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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
CENTRAL DIVISION

PETER PERLOT, MARK MILLER, and **RYAN ALEXANDER**, *Plaintiffs,* v. **C. SCOTT GREEN**, President of the University of Idaho, **BRIAN ECKLES**, Dean of Students, **ERIN AGIDIUS**, Director of the Office of Civil Rights & Investigations, and **LINDSAY EWAN**, Deputy Director of the Office of Civil Rights and Investigations, all individually and all in their official capacities, *Defendants.*	Case No. 3:22-cv-00183-REP **ORAL ARGUMENT REQUESTED** **EXPEDITED HEARING REQUESTED**

PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND EXPEDITED HEARING

Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs Peter Perlot, Mark Miller, and Ryan Alexander respectfully move this Court for a temporary restraining order and preliminary injunction against Defendants C. Scott Green, Brain Eckles, Erin Agidius, and Lindsay Ewan. Defendants are currently violating Plaintiffs rights secured by the First Amendment to the United States Constitution.

On April 7, 2022, Defendants issued no-contact orders against each Plaintiff prohibiting all communications between them and another student. Defendants issued those orders pursuant to their *Title IX Policy* (Policy 6100) and *Discipline Policy* (Policy 2400). Defendants' no-contact orders discriminate based on the content and viewpoint of Plaintiffs' religious speech, inflict a prior restraint on that speech, and burden the exercise of Plaintiffs' religion. Similarly, Defendants' *Title IX Policy* and *Discipline Policy* impose a prior restraint, grant unbridled discretion to Defendants, and burden the exercise of Plaintiffs' religion. Neither the no-contact orders nor Defendants' policies can meet the demanding requirements of strict scrutiny. Both the no-contact orders and Defendants' policies are causing ongoing irreparable injury to Plaintiffs' free speech and religious exercise rights. For that reason, Plaintiffs request that the Court hear their motion for temporary restraining order and preliminary injunction on an expedited basis.

Therefore, Plaintiffs respectfully move this Court for a temporary restraining order and preliminary injunction. Specifically, Plaintiffs move this Court to order Defendants, their officers, agents, servants, employees, attorneys, and those in active concert or participation with them, to:

1. rescind the no-contact orders issued to Plaintiffs Perlot, Miller, and Alexander;
2. terminate any investigation related to the no-contact orders issued to Plaintiffs Perlot, Miller, and Alexander based on allegations of protected speech alone;
3. remove any reference to the no-contact orders and investigations related to the no-contact orders in the University's records for Plaintiffs Perlot, Miller, and Alexander; and

4. stop enforcing Policy 2400 and Policy 6100 to restrict or punish speech based on allegations of pure speech alone that does not rise to the level of harassment as defined in Policy 6100, Section D-19(b).

Plaintiffs also respectfully move this Court to waive the security requirement under Fed. R. Civ. P. 65(c). When "there is no evidence [a] party will suffer damages from the injunction," the district court may properly require no security. *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2003). Here, Defendants will suffer no damages from a preliminary injunction. The injunction will simply prevent them from infringing Plaintiffs' speech and religious exercise rights. *See Morris v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 1082, 1089 n.2 (D. Idaho 2014) (waiving bond requirement when issuing injunction to protect constitutional rights).

In support of this motion, Plaintiffs rely on the attached memorandum of points and authorities and their Verified Complaint.

Respectfully submitted this 26th day of April, 2022.

/s/ Matthew C. Williams

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2022, I electronically filed the foregoing using the CM/ECF system, and will serve the same with Plaintiffs' Verified Complaint on the following parties:

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Dated: April 26,2022

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IN THE UNITED STATES DISTRICT COURT
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PETER PERLOT, MARK MILLER, and **RYAN ALEXANDER**, *Plaintiffs,* v. **C. SCOTT GREEN**, President of the University of Idaho, **BRIAN ECKLES**, Dean of Students, **ERIN AGIDIUS**, Director of the Office of Civil Rights & Investigations, and **LINDSAY EWAN**, Deputy Director of the Office of Civil Rights and Investigations, all individually and all in their official capacities, *Defendants.*	Civil Case No. 3:22-cv-00183-REP

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND EXPEDITED HEARING

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INTRODUCTION

At its core, the First Amendment protects religious speech. "[A] free-speech clause without religion" is like "Hamlet without the prince." *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). The founding fathers considered this irreducible minimum of free speech to be an inalienable natural right that could not be surrendered to the government. Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 281 (2017). As said by a contemporary of the founders, "men should be allowed to express [their] thoughts, with the same freedom that they arise. In other words—speak, or publish, whatever you believe to be truth." *Id.* at 282 n.166. This principle is nowhere more important than at universities, the quintessential "marketplace of ideas." *Healy v. James*, 408 U.S. 169, 180 (1972).

Defendant officials at the University of Idaho have struck at the very foundation of this guarantee. Plaintiffs, three law students at the University, spoke about their religious beliefs on the definition of marriage and religious discrimination. Plaintiff Mark Miller, in response to a question, respectfully shared that he believed that God created marriage to be between one man and one woman. Plaintiff Peter Perlot wrote a short note to the student who asked the question offering to discuss that religious view further with her. And Plaintiff Ryan Alexander politely responded to students attacking his views as bigoted and stated his opinion that religious viewpoints were discriminated against on campus. In short, they spoke what they "believe to be truth." Based on that protected speech alone, Defendants issued a no-contact order, without notice of any complaints against them, to each Plaintiff. The orders prohibit any contact between Plaintiffs and the student that spoke with Plaintiff Miller. And the orders remain in place until Defendants—in their sole discretion—rescind them.

Defendants' no-contact orders and the Policies that allow Defendants to issue such orders violate a host of free speech and free exercise principles. The no-contact orders target Plaintiffs' speech because of its content and viewpoint, impose a prior restraint,

and demonstrate hostility to their religion. Similarly, Defendants' Policies inflict a prior restraint, grant administrators unbridled discretion to discriminate against the viewpoint of speech, and infringe on Plaintiffs' free exercise of religion.

Plaintiffs are suffering ongoing irreparable injury. Not only are the no-contact orders still in effect, but Defendants' Policies that allow them to issue those orders have caused Plaintiffs to self-censor their religious speech. Plaintiffs have no idea when someone might take offense to their religious speech, prompting Defendants to issue future no-contact orders again out of the blue. Plaintiffs thus move this Court for a temporary restraining order and preliminary injunction. Specifically, Plaintiffs ask this Court to order Defendants to:

1. rescind the no-contact orders issued to Plaintiffs;
2. terminate any investigation related to the no-contact orders issued to Plaintiffs based on allegations of protected speech alone;
3. remove any reference to the no-contact orders and investigations related to the no-contact orders in the University's records for Plaintiffs; and
4. stop enforcing Policy 2400 and Policy 6100 to restrict or punish speech based on allegations of pure speech alone that does not rise to the level of harassment as defined in Policy 6100 Section D-19(b).

FACTUAL BACKGROUND

I. Plaintiffs, their religious speech, and the hostility to their religion on campus.

Plaintiffs Perlot, Miller, and Alexander are currently law students at the University of Idaho College of Law in Moscow. Compl. ¶ 23. They are also Christians, who believe that God created the institution of marriage to unite one man and one woman. *Id.* ¶¶ 27–28. Their religious faith motivates them to share the Gospel of Jesus Christ and the truth about marriage with other students. *Id.* ¶¶ 29–30. Their religion also led them to form a chapter of the Christian Legal Society ("CLS") on campus. *Id.* ¶ 75.

Campus hostility to Plaintiffs' religious views escalated when Plaintiffs sought official recognition for their CLS chapter. *Id.* ¶ 81. Plaintiffs needed to secure the approval of the student government, but several members of that body expressed disapproval that the chapter's constitution included the religious view that marriage is between one man and one woman. *Id.* ¶ 82. Other students emailed the chapter's officers criticizing their sincerely held religious beliefs on marriage. *Id.* ¶ 84. Because of its concern with Plaintiffs' and the chapter's religious beliefs, the student government continually delayed recognition of the group. *Id.* ¶¶ 81, 83. The consistent delays forced the law school's dean to intervene in November 2021 and approve the chapter. *Id.* ¶ 85.

Even so, hostility to Plaintiffs' religious views continued. On April 1, 2022, the law school held a "moment of community" in response to an anti-LGBTQ+ slur written on a whiteboard at the Boise campus. *Id.* ¶¶ 89–90. The law school's associate dean invited all students to attend to "show support for those who have" felt "marginalized and excluded." *Id.* ¶ 93. Plaintiffs Perlot and Miller and a few other members of CLS, wanting to show their support for anyone in the community who felt marginalized and excluded, attended the "moment of community." *Id.* ¶ 94. When they arrived, Plaintiffs Perlot and Miller and the other CLS members formed a circle and began to pray. *Id.* ¶ 96. As the prayer continued, a group of about 30 other individuals, including Ms. Doe,[1] also joined the gathering. *Id.* ¶¶ 97–98. After the prayer, Ms. Doe asked the CLS members why the CLS constitution affirms that marriage is between one man and one woman. *Id.* ¶ 99. Plaintiff Miller answered that the affirmation reflects a biblical view of marriage and sexuality. *Id.* ¶ 100. Ms. Doe responded that she did not think that the Bible supported that belief. *Id.* ¶ 101. Plaintiff Miller explained that the Bible defines marriage as between one man and one woman in several places

[1] To respect the student's privacy, Plaintiffs refer to this student as Ms. Doe and have redacted her name and other personally identifying information from the exhibits.

and that it condemns homosexuality, just like every other sin. *Id.* ¶ 102. Neither Plaintiff Miller nor Ms. Doe said anything further, and their conservation ended at that point. *Id.* ¶ 103. Plaintiff Miller and Ms. Doe civilly and respectfully disagreed with each other. *Id.* ¶ 104.

Shortly after the event, Plaintiff Perlot put a handwritten note on Ms. Doe's desk in the law school when she was not there. *Id.* ¶ 106. Plaintiff Perlot invited Ms. Doe to a CLS event or to talk to him further if she so desired. *Id.* Plaintiff Perlot thought that further conversation with Ms. Doe would allow both of them a chance to be fully heard and to better understand each other's views. *Id.* ¶ 107.

On the Monday following the gathering, April 4, Plaintiffs Alexander and Perlot attended an event with other students regarding the American Bar Association's accreditation of the law school. *Id.* ¶¶ 114–16. At the event, several students, including Ms. Doe, opined that certain students had religious beliefs that were bigoted and anti-LGBTQ+. *Id.* ¶ 117. After those students made their comments, Plaintiff Alexander spoke up and explained that Ms. Doe's statements were not true and that the biggest instance of discrimination he had seen on campus was the delay in registering the CLS chapter. *Id.* ¶ 120. Plaintiff Alexander said nothing further at the event. *Id.* ¶ 122. Neither Plaintiff Alexander nor Plaintiff Perlot spoke with Ms. Doe directly during or after the event. *Id.*

II. Defendants issued no-contact orders against Plaintiffs based purely on their religious speech.

On April 7, Defendants issued no-contact orders to Plaintiffs Perlot, Miller, and Alexander based on their protected speech as discussed above. Compl. ¶¶ 126, 143–45. Each order prohibits Plaintiffs from "contacting Ms. Doe in any way, from this point forward, until otherwise notified." *Id.* ¶ 128. Defendants' orders explain that contact "can be defined as, but is not limited to": "[w]ritten," "[v]erbal," "[e]lectronic," and "[n]on-[v]erbal" communication, including mail, letters, text messages,

telephone, voicemail, in person, email, social media, skype, pictures, videos, or music. *Id.* ¶ 129. The orders also require Plaintiffs, including Plaintiff Alexander who currently attends four courses with Ms. Doe, to "sit on opposite sides of the room" from her during class. *Id.* ¶¶ 130, 154. If Plaintiffs believe they have a "legitimate reason" to contact Ms. Doe, they must first obtain permission from Defendants. *Id.* ¶ 131.

The orders do not have a termination date or geographic limitation. *Id.* ¶¶ 133–34. They apply indefinitely and both on and off campus. *Id.* They also threaten Plaintiffs with discipline. *Id.* ¶ 136. Defendants consider any violation of the no-contact orders to be "retaliation" that could lead to "suspension" or even "expulsion." *Id.*

Defendants issued the no-contact orders with almost no process. They did not conduct any investigation regarding whether Plaintiffs Perlot and Alexander violated any University policy. *Id.* ¶ 138. They did not provide any Plaintiffs with notice of the allegations against them. *Id.* Nor did they allow Plaintiffs to respond to any possible complaints against them. *Id.* Rather, Defendants issued the orders because they were "requested by [Ms. Doe]" and "deemed"—in Defendants' own estimation—"reasonable based on the information presented." *Id.* ¶ 141. Defendants have taken no disciplinary action against the other students who criticized Plaintiffs' religious views. *Id.* ¶¶ 84, 113, 166, 182.

III. Defendants' unconstitutional Policies allow them to issue no-contact orders based on protected speech.

Defendants issued the no-contact orders under their *Title IX Policy* (Policy 6100) and their *Discipline Policy* (Policy 2400) (collectively, the "Policies"). Compl. ¶¶ 52, 63, 146. The *Title IX Policy* requires Defendants to "[i]mplement appropriate supportive measures" upon receipt of a complaint of sexual harassment. *Id.* ¶ 54. "[S]upportive measures" include no-contact orders. *Id.* ¶ 55. Indeed, Defendants' Policies call for the "routine[ ] issu[ance]" of no-contact orders in Title IX cases. *Id.* ¶ 67. Defendants' Office of Civil Rights "has sole authority to determine what supportive measures are

to be implemented." *Id.* ¶ 60. But Defendants' Policies do not require them to make a finding that sexual harassment occurred, likely occurred, or will likely occur without a no-contact order. *Id.* ¶¶ 56, 58. Defendants' Policies do not require notice of a complaint or a hearing to the respondent before issuing a no-contact order. *Id.* ¶ 57. Nor does Defendants' *Title IX Policy* provide for an appeal from a no-contact order. *Id.* ¶ 59.

Similarly, Defendants' *Discipline Policy* allows them to issue no contact orders. *Id.* ¶ 65. Defendants can issue no-contact orders even without a formal allegation of wrongdoing. *Id.* ¶ 64. Defendants need not find a violation of the student code of conduct nor even a likely violation. *Id.* ¶ 66. And Defendants' policy exempts the issuance of no-contact orders from any factual finding of potential future harm. *Id.* ¶ 69. Defendants allow an appeal of the no-contact order only to the very same officer that issued the order. *Id.* ¶ 71. Yet the policy provides "no formal procedures" for the appeal and leave the no-contact order in place during any appeal. *Id.* ¶¶ 72–73.

IV. Defendants' no-contact orders are causing Plaintiffs ongoing harm.

Defendants' no-contact orders have cut off Plaintiffs' speech and caused them to self-censor much of what they would like to say. Compl. ¶¶ 150–51. The no-contact orders remain in effect and will do so in perpetuity, unless Defendants—in their sole discretion—rescind them. *Id.* ¶¶ 128, 134. Plaintiffs now live in fear that Defendants will issue no-contact orders without notice based on the expression of their religious beliefs or other opinions some may disagree with. *Id.* ¶ 153. As a result, they have self-censored and forgone exercising their right to free speech while on campus. *Id.* ¶ 151.

LEGAL STANDARD

The standards for a temporary restraining order and a preliminary injunction are the same. *All. for Wild Rockies v. Pierson*, 550 F. Supp. 3d 894, 898 (D. Idaho 2021). To obtain such relief, Plaintiffs must establish that (1) they are "likely to succeed on

the merits"; (2) they are "likely to suffer irreparable harm in the absence of preliminary relief"; (3) "the balance of equities tips in their favor"; and (4) "an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Under the Ninth Circuit's "sliding scale" approach, the elements "are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Hernandez v. Sessions*, 872 F.3d 976, 990 (9th Cir. 2017).

When, as here, there is a hardship balance "that tips sharply toward the plaintiff[s]" and the other two *Winter* factors are met, Plaintiffs need only show "serious questions going to the merits." *All. for Wild Rockies*, 550 F. Supp. 3d at 898 (cleaned up). To prevail, Plaintiffs need not "prove [their] case in full, or show that [they are] more likely than not to prevail"; "[r]ather, the moving part[ies] must demonstrate a fair chance of success on the merits or raise questions serious enough to require litigation." *Harman v. City of Santa Cruz*, 261 F. Supp. 3d 1031, 1041 (N.D. Cal. 2017) (cleaned up). "Serious questions need not promise a certainty of success, nor even present a probability of success, but rather must involve a fair chance of success on the merits." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (cleaned up).[2]

ARGUMENT

I. Plaintiffs will likely succeed on the merits of their First Amendment claims.

Defendants' no-contact orders discriminate based on the content and viewpoint of Plaintiffs' speech, inflict a prior restraint, and burden the exercise of Plaintiffs' religion. Similarly, Defendants' *Title IX Policy* and *Discipline Policy*, under which Defendants issued the no-contact orders, impose a prior restraint, grant unbridled discretion to Defendants, and burden Plaintiffs' religion. But neither the no-contact

[2] The injunction requested will return the parties to the status quo ante litem, so it is prohibitory. *Faison v. Jones*, 440 F. Supp. 3d 1123, 1131 (E.D. Cal. 2020).

orders nor Defendants' Policies can meet the demanding requirements of strict scrutiny. Plaintiffs thus have much more than a fair chance of success on the merits.

A. Defendants' no-contact orders and Policies violate the Free Speech Clause.

For decades, the Supreme Court has recognized that "colleges and universities are not enclaves immune from the sweep of the First Amendment." *Healy*, 408 U.S. at 180. Indeed, the "college classroom with its surrounding environs is peculiarly the marketplace of ideas." *Id.* (cleaned up). Thus, the Court has left "no room for the view" that "First Amendment protections should apply with less force on college campuses than in the community at large." *Id.* Quite the opposite, "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Id.* (cleaned up). But here, Defendants' no-contact orders and Policies violate fundamental First Amendment law by discriminating based on the content and viewpoint of speech, imposing prior restraints, and granting unbridled discretion to administrators.

1. Defendants impermissibly issued no-contact orders to Plaintiffs because of the message they conveyed.

Defendants issued no-contact orders of indefinite duration and with no notice or hearing to Plaintiffs based on what they said. Compl. ¶¶ 134, 138, 143–45. Targeting speech because of its content and viewpoint triggers strict scrutiny, which Defendants cannot meet.

a. Defendants' no-contact orders target the content and viewpoint of Plaintiffs' speech.

Content-based regulations are "presumptively unconstitutional." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). That is because "[a]ny" content-based restriction "completely undercut[s]" our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972). The prohibition on content discrimination

"put[s] the decision as to what views shall be voiced" where it should be—"into the hands of each of us." *Cohen v. California*, 403 U.S. 15, 24 (1971). Indeed, "no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Id.*

Content-based regulations "appl[y] to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. To assess content discrimination, courts "consider whether a regulation of speech on its face draws distinctions based on the message a speaker conveys." *Id.* (cleaned up). When a college targets not only the topic discussed but also "particular views taken by speakers on a subject," the college violates free speech rights "all the more blatant[ly]." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). That viewpoint discrimination is "an egregious form" of content discrimination. *Id.* The government has no role in regulating speech when the "specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.*

Defendants issued the no-contact orders to Plaintiffs because they discussed their sincerely held religious beliefs about marriage and because they discussed religious discrimination. Compl. ¶¶ 143–45. The orders apply because of the "message expressed." *Reed*, 576 U.S. at 163. Similarly, Defendants' orders targeted the viewpoint of Plaintiffs' speech. Both students and professors expressed hostility to Plaintiffs' religious views. Compl. ¶¶ 84, 110–13, 117–18. For example, after Plaintiffs expressed their religious view on marriage, a professor posted a sign in the law school saying, "At this public university your personal religious beliefs are not an excuse to deprive others of their rights under the law." *Id.* ¶¶ 110. And the law school's student government president posted on Facebook that he was "sickened and saddened" by Plaintiffs' religious speech because it went "beyond the pale." *Id.* ¶¶ 111–12. Defendants did not respond by restraining that speech. *Id.* ¶¶ 113, 166, 182. But when Plaintiffs had the temerity to defend their religious views on the very same subjects,

Defendants responded with the gag orders. Defendants have thus targeted the "particular views" taken by Plaintiffs "on a subject." *Rosenberger*, 515 U.S. at 829.

Defendants restricted Plaintiffs' speech because others took subjective offense to it. Regulating speech based on a heckler's veto "discriminat[es] on the basis of viewpoint" because the heckler complains precisely about the views taken by Plaintiffs. *Rosenbaum v. City & Cnty. of S.F.*, 8 F. App'x 687, 692 n.1 (9th Cir. 2001). But it is a "bedrock" First Amendment principle that "government may not prohibit the expression of an idea simply because" some "find[ ] the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Universities especially have a "strong interest" in teaching their students "the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'" *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021). Otherwise, "[b]ecause some people take umbrage at a great many ideas, very soon no one would be able to say much of anything at all." *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 711 (9th Cir. 2010).

b. Defendants' no-contact orders cannot survive strict scrutiny.

Content and viewpoint discrimination must survive strict scrutiny. *Reed*, 576 U.S. at 163–64. That is, the government bears the burden of proving its discrimination is "the least restrictive means available to further a compelling government interest." *Berger v. City of Seattle*, 569 F.3d 1029, 1050 (9th Cir. 2009) (en banc). Defendants cannot meet this "exacting standard." *Id.*

Defendants have no compelling interest in discriminating based on what Plaintiffs said. Defendants may try to rely on general interests in combatting harassment or acts of discrimination. But Plaintiffs' respectful, protected speech comes nowhere near that exceptionally high bar. *See Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (to be actionable harassment must be "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an

educational opportunity or benefit"). What's more, "[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause." *Rodriguez*, 605 F.3d at 708. "Harassment law generally targets conduct" and it can "sweep[ ] in speech . . . only when consistent with the First Amendment." *Id.* at 710. Anti-harassment measures cannot target "pure speech." *Id.*

Nor are the no-contact orders the least restrictive means to any governmental interest. "The scope of [the no-contact orders] is remarkable. [They have] no defined limits." *Bey v. Rasawehr*, 161 N.E.3d 529, 543 (Ohio 2020). The orders restrict all forms of speech and have no geographic or temporal boundaries. Compl. ¶¶ 128–35. They bar Plaintiffs' "[w]ritten," "[v]erbal," "[e]lectronic," and even "[n]on-[v]erbal" speech. *Id.* ¶ 129. They ominously warn that the identified forms of speech are "not limit[ing]" and that the speech-ban applies to communication "in any way" and "under any circumstances." *Id.* ¶ 128. They apply on campus and off. *Id.* ¶ 133. They prohibit Plaintiffs' speech in every state of the Union. *See id.* They even apply internationally. *See id.* The orders also have an infinite duration. *Id.* ¶ 134. But no evidence suggests that Defendants found that Plaintiffs' protected speech amounted to even a potential violation of Defendants' Policies—which it could not, in any event. *Id.* ¶¶ 138–39. Similarly, nothing suggests that Defendants found that Plaintiffs would likely engage in potential harassment or discrimination in the future. *Id.* Finally, the no-contact orders restrict Plaintiffs' speech until "otherwise notified" by Defendants. *Id.* ¶ 128. But the orders do not identify what factors Defendants will consider to lift the orders, or even if Defendants will ever lift the orders. *See* Exs. 16, 17, 18.

It cannot be the least restrictive means to any governmental end to restrict pure speech—the very thing the First Amendment prohibits government from "abridging." U.S. Const. amend. I. The Free Speech Clause "remove[s] governmental restraints from the arena of public discussion." *Cohen*, 403 U.S. at 24. "This is particularly so

on college campuses." *Rodriguez*, 605 F.3d at 708. There, "[i]ntellectual advancement has traditionally progressed through discord and dissent, as a diversity of views ensures that ideas survive because they are correct, not because they are popular." *Id.* That advancement "will not survive if certain points of view may be declared beyond the pale." *Id.* Issuing no-contact orders based on protected speech "distort[s] the market for ideas," *Leathers v. Medlock*, 499 U.S. 439, 448 (1991), and thus—far from furthering a government interest—exceeds governmental authority.

The no-contact orders also are not the least restrictive means to preventing discrimination or harassment. "A complete ban can be narrowly tailored only if each activity within the proscription's scope is an appropriately targeted evil." *Berger*, 569 F.3d at 1053 (cleaned up). Defendants prohibited Plaintiffs from saying "*anything* at all"—"whether flattering or unflattering, fact or opinion, innocuous or significant, and regardless of the medium of communication." *Flood v. Wilk*, 125 N.E.3d 1114, 1126 (Ill. App. Ct. 2019). So Defendants must bear the heavy burden of showing *all* of that speech would rise to the exceptionally high level of harassing or discriminatory conduct. But a brief wave as two students pass each other on a campus walkway or a simple "hello" as they enter class does not harassment make. Defendants already have robust policies in place prohibiting harassing and discriminatory conduct. Compl. ¶¶ 53, 62. That means they must show that the no-contact orders advance their interest in addition to what those policies already provide. They cannot. "It is all but impossible to imagine a factual record that would justify this blanket restriction on [Plaintiffs'] speech." *Flood*, 125 N.E.3d at 1126. "By any measure, this regulation of speech is demonstrably overbroad." *Bey*, 161 N.E.3d at 543.

Defendants' Star Chamber-style edicts pale in comparison with the tailoring required to issue no-contact orders in other situations that—like this one—implicate fundamental rights. Idaho law allows a court to issue an ex parte temporary protection order in cases involving "malicious harassment." Idaho Code § 18-7908. To do so,

a court must "find[ ]," based on a verified petition, that the respondent has "intentionally engaged" in malicious harassment and that "present harm could result if an order is not immediately issued without prior notice." *Id.* § 18-7908(1). Even so, the duration of the order, absent good cause, cannot exceed fourteen days, and the court must hold a "full hearing" with notice to the respondent no later than fourteen days after issuing the ex parte order. *Id.* § 18-7908(4). Similar procedural safeguards apply for domestic violence ex parte temporary protection orders. Idaho Code § 39-6308. Defendants offer none of the above, even though they threaten discipline all the way up to expulsion for violating the gag orders. Compl. ¶ 136.

"If the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002). Defendants cannot first bar Plaintiffs' speech based on the content and viewpoint expressed and then ask questions later. The First Amendment demands much more.

2. Defendants' no-contact orders and Policies cannot overcome the heavy presumption of prior restraints' unconstitutionality.

The prohibition on prior restraints applies with no "less force on college campuses." *Healy*, 408 U.S. at 180, 184. A prior restraint is "an administrative or judicial order that forbids certain communications issued before those communications occur." *Greater L.A. Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 430 (9th Cir. 2014). Prior restraints impose a "heavy burden" on colleges "to demonstrate the appropriateness of that action." *Healy*, 408 U.S. at 184. They are "the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). That is because "[i]t is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors." *Watchtower Bible & Tract Soc'y*

of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 165–66 (2002). It is no surprise then that prior restraints come with a "heavy presumption" against their constitutionality. *Cuviello v. City of Vallejo*, 944 F.3d 816, 826 (9th Cir. 2019).

So dangerous are prior restraints that governments must meet both substantive and procedural safeguards before implementing them. Substantively, government must satisfy the demanding requirements of strict scrutiny. *In re Dan Farr Productions*, 874 F.3d 590, 593 n.2 (9th Cir. 2017). The government must establish that the prior restraint is narrowly tailored to serve a compelling government interest. *See Levine v. U.S. Dist. Ct.*, 764 F.2d 590, 595 (9th Cir. 1985). The prior restraint must be the least restrictive means of achieving that interest. *Id.* "[A]ny imposition of a prior restraint must be based on *case-specific justifications* for why less extreme measures are not viable alternatives." *Dan Farr*, 874 F.3d at 596.

Governments must also demonstrate at least three procedural safeguards: (1) "restraints prior to judicial review may be imposed only for a specified brief period during which the status quo must be maintained"; (2) "expeditious judicial review" must be available; and (3) the government must bear "the burden of seeking judicial review and the burden of proof in court." *Twitter, Inc. v. Sessions*, 263 F. Supp. 3d 803, 810 (N.D. Cal. 2017) (citing *inter alia Freedman v. State of Maryland*, 380 U.S. 51, 58–60 (1965)). Defendants' no-contact orders and Policies fail both the First Amendment's substantive and procedural requirements.

a. Defendants' no-contact orders and Policies cannot survive the strict scrutiny required for a prior restraint.

As discussed above, Defendants' gag orders cannot withstand strict scrutiny. *Supra* Section I.A.1.b; *accord Thompson v. Ragland*, 23 F.4th 1252, 1260 (10th Cir. 2022) (denying qualified immunity when college officials issued a no-contact order based on protected speech). Neither can Defendants' Policies. Defendants have no compelling interest in restricting pure speech. *Supra* Section I.A.1.b. And

Defendants' Policies sweep much more broadly than any anti-harassment or anti-discrimination interests. The Policies allow Defendants to issue gag orders for any violation of the student code of conduct. Compl. ¶ 63. The code covers violations as diverse as cheating, theft of University resources, hazing, and drug use. *Id.* Ex. 6 at 2–4.

For that same reason, Defendants' Policies cannot be the least restrictive means to achieve any governmental interest. For all other interim actions in a disciplinary investigation, Defendants require a finding that without the action, some imminent harm will occur. *Id.* Ex. 9 at 10. But that does not apply to no-contact orders. *Id.* ¶¶ 69–70. Indeed, Defendants' Policies do not require Defendants to find *anything* to issue a no-contact order of unlimited duration. *Id.* And in Title IX cases, Defendants' policy calls for the "routine[ ] issu[ance]" of no-contact orders with no "specific determination" of future harm. *Id.* ¶¶ 67, 70. Thus, Defendants' Policies allow them to cut off all speech between students based on the mere suspicion of any violation of the student code of conduct. *Id.* ¶ 64.

Consider the case of a report that one friend allegedly plagiarized another friend's paper. Without a finding that the plagiarism in fact occurred or even likely occurred, that further plagiarism would recur between these two friends, that the threat of subsequent punishment was not enough to deter further plagiarism, or that any continued speech between the two friends would lead to violations of the code of conduct, Defendants could issue a no-contact order to prohibit any and all speech between the two friends and classmates. Censoring all speech between students based on only an alleged violation of the student code of conduct cannot be the least restrictive means of achieving any governmental interest.

b. Defendants' Policies impose a prior restraint without the necessary procedural safeguards.

Defendants' Policies allow them to issue no-contact orders for an unlimited duration and without the burden to seek any review of their censorship. *Id.* ¶¶ 71–73. Defendants imposed just such orders on Plaintiffs. *Id.* ¶ 128. The only appeal of a no-contact order Defendants' Policies offer goes to the very same officer that issued the order. *Id.* ¶¶ 59, 71. Defendants helpfully provide "no formal procedures for this appeal," and continue to enforce the no-contact order during the pendency of the appeal. *Id.* ¶¶ 72–73. The appeal does not go to a neutral third party, such as a court or even a different administrative body. *Contra Freedman*, 380 U.S. at 58 ("[B]ecause only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint."). Indeed, "[b]ecause the censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression." *Id.* at 57–58. Defendants provide no timeline for resolving disputed no-contact orders, violating the principle that a prior restraint must "be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." *Id.* at 59. Finally, Defendants shirk their "burden of persuasion" to show the need for the no-contact order on appeal. *Id.* at 58.

Governments must tailor prior restraints to redress "extremely serious" "substantive evil[s]" that have an "extremely high" degree of "imminence." *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1440 n.9 (9th Cir. 1984). The government must show a "solidity of evidence" to justify its prior restraint. *Id.* Given that standard, "[e]ven when a speaker has repeatedly exceeded the limits of the First Amendment, courts are extremely reluctant to permit the state to close down his communication forum altogether." *Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1296 (9th Cir. 1987). Here, Plaintiffs have engaged in pure religious speech

protected to the utmost by the First Amendment. They spoke on a college campus where "students must always remain free to inquire, to study and to evaluate, [and] to gain new maturity and understanding." *Rodriguez*, 605 F.3d at 708. One student apparently took offense to their speech, but "[w]ithout the right to stand against society's most strongly-held convictions, the marketplace of ideas would decline into a boutique of the banal, as the urge to censor is greatest where debate is most disquieting and orthodoxy most entrenched." *Id.*

3. Defendants' Policies grant unbridled discretion.

"[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969). Thus, courts "consistently condemn" speech regulations that "vest in an administrative official discretion to grant or withhold a permit based upon broad criteria unrelated to proper regulation of public places." *Id.* at 153. Left with only vague or non-existent criteria on which to make their decision, government officials "may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763–64 (1988). Policies that grant unbridled discretion, therefore, violate the First Amendment's prohibition on viewpoint discrimination. *Epona v. Cnty. of Ventura*, 876 F.3d 1214, 1225 (9th Cir. 2017).

Far from providing narrow, objective, and definite standards, Defendants' Policies go out of their way to remove bridles on discretion. They except no-contact orders from the general provision requiring a finding of some future harm before issuing an interim disciplinary action. Compl. ¶¶ 69–70. And they go further to require the "routine[ ] issu[ance]" of such orders in Title IX cases. *Id.* ¶ 67. The Policies do not even demand a formal complaint of student misconduct. *Id.* ¶¶ 54, 64. Nothing in the Policies limits to whom Defendants can issue no-contact orders. Nothing requires

Defendants to assess evidence of the threat of future harm or ongoing harm to justify sustaining the no-contact order. *Id.* ¶¶ 56, 58, 66, 68. Rather, Defendants' Policies allow administrators to issue no-contact orders "at anytime," "for any reason," and "in the sole and absolute discretion of the [administrator]." *Kaahumanu v. Hawaii*, 682 F.3d 789, 807 (9th Cir. 2012); *accord* Compl. ¶¶ 54–58, 64–70.

This case proves how unbridled discretion allows administrators to target speech based on viewpoint. Defendants have not imposed no-contact orders on other students who expressed opposing views on marriage. *Supra* Section I.A.1.a; *accord* Compl. ¶¶ 113, 166, 182. As the Ninth Circuit has recognized, unbridled discretion will cause citizens to "hesitate to express, or refrain from expressing, [their] viewpoint[s] for fear of adverse government action." *Kaahumanu*, 68 F.3d at 807. That's exactly what has happened to Plaintiffs—and potentially many other students—here. Compl. ¶¶ 149–51.

B. Defendants' no-contact orders and Policies violate the Free Exercise Clause.

Plaintiffs' right to "free exercise" includes not just the right to *believe*, but the right to *exercise* their faith. It encompasses the right to "profess whatever religious doctrine one desires," *Emp. Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 877 (1990), and to "communicat[e]" those teachings to others, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 199 (2012) (Alito, J., concurring). Under the Free Exercise Clause, a law or rule that is not neutral or generally applicable is subject to strict scrutiny. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

Defendants' no-contact orders show hostility to religious people and beliefs and thus flunk neutrality. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rts. Comm'n*, 138 S. Ct. 1719, 1729–31 (2018); *Lukumi*, 508 U.S. at 534. "The Free Exercise Clause bars even subtle departures from neutrality on matters of religion," and it applies "upon

even slight suspicion that . . . state [actions] stem from animosity to religion or distrust of its practices." *Masterpiece*, 138 S. Ct. at 1731 (cleaned up). Where an absence of neutrality boils over into hostility, the government violates the Free Exercise Clause, and courts need not consider the strict scrutiny analysis. *Id.* at 1729–32. Defendants imposed the no-contact orders because of Plaintiffs' speech regarding their religious beliefs about marriage. Compl. ¶¶ 143–45. But Defendants did not censor other students and a professor who spoke on the same topic but from a viewpoint opposing Plaintiffs. *Id.* ¶¶ 82, 110–13, 166, 182. That differential treatment shows Defendants' hostility to Plaintiffs' religion.

Defendants' Policies are not generally applicable because they create "a system of individualized governmental assessment of the reasons for the relevant conduct." *Lukumi*, 508 U.S. at 535, 537. Governments establish "a system of individualized exemptions" when they apply "a subjective test" on a "case-by-case basis" to assess if particular conduct is forbidden. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297 (10th Cir. 2004). Defendants' standardless Policies allow them to impose no-contact orders in a near limitless variety of circumstances. *Supra* Section I.A.2.a, I.A.3. Defendants have the discretion to censor Plaintiffs' religious speech while allowing other, opposing speech—which is exactly what happened here. But Defendants' Policies cannot meet strict scrutiny. *Supra* Section I.A.2.a. And, therefore, they violate the Free Exercise Clause.

II. Plaintiffs meet the remaining temporary restraining order and preliminary injunction factors.

Plaintiffs "meet the remaining requirements as a necessary legal consequence" of their showing on the merits of this religious speech case. *Otto v. City of Boca Raton*, 981 F.3d 854, 870 (11th Cir. 2020). Plaintiffs have already suffered and will continue to suffer irreparable harm without an injunction, the balance of equities sharply favors Plaintiffs, and an injunction would serve the public interest.

The Supreme Court, Ninth Circuit, and this Court have all repeatedly held that "the deprivation of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality); *Associated Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012); *ACLU of Idaho, Inc. v. City of Boise*, 998 F. Supp. 2d 908, 918 (D. Idaho 2014). That's why "[i]rreparable harm is relatively easy to establish in a First Amendment case." *Cal. Chamber of Com. v. Council for Educ. & Research on Toxics*, 29 F.4th 468, 482 (9th Cir. 2022) (cleaned up). Plaintiffs "need only demonstrate the existence of a colorable First Amendment claim." *Id.* Additionally, when, as here, plaintiffs "raise[ ] serious First Amendment questions," a court is "compel[led to] find[ ] that the balance of hardships tips sharply in Plaintiffs' favor." *Am. Beverage Ass'n v. City & Cnty. of S.F.*, 916 F.3d 749, 758 (9th Cir. 2019) (en banc) (cleaned up). Finally, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012).

Plaintiffs have meritorious First Amendment claims and are suffering ongoing censorship of their religious speech. *Supra* Sections I.A, I.B. They thus meet the remaining three factors and merit relief.

CONCLUSION

This Court should grant Plaintiffs' motion for a temporary restraining order and preliminary injunction.

Respectfully submitted this 26th day of April, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2022, I electronically filed the foregoing using the CM/ECF system, and will serve the same with Plaintiffs' Verified Complaint on the following parties:

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