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

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RULE 26.1 DISCLOSURE STATEMENT

Amicus curiae, the Foundation for Individual Rights in

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in Educ. (Feb. 7, 2012), *available at* https://www.thefire.org/email-from-arizona-statestk624m

Legal Scholarship

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.

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.

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

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]

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

The First Amendment rights of public college students are

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 plaintiffsEeo (R)-0.Tw 2 (l)-5e .4 (o)-8.2 (m)4.3 (f)-4u1 (c

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

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

available at

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

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

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

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.")

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,

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

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.*,

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 enactingng 5.2 (c/299

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

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.

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

s/ Jean-Paul Jassy
Attorney for *Amici Curiae*
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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.

Dated: August 3, 2017

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