IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

YOUNG AMERICANS FOR LIBERTY AT KELLOGG COMMUNITY COLLEGE, *et al.*, *Plaintiffs*, v. **KELLOGG COMMUNITY COLLEGE**, *et al.*. *Defendants*.	Case No.: 1:17-cv-58-RJJ-RSK **THE HONORABLE ROBERT J. JONKER**

PLAINTIFFS' MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

"Do you like freedom and liberty?" Compl. ¶ 165, PageID.23. The answer on our college campuses must be a resounding, "Yes." After all, the "essentiality of freedom in the community of American universities is almost self-evident." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Our "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 Univ. of N.Y.*, 385 U.S. 589, 603 (1967). "[S]tudents must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Id*. Thus, "free speech is of critical importance because it is the lifeblood of academic freedom." *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008). So over forty years ago, the Supreme Court held that "state colleges and universities are not enclaves immune from the sweep of the First Amendment" and that its "precedents . . . leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large." *Healy v. James*, 408 U.S. 169, 180 (1972).

But Defendants had a different response to that same question. When Plaintiffs stood along an expansive sidewalk outside a theater at Kellogg Community College ("KCC") and asked their fellow students whether they like the same freedom and liberty the Supreme Court declared essential to college life, Defendants dubbed it "provocative" and had them arrested, jailed, and charged with trespassing. The charges were dismissed after Plaintiffs retained counsel, but the chilling effect of this arrest lingers to this day and will linger until the policies underlying it are enjoined.

Even in high school, "free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969). And Defendants have significantly "*less leeway* in regulating student speech than public elementary or high schools." *DeJohn*, 537 F.3d at 316. Even so, they enforce two policies, only one of which is written, that treat students as if they should be seen but not heard. These policies require students to get a permit ten days before engaging in any constitutionally protected

expression on campus, grant officials unbridled discretion to approve or reject permit requests, prohibit certain forms of speech even when students have a permit, and empower officials to shut down any expression that they deem to violate (unconstitutional) college policies. In the process, these policies eliminate spontaneous speech, drastically curtail leafletting or one-on-one discussions, and broadly limit all speech activities to a single location on campus. It is these policies that Defendants enforced by arresting and jailing Plaintiffs, and it is these policies that Plaintiffs ask this Court to enjoin so that they and all other students at KCC may be free to speak on campus.[1]

STATEMENT OF RELEVANT FACTS

For many months, Mrs. Michelle Gregoire, a KCC student, wanted to get Young Americans for Liberty ("YAL") registered as an official student organization at KCC. Compl. ¶ 134, PageID.20. YAL promotes the natural rights of life, liberty, and property and seeks to train students to advocate for these same principles. *Id.* ¶¶ 13–14, 17–18, PageID.4. KCC requires that to become a registered student organization, YAL must first acquire five student members. *Id.* ¶ 135, Page ID.20.

In the spring of 2016, Mrs. Gregoire tried to generate this level of interest in YAL by speaking with students and trying to recruit members in some outdoor areas of campus. *Id.* ¶ 136, PageID.20. KCC's sixty-three acre campus features a variety of large cultivated grassy areas, often with trees and benches, that are open to the public. *Id.* ¶¶ 72–75, PageID.11; Answer ¶¶ 72, 75, PageID.221. It also includes many open-air quadrangles, sidewalks, and park-like areas where expressive activities would not interfere with KCC's activities or disturb its campus environment. Compl. ¶ 76, PageID.11. But officials quickly stopped her, informing her that KCC policies required her to reserve a table inside the Student Center to speak with students about YAL. *Id.* ¶ 137, PageID.20.

By saying this, these officials enforced Defendants' unwritten Speech Zone Policy. *Id.* ¶ 138, PageID.20. Under this policy, students must confine their expressive activities "to information tables that can only be utilized inside the Student Center." *Id.* ¶ 116, PageID.18. Students are not allowed to utilize the outdoor areas of campus for expressive purposes, and they have to reserve

[1] Plaintiffs file this motion now so that the briefing, any hearings, and this Court's deliberations may be completed before the fall semester begins.

this table with KCC officials in advance. *Id.* ¶¶ 117–19, Page ID.18. To reserve a table, they must submit a table request form "ten (10) business days" in advance. *Id.* ¶ 120, PageID.18. Defendants' policy contains no objective criteria for KCC officials to use when deciding whether to approve or reject these reservation requests. *Id.* ¶¶ 115–22, PageID.17–18.

Defendants enforce this unwritten Speech Zone Policy through KCC's *Student Code of Conduct*. *Id.* ¶ 123, PageID.18; Answer ¶ 123, PageID.226. Students who engage in expressive activity without reserving an information table violate this *Code*. Compl. ¶ 128, PageID.19. It also prohibits its students from "soliciting . . . without permission from the Student Life Office" and from using KCC "facilities . . . or property which has not been reserved . . . through appropriate College officials." *Id.* ¶¶ 129–30, PageID.19–20. Students who violate these provisions face penalties ranging from written warnings to suspension or expulsion. *Id.* ¶¶ 132–33, PageID.20. As Plaintiffs learned, they can also be arrested and jailed.

Trying to follow these instructions, Mrs. Gregoire reserved a table in the Student Center. *Id.* ¶ 139, PageID.20. KCC officials instructed her that she could not approach any students or ask them to come to her table. *Id.* ¶ 140, PageID.21. Indeed, KCC policies prohibit students from "[c]all[ing] out to . . . individuals" when manning these tables. *Id.* ¶ 99, PageID.15. As KCC prohibited her from initiating conversations, Mrs. Gregoire spoke to fewer than five students that day, which prevented her from recruiting the five members needed to start the club. *Id.* ¶¶ 143–44, PageID.21.

In September 2016, Mrs. Gregoire asked Mr. Nathan Berning from the Leadership Institute to help her recruit students for the KCC chapter of YAL. *Id.* ¶ 145, PageID.21. Mr. Berning asked Mr. Isaac Edikauskas if he would be willing to assist given his experience as the vice president of YAL at Michigan State University. *Id.* ¶ 146, PageID.21. Mr. Brandon Withers, another KCC student who was active in YAL at KCC, also agreed to assist. *Id.* ¶ 147, PageID.21.

Shortly after noon on September 20th, these four individuals began recruiting students for YAL at KCC on the large public walkway outside the Binda Performing Arts Center ("Binda Center") at KCC. *Id.* ¶¶ 148–50, PageID.21–22. They chose this area because there is a lot of student traffic in that area and because students commonly engage one another in conversation there. *Id.* ¶ 149,

PageID.21–22. At no time did any of the three or four YAL-affiliated people impede access to buildings, access to parking lots, or the free flow of traffic on the sidewalks. *Id.* ¶¶ 153–54, PageID.22. Nor did they harass anyone who was not interested in talking with them, joining YAL, or receiving their literature. *Id.* ¶¶ 155–56, PageID.22.

Even so, a KCC official approached them, saying that they were required to have a permit to solicit on campus and that they needed to reserve a table inside the Student Center for these activities. *Id.* ¶ 157, PageID.22. Then the administrator relented and said it would be "fine" for them to recruit for another one to two hours. *Id.* ¶ 158, PageID.22–23. But five minutes later, Defendant Hutchinson arrived, instructed them to stop talking with students, and informed them that they were violating both the Speech Permit Policy (by not getting a permit before beginning their activities) and the Speech Zone Policy (because "solicitation" was not allowed in this areas but was instead relegated to information tables inside the Student Center). *Id.* ¶¶ 159–63, PageID.23.

Defendant Hutchinson thereby enforced both the Speech Zone Policy summarized above and the Speech Permit Policy. *Id.* ¶¶ 160–63, PageID.23. Under the latter, students must get a permit before engaging in any expressive activities on campus. The policy states that "[u]se of the College grounds . . . for solicitation is permitted only if the solicitation has been approved by Student Life." *Id.* ¶ 87, PageID.14. "College grounds" encompasses "all lands . . . of all campuses of [KCC]," including "porches" and "sidewalks." *Id.* ¶¶ 85–86, PageID.14. "Solicitation" is defined to include "the carrying or displaying of signs or placards, leafleting, campaigning, marches, rallies, parades, demonstrations, protests, assemblies, speeches, circulation or petitions, and or any public demonstration on the grounds." *Id.* ¶¶ 83–84, PageID.13–14. Thus, the Speech Permit Policy requires students to get a permit to engage in any constitutionally protected speech anywhere on campus.

To get this required permit, students must submit a form to the Student Life Office. *Id.* ¶ 88, PageID.14. That office then has the "authority to approve, modify or deny" these requests. *Id.* ¶ 89, PageID.14. It can do so based on four subjective criteria (*i.e.*, "the reasonable conduct of public business, the educational process, unobstructed access . . . , and to maintain the College grounds"), though nothing says that these are the only reasons it can modify or deny a request. *Id.* ¶¶ 89–91,

PageID.14. Or it can turn to the "governing conditions." *Id.* ¶¶ 95–103, PageID.15–16. One of these gives officials the right to "stop any solicitation" whenever they deem it to violate this policy. *Id.* ¶ 100, PageID.15. But once again, nothing says that these are the only reasons officials may deny or modify a permit request, allowing them to deny requests even if they satisfy all of the governing conditions. *Id.* ¶¶ 102–03, PageID.16. Or the Student Life Office can deny a permit request because the activity in question does not "support the mission of [KCC] or the mission of a recognized college entity or activity." *Id.* ¶¶ 106–07, PageID.16. Nothing gives officials any objective guidance in applying this ambiguous standard. *Id.* ¶¶ 108–11, PageID.16–17.

Even after getting a permit, students are not permitted to talk to other students a few feet away from their table and ask them any questions as the policy prohibits students from "approach[ing] individuals" or "[c]all[ing] out to . . . individuals." *Id.* ¶¶ 82, 99, PageID.12, 15. Instead, they can only talk to students who walk up to their table without any invitation or conversation from those behind the table, as Defendants reminded Mrs. Gregoire. *Id.* ¶¶ 140–41, PageID.21.

If students violate this Speech Permit Policy, they can be punished under KCC's *Code of Conduct for Students*. *Id.* ¶¶ 126–27, PageID.19. That *Code* prohibits "soliciting . . . without permission from the Student Life Office" and "not adhering to the Solicitation Policy after receiving approval for solicitation." *Id.* ¶ 129, PageID.19. Punishments range from written warnings to expulsion, *id.* ¶¶ 132–33, PageID.20, though arrests and jail time are also now obviously real possibilities.

After giving his instructions, Defendants Hutchinson watched Plaintiffs interact with passing students, as one of them asked: "Do you like freedom and liberty?" *Id.* ¶ 165, PageID.23; Answer ¶ 165, PageID.232. Defendant Hutchinson labeled this question "provocative" and claimed that merely asking it obstructed students' access to education. *Id.* ¶ 166, PageID.23. According to him, "engaging [students] in conversation on their way to educational places" violated the Speech Permit Policy because it was an "obstruction to their education." *Id.* ¶ 167, PageID.23–24. Mrs. Gregoire explained that students who were not interested in talking with Plaintiffs just continued on to class. *Id.* ¶ 168, PageID.24; Answer ¶ 168, PageID.232. Plaintiffs did not pester them. *Id.* ¶¶ 155–56, PageID.22. But Defendant Hutchinson condescendingly insisted that he was "trying to

protect" students from "rural farm areas" who "might not feel like they have the choice to ignore the question." *Id.* ¶ 169, PageID.24; Answer ¶ 169, PageID.232.

At this point, Defendant Hutchinson told Plaintiffs they could not continue to speak to students on the walkway in front of the Binda Center and ordered them to move their expressive activities to an information table in the Student Center. Compl. ¶¶ 170, 173, PageID.24. He explained that KCC "has places where we ask people to do this because if somebody's uncomfortable with what you guys are talking about, it's not an impediment to their education." *Id.* ¶ 172, PageID.24; Answer ¶ 172, PageID.233. Plaintiffs replied by saying that they had a constitutional right to speak where they were located and would continue to do so. Compl. ¶ 175, PageID.24. In the short time that Plaintiffs talked with students there, more than twenty students signed a petition indicating an interest in joining YAL at KCC. *Id.* ¶ 176, PageID.25.

Shortly thereafter, Defendant West and several officers confronted Plaintiffs. *Id.* ¶¶ 178–80, PageID.25. Defendant West announced that Plaintiffs were violating the *Code of Student Conduct* by failing to comply with instructions to stop speaking outside the Binda Center. *Id.* ¶ 180, PageID.25. Responding to threats of arrest from Defendant West, Mr. Withers discontinued his expressive activities. *Id.* ¶¶ 182–88, PageID.25–26. Mrs. Gregoire, Mr. Berning, and Mr. Edikauskas respectfully insisted that they had a constitutional right to continue speaking in that location. *Id.* ¶¶ 178–81, PageID.25. Defendant West and his officers then arrested these three individuals, handcuffed them, charged them with trespassing, and transported them to the county jail, where they remained for more than seven hours before posting bond. *Id.* ¶¶ 189–92, PageID.26. Defendant West instructed Mrs. Gregoire that she could not return to KCC without first getting his permission. *Id.* ¶ 190, PageID.26. Even after the prosecutor dismissed all charges, *id.* ¶ 193, PageID.26, this restriction remained in effect until after this suit was filed. Gregoire Decl. ¶¶ 9–16.

YAL at KCC, Mrs. Gregoire, and Mr. Withers desire to engage in protected expression on campus—including oral communication and literature distribution—without obtaining prior permission and without confining those activities to the one designated location on campus, but have refrained from doing so for fear of further punishment and arrest. Compl. ¶ 200, PageID.27.

ARGUMENT

Plaintiffs are entitled to a preliminary injunction as they are likely to succeed on the merits, they are suffering irreparable harm, the balance of equities tips in their favor, and such an injunction serves the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

I. Plaintiffs are likely to succeed on the merits of their claims.

A. Defendants are violating Plaintiffs' First Amendment rights.

Plaintiffs' message was simple and innocuous—an invitation to join a club, a question about freedom and liberty, and a pocket Constitution. The First Amendment protects this and *far* more controversial expression. *Terminiello v. City of Chi.*, 337 U.S. 1, 4 (1949) (noting free speech "best serve[s] its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger"). Its protections extend with equal force to public colleges. *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) ("With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."); *Healy*, 408 U.S. at 180 ("[S]tate colleges . . . are not enclaves immune from the sweep of the First Amendment."). Indeed, it protects students on campus to the same degree it protects citizens off campus. *Healy*, 408 U.S. at 180 ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.").

Hence, federal courts routinely strike down policies like Defendants'. Numerous colleges, like Defendants here, have quarantined student speech using speech zones or permit requirements, but these policies violate the First Amendment.[2] Defendants' policies are viewpoint-based, making them illegal in any forum. But they also represent content-based prior restraints on student speech

[2] *See, e.g.*, *OSU Student Alliance v. Ray*, 699 F.3d 1053 (9th Cir. 2012); *Justice for All (JFA) v. Faulkner*, 410 F.3d 760 (5th Cir. 2005); *Hays Cnty. Guardian v. Supple*, 969 F.2d 111 (5th Cir. 1992); *Grace Christian Life v. Woodson*, 2016 WL 3194365 (E.D.N.C. June 4, 2016); *Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, 2012 WL 2160969 (S.D. Ohio June 12, 2012); *Smith v. Tarrant Cnty. Coll. Dist.*, 694 F. Supp. 2d 610 (N.D. Tex. 2010); *Smith v. Tarrant Cnty. Coll. Dist.*, 670 F. Supp. 2d 534 (N.D. Tex. 2009); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004); *Pro-Life Cougars v. Univ. of Hous.*, 259 F. Supp. 2d 575 (S.D. Tex. 2003); *Khademi v. S. Orange Cnty. Cmty. Coll. Dist.*, 194 F. Supp. 2d 1011 (C.D. Cal. 2002); *Burbridge v. Sampson*, 74 F. Supp. 2d 940 (C.D. Cal. 1999).

that are not narrowly tailored to a significant government interest, do not leave open ample alternative channels of communication, and are substantially overbroad. Thus, they should be enjoined.

1. Both policies are viewpoint-based, which is unconstitutional in any forum.

"In both designated public fora and nonpublic fora, the government may not discriminate based upon the viewpoint of the speaker." *Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834, 845 (6th Cir. 2000). Defendants' policies discriminate due to viewpoint by (a) the Speech Permit Policy's express terms; (b) giving unbridled discretion to discriminate based on viewpoint (and failing to prevent it); and (c) selective enforcement. They are illegal in any forum and should be enjoined.

a. The Speech Permit Policy requires viewpoint discrimination.

Viewpoint discrimination occurs "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* Defendants' Speech Permit Policy runs afoul of this "axiomatic" principle, *id.* at 828, because it bans speech that the College determines does not "support the mission of [KCC] or the mission of a recognized college entity or activity." Compl. ¶¶ 81–82, PageID.12–13. This policy requires that KCC officials examine the viewpoint of expression and censor such speech if it is perceived to be contrary to the College's mission. *Id.* ¶¶ 106–11, PageID.16–17. Thus, a student will be allowed to speak if officials decide that his message supports the mission of KCC or of a "recognized college entity or activity." But if his message does not or if it opposes the missions of those entities, he will not be allowed to speak. This is textbook viewpoint discrimination, a "blatant" First Amendment violation, and reason enough to enjoin this policy. *Rosenberger*, 515 U.S. at 829.

b. Both policies grant unbridled discretion to College officials and lack any protections against viewpoint discrimination.

The Supreme Court "consistently condemn[s]" speech regulations that "vest in an administrative official discretion to grant or withhold a permit based upon broad criteria unrelated to the proper regulation of public places." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969). Rules that do so are treated as viewpoint-based. *See, e.g.*, *Southworth v. Bd. of Regents of*

Univ. of Wis. Sys., 307 F.3d 566, 579 (7th Cir. 2002) ("[T]he prohibition against unbridled discretion is a component of the viewpoint-neutrality requirement."); *Matwyuk v. Johnson*, 22 F. Supp. 3d 812, 824–25 (W.D. Mich. 2014) (finding language that grants unbridled discretion to be viewpoint based, eliminating the need for forum analysis). Left with only vague or non-existent criteria on which to base their decision, government officials "may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763–64 (1988). If the permit scheme involves the "appraisal of facts, the exercise of judgment, and the formation of an opinion," the danger of censorship is too great to be permitted. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992). Instead, speech restrictions must "contain narrow, objective, and definite standards to guide" officials. *Shuttlesworth*, 394 U.S. at 150–51; *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 621 (6th Cir. 2009) ("To avoid granting such unbridled discretion, ordinances must contain precise and objective criteria on which they must make their decisions. . . ." (internal quotations omitted)).

In fact, even if there were no evidence of viewpoint-based enforcement—and there is ample evidence of it—the fact that the policies are so open-ended as to allow for viewpoint-based application renders them unconstitutional. *See Forsyth Cnty.*, 505 U.S. at 133 n.10 ("[T]he success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so."); *Polaris Amphitheater Concerts, Inc. v. City of Westerville*, 267 F.3d 503, 509 (6th Cir. 2001) ("At stake is the risk that in the absence of 'narrowly drawn, reasonable and definite standards for the officials to follow,' the law invites opportunities for the unconstitutional suppression of speech."). Indeed, policies cannot be viewpoint neutral without including affirmative "protection . . . for viewpoint neutrality." *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000). "[V]iewpoint neutrality requires not just that a government refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to *protect* against the improper exclusion of viewpoints." *C.E.F. of Md., Inc. v. Montgomery Cnty. Pub. Schs.*, 457 F.3d 376, 384 (4th Cir. 2006).

Courts have routinely enjoined policies like Defendants' because they gave officials too much discretion to regulate speech. *See, e.g.*, *OSU Student Alliance*, 699 F.3d at 1064–65 (striking University restriction on student newspaper bins that had "no standards to cabin discretion" and "set no fixed standard" for applying the policy because "no court has held that a standardless policy passes [constitutional] muster"); *Smith*, 670 F. Supp. 2d at 536, 538 (striking policy that required a permit before students could speak on campus and relegated such speech to a "free-speech zone" because it gave officials unfettered discretion to impose a prior restraint on speech); *Pro-Life Cougars*, 259 F. Supp. 2d at 577–79, 583–84 (striking down permit rule for "potentially disruptive" student speech because it lacked "any objective guidelines or articulated standards").

Defendants' Speech Permit and Speech Zone Policies, in conjunction with penalties imposed through their *Code of Conduct for Students*, confer the same unfettered discretion that doomed these other speech policies. First, the Speech Permit Policy grants Defendants complete discretion to allow only speech that they determine is consistent with the "mission of [KCC]" or "of a recognized college entity or activity." Compl. ¶ 107, PageID.16. Nothing in the policy provides any objective criteria for assessing which speech meets this standard. *Id.* ¶¶ 108–09, PageID.16–17.

Second, this policy grants the Student Life Office the "authority to approve, modify or deny an application for solicitation in order to assure the reasonable conduct of public business, the educational process, unobstructed access to the College for its students, faculty, employees, occupants and the public, and to maintain the College grounds." *Id.* ¶ 89, PageID.14. Again, it fails to provide any objective or comprehensive guidelines to the officials who must decide when to grant and when to deny permits. *Id.* ¶¶ 90–91, PageID.14. In fact, even if a permit request satisfies all the written "governing conditions," officials can still deny it because the policy does not say that these are the only reasons a request can be denied or guarantee that requests that meet these conditions will be granted. *Id.* ¶¶ 102–03, PageID.16. Thus, the policy does not limit officials' discretion in deciding whether and where a student may speak on campus. *Id.* ¶ 205, PageID.28.

These two aspects of Defendants' policies are akin to an elementary school policy the Fourth Circuit invalidated. *C.E.F. of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062 (4th Cir. 2006).

There, a school district could waive fees for any after-hours use of its facilities that was found to be in "the best interest of the district." *Id.* at 1065. The Fourth Circuit struck down this policy as it could not "be squared with the prohibition on unfettered discretion so essential to viewpoint neutrality." *Id.* at 1069. The "best interests" standard virtually prescribed "unconstitutional decision making," as there was nothing in the policy or how it was applied to prevent officials from encouraging some viewpoints over others. *Id.*at 1070 (citing *Forsyth Cnty.*, 505 U.S. at 133).

Here, Defendants essentially impose a "best interests of [KCC]" standard. Giving officials the authority to deny permits based on subjective factors like "the educational process" and "the reasonable conduct of public business" empowers officials to silence views they do not like. Compl. ¶ 89, PageID.14. Requiring that student speech "support the mission of [KCC] or the mission of a recognized college entity or activity" grants officials unfettered discretion to determine what they perceive to be a valid viewpoint and to silence all others. *Id.* ¶ 107, PageID.16; *accord id.* ¶¶ 127–29, PageID.19 (requiring students to get "permission from the Student Life Office" to speak). Both provisions wrongly require "the appraisal of facts, the exercise of judgment, and the formation of an opinion," *Forsyth Cnty.*, 505 U.S. at 131. Thus, like the fee-waiver policy, Defendants' policies unconstitutionally grant officials unbridled discretion to determine which speech is acceptable.

Third, Defendants' Speech Zone Policy, lacking any objective criteria to approve or deny a request, is closely analogous to the unwritten policy stricken at Oregon State. *OSU Student Alliance*, 699 F.3d 1053. There, OSU officials confiscated the news bins of a conservative student-run newspaper and threw them in a heap next to a dumpster based on an unwritten policy. *Id.* at 1057. The Ninth Circuit found that "[t]he fact that the 'policy' was not written or otherwise established by practice meant there were no standards by which the officials could be limited. It left them with unbridled discretion." *Id.* at 1064–65 (citing *Lakewood*, 486 U.S. at 760); *id.* at 1066 (noting need for "clear standards"). Here, Defendants' policy requires students to obtain "written authorization from Student Life" to use an information table. Compl. ¶ 119, PageID.18. Thus, students must seek a permit ten business days in advance. *Id.* ¶ 120, PageID.18. But the policy provides no guidance, let alone objective guidance, as to which requests to grant and which to deny. *Id.* ¶¶ 121–22,

PageID.18. When officials used a standardless policy to throw news bins and newspapers into a heap next to a dumpster, the Ninth Circuit had "little trouble finding constitutional violations." *OSU Student Alliance*, 699 F.3d at 1058. This Court should have even less trouble here when officials used a similarly standardless policy to throw students in jail. *Id.* ¶¶ 3, 189, PageID.2, 26.

These policies are the quintessential example of unbridled discretion: KCC officials have complete authority over what can be expressed, when it can be expressed, and where it can be expressed. Neither of these policies provide any "precise and objective" standards to guide decisions, *H.D.V.-Greektown*, 568 F.3d at 621, and for this reason alone, they should be enjoined.

c. Defendants enforce their policies selectively.

The state cannot grant "use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972). But Defendants are doing exactly this. On the one hand, they enforced both policies to keep Plaintiffs from expressing themselves anywhere on campus except an information table. Compl. ¶¶ 159–63, 173–74, 194, PageID.23–24, 26. They objected to Plaintiffs approaching passersby with copies of the Constitution. *Id.* ¶¶ 164–72, PageID.23–24. On the other hand, they allowed Spectrum (an LGBT student organization) and another political group to roam the Student Center freely, approaching students with literature. *Id.* ¶¶ 195–99, PageID.26–27. They did nothing to enforce the Speech Zone Policy. *Id.*, PageID.26–27. This is textbook viewpoint discrimination.

2. Both policies are illegal prior restraints in areas that are at least designated public fora for students.

Defendants' Speech Permit and Speech Zone Policies also represent illegal prior restraints. Under this analysis, the Court must (1) determine if Plaintiffs' speech is protected, (2) "identify the nature of the forum," and (3) assess whether the restrictions "satisfy the requisite standard." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 797 (1985).

Because "students enjoy First Amendment rights of speech and association on the [college] campus, . . . the 'denial of use of campus facilities for meetings and appropriate purposes' must be subjected to the level of scrutiny appropriate to any form of prior restraint." *Widmar*, 454 U.S. at 267 n.5. "A prior restraint is any law 'forbidding certain communications when issued in advance

of the time that such communications are to occur,'" *McGlone v. Bell*, 681 F.3d 718, 733 (6th Cir. 2012) (quoting *Alexander v. United States*, 509 U.S. 544, 550 (1993)), or requiring government approval for private speech. *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 274 F.3d 377, 391 (6th Cir. 2001). Defendants' policies require Plaintiffs to obtain permission to speak on campus, and they provide no timeframe or deadline for a response to any request. *Id.* ¶¶ 82–93, 123–33, PageID.12–15, 18–20. These policies are quintessential prior restraints.

As prior restraints censor speech before it occurs, there is a "heavy presumption" against their constitutionality. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *accord Deja Vu*, 274 F.3d at 391. They "are the most serious and least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). To carry their "heavy burden," *Healy*, 408 U.S. at 184, Defendants must show that their policies are reasonable time, place, and manner regulations, meaning that they (1) do not control the time, place, or manner of speech based on its content, (2) are "narrowly tailored to serve a significant governmental interest," and (3) "leave open alternatives for communication," *McGlone*, 681 F.3d at 733 (citing *Forsyth Cnty.*, 505 U.S. at 130). Their policies must fail only one of these requirements to be unconstitutional, but they fail all of them.

a. The First Amendment protects Plaintiffs' speech.

Plaintiffs desire to engage in time-honored forms of protected expression: "flyers, signs, peaceful demonstrations, hosting tables with information, inviting speakers to campus, and talking with fellow students." Compl. ¶¶ 21, 24, 142–43, 149–56, 165, PageID.5, 21–23. These are protected activities and classic forms of speech that lie at the very "foundation of free government by free men." *Schneider v. New Jersey*, 308 U.S. 147, 151 (1939); *see McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (discussing handbilling); *Meyer v. Grant*, 486 U.S. 414, 421–22 & n.5 (1988) (same for circulating petitions and soliciting signatures).

Plaintiffs seek to discuss "political, religious, social, cultural, and moral issues and ideas," and to advance their ideas about "the natural rights of life, liberty, and property." Compl. ¶¶ 18, 21, 24–25, PageID.4–5. Such "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011).

b. Both of Defendants' policies restrict speech in areas of campus that are at least designated public fora for students.

"[T]he extent to which [Defendants] may limit access depends on whether the forum is public or nonpublic." *Cornelius*, 473 U.S. at 797. The Sixth Circuit recognizes four types of fora: traditional public, designated public, limited public, and nonpublic fora.[3] *See McGlone*, 681 F.3d at 732 (recognizing "traditional, designated, and nonpublic fora"); *Miller v. City of Cincinnati*, 622 F.3d 524, 534 (6th Cir. 2010) (recognizing limited public fora). Defendants' policies restrict speech in areas that are at least designated public fora for students, including the public walkway outside Binda Center and the open, outdoor, generally accessible areas of campus.

"[T]he campus of a public university, *at least for its students*, possesses many of the characteristics of a public forum." *Widmar*, 454 U.S. at 267 n.5 (emphasis added). It need not "make all of its facilities equally available to students and nonstudents alike." *Id.* But for students, the campus is at least a designated public forum.

Following *Widmar*, federal courts have consistently found that the generally accessible outdoor areas of campus are designated public fora for students. After a district court ruled otherwise, the Fifth Circuit reversed, finding "the sidewalks and plazas are designated public fora for the speech of university students." *Hays Cnty.*, 969 F.2d at 116. "The campus's function as the site of a community of full-time residents makes it a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment . . . and suggests an intended role more akin to a public street or park than a non-public forum." *Id.* When the University of Texas limited anonymous leafletting, the Fifth Circuit again held the "outdoor open areas of its campus accessible to students—such as plazas and sidewalks—[are designated] public forums for student speech." *JFA*, 410 F.3d at 769. When Oregon State restricted student newspaper bins, the Ninth Circuit ruled its "campus is at least a designated public forum." *OSU Student Alliance*, 699 F.3d at 1062.

[3] In traditional and designated public fora, content-based rules are subject to strict scrutiny, *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009), and content-neutral ones must be narrowly tailored to a significant government interest, and leave open ample alternative channels of communication. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Elsewhere, restrictions must be "reasonable and viewpoint neutral." *Summum*, 555 U.S. at 469.

District courts followed suit. When Texas Tech dubbed a gazebo its "free speech area," the court ruled: "to the extent the campus has park areas, sidewalks, streets, or other similar common areas, these areas are public forums, at least for the University's students, irrespective of whether the University has so designated them or not." *Roberts*, 346 F. Supp. 2d at 861.[4] Based on this, a district court in Ohio declared it was not "aware of any other precedent establishing, that a public university may constitutionally designate its entire campus as a limited public forum *as applied to students.*" *Williams*, 2012 WL 2160969, at *5. Thus, "while the University may exclude those without a legitimate purpose from interior sidewalks and public exterior areas, *such locations remain designated public fora as to students*." *Id.*

Indeed, the Sixth Circuit, in a case involving non-students, ruled that campus sidewalks that blended into the "urban grid" constitute traditional public fora, and all "other open areas . . . are designated public fora." *McGlone*, 681 F.3d at 732–33. Defendants' campus contains a variety of sidewalks—including those Plaintiffs were using—that are "physically indistinguishable from nearby city sidewalks." *Id.* at 732 (quoting *Brister v. Faulkner*, 214 F.3d 675, 681–83 (5th Cir. 2000)); *see* Compl. ¶¶ 72–76, 149, PageID.11, 21–22. It also features park-like areas with lawns, benches, and trees that anyone can freely access at any times. Compl. ¶¶ 72–76, 149, PageID.11, 21–22. The College cannot close these traditional public fora by fiat, especially as to students.[5]

c. Both policies are content-based.

To be a reasonable time, place, and manner restriction, Defendants' policies must be content neutral. *McGlone*, 681 F.3d at 733. The flaws that render them viewpoint-based make them

[4] *Accord Pro-Life Cougars*, 259 F. Supp. 2d at 582 (finding campus grounds, beyond those expressly opened for student speech, "are public fora designated for student speech"); *Smith*, 694 F. Supp. 2d at 625 ("Typically, at least for the students of a college or university, the school's campus is a designated public forum."); *Khademi*, 194 F. Supp. 2d at 1024 (finding "no doubt" that the "generally available" areas of a community college campus are designated public fora as they are open to the public); *Burbridge*, 74 F. Supp. 2d at 947–48 (same).

[5] "[T]raditional public fora are open for expressive activity regardless of the government's intent. The objective characteristics of these properties require the government to accommodate private speakers." *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998); *see Make The Rd. by Walking, Inc. v. Turner*, 378 F.3d 133, 142 (2d Cir. 2004) ("Speech finds its greatest protection in traditional public fora, and government may not alter their public status without completely changing the fora's use, e.g. converting a public park to an office building.").

content-based because viewpoint discrimination is "an egregious form of content discrimination." *Rosenberger*, 515 U.S. at 829.

"Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648–49 (1984). As Defendants' policies lack any protections against viewpoint discrimination, they also allow Defendants to regulate student speech based on content. *See supra* Part I.A.1.b.

A policy is "content based if [it] applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). Here, enforcing both policies, Defendants barred Plaintiffs from expressing themselves on the sidewalks and open areas of campus. Compl. ¶¶ 149–54, 160–64, 173, 180, PageID.21–25. As justification, they cited the questions Plaintiffs asked passersby, questions like, "Do you like freedom and liberty?" *Id.* ¶¶ 164–66, PageID.23. Defendants absurdly labeled this question "provocative," *id.*, PageID.23, proving that they considered the content (and possibly the viewpoint) of the speech when restricting it. *C.E.F. of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 527 (3d Cir. 2004) (Alito, J.) ("To exclude a group simply because it is controversial or divisive is viewpoint discrimination. A group is controversial or divisive because some take issue with its viewpoint.").

Also, it is well established that "[l]istener's reaction to speech is not a content-neutral basis for regulation." *Forsyth Cnty.*, 505 U.S. at 134. Here, Defendants watched Plaintiffs engage with passing students and then restricted Plaintiffs' speech due to the possible reaction of students from "rural farm areas." Compl. ¶ 169, PageID.24. Defendants' were trying to "protect" these rural students because they "might not feel like they have the choice to ignore the question." *Id.*, PageID.24. But "the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975). Trying to protect students based on how they might respond is inherently content-based. Hence, Defendants' policies must pass strict scrutiny. *Reed*, 135 S. Ct. at 2226 ("Content-based laws . . . may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

d. In addition to failing strict scrutiny, Defendants' policies fail intermediate scrutiny by not being narrowly tailored to a significant government interest.

Defendants' policies fail even the intermediate scrutiny for content-neutral rules, where Defendants must show that they are "narrowly tailored" to serve a substantial government interest. *McGlone*, 681 F.3d at 733. That is, the policies must promote a "substantial government interest that would be achieved less effectively absent the regulation," but must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). In other words, they must be so narrowly tailored that they "target[] and eliminate[] no more than the exact source of the evil [they] seek[] to remedy." *Frisby v. Schultz*, 487 U.S. 474, 475 (1988) (internal quotation and citation omitted). Defendants' policies are not narrowly tailored for at least five reasons.

First, as Plaintiffs know all too well, Defendants' policies prohibit even a few students from speaking without a permit and in any location other than an information table in the Student Center. Compl. ¶¶ 83–87, 97, 116–18, PageID.13–15, 18. To reserve such a table, students must seek a permit ten days in advance. *Id.* ¶¶ 119–20, PageID.18. "Permit schemes and advance notice requirements that potentially apply to small groups are nearly always overly broad and lack narrow tailoring." *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 608 (6th Cir. 2005).[6] As Defendants' policies apply to both individuals and small groups alike, and require permitting for speaking anywhere on campus, they are not narrowly tailored.

Second, by requiring students to get a permit before speaking, Defendants "effectively ban" "a significant amount of spontaneous speech," thus violating the First Amendment. *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 167–68 (2002); *accord McGlone*, 681 F.3d at 733–34 ("Any notice period is a substantial inhibition on speech," and "[t]he simple

[6] *Accord Knowles v. City of Waco*, 462 F.3d 430, 436 (5th Cir. 2006) ("[O]rdinances requiring a permit for demonstrations by a handful of people are not narrowly tailored to serve a significant government interest."); *Grossman v. City of Portland*, 33 F.3d 1200, 1207 (9th Cir. 1994) (finding ordinance restricting even small demonstrations not narrowly tailored); *Cmty. for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1392 (D.C. Cir. 1990) (same for permit requirement encompassing groups of two or more); *Douglas v. Brownell*, 88 F.3d 1511, 1524 (8th Cir. 1996) (same for permit requirement affecting groups of ten or more); *Davis v. Francois*, 395 F.2d 730, 735–36 (5th Cir. 1968) (finding policy limiting picketing to two individuals was not narrowly tailored).

knowledge that one must inform the government of his desire to speak and must fill out appropriate forms and comply with the applicable regulations discourages citizens from speaking freely."). This is often "the most effective kind of expression," but permit procedures prevent "immediate speech" from responding to "immediate issues." *Grossman*, 33 F.3d at 1206. Often, timing is of the essence. *Shuttlesworth*, 394 U.S. at 163 (Harlan, J. concurring) ("[W]hen an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all."); *McDonnell v. City & Cnty. of Denver*, __ F. Supp. 3d __, 2017 WL 698802, *7 (D. Col. Feb. 22, 2017) ("Another paramount truth is that the *timing* of expressive activity can also have irreplaceable First Amendment value and significance[.]"). But at KCC, there is no place for spontaneous speech.[7] The Speech Zone Policy requires "ten (10) business days" advance notice to speak, even if just one student wants to distribute literature. Compl. ¶¶ 115–22, PageID.17–18. The Speech Permit Policy and *Code of Conduct* require students to get permission to speak. *Id.* ¶¶ 87, 127–29, PageID.14, 19. Thus, students cannot address time-sensitive matters spontaneously. *Id.* ¶¶ 202–03, PageID.27; *Williams*, 2012 WL 2160969 at *6 (noting "expansive permitting schemes place an objective burden" on free speech and "essentially ban spontaneous speech").

Third, Defendants limit all student speech to one tiny indoor location—an information table in the Student Center. Compl. ¶ 118, PageID.18. When courts consider the interests asserted to justify such speech restrictions, they repeatedly find that limiting students to speech zones is not narrowly tailored. *See Williams*, 2012 WL 2160969, at *7 (holding speech zones are not narrowly tailored to university interests); *Roberts*, 346 F. Supp. 2d at 856, 863 (declaring "free speech gazebo" unconstitutional as the "University's interest in an orderly administration of its campus and facilities . . . does not trump the interest of its students . . . in having adequate opportunities and venues available for free expression"); *Khademi*, 194 F. Supp. 2d at 1034–35 (striking ban on leafleting

[7] *Watchtower*, 536 U.S. at 165–66 ("It 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."); *Thomas v. Collins*, 323 U.S. 516, 539 (1945) ("As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly.").

outside college buildings as overbroad and not narrowly tailored to preventing litter and protecting students from solicitors); *Burbridge*, 74 F. Supp. 2d at 950–51 (restricting certain student events to three "preferred areas" does not advance "a single interest, much less a significant one").

Fourth, Defendants require students to seek a permit "ten (10) business days" before speaking (and then only from behind an information table in the Student Center). Compl. ¶¶ 115–20, 129, PageID.17–19. The Sixth Circuit struck down a policy requiring notice of "at least fourteen (14) days (excluding weekends and holidays)" and cited approvingly to other federal decisions invalidating notice policies of thirty, twenty, seven, five, and two days. *McGlone*, 681 F.3d at 734. A district court in Ohio struck down, as not narrowly tailored, three-, five-, and fifteen-day notice requirements for students. *Williams*, 2012 WL 2160969 at *6–7 & n.5; *Roberts*, 346 F. Supp. 2d at 866, 870 (finding two day advance notice requirement was not narrowly tailored "because it sweeps too broadly in imposing a burden on a substantial amount of expression that does not interfere with any significant interests of the University"). "It is simply unfathomable that a [KCC] student needs to give [KCC] advance notice of an intent to [distribute literature and recruit new members]. *There is no danger to public order arising out of students walking around campus with clipboards seeking signatures [and distributing Constitutions]*." *Williams*, 2012 WL 2160969 at & 7 n.5.

Last, Defendants' policies are not narrowly tailored because they prevent one-on-one conversations outside of a single table area. Compl. ¶¶ 116–18, PageID.18. In 2012, the Sixth Circuit invalidated bans on "sales or soliciting of causes outside of the booth space" at a festival in a large public park. *Bays v. City of Fairborn*, 668 F.3d 814, 817–18 (6th Cir. 2012). When plaintiffs tried to converse with park patrons without a booth permit, police warned them that they "would have a problem" if "we start getting approached by people who say, hey these two guys are approaching me and bothering me and talking about stuff I don't want to hear." *Id*. at 824. To the Sixth Circuit, this ban was "substantially broader than necessary." *Id*. at 823 (quoting *Ward*, 491 U.S. at 800).

Defendants' policies mirror this ban. Both policies govern expansive outdoor areas that are at least designated public fora. *Bays*, 668 F.3d at 817 (noting the 200-acre park at issue was a traditional public forum); *supra* Part I.A.2.b (noting KCC's 63-acre campus is at least a designated

public forum for students). The *Bays* policy limited solicitation to a booth, *Bays*, 668 F.3d at 818, while KCC's policies limit expression to a table. Compl. ¶¶ 97–98, 116–18, PageID.15, 18. In *Bays*, police threatened to enforce the policy if they received complaints that plaintiffs were "approaching [park patrons] and *bothering [them] by talking about stuff [they didn't] want to hear*." *Bays*, 668 F.3d at 824 (emphasis added). Here, Defendant Hutchinson stated that he was "trying to protect" students who "might not feel like they have the choice to ignore the question." Compl. ¶ 169, PageID.24. And he justified the Speech Zone Policy, by saying that it set aside a place where "if *somebody's uncomfortable with what you guys are talking about*, it's not an impediment to their education." *Id.* ¶ 172, PageID.24 (emphasis added). In fact, KCC's policy goes even further to prohibit "approach[ing] individuals" or "[c]alling out to . . . individuals." *Id.* ¶¶ 82, 99, PageID.12–13, 15. Because both policies bluntly isolate one-on-one discussions to a single location, the KCC policy should meet the same constitutional fate as that enjoined in *Bays*.

e. Defendants' policies do not provide ample alternative means of communication.

The policies do not provide "ample alternative channels of communication." *Ward*, 491 U.S. at 802. Relevant factors include whether the speaker can "reach the intended audience"; whether the location is "part of the expressive message"; whether there is "opportunity for spontaneity" in the alternative locations; and whether the alternatives are more costly or less convenient. *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1025 (9th Cir. 2008); *accord Saieg v. City of Dearborn*, 641 F.3d 727, 740 (6th Cir. 2011).

The Speech Permit Policy prohibits students from speaking anywhere on campus unless they get a permit first. Compl. ¶¶ 83–87, 127–29, PageID.13–14, 19. The Speech Zone Policy bans all speech anywhere on campus, except at an information table in the Student Center. *Id.* ¶¶ 117–18, PageID.18. That is, there are no outdoor areas of the campus *not* covered by these restrictions. *See Burbridge*, 74 F. Supp. 2d at 951 (finding college policy limiting student speech to "preferred areas" did not provide ample alternatives for communication). Also, these policies fail to provide "opportunity for spontaneity" as they require all speech to be approved in advance, even ten business days in advance. *Long Beach*, 574 F.3d at 1025; *see also Williams*, 2012 WL 2160969 at

*6 (finding analogous university policy "essentially ban[s] spontaneous speech."). The policies provide one channel of communication (*i.e.*, the table); there are no alternatives. As Mrs. Gregoire can attest, that one channel prevents Plaintiffs from reaching their intended audience of students. At the information table, she "spoke to fewer than five students," but in front of the Binda Center, they quickly signed up "more than twenty." Compl. ¶¶ 143, 176, PageID.21, 25.

Restrictions on speech must satisfy all three criteria for time, place, and manner restrictions to survive intermediate scrutiny and be valid; failing just one renders them unconstitutional. Defendants' policies fail all three. Further, as these policies are content- and viewpoint-based, they must survive strict scrutiny. *Reed*, 135 S. Ct. at 2231. Restrictions that cannot survive intermediate scrutiny necessarily flunk strict scrutiny. Thus, Plaintiffs are entitled to a preliminary injunction.

3. Both policies are overbroad.

A law is unconstitutionally overbroad if it "penalize[s] a substantial amount of speech that is constitutionally protected" and especially when it "delegates overly broad discretion to the decisionmaker." *Forsyth Cnty.*, 505 U.S. at 129–30. Defendants' policies suffer from both flaws. They completely ban all speech everywhere on campus other than at a table in the Student Center—and that only with a permit applied for ten business days in advance. KCC officials have unlimited discretion to withhold the permit and thereby render the entire campus a "speech free" zone. *See supra* Part I.A.1.b. The policies lack any guidelines to cabin Defendants' discretion and any timetables for when administrators must make a decision. Compl. ¶¶ 92–93, PageID.14–15. Both of these policies restrict numerous types of expression that do not impact any legitimate (let alone significant or compelling) interests KCC might have. *See supra* Part I.A.2.d And Defendants enforced them by arresting and jailing Plaintiffs for engaging in two quintessentially protected modes of expression—handbilling and one-on-one conversations—outside of that zone. This just illustrates the overbreadth inherent in the policies and the need for an injunction.

B. Defendants are violating Plaintiffs' Fourteenth Amendment rights.

Both Defendants' Speech Permit Policy and Speech Zone Policy violate the Fourteenth Amendment because they are vague and treat similarly situated students very differently.

1. Defendants' policies are vague.

Government regulations are vague if they (1) fail to provide fair notice of prohibited conduct; (2) lack "explicit standards for those who apply [them]," and thereby invite arbitrary, discriminatory, and overzealous enforcement; and (3) chill the exercise of constitutional freedoms. *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972); *City of Chi. v. Morales*, 527 U.S. 41, 56 (1999). Here, "a more stringent vagueness test should apply" as these policies "interfere[] with the right of free speech." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2735 (2011) (same).

First, Defendants' policies themselves embody these characteristics of vagueness. The Speech Permit Policy gives officials unbridled discretion to decide whether speech "support[s] the mission of [KCC] or the mission of a recognized college entity or activity." Compl. ¶¶ 82, 107–09, PageID.12–13, 16–17. It authorizes them to shut down expression that, in their view, does not meet this description. *See supra* Part I.A.1.a. It contains no objective and comprehensive criteria for officials to use when determining whether to approve, modify, or deny an application to solicit on campus. *See supra* Part I.A.1.a. Likewise, their Speech Zone Policy contains no objective criteria for officials to use when deciding whether to approve or reject a student group's request for an information table in the Student Center. Compl. ¶ 121, PageID.18. Hence, students have no way of knowing in advance how to structure their permit requests, and Defendants have a free hand to grant and deny permits in a discriminatory way. Thus, these policies are unconstitutionally vague.

Second, the fact that KCC officials have such "different understandings of the terms" in these policies and had such difficulty applying them confirms their vagueness. *Williams*, 2012 WL 2160969 at *8. If the officials charged with enforcing these policies have such difficulties, then they are similarly indecipherable to a reasonable student. The policies appear to prohibit Plaintiffs' recruiting activities on the sidewalks near the Binda Center. A KCC administrator initially told Mrs. Gregoire she *could not* solicit on campus without a permit, Compl. ¶ 157, PageID.22, but then reversed course and stated that she *could* recruit students for YAL for about "one to two hours." *Id.* ¶ 158, PageID.22–23. Soon thereafter, Defendant Hutchinson ordered Plaintiffs to

cease their recruiting and move their activities to a table in the Student Center. *Id.* ¶ 173, PageID.24. But his instructions conflict with the Speech Permit Policy, which requires students to submit a table request form ten business days in advance and to obtain a permit. *Id.* ¶¶ 119–20, PageID.18. Even Defendant Hutchinson had to leave and consult with his boss about how to enforce the relevant policies. *Id.* ¶ 177, PageID.25. Next, a security guard approached Plaintiffs, and he also had to leave to consult with others about how to enforce the relevant policies. *Id.* ¶¶ 178–79, PageID.25. Finally, Defendant West ordered the students to cease their speech activities. *Id.* ¶ 180, PageID.25. But he then added a new layer to the policies by threatening to arrest the Plaintiffs for "trespassing," a threat he later carried out. *Id.* ¶¶ 186, 189–92, PageID.25–26. But nowhere does the *Code of Conduct* list "arrest" as a possible sanction. Compl. Ex. 3 at 58–59, PageID.105–06. It lists a variety of penalties: "Administrative Course Withdrawal"; "Warning"; "Probation"; "Interim Suspension"; "Suspension"; "Expulsion;" "Loss of Privileges"; and "Restitution." *Id.*, PageID.105–06. Noticeably absent from this list is "arrest," giving students no warning that they would face arrest for a violation of KCC policy that did not amount to a crime. That Defendants could add "arrest" as a sanction so suddenly accentuates the vagueness of these policies.

Defendants' consultations and confusion illustrate the problems that ensue from policies that lack "explicit standards." *Grayned*, 408 U.S. at 108. KCC officials do not know how to apply these policies; students have no fair notice as to what is prohibited. "[Students] of common intelligence must necessarily guess at [the policies'] meaning," and officials "differ as to [their] application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). The policies should be enjoined.

2. Defendants treated Plaintiffs differently than similarly situated speakers.

The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).[8] But Defendants violate this directive by treating students who try to engage in protected speech differently. Plaintiffs sought to engage in political speech outside of the Binda Center. Compl. ¶¶

[8] As these policies burden fundamental rights, they are "presumptively invidious" (*i.e.*, discriminatory intent is presumed). *Plyler v. Doe*, 457 U.S. 202, 216–17 (1982).

149–50, 165, PageID.21–23. Defendants' policies prohibit speech in this location, and so Defendants prohibited YAL from leafleting or talking to students unless they moved to a table in the Student Center. But Defendants allowed Spectrum to distribute literature in the Student Center without being confined to one table in the Student Center. *Id.* ¶¶ 196–97, PageID.26–27. They also allowed another political group to solicit signatures from students in the outdoor area of campus *Id*. ¶ 198, PageID.27. Plaintiffs were not just denied the ability to speak on campus in ways and in places that other organizations were permitted to do so; they were arrested and jailed for doing so.

All of these speakers are similarly situated students or student organization that engaged in protected speech on campus. Yet Defendants' policies subject them to disparate treatment. As the policies infringe on students' First Amendment rights, they are subject to strict scrutiny, *Cleburne*, 473 U.S. at 440, a test they fail. Thus, YAL is likely to succeed on the merits of this this claim.

II. Plaintiffs are suffering irreparable harm.

"[W]hen reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *ACLU of Ky. v. McCreary Cnty.*, 354 F.3d 438, 445 (6th Cir. 2003) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Here, Plaintiffs' First Amendment rights were violated when they were arrested and jailed for speaking in an outdoor area of campus. This arrest and the policies underlying it naturally chill them from engaging in further expression. Compl. ¶¶ 209–13, PageID.28–29. Thus, their rights continue to be violated every day these policies remain in effect. *Id.* ¶¶ 218–20, PageID.29. These losses of First Amendment rights, are not compensable through monetary damages, and thus constitute irreparable harm. *See Bays*, 668 F.3d at 825 ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (quoting *Elrod*, 427 U.S. at 373)). Because they are suffering these irreparable harms, Plaintiffs request that preliminary injunctive relief be granted so that they may continue their recruiting and leafleting efforts.

III. The requested injunction will not harm Defendant KCC or others.

KCC will not be harmed by the requested injunction. "[E]ven a temporary infringement of First Amendment rights constitutes a serious and substantial injury, and the [University] has no

legitimate interest in enforcing an unconstitutional ordinance." *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006); *accord Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987) (questioning whether defendant has "any 'valid' interest in enforcing" a likely unconstitutional city ordinance). Moreover, no harm will be done to others by this Court enjoining KCC's unconstitutional policies. *See Deja Vu*, 274 F.3d at 400 (asserting that if a plaintiff "shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinment").

Enjoining the challenged policies will not prevent Defendants from protecting their interests in maintaining a safe educational environment. They may still use valid state and local laws and other unchallenged KCC policies to remedy any legitimately illegal or severely disruptive conduct without prohibiting protected speech. Or they can adopt a temporary new policy that is more narrowly tailored to address potential problems they foresee. *See Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1012 (N.D. Cal. 2007) (finding interim policy could "achieve [University's] legitimate ends without unjustifiably invading First Amendment freedoms").

IV. The requested injunction serves the public interest.

The requested injunction will serve the public interest. As the Sixth Circuit has previously held: "It is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994).

CONCLUSION

Defendants arrested and jailed Mrs. Gregoire and two associates for standing in an open area of KCC's campus, distributing copies of the Constitution, and asking, "Do you like freedom and liberty?" They did so pursuant to two policies that are viewpoint- and content-based, that broadly and unconstitutionally restrict speech in "the marketplace of ideas," and that not even KCC officials understand. Hence, Plaintiffs respectfully request that this Court grant their motion for preliminary injunction, prohibit Defendants from enforcing the Speech Permit and Speech Zone Policies and the challenged provisions of the *Code of Conduct for Students*, *see* Compl. ¶¶ 82, 115–22, 124, PageID.12–13, 17–19, and allow them once again to speak freely on their own campus.

Respectfully submitted this 24th day of May, 2017,

/s/ Travis C. Barham

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of May, 2017, I electronically filed a true and accurate copy of the foregoing document with the Clerk of Court using the CM/ECF system, which automatically sends an electronic notification to the following attorneys of record:

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