

United States Court of Appeals for the Ninth Circuit

AARON FLINT,
Plaintiff-Appellant

v.

GEORGE DENNISON, in his official capacity as President of the University of Montana-Missoula; THE ASSOCIATED STUDENTS OF THE UNIVERSITY OF MONTANA, KYLE ENGELSON, in his official capacity as the ASUM Elections Committee Chair; JUSTIN BAKER, AVERIEL WOLFF, SOPHIA ALVAREZ, ANNA GREEN, KRIS MONSON, DEREK DUNCAN, and KATIE BOECKX, in their official capacities as ASUM Elections Committee Members; ASUM President GALE PRICE, ASUM Vice President VINNIE PAVLISH and ASUM Business Manager CASSIE MORTON, in their official capacities as ASUM Executive Officers and ex-officio members of the ASUM Senate; JESSICA ADAM, BRYCE BENNET, ANDREW BISSELL, BRAD CEDERBERG, TYLER CLAIRMONT, NEZHA HADDOUCH, SHAWNA HAGEN, CHRIS HEALOW, ANDREA HELLING, DERF JOHNSON, BRITTA PADGHAM, KIMBERLY PAPPAS, JOSH PETERS, REBECCA PETTIT, JAKE PIPINICH, ROSS PROSPERI, JON SNODGRASS, LESLIE VENETZ, NATHAN ZIEGLER, and CASEY HOGUE, in their official capacities as ASUM Senators,
Defendants-Appellees

Appeal from the United States District Court for the District of Montana,
No. CV 04-85-M-DWM

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STATEMENT OF JURISDICTION

Appellees George Dennison, The Associated Students of the University of Montana (“ASUM”), Kyle Engelson, Justin Baker, Averiel Wolff, Sophia Alvarez, Anna Green, Kris Monson, Derek Duncan, Katie Boeckx, Gale Price, Vinnie Pavlish Cassie Morton, Jessica Adam, Bryce Bennet, Andrew Bissell, Brad Cederberg, Tyler Clairmont, Nezha Haddouch, Shawna Hagen, Chris Healow, Andrea Helling, Derf Johnson, Britta Padgham, Kimberly Pappas, Josh Peters, Rebecca Pettit, Jake Pipinich, Ross Prospero, Jon Snodgrass, Leslie Venetz, Nathan Ziegler, and Casey Hogue (collectively “University Defendants”) contend that this case has become moot and that the Eleventh Amendment bars certain claims for relief for the reasons set forth in Part III.A and III.B of the Argument, *infra* at 51-53 and 54-55. With that caveat, pursuant to Circuit Rule 28-2.2, the University Defendants otherwise agree with Appellant Aaron Flint’s Jurisdictional Statement.

STATEMENT OF ISSUES FOR REVIEW

1. Whether this Court should affirm the District Court's grant of summary judgment because campaign spending limits for student government office are constitutional.
2. Whether this Court should affirm the District Court's judgment in favor of the University Defendants on alternative grounds.

STATEMENT OF THE CASE

Appellant Aaron Flint (“Flint”) commenced this lawsuit challenging the spending limit applicable to student candidates for ASUM, the student government at University of Montana-Missoula (“UM”), on May 5, 2004. He filed a verified complaint with attachments, motions for a temporary restraining order and a preliminary injunction, and a motion to consolidate the preliminary injunction hearing with the trial on the merits. Flint submitted no evidentiary support for the preliminary injunction other than the verified statements of his complaint. The next day, the District Court denied both the temporary restraining order, SER 1,¹ and the motion to consolidate.

With their legal memorandum in opposition to the motion for preliminary injunction, the University Defendants submitted declarations with exhibits from several individuals: ASUM senior faculty advisor Hayden Ausland, SER 7-108; UM Dean of Students Charles Couture, SER 109-118; UM Financial Aid Director Myron Hanson, SER 119-122; and Gale Price, the ASUM President elected in 2004 who was the ASUM Vice-President during Flint’s presidency, SER 122-130. Flint submitted no

¹ References to Appellant’s Excerpts of Record shall be “ER ___” while references to Appellees’ Supplemental Excerpts of Record shall be “SER ___.”

evidentiary materials with his Reply. On July 7, 2004, the District Court held a hearing on preliminary injunction motion and later denied the motion, determining that “a state university may, in the interest of preserving the quality and availability of educational opportunities for its students, place reasonable restrictions on free speech. . . .” SER 134, 141.

Prior to resolution of the preliminary injunction motion, the University Defendants filed a Rule 12(b) motion to dismiss the complaint. Flint subsequently filed an amended verified complaint (with attachments) and the University Defendants then filed a motion to dismiss the amended verified complaint. With his opposition, Flint filed an affidavit, to which the University Defendants objected *inter alia* for lack of personal knowledge by Flint, SER 132-133.

On September 8, 2004, the District Court issued an order to show cause why additional briefing or argument would be necessary to resolve the lawsuit. ER 83. The University Defendants’ submission in response to the Order contended that no further briefing was necessary but suggested that, if the Court chose to refer to matters outside the pleadings to resolve the 12(b)(6) dismissal motion, the Court should convert the motion to one for summary judgment without additional briefing and “dispose of the case

based on the record developed in connection with the motion for preliminary injunction.” SER 146.

One month later, the Court did so by Order dated October 8, 2004, providing the parties an opportunity to submit further evidentiary materials but no further briefing – deeming the legal issues resolved by the order denying the preliminary injunction. ER 88-89. The University Defendants submitted an additional declaration from Gale Price. SER 151-154. Flint submitted no further evidence.

On March 28, 2005, the District Court issued an Order and opinion granting summary judgment to the University Defendants. ER 99.

On April 25, 2005, Flint filed a Notice of Appeal. ER 113.

STATEMENT OF FACTS²

The ASUM Senate, designed as a blend of republican and parliamentary governmental forms, SER 11, 12-13,³ has three elected student executives, twenty elected student senators, two non-voting faculty advisors, and other non-voting ex-officio positions as needed. SER 72 (ASUM Const. Art. IV, § 1). Since its 1906 inception, ASUM has fallen

² Flint submitted no factual evidence sufficient to create any material dispute as to the facts set forth herein.

³ The Declaration of Professor Hayden Ausland, who holds a UM Classics professorship and has served for the past 14 years as ASUM’s senior faculty advisor, SER 7-8, details ASUM’s history.

entirely within the UM educational mission. SER 8-11. The current ASUM Constitution provides that “ASUM is organized exclusively for educational and non-profit purposes[,]” with the primary responsibility of “serv[ing] as an advocate for the general welfare of the students.” SER 70 (ASUM Const., Art. 2, § 1; *see also id.* at § 4 (ASUM government and activities must comply with Montana state law and Montana State Board of Regents policies)).

ASUM offers students experience in many forms of leadership, through which they develop various skills to handle student government responsibilities. ASUM senators and executives have traditionally attended a special seminar or retreat each fall semester. SER 11, 80 (ASUM Bylaws, Art. II § 2.D, Art. III, § 2.D). These sessions may cover parliamentary procedure, service-learning or the promotion of leadership skills. SER 11.

Through ASUM participation, student senators and executives learn how to address conflicting interests of diverse constituencies; how to make recommendations about budget allocations; how to negotiate with administrators over matters such as tuition and fee increases; and how to draft policies for numerous student programs. The ASUM Senate gives students practical deliberative and legislative experience within the framework of the ASUM Bylaws and Constitution to set and implement

policies. This learning and experience form a significant part of these students' education. SER 10-11, 125-126.

Because the ASUM Senate has just 23 student seats, students may participate only by meeting several requirements. All ASUM officers must be registered for seven or more credits during the fall and spring semesters (thereby paying the student activity fee) and must maintain at least a 2.0 cumulative grade-point average. SER 70, 74, 79 (ASUM Const., Art. I § 2, Art. VII § 1; Bylaw, Art. I § 3). In addition, students must run in and win election, following the rules within the ASUM Constitution and Bylaws. SER 74, 88-92. A student candidate who violates any election rules may be censured, denied ASUM campaign funding, barred from candidacy or prevented from taking office. SER 91 (Bylaw Art. V, §§ 5-6).

The ASUM Constitution and Bylaws significantly regulate student campaigns. For example, the Constitution requires that a student must file for candidacy by submitting petitions signed by 50 registered students. SER 74 (ASUM Const. Art. VII § 4(a)). In addition, the ASUM Bylaws limit the campaign period to three weeks, SER 92 (Bylaw Art. V § 7); prohibit the display of any campaign materials or the use of any place-holder signs prior to the start of the campaign period, SER 89 (Bylaw Art. V § 2.B); prohibit campaigning in any manner within the immediate polling sites on the day of

an election, SER 89 (Bylaw Art. V § 2.C); require removal of campaign posters from the floor level of all polling sites, *id.*; prohibit door-to-door campaigning within residence halls or family housing, SER 89 (Bylaw Art. V § 2.E); allow campaigning in classrooms only with instructor permission, *id.*; allow the placement of campaign posters only in very specific locations, SER 89 (Bylaw Art. V § 2.F); and, at issue here, limit how much money a student may spend on his or her campaign, SER 89 (Bylaw Art. V § 2.G).

Once elected, all ASUM officers must adhere to ASUM Personnel Policy requirements. SER 79 (Bylaw Art. II, § 1). An ASUM officer may be recalled from office for failure to perform the duties prescribed by the Bylaws. SER 78, 79-80 (ASUM Const. Art. XIV § 1; Bylaws Art. II, § 2, Art. III, § 2).

Because of ASUM's educational function, UM has a critical interest in making the ASUM election process fair and open to all qualified students, regardless of their economic means. ASUM election spending limits, in place since 1970, SER 12, assure that election to ASUM does not depend on the amount of personal or family resources available for a student to spend on an election campaign.

This is particularly important at UM because of the acute financial needs of many UM students. Approximately two-thirds of the student body

(and three-quarters of in-state students) use financial aid services and of those, a full 34 percent are eligible for federal Pell Grants awarded to the neediest students. SER 120. Indeed, a large percentage of UM Pell Grant recipients have family incomes so low that their federal application shows an Expected Family Contribution (EFC) of zero – the lowest possible amount. SER 121. A relative handful of UM students have the financial resources to spend significant funds on campaigns for student office, while the majority of students clearly do not. SER 122. If students begin winning election to ASUM by spending large sums on their campaigns, students without personal or family resources to spend on student elections will be discouraged from running. SER 122, 127.

According to Goal B(2) of The Montana University System Strategic Plan, the University System seeks “to make sure that every academically qualified individual has an opportunity to receive the benefits of higher education without financial or social barriers.” SER 116. Making ASUM elections the province only of economically elite students therefore would be contrary to the University’s mission and goals. As Professor Ausland explains: “To allow a wealthy student to monopolize access to election would be like allowing that same wealthy student to buy a first shot at

enrolling in some sought-after history class, *i.e.*, it would be unworthy of an American institution of public higher education.” SER 12, 122.

The ASUM election spending limits also serve UM’s important educational interest in promoting diversity in its programs. SER 111-113. UM places great importance on attracting and retaining students from highly diverse backgrounds. SER 111. Providing these students with equal educational opportunities in extracurricular programs is therefore critical to UM’s mission. SER 111-112. Diversity in student government, like diversity in the student body as a whole, enhances the education of all who participate by assuring their exposure to a wide variety of opinions and life experiences. SER 112. Absent spending limits, ASUM officers and Senators will be less likely to include an economically, racially and ethnically diverse cross-section of UM students. SER 112-113. This would harm all students.

Consistent with UM’s goal to provide opportunity for higher education regardless of wealth, ASUM provides financial resources for student campaigns. First, ASUM provides partial funding of student campaigns. SER 127-128. Candidates are reimbursed for the first \$10 of their campaign spending, plus 50 percent of their expenditures over that amount, up to the spending limit. SER 89 (Bylaw, Art. V § 2.G.4). ASUM

cannot afford to provide matching funds for expenditures if there is no spending limit. SER 127. Spending limits therefore serve an important function in budgeting UM resources.

Additional resources for campaigning include publication of candidate profiles in the student newspaper, the *Montana Kaimin*, SER 88-89, 129 (Bylaw, Art. V, § 1.A.3), at least one forum for Senate candidates and another for executive candidates, and one Presidential-Vice Presidential debate. SER 89, 129 (Bylaw, Art. V § 2.D).

At the time Flint violated the ASUM Bylaws during his 2004 ASUM Senate campaign, he was well aware of ASUM student campaign spending restrictions. In his 2003 ASUM presidency bid, Flint ran on a ticket with Appellee Gale Price and the ticket violated the spending limit. SER 124. Both were censured but were allowed to keep their offices. *Id.* In Flint's 2004 ASUM Senate bid, he again ignored the spending limits and encouraged others to do so. SER 152, 154. As a result, he was denied the seat after the election.

SUMMARY OF ARGUMENT

The First Amendment does not prohibit a university from enforcing reasonable regulations to assure the fairness of student government elections, including a limit on campaign expenditures by student government

candidates. Campaign spending limits for student government office foster greater participation by a broad and diverse range of students, furthering the educational value of student government and assuring that its benefits are appropriately open to all students. This is particularly important given the acute financial needs of so many UM students. Courts defer to this type of university educational determination as to ““what may be taught, how it shall be taught, and who may be admitted to study[,]”” *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)), as well as the university’s right to “make academic judgments as to how best to allocate scarce resources.” *Widmar*, 454 U.S. at 276. As long as the university’s regulation is viewpoint neutral, as is certainly true of the student spending limits, it is permissible under the First Amendment. *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 233 (2000).

Flint’s argument that student elections and elections for public office should be subject to the same First Amendment analysis disregards the importance of education and “the special characteristics of the school environment.” *See Widmar*, 454 U.S. at 267 n.5 (quoting *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 506 (1969)). Nothing in *Buckley v. Valeo*, 424 U.S. 1 (1976), which applied to congressional campaigns,

subjects student government regulations to the same First Amendment constraints as elections to Congress or state government. To ignore the critical and significant distinctions between student government and student elections, on the one hand, and public office-holding and elections for public office, on the other, misunderstands the purpose of both education and the First Amendment.

Alternatively, ASUM elections and the ASUM Senate constitute a nonpublic or limited public forum –rather than a designated forum, as Flint contends– with reasonable and viewpoint-neutral restrictions that are therefore constitutional. It is well established that the government’s intent and its selectivity in access to a particular forum are largely determinative of the nature of the forum, and therefore of the degree of scrutiny the Court applies to the subject regulation. *See, e.g., Arkansas Educational Television Comm’n v. Forbes* [hereafter “*Forbes*”], 523 U.S. 666 (1998); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983); *DiLoreto v. Downey Unified School Dist. Bd. of Educ.*, 196 F.3d 958, 964 (9th Cir. 1999). The fact that a restriction affects political speech or occurs in the university context does not mean that the property at issue is a public or designated public forum. *See, e.g., Forbes*, 523 U.S. at 680 (candidate debate sponsored by state-owned public broadcaster was a nonpublic

forum); *Cogswell v. City of Seattle*, 347 F.3d 809, 814 (9th Cir. 2003) (voter pamphlet with candidate profiles was a limited public forum), *cert. denied*, 541 U.S. 1043 (2004); *Desyllas v. Bernstine*, 351 F.3d 934, 943 (9th Cir. 2003) (campus locations not approved for handbill-posting are nonpublic fora).

Here, the University Defendants' intent is clear through the consistent limitation of access to ASUM elections and the ASUM Senate. Each year, office in the ASUM Senate is open to only 23 students. To hold or run for office, students must satisfy several criteria including maintenance of a required grade point average and adherence to ASUM campaign rules. Students can be censured, denied funding, barred from candidacy, denied from taking office, or removed from office for failure to satisfy the criteria. Because of the limited access, ASUM elections and the ASUM Senate are either a nonpublic or limited public forum whose regulation is subject to a lenient reasonableness standard. The student spending limits at issue here meet this standard.

If, for some reason, this Court considers ASUM a designated public forum or if *Buckley's* exacting scrutiny standard is applicable to student elections, as Appellant contends, ASUM student campaign spending limits still satisfy the relevant degree of scrutiny. As the Supreme Court has

cautioned: “[W]e wish to dispel the notion that strict scrutiny is strict in theory, but fatal in fact.” *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (internal citation omitted). The ASUM spending limits are narrowly tailored to address the University Defendants’ compelling interests in structuring an educational program to provide equal access to students of limited means, in providing multiple experiences to students, and in the educational benefits of diversity. They are therefore constitutional.

Several alternative grounds also support the judgment in favor of the University Defendants. Because Flint has graduated, his claims are moot. *DeFunis v. Odegaard*, 416 U.S. 312, 319 (1974). Because the student defendants are not state actors, the claims against them must be dismissed. *See, e.g., Leeds v. Meltz*, 85 F.3d 51 (2d Cir. 1996). Finally, the Eleventh Amendment bars Flint’s claims to the extent they seek retroactive relief.

For all the above reasons, this Court should affirm the judgment of the district court in favor of the University Defendants.

ARGUMENT

Standard of Review

This Court reviews a district court's grant of summary judgment *de novo*. *See Arakaki v. Hawaii*, 314 F.3d 1091, 1094 (9th Cir. 2002). Because neither Flint nor the University Defendants contends that there are any

genuine issues of material fact, this Court’s task is to determine whether the district court correctly applied the relevant substantive law. *Id.*

I. BECAUSE THE FIRST AMENDMENT ALLOWS UNIVERSITIES WIDE LATITUDE TO REGULATE STUDENT GOVERNMENT IN FURTHERANCE OF THE UNIVERSITY EDUCATIONAL MISSION, THE STUDENT SPENDING LIMITS ARE CONSTITUTIONAL.

UM has determined that a campaign spending limit for student government office will foster greater participation by a broad and diverse range of students, furthering the educational value of student government and assuring that its benefits are appropriately open to all students. The U.S. Supreme Court has cautioned that courts must defer to the educational missions of institutes of higher learning. Courts should be “reluctan[t] to trench on the prerogatives of state and local educational institutions” and be mindful of their “responsibility to safeguard . . . academic freedom, ‘a special concern of the First Amendment.’” *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 226 (1985) (internal citation omitted). As the district court recognized and relied upon, state universities have the right to determine ““who may teach, what may be taught, how it shall be taught, and who may be admitted to study[,]” ER 102-103, 109-111; SER 137; *Widmar*, 454 U.S. at 276 (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring)), as well as the right to “make academic judgments as to how

best to allocate scarce resources.” *Widmar*, 454 U.S. at 276. The student spending limit is therefore constitutionally permissible.

Because “[a] university’s mission is education, . . . [it has] authority to impose reasonable regulations compatible with that mission upon the use of its campus or facilities.” *Id.* at 267 n.5. Indeed, the “goals of [a] university are . . . inextricably connected with the underlying policies of the First Amendment,” *Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, 1039 (9th Cir. 1999), and “First Amendment rights must be analyzed ‘in light of the special characteristics of the school environment.’” *Widmar*, 454 U.S. at 267 n.5 (citing *Tinker*, 393 U.S. at 503). A university has the “right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education.” *Id.* at 277. This does not remove a university’s conduct from the ambit of the First Amendment; rather, it states a rule as to the appropriate First Amendment analysis within the university setting.

The Supreme Court decision in *Board of Regents of the University of Wisconsin System v. Southworth* confirms that, even when university policies carry a “high potential for intrusion” on students’ First Amendment rights, the policies will be upheld if they are viewpoint-neutral. 529 U.S. at 232-234 (rejecting First Amendment challenge to mandatory student activity

fees used to support extracurricular student speech even though students were thus forced to subsidize speech they found objectionable or offensive). The ASUM spending limit, applicable to all candidates, is clearly viewpoint-neutral. *See* Part II.B.1, *infra* at 36-37.

This Court similarly rejected a First Amendment challenge in the university setting the year before *Southworth* was decided. In *Rounds v. Oregon State Bd. of Higher Education*, the Court correctly concluded that strict scrutiny was not the appropriate analysis for students' First Amendment rights and that mandatory activity fees are constitutional. 166 F.3d at 1038 n.4, 1039-1040. The Court found the educational context of student government central to the First Amendment analysis:

In assessing purpose, it is of the utmost significance that the organizational speech at issue occurs in an academic setting, for "[i]t is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation."

Id. at 1038 (internal citation omitted).

Because ASUM exists to support the UM educational mission, SER 8-11, UM enjoys wide latitude to decide what rules and procedures will govern the election process for deciding which students will have the opportunity of serving as an ASUM officer or senator. ASUM student spending limits reflect a reasonable means of assuring that students need not have substantial personal or family resources to enjoy a fair opportunity to campaign, win

election, and have access to the educational opportunity afforded by ASUM. SER 111-114, 122, 127. This is particularly important given the acute financial needs of so many UM students. SER 120-121. The learning experience afforded by student government is enhanced for all participants when its membership includes students of diverse backgrounds. SER 113; *see Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (fostering diversity in student body serves a compelling educational interest). Finally, the learning experience afforded by student government extends to the election process itself, as well as the students' role in running elections and enforcing applicable rules. SER 12-15, 126; *Southworth*, 529 U.S. at 229 (student initiative provides educational content). Regulation of student elections thus clearly implicates UM's prerogative of determining "what may be taught, how it shall be taught, and who may be admitted to study." *Widmar*, 454 U.S. at 276 (citation omitted).

Consistent with UM's goal to provide opportunity for higher education regardless of wealth, ASUM Bylaws also provide for partial funding of student election campaigns. SER 89 (Bylaw, Art. C § 2.G.4). These funds come from the ASUM budget. *Id.*; SER 127. If wealthy students spend unlimited amounts on their campaigns, ASUM cannot afford to provide unlimited matching funds for students lacking such financial

resources. SER 127. The spending limits thus serve an important function in allowing the University to determine “how best to allocate scarce resources.” *See Widmar*, 454 U.S. at 276.

Flint’s contention that student elections and elections for public office should be subject to the same First Amendment analysis disregards “the special characteristics of the school environment.” Nothing in *Buckley*, 424 U.S. 1, which applied to congressional campaigns, subjects student government regulations to the same First Amendment constraints as elections to Congress or state government. Unlike ASUM, neither Congress nor the Montana Legislature exists to further the education of persons elected to serve there (even if that may be an incidental effect in some cases). SER 70 (ASUM Const. Art. II § 1). Neither Congressional representatives nor state legislators are required to demonstrate a minimum grade point average to gain a place on the ballot, as are ASUM candidates. SER 74 (ASUM Const. Art. VII § 1). Unlike ASUM student candidates, candidates for Congress and the state legislature are neither limited to a three-week campaign period nor are they limited to specific locations for electioneering to ensure that they can focus on other educational pursuits including academics. SER 89, 92 (Bylaws, Art. V §§ 2, 7). Neither Congress nor the Montana Legislature includes non-voting faculty members

as part of the legislative body. SER 72 (ASUM Const. Art. IV § 1). Neither Congress nor the state legislature is required to conform its activities to “the policies of the Montana Board of Regents of Higher Education,” as is ASUM. SER 70 (ASUM Const., Art. II § 4). To ignore the critical distinctions between student government and student elections, on the one hand, and public office-holding and elections for public office, on the other, misunderstands the purpose of both education and the First Amendment.

In its opinions denying the preliminary injunction and in upholding the spending limits, the District Court relied on a case similar to the one before this Court, in which the Eleventh Circuit rejected a First Amendment challenge to student government election regulations. SER 139-142, ER 106-107 (*citing and discussing Alabama Student Party v. Student Government Ass’n of the University of Alabama*, 867 F.2d 1344 (11th Cir. 1989)). Specifically, the Student Government Association of the University of Alabama adopted regulations prohibiting distribution of campaign materials more than three days before the election, distribution of campaign literature on election day, and open forums or debates among student government candidates except during election week. *Alabama Student Party*, 867 F.2d at 1345. These restrictions did not merely affect campus

activities or facilities use, but also limited campaigning off-campus. *Id.* at 1352 (Tjoflat, J., dissenting).

These regulations unquestionably had a direct and appreciable impact on the quantity of election-related speech that candidates could engage in and student voters could hear. Nevertheless, the Eleventh Circuit emphasized that the constitutional question

is a different one than posed by election restrictions in a non-academic setting. . . . [T]his is a university, whose primary purpose is *education*, not electioneering. Constitutional protections must be analyzed with due regard to that educational purpose, an approach that has been consistently adopted by the courts.

Id. at 1346; *see also Widmar*, 454 U.S. at 367 n.5 (“A university’s mission is education, and decisions of this Court have never denied a university’s authority to impose reasonable regulations compatible with that mission upon the use of its campus or facilities.”). Relying principally on a university’s right to determine ““who may teach, what may be taught, how it shall be taught, and who may be admitted to study,”” the court held that the university was “entitled to place reasonable restrictions on this learning experience.” *Alabama Student Party*, 867 F.2d at 1345, 1347 (quoting *Widmar*, 454 U.S. at 276).

Additionally, the court observed that “[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers

and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself.” *Id.* at 1347 (quoting *Regents of the University of Michigan*, 474 U.S. at 226 n. 12). It concluded: “In the present case, and in other school cases raising similar First Amendment challenges, these principles translate into a degree of deference to school officials who seek to reasonably regulate speech and campus activities in furtherance of the school's educational mission.” *Id.* *Cf. Chapman v. Thomas*, 743 F.2d 1056, 1059 (4th Cir. 1984) (recognizing the “legitimate interest of the university in promoting student participation in student government”); *Sellman v. Baruch College*, 482 F. Supp. 475, 480 (S.D.N.Y. 1979) (rejecting constitutional challenge to requirement that student government candidates register for 12 credits and maintain 2.5 grade point average, because “[t]he fundamental purpose of Baruch College is to educate students”). This Court should rule likewise and affirm the judgment below.

By contrast, the *Alabama Student Party* dissent – relying on a misunderstanding of *Widmar* -- reasoned that the student election regulations were content-based because they excluded speech about student government elections while permitting other kinds of speech, and concluded that the regulations therefore were not entitled to deference under a test of “reasonableness” but instead must be supported by a compelling

governmental interest. *Alabama Student Party*, 867 F.2d at 1352-1354 (Tjoflat, J., dissenting). *Widmar* struck down a university policy of excluding student religious groups from meeting on campus, where the university routinely allowed various non-religious groups to meet on campus. In *Widmar*, the Court emphasized that its holding was based on the university's selective exclusion of disfavored groups, and that it *should not be read to undermine the traditional deference afforded to a university's academic judgments concerning the best means to foster its educational mission*. 454 U.S. at 276-277 n. 20. Moreover, the reasoning of the *Alabama Student Party* dissent has been undermined by the Supreme Court's later decisions in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), and *Southworth*, which clarify that viewpoint neutrality rather than content neutrality is the guiding rule in a university setting. *Rosenberger*, 515 U.S. at 829-830; *Southworth*, 529 U.S. at 230, 233-234; *see also Cogswell*, 347 F.3d at 814-816 (explaining distinction between content and viewpoint neutrality).

Plaintiff cites a number of decisions applying *Buckley*'s standard of strict scrutiny to strike down spending limits, App't Br. at 12-14, but these decisions are inapposite because they address public elections for state or municipal office, not student government elections. Flint also asserts

without citation, presumably to bolster his argument about the equivalence of student elections and elections for public office, that the structure of ASUM “is modeled after our federal government.” App’t Br. at 7. This ignores the obvious differences between the federal government and ASUM. See Part I, *supra* at 20-21; see also SER 11, 12-13.

The sole decision holding that *Buckley* somehow bars spending limits in student government elections is *Welker v. Cicerone*, 174 F. Supp. 2d 1055 (C.D. Cal. 2001), which the District Court in this case explicitly and correctly rejected. As the District Court discussed at length, SER 139-141, ER 105-106, the *Welker* court uncritically accepted the contention that *Buckley* was controlling in the student government elections context and thus rejected out of hand the university’s educational interest in imposing spending limits to provide equal access to student government by students of limited means.⁴ This was clear error by the *Welker* court. As explained above, their educational missions entitle universities to regulate speech more

⁴ *Welker* quoted *Buckley*’s admonition that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.” 174 F. Supp. 2d at 1065 (internal citations and quotations omitted). Even in the context of public elections, it has been noted that “those words [in *Buckley*] cannot be taken literally. The Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many.” *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 399, 402 (2000) (Breyer, J., joined by Ginsburg, J., concurring).

broadly than is permissible in the context of elections for federal or state office. The governing test is one of reasonableness, not strict scrutiny.

For all the above reasons, ASUM spending limits reflect UM's reasonable judgment as to "what may be taught, how it shall be taught, and who may be admitted to study" as well as its judgment as to "how best to allocate scarce resources." *Widmar*, 454 U.S. at 276 (internal citation omitted). Accordingly, they are constitutional under the First Amendment.

II. IN THE ALTERNATIVE, THE STUDENT SPENDING LIMITS SATISFY A FORUM ANALYSIS.

Because participation as a student candidate and in the ASUM Senate is an educational opportunity, and because Flint has not been denied access to any governmental property (metaphysical or otherwise), the analysis set out in Part I rather than First Amendment forum analysis is applicable. *See United States v. American Library Assn.*, 539 U.S. 194, 203, 205 (2003) (holding forum analysis incompatible with discretion public libraries require to facilitate learning and cultural enrichment); *Perry*, 460 U.S. at 49 n.9 (noting public forum cases inapposite when access to government property not at issue). "When the University determines the content of the education it provides...we have permitted the government to regulate the content of what is or is not expressed. . . ." *Rosenberger*, 515 U.S. at 833. If the Court

nevertheless deems forum analysis appropriate, the spending limit on student candidates satisfies the relevant standard.

Courts employ a forum analysis “as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes.” *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800 (1985). Speech is not “equally permissible in all places and at all times,” even on government property. *Id.* at 799. “Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum.” *Id.* at 800.

A. ASUM Elections and the ASUM Senate Are Non-Public or Limited Public Fora.

Generally speaking, there are three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum. *DiLoreto*, 196 F.3d at 964. A traditional public forum, like a street or park, is a government property that has been “devoted to assembly and debate” by “long tradition or by government fiat.” *Perry*, 460 U.S. at 45. Traditional public forum status does not extend beyond its historic confines. *Forbes*, 523 U.S. at 678. A designated public forum is a public property that “the state has opened for use by the public as a place for expressive activity.” *Perry*, 460 U.S. at 45. All other public property is

considered a nonpublic forum. *DiLoreto*, 196 F.3d at 965. While regulation of speech in a traditional or designated public forum is subject to strict scrutiny, “the state may reserve [a nonpublic] forum for its intended purposes, *communicative or otherwise*,” as long as the regulation of speech is reasonable and viewpoint-neutral. *Perry*, 460 U.S. at 45-46 (emphasis added).

The Ninth Circuit has recognized a specific type of nonpublic forum called a “nonpublic forum open for a limited purpose.” *DiLoreto*, 196 F.3d at 965, 967. This is equivalent to what the Supreme Court has termed a “limited public forum.”⁵ *Id.* at 965 (*citing Rosenberger*, 515 U.S. at 829). “[R]estrictions that are viewpoint neutral and reasonable in light of the purpose served by the particular forum are permissible.” *Id.* As a result, viewpoint neutral regulations that confine a forum to its limited and legitimate purposes satisfy constitutional scrutiny. *Cogswell*, 347 F.3d at 815 (*citing Rosenberger*, 515 U.S. at 829). A nonpublic or limited public forum is at issue in this case.

⁵ This Court has also described a limited public forum as “a sub-category of a designated public forum that ‘refers to a type of nonpublic forum that the government has intentionally opened to certain groups or to certain topics.’” *Cogswell*, 347 F.3d at 814 (*quoting Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001)). Whether a limited forum is properly a sub-category of a non-public forum or a designated public forum, it is still subject to the nonpublic forum “lenient reasonableness standard”. *Id.*

Flint contends that ASUM elections are a designated public forum. “The relevant forum is defined by the *access* sought by the speaker.” *DiLoreto*, 196 F.3d at 965 (citing *Cornelius*, 473 U.S. at 801); *see also Planned Parenthood of Southern Nevada v. Clark County School District*, 941 F.2d 817, 822 n.4 (9th Cir. 1991) (en banc). “When speakers seek general access to public property, the forum encompasses that property. . . . In cases in which limited access is sought, our cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property.” *Cornelius*, 473 U.S. at 801. Here, the forum at issue is either “ASUM elections,” as Flint contends, or the ASUM Senate itself.⁶

In establishing the type of forum, however, this Court “must examine the terms on which the forum operates,” *Hopper*, 241 F.3d at 1075, including consideration of the “special nature and function” of a university, *DiLoreto*, 196 F.3d at 968 (citing *Cornelius*, 473 U.S. at 801-802). The

⁶ If forum analysis applies, the ASUM Senate is more likely the relevant forum. Flint was not denied access to ASUM elections but rather campaigned with no restrictions – disregarding the ASUM Bylaws – and his name remained on the ballot. On the other hand, Appellant sought access to an ASUM Senate seat, and that access was denied for his repeated disregard of the governing rules. *See, e.g., Cornelius*, 473 U.S. at 801 (relevant forum was Combined Federal Campaign charity drive rather than federal workplace). Regardless, as demonstrated below, both “ASUM elections” and the ASUM Senate qualify as a non-public or limited public forum.

essential question is one of intent and the Court looks both to the policy and the practice of the government. *Id.* at 966 (“School facilities may be deemed to be public forums only if school authorities have by policy or practice opened those facilities for indiscriminate use by the general public.”) (internal citations and quotations omitted). “The government does not create a designated public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.” *See Forbes*, 523 U.S. at 677 (internal citation and quotation omitted); *see also Desyllas*, 351 F.3d at 943. “A designated public forum is not created when the government allows *selective access for individual speakers* rather than general access for a class of speakers.” *Forbes*, 523 U.S. at 679 (emphasis added). “What matters is what the government actually does—specifically, whether it consistently enforces the restrictions on use of the forum that it adopted.” *Hopper*, 241 F.3d at 1075.

In determining the nature of the forum, therefore, courts examine the selectivity of the forum at issue. “In general, the more restrictive the criteria for admission and the more administrative control over access, the less likely a forum will be deemed public.” *Id.* at 1078. The “standards for inclusion and exclusion . . . must be unambiguous and definite.” *Id.* at 1077 (internal citation omitted). Contrary to Flint’s suggestion, the simple fact that the

challenged restriction affects political speech or occurs in the university context is not dispositive of the nature of the forum. *See Forbes*, 523 U.S. at 680 (candidate debate sponsored by state-owned public broadcaster was a nonpublic forum); *Cogswell*, 347 F.3d at 814 (voter pamphlet with candidate profiles was a limited public forum); *Desyllas*, 351 F.3d at 943 (campus locations not approved for handbill-posting are nonpublic fora).

The University Defendants have taken no action to provide general access to student elections or to ASUM Senate office. Access is clearly selective and the standards are unmistakable. Each year, office in the ASUM Senate is open to only 23 students. SER 71, 72. To hold or run for office, a student must be registered for seven or more credits during the fall and spring semesters, thereby paying a student activity fee, and must maintain at least a 2.0 cumulative grade-point average. SER 70, 74, 79. Students must run in an election, following the rules within the ASUM Constitution and Bylaws including the spending limit, and win the election. SER 74, 88-92. Once elected, all ASUM officers must participate in a seminar or retreat and adhere to the requirements in the ASUM Personnel Policy. SER 11, 79, 80. A student candidate who violates any of the governing rules may be censured, denied ASUM campaign funding, barred from candidacy or denied from taking office. SER 91. Moreover, an

ASUM officer may be recalled from office for failure to perform the duties prescribed by the Bylaws. SER 78, 79-80.

There is no question that these rules have been applied consistently, nor does Flint contend otherwise. The spending limits have been in place continuously since 1970. SER 12. Indeed, Appellee Gale Price, who ran on a ticket with Flint in the 2003 election, was also censured for violating the limits. SER 124.

The conclusion that the ASUM elections and the ASUM Senate are either nonpublic or limited public fora is consistent with Supreme Court and Ninth Circuit cases establishing selective access as the hallmark of such fora. For example, in *Cornelius*, the Supreme Court concluded that the Combined Federal Campaign, a charity drive aimed at federal employees, was a nonpublic forum because the government consistently limited participation to “appropriate” voluntary agencies. *Cornelius*, 473 U.S. at 804-805. In *Perry*, the Court concluded that a school’s internal mail system was a nonpublic forum because there was only selective rather than general access to it. *Perry*, 460 U.S. at 47. *See also Hills v. Scottsdale Unified School Dist. No. 48*, 329 F.3d 1044, 1049 (9th Cir. 2003) (concluding literature distribution program was limited public forum because expression open only to specific types of nonprofit organizations), *cert. denied*, 540

U.S. 1149 (2004); *DiLoreto*, 196 F.3d at 966-967 (concluding high school baseball field fence was nonpublic or limited public forum because advertising limited to certain subjects).

For all the above reasons, ASUM elections and the ASUM Senate are non-public or limited public fora.

B. ASUM Spending Limits Meet The Standard For A Non-Public or Limited Public Forum.

As a restriction on a non-public or limited public forum, ASUM spending limits are subject to a lenient reasonableness standard. *See Cogswell*, 347 F.3d at 814. Under this test, UM can restrict access “as long as (1) the restriction does not discriminate according to the viewpoint of the speaker, and (2) the restriction is reasonable.” *Id.*

Flint suggests a different standard is appropriate because the regulated speech is that of a student rather than the university itself, and cites *Downs v. Los Angeles Unified School Dist.*, 228 F.3d 1003 (9th Cir. 2000) as explaining the distinction. The *Downs* distinction, however, is between government speech and school-sponsored student speech. *Id.* at 1011. Indeed, the language of *Downs* supports the above application of the forum analysis: “When an individual speaks, the government’s ability to regulate that speech depends in some situations on the designation of the forum in which the individual chooses to speak.” *Id.* at 1009.

Downs in fact rejected a First Amendment claim by holding that the government speech at issue was not subject even to the rule of viewpoint neutrality. *Id.* at 1016-1017. In *Downs*, a public high school teacher challenged the constitutionality of school officials' refusal to allow him to post materials on a bulletin board that reflected a differing viewpoint to materials on a different bulletin board relating to the school's gay and lesbian awareness month. *Id.* at 1005. In its analysis and decision that the teacher's speech was not entitled to First Amendment protection, the Court compared the government's speech with that of an individual whose speech might bear the "imprimatur" of the school, and would therefore be subject to a requirement of viewpoint neutrality.⁷ *Id.* at 1009-1011. Such speech occurs when an individual student's speech takes place as part of a school program, as Flint's speech occurred as part of his participation in ASUM elections (with the benefit of the school-sponsored *Montana Kaimin* profile and candidate forum).⁸ *See Rosenberger*, 515 U.S. at 834 ("[A] University

⁷ The Court noted a split in the circuits as to whether viewpoint neutrality is even required in non-public forum school-sponsored speech cases. *See Downs*, 228 F.3d at 1010 n.2. While not addressing a school's regulation of personal expression explicitly, the note and the accompanying text suggest that viewpoint neutrality is the standard for regulation of both individual and school-sponsored expression.

⁸ That Flint's speech occurred as part of his participation in a school-sponsored activity distinguishes this case from *Tinker*, 393 U.S. 503, which regarded personal expression unrelated to any school activity on school

may not discriminate based on the viewpoint of private persons whose speech it facilitates.”); *see also e.g. Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988) (holding student newspaper a nonpublic forum subject to reasonableness requirement; greater regulation permitted with respect to school-sponsored activities “to assure that participants learn whatever lessons the activity is designed to teach”).⁹ Accordingly, the *Downs* distinction does not affect the relevant analysis.

premises. In any event, the Court’s decision in *Tinker* was in large part influenced by the lack of viewpoint neutrality of the prohibition on expression at issue. As part of its analysis, the Court stated:

In order for the State . . . to justify prohibition of a particular expression of opinion, it must be able to show its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. . . . [T]he action of the school authorities appears to have been based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation’s part in the conflagration in Vietnam. . . . Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

Tinker, 393 U.S. at 509-511.

⁹ This Circuit has not decided whether *Hazelwood*’s rule that school-sponsored speech may be regulated so long as the regulation is reasonably related to legitimate pedagogical concerns, 484 U.S. at 273, should be incorporated wholesale at the university level. *See Brown v. Li*, 308 F.3d 939 (9th Cir. 2002), *cert denied*, 538 U.S. 908 (2003). *Hazelwood* was a forum analysis case in which the Supreme Court determined that the high school student newspaper was a non-public forum. This case can be decided

1. ASUM spending limits are viewpoint-neutral.

Impermissible viewpoint discrimination “‘targets not subject matter, but particular views taken by speakers on a subject.’” *DiLoreto*, 196 F.3d at 969 (quoting *Rosenberger*, 515 U.S. at 829). It occurs when the rationale for the restriction at issue is the “‘specific motivating ideology or perspective of the speaker.’” *See Desyllas*, 351 F.3d at 943 (quoting *Rosenberger*, 515 U.S. at 829). There is no dispute that the spending limit applies equally to all ASUM Senate candidates and there is no record evidence of any viewpoint discrimination in this regard.

Flint contends that there is viewpoint discrimination because the spending limits do not apply to “noncandidate students, student associations and outside groups.” App’t Br. at 41. However, there is no evidence suggesting that the failure to limit independent spending is the result of a desire to discriminate against a particular viewpoint, or that third parties as a group seek to advance specific viewpoints different from the range of viewpoints advanced by candidates. Flint’s affidavit does not allege any

in the University Defendants’ favor without directly addressing the extension of *Hazelwood* into the university context by simply applying the forum analysis detailed in this section. Of course, the case can also be decided by extending *Hazelwood*’s forum analysis to the university context. *See, e.g., Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (en banc) (applying *Hazelwood* forum analysis to determine that university student newspaper is nonpublic forum).

viewpoint discrimination.¹⁰ ER 79-81. Indeed, the only record evidence on the issue establishes that there was at most one instance of third party spending related to a student campaign, and that such spending therefore is exceedingly rare. SER 152. In any event, distinctions based on status or speaker identity are not considered viewpoint discrimination. *Perry*, 460 U.S. at 49.

2. ASUM spending limits are reasonable.

The reasonableness standard “focuses on whether the limitation is consistent with preserving the property for the purpose to which it is dedicated.” *DiLoreto*, 196 F.3d at 967; *see also United States v. Kokinda*, 497 U.S. 720, 732-733 (1990) (plurality) (upholding prohibition of political solicitation on postal premises, including sidewalk, to prevent disruption of Postal Service’s business); *Greer v. Spock*, 424 U.S. 828, 838 (1976) (upholding exclusion of political speech from military reservation because purpose was to train soldiers, not provide public forum). Restrictions can be

¹⁰ The opinion granting summary judgment makes no mention of Flint’s affidavit. The District Court was correct to ignore the affidavit because its core allegations were not relevant to the court’s analysis and were based only “on information and belief” rather than personal knowledge. *See* Fed. R. Civ. P. 56(e) (requiring summary judgment affidavits to be “made on personal knowledge” and to “set forth such facts as would be admissible in evidence”); *Cermetek, Inc. v. Butler Avpak, Inc.*, 573 F.2d 1370, 1377 (9th Cir. 1978) (holding facts based on “information and belief” not sufficient to create genuine issue of fact”).

based on subject matter so long as they are reasonable in light of the purpose of the forum. *DiLoreto*, 196 F.3d at 967. The regulation “need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation.” *Kokinda*, 497 U.S. at 730 (*quoting Cornelius*, 473 U.S. at 808) (emphasis in original). ASUM spending limits easily meet this reasonableness standard.

The Montana University System seeks “to make sure that every academically qualified individual has an opportunity to receive the benefits of higher education without financial or social barriers.” SER 116. Since its inception, ASUM has fallen entirely under UM’s educational mission. SER 8-11. ASUM spending limits assure that students need not have substantial personal or family resources in order to have access to the educational opportunity afforded by ASUM Senate participation. SER 111-114, 122, 127. Moreover, the learning experience afforded by student government is enhanced for all participants when its membership includes students of diverse backgrounds. SER 113. Finally, the learning experience afforded by student government extends to the election process itself, especially the students’ role in running elections and enforcing applicable rules. SER 12-15, 126. ASUM spending limits therefore are a reasonable mechanism to maintain the educational character of the ASUM Senate.

Flint asserts the student spending limit is unreasonable because he contends that the purpose of ASUM elections is political expression. As has been amply demonstrated, the purpose of ASUM elections and the ASUM Senate is educational. Even in the context of election to public office, however, restriction on political speech to serve the purpose of a limited public forum is permissible. *See Cogswell*, 347 F.3d at 817.

Flint also contends that the student spending limit is unreasonable because spending by noncandidate groups is unlimited. As mentioned above, such spending is rare. SER 152. Even in the context of elections for public office, a “statute is not invalid under the Constitution because it might have gone farther than it did.” *Buckley*, 424 U.S. at 105 (*quoting Katzenbach v. Morgan*, 384 U.S. 641 (1966))(internal citations omitted); *see also McConnell v. Federal Election Comm’n*, 540 U.S. 93, 207-208 (2003) (“[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.”) (*quoting Buckley*, 424 U.S. at 105).

Notwithstanding the ASUM resources available to student campaigns, SER 88-89, 127-128, 129, Flint further complains that the ASUM spending limit amount is unreasonable. Even when heightened scrutiny is applicable to the campaign finance of candidates for public office, courts will not use a

scalpel to review the specific monetary amount of a restriction. *See Shrink Missouri PAC*, 528 U.S. at 395-397.

Finally, in the affidavit submitted with his 12(b)(6) opposition brief below, Flint contended that the spending limit was unreasonable because, he asserted, it renders ASUM less diverse by inhibiting “minority” voices from responding to third party spending. ER 80. This argument is illogical. Students who lack sufficient funds to respond to unlimited funding by an opponent in an ASUM campaign also lack sufficient funds to respond to unlimited spending by third parties. Spending limits help foster access to educational opportunity by assuring that student candidates of diverse economic backgrounds can run for ASUM office. SER 112-113. The distinction between third parties and student candidates therefore is reasonable because it is consistent with the educational purpose of the relevant forum. *See, e.g., Perry*, 460 U.S. at 50 (holding exclusion of one union, but not another which was exclusive bargaining representative, from use of interschool mail system reasonable because consistent with purpose of property).

III. EVEN IF STRICT SCRUTINY WERE APPLICABLE TO STUDENT GOVERNMENT SPENDING LIMITS, ASUM LIMITS SATISFY THE FIRST AMENDMENT.

Even if, contrary to the authorities cited above, ASUM is considered a designated public forum or if *Buckley*'s exacting scrutiny standard were applicable to student elections, ASUM student campaign spending limits meet the standard and do not violate the First Amendment. As the Supreme Court has cautioned: "[W]e wish to dispel the notion that strict scrutiny is strict in theory, but fatal in fact." *Adarand*, 515 U.S. at 237 (internal citation omitted). In recent years, the Court has upheld a number of electoral regulations against First Amendment challenge even while applying strict scrutiny. See *Burson v. Freeman*, 504 U.S. 191 (1992) (applying strict scrutiny to state ban on electioneering activity near polling places, but upholding ban) (plurality); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (applying strict scrutiny to Michigan statute restricting independent expenditures by corporations in political campaigns, but upholding restriction). Similarly, even if *Buckley* or the forum analysis requires exacting scrutiny of student spending limits, that would not mean that the limits are automatically unconstitutional.

Buckley, for example, carefully listed three specific governmental interests that had been offered to justify limits on congressional campaign spending limits: (1) deterring corruption and preventing evasion of the contribution limits; (2) equalizing the financial resources of candidates for

public office; and (3) restraining the cost of election campaigns for its own sake, 424 U.S. at 55-56. While rejecting these interests as a basis for the congressional spending limits at issue there, the Court did not hold that there could never be a new and compelling governmental interest to justify campaign spending limits. Rather, the Court stated: “No governmental interest *that has been suggested* is sufficient to justify [the congressional spending limits].” *Id.* at 55 (emphasis added). This clearly leaves the door open for courts to consider different compelling interests supporting spending limits.

Indeed, the Second Circuit Court of Appeals in the case *Landell v. Sorrell*, 382 F.3d 91 (2004), *petitions for cert. filed*, 73 U.S.L.W. 3686 (May 12, 2005) (No. 04-1530) and 73 U.S.L.W. 3751 (Jun 14, 2005)(No. 04-1697), recently affirmed this view. According to the Second Circuit:

[T]he *Buckley* Court did not conclude that the Constitution would always prohibit expenditure limits, regardless of the reasons asserted and the record supporting the limitations. It simply held that, based on the record before it, “[n]o governmental interest that has been suggested is sufficient to justify” the federal expenditure limits. Accordingly, after *Buckley*, there remains the possibility that a legislature could identify a sufficiently strong interest, and develop a supporting record, such that some expenditure limits could survive constitutional review.

Id. at 107-108 (*quoting Buckley*, 424 U.S. at 55). *But see Homans v. City of Albuquerque*, 366 F.3d 900, 914 (10th Cir.) (holding *Buckley* precludes

campaign spending limits regardless of facts and legal interests supporting them), *cert. denied*, 125 S.Ct. 625 (2004); *Kruse v. City of Cincinnati*, 142 F.3d 907, 918-19 (6th Cir.) (same), *cert. denied*, 525 U.S. 1001 (1998).¹¹

The Second Circuit then found that Vermont had established at least two compelling state interests in support of its mandatory spending limits on

¹¹ After a lengthy string cite, Flint characterizes the *Landell* decision as an anomaly with respect to spending limits. App't Br. at 12-14. In the two Circuits that have rejected candidate spending limits as a matter of law, the panels were divided. See *Kruse v. City of Cincinnati*, 142 F.3d at 920 (Cohn, J., concurring) (expressly disagreeing with panel majority's holding that *Buckley* categorically invalidates campaign expenditure limits); *Homans v. City of Albuquerque*, 366 F.3d at 908 (Lucero, J., concurring) ("*Buckley* does not preclude the use of expenditure limits to further a state's anti-corruption interest in all circumstances."). In another case, this Court applied the strict scrutiny standard but invalidated the regulation, which operated like a candidate spending limit, because it failed the "narrow tailoring" prong. *Service Employees International Union v. Fair Political Practices Comm'n*, 955 F.2d 1312, 1322 (9th Cir. 1992). Other cases cited by Flint did not address candidate spending limits and are therefore inapplicable. *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985), *Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 614 (1996), *Lincoln Club of Orange County v. City of Irvine, CA*, 292 F.3d 934 (9th Cir. 2002), and *New Hampshire Right to Life Political Action Committee v. Gardner*, 99 F.3d 8 (1st Cir. 1996), for example, address only the constitutionality of limits on independent expenditures by political action committees and political parties, not limits on expenditures by candidates' campaigns. In addition, *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), and *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), did not involve spending limits, but instead total bans on all campaign spending by certain types of entities. Notably, *Austin v. Michigan Chamber of Commerce* upheld a total ban on independent expenditures by business corporations. 494 U.S. 652.

candidates for state office: “preventing the reality and appearance of corruption, and protecting the time of candidates and elected officials.” *Landell*, 382 F.3d at 124. Notwithstanding *Buckley*’s rejection of the anti-corruption interest, the Second Circuit determined that the factual record before it was sufficiently different from that in *Buckley* such that the interest might support spending limits. *Id.* at 119. Additionally, the Court determined that the time-protection rationale – which it also characterized as “protecting the quality of democratic representation” – had not been considered by the *Buckley* court in support of spending limits. *Id.* at 120-121, 124 n.18. The Court determined that these interests were sufficiently compelling to support spending limits. *Id.* at 124-125.

Similarly, *Buckley* did not address whether a university’s interests in structuring its educational program to provide equal access to students of limited means, in providing multiple experiences to its students, or in the educational benefits of diversity, form a compelling basis for spending limits in student government elections. While *Buckley* did not accept equalization of financial resources as a compelling reason for spending limits on candidates for public office, the *Buckley* Court did not consider whether the interest in equal educational opportunity could support student spending limits. Accordingly, nothing in *Buckley* prevents this Court from finding

those interests sufficiently compelling to survive strict scrutiny. Because the same facts discussed above in Part I demonstrate that these interests are not merely permissible, but compelling, this section will not repeat those facts. Instead, the University Defendants briefly highlight here the relevant educational benefits, and explain why the limits are narrowly tailored.

A. The University Has a Compelling Interest in Preserving Educational Opportunity for All Students.

Fifty years ago, the Supreme Court stated: “Education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. . . . Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.” *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). The Montana University System’s Strategic Plan seeks to implement these principles by “mak[ing] sure that every academically qualified individual has an opportunity to receive the benefits of higher education *without financial or social barriers*.” SER 116 (emphasis added). The student spending limits are part of that endeavor.

Removing the spending limits and requiring less affluent students to become active fundraisers is in tension with this aspect of the University’s Strategic Plan. In such a situation, less affluent students face financial barriers to the benefits of higher education because they either must forego

the opportunity to run for student government or must neglect academic and other responsibilities. *See, e.g.*, SER 127. Just as *Landell* recognized that the protection of candidates' and officeholders' time is compelling, *Landell*, 382 F.3d at 124, so too is the protection of students' time so that they may focus on their responsibilities. *See, e.g.*, *Southworth*, 529 U.S. at 231 ("Students enroll in public universities to seek fulfillment of their personal aspirations and of their own potential."). Flint's contention that the University Defendants should require less affluent students to raise funds from other students rather than limit student spending simply does not address that educational interest. The University Defendants are entitled to establish rules that allow students both to focus on academic studies and to participate in extracurricular activities. *See Widmar*, 454 U.S. at 276 (determining state universities have right to determine "who may teach, what may be taught, how it shall be taught, and who may be admitted to study" as well as right to "make academic judgments as to how best to allocate scarce resources.") (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring)); *cf. Landell*, 382 F.3d at 128 (rejecting notion that state cannot address two interests at once).

Additionally, the University Defendants' interest in diversity, a subset of its more generalized interest in educational opportunity, is sufficiently

compelling on its own to support the student spending limits. In *Grutter v. Bollinger*, 539 U.S. 306, in which the Supreme Court upheld against a Fourteenth Amendment challenge the use of racial classifications as part of the affirmative action policy used in a law school's admissions process, the Court described the educational benefits of diversity:

[C]lassroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds. . . . [S]tudent body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals. . . . These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.

Id. at 330 (internal citations omitted). Thus, the Court concluded that “attaining a diverse student body is at the heart of the Law School's proper institutional mission.” *Id.* at 329. This Court has likewise favorably endorsed the compelling state interest of diversity in public higher education. *Smith v. University of Washington*, 392 F.3d 367, 369 (9th Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3650 (Apr 18, 2005) (No. 04-14).

Diversity is especially important in an educational activity like the ASUM, which provides leadership training and experience with governance. SER 112. *Grutter* explained that “nowhere is the importance of such openness more acute than in the context of higher education” because

universities “represent the training ground for a large number of our Nation's leaders.” 539 U.S. at 332. Although *Grutter* involved racial diversity, the logic of its observations about the educational benefits of diversity applies equally to students of diverse economic backgrounds.

Importantly, a spending limit promotes racial and ethnic diversity as well as economic diversity in ASUM. SER 112-113. For example, Native American students at UM come disproportionately from lower-income families, and would therefore face greater barriers in winning a student government seat if spending were unlimited. *Id.*

In *Grutter*, the Supreme Court found diversity in education sufficiently compelling to permit state university use of a racial classification otherwise impermissible under the Fourteenth Amendment. The interest in educational diversity therefore surely is also compelling enough to satisfy First Amendment exacting scrutiny of a student government spending limit.

B. ASUM Spending Limits Are Narrowly Tailored.

The University Defendants have demonstrated above that a test of reasonableness, not narrow tailoring, governs the constitutionality of ASUM spending limits. Nonetheless, ASUM spending limits are narrowly tailored to achieve economic diversity among students running for ASUM office and

participating in ASUM governance. Along with university funding (available only because of the spending limits), the spending limits allow students with few financial resources the opportunity to run for student office and have a credible chance of success in ASUM elections. SER 89, 111-114, 122, 127. Elections without spending limits would provide an enormous advantage to students with significant financial resources. SER 126-128. Indeed, it is hard to conceive of a system without spending limits that could actually achieve economic diversity among ASUM officers and Senators.

Making the limits voluntary in conjunction with partial university funding, for example, is not a workable solution. If the limits are not mandatory, the students who do not need financial assistance for their campaigns maintain their huge advantage. A student who “voluntarily” accepts a spending limit of \$100 in order to get ASUM campaign funds for the student’s campaign will be far out-spent by students with no need of the ASUM funding. ASUM lacks sufficient funds to provide unlimited matching funds to students. SER 127. Moreover, requiring poor students to raise funds to compete with wealthy students is unworkable for the reasons set forth above in Part III.A, *supra* at 45-46. Again, without mandatory limits, students with few financial resources will have less access to the

learning experience provided by student government participation and all students will lose the educational benefit of a diverse ASUM.

Limits on contributions are also insufficient to promote economic or racial diversity because contribution limits are unrelated to providing the means for less wealthy students to run for office.¹² Wealthier students do not need contributions to run for office.

Finally, the spending limits do not prevent students from learning about the ASUM candidates and their positions. Within the three-week campaign period, there are two debates sponsored by ASUM at the University Center, a forum for Senate candidates, a forum for executive candidates, and publication in the student newspaper of free profiles of all students running for office. SER 88-89, 129. Candidates can talk to students at the Oval or contact people by email, which cost very little. SER 129. Candidates can ask their supporters to talk to their friends on the candidates' behalf. *Id.* Candidates can attend meetings of the many student groups on campus to explain positions, again with little or no spending. *Id.*

¹² Moreover, there is no enforcement agency such as the FEC that audits reports of contributions to students, and no realistic way to trace the source of an individual student's funds. By contrast, if a student violates the spending limit, it is generally very obvious because the expenditures will be visible in terms of signs, T-shirts, posters, or other campaign materials distributed on campus. SER 128.

In sum, even if the highest level of First Amendment scrutiny applied to ASUM spending limits, the limits are narrowly tailored to further compelling interests and thus survive exacting scrutiny.

IV. ALTERNATIVE GROUNDS, INCLUDING MOOTNESS, LACK OF STATE ACTION, AND ELEVENTH AMENDMENT IMMUNITY, ALSO SUPPORT JUDGMENT IN FAVOR OF THE UNIVERSITY DEFENDANTS.

Several additional grounds support the District Court’s judgment in favor of the University Defendants, including mootness, lack of state action as to the individual student defendants, and Eleventh Amendment immunity as to any claim for retroactive relief. The University Defendants presented these last two arguments in the lower Court, which chose to dismiss the case on other grounds. Defendants’ Motion to Dismiss Plaintiff’s Amended Complaint Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), at 2 (docket # 66). All three arguments are now addressed below.

A. Flint’s Graduation Moots This Case.

As correctly noted in Flint’s Brief, “At the time the complaint was filed, Plaintiff Aaron Flint was an enrolled undergraduate student in his fourth year and final year at UMT.” App’t Br. at 5. What Flint has failed to explain to this Court, however, is that he graduated from UM in December

2004 and is no longer a UM student.¹³ Well-established federal jurisprudence requires dismissal on mootness grounds of student declaratory or injunctive relief claims against educational institution policies or procedures when a student has in fact graduated. *DeFunis*, 416 U.S. at 319; *Mellen v. Bunting*, 327 F.3d 355, 363-65 (4th Cir. 2003), *cert. denied*, 541 U.S. 1019 (2004); *Cole v. Oroville Union High School Dist.*, 228 F.3d 1092, 1097-98 (9th Cir. 2000); *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 798-99 (9th Cir. 1999) (*en banc*). As stated in Appellant’s Brief, Flint seeks only “declaratory and injunctive relief against the ASUM campaign expenditure restrictions.” App’t Br. at 3. He has filed no damages claim, and therefore his entire case requires dismissal. *Cole*, 228 F.3d at 1099.

This Court has more than passing familiarity with mootness dismissals of public university student election claims. *Students For a Conservative America v. Greenwood*, 378 F.3d 1129, *as amended in* 391 F.3d 978 (9th Cir. 2004). As the Court has aptly noted in *Greenwood*: “We have an independent duty to consider *sua sponte* whether a case is moot.”

¹³ While this occurred after briefing had been completed in the district court and is not affirmatively reflected in the record, the Court can take judicial notice of Flint’s graduation as it is a matter not reasonably subject to dispute. Fed. R. Evid. 201(b). The timing of Flint’s graduation also explains why the University Defendants did not raise the mootness argument during the briefing on the motion to dismiss below.

391 F.3d at 979 (other citations omitted). Here, Flint had ample time to challenge ASUM spending limits before violating them and yet he chose not to do so, thus inflicting his injury on himself. *DeFunis*, 416 U.S. at 319. Based on these circumstances and because Flint has no viable basis for claiming a mootness exception, mootness dismissal is readily warranted.

B. The Named Student Appellees Are Not State Actors.

The University Defendants call this Court's attention to *Husain v. Springer*, 193 F. Supp. 2d 664 (E.D.N.Y. 2002), a case involving student government challenges to public campus election rules and decisions. As in the instant case, the *Husain* plaintiffs sued campus administrators plus a number of individually named elected student government officers involved in making the challenged election decision. The court properly dismissed all named student defendants by finding they were not state actors required as a condition for plaintiffs' federal First Amendment claims. The *Husain* court confronted facts somewhat similar to those in the present case, in that *Husain* plaintiffs alleged significant student government officials' acts intended to impair student election results. The *Husain* court, relying on *Leeds v. Meltz*, 85 F.3d at 54, correctly rejected the extensive public campus regulation and public funding of the students as bases for finding the named student defendants state actors.

Leeds provides useful guidance here, because the Second Circuit affirmed a Rule 12(b)(6) dismissal of a First Amendment § 1983 civil rights claim against public university law school student publication editors by finding that the editors were not state actors. *Id.* at 55. This is consistent with other federal decisions ruling that public education students do not become state actors for federal jurisdiction and liability purposes even when the students engage in institutionally sponsored or condoned activity. *Mentavlos v. Anderson*, 249 F.3d 301, 319 (4th Cir. 2001); *Yeo v. Town of Lexington*, 131 F.3d 241, 253 (1st Cir. 1997) (declining to treat high school student government officials as state actors for First Amendment civil rights claim purposes). No named student Appellee here has state actor status; and all federal claims against these students must therefore be dismissed.

C. The Eleventh Amendment Bars Any Retroactive Relief Regarding The ASUM Election To The Extent Appellant Seeks Any Such Relief.

Although the relief sought by Flint in this case is far from clear, it is well-established that the Eleventh Amendment to the U.S. Constitution effectively bars retroactive relief regarding the ASUM election at issue. As noted above, Appellee ASUM is an essential part of UM and the Montana University System, while Appellee George Dennison is the UM President. UM and the Montana University System enjoy full Eleventh Amendment

protection from most forms of suit and remedial relief in federal court as an agency and instrumentality of the State of Montana. *State of Montana v. Peretti*, 661 F.2d 756 (9th Cir. 1981); Mont. Const. Art. X, §§ 9, 10; Mont. Code Ann. §§ 2-15-104(1)(d); 2-15-1505; 20-25-201(1); 20-25-451. This is consistent with the rule of law generally applicable to public university systems created by state constitutions. *Regents of Univ. of California v. Doe*, 519 U.S. 425 (1997); *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982).

Although the University Defendants recognize Flint's right to sue state officials for prospective injunctive relief, *Doe v. Lawrence Livermore Nat'l Laboratory*, 131 F.3d 836, 839 (9th Cir. 1997), a request to set aside a past election would not be covered by this exception, as such relief would be retroactive rather than prospective. Thus, to the extent Flint seeks any retroactive relief such as overturning a past election, or any other form of retroactive relief, his suit is barred by the Eleventh Amendment.

CONCLUSION

For all the reasons above, this Court should affirm the judgment of the District Court.

Circuit Rule 28-2.6 Statement

The University Defendants are unaware of any related cases pending in this Court.

Respectfully submitted,

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Revised FORM 8

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PURSUANT TO CIRCUIT RULE 32-1**

Case No. 05-35441

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_____/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that, on September 19, 2005, I have caused to be served two copies of Appellees' Brief and one copy of Appellees' Supplemental Excerpts of Record via Federal Express, overnight delivery, on the following counsel for Plaintiff-Appellant:

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The original brief, 15 copies of the brief, and five copies of Appellees' Supplemental Excerpts of Record were dispatched on September 19, 2005, to the Clerk of Court by delivering the same to a commercial courier (Federal Express) for overnight delivery.

_____/s/_____
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