, 26 F. Supp. 2d 664, 671 (S.D.N.Y. 1998).

potential threat to personal safety, to court property, and to the orderly conduct of court business.” 396 F.3d at 58. The Second Circuit held that even though the ban was content-neutral and applied to a nonpublic forum, its expansive scope violated the plaintiff’s right to free expression. *Id.* at 58–59; *see also* *McTernan v. City of York*, 564 F.3d 636, 655 (3d Cir. 2009) (applying heightened scrutiny to a targeted “police directive, issued by officers in the field”); *Bernstein v. Sims*, 643 F. Supp. 3d 578, 585 (E.D.N.C. 2022) (applying *Madsen*’s reasoning to a trespass ban from a limited public forum).

The Fourth Circuit has acknowledged these cases but not resolved whether intermediate or heightened scrutiny should apply to orders from law enforcement. *See Ross*, 746 F.3d at 553. Here, even if intermediate scrutiny applies, Defendants must prove that the campus bans “promote[] a substantial government interest that would be achieved less effectively absent the regulation and . . . not burden substantially more speech than is necessary to further the government’s legitimate interests.” *Id.* at 552–53 (quotation marks omitted). This must involve first using “less intrusive tools readily available to” the government. *Billups v. City of Charleston*, 961 F.3d 673, 690 (4th Cir. 2020)

Defendants cannot do that. Through the campus bans, Defendants have created a large, indefinite, First-Amendment-free-zone—the entirety of UNC’s campus, which spans more than 700 acres—for peaceful demonstrators who have not been convicted of anything and pose no articulable threat to public

safety.² These bans do not actually advance any legitimate state interest, their scope burdens a great deal of protected activity, and Defendants did not first attempt less restrictive measures—such as simply removing the encampment tents or imposing a less expansive restriction on Plaintiffs’ access to campus. *See Hulbert v. Pope*, 70 F.4th 726, 737 (4th Cir. 2023) (officer’s actions were narrowly tailored because he had merely ordered protestor to “back up a few feet” before escalating to arrest).

Defendants do not address narrow tailoring. Instead, they argue that Plaintiffs have not shown a “strong or compelling” need to be on campus. (Doc. 19 at 19). But Plaintiffs do not have to justify their exercise a constitutional right. Rather, the *government* must justify its actions when it restricts protected speech. *E.g.*, *Cox v. City of Charleston*, 416 F.3d 281, 284 (4th Cir. 2005).

Defendants next contend that Plaintiffs “do not fit within the class of persons for whom UNC-CH opened its campus as a limited public forum” because they did not comply with a dispersal order, and so strict scrutiny should not apply. (Doc. 19 at 18). This argument also fails.

First, Plaintiffs dispute that they knowingly failed to comply with a dispersal order, and they allege that the order was unlawful. (Doc. 10 ¶¶ 90, 343).

² *See* UNC School of Government, <https://mpa.unc.edu/about/location/>.

Moreover, as discussed below, Plaintiffs are indeed among the class of people who have a right to access UNC's campus.

But even accepting Defendants' premise, that still cannot justify such an expansive burden on protected expression. The Supreme Court has found it "obvious" that a complete ban on First Amendment activity "cannot be justified even [in] a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech." *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987) (emphasis added). A failure to disperse that incurs no criminal penalties and poses no articulable, ongoing threat to public safety cannot justify the indefinite campus bans here.

Defendants rely on *Wood v. Arnold*, 321 F. Supp. 3d 565 (D. Md. 2018), where the court upheld the exclusion of a student's parent from school grounds. But that parent had screamed profanity at school staff and made threatening posts on social media, and the trespass notice "was limited in duration[.]" *Id.* at 583. Here, Defendants have not alleged that Plaintiffs themselves said or did anything threatening, and the campus bans are indefinite.

Accordingly, Plaintiffs will likely succeed on their prior restraint claims.

II. The indefinite campus bans deprive Plaintiffs of liberty and property interests without sufficient process.

A. Plaintiffs have liberty and property interests implicated by their campus bans.

The First Amendment gives Plaintiffs a liberty interest in accessing “parks and other spaces open to the public” for the purpose of engaging in political activity. *Norris v. Asheville*, No. 1:23-cv-103, 2024 WL 1261206 at *6 (W.D.N.C. March 25, 2024) (citing *City of Chicago v. Morales*, 527 U.S. 41 (1999) (plurality opinion)). Once a limited public forum is opened, states are “bound by the same standards as apply in a traditional public forum,” including the right to be there. *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 46. “One who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views[.]” *Jamison v. Texas*, 318 U.S. 413, 416 (1943).³

In response, Defendants say UNC’s facilities “are not open to the public in the same way that streets and parks are.” (Doc. 19 at 20) (quotation marks

³ Plaintiff Mohanarajah also has a protected interest as a UNC student. *Goss v. Lopez*, 419 U.S. 565, 574 (1975). Defendants wrongly conflate her leave of absence with not being associated with UNC. If Mohanarajah were truly unaffiliated with UNC, she would not have been subject to EEAC disciplinary procedures that Defendants used to suspend her.

Moreover, Plaintiffs Rogers and Newman have a right to continued employment that the campus bans interfere with. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538–40 (1985). They do not have to be employed by UNC to have employment interests implicated by the bans.

omitted). But Defendants rely on cases addressing entirely different universities with entirely different policies.

Not all university forums are identical, nor do all universities have the same policies or histories. Defendants try to lump UNC and Polk Place in with other universities with more limited rights of access. (*Id.* at 20–21). In *ACLU v. Mote*, for example, an amphitheater had only been opened to the public in recent years, and the use of outdoors spaces required prior approval and sponsorship for people not affiliated with the university. 423 F.3d 438, 441–442, 444 (4th Cir. 2005). The university’s purpose was “not to provide a venue for expression of public views that are not requested or sponsored by any member of the campus community.” *Id.* at 444.

Here, Polk Place (and other outdoor parts of UNC’s campus) have been open to the public for many decades. Polk Place is a large, grassy quad on UNC’s campus that is open to the public and operates like a city park—anyone can go there to toss a frisbee or engage in First Amendment activity. Use of the area does not require prior reservation, sponsorship, or approval, and UNC policies allow for Polk Place’s continued occupation, even overnight. (Doc. 10 ¶¶ 41–46).

Therefore, Plaintiffs have likely established interests protected by the Due Process Clause.

B. Plaintiffs received no pre-deprivation notice or hearing.

“At a minimum, procedural due process requires ‘fair notice’ of impending governmental action and ‘an opportunity to be heard.’” *Norris*, 2024 WL 1261206, at* 5 (quoting *Snider Int’l Corp. v. Town of Forest Heights*, 739 F.3d 140, 146 (4th Cir. 2014)). Plaintiffs received neither before being indefinitely banned from campus.

Defendants argue it would be “impractical” to provide a hearing for each trespassed individual where “notices must be issued in real-time” so the “individual does not remain on campus after breaking the law[.]” (Doc. 19 at 23). But the bans were issued after the encampment had been successfully cleared. Rogers’ ban was issued three days later. (*Id.* at 12). And Plaintiffs were never accused of creating the kind of ongoing safety threat that could justify doing away with pre-deprivation hearings. *See Goss*, 419 U.S. at 582.⁴

Defendants rely on *Johnson v. Jessup* to argue Plaintiffs received adequate pre-deprivation process, but even that case acknowledges the requirement of notice apprising the parties of the “*pendency* of the action.” 381 F. Supp. 3d 619, 645 (M.D.N.C. 2019) (emphasis added). Those plaintiffs challenged the state’s driver’s license suspension scheme and argued, in part, that

⁴ The trespass charges against another participant were dismissed by a criminal court judge who ruled the State had not provided sufficient evidence the participants had violated the law. (Doc. 10 ¶ 254)

notice was deficient. *Id.* at 644. But the notice was issued *before* the suspensions took effect, and provided instructions for license reinstatement—simply paying outstanding fees. *Id.* at 645.

Assuming, however, that Defendants did not have to provide pre-deprivation process, the appeal hearings were deficient in several ways.⁵

C. The post-deprivation hearings lacked minimal procedural safeguards.

First, Plaintiffs never received a meaningful explanation of the charges or evidence against them. Defendants argue that Plaintiffs were only entitled to present their side of the story (Doc. 19 at 24), but ignore that Plaintiffs also had a right to “an explanation of the evidence the authorities have,” *Goss*, 419 U.S. at 581, and “the factual basis for a material government finding.” *Kirk v. Comm’r of Soc. Sec. Admin.*, 987 F.3d 314, 325 (4th Cir. 2021) (cleaned up). In *Rodgers v. Norfolk School Board*, for example, the post-deprivation hearing satisfied due process in part because the plaintiff had received a detailed written report of the evidence against her and the names of witnesses before the hearing took place. 755 F.2d 59, 63–63 (4th Cir. 1985).

Here, Defendants’ policies recognize these requirements: Plaintiffs had “the right to review advance written notice of the charges” and “the right to

⁵ Defendants assert that Plaintiff Dames did not appeal her trespass notice, but they do not argue that this weighs against her claims.

review the evidence in support of the charges.” (Doc. 19-1, Ex. 1). Defendants’ policies further state “the appellant is informed of the allegations made against them” during the appeal hearing. (Doc. 19-3, Ex. 1).

But Plaintiffs received nothing of the sort. Defendants presented no witnesses and no evidence supporting their actions, nor any further explanation of the charges against Plaintiffs. (Doc. 10 ¶¶ 225–27). Indeed, Plaintiffs did not learn of the allegations against them concerning the tent policy or Defendants’ “other safety and security concerns” until they received Defendant James’ letters upholding their bans upon appeal. (*See id.* ¶ 234).

Second, Plaintiffs’ appeal hearings were not before a neutral decisionmaker. Defendants argue that because Defendant James didn’t personally arrest Plaintiffs or issue their trespass bans, he is a neutral party. But a decisionmaker loses the appearance of neutrality when he also served as the “one man grand jury” and likely relied “on his own personal knowledge and impression.” *In re Murchison*, 349 U.S. 122, 134 (1950) (cleaned up). Defendants concede that James was present at the encampment the day it was cleared, participated in the decision to clear the encampment, and directed officers to arrest and trespass participants who failed to disperse. (Doc. 19-3, ¶ 14).

For these reasons, Plaintiffs will likely succeed on their procedural due process claim.

III. Plaintiffs satisfy the other preliminary injunction requirements.

In addition to contesting the merits, Defendants argue Plaintiffs cannot show irreparable harm because they “did not file their motion for preliminary injunction until almost a year after the trespass notices were issued.” (Doc. 19 at 26). Defendants are mistaken.

To show irreparable harm, a plaintiff needn’t seek relief immediately. Courts recognize that it takes time to investigate and prepare litigation, and any delay becomes less relevant if the defendant isn’t prejudiced. *See, e.g., Candle Factory, Inc. v. Trade Associates Group, Ltd.*, 23 Fed. App’x 134, 138–39 (4th Cir. 2001) (unpublished) (one-year delay did not preclude finding irreparable harm); *Norris*, 2024 WL 1261206, at *7.

Here, Defendant James didn’t issue his decision on Plaintiffs’ appeals until August 12, 2024, more than three months after the initial trespass notices. (Doc. 10 ¶ 231). Plaintiffs engaged counsel who further investigated the matter, which included submitting public records requests and reviewing the responses. (*See* Doc. 12-1, Johnson Decl. ¶ 4). Plaintiffs also had to wait until their criminal charges resolved before suing in federal court. *See Heck v. Humphrey*, 412 U.S. 477 (1994). Plaintiffs’ counsel then prepared and filed the complaint, followed by an amended complaint which alleged additional facts

and removed several claims. (See Doc. 10). Defendants do not argue that this caused them any prejudice.

As to the balance of equities, Defendants are “in no way harmed by issuance of a preliminary injunction which prevents them from enforcing restrictions likely to be found unconstitutional.” *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (cleaned up). Citing nothing, they argue that “UNC-CH’s interests in fulfilling its core mission of educating students in a non-disruptive, safe environment heavily outweighs Plaintiffs’ interests in being physically present on UNC-CH’s campus.” (Doc. 19 at 27). But, as with the rest of their brief, Defendants don’t even suggest that any Plaintiff poses a real, ongoing threat to campus operations.

CONCLUSION

Plaintiffs’ motion for a preliminary injunction should be granted.

Respectfully submitted, this the 1st day of July, 2025.

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CERTIFICATE OF SERVICE

I certify that on July 1, 2025, I filed the foregoing with the Clerk of the Court using the CM/ECF system which will effectuate service on all counsel of record.

/s/ Ivy A. Johnson

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CERTIFICATE OF WORD COUNT

Pursuant to L.Cv.R. 7.3(d) I hereby certify that this brief has fewer than 3,250 words, as calculated by the word processing software used to prepare this brief.

/s/ Ivy A. Johnson
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