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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

OSU STUDENTS ALLIANCE, a registered student organization at Oregon State University and non-profit corporation organized under section 501(c)(3) of the Internal Revenue Code, and **WILLIAM ROGERS**,

Plaintiffs,

v.

Case No. 6:09-cv-06269-AA
Hon. Ann L. Aiken

PLAINTIFFS' MOTION TO ALTER, AMEND, AND/OR RECONSIDER THE FEBRUARY 22, 2010 JUDGMENT AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT
Pursuant to Fed. R. Civ. P. 59(e)
Request For Oral Argument

ED RAY, individually, and in his official capacity as President of Oregon State University; **MARK MCCAMBRIDGE**, individually, and in his official capacity as Vice President for Finance and Administration of Oregon State University; **LARRY ROPER**, individually, and in his official capacity as Vice Provost for Student Affairs at Oregon State University; **VINCENT MARTORELLO**, individually, and in his official capacity as Director of Facilities Services for Oregon State University,

Defendants.

Pursuant to L.R. 7.1, Plaintiffs' counsel, Heather Gebelin Hacker, hereby certifies that counsel for Plaintiffs made a good faith effort to confer with defense counsel, Roger J. DeHoog and Nathan B. Carter, concerning the substance of this motion, and counsel cannot agree.[1]

Plaintiffs OSU Students Alliance (OSUSA) and William Rogers, by and through counsel, and pursuant to Fed. R. Civ. P. 59(e), hereby move this Court to alter, amend, and/or reconsider its February 22, 2010 Judgment (Dkt. #57) and Order (Dkt. #56) granting Defendants' Motion to Dismiss and Motion for Summary Judgment. The Judgment and Order makes several clear errors of law which have resulted in injustice to the Plaintiffs, who were denied a fair opportunity to litigate their claims against Defendants. As to the motion to dismiss, each of Plaintiffs' causes of action stated claims for relief under the applicable standards, but the Court dismissed the claims by disregarding several aspects of Plaintiffs' claims, construing the facts in favor of the Defendants, and applying an erroneous legal standard. Further, the Court should have allowed Plaintiffs to amend their complaint prior to dismissal with prejudice. As to the

[1] Specifically, on March 19, 2010, attorney David J. Hacker contacted Messrs. DeHoog and Carter to inform them of Plaintiffs forthcoming Fed. R. Civ. P. 59(e) motion and to inquire as to whether their clients oppose or consent to the motion. Mr. DeHoog stated on March 22, 2010 that his clients oppose the motion.

motion for summary judgment, the Court erred by ignoring Plaintiffs' Fed. R. Civ. P. 56(f) request to conduct discovery necessary to the case before granting summary judgment in Defendants' favor, and by relying on a disputed material fact. These errors of law have denied justice to Plaintiffs, and Plaintiffs respectfully request the Court reconsider its ruling in light of these errors.

This motion is made pursuant to the Federal Rules of Civil Procedure, the grounds specified in Plaintiffs' memorandum in support of this motion, the Verified Complaint in this action, the exhibits attached thereto, the declarations on file, and such other and further evidence as may be presented to the Court at the time of the hearing.

Respectfully submitted this 22nd day of March, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2010, 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:

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

OSU STUDENTS ALLIANCE, a registered student organization at Oregon State University and non-profit corporation organized under section 501(c)(3) of the Internal Revenue Code, and **WILLIAM ROGERS**,

Plaintiffs,

Case No. 6:09-cv-06269-AA
Hon. Ann L. Aiken

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO ALTER, AMEND, AND/OR RECONSIDER THE FEBRUARY 22, 2010 JUDGMENT AND ORDER GRANTING DEFENDANTS'

vs.

ED RAY, individually, and in his official capacity as President of Oregon State University; **MARK MCCAMBRIDGE**, individually, and in his official capacity as Vice President for Finance and Administration of Oregon State University; **LARRY ROPER**, individually, and in his official capacity as Vice Provost for Student Affairs at Oregon State University; **VINCENT MARTORELLO**, individually, and in his official capacity as Director of Facilities Services for Oregon State University,

Defendants.

MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT
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INTRODUCTION

Plaintiffs seek reconsideration of the Court's February 22, 2010 judgment and order granting Defendants' motions to dismiss and for summary judgment and dismissing Plaintiffs' case. The Court made several errors of law which have resulted in injustice to the Plaintiffs, who were denied a fair opportunity to litigate their claims against Defendants. Plaintiffs stated claims for relief under each cause of action under the applicable standard, but the Court dismissed the claims by disregarding several aspects of Plaintiffs' claims, construing the facts in favor of the Defendants, and applying an erroneous legal standard. Further, the Court should have allowed Plaintiffs to amend their complaint if essential facts to state a claim were found lacking. The Court also erred by ignoring Plaintiffs' request under Fed. R. Civ. P. 56(f) to conduct discovery necessary to the case before granting summary judgment in Defendants' favor and by relying on a disputed material fact. These errors of law have denied justice to Plaintiffs, and Plaintiffs respectfully request the Court reconsider its ruling in light of these errors.

ARGUMENT

Fed. R. Civ. P. 59(e) allows for alteration or amendment of a judgment. Alteration or amendment is appropriate (1) to "correct manifest errors of law or fact upon which the judgment is based;" (2) to present "newly discovered or previously unavailable evidence;" (3) to "prevent manifest injustice;" or (4) when there is an "intervening change in controlling law." *Turner v. Burlington N. Santa Fe R.R. Co.*, 338 F.3d 1058, 1063 (9th Cir. 2003) (citations omitted). Plaintiffs move pursuant to the first and third grounds of this standard.

I. The Court Committed Clear Error By Granting Summary Judgment on Plaintiffs' Claims for Injunctive Relief.

Summary judgment should only be rendered when, after adequate time for discovery, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The Court granted summary judgment on Plaintiffs' claims for permanent injunctive relief, finding that it was "absolutely clear" that Defendants would not return to the previous conduct at issue. (Opinion and Order, Feb. 22, 2010 (hereinafter "Order"), at 9-10). The facts supporting the Court's ruling were drawn only from self-serving affidavits filed by Defendants. But the facts must be taken in a light most favorable to Plaintiffs, and they showed that Defendants specifically reserved the right to change the policies at issue. Defendants continued to argue that the *Daily Barometer* and *The Liberty* were not similarly situated and that the prior policies were constitutionally acceptable. Thus, it was simply not "absolutely clear" that Defendants would not return to giving the *Barometer* more favorable distribution rights than other student publications, including *The Liberty*. Plaintiffs should have been given the chance to depose the Defendants about their intentions and rebut the self-serving affidavits they filed. Moreover, at minimum, this is a disputed fact which should have precluded summary judgment at this stage.

A. The Court Committed Clear Error By Denying Plaintiffs The Opportunity To Conduct Discovery On Disputed Issues Of Material Fact, Even Though Plaintiffs Requested To Do So Under Rule 56(f).

Where a summary judgment motion has been filed prior to an opportunity for discovery, and where the non-moving party counters with a Fed. R. Civ. P. 56(f) declaration, courts are *required* to grant an opportunity for discovery. "Although Rule 56(f) facially gives judges the discretion to disallow discovery when the nonmoving party cannot yet submit evidence supporting its opposition, the Supreme Court has restated the rule as *requiring*, rather than merely permitting, discovery 'where the non-moving party has not had the opportunity to

discover information that is essential to its opposition.'" *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (emphasis added) (quoting *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 5 (1986)); *see also Berkeley v. Home Ins. Co.*, 68 F.3d 1409, 1414 (D.C. Cir. 1995) (describing "the usual generous approach toward granting Rule 56(f) motions"); *Wichita Falls Office Assoc. v. Banc One Corp.*, 978 F.2d 915, 919 n.4 (5th Cir. 1992) (Rule 56(f)-based "continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course unless the non-moving party has not diligently pursued discovery of the evidence") (internal quotation marks and citation omitted)); *Sames v. Gable*, 732 F.2d 49, 52 (3d Cir. 1984) (same).

Not granting a request under Rule 56(f) to obtain evidence to counter facts raised by the opposing side where no discovery had taken place "is misguided" and denies "Plaintiffs a fair opportunity to litigate the merits of their claim." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 972 (9th Cir. 2009). "Especially where, as here, documentation or witness testimony may exist that is dispositive of a pivotal question . . . lightning-quick summary judgment motions can impede informed resolution of fact-specific disputes." *Burlington N. Santa Fe R.R. Co. v. The Assiniboine & Sioux Tribes of the Fort Peck Reservation*, 323 F.3d 767, 774 (9th Cir. 2003). In this case, documentation or witness testimony may certainly exist to show that Defendants merely changed the policy to get rid of the lawsuit, and intend to change it again to favor their preferred publication—whether in the form of emails between officials, official correspondence, or through impeachment of the statements in declarations. Because the facts regarding Defendants' intentions in changing the new policies are disputed[1] (and are certainly material, since they are the dispositive facts relied upon by the Court in ruling on the motion for summary

[1] *See* Pls.' Resp. Defs.' Concise Stmt. of Mat. Facts ¶¶5, 12.

judgment), summary judgment was improper and the Court must give Plaintiffs the chance to conduct discovery on this point.

Indeed, Plaintiffs opposed Defendants' motion in part on the basis that they required discovery, and were denied it through no fault of their own, as evidenced by the 56(f) declaration submitted by counsel. (H.G. Hacker Decl. ¶¶1-8). Counsel's declaration meets all the requirements of Rule 56(f), as it was timely, identifies information relevant to the summary judgment motion that is expected to be discovered, and refers to facts solely within the possession or knowledge of defendants. *See Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortgage Corp.*, 525 F.3d 822, 827 (9th Cir. 2008). Great specificity is not required. "Where, as in the present litigation, no discovery whatsoever has taken place, the party making a Rule 56(f) motion cannot be expected to frame its motion with great specificity as to the kind of discovery likely to turn up useful information, as the ground for such specificity has not yet been laid."[2] *Burlington Northern*, 323 F.3d at 774.

Because Defendants changed their policies grudgingly, only in response to this litigation, because Defendants continuously insist that they may give the *Daily Barometer* more favorable distribution rights on campus than *The Liberty*, because Defendants continue to insist that they may employ unwritten and vague policies to student speech,[3] and because Defendants consistently defend the need for the old policy and its constitutionality, Plaintiffs have shown a basis for believing that their constitutional rights are still threatened. And where the non-moving

[2] This is especially so in this case, where it was not even clear at the time Plaintiffs filed their opposition and 56(f) declaration which claims Defendants based their summary judgment motion on, and which facts they considered material. Defendants did not clarify the basis for their motion until they filed their reply brief and did not submit a statement of material facts, as required by Local Rule 56(a), until they submitted their reply brief. (*See* Pls.' Opp. Defs.' MTD, MSJ at 30; Defs.' Reply Supp. MTD at 1, 2).

[3] *See* Defs.' Memo. Supp. MTD at 5.

party has shown that they have "some basis for believing" that they are still threatened with harm, and where they have also "had no fair opportunity to develop the record concerning the extent of that threatened harm, it [i]s an *abuse of discretion* for the district court to decide the summary judgment motion before granting the [plaintiffs'] Rule 56(f) motion." *Id.* at 774-75 (emphasis added) (citing *VISA Int'l Serv. Ass'n v. Bankcard Holders of Am.*, 784 F.2d 1472, 1475 (9th Cir. 1986); *Glen Eden Hosp., Inc. v. Blue Cross & Blue Shield, Inc.*, 740 F.2d 423, 427 (6th Cir. 1984) (finding an abuse of discretion where the district court gave no reason for declining to permit further discovery before ruling on the motion for summary judgment, when counsel's affidavit satisfied the requirements of Rule 56(f))). The Court committed clear error by denying Plaintiffs the opportunity for discovery on a disputed fact material to summary judgment; thus, the Court should amend its judgment to deny or postpone summary judgment on Plaintiffs' claims for injunctive relief.

B. The Court Committed Clear Error By Taking The Facts In The Light Most Favorable To The Moving Party, And By Granting Summary Judgment On The Basis Of A Material Disputed Fact.

In considering a motion for summary judgment, the Court must view the evidence "in the light most favorable to the non-moving party." *San Diego Police Officers Ass'n v. San Diego City Employees' Ret. Sys.*, 568 F.3d 725, 733 (9th Cir. 2009). If a material fact is in genuine dispute, summary judgment is precluded. *See Celotex*, 477 U.S. at 322; *see also* Fed. R. Civ. P. 56.

Here, the Court erroneously viewed the evidence in the light most favorable to the *moving* party when it held that Defendants' self-serving assertions about the "intentions" it had regarding its new policies, changed in response to this litigation, were enough to overcome Defendants' heavy burden of showing mootness, especially in light of the fact that the Court denied Plaintiffs the opportunity to rebut this evidence through discovery. Both Defendant

Martorello and Dan Larson stated that they have "no current plans" to change the policies, but that does not mean they never will, and to interpret this evidence in the light most favorable to Plaintiffs, it indicates that it is not clear they will not change it. Larson stated that OSU "reserve[s] the right to do so to *address any problems*," (Larson Decl. ¶9), and Defendant Martorello stated that OSU "reserves the right *to change the specific locations* designated for bins or *increase or decrease the number of those locations*," (2d Martorello Decl. ¶8). Interpreting these facts in the light most favorable to Plaintiffs shows that there is, at minimum, ambiguity as to what circumstances might cause Defendants to change the policies, not absolute clarity, and the ambiguity should be resolved through discovery. And given that an increase or change in location to the *Barometer*'s bins, or a decrease or change in the location of *The Liberty*'s bins would renew the constitutional injury to Plaintiffs, the facts—as viewed in the light most favorable to Plaintiffs—indicate that it is not absolutely clear that Defendants will not return to the challenged practice. Moreover, Defendants' intentions about the policy and future changes are a material disputed fact, which precludes the Court from granting summary judgment at this time. (Pls.' Resp. Defs.' Concise Stmt. Mat. Facts ¶¶5, 12). Thus, this Court committed clear error in granting Defendants' motion for summary judgment, and the judgment should be amended to correct this injustice.

II. The Court Committed Clear Error By Dismissing Plaintiffs' Claims for Damages.

A. The Court Committed Clear Error By Disregarding Plaintiffs' Claims for Nominal Damages.

The Court clearly erred in dismissing Plaintiffs' lawsuit when it had not addressed several of its claims. Specifically, Plaintiffs presented claims regarding the constitutionality of the policy that was applied to keep them from campus speech venues, entailing a lengthy period of constitutional deprivation that justifies a nominal damage award. Defendants applied against

them a policy that was an unconstitutional prior restraint, as it vested unfettered discretion in administrators and allowed for content- and viewpoint-based discrimination, was not narrowly tailored to a significant government interest, and failed to leave open ample alternative channels of communication. Defendants' policy also violated the Due Process Clause, as it was unconstitutionally vague. Even if Plaintiffs were not entitled to permanent injunctive relief against the former policy, they are still entitled to an award of nominal damages for the infringement of their rights. Notably, Plaintiffs' bins were excluded from most areas of campus for nearly one year pursuant to Defendants' former policy, which irrevocably harmed them, denying them at length their constitutional rights. (*See* Compl. at ¶31 (bins were removed in winter 2008-2009); 3d Rogers Decl. ¶¶9, 14 (bins were placed back on campus and in dining halls in December 2009 and January 2010)). By not even considering these claims, the Court denied justice to Plaintiffs and committed clear errors of law which require the Court to reconsider its judgment dismissing Plaintiffs' case.

The Court appeared to find that Plaintiffs sought only damages for an economic injury, but this was clearly erroneous. Plaintiffs did suffer an economic injury, namely the damage to one of their bins, destruction of their locks and chains, and 150 copies of a newspaper run. (Compl. ¶47; Compl. Ex. 6). But Plaintiffs suffered an additional constitutional injury in being banned from most parts of campus for almost a year pursuant to an unconstitutional policy, and by being excluded based on the viewpoint of their speech. The Court failed to address this claim in Plaintiffs' complaint for which they were entitled to nominal damages.

Both the Supreme Court and the Ninth Circuit have held that when

> a plaintiff alleges violation of a constitutional right . . . even if compensatory damages are unavailable because the plaintiff has sustained no "actual injury"—such as an economic loss, damage to his reputation, or emotional distress—nominal damages are nonetheless available in order to "mak[e] the deprivation of

> such right [ ] actionable" and to thereby acknowledge the "importance to organized society that [the] right[ ] be scrupulously observed."

Jacobs v. Clark County Sch. Dist., 526 F.3d 419, 426 (9th Cir. 2008) (citing *Carey v. Piphus*, 435 U.S. 247, 266 (1978)); *see also Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986) ("Our discussion [in *Carey*] makes clear that nominal damages . . . are the appropriate means of 'vindicating' [constitutional] rights whose deprivation has not caused actual, provable injury.").

The Court did not analyze compensatory and nominal damages separately, as they must be. "Compensatory damages and nominal damages serve distinct purposes." *Schneider v. County of San Diego*, 285 F.3d 784, 795 (9th Cir. 2002). Nominal damages constitute a "'symbolic vindication of [a] constitutional right,'" and are awarded regardless of whether "'the constitutional violation causes any actual damage.'" *Id*. (citing *George v. City of Long Beach*, 973 F.2d 706, 708 (9th Cir. 1992)). By contrast, compensatory damages "serve to return the plaintiff to the position he or she would have occupied had the harm not occurred." *Id*. (citations omitted). And nominal damages are awarded even when the plaintiff has been fully compensated through another cause of action. *Id*.

In *Estate of Macias v. Ihde*, 219 F.3d 1018, 1028 (9th Cir. 2000), the Ninth Circuit held that that nominal damages must be awarded for violations of constitutional rights even when no actual damages are shown. "In this Circuit, nominal damages *must* be awarded if a plaintiff proves a violation of his [or her] constitutional rights." *Id*. (emphasis added) (citing *George*, 973 F.2d at 708); *see also Floyd v. Laws*, 929 F.2d 1390, 1403 (9th Cir. 1991) (finding the trier of fact must award nominal damages to the plaintiff as a symbolic vindication of her constitutional rights). It was clear error for the Court to dismiss Plaintiffs' lawsuit when it had

not even considered Plaintiffs' viable nominal damages claim for the constitutional harm caused by Defendants' policy.

B. The Court Committed Clear Error By Not Accepting Plaintiffs' Facts as True.

Under Federal Rule of Civil Procedure 8(a)(2) a pleading must only contain a "short and plain statement of the claim showing that the pleader is entitled to relief." "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009). The rule does not require "detailed factual allegations," though it requires more than "*unadorned*, the-defendant-unlawfully-harmed-me" accusations. *Id*. at 1949 (emphasis added) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (citing *Twombly*, 550 U.S. at 570).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (citing *Twombly*, 550 U.S. at 556); *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 812 (9th Cir. 2010). The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 129 S. Ct. at 1949. But "*[s]pecific facts are not necessary*; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam) (citing *Twombly*, 550 U.S. at 555); *see also Moss*, 572 F.3d at 968 (citing the same *Erickson* standard in light of *Twombly*). "[P]leadings should not be found deficient even if it is apparent 'that a recovery is very remote and unlikely.'" *Moss*, 572 F.3d at 968 (citing *Twombly*, 550 U.S. at 556).

To be sure, the objective of pleading is to put the defendant on notice as to what the claim is and the grounds for it. Pleading does not require proof of the claim, but merely notice of it. *Iqbal* changed none of that. What *Iqbal* confirmed is solely that a claim must be plausible, meaning that it cannot be "the-defendant-unlawfully-harmed-me" accusation. However, *Iqbal* did not overrule *Erickson*, and that case confirms that specific facts are not necessary at the pleading stage, because Rule 8 does not require it. This Court found that Plaintiffs "must present factual statements that would lead the court to conclude that the acts of individual defendants *plausibly caused* the harm alleged by the plaintiffs." (Order at 11) (citing *Iqbal*, 129 S. Ct. at 1949) (emphasis added).) However, that is not the standard established by the Ninth Circuit. Plaintiffs need only plead "factual content" that is "*plausibly suggestive* of a claim entitling the plaintiff to relief." *Moss*, 572 F.3d at 969 (emphasis added) (citing *Iqbal*, 129 S. Ct. at 1949). Thus, the Court applied a heightened causation standard not countenanced by *Iqbal* or *Moss*. This is clear error warranting reconsideration of the Court's ruling.

The Court granted Defendants' Motion to Dismiss by applying a heightened pleading standard to Plaintiffs' complaint. This was clear error and manifestly unjust. At the motion to dismiss stage, the Court is not concerned with "whether a plaintiff will ultimately prevail" but with whether he is entitled to offer evidence to support his claims. *See Hearns v. Terhune*, 413 F.3d 1036, 1043 (9th Cir. 2005) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). Of course, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 129 S. Ct. at 1949. But determining whether a complaint states a plausible claim for relief is "context-specific" that "requires the reviewing court to draw on its judicial experience and common sense." *Id*. at 1950. "When there are well-pleaded factual allegations, a

court should *assume their veracity* and then determine whether they plausibly give rise to an entitlement to relief." *Moss*, 572 F. 3d at 970 (emphasis added) (citing *Iqbal*, 129 S. Ct. at 1950). In analyzing a motion to dismiss, the Court accepts as true the factual allegations contained in the complaint and views all inferences in the light most favorable to the plaintiff. *See Erickson*, 551 U.S. at 94; *Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001). The Court closed the door of justice to Plaintiffs who were clearly injured by an unconstitutional policy (as the Defendants essentially admitted by changing their policy). In doing so, the Court did not accept Plaintiffs' pleaded facts as true.

1. Plaintiffs pleaded plausible claims under the First Amendment.

To state a claim under the First Amendment, Plaintiffs pleaded facts that showed plausible viewpoint discrimination and unconstitutional regulation of speech in a public forum. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). "Viewpoint discrimination occurs when the government prohibits speech by particular speakers, thereby suppressing a particular view about a subject." *Moss*, 572 F.3d at 970 (quotation marks and citation omitted). Thus, viewpoint discrimination occurs when some speakers are allowed access to a forum and others are not, even though their speech is otherwise permissible. *See Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953); *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 87 (1st Cir. 2004); *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610, 625 (4th Cir. 2002).

Plaintiffs' newspaper, *The Liberty*, and *The Daily Barometer* are both student newspapers written by students at OSU. (Compl. ¶¶1, 18, 29, 57). *The Liberty* has a distinctly different viewpoint than the *Barometer*, and actually exists as an alternative to the *Barometer*. (*Id*. ¶17).

Prior to winter term in the 2008-2009 academic year, *The Liberty*, *The Daily Barometer*, and several other non-student newspapers (*Corvallis Gazette-Times*, *Eugene Weekly*, and *USA Today*) all had distributions bins placed around OSU's campus. (*Id*. ¶¶23-27, 29-30). However, during the 2008-2009 winter term, *The Liberty*'s distribution bins disappeared from campus (*id*. ¶31), and "the State Police determined that the OSU Facilities Department had removed the bins" (*id*. ¶33). Joe Majeski of the OSU Facilities Department told Plaintiff Rogers that the bins had been removed pursuant to a 2006 policy "that restricted the authorized placement of newspaper distribution bins to designated areas on campus." (*Id*. ¶38; *see also id*. ¶¶35-37). Defendant Martorello, Director of OSU Facilities Services (*id*. ¶13), "related the existence of the policy regarding bin placement that Mr. Majeski had previously explained. Defendant Martorello also stated that the University was trying to keep the campus clean and was therefore regulating "off-campus newspaper bins" (*id*. ¶52). Defendant McCambridge confirmed this policy (*id*. ¶59), as did Charles Fletcher, who spoke on behalf of Defendant Ray (*id*. ¶88; Compl. Ex. 18). However, even though Plaintiffs' bins were the only ones subject to wholesale removal, Plaintiffs' bins were not the only ones which "violated" Defendants' policy, as distribution bins for *The Daily Barometer*, *Corvallis Gazette-Times*, and *Eugene Weekly* were not removed some months later, even though they violated Defendants' policy. (*Id*. ¶¶60, 66; Compl. Exs. 9 & 10).

Taking these facts as true, which the Court must do, Plaintiffs sufficiently alleged the requisite facts to plausibly suggest, *Moss*, 572 F.3d at 969, that they are entitled to relief. OSU opened a forum for speech by allowing newspaper distribution on campus. *The Liberty* was excluded from that forum, while other newspapers were not. OSU's Facilities Department told Plaintiffs that the bins were removed pursuant to OSU policy. Hence, Plaintiffs sued the director of the Facilities Department, the President of OSU (who is the final decision-maker at the

university), and all those persons who participated in creation of the policy. The Court erroneously thought Plaintiffs should have alleged the "individual defendants [who] were directly involved in the removal of the newspaper bins" (Order at 12), but Plaintiffs could not because the bins were taken *without notice*. (Compl. ¶¶31, 34). Although Plaintiffs do not know which OSU employee removed their bins (for that information is in the possession of OSU), Plaintiffs do know and did name those responsible for enforcing the unconstitutional policy that led to the bin removal. To plead an individual capacity claim against a state official, Plaintiffs must show only that "the official, acting under color of state law, caused the deprivation of a federal right." *Hafer v. Melo*, 502 U.S. 21, 25 (1991). Plaintiffs' Verified Complaint challenged the constitutionality of the policy created by Defendants Ray, McCambridge, Roper, and Martorello and the actions they took pursuant to the policy. Each of these defendants individually violated Plaintiffs' right to speak by continuing to exclude *The Liberty* from campus after the bins were taken. That is sufficient to state a claim under the First Amendment.

The Court also states that Plaintiffs did not provide sufficient facts to support a conclusion that the two papers were similarly situated, and that "many facts, particularly that *The Liberty* was privately funded, negate that conclusion." (Order at 13). But this again is clear error. Plaintiffs alleged many facts supporting the *plausible suggestion* that the two papers are similar for constitutional analysis—*both* papers are written by students of OSU and distributed on the OSU campus. In terms of access to the campus, which is a public forum for students and student speech, both papers are "plausibly" entitled to the same access—regardless of any differences between the operations of the two papers. Suggesting otherwise simply shows that the Court adopted Defendants' reading of the facts, rather than taking them in the light most favorable to Plaintiffs.

Plaintiffs alleged that *The Liberty* has always been entirely written by, edited by, published by, and distributed to OSU students. (Compl. ¶18). OSUSA incorporated as a non-profit organization under section 501(c)(3) of the Internal Revenue Code in 2002 so it could receive private donations to cover costs of publishing the paper—this does not mean the paper is supported exclusively by "private donations," insinuating that it is somehow less than student speech, as Defendants argued and this Court wrongfully believed, drawing an inference in favor of the moving party. (*Id.* at ¶19). *The Liberty*, like most papers, also receives funds to cover the costs of publishing the paper from advertising revenue, just like the *Barometer*. (*Id.* at ¶¶20, 28). *The Liberty* and the *Barometer* are the only two student newspapers on campus. (*Id.* at ¶29). Plaintiff OSUSA, the organization responsible for *The Liberty*, has been, and is, a registered student organization on campus, since its inception, save for one year missed as an oversight, and is eligible to receive student fee funding. (*Id*. at ¶64; 2d Rogers Decl. ¶7). And regaining their RSO status made no difference to Defendants as to whether *The Liberty*'s bins could be on campus like the *Barometer*'s. (*Id.* at ¶¶62-65, 68).

Importantly, all of Defendants' assertions that the *Barometer* is "OSU's own paper," "published by OSU," and "created by OSU itself" are simply bald assertions, not supported by any evidence, (Defs.' Opp. Pls.' MPI at 11-12, 14; Defs.' Reply Supp. MTD at 15, 17), and the assumption that the *Barometer* receives funds from the school while *The Liberty* may not is untrue and has nothing to do with OSU's stated interests in the policy at issue. Plaintiffs have evidence, discovered after the filing of the complaint, that the *Barometer* in fact does not operate from student fee funds,[4] is not controlled by OSU, and that Plaintiff OSUSA is eligible to receive

[4] Moreover, student fee funds are *not* government funds and therefore do not make recipients government entities. *Rosenberger*, 515 U.S. at 830 ("[T]he student fees paid to the University

student fee funds, but could not properly offer such evidence without converting the Motion to Dismiss into a Motion for Summary Judgment. Indeed, Plaintiffs are *not* required to present evidence at this stage, but that is precisely what the Court is requiring them to do.

2. Plaintiffs pleaded plausible claims under the Fourteenth Amendment's Due Process Clause.

No state may "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. "In other words, the government may not take property like a thief in the night; rather, it must announce its intentions and give the property owner a chance to argue against the taking." *Clement v. City of Glendale*, 518 F.3d 1090, 1093 (9th Cir. 2008). The government must provide advance notice before taking a citizen's property, and the government must present a "strong justification for departing from the norm." *Id*. at 1094.

The Court's Order states "the individual defendants were not involved in the bin removal process. There are no facts tying individual defendants to any alleged lack of notice." (Order at 14). This is clearly erroneous based on the pleaded facts. Plaintiffs' complaint challenges the policy pursuant to which the bins were removed, in addition to the actual removal itself. As stated above, Plaintiffs do not know who actually went around campus and removed the bins, because it was done *without notice*. And this is the whole point. The policy created by OSU enabled the Facilities Department to act without notice. Defendant Ray, as the final decision maker at OSU, is responsible for the policy. (Compl. ¶10). Defendant McCambridge is Vice President of Finance and Administration, and "is responsible for overseeing campus administration and creating, implementing, and/or administering university policies, including the policies and procedures challenged herein." (*Id*. ¶11). Defendant Roper is Vice Provost for Student Affairs, and "is responsible for overseeing campus administration related to Student

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are not state funds, regardless of how the University classifies them"). If the sources of funding for the papers played a role in the Court's decision, that is clear error.

Affairs and creating, implementing, and/or administering university policies, including the policies and procedures challenged herein." (*Id*. ¶12). Defendant Martorello is Director of Facilities Services, and "is responsible for overseeing campus administration related to Facilities and creating, implementing, and/or administering university policies, including the policies and procedures challenged herein." (*Id*. ¶13). Defendant Martorello told Plaintiff Rogers that the bins were removed pursuant to policy (*id*. ¶52), which the other defendants confirmed (*id*. ¶¶59, 88). The Court must accept these facts as true. *Iqbal*, 129 S. Ct. at 1949. And more specific allegations are not necessary. *Erickson*, 551 U.S. at 93.

The logical conclusion of the Court's decision is that Plaintiffs should have also sued the OSU Facilities staff who actually drove around campus picking up the bins and who threw them in a heap in the storage yard. While this was not necessary for Plaintiffs' complaint to survive dismissal, as stated above, the Court's conclusion is erroneous for two reasons. First, Plaintiffs do not know who in the Facilities Department actually took the bins; they were taken without notice. Second, the Court's conclusion that only those who actually took the bins are liable is erroneous, because those who created the policy that caused the deprivation are also liable under the Constitution. Creation of an unconstitutional policy can "cause[ ] the deprivation of a federal right." *Hafer*, 502 U.S. at 25. In *Kwai Fun Wong v. United States*, cited by the Court's Order (Order at 12), the Ninth Circuit stated: "[Plaintiff] correctly argues that direct, personal participation is *not necessary* to establish liability for a constitutional violation." 373 F.3d 952, 966 (9th Cir. 2004) (emphasis added). The Court's Order disregarded the principle that the "requisite causal connection can be established . . . also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." *Id*. (quoting *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978)).

The Court's Order also disregarded that Plaintiffs stated claims to plausibly suggest that Defendants are liable in their supervisory capacities. "A supervisor may be liable if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989) (citing *Thompkins v. Belt*, 828 F.2d 298, 303-04 (5th Cir. 1987)). Supervisory liability exists even without overt personal participation in the offensive act if supervisory officials implement a policy so deficient that the policy "itself is a repudiation of constitutional rights" and is "the moving force of the constitutional violation." *Id*. (quotation omitted).

Defendants' creation of the policy allowing for the removal of *The Liberty*'s bins set in motion the acts of those who actually removed the bins from campus. Defendants knew or should have known that the policy failed to provide adequate notice to Plaintiffs, as the policy did not require prior notice to be given. None of the Defendants ever indicated after the bin removal that the action was inconsistent with that policy and reverse it—rather, they defended it. (*See* Compl. ¶¶36, 38, 51, 52, 58, 59, 68, 72, 87, 88). Moreover, the Court disregarded the other aspect of Plaintiffs' due process claim—that their Fourteenth Amendment rights were violated because the policy itself, created by Defendants, was unwritten and vague. Each day that Plaintiffs' newspaper bins were barred from campus, a constitutional injury occurred. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). These facts are sufficient to plausibly suggest that Plaintiffs have stated a claim against each of the Defendants in their individual capacities. *Iqbal*, 129 S. Ct. at 1949. More specific allegations are not necessary. *Erickson*, 551 U.S. at 93.

3. The Court committed clear error by dismissing Plaintiffs' Equal Protection Claim when Defendants did not ask for dismissal of that claim and when the Court did not provide notice or leave to amend.

While "[a] trial court may dismiss a claim sua sponte under Fed. R. Civ. P. 12(b)(6)," *Omar v. Sea-Land Serv., Inc.*, 813 F.2d 986, 991 (9th Cir. 1987), the court must first give notice of its intention to dismiss and "afford plaintiffs an opportunity to at least submit a written memorandum in opposition to such motion," *Lee*, 250 F.3d at 683 n.7 (citation omitted). Moreover, the Ninth Circuit has found that it "must reverse" when it is unclear why the district court did not allow leave to amend before dismissing a claim sua sponte. *Id*.

Here, Defendants did not move to dismiss Plaintiffs' Equal Protection claim. However, the Court dismissed this claim nonetheless merely by referring to its analysis of Plaintiffs' First Amendment claim. (Order at 14). This was clear error. Equal protection claims are distinct from First Amendment claims. The Supreme Court "has held that content-based restrictions on speech can violate the 'equal protection' guarantees when such restrictions 'differentiate between types of speech.'" *Luckett v. City of Grand Prairie*, 2001 WL 285280, *6 (N.D. Tex. Mar. 19, 2001) (quoting *Burson v. Freeman*, 504 U.S. 191, 197 n.3 (1992); citing *Police Dep't of Chi. v. Mosley*, 408 U.S. 92 (1972)). In *Luckett*, the plaintiff argued that his First Amendment rights were violated because he was denied permission to speak at a public meeting. *Id*. at *5. In addition, he argued that his Fourteenth Amendment rights were violated because he was denied permission to speak at a public meeting and others were permitted to. *Id*. at *6. This is different than alleging a First Amendment violation based on viewpoint, and then asserting an Equal Protection claim because one was treated differently from others. Similarly, Plaintiffs' complaint shows that their rights were violated not only by the Defendants' viewpoint-discriminatory policy and actions, but also that while its bins were removed from campus, *The*

Daily Barometer's bins were not removed. Plaintiffs' equal protection claims are distinct from their First Amendment claims in that the restriction of expressive activity itself (without meeting the appropriate standards) violates the First Amendment, whether or not the Defendants treated anyone else favorably. And by contrast, their equal protection claims hinge on differential treatment.

The Supreme Court does not take a "one or the other" approach to the First and Fourteenth Amendments. For example, in *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 666 (1990), *overruled on other grounds by Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 913 (2010), the Court begins its analysis of the plaintiff's Fourteenth Amendment claims by stating: "Because we hold that [the regulation at issue] does not violate the First Amendment, we must address the [plaintiff's] contention that the provision infringes its rights under the Fourteenth Amendment." In many cases, it is not necessary to reach the issue of whether or not the Fourteenth Amendment was violated because the court has already found the First Amendment was violated. Here, unless the Defendants are willing to concede that Plaintiffs' rights were violated under the First Amendment and that all Plaintiffs' requested relief is available under the First Amendment claims, there is no reason to disregard Plaintiffs' Fourteenth Amendment claim.

Because fundamental rights are so important, it is the burden on the right itself, rather than any reason for the burden, which violates the Equal Protection Clause. *See Reynolds v. Sims*, 377 U.S. 533, 566 (1964). And there is no doubt that First Amendment freedoms are fundamental rights. The Supreme Court has explained that "fundamental rights, for equal protection purposes, are such rights as: a right of a uniquely private nature, the right to vote, right of interstate travel *and rights guaranteed by the First Amendment*." *Sonnier v.*

Quarterman, 476 F.3d 349, 368 n.16 (5th Cir. 2007) (emphasis added) (citing *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 n.3 (1976)). Thus, Plaintiffs do not need to prove any discriminatory intent or purpose to make out a successful claim under the Equal Protection Clause of the Fourteenth Amendment. They need only show that similarly-situated newspapers were treated differently and that disparate treatment resulted in the burden of their First Amendment rights.

Plaintiffs pleaded facts sufficient to plausibly suggest that the Defendants violated their right to equal protection of law. *The Liberty* and *The Daily Barometer* are both student newspapers written by students at OSU. (Compl. ¶¶1, 18, 29, 57). *The Liberty*, *The Daily Barometer*, *Corvallis Gazette-Times*, *Eugene Weekly*, and *USA Today* all had distributions bins placed around OSU's campus. (*Id*. ¶¶23-27, 29-30). During the 2008-2009 winter term, *The Liberty*'s distribution bins disappeared from campus (*id*. ¶31), because of Defendants' 2006 policy "that restricted the authorized placement of newspaper distribution bins to designated areas on campus" (*id*. ¶38). However, distribution bins for *The Daily Barometer*, *Corvallis Gazette-Times*, and *Eugene Weekly* were not removed. (*Id*. ¶¶60, 66; Compl. Exs. 9 & 10). Thus, similarly-situated newspapers were allowed to keep their distribution bins on campus, but Plaintiffs' newspaper was not.

The Court erroneously found that *The Liberty* was not similarly situated to *The Daily Barometer*. (Order at 13). Instead of accepting the pleaded facts "as true," *Iqbal*, 129 S. Ct. at 1949, the Court imposed its own judgment on the facts and found that an insignificant fact—funding—demonstrated that the two newspapers were different. But as stated above, the facts as pleaded were "plausibly suggestive" that *The Liberty* and *The Daily Barometer* are similar. *Moss*, 572 F.3d at 969. The Court did not, and could not, articulate any other facts showing a

difference in the newspapers. This is because at the motion to dismiss stage, "specific facts are not necessary," the goal of pleading is only to put the Defendants on notice. *Erickson*, 551 U.S. at 93. If the Court found that particular facts to *prove* a claim were lacking, it should have denied the motion to dismiss and allowed the case to proceed. If the Court found that certain requisite facts to *state* a claim were lacking, it should have dismissed without prejudice and with leave for Plaintiffs to amend their complaint. Its failure to do so justifies reconsideration. *Lee*, 250 F.3d at 683 n.7.

C. The Court Should Have Allowed Plaintiffs to Amend Their Complaint Prior to Dismissal with Prejudice.

The Court also committed clear error by dismissing Plaintiffs' complaint without first allowing them leave to amend. "Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment." *Moss*, 572 F.3d at 972 (citing *Gompper v. VISX, Inc.*, 298 F.3d 893, 898 (9th Cir. 2002)). "A district court's failure to consider the relevant [*Foman v. Davis*, 371 U.S. 178 (1962)] factors and articulate why dismissal should be with prejudice instead of without prejudice may constitute an abuse of discretion." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (per curiam) (citing *Foman*, 371 U.S. at 182; *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986); *Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1292-93 (9th Cir. 1983)). It is well-established that "in dismissing for failure to state a claim under Rule 12(b)(6), a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir.2000) (en banc) (quotation omitted).

In *Moss*, the Ninth Circuit held that the plaintiffs should have been given the opportunity to amend their complaint to add allegations which would create a plausible claim of viewpoint discrimination. 572 F.3d at 972, 974-75. Here, Plaintiffs did set out facts, which viewed in the light most favorable to them, show a plausible claim for viewpoint discrimination, among other claims. But if there was any doubt, the Court clearly erred by not giving Plaintiffs the chance to amend. Moreover, if the Court believed Plaintiffs failed to name the correct defendants in articulating a claim for damages, Plaintiffs should have been given leave to amend to add additional parties. Denying Plaintiffs this opportunity was unjust and a clear error of law, which requires the judgment be amended to allow this.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request the Court reconsider its ruling on Defendants' motions to dismiss and for summary judgment in light of the clear errors of law in the opinion and the manifest injustice resulting to Plaintiffs.

Respectfully submitted this 22nd day of March, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2010, 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:

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