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Higher Education Alert

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Ninth Circuit declines to extend "school-sponsored speech doctrine" to higher ed

By Matthew Netti and Amy Spencer

The ruling fails to grant colleges similar latitude as K-12 schools to restrict speech under the First Amendment.

What's the Impact?

- On-campus speech remains heavily protected by the First Amendment.
- College administrators should proceed cautiously when seeking to restrict on-campus speech.
- Policies must be drafted using specific, express prohibitions to best position them to survive vagueness and overbreadth challenge.

Students at Clovis Community College (CCC), a public community college in Fresno, California, founded a local chapter of the conservative student organization Young Americans for Freedom (YAF). The students sought to post flyers on bulletin boards around campus containing "anti-communist," "anti-leftist," and "pro-life" messages. The YAF students sought approval for the "pro-life" posters in anticipation of the Supreme Court hearing oral arguments in *Dobbs v. Jackson Women's Health Organization.* CCC permitted a few of the posters to be hung on bulletin boards in a well-attended portion of campus, but after receiving complaints that the

posters made students uncomfortable, they were taken down or moved to a more remote part of campus.

CCC had a Flyer Policy that contained rules student organizations must follow when posting on campus. The Flyer Policy read in relevant part:

> **Posting Information:**
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> • All posters not bearing the Clovis Community Logo or in the provided Clovis Community College Template (i.e., posters not from a College Department or Division) must be approved and stamped by the Clovis Community College Student Center Staff. Failure to do so will result in unapproved/unstamped flyers being removed and thrown away.
>
> • Posters with inappropriate or offens[ive] language or themes are not permitted and will not be approved.

Preliminary injunction

On August 11, 2022, the YAF students filed a motion for a preliminary injunction to prevent enforcement of the CCC's Flyer Policy, specifically the provision that prohibited "inappropriate or offensive language or themes." The students named the then-president of the college, various members of the administration, and the school as defendants. The students claimed the Flyer Policy violated their First Amendment rights because the Flyer Policy was facially viewpoint discriminatory and applied in a manner that discriminated against their conservative viewpoints. The students also argued that the Flyer Policy was unconstitutionally vague and overbroad. CCC responded that the bulletin boards did not constitute a public forum, therefore CCC should be granted discretion not to promote or sponsor speech on a controversial subject.

The Eastern District of California walked through the exercise of a traditional forum analysis, explaining the types of restrictions permitted under the First Amendment in each of the three forums: traditional public forums, designated public forums, and non-public forums. Traditional public forums, such as sidewalks and parks, typically must be free from content-based restrictions. Designated public forums are spaces traditionally not regarded as public, but that the government has opened up for that purpose. In designated public forums, the government has much more leeway to regulate speech. In non-public forums, courts permit reasonable content-based restrictions on speech. In both traditional public forums and designated public forums, viewpoint-based restrictions are prohibited.

The Eastern District of California did not find it necessary to label CCC's bulletin board as a traditional public forum or as a designated public forum because viewpoint-based restrictions are prohibited in both. The court was then faced with deciding if the Flyer Policy qualified as a viewpoint restriction. The students cited to a previous Supreme Court decision, *Matal v. Tam,* that suggested that a ban on "offensive" language is viewpoint discrimination because what qualifies

as "offensive" necessarily depends on the government's viewpoint.[1] But CCC pointed to other Supreme Court decisions that have recognized that K-12 schools have a heightened interest in regulating third-party speech when the public may perceive the speech was sponsored by the school, referred to as the "school-sponsored speech doctrine."[2] The Supreme Court has recognized a high school's legitimate pedagogical need to remain neutral on matters of political controversy. CCC sought to extend the K-12 "school-sponsored speech doctrine" to college campuses.

The court evaluated both arguments but ultimately avoided the question. Instead, it granted the students' preliminary injunction based on their argument that the Flyer Policy was unconstitutionally overbroad and vague. The court ruled that CCC did not have a legitimate pedagogical need to prohibit all offensive speech, and, therefore, the ban contained in the Flyer Policy was overbroad and could not be applied to restrict the YAF students' posters.[3]

Ninth Circuit Appeal

CCC appealed the district court's decision to the Ninth Circuit Court of Appeals. The court affirmed the lower court's decision, echoing its finding that the Flyer Policy was unconstitutionally overboard and vague.[4] Importantly, the Ninth Circuit declined to extend the "school-sponsored speech doctrine" to college campuses.

Takeaways

While the Supreme Court has granted K-12 schools great flexibility in restricting speech based on pedagogical concerns, likely because the Court has described the college campus as a "marketplace of ideas" where students learn the "background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition," courts have declined to grant colleges the same latitude to restrict speech under the First Amendment.[5]

Moving forward, colleges must tread lightly when seeking to restrict or limit speech on campus. Policies must be drafted using specific, express prohibitions to best position them to survive vagueness and overbreadth challenge. Additionally, colleges should refrain from restrictions based on vague terms such as "offensive" or "inappropriate" because courts have often found these types of restrictions can impermissibly chill First Amendment protected speech. Viewpoint restrictions, such as those targeting one side of a politically controversial issue, are also prohibited. Alternatively, courts may be inclined to uphold narrowly tailored restrictions on speech when the public may attribute third-party viewpoints as viewpoints of the college. For

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[1] *Matal v. Tam*, 582 U.S. 218 (2017).

[2] *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986).

[3] *Flores v. Bennett*, 635 F. Supp. 3d 1020 (E.D. Cal. 2022).

[4] *Flores v. Bennett*, No. 22-16762, 2023 WL 4946605, at *1 (9th Cir. Aug. 3, 2023).

[5] *Healy v. James*, 408 U.S. 169, 180 (1972); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835-36 (1995).

example, if a student organization posted a flyer expressing a controversial viewpoint bearing the school's logo.

While other courts may consider extending the "school-sponsored speech doctrine" or other First Amendment exceptions to higher education institutions, until then, college administrators should proceed cautiously when seeking to restrict on-campus speech. Further, before asserting this argument again, colleges and universities may want to consider whether the possible consequences of being granted the same authority to restrict speech that K-12 schools enjoy—diminished protections for themselves and their faculty—are worth the tradeoff.

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