

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-55380

THE KOALA, an unincorporated association

Plaintiff-Appellant,

v.

PRADEEP KHOSLA, in his official capacity as Chancellor of the University of
California, San Diego; et al.

Defendants-Appellees.

**BRIEF *AMICUS CURIAE* OF THE STUDENT PRESS LAW CENTER,
AMERICAN SOCIETY OF NEWS EDITORS, ASSOCIATED PRESS
MEDIA EDITORS, ASSOCIATION OF ALTERNATIVE NEWSMEDIA,
COLLEGE MEDIA ASSOCIATION, FIRST AMENDMENT COALITION,
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AND
SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF
APPELLANT AND REVERSAL OF THE DISTRICT COURT DECISION**

ON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
No. 3:16-cv-1296-JM-BLM
The Honorable Jeffrey T. Miller, Judge

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RULE 26.1 DISCLOSURE STATEMENT

None of the *amici* organizations – the Student Press Law Center, American Society of News Editors, Associated Press Media Editors, Association of Alternative Newsmedia, College Media Association, First Amendment Coalition, Reporters Committee for Freedom of the Press or Society of Professional Journalists – has a parent corporation or issues stock. No publicly held corporation has an ownership interest of more than 10 percent in any of the *amicus* organizations.

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INTEREST OF AMICI CURIAE¹

The Student Press Law Center (“SPLC”) is a nonprofit, nonpartisan organization founded in 1974 to promote youth involvement in civic life through journalism. The SPLC provides free educational materials and workshops to students across the country about the First Amendment and about ways to protect their freedom of expression, and its attorneys are the authors of the widely used reference text, *Law of the Student Press*. The SPLC regularly advocates on behalf of students in court as *amicus curiae* by opposing government actions that restrict students’ First Amendment rights. The SPLC has an interest in protecting the ability of student journalists to express themselves freely without fear of official retaliation.

The American Society of News Editors (“ASNE”) is an organization with some 500 members that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of

¹ 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. Plaintiff has consented to the filing of this brief. This brief is being submitted with a Motion for Leave to File pursuant to Rule 29, Federal Rules of Appellate Procedure, after *Amici* unsuccessfully attempted to secure consent from defendant.

Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

Associated Press Media Editors (“APME”) is a non-profit association of editors representing Associated Press-member news organizations across North America. APME advances the principles and practices of responsible journalism. APME supports and mentors a diverse network of current and emerging newsroom leaders, champions the First Amendment and promote freedom of information, trains journalists to realize their aspirations and thrive in a rapidly changing environment, promotes forward-looking ideas that benefit news organizations and the communities they serve, and works closely with the Associated Press, the largest independent media operation in the world.

The Association of Alternative Newsmedia (“AAN”) is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like *The Village Voice* and *Washington City Paper*. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

The College Media Association (“CMA”), founded in 1954 as the National Council of College Publications Advisers, now has more than 800 members from

coast to coast. CMA is committed to supporting free and unfettered student media at colleges and universities, believing that students should control content without fear of retribution.

The First Amendment Coalition (“FAC”) is a nonprofit advocacy organization based in San Rafael, California, dedicated to freedom of speech and government transparency and accountability. FAC’s members include news media outlets, both national and California-based, traditional media and digital, together with law firms, journalists, community activists, and ordinary citizens.

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided assistance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Society of Professional Journalists (“SPJ”) is dedicated to improving and protecting journalism. It is the nation’s largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

SUMMARY OF ARGUMENT

Student newspapers have served integral roles on college campuses for centuries, and the modern student press continues this tradition. Student newspapers provide needed training for future news professionals by giving student journalists opportunities to cover news both on campus and in their broader communities. This positions student journalists to fill the traditional role of the Fourth Estate: to serve as government watchdogs, reporting on the actions of public officials on campus. These public officials include both public college administrations and student governments, whose authority includes the power to control millions of dollars in public funds.

When student publications serve these important watchdog functions, they often face official retaliation and censorship attempts. College administrators and student governments regularly use their authority to push back against quality journalism by threatening the jobs of student publication advisers and by threatening to discipline student publication staff members. Perhaps the most common form of official censorship of the collegiate press, though, comes via threats to publications' funding, as occurred in this case. Even when, as here, these funding cuts threaten only print budgets, they place student media in peril, as student publications continue to rely on their print products to attract audiences and advertisers.

Although this case is ostensibly about *The Koala* and its entertainment publication, the rule in this case will affect flagship student newspapers across the country. These are the publications that alert taxpayers when public college administrations fail to meet their obligations under federal law. These are the publications that reveal when college officials misuse public funds. These are the publications that are first to report when breaking news, such as school shootings, comes to their campuses. Still, these are the publications that research demonstrates commonly face mounting official censorship attempts. The district court ruling, if allowed to stand, will give license to college officials to continue, and escalate, the civically corrosive practice of censorship.

ARGUMENT

I. Student Newspapers Serve the Traditional Watchdog Function of the Fourth Estate, Ensuring Public Accountability in Public College Governance

For more than two centuries, student newspapers have been a pivotal part of American college campuses. *See History*, The Dartmouth (last visited July 18, 2017), <http://www.thedartmouth.com/page/history> (claiming its founding in 1799, which appears to be the earliest college newspaper founding date); *see also About Us*, The Miami Student (last visited July 18, 2017), <http://miamistudent.net/about-us/> (claiming its founding in 1826, which appears to be the earliest public college newspaper founding date). Today, these publications serve many important functions: They provide training grounds for future news professionals. *See Sarah Kliff, Don't Believe the Skeptics*, Vox (Apr. 30, 2015, 12:00 PM), <https://www.vox.com/2015/4/30/8521375/college-newspapers-valuable> (advising future journalists to gain on-the-job training by working for their college newspapers); *see also* Richard J. Peltz, *Censorship Tsunami Spares College Media*, 68 Tenn. L. Rev. 481, 482 (2001) (arguing that “the student publication offers the single best avenue for training . . . for a career in professional journalism”). College newspapers also offer critical community news and commentary, which is increasingly in demand as local news agencies fall victim to today’s tough economy. *See, e.g.*, Jennifer Conlin, *Local News, Off College Presses*, The New

York Times (Apr. 13, 2014),
<https://www.nytimes.com/2014/04/14/business/media/turning-to-college-journalists-for-the-news-in-town-michigan.html> (detailing how college newspapers have filled the void of shuttered local news agencies); William Anderson, *Student Journalists Are Our Future*, *The Nation* (July 11, 2017),
<https://www.thenation.com/article/student-journalists-are-our-future-we-should-start-treating-them-like-it/> (claiming that “student journalists are uniquely positioned to fill the hole created by the decline of local news”). Most importantly, college newspapers uphold the great traditions of the Fourth Estate: to serve as watchdogs of government and quasi-government officials, including public college administrators and student governments, and to foster the “peculiar[] marketplace of ideas” that American colleges and universities ought to be. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). While this case involves a humor publication, the Supreme Court has extended the full benefit of the First Amendment even to very harsh humor about social and political issues. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). More to the point, nothing about the court’s ruling below confines itself to distasteful humor publications; all student media, including media of unassailable literary and scientific merit, was affected by the University of San Diego’s wrongful action, and all student media will be vulnerable to retaliation if the ruling is not overturned.

Nearly every public college in the United States has at least one student newspaper. These media are in especially apt positions to keep an eye on administrative decisions—which, at public institutions, are government decisions. As students, staff members of these publications have front-row views of the goings on at public institutions of higher education, and also have increased motivation to discover and report on both the ills and the successes of their institutions. Student publications also provide public accountability to student government associations, which often have been delegated authority to control wide swathes of public funds. In other words, just like their professional counterparts, student media take on the role of the government watchdog.

This role can be seen at Mercer County Community College, for example, where student newspaper *The Voice* uncovered and documented the college's lack of compliance with federal crime disclosure laws. David Foster, *MCCC Has 'Shortcomings' in Public Safety Operations*, *The Trentonian* (July 4, 2017), <http://www.trentonian.com/general-news/20170704/mccc-has-shortcomings-in-public-safety-operations-doe-finds>; see Svetlana Craft, Maria Ramos & Jasmine Santalla, *Safety Concerns Resurface After Sex Offender Mercer Student Arrested*, *The College Voice* (Feb. 24, 2017), <http://www.mcccvoice.org/woolf/>. While college administrators—government actors—tried to sweep campus crime under the rug, in direct contravention of federal mandates, *The Voice* uncovered these

dangers and reported them to the public. *Id.* The media watchdog role can also be seen at the City University of New York, where Queens College student newspaper *The Knight News* reported on CUNY's financial ties to the private prison industry, raising questions about how a state institution was using public funds. Fernando Echeverri & Brandon Jordan, *CUNY Financially Tied to Private Prison Industry*, *The Knight News* (Mar. 12, 2015), <https://www.theknightnews.com/2015/03/12/cuny-financially-tied-to-private-prison-industry>.

At Kent State University, it was college newspaper the *Daily Kent Stater* that first exposed that a would-be donor had been found guilty of violating federal securities laws resulting from his participation in a Ponzi scheme. Dan Reimold, *Investigative Reporting on Campus*, *College Media Review* (Feb. 13, 2012), <http://cmreview.org/investigative-reporting-on-campus>. This reporting led to the cancellation of a plan to name an athletic facility after the donor. *Id.* At Texas A&M, it was student newspaper *The Battalion* that used public records to investigate and report on how the university foundation had invested public endowment funds into companies associated with the Sudanese genocide, a matter of undeniable public interest and concern. Spencer Davis, *A Dark Spot on Texas A&M's Investments*, *The Battalion* (Nov. 10, 2015),

http://www.thebatt.com/news/a-dark-spot-on-texas-a-m-s-investments/article_33a57b34-8777-11e5-b098-43d234042495.html.

In addition to serving as a watchdog of government and quasi-government affairs, student newspapers have proven essential sources of community information in times of crisis. When an active shooter situation emerged at Virginia Tech in 2007, the campus newspaper *The Collegiate Times* was the first to call public attention to the hazard. Joe Strupp, *Honoring the Virginia Tech Student Paper*, Editor & Publisher (Apr. 23, 2007), <http://www.editorandpublisher.com/columns/honoring-the-virginia-tech-student-paper/>. When unsanctioned fraternities at University of Buffalo put students in peril by using their unofficial statuses to evade university hazing policies, it was student newspaper *The Spectrum* that published a 4,700-word investigative report revealing to students and community members the risky practices of these organizations. Dan Reimold, *U of Buffalo Investigation Reveals the Dangers of Illegal Fraternities*, USA Today College (May 27, 2014), <http://college.usatoday.com/2014/05/27/u-of-buffalo-investigation-reveals-the-dangers-of-illegal-fraternities>; Lisa Khoury, *Animal Heights*, *The Spectrum* (May 9, 2014), <http://www.ubspectrum.com/article/2014/05/animal-heights>.

Time and again, student publications have served as the public's eye on local and campus news and official decision-making. It is not only entertainment

publications like *The Koala* that are put at risk by the District Court’s decision in this case, but also multitudes of other campus publications dedicated to responsible journalism as a public service.

II. The Student Press Faces Mounting Official Censorship, Commonly Through Funding Cuts

A. College Officials Regularly Abuse Their Authority to Push Back Against Quality Student Journalism

While student journalists should be applauded for their efforts to investigate and report on issues facing their campuses and their communities, it is often these journalists who bear the brunt of official censorship. *See, e.g.*, Eugene Volokh, *Warning to Student Journalists*, *The Washington Post* (Apr. 7, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/04/07/warning-to-student-journalists-asking-hostile-questions-and-videotaping-may-be-treated-as-threatening-or-endangering-health-or-safety/?utm_term=.3639aab2cd0d; Frank LoMonte, *Viewpoint: Student Newspapers are Struggling with their First Amendment Rights*, *USA Today College* (Feb. 1, 2017), <http://college.usatoday.com/2017/02/01/college-newspapers-free-speech/>; Catherine Rampell, *Free Speech is Flunking Out on College Campuses*, *The Washington Post* (Oct. 22, 2015); Lisa Maria Garza, *College Newspapers Fight for Rights*, *USA Today College* (Aug. 21, 2012). A 2015 report in *The Atlantic* described “a string of student-newspaper controversies

that have erupted in the past year,” highlighted by the sudden firing of the faculty journalism adviser at Butler University after she was accused of tipping off the newspaper to an impending announcement of campus-wide budget cuts. David R. Wheeler, *The Plot Against Student Newspapers?*, *The Atlantic* (Sept. 30, 2015), <https://www.theatlantic.com/education/archive/2015/09/the-plot-against-student-newspapers/408106/>. Many of these controversies involved students facing official retaliation for important journalism. *The Atlantic* featured the case of Fairmont State University newspaper *The Columns*, which saw its faculty adviser fired after it published an investigative piece revealing that toxic mold had been found in campus dorms. *Id.* The story also featured the case of the student newspaper at University of Memphis, which faced funding cuts after it published an opinion piece criticizing the university for its lack of response in the wake of a rape on campus. *Id.* As these cases exemplify, colleges can and will use punitive authority to deter watchdog journalism, so the fear that colleges will exploit the District Court’s ruling to shutter news organizations is neither abstract nor speculative.

Other examples of official pressures on student newspapers abound. Student journalists at the University of Kentucky received a tip that a professor had been allowed to quietly resign amidst accusations that he had assaulted students. *The Kentucky Kernel* requested public records related to the incident, but the university refused to release the records to *The Kernel*. Stephanie Saul, *Campus Press v.*

Colleges, The New York Times (Dec. 2, 2016), <https://www.nytimes.com/2016/12/02/us/kentucky-student-journalism-free-speech.html>. The newspaper appealed to the state attorney general, who instructed the university to release the records with names redacted. *Id.* After the unredacted records were leaked to *The Kernel* and the newspaper published a story based on the records, the university sued its own student newspaper to prevent the effectuation of the attorney general's ruling. *Id.* Soon afterward, Western Kentucky University filed a lookalike lawsuit against its campus newspaper, the *College Heights Herald*, to block access to public records, thereby impeding the paper's ability to responsibly report on issues of campus employee sexual misconduct. Linda Blackford, *WKU Sues Student Newspapers Over Sexual Misconduct Records*, Lexington Herald Leader (Feb. 28, 2017), <http://www.kentucky.com/news/local/counties/fayette-county/article135400309.html>.

Colleges have used every possible pressure point to coerce students to avoid unflattering news coverage or to punish publications that provoke controversy. For example, when Northern Michigan University newspaper *The North Wind* published investigative reports about travel reimbursements for trustees, sexual assault on campus, and an insider contract with a concession vendor, officials removed the newspaper's adviser, saying she was too assertive in coaching her

students to make freedom-of-information requests. David Jesse, *Northern's Student Newspaper Adviser Ousted*, Detroit Free Press (Apr. 7, 2015, 8:49 PM), <http://www.freep.com/story/news/local/michigan/2015/04/07/northern-paper-reed/25438113>; see also *CMA Opposes Removal of Adviser to North Michigan University Student Newspaper*, College Media Association (Apr. 10, 2015, 10:07 AM), http://www.collegemedia.org/news/cma_news/article_e4191164-df8a-11e4-b312-c72cf6d812df.html; Andy Thomason, *Claims of Retaliation Follow Firings at 2 Student Newspapers*, The Chronicle of Higher Education (Apr. 8, 2015), <http://www.chronicle.com/blogs/ticker/claims-of-retaliation-follow-firings-at-2-student-newspapers/>. Campus officials also would not allow the only applicant for newspaper editor for the following year to take that position, even though the applicant had been serving as the newspaper's second-in-command. *Id.*

Habitually, when student publications diligently report on campus issues of public import, they face pushback by school administrators and student governments. In the face of investigative reporting, campus officials file lawsuits, dismiss publication advisers, and block student editor applicants. Research indicates that they also threaten disciplinary action against student staff members and threaten student staff members' already-secured jobs. Lindsie Trego, *Knowledge Will Set You Free (From Censorship) 17* (July 1, 2017) (unpublished manuscript) (on file with the Association for Education in Journalism and Mass

Communication). The instances of official censorship of student publications documented in the mainstream media and outlined in this brief only scratch the surface; these instances are not anomalous. A recent report by a coalition of academic-freedom organizations described an informal survey of faculty journalism advisers that brought to light more than 20 previously undisclosed recent instances in which advisers “reported suffering some degree of administrative pressure to control, edit, or censor student journalistic content.” American Association of University Professors et al., *Threats to the Independence of Student Media* (Dec. 2016), https://www.aaup.org/file/StudentMediaReport_0.pdf. In fact, a recent survey of student editors of flagship newspapers at public, four-year colleges revealed that more than 60 percent of these publications faced at least one instance of administrative censorship during a one-year period. Trego, Knowledge Will Set You Free (From Censorship) 16 (July 1, 2017) (unpublished manuscript) (on file with the Association for Education in Journalism and Mass Communication).

B. Public College Officials Commonly Use the Power of the Purse to Retaliate Against Quality Student Journalism Via Funding Cuts

Probably the most common method that college and university officials use to push back against responsible reporting by student media is funding cuts, similar to what is seen in this case. Few student newspapers are fully financially independent from their universities, with most publications receiving student

activities fees (53.5 percent) and/or general college funds (31.6 percent). Lillian Lodge Kopenhaver, *Research Spotlight: Still in Growth Mode*, College Media Review (Sept. 6, 2012), <http://cmreview.org/research-spotlight-still-in-growth-mode/>. Many newspapers rely on these funds for at least half of their annual budgets. *See id.* (finding that 38.6 percent of college newspapers receive at least half their annual budgets from student activities fees, while 21.2 percent receive at least half their annual budgets from general college funds). This dependency leaves many student publications especially vulnerable to official censorship. Thus, ill-motivated college administrators can simply stop the presses by invoking the power of the purse.

Funding cuts as official retaliation are not unique to *The Koala*.² For example, at Armstrong Atlantic State University, *The Inkwell* student newspaper recommitted itself to serving as a campus watchdog after years of avoiding difficult issues. Robin Wright Gunn, *Free Speech Fight*, Connect Savannah (Sept. 9, 2008), <https://www.connectsavannah.com/savannah/free-speech-fight/Content?oid=2159948>. It published investigative reports intending to keep

² Even in this case, four other student publications lost their print funding, including *The Muir Quarterly*, *The Saltman Quarterly*, *The Undergraduate Research Journal*, and *The Fashion Quarterly*. *See* UCSD Guardian Editorial Board, *The UCSD Guardian View on A.S. Defunding*, *The Guardian* (Nov. 24, 2015), <http://ucsdguardian.org/2015/11/24/the-ucsd-guardian-view-on-a-s-defunding-student-media-or-nah/>.

administrators accountable, including a story criticizing administration for reacting slowly after it was revealed that an administrator had used a university credit card to make unauthorized purchases, a story about expired campus elevator permits, and a story calling into question the university's compliance with the Clery Act. *Id.* After these stories were printed, officials cut *The Inkwell's* funding by nearly \$15,000. *Id.* The funding was later restored under a settlement agreement after *Inkwell* editors sued for First Amendment violations. Erica Walters, *Armstrong Atlantic, Inkwell Settle Lawsuit Over Funding Cut*, Student Press Law Center (Nov. 20, 2008), <http://www.splc.org/article/2008/11/armstrong-atlantic-inkwell-settle-lawsuit-over-funding-cut>. Had the ruling below applied in Georgia, Armstrong Atlantic could simply have declared "we've decided to discontinue paying for student media" and *The Inkwell* would have been left without recourse to absorb a crippling loss of funding.

Another example of funding being used to punish watchdog student journalism occurred at the University of Kansas, where *The Daily Kansan* faced a \$45,000 annual budget reduction after it printed an editorial criticizing the university's student senate election process. Madeline Will, *Editors of the Daily Kansan Filed First Amendment Suit Against University Administrators for Funding Reduction*, Student Press Law Center (Feb. 5, 2016), <http://www.splc.org/article/2016/02/daily-kansan-lawsuit>. Similar to what occurred

with *The Inkwell*, *The Daily Kansan*'s funding was voluntarily restored after newspaper editors filed a First Amendment suit against university officials. Evelyn Andrews, *Lawsuit Over Student Newspaper Funding at University of Kansas Voluntarily Dismissed*, Student Press Law Center (July 7, 2016), <http://www.splc.org/article/2016/07/lawsuit-over-student-newspaper-funding-at-kansas-university-voluntarily-dismissed>. These instances demonstrate that a meaningful federal judicial recourse can mean life-or-death for journalism on college campuses.

Increasingly, censorship pressure comes not just from administrators but from offended readers as well. In one recent example, when *The Wesleyan Argus* printed an opinion piece critical of the Black Lives Matter movement, the Wesleyan student government voted to revoke the publication's funding as punishment. Kaitlin DeWulf, *Wesleyan Student Government Revokes Student Newspaper's Funds*, Student Press Law Center (Mar. 24, 2016), <http://www.splc.org/article/2016/03/wesleyan-argus-funding-revoked>. Only after public outcry did the student government back off and instead decide to "study" reducing or revoking the newspaper's financial support. *Id.*

These stories of retaliation-by-purse—like other stories of censorship of the student press—are not unique; nearly one-fifth of student editors of newspapers that receive at least some college or departmental funding reported experiencing

threats of funding cuts during a one-year period. Trego, *Knowledge Will Set You Free (From Censorship)* 16 (July 1, 2017) (unpublished manuscript) (on file with the Association for Education in Journalism and Mass Communication).

C. Student Newspapers Rely on Print Publications to Attract Audiences and Advertisers, and Official Retaliation Via Print Funding Cuts is Detrimental to the Student Press

Campus publications are vulnerable not only to total revocation of their operating budgets, but also to cuts of their print budgets, as occurred in this case. Some may argue that revocation of print funding does not substantially harm student publications, since student media have alternative options in today's digital environment. However, this argument is misguided. Recent research indicates that print editions of campus newspapers are more read than their online counterparts. *See, e.g.* Hans K. Meyer, Burton Speakma & Nisha Garud, *Active Choice, Passive Consumption*, *College Media Review* (Sept. 27, 2016), <http://cmreview.org/active-choice-passive-consumption>; Bill Krueger, *Students Prefer Printed College Newspapers Over Online*, *Poynter* (Sept. 14, 2010), <https://www.poynter.org/2010/students-prefer-printed-college-newspapers-over-online/105600/>. According to one survey, 56 percent of college students report not even knowing of their student newspapers' online editions. Krueger, *supra*. On the other hand, 63 percent of students reported regularly reading the *print edition* of their campus newspapers. *Id.* In other words, print is a more effective medium than

digital options for student publications to disseminate their messages. Thus, funding cuts to publications' print budgets substantially interfere with their ability to attract their primary audiences and to contribute to the campus marketplace of ideas.

Print editions also remain important to the ability of student newspapers to generate income. Most student publications derive their incomes primarily from advertising revenue, *see* Lillian Lodge Kopenhaver, *Newspaper Revenues, Salaried Positions Grow; Online Editions Expand as Well*, College Media Review (Sept. 6, 2012), <http://cmreview.org/research-spotlight-still-in-growth-mode/>, and advertisers have been reluctant to spend as much on online advertising as they traditionally have for print advertising, Krueger, *supra*. Only 15.4 percent of newspapers with online editions are able to fully support the operating costs of their online editions with online advertising revenue. Kopenhaver, *supra*. This means that while student newspapers are publishing more and more online, they still rely on their print publications to not only attract a student audience, but also to fund their print and online enterprises. When student publications lack revenue from print advertising, they may not be able to pay for the costs associated with maintaining a website, such as staff salaries, web hosting and domain registration fees. Therefore, cuts to the print budgets of publications have a compounding effect on student newspapers' ability to speak: These cuts not only hinder the

ability of publications to effectively reach their student audiences, but they also hinder publications' usage of alternative communication methods by preventing them from earning the revenue they need to publish effectively online.

III. The District Court's Opinion Threatens the Student Press by Giving License to Public College Administrators to Censor Student Publications, Which History Demonstrates College Officials Are Already Inclined to Do

While this case is superficially about *The Koala* and its arguably offensive humor news, the rule established in this case has the potential to impact the freedom of diverse student publications across the country to report on controversial issues of public importance without fear of official retaliation. The rule established in this case will affect flagship student newspapers that focus on investigative reporting as much as it will affect offbeat humor publications like *The Koala*. To allow UC-San Diego to defund all student print publications would give college administrators across the country license to retaliate against the student press, something that too many are already inclined to do.

The district court decision threatens student publications in three major ways: (1) It threatens to use the Eleventh Amendment in an unprecedented way to prevent student media from seeking judicial recourse when they face unconstitutional funding cuts; (2) It threatens to set the precedent of defining forums too narrowly, thereby making unconstitutional forum regulations look like simple forum closures; (3) It threatens student media by abstaining from

examination of decision-maker motive in cases of even nakedly viewpoint-discriminatory forum closures.

First, the Eleventh Amendment simply is not a bar to student publications seeking prospective reinstatement of their funding, *see, e.g., Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004) (finding that suits for prospective injunctive relief are permitted “against state officials acting in violation of federal law” in order “to ensure the enforcement of federal law”); *Edelman v. Jordan*, 415 U.S. 651, 677 (1974) (finding that while the Eleventh Amendment bars retroactive money awards that require payment from state treasuries, federal courts’ remedial powers to offer prospective injunctive relief under § 1983 remain), and certainly is not a bar to student publications seeking prospective reinstatement of their *eligibility* to seek funding, as is at issue in this case. (ER 37 ¶ 4.) If the Eleventh Amendment were to block this case, it also would have served as a bar in numerous other cases in which student publications have sought prospective funding, including *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). But that is not what the Supreme Court decided in that case. *Id.* at 844. Instead, the Court found that the University of Virginia had to consider the student publication at issue in *Rosenberger* to be eligible to seek student activities funds in order for the university to “uphold[] its duties under the Free Speech Clause.” *Id.* Creating a precedent, as this case would, that allows

public colleges and universities to evade judicial scrutiny in claims for prospective injunctive relief by hiding behind the Eleventh Amendment would embolden college administrators across the country to use funding cuts to punish journalistically sound watchdog reporting.

Second, the district court opinion threatens to set precedent that draws forums too narrowly, leading to absurd ends. If the appropriate forum in this case is “Associated Students’ funding of student print publications,” then the appropriate forum when a college decides to stop funding religious student groups might be considered “Associated Students’ funding of religious student groups.”³ If this is true, then the case of a de-funded religious group would be properly construed to be a forum closure case, rather than the appropriate interpretation as a forum regulation case, as was seen in *Rosenberger. Id.* And while UC-San Diego happened to be providing financial support for multiple student publications, smaller colleges may fund only one or two; if *The Inkwell* was the only publication receiving funding at Armstrong State, would the newspaper be subject to “forum

³ Beyond leading to absurd ends, the forum definition and forum closure seen in this case also unconstitutionally “singles out” collegiate press for a financial burden—ineligibility for funding—beyond the vulnerability of other non-press speakers. *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 582 (1983). Scholars have noted that the Press Clause should be read to serve as a protection for the press additional to the protections of the Speech Clause. See Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. Rev. 1025 (2010).

closure” at any time for any reason on the grounds that the “forum” is defined as “funding of *The Inkwell?*”

This absurdity would extend to physical forums—such as speech zones, event space, and free speech boards—along with metaphysical forums like funding: For example, a college may have a physical space designated as a limited forum for students and student groups to express their views on a variety of topics. If the college restricts this space to being open only from midnight until 1 a.m. on Wednesday mornings in response to a Students for Life group requesting use of the space, the District Court rule would, correctly, construe this as a forum restriction. This decision would need to be reasonable, viewpoint-neutral, and non-retaliatory. *Rosenberger*, 515 U.S. at 829. However, if the college completely closes this space in response to a pro-life group requesting use, the District Court rule would construe this as a forum closure, impervious to review. Even though these decisions would be functionally equivalent, the more drastic option—forum closure—would not need to be reasonable, viewpoint-neutral, or non-retaliatory. The absurdity of how the District Court rule would play out, in both metaphysical and physical spaces, is self-evident.

Like courts in *Rosenberger* and similar cases, *see, e.g., Amidon v. Student Ass’n of State Univ. of New York at Albany*, 508 F.3d 94 (2d Cir. 2007) (defining the forum as “[a] pool of student activity fees”); *Southworth v. Bd. Of Regents of*

Univ. of Wisc. System, 376 F.3d 757 (7th Cir. 2004) (defining the relevant forum as “a pool of funding”); *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997) (defining the relevant forum as the university’s “system for funding student groups”), this court should construct the forum in a reasonable manner by defining it as the entire campus activity funding for all student groups. This is the only construction consistent with the Supreme Court’s ruling in *Rosenberger*, the central premise of which is that a religious student newspaper must be allowed to compete for financial support on equal and viewpoint-neutral terms with all other eligible student organizations.

Once the forum is constructed in this way, the relevant question becomes whether expulsion of student print media is a constitutionally valid restriction on the limited forum. To be valid, the policy must be both reasonable in light of the purpose of the forum and viewpoint-neutral. *Rosenberger*, 515 U.S. at 829. The expulsion of student print media at issue is unreasonable in light of the purpose of the forum. (Appellant’s Opening Br. 45). However, the expulsion of student print media is also viewpoint discriminatory. Facial neutrality does not save a regulation on a limited forum from violating the First Amendment when the policy is, in fact, designed to discriminate based on viewpoint. *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 812 (1985) (finding that viewpoint-neutral regulations “that [are] in fact based on the desire to suppress a particular point of

view” will not pass constitutional muster); *Perry Educ. Ass’n v. Perry Local Educator’s Ass’n*, 460 U.S. 37, 46 (1983) (pointing out that regulations that are “an effort to suppress expression merely because public officials oppose the speaker’s view” are not viewpoint-neutral); *Sammartano v. First Judicial Dist. Court, in and for Cnty. of Carson City*, 303 F.3d 959 (9th Cir. 2002) (holding that “[i]f the evidence reflects that [viewpoint] is the motivation or intent of the government in enacting [a] regulation, the regulation is viewpoint discriminatory”); *Eagle Point Educ. Assn. v. Jackson Sch. Dist. No. 9*, 2015 WL 4170188 (D. Oregon 2015) (holding a school district policy disallowing protest on school property in the wake of a teacher labor dispute violative of the First Amendment because, though the policy was facially neutral, the record and timing indicated that the policy was established for viewpoint-discriminatory reasons).

Third, even if this is a case of forum closure rather than forum regulation, courts must be able to examine decisionmaker motivation in forum closure cases. Viewpoint discrimination remains an “egregious form of content discrimination,” *Rosenberger*, 515 U.S. at 829, even when it motivates a facially neutral action such as a forum closure. In nearly every area of law in which discrimination is at issue, the courts have recognized that facial neutrality is not necessarily dispositive. *See, e.g., Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (holding that in free exercise clause cases, “[F]acial neutrality is not determinative.

. . . [and] action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality”); *Pacific Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142 (9th Cir. 2013) (finding that in employment discrimination cases, “[a] willingness to inflict collateral damage by harming some, or even all, individuals from a favored group in order to successfully harm members of a disfavored class does not cleanse the taint of discrimination; it simply underscores the depth of the defendant’s animus”); *United States v. Goodwin*, 219 Fed.Appx. 709, 712 (9th Cir. 2007) (holding that in cases dealing with discriminatory use of peremptory jury challenges, race-neutral bases for peremptory challenges may still be pretextual, and thus discriminatory). Decisionmaker motivation is exactly what the courts must consider—especially in a retaliation case, in which even an otherwise legal action can be transformed into an illegal one if it was motivated by constitutionally protected activity and would chill continued engagement in such activity, *see Ariz. Students’ Ass’n v. Ariz. Bd. Of Regents*, 824 F.3d 858, 867 (9th Cir. 2016) (holding that all one needs to establish a claim of retaliation is (1) engagement in constitutionally protected activity, (2) official actions that would chill an ordinary person from continuing the protected activity, and (3) that engagement in protected activity substantially motivated the official action). Motive is the entire point of a retaliation case such as this, and courts routinely examine whether decisionmakers’

stated rationales are genuine or pretextual. *See, e.g., Richardson v. Pratcher*, 48 F. Supp. 3d 651 (S.D.N.Y. 2014) (holding that in First Amendment cases, “it is never objectively reasonable to act with retaliatory intent”); *Hoover v. Radabaugh*, 307 F.3d 460, 467 (6th Cir. 2002) (finding that “[a]n act taken in retaliation for the exercise of a constitutionally protected right is actionable even if the action would have been proper if taken for a different reason”). In holding that decisionmaker motive is inconsequential in cases of forum closure, the district court confused something that may be difficult to prove—illicit motivation—for something that would not matter if proven.

This court should follow the First Circuit in finding that, “Once the state has created a forum, it may not condition access to the forum on the content of the message to be communicated, or close the forum solely because it disagrees with the messages being communicated in it.” *Student Gov’t Ass’n v. Bd. Of Trustees of Univ. of Mass.*, 868 F.2d 473, 480 (1st Cir. 1989). To hold otherwise would be to allow swathes of viewpoint discrimination, so long as collateral damage is swept up in its wake. It would also give colleges a loophole by which they can subvert the Supreme Court’s anti-viewpoint discrimination ruling in *Rosenberger* and escalate the pattern of retaliation already well-documented at institutions across the country.

CONCLUSION

Student media often provide the public’s only insight into the official decisions of college administrations and student governments—institutions that have the ability to wield the power of the state, and who hold the purse strings of millions of dollars in public funds. Stories like those highlighted in this brief demonstrate that student media are dedicated to upholding the ideals of a watchdog Fourth Estate, but that they face mounting official hurdles in their efforts to uphold these ideals. To allow the District Court ruling to stand in this case would be to license widespread discrimination of the student press.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing brief was produced using a 14-point Times New Roman font and contains 6,010 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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