JEFFERSON B. SESSIONS III
Attorney General
JOHN M. GORE
Acting Assistant Attorney General
TARA HELFMAN
Senior Counsel
STEVEN MENASHI
Acting General Counsel, Department of Education
THOMAS E. CHANDLER
Deputy Chief, Appellate Section
VIKRAM SWARUUP
Attorney, Appellate Section
U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Ave., N.W.
Washington, DC 20530
Telephone: (202) 616-5633
Facsimile: (202) 514-8490
Email: vikram.swaruup@usdoj.gov

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

KEVIN A. SHAW,

Plaintiff,

v.

KATHLEEN F. BURKE, et al.,

Defendants.

No. 2:17-cv-02386-ODW-PLA

UNITED STATES' STATEMENT OF INTEREST

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

FEDERAL STATUTES

OTHER

UNITED STATES' STATEMENT OF INTEREST

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General "to attend to the interests of the United States in a suit pending in a court of the United States." In particular, the Department of Education is committed to ensuring that "institution[s] of higher education . . . facilitate the free and open exchange of ideas." 20 U.S.C. § 1011a(a)(2). In the United States' view, Plaintiff Kevin Shaw has properly pleaded that speech regulations imposed by Los Angeles Pierce College ("Pierce College" or "College") and the Los Angeles Community College District ("District") violated his First Amendment rights.

INTEREST OF THE UNITED STATES

The United States has an interest in protecting the individual rights guaranteed by the First Amendment. The right to free speech lies at the heart of a free society and is the "only effectual guardian of every other right." Virginia Resolutions (Dec. 21, 1798), *in* 5 THE FOUNDERS' CONSTITUTION, 135, 136 (Philip B. Kurland & Ralph Lerner, eds., 1987). State-run colleges and universities are no exception from this rule, especially since "the campus of a public university, at least for its students, possesses many of the characteristics of a public forum." *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981). Thus, public universities have "an obligation to justify [their] discriminations and exclusions under applicable constitutional norms." *Id.* at 267.

The United States has a significant interest in the vigilant protection of constitutional freedoms in institutions of higher learning. As the Supreme Court has noted, "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

In recent years, however, many institutions of higher education have failed to answer this call, and free speech has come under attack on campuses across the

country. Such failure is of grave concern because freedom of expression is "vital" on campuses. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

It is in the interest of the United States to lend its voice to enforce First Amendment rights on campuses because "'[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'" *Keyishian v. Bd. of Regents of State Univ. of N.Y.*, 385 U.S. 589, 603 (1966) (citation omitted). "[O]ur history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–509 (1969).

FACTUAL AND PROCEDURAL BACKGROUND

Because the case is before the Court on a motion to dismiss, the Court must take all of Plaintiff's well-pleaded allegations as true. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–556 (2007). Likewise, for purposes of this Statement of Interest, the United States takes Plaintiff's well-pleaded allegations as true. The United States takes no view regarding whether Plaintiff will succeed in proving these allegations at trial.

According to the Complaint, Plaintiff Kevin Shaw is a student at Los Angeles Pierce College, one of nine public community colleges within the Los Angeles Community College District. Doc. 1 (Complaint) ¶¶ 1, 3, 14, 28. Mr. Shaw brings facial and as-applied challenges to the District's published speech policies and the College's published and unpublished speech policies.

Specifically, Mr. Shaw challenges Chapter IX, Article IX of the Los Angeles Community College District Rules ("District Rules"), which are promulgated and maintained by the District's Board of Trustees. Chapter IX, Article IX contains

provisions that govern freedom of speech on campuses ("District Free Speech Policy"):

- All of the District's colleges, except for designated Free Speech Areas, are non-public fora that are not open to free speech and expression, *id.* ¶ 35, Ex. A at 31;
- Each college president may designate "Free Speech Areas" on campus "for free discussion and expression by all persons," subject to content-neutral time, place, and manner restrictions, including "reasonable time restrictions on the use of Free Speech Areas," *id.* ¶ 38, Ex. A at 32; and
- Students may distribute literature, including "petitions, circulars, leaflets, newspapers, miscellaneous printed matter and other materials" *only* in designated Free Speech Areas, *id.* ¶ 37, Ex. A at 31.

Mr. Shaw alleges that Pierce College "has also adopted and enforced other policies and practices that severely restrict free speech and expressive activity, including an apparently unpublished requirement" that students wishing to utilize the Free Speech Area must first complete a permit application. *Id.* ¶ 4. This permit application contains additional rules governing campus speech ("College Free Speech Area Policy"). These rules can be found only on the permit application; thus, students like Mr. Shaw are only able to learn of the College's particular rules governing free expression after requesting and obtaining an application form. *Id.* ¶¶ 43–44. Beyond that form, students "have no public, generally accessible means to discern any restrictions to which they are subject or under which they could be punished for engaging in speech or expressive activity" on campus. *Id.* ¶ 40.

As printed on the permit application, the Pierce College Free Speech Area Policy states the following:

- "The college has one (1) Free Speech Area" on campus "designated for free speech and gathering of signatures," *id.*, Ex. C at 36–37;
- "[D]istribution [of materials] shall take place only within the geographical limits of the Free Speech Area," *id.*, Ex. C at 38;
- Permitted students may utilize the Free Speech Area from 9:00 a.m. until 7:00 p.m. on Monday through Friday, *id.*, Ex. C at 37; and
- Students wishing to distribute materials in the Free Speech Area must provide to the Vice President of the Student Services Office ("Student Services") the name and address of the organization, the name(s) of the distributor(s), and the date and time of distribution, *id.* ¶ 8, Ex. C at 36.

According to Mr. Shaw, the College does not limit in any way the discretion of administrators to approve or reject applications submitted by students. *Id.* ¶ 50.

The permit application also identifies the location of the Free Speech Area by reference to dotted lines on an attached map. *Id.*, Ex. C at 37. These lines delineate an area "comprising approximately 616 feet," which is "approximately .003% of the total area of Pierce College's 426 acres, and approximately .007% of the main area of campus featured in Pierce's online campus map." *Id.* ¶ 46. According to Mr. Shaw, the geographic restriction is not tied to any interest of the College because the College "has many open areas and sidewalks beyond the Free Speech Area where student speech, expressive activity, and distribution of literature would not interfere with or disturb access to college buildings or sidewalks, impede vehicular or pedestrian traffic, or in any way substantially disrupt the operations of the campus or the college's educational functions." *Id.* ¶ 54.

The College enforces these speech restrictions through its Standards of Student Conduct. Those standards require students to conform to District Rules

(including the speech rules) and state that violation of the rules will result in disciplinary action. *Id.* ¶ 55.

Mr. Shaw alleges that the College enforces these rules in a manner that unconstitutionally limits student speech. On November 2, 2016, Shaw and two other individuals set up a table on an area of campus known as the "Mall" to distribute Spanish-language copies of the United States Constitution and to discuss free speech issues with students. *Id.* ¶¶ 56–57. Although the table was outside of the Free Speech Area, Mr. Shaw was not disrupting any campus operations or interfering with foot traffic while distributing copies of the Constitution. *Id.* ¶¶ 57–58.

Shortly after Mr. Shaw set up his table, an administrator told him that he was not permitted to engage in free speech outside the designated Free Speech Area and that he needed to complete a permit application to use the Free Speech Area. *Id.* ¶ 60. The administrator "insisted that Shaw accompany him into a building so that Shaw could complete a permit application." *Id.* Upon asking the administrator "what would happen if he refused to accompany him into the building and continued his expressive activity in his current location, he was told that he would be asked to leave the campus." *Id.* ¶ 61. Mr. Shaw complied with the administrator's instructions and completed a permit application.

Approximately two weeks after that incident, Mr. Shaw again attempted to distribute materials outside the Free Speech Area. *Id.* ¶ 66. He distributed materials "for several hours in an open, grassy area of campus outside the Free Speech Area," uninterrupted by administrators. *Id.* During this time, Mr. Shaw witnessed a large protest form outside the Free Speech Area. *Id.* Mr. Shaw therefore alleges that the College enforces its speech restrictions "selectively and unevenly" by allowing speech outside the designated area in some instances but prohibiting it in others. *Id.* ¶ 67.

Mr. Shaw engaged with administrators at length regarding his desire to engage in free speech. He informed them that he did not intend to block access to any buildings, use amplified sound, or disrupt College operations. *Id.* ¶ 65. He also sought a copy of the College's speech policies. *Id.* ¶ 71. In response to this request, an administrator informed Mr. Shaw that those who wanted "to use the free speech area are asked to fill out a free speech use form" and that "[o]nce that is done a copy of the policy and a permit is handed to each person that comes into our office." *Id.* ¶ 74.

Mr. Shaw attempted on three occasions thereafter to obtain a copy of the College Free Speech Area Policy and the permit application that he had submitted on November 2, 2016, from the Associated Student Organization office. *Id.* ¶¶ 77–80. According to the Complaint, it was only when Mr. Shaw refused to leave the office that Defendants begrudgingly provided him with a copy of the policy and his application. *Id.* ¶ 80–85.

Mr. Shaw subsequently filed suit, alleging that the College's enforcement of its speech rules prevented him from speaking on campus and distributing materials, and that this conduct infringed on his rights under the First Amendment. Mr. Shaw further alleges that he wants to petition for signatures and distribute literature on campus without seeking prior authorization and without being limited to the 616-square-foot Free Speech Area. *Id.* ¶ 88. But he fears doing so because enforcement of the College's policies could result in discipline under the Standard of Student Conduct or his removal from campus by the sheriff's office. *Id.*

In the Complaint, Mr. Shaw challenges, both on their face and as applied, (1) the requirement that he seek permission before using the Free Speech Area and (2) the limitation of speech to the small Free Speech Area. *Id.* Defendants, various College officials, have moved to dismiss the Complaint. Doc. 22 (Defendants' Notice of Motion and Motion to Dismiss).

The United States does not address the Eleventh Amendment, standing, or qualified immunity issues raised in Defendants' motion to dismiss. *Id.* at 3–10, 22–25. Taking the facts alleged as true, the United States is of the view, for the reasons below, that Plaintiff has stated claims for violations of the First Amendment.

DISCUSSION

The free speech protections of the First Amendment are as applicable to State-run colleges as they are to any other government institution. *Healy v. James*, 408 U.S. 169, 180 (1972). Mr. Shaw's allegations, if proven, demonstrate that Pierce College's speech policies and practices, which the College applied to deny Mr. Shaw his right to engage in expressive activity in a public forum, imposed prior restraints that were not narrowly tailored to further a significant government interest and failed to provide other alternative channels of communications. Mr. Shaw has therefore stated claims under the First Amendment.

I. PLAINTIFF ADEQUATELY PLEADED THAT THE DISTRICT AND COLLEGE SPEECH RESTRICTIONS VIOLATE THE FIRST AMENDMENT

Under the First Amendment, the power of the government to regulate speech on college and university campuses is contingent on the character of the forum in question. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983) ("The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue."). A "public forum" is "public property which the state has opened for use by the public as a place for expressive activity," either by tradition or designation. *Id*. at 45.

The government may impose permitting requirements on expressive activity in a public forum to manage competing uses of the space. *Forsyth Cty., Ga,. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). However, there is a heavy

presumption against the validity of prior restraints, *id.*, 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 and then obtain a permit to do so," *Watchtower Bible & Tract Soc'y v. Stratton*, 536 U.S. 150, 165–66 (2002). Thus, the Supreme Court has repeatedly "condemned statutes and ordinances which required that permits be obtained from local officials as a prerequisite to the use of public places, on the grounds that a license requirement constituted a prior restraint on freedom of speech . . . and, in the absence of narrowly drawn, reasonable and definite standards for the officials to follow, must be invalid." *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951).

Furthermore, in a "public forum," the government may impose "[r]easonable time, place, and manner restrictions . . . but any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest and restrictions based on viewpoint are prohibited." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009) (citations omitted); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Perry Educ. Ass'n*, 460 U.S. at 45. In such a forum, even content-neutral time, place, and manner restrictions must be narrowly tailored to achieve a significant government interest and "leave open ample alternative channels of communication." *Perry Educ. Ass'n*, 460 U.S. at 45; *Ward*, 491 U.S. at 791.

The District Free Speech Policy designates the College's Free Speech Area as a public forum "for free discussion and expression by all persons." Doc. 1, Ex. A at 30. Because the Free Speech Area has been intentionally opened up for expression and speech, it is a designated public forum. *See Bloedorn v. Grube*, 631 F.3d 1218, 1231 (11th Cir. 2011). Pierce College also has adopted an unpublished Free Speech Area Policy that, together with the District Free Speech

Policy, limits student expression to the Free Speech Area and requires students to secure permission to utilize the Free Speech Area from College administrators by submitting a permit application in advance. *Id.* ¶ 4, Ex. C.

Taken as true, Mr. Shaw's allegations state a claim that the College's speech restrictions are constitutionally infirm in two key respects. First, they create an unconstitutional prior restraint on speech in the Free Speech Area. Second, in all events, they are not valid time, place, and manner restrictions because they are not narrowly tailored and do not leave open ample alternative channels of communication.[1]

A. The Permitting Requirement Creates An Unconstitutional Prior Restraint

Under the First Amendment, there is a heavy presumption against the validity of prior restraints, which "make[] the peaceful enjoyment of freedoms

---

[1] There is no dispute that public educational institutions have a significant interest in ensuring that speech is not used to jeopardize the ordinary function and order of classes and other educational activities. *See Grayned v. City of Rockford*, 408 U.S. 104, 118 (1972). In the light of these significant government interests, courts have noted that a school policy that "prohibits speech that would substantially interfere with a student's educational performance, may" be constitutionally permissible because "[t]he primary function of a public school is to educate its students; conduct that substantially interferes with the mission is, almost by definition, disruptive to the school environment." *DeJohn v. Temple Univ.*, 537 F.3d 301, 320 n.22 (3d Cir. 2008). Moreover, certain content-based restrictions on speech are permissible in any public setting. For example, public colleges can restrict fighting words, harassing speech that creates a hostile environment, and true threats. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (defining fighting words as those which "by their very utterance inflict injury or tend to incite an immediate breach of the peace"); *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999) (establishing liability standards for damages under Title IX based on school district's failure to respond to hostile environment created by student-on-student sexual harassment); *Virginia v. Black*, 538 U.S. 343, 359 (2003) (defining true threats as speech that intends "to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals") (citation omitted).

which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969); *see also Forsyth Cty.*, 505 U.S. at 130; *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 225 (1990). "A prior restraint is any government restriction that vests an administrative official with discretionary power to control in advance the use of public places for First Amendment Activities." *Univ. of Cincinnati Chapter of Young Americans for Liberty v. Williams*, No. 12-155, 2012 WL 2160969 at *6 (S.D. Ohio June 12, 2012) (citing *Kunz v. New York*, 340 U.S. 290, 293–294 (1951)).

The First Amendment prohibits "regulations that confer unbridled discretion on a permitting or licensing official," *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1025 (9th Cir. 2009), because they invite favoritism, arbitrary enforcement, and viewpoint discrimination, which is often difficult to detect, *Kaahumanu v. Hawaii*, 682 F.3d 789, 807 (9th Cir. 2012). Thus, any permitting requirement that operates as a prior restraint "must contain narrow, objective, and definite standards to guide the licensing authority." *Forsyth Cty.*, 505 U.S. at 131 (internal quotation marks and citation omitted). Indeed, a heavy burden rests on the college to demonstrate the propriety of any prior restraints. *Healy*, 408 U.S. at 184. The Supreme Court has therefore permitted parties to challenge permitting requirements "in cases where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker." *Forsyth Cty.*, 505 U.S. at 129.

As alleged in the Complaint, three aspects of the College's permitting requirements for the Free Speech Area are facially unconstitutional. First, Mr. Shaw alleges that the College's permitting system gives College administrators unlimited discretion to grant or deny permits. Doc. 1 ¶¶ 52, 111. Courts have routinely struck down permitting schemes that, like the scheme at issue here,

confer unbridled discretion and fail to identify objective and narrow standards for the licensing authority to apply. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988) ("[I]n the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship") (citation omitted); *Kunz*, 340 U.S. at 294 ("[W]e have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places") (citation omitted); *cf. Bowman v. White*, 444 F.3d 967, 981 (8th Cir. 2006) (upholding permitting scheme because the rule "grants the University the right to deny or revoke a permit for the use of a space by a Non-University Entity only for limited reasons, such as interference with the educational activities of the institution"). This is true because "[i]f the permit scheme involves appraisal of facts, the exercise of judgment, and the formation of an opinion by the licensing authority, the danger of censorship and of abridgment of our precious First Amendment freedoms is too great to be permitted." *Forsyth Cty.*, 505 U.S. 123 at 131 (internal quotation marks and citations omitted).

Second, the College's rules require all speakers to apply for and obtain a permit, regardless of whether the applicants plan to speak alone or as part of a group and regardless of whether an applicant's speech is likely to draw a crowd. Courts have rejected this sort of "unflinching application" of permitting requirements to small groups "posing no threat to the safety, order, and accessibility of streets and sidewalks," *Cox v. City of Charleston*, 416 F.3d 281, 285–287 (4th Cir. 2005), on the ground that such rules are not narrowly tailored, *Burk v. Augusta-Richmond Cty.*, 365 F.3d 1247, 1255 n.13 (11th Cir. 2004). Thus, courts have invalidated permitting requirements for small groups, *Boardley v. Dep't of Interior*, 615 F.3d 508, 520–523 (D.D.C. 2010), including groups of ten, *Douglass v. Brownell*, 88 F.3d 1511, 1524 (8th Cir. 1996), groups of "six to eight,"

Grossman v. City of Portland, 33 F.3d 1200, 1205–1208 (9th Cir. 1994), groups of three, *Cox*, 416 F.3d at 286, and groups of two, *Cmty. for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1392 (D.D.C. 1990).

In *Grossman*, the Ninth Circuit addressed the constitutionality of a municipal ordinance that required a permit for any person "to conduct or participate in any organized entertainment, demonstration, or public gathering, or to make any address, in a [public] park." 33 F.3d at 1201. The city applied that ordinance to "arrest[] and handcuff[]" a member of a group of "six to eight people" engaged in "a small, peaceful anti-nuclear protest." *Id.* at 1202. That person brought suit alleging that the ordinance violated his First Amendment rights, and the Ninth Circuit agreed. *Id.*

The Ninth Circuit held that the permitting scheme was "a prior restraint" that "restricted access to the public parks, the quintessential public forums," *Grossman*, 33 F.3d.at 1204 (internal quotation marks and citations omitted), and that the ordinance was not narrowly tailored, *id.* at 1205–1208. In particular, the Ninth Circuit concluded that the ordinance was "extremely broad" because it included "the actions of single protesters" within its sweep. *Id.* at 1206. Accordingly, "[r]ather than being narrowly tailored to protect speech, as it should have been," the ordinance "was tailored so as to preclude speech." *Id.* at 1207.

Similarly, other circuits have held unconstitutional as impermissible prior restraints permitting schemes that unnecessarily require two or three people gathered together to acquire a permit before engaging in speech. For example, the Sixth Circuit invalidated an ordinance as "hopelessly overbroad" because "virtually any group of two or more persons walking on a public right of way with a common purpose or goal would presumably be required to possess a permit under the Ordinance." *American-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 608 (6th Cir. 2005). Likewise, the Fourth Circuit held unconstitutional an ordinance that criminalized the failure to obtain a permit before

a group of three people engaged in any sort of expressive conduct. *Cox*, 416 F.3d at 286 ("Even if their expression does nothing to disturb the peace, block the sidewalk, or interfere with traffic, the [regulation] renders it criminal.").

As alleged, the College's policies and practices similarly included the actions of a small group of people within their sweep. *Grossman*, 33 F.3d at 1206. Specifically, Mr. Shaw and two other people—a smaller group than the "six to eight" in *Grossman*, *id.* at 1202—"set up a small folding table outside the Free Speech Area on the Pierce College Mall" and "intended to discuss their political beliefs with students on the Pierce College Campus," Doc. 1 ¶¶ 57–58. Mr. Shaw's activities did not interrupt the ordinary functions of the College or draw a large crowd. *Id.* ¶ 58. To the contrary, he sought to distribute copies of the Constitution, speak to his fellow students, and collect signatures for a petition by himself or with one or two others. *Id.* ¶¶ 56–58, 64. The College's policies prohibiting this kind of non-disruptive expressive activity by an individual or small group are unconstitutionally broad and, instead of "being narrowly tailored to protect speech," are "tailored so as to preclude speech." *Grossman*, 33 F.3d at 1206–1207.

Third, the requirement that students provide their names, organizational affiliation, and other information to administrators before engaging in speech violates the First Amendment because it effectively bans all spontaneous speech. *See* Doc. 1 ¶ 48. Courts have struck down restrictions where "there is a significant amount of spontaneous speech that is effectively banned by the [regulation]." *Watchtower Bible & Tract Soc'y.*, 536 U.S. at 167; *see also Grossman*, 33 F.3d at 1206 (noting that broad permitting schemes ban "[s]pontaneous expression, which is often the most effective kind of expression"); *Williams*, 2012 WL 2160969, at *6 ("[E]xpansive permitting schemes place an objective burden on the exercise of free speech. Further, they essentially ban spontaneous speech.") (citation omitted). The permitting requirement here prevents students from engaging in spontaneous

speech, even within the designated Free Speech Area, and is therefore constitutionally suspect. *McGlone v. Bell*, 681 F.3d 718, 734–735 (6th Cir. 2012) (reversing dismissal of a complaint challenging registration requirement because college had "not explained how the policy at issue maintains order or prevents interruption of an educational mission").

Mr. Shaw has stated a claim that the permit requirement on its face infringed on his First Amendment rights. Indeed, he has alleged that the requirement, together with campus administrators' enforcement of the policy, has made him fearful to speak on campus. Doc. 1 ¶ 88. As the Ninth Circuit has recognized, permitting requirements have precisely this chilling effect because "[t]he simple knowledge that one must inform the government of [one's] desire to speak and must fill out appropriate forms and comply with the applicable regulations discourages citizens from speaking freely." *N.A.A.C.P. v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984).

B. Pierce College's Ban On Speech Beyond The 616-Square-Foot Free Speech Area Is, In Any Case, An Invalid Time, Place, and Manner Restriction

Even if the College's closure to student expression of all fora outside the Free Speech Area were not an invalid prior restraint, it still would violate the First Amendment because it is not a valid time, place, or manner restriction. Time, place, or manner restrictions are a vital means through which the government manages competing uses of public fora. "For example, two parades cannot march on the same street simultaneously, and government may allow only one. A demonstration . . . on a large street during rush hour might put an intolerable burden on the essential flow of traffic, and for that reason could be prohibited. If overamplified loudspeakers assault the citizenry, government may turn them down." *Grayned v. City of Rockford*, 408 U.S. 104, 115–116 (1972) (citations omitted). However, "[f]ree expression must not, in the guise of regulation, be

abridged or denied." *Id.* at 117 (internal quotation marks omitted). Thus, it is well-established that "even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward*, 491 F.3d at 791 (internal quotation marks omitted).

Ultimately, "[t]he nature of a place, the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." *Grayned*, 408 U.S. at 116 (internal quotation marks omitted). With respect to the unique characteristics of the educational environment, expressive activity that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others is . . . not immunized by the constitutional guarantee of freedom of speech." *Tinker*, 393 U.S. at 513. At the same time, "[c]ollege campuses traditionally and historically serve as places specifically designated for the free exchange of ideas." *Bowman*, 444 F.3d at 979 (citing *Healy*, 408 U.S. at 180). Thus, "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views" in State-operated schools. *Tinker*, 393 U.S. at 511.

Any assessment of the reasonableness of time, place, or manner restrictions requires an examination of the physical characteristics of the area in question and its traditional, designated, or habitual uses. *See infra* pp. 16–17. Yet Pierce College imposes its speech restrictions without regard for "[t]he crucial question"—"whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned*, 408 U.S. at 116. The District Rules indiscriminately convert all areas outside the Free Speech Area—that is, more than 99.9% of the campus, including its Mall, sidewalks, and publicly accessible spaces—into non-public fora without any consideration of the

variety of fora present on a modern university campus. Doc. 1, Ex. A ("The colleges of the Los Angeles Community College District are non-public forums, except for those portions of each college designated as Free Speech Areas"). That imprecise, blunt labeling of the College's grounds fails to take into account the various uses of the many spaces on the College, and therefore disregards the corresponding levels of judicial scrutiny. *See Bowman*, 444 F.3d at 976 ("A modern university contains a variety of fora."). Because speech restrictions in non-public fora need only be reasonable and *viewpoint* neutral, *see Perry Educ. Ass'n*, 460 U.S. at 46, the College is ostensibly free to discriminate on the basis of the content of speech or bar certain speech altogether.

This is particularly troubling because courts have held that outdoor public spaces on campus are public fora, especially for students such as Mr. Shaw. For example, the Fifth Circuit held that "outdoor areas of [a] campus generally accessible to students—such as plazas and sidewalks—[are] public forums for student speech." *Justice For All v. Faulkner*, 410 F.3d 760, 769 (5th Cir. 2005); *Hays Cty. Guardian v. Supple*, 969 F.2d 111, 117 (5th Cir. 1992) (finding that a "campus's function as the site of a community of full-time residents . . . suggests an intended role more akin to a public street or park than a non-public forum."). In addition, the Eighth Circuit held that campus areas, "including the streets, sidewalks, and open areas located inside and directly adjacent to the campus," were public fora. *Bowman*, 444 F.3d at 977–978; *see also Gilles v. Garland*, 281 F. App'x 501, 509–510 (6th Cir. 2008) (discussing *Bowman*); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 861–862 (N.D. Tex. 2004) (holding that a campus's park areas, sidewalks, streets, or other similar common areas "comprise the irreducible public forums on the campus"). To determine whether particular areas are designated public fora, courts must analyze the objective evidence in the record, including the physical characteristics and location of the area, the traditional use of

the property, the purposes of the space, and the college's intent and policy with respect to the property. *Bowman*, 444 F.3d at 978.

Pierce College is no exception to this rule. According to the Complaint, there are "open areas and sidewalks beyond the Free Speech Area where student speech, expressive activity, and distribution of literature would not interfere with or disturb access to college buildings or sidewalks" or otherwise disrupt the educational mission of the College. Doc. 1 ¶ 54. Mr. Shaw further alleges that, at the time he was stopped from distributing Spanish-language copies of the United States Constitution and discussing his political views with willing students, he was located alongside a "large thoroughfare called 'the Mall'" and was not "disrupting campus operations or interfering with foot traffic." *Id.* ¶¶ 57–58.

Although the College and District Rules are relevant in determining whether parts of campus have been designated as public fora for student speech, these rules are not dispositive in and of themselves. To the contrary, according to the Ninth Circuit, the College and District must consistently *apply* those rules if they wish to convert Pierce College's public fora into a non-public forum property. The Ninth Circuit's decision in *OSU Student Alliance v. Ray*, 699 F.3d 1053 (9th Cir. 2012), is instructive. In that case, the court held that in order to "destroy the designation of a public forum, the government must do more" than merely announce a policy. *Id.* at 1063. Rather, it must "consistently *apply* a policy specifically designed to maintain a forum as non-public." *Id.* (emphasis added).

Mr. Shaw has alleged that the College's application of its policies was inconsistent at best because the College allowed students to engage in expressive activity outside the Free Speech Zone. Specifically, Mr. Shaw alleged that campus administrators allowed a "large protest that formed outside of the Free Speech Area" to proceed. Doc. 1 ¶ 66. Indeed, on one occasion, Mr. Shaw was himself able to distribute materials outside the Free Speech Area unimpeded by Pierce College officials. *Id.* Thus, Mr. Shaw has demonstrated that Pierce College did

not consistently apply the District's non-public forum policy to areas that would otherwise be public fora, including the campus's open, grassy areas and sidewalks. *See Hays Cty. Guardian*, 969 F.2d at 118 ("[T]he government's policy is indicated by its consistent practice, not each exceptional regulation that departs from the consistent practice").

The allegations regarding the narrowness of the Free Speech Area give rise to a sufficient First Amendment claim because it is "the right of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity to win their attention.'" *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949)). The College has limited all speech to a 616-square-foot Free Speech Area on a campus that spans hundreds of acres. Doc. 1 ¶ 46. Moreover, the College bans distribution of materials and collection of signatures outside of the Free Speech Area. *Id.* And the map attached to the Complaint shows that the restriction of speech to the Free Speech Area prevents students from communicating with peers who traverse other parts of the campus. *Id.*, Ex. B. Yet the College fails to explain why its stated interest of "avoiding disruption, insuring safety, comfort, or convenience of the public, and maintaining grounds that are attractive and intact," Doc. 22 at 23, justifies the limitation of free expression to a peculiarly small area of campus.

Specifically, the College does not address why substantial portions of ordinarily common spaces, including parts of the large thoroughfare known as the College's "Mall," are excluded as alternative fora for student expression. Doc. 1 ¶¶ 46, 57; *see Kuba v. 1-A Agric. Ass'n*, 387 F.3d 850, 862 (9th Cir. 2004) (holding that a policy that "relegates communication activity to three small, fairly peripheral areas, does not sufficiently match the stated interest of preventing congestion and so is not narrowly tailored to serve the government's interest") (internal quotation marks and citation omitted). "While the First Amendment does not guarantee the right to employ every conceivable method of communication at

all times and in all places, a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate." *Pine v. City of W. Palm Beach*, 762 F.3d 1262, 1274 (11th Cir. 2014) (quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984)).

Speech restrictions must allow students the opportunity to engage with a full cross-section of the campus community. *See Sarre v. City of New Orleans*, 420 F. App'x 371, 376–377 (5th Cir. 2011). Furthermore, the alternative forum may not compromise the "quantity or content" of student expression. *Ward*, 491 U.S. at 802; *cf. Pine*, 762 F.3d at 1274–1275 (finding subject ordinance prohibiting amplified sound "leaves open robust alternative channels of communication" because it "in no way restricts the use or display of signs or the distribution of literature, thereby providing reasonable alternative modes of communication").

Of course, none of the foregoing requires the College to open up its entire campus for free expression. While regulations of speech must allow for ample alternative channels of communication, speakers are not entitled to their first choice of alternative forum. Rather, the regulation must not foreclose the speakers' ability to reach their intended audience. *Sarre*, 420 App'x at 376. Providing alternative channels of communication is particularly feasible because "[a] university campus will surely contain a wide variety of fora on its grounds." *Bloedorn*, 631 F.3d at 1232; *see also Bowman*, 444 F.3d at 977 ("[L]abeling the campus as one single type of forum is an impossible, futile task."). In addition to treating different parts of campus differently, a college also need not treat student speech identically to non-student speech. *See Justice For All*, 410 F.3d at 767; *see also Widmar*, 454 U.S. at 268 n.5 ("We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike."); *Bloedorn*, 631 F.3d at 1234 (holding that for *non-students*, certain outdoor areas of a public college or university can be deemed a non-public forum if applicable policies suggest that these spaces are for the exclusive use and benefit of students).

These limitations, however, are largely inapplicable to the facts pleaded in the complaint. Mr. Shaw is a student at Pierce College and is seeking to engage in speech in outdoor areas and sidewalks—not classrooms or other spaces that are more appropriately characterized as non-public fora. Doc. 1 ¶ 88. These outdoor areas and sidewalks almost certainly constitute designated public fora as to Mr. Shaw. Mr. Shaw has alleged that there is no significant interest (such as interruption of campus operations or educational functions) in banning all expressive conduct outside of the 616-square-foot Free Speech Area. *Id.* ¶ 54. Nevertheless, the College's rules have proscribed Mr. Shaw from engaging in speech outside that small area. *Id.* ¶ 88. Factual development is necessary to determine the proper character of the outdoor spaces, and such determination is better suited for the summary judgment or trial phase. Accordingly, Mr. Shaw has sufficiently pleaded a claim that the College's limitations on speech outside the Free Speech Zone violate the First Amendment.

CONCLUSION

The United States respectfully requests that the Court consider the foregoing in resolving the pending motion to dismiss.

Dated: October 24, 2017

Respectfully submitted,

JEFFERSON B. SESSIONS III
Attorney General

JOHN M. GORE
Acting Assistant Attorney General

TARA HELFMAN
Senior Counsel

STEVEN MENASHI
Acting General Counsel, Department of Education

THOMAS E. CHANDLER
Deputy Chief, Appellate Section

/s/ Vikram Swaruup
VIKRAM SWARUUP
Attorney, Appellate Section
U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Ave., N.W.
Washington, DC 20530
Telephone: (202) 616-5633
Facsimile: (202) 514-8490
Email: vikram.swaruup@usdoj.gov

Miscellaneous Filings (Other Documents)

2:17-cv-02386-ODW-PLA Kevin A. Shaw v. Kathleen F. Burke et al

ACCO,(PLAx),DISCOVERY,MANADR

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Notice of Electronic Filing

The following transaction was entered by Swaruup, Vikram on 10/24/2017 at 2:05 PM PDT and filed on 10/24/2017

Case Name: Kevin A. Shaw v. Kathleen F. Burke et al
Case Number: 2:17-cv-02386-ODW-PLA
Filer: United States
Document Number: 39

Docket Text:
STATEMENT of Interest filed by Interested Party United States (Swaruup, Vikram)

2:17-cv-02386-ODW-PLA Notice has been electronically mailed to:

Arthur I Willner awillner@leaderberkon.com, ajiminez@leaderberkon.com, bbailey@leaderberkon.com, gjannace@leaderberkon.com, kpatel@leaderberkon.com, salvarenga@leaderberkon.com

Brynne S Madway brynne.madway@thefire.org

David Salazar dsalazar@leaderberkon.com

Marieke T Beck-Coon marieke@thefire.org

Sharon J Ormond sormond@aalrr.com

2:17-cv-02386-ODW-PLA Notice has been delivered by First Class U. S. Mail or by other means BY THE FILER to :

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:N:\ECF\Shaw\2_17-cv-02386 20171024 Shaw U.S. Statment of Interest.pdf
Electronic document Stamp:
[STAMP cacdStamp_ID=1020290914 [Date=10/24/2017] [FileNumber=24434902-0] [44b0ca878fc3ba12f7a38ef25b445a81050dc081e505e2922d764252a42317650d082552db84e30c9668c560e37973b7fbc1b36f62ac4d77ed9e9dfb3e67a604]]