No. 10-35555

IN THE

United States Court of Appeals for the Ninth Circuit

OSU STUDENTS ALLIANCE, ET AL.,

Plaintiffs-Appellants,

v.

ED RAY, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Oregon
Civil Case No. 6:09-cv-06269-AA (Hon. Ann Aiken)

BRIEF FOR *AMICI CURIAE*

Student Press Law Center
Filed in Support of Appellant, Seeking Reversal

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IDENTITY OF THE *AMICI CURIAE*, STATEMENT OF INTEREST, AND SOURCE OF AUTHORITY TO FILE

This Amicus Curiae Brief is respectfully submitted by the Student Press Law Center.

The Student Press Law Center (the "SPLC") is a nonprofit, non-partisan organization which, since 1974, has been the nation's only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of the United States. The SPLC provides free legal assistance, information and educational materials for student journalists on a variety of legal topics.

The SPLC is regularly called upon by the college media to assist in resolving controversies involving the distribution of publications on campus. As an advocate for the rights of the student media to publish free from untoward government interference, the Center has a special interest in the potential consequences of the decision of the United States District Court, which could substantially lower the bar for colleges and universities to unduly restrict access to campuses that should be welcoming spaces for the exchange of diverse viewpoints.

Pursuant to FED. R. APP. P. 29(a), this Brief is being filed without a motion seeking leave of Court, because counsel for the Appellants and the Appellees have consented to its filing.

I. INTRODUCTION AND SUMMARY

This is a case that will be closely watched by collegiate media outlets across the country, and that has great potential to affect their well-being, because it is rare that a public university attempts to impose (and to defend as legitimate) such a sweeping – and selectively enforced – prohibition on the distribution of a student-produced news product. A ruling in favor of the University[1] would send the noxious message to all universities that courts will perfunctorily dismiss student journalists' censorship claims at the earliest opportunity, unless the students show up at the courthouse filing counter with a smoking gun, a signed confession, and a swab of each defendant's DNA.

To be clear, what happened here – according to the facts that the District Court was required to accept as true – is that a conservative student newspaper at Oregon State University, *The Liberty*, was selectively consigned for nearly a year to a low-traffic distribution zone under a "policy" that the University never memorialized in writing. The policy was variously explained as an attempt to keep walkways clear for disabled pedestrians, and also as an attempt to beautify the campus – yet neither rationale explains why other publications were permitted to have more racks than *The Liberty* (thus detracting more from the beauty of the

[1] For simplicity, the brief will refer to Appellants as "the Students" and to Appellees collectively as "the University."

campus) or why others were permitted to keep racks chained in pedestrian areas from which *The Liberty* was evicted on "safety" grounds.

As an initial matter underlying all of the issues in this case, it bears emphasis that the "policy" being challenged is an indistinct one. While it is undisputed that a competing student publication, *The Daily Barometer*, received preferential access to distribution locations, the rationale for this distinction is unclear. The Students were at various times told that *The Liberty* was subject to second-class status because (1) *The Liberty* was an "off campus newspaper" (ER 63-64, 93), (2) the University had better "communication ability" with *The Daily Barometer* (ER 95, 128), and (3) *The Daily Barometer* was a 100-year-old publication funded by and published "on behalf of" the University (ER 99-100, 146).[2] The nebulous boundaries of the University's (since-revised) policy, and the shifting justifications for it, make this a case uniquely unsuited for summary disposition at the pleadings stage.

The OSU Students Alliance brief amply demonstrates the many reasons that dismissal of the Complaint was premature. The SPLC fully agrees with the Students' enumeration of the multiple legal errors that require reversal. The SPLC

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[2] If this latter rationale, proffered in writing by the University's associate general counsel, is genuinely the explanation, then the distinction was flatly unconstitutional under the rationale of *Hays County Guardian v. Supple*, 969 F.2d 111 (5th Cir. 1992), as detailed in Appellants' brief at 36-38.

write separately solely to emphasize several points that are of broad importance to the rights of all student journalists.

II. ARGUMENT

A. The Students Identified Specific Acts of the Individual Defendants Sufficient to Sustain a Claim for § 1983 Liability.

1. The Defendants Are Liable as Supervisors for Endorsing Their Subordinates' Action and Refusing to Ameliorate Ongoing Constitutional Violations.

The District Court plainly erred in demanding proof that the Students present evidence at the pleading stage ascribing hands-on responsibility for the University's unlawful censorship to each individual defendant. This error both misperceives the nature of the challenge – the challenge is not merely to the confiscation of *The Liberty*'s bins, but to the formulation and ongoing refusal to rectify an unconstitutionally vague and discriminatory practice – and misperceives the proper allocation of burdens at the motion-to-dismiss phase.

Recently, in *al-Kidd v. Ashcroft*, this Circuit reaffirmed that supervisors may be held liable for the constitutional torts of their subordinates in four instances:

> (1) for setting in motion a series of acts by others, or knowingly refusing to terminate a series of acts by others, which they knew or reasonably should have known would cause others to inflict constitutional injury; (2) for culpable action or inaction in training, supervision, or control of subordinates; (3) for acquiescence in the constitutional deprivation by subordinates; or (4) for conduct that shows a "reckless or callous indifference to the rights of others."

al-Kidd v. Ashcroft, 580 F.3d 949, 965 (9th Cir. 2009) (quoting *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991)). *See also Corales v. Bennett*, 567 F.3d 554, 570 (9th Cir. 2009); *Preschooler II v. Clark County Sch. Bd. of Trustees*, 479 F.3d 1175, 1182 (9th Cir. 2007). In the case *sub judice*, the plaintiffs have pled facts consistent with supervisory liability under at least three of the *al-Kidd* prongs. They are that (1) the defendants refused to terminate an unconstitutional course of conduct depriving *The Liberty* of access to the campus audience, (2) they acquiesced in the constitutional deprivations perpetrated by their subordinates, and (3) their responses to the persistent inquiries of Plaintiff Rogers evinced a "reckless or callous indifference to the rights of others."

The University and the District Court each crucially misapplied the precedent of *Kwai Fun Wong v. United States*, 373 F.3d 952 (9th Cir. 2004) and its progeny – the University in arguing below that conversations and e-mails after the bin removal are "simply too far removed from the violations" to evidence impermissible motives, and the District court in erroneously holding that the plaintiffs "fail[ed] to identify specific acts committed by a defendant that caused alleged harm." The situation in *Kwai Fun Wong* is not analogous. In that case, the court held that INS supervisory officials who had done nothing more than revoke Ms. Wong's parole and order her removal could not be held liable for subsequent constitutional violations that allegedly occurred during Ms. Wong's detention

months after the supervisors' involvement. *Id.* at 967. This holding has no bearing on a supervisor's constitutional duty to prevent ongoing constitutional violations or to refuse to acquiesce in such violations.

Despite the characterization of the District Court, the constitutional infirmities of Oregon State's conduct run deeper than the solitary act of removing newspaper bins. The confiscation of the bins occurred during the winter 2008-09 term and all defendants had been notified of these events by the end of April 2009. (ER 90, 93-95.) At this point the defendants took no remedial action; indeed, some even wrote e-mails attempting to justify the school's conduct. (ER 95-97, 128, 135.) Not until the fall term of 2009, after the students had brought suit, did Defendant Martorello overhaul the policy. (ER 64, 66-68, 37, 39.) After nearly a year of censorship, of which the defendants had been cognizant for eight months, the Students finally were able to replace their eight outdoor bins in January 2010. (ER 28, 51, 56, 59-60.)

2. Establishing an Unconstitutional Policy is an Act Sufficient to Attribute Personal Liability to the Policymaker.

The court in *Kwai Fun Wong* held that "direct, personal participation is not necessary to establish liability for a constitutional violation." *Id.* at 966. Rather, it is sufficient that the actor "[set] in motion a series of acts by others which the actors knows or reasonably should know would cause the others to inflict the

constitutional injury." *Id*. (quoting *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978)). According to the *Kwai Fun Wong* court, the crucial question is whether the violation is foreseeable.

Within this framework, it is clear that promulgation of a policy that grants the official school publication preferential distribution rights over independent student-run publications would clearly lead to disparate treatment Equal Protection violations on the ground. Likewise, violations of due process are eminently foreseeable when the bin removal policy does not contain any process of notification. The same connection holds between the establishment of the policy and the First Amendment violations that accompanied removal of the students' bins. Other circuits have explicitly declared that "promulgation, creation, implementation, or utilization of a policy that caused a deprivation of plaintiff's rights also could have constituted sufficient personal involvement." *Dodds v. Richardson*, No. 09-6157 (10th Cir. filed Aug. 6, 2010). *See also Hernandez v. Keene*, 341 F.3d 137, 145 (2d Cir. 2003) (recognizing that liability can be based on "creation of a policy or custom that sanctioned conduct amounting to a constitutional violation, or allowing such a policy or custom to continue").

Without doubt, the issue is muddied by the fact that the University's working policy was "unwritten" and established in 2006, the year that Defendant Martorello assumed the role of Director of Facilities Services. (ER 63, 91.) If

anything, the fact that the policy at issue was unwritten should counsel against disposing of the case at the pleadings stage. Discovery could better elucidate the exact contours of the policy. Further, state officials should not be rewarded – or relieved of responsibility – for their failure to commit their administrative policies to writing. The agents who uprooted *The Liberty's* bins were acting pursuant to the University's unwritten policy; they were (in the words of the State Police) finally "catching up" with the policy. (ER 91.) Such adherence to the policy was wholly foreseeable, and under the standard of *Kwai Fun Wong*, therefore must be attributed to the initial establishment of the policy.

B. Whether a Time, Place, and Manner Regulation Leaves Open Sufficient Alternative Channels of Communication is a Factual Question that Cannot be Resolved at the Pleadings Stage

The Complaint adduces sufficient facts to raise a triable issue as to whether the University's regulation was motivated by the content or viewpoint of *The Liberty*, in which case the regulation indisputably was unconstitutional. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992); *United States v. Grace*, 461 U.S. 171, 177 (1983). This point is persuasively argued in Appellant's brief at 31-33 and requires no elaboration. But importantly, the Students need not even demonstrate that the policy was content- or viewpoint-discriminatory, because even a content-neutral time, place, and manner regulation must allow the

speaker a reasonable opportunity to reach his desired audience, and there is convincing evidence that this regulation did not.

The Supreme Court has established that the state may enforce time, place, and manner regulations that are content-neutral; however, these regulations must be narrowly tailored to serve a significant government interest and must leave open ample alternative channels of communication in order for a court to uphold them. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

In this case, the Students alleged in their pleadings that the alternative channels of communication left open for their newspaper under the Policy were inadequate, thus putting the issue of the Policy's reasonableness in dispute. The issue of whether the policy provided adequate alternative channels of communication requires a determination of factual questions about the Policy itself. These questions cannot be resolved at the pleadings stage. Because the students' allegations necessarily involve a factual inquiry into the channels of communication left open by the Policy, the issue of whether the time, place, and manner regulation is reasonable could not have been resolved on a motion to dismiss. *See Marcavage v. City of Philadelphia*, 271 Fed. Appx. 272, 275 (3rd Cir. 2008) (noting that without an initial factual inquiry, the jury could not render a decision on whether a time, place, and manner restriction was reasonable).

This Circuit has recognized the fact-intensive nature of this issue. In 2009, the Ninth Circuit remanded a case to district court for a factual determination on whether ample alternative channels of communication were established after the plaintiff contested the issue. *Berger v. City of Seattle*, 569 F.3d 1029, 1059 (9th Cir. 2009) (noting that First Amendment interests require paying attention to the facts of the specific regulation at issue). After determining that there was conflicting evidence as to whether adequate channels of communication were accessible, this Court determined that it could not grant summary judgment on the issue. *Id*. at 1050. Applying this Court's reasoning to this case, the existence of a factual dispute over the adequacy of alternative channels of communication should preclude a resolution of this issue at the motion-to-dismiss stage. *See Monteiro v. City of Elizabeth*, 436 F.3d 397, 404-05 (3rd Cir. 2006) (noting that when questions of law depend on disputed issues of material fact, those issues must be determined by the jury or other factfinder before the question of law can be determined by the court).

Other circuits have also affirmed that the sufficiency of alternative channels is a question of fact. *See Pouillon v. City of Owosso*, 206 F.3d 711, 717-18 (6th Cir. 2000) (determining that the question of the sufficiency of alternative channels should have gone to a jury); *Marcavage*, 271 Fed. Appx. at 275 (citing *Pouillon* and affirming the proposition that the sufficiency of alternate channels for

communication is a question of fact for the jury to decide); *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 231 (2d. Cir 2006) (noting that the district court must determine whether as a factual matter, regulations left plaintiffs with adequate alternative channels of communication).

Because the District Court erroneously dismissed the issue of whether the University's regulation left open adequate alternative channels of communication without providing an opportunity for the parties to present facts on the issue, the judgment of the District Court should be reversed.

C. Nominal Damages Must be Awarded Once a First Amendment Violation is Established

The District Court (ER 16) either ignored or completely misapprehended the well-established principle that an award of (at least) nominal damages is mandatory once a constitutional violation is found. *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 426 (9th Cir. 2008); *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002); *accord Risdal v. Halford*, 209 F.3d 1071, 1072 (8th Cir. 2000) (holding that the Supreme Court's 1992 ruling in *Farrar v. Briggs* "requires an award of nominal damages upon proof of an infringement of the first amendment right to speak"). The court appeared to believe that proof of compensable financial loss was required before any damages, even nominal ones, could be awarded. This would be an extraordinarily dangerous notion for all future

civil-rights plaintiffs, but most especially for those who – like student journalists – will rarely be able to obtain any other meaningful redress.

It is especially vital that student journalists have the ability to vindicate their First Amendment rights through the award of nominal damages because student journalists are at heightened risk of having their claims for injunctive relief dismissed on mootness grounds. Because schools often are able to "run out the litigation clock" until censored journalists graduate[3] – thus arguably mooting students' claims for injunctive relief – even the most egregious acts of censorship may go unpunished without the recourse of nominal damages, and the accompanying potential for attorney fees and punitive damages.

Although these Appellants were "lucky" enough to suffer tangible economic injury in the form of destroyed newspapers and a damaged distribution box, journalists in a typical censorship case will have a more difficult time establishing entitlement to compensatory damages. The Eleventh Amendment precludes federal courts from awarding monetary damages against state institutions themselves, and qualified immunity protects against individual financial liability for "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*,

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[3] *See, e.g., Lane v. Simon*, 495 F.3d 1182, 1186-87 (10th Cir. 2007) (finding that college student editors' First Amendment retaliation claims seeking declaratory and injunctive relief became moot when they graduated while their case was pending).

475 U.S. 335, 341 (1986). And if the government agency voluntarily abandons the unconstitutional policy once sued and promises not to resume it (as occurred here), injunctive relief likewise may be off the table. Thus, in the more typical case where censorship consists of stifling students' ideas rather than impounding their tangible property – for instance, requiring that a faculty member review the newspaper pre-publication and remove editorials critical of the college's administration – the potential for nominal damages may be the plaintiff's only incentive and the defendant's only deterrent.

As the Supreme Court said in *Carey v. Piphus*: "By making the deprivation of [constitutional] rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed . . . ." 435 U.S. 247, 266 (1978). The First Amendment was not "scrupulously observed" at Oregon State University in this case, and it is essential that these students – and all students – have some vehicle for vindicating their rights and holding government agencies accountable for their actions.

III. CONCLUSION

It is a bedrock First Amendment principle that a college campus is uniquely a forum for the free exchange of views, and in particular views about topical issues of public concern, the subject matter of *The Liberty* and of all newspapers. As the Supreme Court memorably asserted in *Healy v. James*:

> [T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The college classroom with its surrounding environs is peculiarly the marketplace of ideas, and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.

408 U.S. 169, 180-81 (1972) (internal citation and quotations omitted). This Circuit has also found that:

> [D]iscussion of controversial ideas on a college campus is essential to the background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition in the university setting. Vigorous debate on controversial topics is consistent with the Supreme Court's description of our college and university campuses as vital centers for the Nation's intellectual life.

Brown v. Li, 308 F.3d 939, 961 (9th Cir. 2002) (citing *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 835 (1995) (internal quotes omitted)).

It is because the District Court's opinion, if followed by future courts, would put this bedrock principle at risk that it is essential for this Court to repudiate the opinion below and require the searching factual inquiry that the First Amendment demands. If the District Court's parsimonious application of the First Amendment were to prevail, colleges would be free to selectively assign disfavored speakers to remote and inaccessible corners of the campus, so long as they were careful not to document the involvement of higher-level policymakers or to put any standards into writing. We cannot yet know for certain whether the injury in this case was attributable to an intentional policy decision to suppress one student group's

disfavored viewpoint, or to carelessly formulated standards that enabled employees to make arbitrary enforcement decisions, or to something in between – and that is precisely why a jury trial, not a motion to dismiss, is the proper place to sort out what occurred.

Even in the year 2010, the printed campus newspaper remains the most effective and reliable vehicle for delivering a message to a collegiate audience, one for which there is no adequate substitute.[4] A sustained inability to get newspapers into the hands of most of Oregon State University's student readership is a genuine injury, for which the Students are entitled to more than the perfunctory inquiry the District Court afforded them.

For all the reasons set forth above, the Student Press Law Center respectfully request that the District Court's judgment be reversed.

Respectfully submitted,

/s/

[4] *See* Bill Krueger, "Students Prefer Printed College Newspapers over Online," MAKING SENSE OF NEWS, The Poynter Institute (Sept. 14, 2010), *available at* http://www.poynter.org/column.asp?id=136&aid=190619 (last viewed Oct. 18, 2010) (asserting that print versions of college student publications are more widely read and more economically successful than online versions, and noting that many students are unaware whether their campus newspapers are even available online); Marcin Skomial, *Wired Students Prefer Campus News on Paper*, THE NEW YORK TIMES (Aug. 19, 2002) at C7 (making the same points).

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October 19, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October, 2010, 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 the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

__________/s/__________________
James J. Manning, Jr.

CERTIFICATION OF COMPLIANCE

Word Count: 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 3,306 words, excluding the parts of the brief exempted under Fed. R. App. P. 32 (a)(7)(B)(iii).

/s/

James J. Manning, Jr.