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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Ryan Arneson,

Plaintiff,

vs.

Maricopa County Community College District; South Mountain Community College; Rufus Glasper, in his official capacity as Chancellor of the Maricopa County Community Colleges; Dr. Shari Olson, in her official capacity as President of South Mountain Community College; Buddy Cheeks, individually and in his official capacity as Director of Student Life & Leadership at South Mountain Community College,

Defendant.

Case No. CV 11-02587-PHX-NVW

Judge Neil V. Wake

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND SUPPORTING MEMORANDUM OF LAW

Oral Argument Requested

Accompanying Documents: Affidavit of Ryan Arneson; MCCCD Solicitation Policy; SMCC Solicitation Policy; MCCCD Petition Policy; Email from Buddy Cheeks

Plaintiff Ryan Arneson ("Arneson") respectfully moves this Court for a preliminary injunction against the Maricopa County Community College District ("MCCCD") and South Mountain Community College ("SMCC") solicitation policies, on their face and as-applied, to protect the peaceful religious expression of Arneson and third-party speakers in the open, outdoor areas at SMCC.

SUMMARY OF FACTS

Arneson is a Christian minister who desires to share his religious beliefs with others in public. (Affidavit of Ryan Arneson, ¶ 3, attached to Motion for Preliminary Injunction as Exhibit "A"). Arneson does so peacefully through one-on-one conversation and literature distribution. (Ex. "A," ¶ 4). Toward this end, Arneson wants to convey his Christian message in the open, outdoor areas on the Main Campus of SMCC, one of the many community colleges that make up the MCCCD. (Ex. "A," ¶¶ 3, 9). These open, outdoor areas at SMCC resemble public parks, public sidewalks, and public pedestrian malls and are well suited for Arneson's expression. (Ex. "A," ¶ 12). Students and non-students have free access to these areas and commonly use them. (Ex. "A," ¶ 13).

From 2009 until mid-2011, Arneson periodically expressed his beliefs in one of the outside areas at SMCC. (Ex. "A," ¶¶ 14-26). He did so with the approval of the SMCC administration. (Ex. "A," ¶ 23). But following the 2011 spring semester, SMCC began to require Arneson to pay fees to engage in any expression at SMCC, pursuant to SMCC's and MCCCD's solicitation policies. (Ex. "A," ¶¶ 23-25; email from Buddy Cheecks, attached to attached to Motion for Preliminary Injunction as Exhibit "E"). Aside from this fee requirement, many other provisions in the SMCC and MCCCD solicitation policies hinder and deter Arneson's desired expression on campus. (Ex. "A," ¶¶ 27-34).

As a result, Arneson has stopped expressing his religious beliefs at SMCC. (Ex. "A," ¶ 34). If not for these solicitation policies, and the actions of Defendants, Arneson would immediately return to SMCC to share his religious message via conversation and literature distribution. (Ex. "A," ¶ 34).

ARGUMENT

A preliminary injunction motion turns on four factors: (1) the likelihood of Plaintiff's success on the merits; (2) the likelihood of irreparable harm to the Plaintiff in the absence of relief; (3) the balance between the harm to the Plaintiff and the harm that the relief would cause to the other litigants; and (4) the public interest. *Stormans, Inc. v. Selecky*, 571 F.3d 960, 977-78 (9th Cir. 2009). All of these factors favor Arneson receiving his requested injunctive relief.

I. ARNESON IS LIKELY TO SUCCEED ON MERITS

Arneson seeks to enjoin the MCCCD and SMCC solicitation policies because they place undue limitations on his expression in public places and thereby violate the First Amendment. In evaluating a speech restriction on public property, this Court is to A) assess whether the expressive activity deserves protection, B) determine the nature of the forum, and C) apply the appropriate level of scrutiny to the restriction. *Currier v. Potter*, 379 F.3d 716, 734-35 (9th Cir. 2004).

A. Arneson's Expression Triggers First Amendment Protection

Arneson desires to convey his religious beliefs through one-on-one dialogue and literature distribution. (Ex. A, ¶ 34). These harmless – but vital – means of communication deserve First Amendment protection. *See, e.g., Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981) (oral and written dissemination of religious viewpoints); *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943) (religious literature distribution).

B. Arneson Wants to Speak in Public Fora

The extent speech on public property can be properly regulated depends on the character of the property in question. *Frisby v. Schultz*, 487 U.S. 474, 479 (1988). The Ninth Circuit observes four categories of property for speech purposes: traditional, designated, limited, and nonpublic. *Flint v. Dennison*, 488 F.3d 816, 830 (9th Cir. 2007). Traditional public fora are places that, by long tradition, have been devoted to assembly

and debate. *Id.* Designated public fora are spots that the government has intentionally set aside for expressive activity. *Id*. Limited public fora are designated public fora that the government has intentionally limited to certain groups or for select topics. *Id*. at 831. And nonpublic fora are those remaining publicly-owned areas that have not by tradition or designation been opened up to expressive activity. *Id*. at 830.

For this determination, a fundamental consideration is "the access sought by the speaker." *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 965 (9th Cir. 1999). Arneson desires to speak in sidewalks, parks, and pedestrian malls on SMCC's campus. (Ex. A, ¶¶ 11-14).

1. Open, outside areas at SMCC are presumptively traditional public fora

Sidewalks, streets, parks and pedestrian malls have long been considered "prototypical" examples of traditional public fora. *Schneck v. Pro-Choice Network*, 519 U.S. 357, 377 (1997). No "particularized inquiry" into the precise nature of these types of areas is needed. *Frisby*, 487 U.S. at 481. "[W]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public…for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). All sidewalks, park areas, and public malls are presumptively traditional public fora. *See, e.g.*, *United States v. Grace*, 461 U.S. 171, 177 (1983) ("streets, sidewalks, and parks, are considered, without more, to be 'public forums.'"); *Henderson v. Lujan*, 964 F.2d 1179, 1182 (D.C. Cir. 1992) (noting that "the burden [is] on the government to show that the use [of a sidewalk] was overwhelmingly specialized" in order to negate its traditional public forum status); *ACLU of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1105 (9th Cir. 2003) ("the onus is on the Defendants to demonstrate that the area encompassed by the Fremont Street Experience is no longer a street and has lost its public forum status."); *Warren v. Fairfax County*, 196 F.3d 186, 196 (4th Cir. 1999) (en banc) ("If streets, sidewalks, and parks are traditional public fora, then a court bears a heavy burden in explaining why a property which is mainly a

combination of all three from a standpoint of physical characteristics, objective uses and purposes, and traditional historic treatment, is not.").

The Ninth Circuit acknowledged this well-established principle in *ACLU of Nevada v. City of Las Vegas*. There, the City of Las Vegas created a pedestrian mall area known as the Freemont Street Experience. 333 F. 3d at 1094-95. This area contained infrastructure elements and pavement distinguishing it from other sidewalks and streets. *Id*. On this basis, Las Vegas claimed that the area had lost its traditional public forum status. *Id*. The Ninth Circuit viewed the matter differently, noting that the area retained objective characteristics of a sidewalk and pedestrian mall. *Id*. at 1101. Considering physical characteristics more important than governmental intentions, the Ninth Circuit held the area to be a traditional public forum. *Id.* at 1104.

The objective characteristics highlighted in *ACLU of Nevada* support the existence of traditional public fora at SMCC. Arneson desires to speak in areas where students and non-students congregate and regularly engage in expression. (Ex A., ¶ 13). The general public has free access to these areas. (Ex A., ¶¶ 11-13). These areas have every appearance of streets, sidewalks, pedestrian malls, and park-like areas, sharing the same physical characteristics as their counterparts off-campus. (Ex A., ¶ 12). *See also First Unitarian Church of Salt Lake City v. Salt Lake City Court*, 308 F.3d 1114, 1124-29 (10th Cir. 2002) (relying on objective factors such as the property's physical characteristics to rule that privately owned sidewalk was traditional public forum). Moreover, the historical use of college property is congruent with the discussion of ideas. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 836 (1995).

Like the fora scrutinized in *ACLU*, the open, outdoor areas at SMCC must be deemed traditional public fora. Another district court in the Ninth Circuit has made this very finding in the university context, declaring that "sidewalks and plazas on a publicly-supported college campus constitute a public forum…" because a "primary purpose of a college or university is to contribute to the exchange of ideas…" *Jews for Jesus, Inc. v.*

City College of San Francisco, No. C 08-03876 MHP, 2009 WL 86703, at *3 (N.D.Cal. Jan. 12, 2009). This Court should do likewise.

2. Defendants cannot rebut presumption favoring traditional public forum status

Given that the open, outdoor areas at SMCC are presumptively traditional public fora, the burden is squarely on university defendants to rebut the presumption, which can only be done by showing that the subject areas are somehow incompatible with expression. *See, e.g.*, *Las Vegas*, 333 F.3d at 1100 (noting that the most significant principle to determine status is the "common concern for the compatibility of the uses of the forum with expressive activity."). University defendants are unable to make this showing. (Ex A., ¶ 13).

The only difference between these public areas and other public sidewalks, parks, and malls found elsewhere in Phoenix is location. This fact cannot negate traditional public forum status; streets, parks, and malls appear in a multitude of unique places, and yet, such areas typically secure traditional public forum status. *See, e.g.*, *Berger v. City of Seattle*, 569 F.3d 1029, 1035 (9th Cir. 2009) (*en banc*) (finding 80-acre public park to be traditional public forum despite its unique attributes); *Id*. at 1036 n.3, 1085 (adopting analysis of concurrence that park was still traditional public forum even though park was not "the average public park" but contained "novel attributes"); *ACLU*, 333 F.3d at 1100-05 (finding street to be traditional public forum despite its unique design, location, and purpose); *Gerritsen v. City of Los Angeles*, 994 F.2d 570, 576 (9th Cir. 1993) (finding part of park to be traditional public forum even though it had a "unique historic and cultural atmosphere" and a "special ambience," because park area was no different from other areas of park). A college campus is no different, for it also contains many unique places where parks, sidewalks, and malls appear.[1] What matters, whether on campus or

[1] A public university contains a wide variety of fora. *See, e.g.*, *Bowman v. White*, 444 F.3d 967, 976-77 (8th Cir.2006) (recognizing multiple fora on university campus). And if

off, is not location, but compatibility with expression.[2] And this factor overwhelmingly supports the existence of traditional public fora at SMCC.[3]

C. MCCCD and SMCC Solicitation Policies are Unconstitutional Prior Restraints

The final step in forum analysis is to apply the appropriate scrutiny to the solicitation policies. The scrutiny is great here, since the policies constitute prior restraints.

A prior restraint is any law "forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993). This definition encompasses the MCCCD Policy since it requires speakers to obtain "prior approval" before speaking on a campus. (Ex. B, §2.A). Likewise, the SMCC Policy requires speakers to submit a request form "[a]t least 14 days in advance of your visit." (Ex. C). These policies force all would-be speakers to apply for

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a university, like a city, contains a wide variety of fora, it follows that a university contains traditional public fora, just like a city. *Id.* at 988 (Bye, J. concurring) (explaining that outside areas on campus deserve traditional public forum status).

[2] The university's stated intent or purpose cannot alter the traditional forum status of its campus. *See ACLU*, 333 F. 3d at 1104. It does not matter if the primary purpose of a university is education, and not expression; no traditional public forum has a primary purpose of expression. *See Warren*, 196 F.3d at 195 ("The primary purpose for which a particular piece of property was created is not dispositive. One cannot seriously argue with Justice Kennedy's observation that the traditional public fora of streets, sidewalks, and parks are not primarily designed for expressive purposes.").

[3] If not traditional public fora, these areas are designated public fora because the solicitation policies themselves open these areas up for a wide variety of expressive topics and to a wide variety of groups. (Ex. B, §1) (allowing any solicitor to speak on campus and defining solicitor broadly as any entity that would "purport to sell or promote any product, service, or idea"); (Ex. C) (section on "General Information"). With these policies, SMCC and MCCCD have intentionally opened up SMCC to discourse and created a designated public forum (if not traditional public forum). *See Bowman*, 444 F. 3d at 977-79 (university created designated public forum through policy allowing wide variety of expressive topics and speakers on campus). The creation of a designated public forum is significant because the same standard of scrutiny applies in both traditional and designated public fora. *See Flint*, 488 F.3d at 830.

and secure permission speak prior to speaking --- the distinguishing mark of a prior restraint.

The classification is critical because prior restraint bears "a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). To survive scrutiny, a prior restraint must be content-neutral, narrowly tailored to serve a significant governmental interest, leave open alternatives for communication, and contain sufficient guidelines clear to avoid unbridled discretion. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). MCCCD's and SMCC's solicitation policies do not meet these standards.

1. Policies are content-based

Content-based restrictions are particularly suspect. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger*, 515 U.S. at 831. "A regulation is content-based if either the underlying purpose of the regulation is to suppress particular ideas, or if the regulation, by its very terms, singles out particular content for differential treatment." *Berger*, 569 F.3d at 1051.

The MCCCD and SMCC solicitation policies are content-based since both policies textually single out political content for special treatment over religious expression. Both solicitation policies explicitly exempt expression about political candidates and about political referenda from their requirements. (Ex. B, §1) (noting that policy applies to all solicitors "but does not include such an entity that would enter the premises for the purposes of promoting, opposing, or soliciting petition signatures in connection with any political candidate or initiative, or referendum ballot.") (Ex. C).[4] Persons soliciting

[4] While the solicitation policies exempt political expression, MCCCD's Petition Policy supplies special treatment for political expression. (Ex. D, §§1, 3) (regulating "representatives who wish to solicit signatures on petitions for the purpose of submission of a ballot proposition to voters, or nomination of a candidate for elective office" and

religious content and distributing religious material at SMCC fall under the solicitation policies and are subject to those harsh burdens, but those soliciting political content and distributing political material are exempted from them. The distinction turns solely on the content a person solicits and/or distributes. At SMCC, what a person says determines how freely that person may speak.

Since the distinction is rooted in the very terms of the MCCCD and SMCC policies, these policies are necessarily content-based. The only way MCCCD and SMCC officials can determine whether expression falls under the "political exemption" in their solicitation policies is to evaluate the content of a speaker's message. *See ACLU v. City of Las Vegas*, 466 F.3d 784, 795-96 (9th Cir. 2006) (noting that policy is content-based if officer must read speaker's message to determine if expression qualifies for exemption in policy). *Accord Foti v. City of Menlo Park*, 146 F.3d 629, 636 (9th Cir. 1988). Policies similar to the MCCCD and SMCC policies have been pegged as content-based. *See, e.g.*, *ACLU*, 466 F.3d at 793 (ordinance banning solicitation "for the purpose of obtaining money, charity, business or patronage, or gifts of items of value for oneself or another person or organization" was content based); *Lopez v. Town of Cave Creek*, 559 F.Supp.2d 1030, 1032 (D.Ariz. 2008) (ordinance was content-based because it "prohibits solicitation on the topics of 'employment, business or contributions,' while allowing solicitation of votes or ballot signatures.").[5]

Being content-based, MCCCD and SMCC solicitation policies are "presumptively unconstitutional" and subject to "strict scrutiny." *ACLU*, 466 F.3d at 792. Accordingly,

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who distribute "informational literature about the proposed candidate or ballot initiative."). In comparison, the solicitation policies impose much stricter requirements on expression than the petition policy. *Compare* (Ex. B, §2) *with* (Ex. D).

[5] The MCCCD and SMCC solicitation policies are no different from sign ordinances deemed to be content-based for exempting particular signs due to content. *See, e.g.*, *Desert Outdoor Advertising v. City of Moreno Valley*, 103 F.3d 814, 820 (9th Cir. 1996); *National Advertising Co. v. City of Orange*, 861 F.2d 246, 249 (9th Cir. 1988).

MCCCD and SMCC solicitation policies cannot hope to overcome "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

2. Policies are not narrowly tailored to further any significant interest

MCCCD's and SMCC's solicitation policies also violate the First Amendment because they are not narrowly tailored to a significant government interest.[6] Under this requirement, regulations cannot "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). A restriction is "narrowly tailored" only if it eliminates no more evil than it seeks to remedy. *Frisby*, 487 U.S. at 485.

In this respect, "the First Amendment demands that municipalities provide 'tangible evidence' that speech-restrictive regulations are 'necessary' to advance the proffered interest…" *Edwards v. City of Coeur d'Alene*, 262 F.3d 856, 863 (9th Cir. 2001) (citation omitted). And, the availability of less burdensome alternatives is an indicator of insufficient tailoring. *See Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1041 (9th Cir. 2006). Five separate provisions in the subject solicitation policies are not narrowly tailored.

a. fourteen-day notice requirement

SMCC's solicitation policy requires speakers to apply and submit paperwork "[a]t least 14 days in advance of your visit." (Ex. C). This requirement applies to any individual wishing to engage in any type of speech, including one-on-one dialogue and literature distribution, creating an excessively long delay on expression.

There is no adequate justification for this delay. Of course, "[a]ny notice period is a substantial inhibition on speech." *American-Arab Anti-Discrimination Comm. v. City of*

[6] For the same reasons that these policies lack narrow tailoring, they are also overbroad, because they restrict a substantial amount of protected expression. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002).

Dearborn, 418 F.3d 600, 605 (6th Cir. 2005). It is offensive "to the very notion of a free society…" that "a citizen must first inform the government of her desire to speak…" even if issuance of permits is "a ministerial task that is performed promptly and at no cost to the applicant…" *Watchtower Bible & Tract Soc'y v. Vill. of Stratton*, 536 U.S. 150, 165-66 (2002). Not only do notice schemes prevent many "religious and patriotic" persons from speaking, *id.* at 165-67, notice schemes also eliminate spontaneous speech because of the "procedural hurdle" of filling out paperwork and the "temporal hurdle of waiting for the permit to be granted…" *Grossman v. City of Portland*, 33 F.3d 1200, 1206 (9th Cir. 1994) (citations omitted).

For these reasons, advance notice requirements are heavily scrutinized to ensure that they do not impose too great a delay. *See, e.g.*, *Church of the Am. Knights of the Ku Klux Klan v. City of Gary*, 334 F.3d 676, 682 (7th Cir. 2003) ("[T]he length of the required period of advance notice is critical to its reasonableness…a very long period of advance notice with no exception for spontaneous demonstrations unreasonably limits free speech."). And a 14-day notice requirement imposes too great a delay. To be sure, any requirement longer than three days is unsustainable. *See, e.g.*, *Sullivan v. City of Augusta*, 511 F.3d 16, 38-40 (1st Cir. 2007) (invalidating thirty day notice requirement); *Douglas v. Brownell*, 88 F.3d 1511, 1523-24 (8th Cir. 1996) (invalidating five day notice requirement); *Grossman*, 33 F.3d at 1204-08 (invalidating seven day notice requirement); *NAACP v. City of Richmond*, 743 F.2d 1346, 1357 (9th Cir. 1984) ("[A]ll available precedent suggests that a 20-day advance notice requirement is overbroad."); *Roberts v. Haragan*, 346 F.Supp.2d 853, 868-69 (N.D.Tex. 2004) (invalidating two-day advance notice requirement for students to speak in certain designated areas on university campus). Concerns over traffic, crowd control, property maintenance, or the public welfare, while legitimate, cannot support a notice of 14 days; university officials do not need two weeks to plan for someone having a conversation on campus.

The scrutiny is particularly great for individuals and small groups. While some sort of notice might be beneficial in dealing with a large group, individuals and small groups do not generate the same concerns. *See, e.g.*, *Santa Monica*, 450 F.3d at 1039. Consequently, advance notice requirements cannot be imposed on individuals and small groups wishing to speak in public fora. *See Berger*, 569 F.3d at 1039 ("It is therefore not surprising that we and almost every other circuit to have considered the issue have refused to uphold registration requirements that apply to individual speakers or small groups in a public forum."). *Accord Boardley v. U.S. Department of Interior*, 615 F.3d 508, 523 (D.C. Cir. 2010); *Cox v. City of Charleston*, 416 F.3d 281, 284-86 (4th Cir. 2005); *Dearborn*, 418 F.3d 608. SMCC's 14-day notice requirement is unnecessarily long, specifically, as applied to individuals and small groups.

b. fee requirement

MCCCD's and SMCC's solicitation policies also lack narrow tailoring for another reason: they charge excessive fees without exempting those who cannot pay them.[7] Both policies require a speaker to pay an exorbitant "Campus Visit Fee of $50/day or $125/week." (Ex. B, §2.A); (Ex. C). Both policies also require speakers to obtain insurance and present a "certificate of insurance" to SMCC. (Ex. B, §2.A); (Ex. C) (requiring general liability policy covering 1 million dollars).

These costs are unconstitutionally excessive. Licensing fees and insurance fees are permissible only if they are nominal and serve to defray the cost of administrative expenses. *See Murdock*, 319 U.S. at 113-14 (invalidating fee on solicitation because it "is not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question."); *Citizens Action Group v. Powers*, 723 F.2d 1050, 1056 (2d Cir. 1983) (invalidating $200 administrative fee to use government property because

[7] For the same reasons that MCCCD's and SMCC's advance notice requirement lacks narrow tailoring for applying to individuals and small groups, the fee requirements also lack tailoring for applying to individuals and small groups.

government failed to show fee defrayed costs); *Id.* at 1057 (invalidating requirement to obtain $100,000/$300,000 liability policy because such a requirement was excessive); *Fernandes v. Limmer*, 663 F.2d 619, 633 (5th Cir. 1981) (invaliding a $6 per day fee to distribute literature in a municipal airport because fee did not defray costs). MCCCD's and SMCC's fees are neither nominal nor necessary. It is inconceivable that a person standing on a sidewalk engaging in one-on-one conversation could produce costs of $50 per day or necessitate one million dollars in insurance coverage. The charges supply an unjustified profit for MCCCD and SMCC at the expense of free speech.

To be valid, regulations that impose insurance requirements and other fees must exempt indigent speakers. *See, e.g., Powers*, 723 F.2d at 1056-57 (invalidating permit requirement when applied to group unable to afford insurance); *Cent. Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1523-24 (11th Cir. 1985) (invalidating parade ordinance in part because it failed to exempt indigents from paying the cost for police protection); *Coe v. Town of Blooming Grove*, 567 F.Supp.2d 543, 563-64 (S.D.N.Y. 2008) (invalidating policy imposing insurance requirement on speakers without exempting indigents); *Van Arnam v. GSA*, 332 F.Supp.2d 376, 406 (D.Mass. 2004) (invalidating an indemnification requirement for lack of indigency exemption. SMCC requires an insurance fee and a use fee and the total of all these fees makes it impossible for indigents (as well as many other individuals) to speak anywhere at SMCC. This undue burden is not narrowly tied to any legitimate interest.[8]

[8] MCCCD and SMCC may attempt to defend its fee and insurance requirements by pointing to its ability to waive these requirements, but this defense is insufficient. First, nothing in the solicitation policies allows for waiver. Though the MCCCD policy allows for waiver for "special events" and for "students" (Ex. B, §2.F), Arneson does not qualify under either category. Second, even if the MCCCD and SMCC solicitation policies could be interpreted to allow waivers, these policies only allow for the possibility of waiver; they do not guarantee waiver. (Ex. B, §2.F) ("A college may waive the fee prescribed…") (emphasis added). Consequently, the policies would still be unconstitutional because they would empower officials with unbridled discretion to make waiver decisions for any

c. insurance requirement

MCCCD's and SMCC's solicitation policies are also constitutionally problematic for requiring speakers to insure SMCC against the actions of third parties.[9] The SMCC solicitation policy explicitly makes applicants supply a "certificate of insurance displaying appropriate insurance coverage." (Ex. B, §2.A); (Ex. C).

Forcing speakers to secure insurance coverage, SMCC is indirectly forcing speakers to pay for the misdeeds of third parties. It requires speakers to do the impossible: control the actions of third parties. For instance, an audience member could attack a speaker or create some type of disturbance out of anger with a speaker's message. Insurance companies would necessarily take this factor into account when assessing costs speakers must bear to obtain the insurance, necessarily imposing fees on a speaker based on the potential misbehavior by third parties. This circumstance imposes too great a burden on free speech.

For this reason, the Ninth Circuit has condemned insurance requirements when they consider the actions of third parties. *See, e.g., Long Beach*, 574 F.3d at 1041 (invalidating insurance requirement because it "contain[ed] no exclusion for losses to the City occasioned by the reaction to the permittees' expressive activity. The clauses thus allow the City impermissibly to shift some of the costs related to listeners' reactions to speech from the City to the permittees…. The provision requires permittees to assume legal and financial responsibility even for those 'activities at the event' that are outside the control

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reason, even for content and viewpoint-based reasons. *See, e.g., Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1043 (9th Cir. 2009) (invalidating policy for giving city officials discretion to waive "departmental services charges"). *Accord Dearborn*, 418 F.3d at 607; *City of Gary*, 334 F.3d at 682; *City of Richmond*, 743 F.2d at 1357-58.

[9] For the same reasons that MCCCD's and SMCC's advance notice requirement lacks narrow tailoring for applying to individuals and small groups, the insurance requirement also lack tailoring for applying to individuals and small groups.

of the permittee.").[10]

Just like the insurance requirement invalidated in *Long Beach*, MCCCD's and SMCC's insurance requirement forces speakers to bear the costs for the actions of third parties --- actions that the permittee cannot control and actions that include hostile reactions to a speaker's message. And, just like the provisions invalidated in *Long Beach*, MCCCD's and SMCC's insurance requirements should also be invalidated.

d. exception for political expression

As noted, the MCCCD and SMCC solicitation policies exempt political expression from their undue requirements. This exemption undermines any need for the existence of the policies in the first place. *See City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) ("Exemptions from an otherwise legitimate regulation of a medium of speech ... may diminish the credibility of the government's rationale for restricting speech in the first place."). *Accord Chaker v. Crogan*, 428 F.3d 1215, 1226-27 (9th Cir. 2005).

SMCC cannot justify its 14-day notice requirement as necessary to prepare and plan for potential religious speakers, while simultaneously declining to apply this same rationale to political speakers. There is no reason to think a political speaker would cause fewer problems or necessitate less planning time than a religious speaker. In light of this similarity between

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[10] In effect, MCCCD's and SMCC's insurance requirements are also content-based. A regulation that turns on listener reaction is a content-based restriction subject to strict scrutiny. *See Forsyth County*, 505 U.S. at 134. Because MCCCD's and SMCC's insurance requirement forces speakers to absorb the costs of third parties, including those parties that react angrily toward a speaker's message, these provisions improperly turn on listener reaction. *See, e.g., Id.* at 134 (invalidating permit scheme as content based for forcing speaker to cover fee for the cost of necessary and reasonable protection of persons participating in or observing event); *The Nationalist Movement v. City of York*, 481 F.3d 178, 185-86 (3d Cir. 2007) (invalidating permit scheme requiring speakers to sign covenant promising to "bear all costs of policing, cleaning up and restoring" a park because provision was content based); *Walsh*, 774 F. 2d at 1521-23 (invalidating ordinance requiring groups to prepay cost of police protection where unpopularity of the message might increase cost).

these two types of speakers, SMCC's exemption for political speakers proves that SMCC can in fact accommodate religious speakers, process their applications, and effectively coordinate resources in less than 14 days.[11] By exempting political speakers from its requirements, SMCC reveals that the requirements are superfluous. Thus, SMCC has failed to carry its burden to show "that the harms it recites are real" and has failed to show that its policies further any government interest. *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). *See also Kuba v. 1-A Agr. Ass'n*, 387 F.3d 850, 859 (9th Cir. 2004) ("merely invoking interests…is insufficient. The government must also show that the proposed communicative activity endangers those interests.").

e. ban outside designated areas

The final reason that the MCCCD and SMCC solicitation policies lack tailoring is because of the complete ban on expression imposed by these policies. Though these policies allow expression in certain designated areas, they only allow expression in these particular areas. (Ex. B, §2.C) ("All solicitation must take place at tables in designated areas."); (Ex. C) ("Solicitors will be directed to a college-designated area…"). These policies effectively ban all expression – including conversation and literature distribution – outside of these designated areas.[12]

Such a complete ban on all forms of expression is too broad in a public forum. *See, e.g.*, *Schneider v. New Jersey*, 308 U.S. 147, 157-64 (1939) (invalidating ban on literature distribution occurring on public sidewalks); *Lederman v. United States*, 291 F.3d 36, 44-46 (D.C. Cir. 2002) (invaliding ban on "demonstrations" including "speechmaking" on sidewalks around capital building); *Gerritsen*, 994 F.2d at 577 (invalidating ban on literature distribution in certain parts of city park). There is no justifiable reason to ban

[11] Of course this logic applies to condemn the fees and insurance requirements just as it condemns the 14 day advance notice requirement.

[12] This ban severely hinders Arneson since he wants to speak in various areas on campus. (Ex A., ¶ 29).

every form of speech on open areas of SMCC's campus, particularly, one-on-one dialogue and literature distribution that pose no threat to security or traffic flow.[13]

3. SMCC solicitation policy allows for unbridled discretion

SMCC's solicitation policy further violates the First Amendment because it forces applicants to speak in "a college-designated area," but does not specify this location or constrain the discretion of officials in choosing the area. (Ex. B, §2.C); (Ex. C). The policy allows SMCC officials to assign a speaker to an inaccessible area of campus for any reason, including dislike of a speaker's message. Nothing in the policy guides SMCC officials in making this assessment or prevents officials from playing favorites based on their like/dislike of a speaker's message. In turn, speakers are forced to tailor their message to appease officials enforcing the policy or forgo speaking altogether for fear of punishment. This dilemma is forbidden by the unbridled discretion doctrine. *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988).[14]

The Supreme Court invalidated a policy just like SMCC's policy in *Lakewood v. Plain Dealer Publ'g Co.* In *Lakewood*, a city ordinance gave the mayor power to deny applications to place newsrack on public property. *Id.* at 753-54. And the ordinance also allowed the mayor to impose any "other terms and conditions deemed necessary and reasonable by the Mayor." *Id.* The Supreme Court invalidated this scheme not only because it gave the mayor unbridled discretion to deny applications but also because it gave the mayor unbridled discretion to "require the newsrack to be placed in an inaccessible location without providing any explanation whatever." *Id.* at 769-70. Like

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[13] Broad bans on literature distribution are not even allowed in non-public fora, much less the traditional public forum at issue here. *See, e.g., Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 680-683 (1992); *Norfolk v. Cobo Hall Conference and Exhibition Center*, 543 F.Supp.2d 701, 712 (E.D.Mich. 2008); *Wickersham v. City of Columbia*, 371 F.Supp.2d 1061, 1088-92 (W.D.Mo. 2005).

[14] Unbridled discretion is so harmful that it is forbidden in every forum type, including nonpublic fora. *See Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Schs.*, 457 F.3d 376, 386 (4th Cir. 2006).

the ordinance invalidated in *Lakewood*, SMCC's policy gives officials unbridled discretion to make the location of speech at SMCC impractical. This unbridled discretion acts as a separate and distinct violation of the First Amendment.

II. ARNESON IS SUFFERING IRREPARABLE HARM

Without the requested injunction, Arneson is continually prevented from exercising his First Amendment rights in a public forum. He desires to speak but cannot due to fear of punishment. (Ex A., ¶ 34). His loss of the right to speak is both actual and imminent, resulting in irreparable injury. *See Sammartano v. First Judicial District Court*, 303 F.3d 959, 973 (9th Cir. 2002).

III. INJUNCTION WILL CAUSE NO HARM TO DEFENDANTS

Granting Arneson's request for injunctive relief - which only commands Defendants to comport with constitutional requirements - will cause no true harm to them. There is no legitimate interest in enforcing an unconstitutional policy. *See, e.g., Klein v. City of San Clemente*, 584 F.3d 1196, 1207 (9th Cir. 2009) (noting that "our caselaw clearly favors granting preliminary injunctions to a plaintiff like Klein who is likely to succeed on the merits of his First Amendment claim…").

IV. PUBLIC INTEREST FAVORS INJUNCTION

In this matter, the public interest will be best served by the elimination - rather than the continuation - of censorship at SMCC. The public is best served by preserving informed public discourse at one of its centers for higher learning. *See Sammartano*, 303 F.3d at 974.

CONCLUSION

For the foregoing reasons, Arneson respectfully requests this Court to grant his Motion for Preliminary Injunction.

Respectfully submitted this the 17th day of January, 2012.

By:

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2012, I electronically filed the foregoing paper with the Clerk of Court using the ECF system which will send notification of such filing to the following: none

and I hereby certify that a copy of the foregoing, along with the Complaint and Summons, has been/will be delivered to a process server for service on defendants.

/s/ Nathan W. Kellum

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