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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO  
Boise Division

TANYA CORDOVA, JUSTIN RANGER, PAUL  
BESKOW, SAMANTHA THORSON, JESSE)  
BARNUM, and ALEX CANFIELD, )

Plaintiffs, )

vs. )

MICHAEL LALIBERTE, in his official capacity) as Boise State University Vice President for Student Affairs; KELLY STEVENS, in her official capacity as Director of Student Activities; and TERI RAPP, in her official capacity as Financial Technician for the Associated Students of Boise State University, )

Defendants. )

Civil Action No. \_\_\_\_\_

BRIEF IN SUPPORT OF PLAINTIFFS'  
MOTION FOR PRELIMINARY  
INJUNCTION

## INTRODUCTION

Boise State University requires students to pay a fee for the support of student organizations. Through Defendants, the university then mandates the viewpoint discriminatory allocation of those fees, requiring discrimination against religious student groups and permitting such discrimination against all other groups. Plaintiffs move this Court for a preliminary injunction to enjoin Defendants from exacting and allocating these fees unless and until the Defendants adopt adequate safeguards for viewpoint neutrality, including the elimination of their ban on equal treatment for religious student organizations. Since Plaintiffs are substantially likely to prevail in their First Amendment claim, they establish the other remaining factors for a grant of preliminary injunction: that they have irreparable injury, that the balance of hardships is in their favor, and that a preliminary injunction is in the public interest.

### Standard for Preliminary Injunction

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural Res. Def. Council*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 365, 374 (2008). Plaintiffs readily establish each factor. First, plaintiffs demonstrate below that they are likely to succeed on the merits of their First Amendment claim. Second, since plaintiffs show that they are likely to succeed on the merits, they also establish irreparable injury, since “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976).<sup>1</sup> Third, plaintiffs also show that the balance of harms is in their favor

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<sup>1</sup> The *Winter* Court overturned Ninth Circuit case law allowing a plaintiff who shows “a strong likelihood of prevailing on the merits” to obtain a preliminary injunction with only the

because “the fact that a case raises serious First Amendment questions compels a finding . . . ‘that at the very least the balance of hardships tips sharply in [Plaintiffs’] favor.’” *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 973 (9th Cir.2002) (quoting *Viacom Int’l. v. FCC*, 828 F. Supp. 741, 744 (N.D. Cal.1993)). Fourth, “[c]ourts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles,” *id.* at 974 (citing cases from six circuits) and the Ninth Circuit has also emphasized that it is in the public interest to uphold First Amendment rights to protect against infringement of “the free expression interests of . . . other people” who are not parties to the case. *Id.* Thus, a grant of preliminary injunction is appropriate in this case.

#### FACTS

#### Parties

Plaintiffs Tanya Cordova, Justin Ranger, Paul Beskow, Samantha Thorson, Jesse Barnum, and Alex Canfield (“Plaintiffs”) are students in good standing at Boise State University who pay the Associated Student Body student activity fee. Verified Complaint ¶¶ 2.1-2.6, 3.20. Plaintiffs disagree with the views of one or more student groups at Boise State University who receive student activities fees. Compl. ¶¶ 2.1-2.6, 3.21. However, they do not object to paying student activities fees that are directed to these groups so long as the fees they are required to pay are dispensed in a viewpoint neutral and otherwise constitutionally appropriate manner. Compl.

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“possibility” of irreparable harm and reaffirmed the traditional test, holding that plaintiffs must show a “likel[i]hood” of irreparable harm. *Winter*, 129 S. Ct. at 375. However, *Winter* is not a First Amendment case; rather it is a case involving a challenge, brought under federal environmental statutes, of the Navy’s use of sonar in anti-submarine warfare training, *id.* at 378, thus implicating unique public interest concerns that are not relevant to a First Amendment case. *Winter* does not disturb the well-established rule that the denial of First Amendment rights necessarily constitutes irreparable harm. *Elrod*, 427 U.S. at 373.

¶¶ 2.1-2.6, 3.22. Plaintiffs are active members in one or more religious student organizations at Boise State University. Compl. ¶¶ 2.1-2.6. Additionally, Plaintiffs Ranger, Thorson, and Barnum are officers in one or more religious student organizations at Boise State University. Compl. ¶¶ 2.2, 2.4, 2.5.

Defendants are responsible for the interpretation, application and implementation of university policies concerning student organizations, including the allocation of ASB student activity fees to student organizations. Compl. ¶¶ 2.7-2.9.

#### ASBSU Funding of Student Organizations From Student Activity Fees

Every student at Boise State University pays a mandatory Associated Student Body student activity fee each year. Compl. ¶ 3.1; Compl. Ex. A. Funds from the Associated Student Body student activity fee are accounted for separately from tuition and other fees. Compl. ¶ 3.2; Compl. Ex. A, 1. All proceeds from the Associated Student Body student activity fee are provided by the University to the ASBSU Financial Technician, Defendant Teri Rapp, for allocation by ASBSU to recognized student organizations in good standing. Compl. ¶ 3.3; Compl. Ex. B, 9. Student organizations seeking ASBSU funds must submit a budget request by January 30, 2009, in order to be considered for funding for the following academic year. Compl. ¶ 3.4; Compl. Ex. C. However, student groups that submit a budget after the end of January but before February 15, the final deadline, may still receive ASBSU funding, but will have their budget request automatically cut by 10%. Compl. ¶ 3.4; Compl. Ex. C. *See also* Compl. Ex. B, 10 at § 22-230, *et. seq.* Student organizations submit their budget requests to Defendant Rapp, the ASBSU Financial Technician, in the ASBSU Business Office. Compl. ¶ 3.5; Compl. Ex. B, 10 at § 22-230; Compl. Ex. C, 10.

Funding approved by ASBSU is provided as matching funds for an organization's own fundraising efforts. Organizations receive \$2 in matching funds for every \$1 they raise. Compl. ¶ 3.6; Compl. Ex. B, 11 at § 22-401; *see also* Compl. Ex. D, 10. However, each organization is also eligible for up to \$250 in non-matching funding. Compl. ¶ 3.6. The amount awarded as non-matching funds is subtracted from the organization's matching funds awarded by ASBSU. Compl. ¶ 3.6; Compl. Ex. B, 13 at § 22-500. Barring special action to raise an organization's budget limit, previously funded organizations may request only up to 150% of their approved budget from the previous year, or \$3,000, whichever is less. Compl. ¶ 3.7; Compl. Ex. B, 11 at § 22-401. However, new organizations or those that have not previously received funding may request only \$700. Compl. ¶ 3.7; Compl. Ex. B, 11 at § 22-401.

The Financial Advisory Board (FAB), an ASBSU committee, meets between February 1 and April 1, the "Budget Hearing Period" to consider funding requests of student organizations. Compl. ¶ 3.8; Compl. Ex. B, 10 at § 22-230. The FAB then submits its recommendations for funding for each student organization to the full ASBSU for final approval. Compl. ¶ 3.9; Compl. Ex. B, 11 at § 22-250; Compl. Ex. D, 10. In determining the amount of funding to award each organization, ASBSU "will consider funding only those projects or activities that benefit the student and enhance the image of Boise State University, with a special emphasis on activities that will benefit large numbers of students." Compl. ¶ 3.10; Compl. Ex. B, 11 at § 22-300; *see also* Compl. Ex. C, 1 (same). ASBSU has published no further explanation of the specific factors it considers in determining whether a student group's budget satisfies these criteria. Compl. ¶ 3.10. Defendant Rapp is responsible for managing the budgets of each student organization funded by ASBSU, ensuring that they satisfy all Boise State and ASBSU policies. Compl. ¶ 3.11; Compl. Ex. B, at §§ 21-400-500, 22-405, 22-420, 22-455.

### Exclusion of Religious Student Organizations

Boise State University recognizes over 200 student organizations representing a broad range of opinions on a diversity of topics. These include the Secular Student Alliance, 2nd Amendment Gun Club, Bisexuals, Gays, Lesbians, & Allies for Diversity, College Democrats, College Republicans, and many others. Compl. ¶ 3.12; Compl. Ex. E. Among the 200 recognized student organizations are also approximately eighteen organizations categorized as religious student organizations. Compl. ¶ 3.13; Compl. Ex. E, 4. These represent a variety of religious viewpoints, including Intervarsity Christian Fellowship, the Muslim Student Organization, and Vedic Philosophical & Cultural Society. Compl. ¶ 3.13; Compl. Ex. E, 4. The Boise State University Student Involvement Center, under the authority of Defendant Laliberte, “creates and defines student organization categories,” determining whether a student organization is religious, cultural, special interest, etc, and assigning them to the category they deem appropriate. ASBSU relies upon these categories. Compl. ¶ 3.14; Compl. Ex. B at § 22-110.

Religious student organizations are singled out for exclusion from ASBSU funding. Compl. ¶ 3.15; Compl. Ex. B, 10 at § 22-110 (“ASBSU shall not fund Ad Hoc organizations recognized by ASBSU Judiciary (through their own rules) or sectarian organizations”); Compl. Ex. C, 2 (“Club Sport and Religious Organizations are not eligible for funding”); Compl. Ex. D, 9 (“Religious Organizations cannot receive funding from ASBSU. Club Sport organizations receive funding via the Club Sports fee, which is administered by Campus Recreation.”). *See also* Compl. Ex. F (same as Compl. Ex. D).

Boise State University's sole asserted basis for singling out religious student organizations for exclusion from receiving ASBSU funding is that it must do so in order to comply with the Idaho Constitution:

#### Why Can't Religious Groups Receive Funds from ASBSU?

The Idaho State Constitution expressly forbids state money going to religious organizations. Here is text of the constitution: [sic]

#### *Article IX Education and School Lands*

#### SECTION 5. SECTARIAN APPROPRIATIONS PROHIBITED.

Neither the legislature nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or monies whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, or to help support or sustain any school, academy, seminary, college, University or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever; nor shall any grant or donation of land, money or other personal property ever be made by the state, or any such public corporation, to any church or for any sectarian or religious purpose; provided, however, that a health facilities authority, as specifically authorized and empowered by law, may finance or refinance any private, not for profit, health facilities owned or operated by any church or sectarian religious society, through loans, leases, or other transactions.

Compl. ¶ 3.16; Compl. Ex. D, 2.

Boise State University appears to be alone in its interpretation of the Idaho Constitution among its peers in the state, as other public schools and universities in the State of Idaho permit religious student organizations to participate equally with other student organizations in seeking allocations of student fees collected by those schools for allocation to student organizations.

Compl. ¶ 3.17.<sup>2</sup>

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<sup>2</sup> The Idaho Dept. of Educ. lists seven public colleges and universities. See Idaho Dept. of Educ., Colleges & Universities, at <http://www.idaho.gov/education/suniv.html> (last visited Dec. 16, 2008) (listing public colleges and universities). Aside from Boise State, no other public college

The Secular Student Alliance has been classified as a “special interest” student organization and is therefore eligible for ASBSU funding. Compl. ¶ 3.18. Its purposes include the following:

Present a positive view of atheism, agnosticism, rationalism, secularism, humanism, skepticism, and all non-religious worldviews to the community. . . .

Promote and practice the open, rational, and scientific examination of the universe and our place in it. . . .

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or university in Idaho appears to have an express policy against funding religious student organizations. See, e.g., E. Idaho Tech. Coll., *Student Handbook, Student Senate Bylaws*, art. V § 6, <http://www.eitc.edu/pdf/StudentHandbook.pdf> (last visited Dec. 16, 2008) (“Any Student Organization may request for funding from the Student Senate budget committee.”); Idaho State Univ., *How to Establish a Recognized Student Org. at Idaho State Univ.*, [http://www.isu.edu/stdorg/lead/manual/Steps\\_2007.pdf](http://www.isu.edu/stdorg/lead/manual/Steps_2007.pdf) (last updated Aug. 3, 2007) (no restriction against funding religious student organizations); Lewis-Clark State Coll. Student Activities, *Categorical Listing of Student Orgs.*, <http://www2d.isu.edu/departments/stdorg/temp/directory.php> (last updated Dec. 16, 2008) (lists religious student organizations); Lewis-Clark State Coll. Student Activities, *Clubs and Organizations Policies and Procedures*, <http://www.lcsc.edu/studentclubs/Policies/Policies.pdf> (last visited Dec. 16, 2008) (no restriction against funding religious student organizations); Lewis-Clark State Coll. Student Activities, *Clubs and Orgs. Handbook* 15, 16, <http://www.lcsc.edu/studentclubs/Hanbook/Handbook.pdf> [sic] (last visited Dec. 16, 2008) (religious student organizations can be recognized and all recognized student organizations have right to apply for funding); see also Lewis-Clark State Coll. Student Activities, *Funding Opportunities*, <http://www.lcsc.edu/studentclubs/Funding/FundingOpportunities.pdf> (last visited Dec. 16, 2008) (all recognized student organizations are eligible for funding); Assoc. Students N. Idaho Coll., *Club Funding*, <http://www.nic.edu/Websites/index.asp?dpt=7&pageID=564> (last visited Dec. 16, 2008) (no restriction on funding religious student organizations); Assoc. Students N. Idaho Coll., *N. Idaho Coll. 2008/2009*, [http://www.thezonelive.com/zone/02\\_SchoolStructure/ID\\_NorthIdahoCollege/handbook.pdf](http://www.thezonelive.com/zone/02_SchoolStructure/ID_NorthIdahoCollege/handbook.pdf) (last visited Dec. 16, 2008) (no restriction on funding religious student organizations); The Coll. of S. Idaho Student Gov’t, *By-Laws of the Assoc. Students of the Coll. of S. Idaho*, art. V, § G. at <http://www.csi.edu/studentgovernment/byLaw.asp> (last visited Dec. 16, 2008) (no restriction on funding religious student organizations); Assoc. Students Univ. of Idaho, *ASUI Activities Board Reimbursement Guide*, <http://www.common.uidaho.edu/stuorgs-html/ReimbursementGuide.pdf> (last visited Dec. 16, 2008) (no restriction on funding religious student organizations); Assoc. Students Univ. of Idaho, *2007-2008 Student Organization & Advisor Handbook*, (last visited Dec. 16, 2008) (same); Assoc. Students Univ. of Idaho, *ASUI Activities Bd. Bylaws*, <http://www.common.uidaho.edu/stuorgs-html/Fall2008Bylaws.doc> (last updated Sept. 23, 2008).



Promote the view that ethics and morality can be meaningfully based on humanistic and rational values. . . . [and]

Advocate for the separation of church and state.

Dec. of M. Casey Mattox, Ex. 1, 1.

In addition to the prohibition on ASBSU funding for religious student organizations, Boise State University officials have also recently informed at least one religious student organization that they intend to draft a new university policy that would deny religious student groups the same use of university facilities for meetings and activities that other student groups have. Compl. ¶ 3.19.

### Argument

I. The University's Exclusion of Religious Student Organizations from Student Activity Fee Funding Through Mandatory Student Fees Presumptively Violates the First Amendment.

A. The university's denial of student activity fees to religious student organizations where it makes such fees available to groups promoting all other viewpoints, including atheistic viewpoints, is viewpoint discrimination.

As the Supreme Court has stated, “[t]he First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech *if the program is viewpoint neutral.*” *Bd. of Regents of Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217, 221 (2000) (*Southworth I*) (emphasis added). Plaintiffs “have standing to challenge the constitutionality of the University's fee system because they have paid mandatory student fees, and under the Supreme Court's decision in *Southworth I*, they are entitled to the protection of viewpoint neutrality.” *Southworth v. Bd. of Regents of Univ. of Wisc. Sys.*, 307 F.3d 566, 595 (7th Cir. 2002) (*Southworth II*); *Southworth I*, 529 U.S. at 229-30, 233. As the Court stated, the university “exact[s] the fee at issue for the sole purpose of facilitating the free and open exchange of ideas by, and among, its students. [Thus,] objecting students may insist upon

certain safeguards with respect to the expressive activities which they are required to support.” *Southworth I*, 529 U.S. at 229. The university cannot exact these fees without providing these safeguards, which are required by the First Amendment. *Id.* at 231.

When a public university recognizes and provides student activity fee funding to student groups, it creates a limited public forum. *Rosenberger v. Bd. of Regents of Univ. of Va.*, 515 U.S. 819, 830 (1995); *Widmar*, 454 U.S. 263, 267 (1981); *Rounds v. Or. State Bd. of Higher Ed.*, 1066 F.3d 1032, 1039 (9th Cir. 1999). The purpose of a forum for recognizing and providing student activity fee funding to student organizations is to “facilitate a wide range of speech,” even speech that “some students find objectionable and offensive to their personal beliefs.” *Southworth I*, 529 U.S. at 232; *Rosenberger*, 515 U.S. at 834; *Healy v. James*, 408 U.S. 169, 180 (1972). In this limited public forum, the Defendants may not “exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of its viewpoint.” *Rosenberger*, 515 U.S. at 829. The Supreme Court has consistently held that religious viewpoints may not be singled out for disadvantage. *Widmar*, 454 U.S. at 269-70; *Rosenberger*, 515 U.S. at 80-31; *Lamb’s Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384, 393 (1993). By excluding religious student organizations from student activity fees for which all other student organizations are eligible, the university has engaged in viewpoint discrimination prohibited by the First Amendment.

The university’s categorical discrimination against all religious views, as opposed to singling out only one religious student organization, does not make its policy any less viewpoint discriminatory. *Widmar*, 454 U.S. at 265, 269-70; *Rosenberger*, 515 U.S. at 830-31; *Lamb’s Chapel*, 508 U.S. at 393. The viewpoint discriminatory nature of the university’s policy is even more stark in light of its willingness to make funds available to an atheistic student organization

that exists to promote viewpoints critical of religious views and to “present a positive view of atheism, agnosticism, rationalism, secularism, humanism, skepticism, and all non-religious worldviews to the community.” Mattox Dec., Ex. 1, 1. As the Court stated in *Rosenberger*,

It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint. The dissent’s declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.

*Rosenberger*, 515 U.S. at 831-32. Here, the University skews the debate on issues by excluding student activity fee funds to all religious perspectives on the debate, and compounds this problem further by making those funds available to atheistic perspectives on the debate.

B. The denial of student activity fees to religious student organizations is not reasonable in light of the purpose of the forum, which is to foster a diversity of viewpoints at the university.

The denial of student activity fee funding to religious student organizations is also not “reasonable in light of the purpose served by the forum.” *Rosenberger*, 515 U.S. at 829. The purpose of the university’s recognition and funding of student groups is to allow students “the opportunity to contribute to the rich social and intellectual landscape of [the university].” *cf.* *Southworth I*, 529 U.S. at 233 (in order that “students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life,” a “university may impose a mandatory fee to sustain an open dialogue to these ends”). This panoply of diverse viewpoints is not the university’s speech but rather the students’ speech, as the university states, “[t]he organization[s] [are] for the students and *students should make the decisions.*” Compl. Ex. F, 9; *cf.* *Southworth I*, 529 U.S. at 229 (“The University’s whole justification for fostering the challenged expression is that it springs from the initiative of the students, who alone give it purpose and content”). Denying student

activity fee funds to religious groups undermines the goal of fostering diverse views. Excluding religious student organizations from the forum for allocations of student activity fees subverts the university's goal of empowering students to make contributions to the intellectual life of the university through participation in student organizations.

II. The University Fails to Provide the Constitutionally Required Safeguards Against Viewpoint Discrimination in Distributing These Funds, Presumptively Violating the First Amendment and Triggering Strict Scrutiny.

In *Southworth I*, 529 U.S. at 233, the Supreme Court held that where a university collects student activity fees and distributes them through student government to student organizations, it must ensure that these funds are allocated in a viewpoint neutral fashion. *See also, Southworth II*, 307 F.3d at 573; *Amidon v. Student Assoc. of State Univ. of N.Y. at Albany*, 508 F.3d 94, 99 (2d Cir. 2007). “A university's viewpoint-discriminatory decision respecting how much funding to allocate to an RSO raises the same concerns as a viewpoint-discriminatory decision respecting whether to fund an RSO at all,” because the size of the fee allocation to a student organization “can skew debate on issues on which the group advocates a position.” *Amidon*, 508 F.3d at 101. For the reasons above, Defendants have affirmatively demanded viewpoint discrimination against religious student organizations. Moreover, as described below, the university fails to provide safeguards against additional viewpoint discrimination in the distribution of student activity fee funds.

First, “ASBSU will fund only projects or activities that benefit the student and enhance the image of Boise State University, with special emphasis on activities that will benefit large numbers of students.” Compl. Ex. C, 1. This requirement fails to provide adequate safeguards against viewpoint discrimination for two reasons. First, the requirement that the funded project or activity “benefit the student and enhance the image of Boise State University,” *id.* is “too

vague and pliable to effectively provide the constitutional protection of viewpoint neutrality required by *Southworth I*.” *Amidon*, 508 F.3d at 104 (rejecting criteria of “enrichment of campus life” and “complement[ation] [of] the educational mission” of the university as “too vague and pliable to bridle the student government’s discretion”). The “prohibition against unbridled discretion is a component of the viewpoint-neutrality requirement.” *Southworth II*, 307 F.3d at 579; *Forsyth v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (“A government regulation that allows arbitrary application ... has the potential for becoming a means of suppressing a particular point of view.”) *See also DeBoer v. Vill. of Oak Park*, 267 F.3d 558, 572 (7th Cir. 2001); *Child Evangelism Fellowship of Md. v. Montgomery County Pub. Sch.*, 457 F.3d 376, 384, 386-89 (4th Cir. 2006). Where there are “no articulated standards,” “the administrator is not required to rely on any objective factors.” *Forsyth*, 505 U.S. at 133. Hence, the official “need not provide any explanation for his decision,” rendering the decision “unreviewable.” *Id.* By contrast, definite and concrete “standards provide the guideposts that check the [allocator] and allow courts quickly and easily to determine whether the [allocator] is discriminating against disfavored speech.” *Lakewood v. Plain Dealer Publishing*, 486 U.S. 750, 758 (1988). *See also Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150 (1969). The requirement that a project or activity “benefit the student and enhance the image of Boise State University” plainly fails to provide the necessary objective standard to guide the ASBSU’s discretion.

Second, the university’s “special emphasis on activities that will benefit large numbers of students,” Compl. Ex. C, 1, is viewpoint discriminatory because the “[u]niversity cannot use the popularity of the speech as a factor in determining funding,” e.g., “by consider[ing] the number of students benefitting [sic] from the speech.” *Southworth II* at 594-595 (citing *Southworth I*, 529 U.S. at 235). The university’s criterion thus fails to comply with *Southworth I*’s requirement

“that minority views are treated with the same respect as majority views” and is therefore viewpoint discriminatory. *Southworth I*, 529 U.S. at 235 (quoted by *Southworth II*, 307 F.3d at 594-95).

Additionally, the university’s [c]onsideration of the length of time that a[] [recognized student organization] has been in existence and the amount of funding the [recognized student organization] has been in existence” is also viewpoint discriminatory. *Southworth II*, 307 F.3d at 593-94. Specifically, the university imposes a ceiling of \$700 on student activity fee funding for “new organizations,” which are defined as “those that have been recognized by the ASBSU Judiciary after February 1 (even if they once existed in the past).” Ex. C, 1 (but see Ex. D, 9 (ceiling given as \$400). Moreover, “[a] club can only ask for 150% of its approved budget from last year, or \$3,000, whichever is less.” Thus if an organization is eligible to apply for \$700 in the first year of its existence, it is not until the organization’s fifth year of existence that it would become eligible for applying to the maximum amount of \$3000, assuming that the organization was able to obtain the maximum amount of funding for which it was eligible year after year, though there is of course no guarantee that an organization will obtain the maximum funding in any year, or that an organization will even be able to maintain a continuous existence for continuous existence for five straight years under a policy that strictly constrains its funding vis-à-vis older groups.

Furthermore, since there are “no procedures designed to assure the distribution of funds in a viewpoint-neutral manner,” basing funding decisions on “the length of time an organization has been in existence, or the amount of funding that the [recognized student organization] received in the past . . . depend in part on viewpoint-based decisions of the past,” producing this result: “viewpoint discrimination from past years has been institutionalized into the current

system.” *Southworth II*, 307 F.3d at 594. As the *Southworth II* court discussed, this consideration is viewpoint discriminatory as it pertains to groups that were historically prohibited from receiving funding as well as other groups more generally. *Id.* First, the university’s viewpoint discriminatory exclusion of “organizations espousing . . . religious viewpoints,” places religious groups at “at a funding disadvantage compared to other viewpoints,” *id.*, and thus the consideration of longevity and past funding should be enjoined against religious groups. Second, this part of the policy should also be enjoined against non-religious groups as well, since there are “no procedures designed to assure the distribution of funds in a viewpoint-neutral manner,” *id.*, and as discussed above, the university employed criteria that raise concerns of viewpoint discrimination, and thus “institutionalize[]” viewpoint discrimination in the funding of all student groups, not just religious ones. *Id.* Lastly, considering longevity and past funding “discriminates against less traditional viewpoints,” *id.* (citing *Lamb’s Chapel*, 508 U.S. at 394; *see also Rosenberg*, 515 U.S. at 828), such that “historically popular viewpoints are at an advantage compared with newer viewpoints.” *Id.*

III. The University Fails Strict Scrutiny Because It is Unable to Show That It Has a Compelling Interest in Excluding Religious Student Organizations from Student Activity Fees That Are Available to All Other Recognized Student Organizations.

A. The university may not rely on a state constitutional provision to exclude a religious student organization from a speech forum in violation of the First Amendment.

As the Supreme Court and the Ninth Circuit have ruled, state reliance on its own constitution, when such reliance infringes on First Amendment rights, is insufficient to satisfy the requirement of a compelling interest. *See Widmar*, 454 U.S. at 276 (“we are unable to recognize the State’s interest [in complying with its own constitutional provision] as sufficiently ‘compelling’ to justify unconstitutional conduct”); *Kreisner v. City of San Diego*, 1 F.3d 775,

779 (9th Cir. 1993) (explaining that even if the California Constitution required a broader separation of church and state, this State interest could not be found "compelling" in conflict with the Free Exercise and Speech Clauses); *Tenafly Eruv Ass'n. v. Borough of Tenafly*, 309 F.3d 144, 172 (3d Cir. 2002) ("a government interest in imposing greater separation of church and state than the federal Establishment Clause mandates is not compelling in the First Amendment context").

Moreover, this court has previously acknowledged that the federal Equal Access Act's requirements, which "directly involve First Amendment values," by mandating that federal grantees provide religious student organizations with equal access to public school facilities in the K-12 context, preempts contrary provisions of the Idaho Constitution, including Idaho Const. art. IX, § 5. *Hoppock v. Twin Falls Sch. Dist. No. 411*, 772 F. Supp. 1160, 1163-64 (D. Idaho 1991); *see also Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990) (upholding Equal Access Act under Establishment Clause) (cited by *Hoppock*, 772 F. Supp. at 1161 (*Mergens* is "a case basically identical to this one")). The Ninth Circuit has stated that the Equal Access Act "was written to enact the policy of equal access . . . religious speech enunciated by the Court in *Widmar*," *Prince v. Jacoby*, 303 F.3d 1074, 1080 (9th Cir. 2002) (citing *Widmar*, 454 U.S. at 267-71); *see also Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 856-57 (2d Cir. 1996) (Equal Access Act is "an analog" to the First Amendment).

B. The university fails to show that the cited provision of the Idaho Constitution requires the university to deny religious student organizations access to the speech forum.

The university's only stated interest in denying student activity fee money to student organizations is its assertion that Idaho Const. art. IX, § 5 compels Boise State to deny student activity fee funding from ASBSU to religious student groups. The university cites no legal



authority interpreting this provision such that it is applicable to the context of university student activity fee allocations to student organizations. While the Idaho Supreme Court in *Epeldi v. Engelking* stated “that the framers of [Idaho’s] constitution intended to more positively enunciate the separation between church and state than did the framers of the United States Constitution,” 488 P.2d 860, 866 (Idaho 1971), nowhere did the court state in that opinion or otherwise that it would interpret Idaho Const. art. IX, § 5 to exclude a religious student organization from participation in a speech forum in violation of viewpoint neutrality.

The Court in *Southworth I* has stated that student activity fee money is *not* public money. *Southworth I*, 529 U.S. at 229. Thus, the Idaho Const. art. IX, § 5 restriction on the use of “public” money should not be construed in a manner that violates *Southworth I* by reading the provision to require the university to exclude religious student organizations from student activity fee funding. Furthermore, a university’s “sole purpose” in distributing student activity fee money to student organizations is to “facilitat[e] the free and open exchange of ideas by, and among, its students,” *Southworth I*, 529 U.S. at 229, certainly not for advocating religious viewpoints or any other viewpoints espoused from student organizations receiving funding. Therefore the distribution of student activity fees cannot be for a “religious purpose” under art. IX, § 5. The university agrees that student organizations are student initiated; student organizations advocate the viewpoints of students, not of the university. Compl. Ex. F, 9.

Moreover, the university’s asserted interest in complying with the strictures of Idaho Const. art. IX, § 5 is weakened by the fact that other Idaho public colleges or universities do not exclude religious student organizations from student activity fee funding. *See* sources cited *supra* p. 6, note 2.

Of the seven public colleges and universities listed by the Idaho Department of Education, only Boise State appears to have an express policy denying student activity fee money to religious student organizations, thus undermining the university's asserted interest in denying funds to religious student organizations.

C. The Supreme Court decision in *Locke v. Davey* is by its terms inapplicable to a case involving a university's speech forum.

The Supreme Court decision in *Locke v. Davey*, 540 U.S. 712 (2004), which upheld a state's decision not to fund clergy training, *id.* at 721, does not justify the university's exclusion of religious student organizations from student activity fee funding. *Locke*, by its express terms, is not applicable in cases involving speech forums, *id.* n. 23, and thus it is inapplicable in this case. *Rosenberger*, 515 U.S. 819 (cited by *Locke*, 540 U.S. at 721 n. 23); *see also Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1255 n.3 (10th Cir. 2008) ("The Court also indicated that the prohibition on discrimination on the basis of religion continues to apply to funding programs that are forums for speech." (citing *Locke*, 540 U.S. at 720 n. 3 and distinguishing *Rosenberger*)). "[T]he only interest at issue" in *Locke* "[wa]s the [s]tate's interest in not funding the religious training of clergy." *Locke*, 540 U.S. at 723 n.5.

D. The Establishment Clause does not require the university to exclude religious student organizations from student activity fee funding.

Nor does the Establishment Clause provide a justification for exclusion, since there is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause. *Rosenberger*, 515 U.S. at 846. As the Supreme Court has held repeatedly, the Establishment Clause does not require a public university to exclude religious student organizations from participation in speech forums, *Widmar*, 454 U.S. at 273, such as systems of student activity funding. *Rosenberger*, 515 U.S. at 845-46. Nor may the university rely on an

asserted fear of an Establishment Clause violation because the Supreme Court has stated that there is no “plausible fear” of an Establishment Clause violation when student activity fees are granted to a student organization. *Id.* at 842.

IV. Because They Are Likely to Prevail on the Merits, Plaintiffs Satisfy the Remaining Requirements for Entry of a Preliminary Injunction.

As demonstrated above, Plaintiffs are likely to succeed on the merits of their First Amendment claim. Thus, they satisfy all remaining requirements of an entry of preliminary injunction. Since plaintiffs show that they are likely to succeed on the merits, they also establish irreparable injury, since “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod*, 427 U.S. at 373. Plaintiffs also show that the balance of harms is in their favor because “the fact that a case raises serious First Amendment questions compels a finding . . . ‘that at the very least the balance of hardships tips sharply in [Plaintiffs’] favor.’” *Sammartano*, 303 F.3d at 973 (quoting *Viacom Int’l.*, 828 F. Supp. at 744). Lastly, “[c]ourts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles,” *id.* at 974 (citing cases from six circuits) and the Ninth Circuit has also emphasized that it is in the public interest to uphold First Amendment rights to protect against infringement of “the free expression interests of . . . other people” who are not parties to the case. *Id.* Thus, preliminary injunction is appropriate in this case.

#### CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court enter preliminary injunctive relief, prohibiting the Defendants from continuing to exact and allocate student activity fees for the support of student organizations unless and until they cease the viewpoint discriminatory

exclusion of religious student organizations and adopt adequate protections for viewpoint neutrality in the allocation of student fees to student organizations.

Respectfully submitted this 16th day of December, 2008.



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