No. 17-55380

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE KOALA,
Plaintiff-Appellant,

v.

PRADEEP KHOSLA; DANIEL JUAREZ; JUSTIN PENNISH,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of California, Case No. No. 3:16-cv-1296-JM-BLM

BRIEF OF *AMICI CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION AND CATO INSTITUTE IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

FILED WITH CONSENT OF ALL PARTIES - F.R.A.P. 29(a)

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INTEREST OF AMICI CURIAE[1]

The Foundation for Individual Rights in Education ("FIRE") is a nonpartisan, nonprofit, tax-exempt education and civil liberties organization dedicated to defending student and faculty rights at our nation's institutions of higher education. Since its founding in 1999, FIRE has effectively and decisively defended constitutional liberties including freedom of speech, legal equality, due process, religious liberty, and sanctity of conscience on behalf of students and faculty nationwide via legal and public advocacy. FIRE believes that if our nation's universities are to best prepare students for success in our democracy, the law must remain clearly on the side of student and faculty rights.

The Cato Institute ("Cato") was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was

[1] All parties have consented to the filing of this brief. No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief.

established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs.

This case is of interest to *amici* because the district court's ruling poses a threat to the expressive rights of college students and student organizations.

SUMMARY OF ARGUMENT

The lower court's decision ignored the unique importance of protecting student First Amendment rights on public college campuses and misconstrued applicable doctrine to arrive at a result that, if allowed to stand, would imperil free speech at our nation's public colleges and universities. Left unchallenged, the lower court's reasoning will be seized upon by public college administrators to further restrict free expression on campus.

The vital importance of protecting First Amendment rights on public college campuses has been recognized by the Supreme Court in holdings spanning six decades. Nevertheless, campus censorship

is rampant. *Amicus* FIRE surveyed 449 colleges and universities in 2016 and found that the overwhelming majority maintain regulations that seriously infringe on protected speech. In FIRE's experience, college administrators will seize on any ambiguity in the law to justify these restrictions. Of particular relevance to this case, college administrators routinely abuse facially viewpoint-neutral regulations to single out and suppress speech that is offensive, unpopular, or critical of the university administration.

As FIRE has seen, university administrators are well aware of legal developments that might empower them to enact additional restrictions on student speech. For example, within ten days of the Seventh Circuit's 2005 decision in *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005), the general counsel of the California State University System sent a memo to all system presidents noting that the Seventh Circuit's decision, while not binding in California, "appears to signal that CSU campuses may have more latitude than previously believed to censor the content of subsidized student newspapers." Memorandum from Christine Helwick, General

Counsel of the Cal. State Univ. Sys., to CSU Presidents 2 (June 30, 2005), *available at* https://www.thefire.org/csu-hosty-memo.

In accepting Defendant-Appellee's argument that the relevant forum was student print media organizations, rather than student organizations as a whole, the district court misstated and misapplied relevant jurisprudence governing public forums. By treating the targeted defunding of a few student organizations as a viewpoint-neutral forum closure, the district court misconstrued relevant precedent, ignored the particular importance of viewpoint neutrality in the public university setting, and paved the way for pretextual forum closings to silence disfavored speech on public campuses in the future.

Given our experience defending the expressive rights of college students and faculty, *amici* have no doubt that a decision upholding the district court's erroneous ruling in the instant case would grievously harm campus discourse. Public college administrators nationwide will watch this Court's decision closely.

We urge this Court to consider the impact of any ruling on the free speech rights of students and faculty. If the district court's

decision stands, public college administrators will be presented with a road map for an end-run around decades of First Amendment jurisprudence governing student speech rights. To ensure that the "marketplace of ideas"[2] remains vibrant and that administrative efforts at censorship fail, this Court should reaffirm the necessity of broad First Amendment protections for public college students by reversing the below decision.

ARGUMENT

I. The lower court ignored the importance of First Amendment rights on campus and disregarded the prevalence of student censorship

In its ruling, the district court ignored both the unique role of free speech in the university setting and the alarming propensity of universities to censor unpopular speech.

A. The lower court's decision is at odds with decades of rulings governing free speech on campus

In decisions stretching back six decades, the Supreme Court has consistently articulated the importance of protecting free

[2] *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the 'marketplace of ideas.'").

expression in higher education. *See, e.g.*, *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 836 (1995) ("For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses."); *Keyishian*, 385 U.S. at 603 (1967) ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'") (internal citation omitted).

Given that public universities play a "vital role in a democracy," our Supreme Court has wisely warned that silencing student and faculty speech "would imperil the future of our Nation." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). The Court's stark admonition regarding the repercussions of campus censorship is unambiguous: "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Id.*

Reflecting the clarity of this guidance, lower courts have delivered a virtually unbroken string of rulings affirming the critical importance of First Amendment protections for college students.[3]

[3] *See, e.g., McCauley v. Univ. of the V.I.*, 618 F.3d 232 (3d Cir. 2010) (invalidating university speech policies, including harassment policy); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (striking down sexual harassment policy); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (declaring university discriminatory harassment policy facially unconstitutional); *Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, No. 1:12-cv-155, 2012 WL 2160969 (S.D. Ohio June 12, 2012) (invalidating "free speech zone" policy); *Smith v. Tarrant Cty. Coll. Dist.*, 694 F. Supp. 2d 610 (N.D. Tex. 2010) (finding university "cosponsorship" policy to be overbroad); *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (enjoining enforcement of university civility policy); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (finding university sexual harassment policy unconstitutionally overbroad); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of university harassment policy due to overbreadth); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575 (S.D. Tex. 2003) (declaring university policy regulating "potentially disruptive" events unconstitutional); *Booher v. Bd. of Regents, N. Ky. Univ.*, No. 2:96-CV-135, 1998 WL 35867183 (E.D. Ky. July 22, 1998) (finding university sexual harassment policy void for vagueness and overbreadth); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (declaring university racial and discriminatory harassment policy facially unconstitutional); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (enjoining enforcement of university discriminatory harassment policy).

B. Censorship is a widespread and pernicious problem on our public campuses

The First Amendment rights of public college students are threatened with depressing regularity. *Amicus* FIRE annually reviews speech policies maintained by almost 450 colleges and universities; its 2017 report found that 33.9 percent of public colleges and universities surveyed maintained at least one policy that clearly and substantially restricts First Amendment rights. *Spotlight on Speech Codes 2017: The State of Free Speech on Our Nation's Campuses*, Found. for Individual Rights in Educ., https://www.thefire.org/spotlight-on-speech-codes-2017 (last accessed July 27, 2017). An overwhelming ninety-four percent of public colleges and universities surveyed at that time maintained either an explicitly and severely restrictive speech policy or one that can be used to suppress or punish protected expression. *Id.*

These restrictive speech codes are used to silence students and student organizations, including the student press. Since its founding in 1999, FIRE has received thousands of reports of censorship on public college campuses and has successfully defended student and faculty rights in hundreds of instances.

FIRE's recent litigation efforts further illustrate the extent of the problem. Launched in July 2014, FIRE's Stand Up For Speech Litigation Project has already coordinated the filing of thirteen separate federal lawsuits in defense of student and faculty First Amendment rights. Catherine Sevcenko and Katie Barrows, *FIRE's Stand Up For Speech Litigation Project Turns Two*, FIRE Newsdesk (July 1, 2016), https://www.thefire.org/fires-stand-up-for-speech-litigation-project-turns-two. Eight have resulted in settlements favorable to plaintiffs, and one resulted in a favorable court decision.[4] (Five cases are ongoing.) In total, these cases have secured over $400,000 in settlement fees and policy changes benefiting over 250,000 students. *Id.*

Despite the clarity of the legal precedent, however, censorship of student expression on our nation's public campuses runs rampant. Unfortunately, as here, public college administrators too often trample students' rights to free expression in an effort to limit controversy or criticism of the university.

[4] *Gerlich v. Leath*, 861 F.3d 697 (8th Cir. 2017).

The effect of this climate of censorship on students is more than hypothetical. According to a 2015 survey of college students' free-speech attitudes, 49 percent of survey participants admitted that they were intimidated to share beliefs that differ from their professors, and fully half of respondents said they had "often felt intimidated" to express beliefs different from those of their classmates. Press Release, McLaughlin & Associates, The William F. Buckley, Jr. Program at Yale: Almost Half (49%) of U.S. College Students "Intimidated" by Professors when Sharing Differing Beliefs: Survey" (Oct. 26, 2015), http://mclaughlinonline.com/2015/10/26/the-william-f-buckley-jr-program-at-yale-almost-half-49-of-u-s-college-students-intimidated-by-professors-when-sharing-differing-beliefs-survey. A 2016 survey yielded similar results, with a majority (54 percent) of college students surveyed agreeing that "[t]he climate on my campus prevents some people from saying things they believe because others might find them offensive." Gallup, *Free Expression on Campus: A Survey of U.S. College Students and U.S. Adults*,

https://www.knightfoundation.org/media/uploads/publication_pdfs/FreeSpeech_campus.pdf (last visited July 27, 2017).

In some cases, the policies that universities use to suppress unpopular speech are facially viewpoint-discriminatory—such as California State University, Fresno's ban on the electronic transmission of "offensive material based on gender, race, color, religion, national origin, sexual orientation, or disability." Interim Acceptable Use Policy of Information Technology Resources, Cal. State Univ., Fresno, http://fresnostate.edu/mapp/documents/apm/622.pdf (last visited July 27, 2017). Over the past several decades, however, courts have roundly rejected these species of overt speech codes.[5] Accordingly, universities have had to find more creative ways to silence unpopular, dissenting, or merely inconvenient speech.

C. Universities routinely abuse content-neutral regulations to silence dissenting campus views

As appellants point out, the district court's opinion "drew a roadmap for immunizing censorship" of almost any speech on any

[5] *See, e.g.*, cases cited *supra* note 3.

campus. Appellants' Opening Br. at 40. In FIRE's experience, universities will take advantage of any rationale they can to suppress unpopular or controversial speech, particularly given the well-established constitutional infirmity of explicitly viewpoint-discriminatory speech codes. If a university is free to employ viewpoint-neutral regulations in an obviously pretextual way to silence controversial speech, then no speech is safe from censorship. We know this to be true because universities attempt to do so all the time.

In March 2017, for example, the University of South Alabama ordered a student to remove a Trump/Pence "Make America Great Again" sign from his dormitory window. The administrator issuing the order cited the university's 501(c)(3) policy, which prohibits the university from supporting political candidates—despite the fact that it was obviously the student's own speech, and despite the fact that Trump had already been elected president when the student posted his sign. Letter from Adam Steinbaugh, Senior Program Officer, Found. for Individual Rights in Educ., to Michael A. Mitchell, Dean of Students, Univ. of S. Ala. (Apr. 11, 2017),

available at https://www.thefire.org/fire-letter-to-the-university-of-south-alabama-april-11-2017.

Other universities—including universities within the University of California system—have used ostensibly viewpoint-neutral trademark policies to prohibit student speech because it was unpopular or critical of the university. For example, in December 2014, the Ayn Rand Society at the University of California, Davis was warned by administrators that the group's inclusion of the initials "UCD" in the URL of its Facebook page violated the university's trademark policy. Email from Ctr. for Student Involvement staff, Univ. of Cal., Davis, to Ayn Rand Soc'y (Nov. 26, 2014), *available at* https://www.thefire.org/follow-up-email-from-csi-to-ayn-rand-society-at-uc-davis-november-26-2014. When the student group refused to delete the page, it was stripped of its "good standing" status, denying it the ability to reserve meeting spaces and apply for funding. Letter from Ari Z. Cohn, Found. for Individual Rights in Educ., to Linda P.B. Katehi, Chancellor, Univ. of Cal., Davis (Dec. 10, 2014), *available at* https://www.thefire.org/letter-from-fire-to-uc-davis-chancellor-

linda-p-b-katehi/. Only after FIRE protested was the punishment reversed—and even then not until August 2015. Press Release, Found. for Individual Rights in Educ., UC Davis Reverses Punishment of Student Club That Used University Name (Aug. 27, 2015), *available at* https://www.thefire.org/uc-davis-reverses-punishment-of-student-club-that-used-university-name/.

In 2009, the University of California, Los Angeles threatened legal action against a former student for maintaining a private, non-commercial website (ucla–weeding101.info) that criticized the university's intolerance of dissenting viewpoints. Letter from Patricia M. Jasper, Senior Campus Counsel, Univ. of Cal., Los Angeles, to Tom Wilde (Aug. 6, 2009), *available at* https://www.thefire.org/letter-to-tom-wilde-from-patricia-m-jasper/. After FIRE pointed out that the site was protected by the First Amendment and could not reasonably be mistaken as the university's expression, the university dropped its demands of the student. Press Release, Found. for Individual Rights in Educ., Victory for Free Expression: UCLA Drops Unconstitutional Threats Against Internet Speech; Online Speech Still Threatened at Santa

Rosa Junior College (Aug. 21, 2009), *available at* https://www.thefire.org/victory-for-free-expression-ucla-drops-unconstitutional-threats-against-internet-speech-online-speech-still-threatened-at-santa-rosa-junior-college-2/.

Supposedly viewpoint neutral "spam" policies have been likewise abused. In December 2011, for example, shortly after students created a petition to lower tuition at Arizona State University (ASU) on the petition website change.org, ASU blocked access to the website on its network. When ASU's censorship of the site gained widespread attention, the university explained its actions by citing concerns about "spamming" emails from the site related to the petition. As FIRE wrote in a letter to the university:

> While ASU may take certain content- and viewpoint-neutral measures to protect the integrity of its network, the timing of ASU's actions in this case has created the unmistakable impression that ASU has used its spam policy as a pretext to deny access to a petition because of content that is critical of the university and its administration. Even if ASU does have a legitimate interest in blocking "spam" emails originating from Change.org, there is no reason that this would involve blocking access to the website for users of ASU's network. Such action by ASU is wholly inconsistent with ASU's obligations as a university legally and morally bound by the First Amendment. We sincerely hope that this is not the case.

Letter from Peter Bonilla, Assistant Dir., Individual Rights Defense Program, Found. for Individual Rights in Educ., to Michael M. Crow, President, Ariz. State Univ. (Feb. 3, 2012), *available at* https://www.thefire.org/letter-from-fire-to-arizona-state-university-president-michael-m-crow-february-3-2012. Several days after receiving FIRE's letter, ASU restored students' access to change.org. Email from Jose Cardenas, Senior Vice President and General Counsel, Ariz. State Univ., to Peter Bonilla, Assistant Dir., Individual Rights Defense Program, Found. for Individual Rights in Educ. (Feb. 7, 2012), *available at* https://www.thefire.org/email-from-arizona-state-university-senior-vice-president-and-general-counsel-jos233-a-c225rdenas-to-fire-february-7-2012.

In 2008, Michigan State University (MSU) revealed plans to shorten the school's academic calendar and freshman orientation schedule. This led members of the University Committee on Student Affairs (UCSA), which included faculty, students, and administrators, to construct a response letter voicing concerns over the proposed plans. Kara Spencer, a student member of the UCSA, told the UCSA that she would send individual faculty her own

version of its letter, carefully selecting 391 of them. Her email to faculty asked them to express their concerns about the scheduling plan to the provost or the university's Faculty Council. Email from Kara Spencer to selected faculty members (Sept. 15, 2008), *available at* https://www.thefire.org/e-mail-from-kara-spencer-to-selected-faculty. Despite the fact that her email was timely, carefully targeted, and concerned a campus issue, Spencer was found guilty of violating MSU's "spam" policy. Email from Student Faculty Judiciary to Kara Spencer (Dec. 10, 2008), *available at* https://www.thefire.org/e-mail-to-kara-spencer-from-the-judicial-affairs-office.

Similarly, universities often use policies prohibiting the formation of "duplicative" student groups as a pretext to deny recognition to groups espousing unpopular views.

For example, the University of South Florida in 2010 refused to approve the conservative student group Young Americans for Freedom on the grounds that it was too similar to the libertarian student group Young Americans for Liberty. Email from Edna Jones Miller, Student Programs Coordinator, Univ. of S. Fla., to

Anthony Davis (Sept. 23, 2010), *available at* https://www.thefire.org/e-mail-from-student-programs-coordinator-edna-jones-miller-to-anthony-davis-september-23-2010. Only after FIRE pointed out that USF had two African-American student groups, multiple Latino student groups, and numerous Christian student groups—and that conservatism and libertarianism were different political philosophies—did USF reconsider YAF's request and approve the new group. Press Release, Found. for Individual Rights in Educ., University Recognizes Young Americans for Freedom: Conservative and Libertarian Groups were too 'Similar' to Coexist (Nov. 30, 2010), *available at* https://www.thefire.org/university-recognizes-young-americans-for-freedom-conservative-and-libertarian-groups-were-too-similar-to-coexist-2.

Indeed, when it comes to finding a pretextual viewpoint-neutral justification to suppress unpopular speech, universities' creativity is almost boundless.[6]

[6] While we have cited cases from public universities as examples, the use of pretext to censor controversial speech is rampant at private universities as well. In 2014, for example, the

In November 2011, Auburn University student Eric Philips was required to remove a banner supporting Ron Paul's presidential campaign from the inside of his dormitory window. The university cited a viewpoint-neutral policy prohibiting all window decorations in its residence halls. However, Philips provided FIRE with numerous photographs of other dormitory window decorations, demonstrating that the policy was in fact being selectively enforced against his political expression. Found. for Individual Rights in Educ., Auburn University: Ban on Ron Paul Window Hanging Exposes Double Standard,

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University of Notre Dame denied recognition to a prospective organization called Students for Child-Oriented Policy (SCOP), which advocated for traditional marriage. The ostensible reason for the denial—which came shortly after several hundred Notre Dame students opposed to SCOP's mission petitioned against its recognition—was that SCOP's mission "closely mirrored" that of other groups on campus. As FIRE pointed out to Notre Dame, however, SCOP's mission was actually quite different from those of other campus groups. The university was in fact using the pretext that SCOP "closely mirrored" other organizations in order to deny recognition to SCOP on the basis of its viewpoint. *See* Letter from Peter Bonilla, Dir., Individual Rights Defense Program, Found. for Individual Rights in Educ., to Rev. John I. Jenkins, C.S.C., President, Univ. of Notre Dame (May 23, 2014), *available at* https://www.thefire.org/fire-letter-to-university-of-notre-dame-rev-john-i-jenkins-c-s-c.

https://www.thefire.org/cases/auburn-university-ban-on-ron-paul-window-hanging-exposes-double-standard.

The Ohio State University, for its part, cited environmental regulations to stop a controversial student organization—Buckeyes for Concealed Carry on Campus—from distributing flyers in the university's student union building. Letter from Peter Bonilla, Assistant Dir., Individual Rights Defense Program, Found. for Individual Rights in Educ., to E. Gordon Gee, President, Ohio State Univ. (Dec. 13, 2011), *available at* https://www.thefire.org/fire-letter-to-the-ohio-state-university-president-e-gordon-gee-december-13-2011.

In 2008, editors of Armstrong State University's student newspaper, *The Inkwell*, sued the university and its Student Government Association (SGA) for reducing the paper's budget following complaints by the SGA about the paper's content. Compl., Mensing v. Armstrong Atlantic State Univ., No. 4:08-cv-00154-BAE-GRS (S.D. Ga. Aug. 4, 2008). The SGA claimed that the reduction in the *Inkwell*'s funding was due simply to a new *Inkwell* policy whereby the SGA was being charged for its advertisements,

but the paper's staff believed that was pretextual and that the cuts were actually due to the paper's content. Ultimately, the parties settled out-of-court and the *Inkwell*'s budget was fully restored. Jan Skutch, *University paper wins suit to restore budget*, Athens Banner-Herald (Nov. 23, 2008), http://onlineathens.com/stories/112308/new_358857237.shtml#.WXZkysbMzq0.

And in a crystal-clear instance of pretextual forum closure, the University of Alabama banned all window displays after it unsuccessfully tried to prevent a student from hanging a Confederate flag in his window by citing a viewpoint-discriminatory policy banning window displays that were "inconsistent with accepted standards or University policies." The dormitory's professor-in-residence at the time refused to enforce that policy because he recognized that it violated the First Amendment. So administrators chose to ban all window displays, prompting student protests and opposition from a variety of free-speech groups, including the Alabama chapter of the ACLU. Press Release, Found. for Individual Rights in Educ., FIRE Coalition Shatters

Window Display Censorship Policy at University of Alabama (Oct. 3, 2003), *available at* https://www.thefire.org/fire-coalition-shatters-window-display-censorship-policy-at-university-of-alabama.

In short, the pretextual use of viewpoint-neutral regulations to suppress unpopular speech on campus is rampant. If this Court allows the district court's ruling to stand, universities will seize on its flexible definition of a forum and its disregard for motive as an opportunity to selectively censor student speech.

II. The district court's decision misstates and misapplies forum doctrine

Courts, including this court, have sought to apply a consistent forum analysis to campus speech. *See*, *e.g.*, *Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703 (9th Cir. 2009); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983) (discussing the forum analysis). This analysis has resulted in three general categories of forum status. The traditional public forum, such as a campus sidewalk, can only be regulated with time, place, and manner restrictions that are either content-neutral or

necessary to further a compelling government interest. *See*, *e.g.*, *Roberts v. Haragan*, 346 F. Supp. 2D 853, 862-3 (N.D. Tex. 2004) ("First Amendment protections and the requisite forum analysis apply to all government-owned property; and nowhere is it more vital… than on a public university campus where government ownership is all-pervasive."). On the other end of the scale, the non-forum (or closed forum), such as an administrator's office, can be subject to any reasonable and viewpoint-neutral restriction. *Rodriguez*, 605 F.3d at 710 ("But even in a nonpublic forum, state actors may not suppress speech because of its point of view. . . .").

Between these two levels of regulation is the limited public forum, created when the government sets aside a place (such as a meeting room) or property (such as funding) for the use of certain people or topics. *Widmar v. Vincent*, 454 U.S. 263 (1981) (university meeting rooms); *Rosenberger*, 515 U.S. at 819 (student activity funds); *Giebel v. Sylvester*, 244 F.3d 1182 (9th Cir. 2001) (bulletin boards). Someone who legitimately has access to a limited public forum cannot have that access restricted absent a compelling governmental interest, even though the government had no

obligation to open the forum in the first place. *Perry*, 460 U.S. at 45; *City of Madison Joint Sch. Dist. v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 179 (1976) ("Once a forum is opened to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.") (quoting *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972)).

The Supreme Court has ruled that student activity fees act as a limited public forum designed to benefit the students who pay into the fund. *Rosenberger*, 515 U.S. at 819, 830; *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 230 (2000) ("The standard of viewpoint neutrality found in the public forum cases provides the standard we find compelling.").

The district court misapplied this well-settled jurisprudence.

D. Defining the relevant forum as student print-media organizations, rather than student organizations as a whole, misconstrues binding precedent

The forum created by student activity fees is the student activity fee system as a whole. *See*, *e.g.*, *Rosenberger*, 515 U.S. at 840 ("The object of the SAF is to open a forum for speech and to support various student enterprises, including the publication of

newspapers, in recognition of the diversity and creativity of student life."). A limited public forum must be opened by policy or practice. *Perry*, 460 U.S. at 47. In this case, the university can point to no existing policy or practice that created a "print media" subcategory because none existed until it wanted to censor *The Koala*.

In ruling otherwise, the district court cites *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788 (1985), for two principles: one, that the forum in question is limited to the access specifically sought by the requester, and two, that the Supreme Court excluded requesters from "the limited public forum" using a reasonableness standard. *Koala v. Khosla*, No. 16cv1296 JM(BLM), 2017 WL 784183 (S.D. Cal. Feb. 28, 2017) at *4–5, and *6 n.5. Neither of these statements are accurate descriptions of the facts or holding of *Cornelius*, and the district court's opinion cannot stand in light of the Supreme Court's actual holding.

What *Cornelius* actually says about tailoring a forum is that weighing general access to public property is unnecessary when the actual forum being sought is not tied to a physical location. *Cornelius*, 473 U.S. at 801. The Court cited its prior rulings in

Perry, 460 U.S. at 37, where an internal "mail system" was at issue, and *Lehman v. Shaker Heights,* 418 U.S. 298 (1974), which involved advertising on the sides of moving city buses. It then reasoned that, as between the physical workplace and the metaphysical CFC pool of funds, the petitioners were seeking only the latter. *Cornelius*, 473 U.S. at 801–02. It did not, however, attempt to define a new forum within the CFC based on the ideology, media, or other characteristics of the requester.

The district court's second misreading of *Cornelius* is even starker: the Supreme Court found the CFC was a non-public forum, not a limited public forum.[7] *Cornelius* holds that the government can only regulate private speech in a *non-forum* setting in a manner that is viewpoint-neutral and reasonable. *See*, *e.g.*, *Hotel Emp's & Restaurant Emp's Union, Local 100 v. City of N.Y. Dep't of Parks and Recreation*, 311 F.3d 534, 553 (2d Cir. 2002) (citing *N.Y.*

[7] *Compare Cornelius*, 473 U.S. at 797 ("Applying this analysis, we find that respondents' solicitation is protected speech occurring in the context of a nonpublic forum…") *with Koala*, 2017 WL 784183 at *6, n.5 ("Ultimately, the Supreme Court held the respondent organizations were properly excluded from the limited public forum using a reasonableness standard.")

Magazine v. Metro. Transp. Auth., 136 F.3d 123, 128 (2d Cir 1998), *cert. denied*, 525 U.S. 824 (1998)).

Under the district court's ruling, the Supreme Court's forum doctrine would be meaningless. The purpose of a limited public forum is to offer speakers a greater degree of protection from government censorship than they would otherwise receive; the doctrine "forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place." *Perry*, 460 U.S. at 45. The district court's test for a limited public forum is taken from a non-forum case.

Having chosen the wrong test to apply, the district court then declines to actually apply the test by ignoring that *The Koala* was targeted for its viewpoint. The court departs from established precedent by refusing to analyze whether a rule had a discriminatory purpose or effect if the rule is facially viewpoint-neutral. *See Koala*, 2017 WL 784183 at *4, n.3 ("The court further notes that the precise definition [of the forum] is less determinative than whether the Media Act is viewpoint neutral and reasonable in light of the purpose of the forum."). In support of this novel

interpretation of forum doctrine, it incorrectly cites the Seventh Circuit's holding in *Grossbaum v. Indianapolis-Marion City Building Authority*, 100 F.3d 1287 (7th Cir. 1996); *see also Koala*, 2017 WL 784183 at *7.

In *Grossbaum*, the Seventh Circuit upheld a city policy prohibiting displays in the lobby of a city-owned building. It adopted that policy after it lost a constitutional challenge to a prior policy that prohibited only religious displays. In the present case, the district court summarized *Grossbaum* as supporting the notion that "in a First Amendment Free Speech case motive plays no role in assessing a content-neutral regulation of speech in a limited public forum." *Koala*, 2017 WL 784183 at *7. That is an inaccurate summary of *Grossbaum*, which limits that rationale to the analysis of a "prospective, generally applicable rule." *Grossbaum*, 100 F.3d at 1295.

The *Grossbaum* court focused on the effect of the rule in question, which was to ban access to the forum entirely in a way that equally disadvantaged all who tried to access the forum. It compared the city's ban to Jackson, Mississippi's closure of public

swimming pools to avoid desegregating them, upheld by the Supreme Court in *Palmer v. Thompson*, and the Court's opinion that the rule resulted in "no state action affecting blacks differently from whites." 403 U.S. 217, 224–26 (1971), cited in *Grossbaum*, 100 F.3d at 1293. The *Grossbaum* court recognized, citing then-professor Elena Kagan, that "most descriptive analyses of First Amendment Law . . . have considered the permissibility of governmental regulation of speech by focusing on the effects of a given regulation." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 413 (Spring 1996), cited in *Grossbaum*, 100 F.3d at 1293.

Here, the district court did not focus on the effect of the Media Act, which was to disadvantage a class of students otherwise eligible to access the forum based on their decision to publish newspapers. The opinion below describes the Media Act as "a content neutral policy of general applicability affecting all RSOs seeking media publication funds." *Koala*, 2017 WL 784183 at *8. This reasoning simply ignores that only media publications were

impacted by the rule of supposedly "general applicability." The Supreme Court has routinely rejected purportedly generally applicable laws intended to have an adverse effect on media. *See*, *e.g.*, *Minneapolis Star v. Minnesota Comm'r*, 460 U.S. 575, 585 (1983) ("[D]ifferential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional."). Following the district court's reasoning, a university could pass a rule prohibiting the observance of Catholicism; instead of recognizing it as a targeted suppression of a First Amendment right, a school could meet the district court's standard by describing its discriminatory rule as "a neutral policy of general applicability affecting all students seeking to take communion." A policy cannot be "content neutral" while targeting news media or of "general applicability" when applied only to selected groups.

The district court also found the policy was not retaliatory, even though it closely tracks an example cited in *Grossbaum* as unconstitutional retaliation:

> [G]overnment officials cannot escape a retaliation claim by simply dressing up individualized government action to look like a general rule. A policy that prohibited all lobby displays by groups that had put up displays during the previous December, for example, would be neither prospective nor generally applicable.

Grossbaum, 100 F.3d at 1295.

Here, the Media Act is precisely the kind of "dressed up" targeted action the *Grossbaum* court distinguished. In its example, there may well have been other speakers prohibited from speaking under a lobby display policy that banned prior speakers, as well as the targeted speaker; that imprecise calculation would not, in the court's view, have made the policy less retaliatory. Accordingly, *Grossbaum* provides no support for the district's holding.

E. Even if the entire forum had been closed, the pretextual nature of the closing is discriminatory on the basis of both content and viewpoint

Even if the university had closed the entire forum, its actions are so transparently calculated to interfere with plaintiff's speech that the attempt violates the Constitution. While plaintiff's speech may alienate many in the campus community, defendants' " 'desire to harm a politically unpopular group cannot constitute a legitimate

governmental interest.' " *Romer v. Evans*, 517 U.S. 620, 634–35 (1996) (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

The plaintiff has provided substantial evidence — and certainly enough to survive a motion to dismiss — that the defendants acted with the purpose and effect of targeting *The Koala*'s student activity subsidy. In *ACT-UP v. Walp*, 755 F. Supp. 1281 (M.D. Pa. 1991), the Pennsylvania state legislature closed access to the House gallery to prevent a group from raising awareness about AIDS and demonstrating their support of that cause to their representatives. The U.S. district court, after determining the gallery was a limited public forum, found this closure was unconstitutional:

> Here, the government admits that the closing of the gallery, though closed to everyone, was aimed at preventing the ACT-UP members access. . . . This is a content-based restriction, and thus any time, place, and manner limits used to carry out the restriction are invalid. As a content-based restriction, the closing must be necessary to protect a compelling government interest.

Id. at 1289. In the posture of the present case, the district court is bound to accept plaintiff's allegation that defendants acted to target *The Koala*. Just as in *ACT-UP*, that targeting is a content-based

restriction, because it has the purpose and effect of restricting speech from a particular speaker. The district court seems unwilling, yet not unable, to recognize this targeting.

The district court's failure to consider evidence of viewpoint discrimination is equally fatal to its reasoning. Even in *Cornelius*, which did not involve a limited public forum, the Supreme Court remanded the case to determine whether the government had engaged in unconstitutional viewpoint discrimination in enacting its reasonable restrictions. *Cornelius*, 473 U.S. at 812–13. Under the district court's ruling, *The Koala* has more protection from viewpoint discrimination in a non-forum than in a limited public forum—the opposite of what forum status is intended to do.

The possibility of viewpoint discrimination deserves to be considered, particularly given that the Supreme Court has made it clear that restrictions on print media are inherently suspicious, as print media has traditionally been afforded the highest level of First Amendment protection. *See*, *e.g.*, *Miami Herald v. Tornillo*, 418 U.S. 241, 258 (1974) (Florida statute requiring newspapers to provide access to political rivals not "consistent with First

Amendment guarantees of a free press"); *Schneider v. State of N.J., Town of Irvington*, 308 U.S. 147 (1939).

F. Even if forum doctrine itself does not require analyzing the motivation for closure, viewpoint neutrality is a requirement of student activity fee schemes

Under the precedents binding this Court, the forum analysis applicable to student activity fee forums requires that university decisions relevant to the forum be viewpoint neutral. In *Southworth*, the Supreme Court made clear the forum status of a student activity fee funding scheme—and thus, the ability of a university to collect it as a mandatory fee—was conditioned on the viewpoint neutrality of the decisions made. It reiterated this point repeatedly, in fact:

> The University may determine that its mission is well served if students have the means to engage in dynamic discussions. . . If the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends.
>
> The University **must provide some protection to its students' First Amendment interests**, however. The proper measure, and the principal standard of protection for objecting students, we conclude, is the **requirement of viewpoint neutrality in the allocation of funding support**. . . .

> Viewpoint neutrality is the justification for requiring the student to pay the fee in the first instance and for insuring the integrity of the program's operation once the funds have been collected. . . .
>
> **If the rule of viewpoint neutrality is respected**, our holding affords the University latitude to adjust its extracurricular student speech program to accommodate these advances and opportunities.

Southworth, 529 U.S. at 233–34 (emphases added). The Court's language conditions the validity of the program on its viewpoint neutral administration. The *Southworth* Court then remanded for further review the university's system of having a student referendum to allocate funding, as that created the potential for viewpoint-based funding decisions in the future: "To the extent the referendum substitutes majority determinations for viewpoint neutrality, it would undermine the **constitutional protection the program requires**." *Id.* at 235 (emphasis added). Such a mechanism would have created decisions that were at least as pretextually viewpoint-neutral as the decisions made here, if not more so. Nevertheless, the *Southworth* Court found such a mechanism endangered the program's "required" viewpoint neutrality.

Since that decision, the Court has distinguished the forums described in *Southworth* from those described in other mandatory fee cases. For example, in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), the Court struck down a mandatory agency fee paid to a public employees union. The union would then use that money for, *inter alia*, engaging in its own speech. In striking down the Illinois agency fee system, the *Harris* Court distinguished its ruling from its ruling in *Southworth* by observing "[p]ublic universities have a compelling interest in promoting student expression in a manner that is viewpoint neutral." *Id.* at 2644. If, as in the words of the Court, viewpoint neutrality is what distinguishes a constitutionally valid student fee system from a constitutionally invalid agency fee system, then it is an infringement on the constitutional rights of UCSD students to permit the university to operate its forum in a viewpoint-discriminatory fashion.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

This brief complies with the length limits permitted by Ninth Circuit Rule 32-1 and Fed. R. App. P. 29(a)(5) and 32(a)(7)(B). This brief is 6,372 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Word 2016 in 14-point New Century Schoolbook.

Dated: August 3, 2017

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of *Amici Curiae* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 3, 2017.

All participants in this case are registered CM/ECF users, and will be served by the appellate CM/ECF system.

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