

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

YOUNG AMERICANS FOR LIBERTY AT  
KELLOGG COMMUNITY COLLEGE,  
MICHELLE GREGOIRE, and BRANDON  
WITHERS,

Plaintiffs,

Case No. 1:17-cv-58-RJJ-RSK

v.

Hon. Robert J. Jonker

KELLOGG COMMUNITY COLLEGE; The  
Trustees of Kellogg Community College –  
STEVE CLAYWELL, JILL BOOTH,  
MATTHEW A. DAVIS, REBA M.  
HARRINGTON, JONATHAN D. BYRD,  
JULIE CAMP SEIFKE, PATRICK A.  
O'DONNELL – all individual and all in their  
official capacities as members of the Board of  
Trustees of Kellogg Community College; MARK  
O'CONNELL, President of Kellogg Community  
College, in his official and individual capacities;  
KAY KECK, Vice President for Student and  
Community Services of Kellogg Community  
College, in her official and individual capacities;  
TERAH ZAREMBA, Dean of Student Services  
of Kellogg Community College, in her official  
and individual capacities; DREW HUTCHINSON,  
Manager of Student Life of Kellogg Community  
College, in his official and individual capacities;  
and HAROLD WEST, Chief of Public Safety  
and Director, Student Relations, in his official  
and individual capacities,

Defendants.

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**DEFENDANTS' BRIEF IN RESPONSE TO  
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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## INTRODUCTION

Despite the constitutional jargon contained in the Complaint filed by the individual Plaintiffs as members of Young Americans for Liberty at Kellogg Community College, this case is not about free speech. This case is not about an overbroad or vague solicitation policy unreasonably enforced on a public college campus. This case is not about viewpoint discrimination. Quite simply, this case is about whether Plaintiffs can ignore Defendant Kellogg Community College's ("KCC" or "Defendants") facially valid solicitation policy to further the national Young Americans for Liberty's "Fight For Free Speech" campaign, which seeks to "challenge and reform the restrictive speech codes on [college] campuses." As shown below, the answer is a resounding no.

Here, KCC maintains a Solicitation Policy that asks only that those who wish to solicit on campus comply with its request process, and that if an unaffiliated group wishes to solicit on campus it must seek sponsorship from a KCC entity first. KCC's policy plainly states, "***Student Life will not take the content of the speech into consideration when approving, modifying or denying an application.***" In fact, the Plaintiffs do not claim, nor could they, that KCC applies its policies in a discriminatory manner. The overwhelming majority of courts that have considered solicitation policies similar to KCC's have rejected claims arising under similar situations. These courts, as this Court should similarly find in this case, recognize that public college campuses are limited public fora which may be regulated with reasonable time, place, and manner restrictions provided that the policy does not discriminate based on the viewpoint of the speaker.

In this case, Plaintiffs seek the extraordinary remedy of a preliminary injunction despite their admission that the KCC solicitation policy states explicitly that it is applied without

consideration of the content of the speech or viewpoint of the organization applying for a permit. Plaintiffs also ask this Court to ignore the fact that KCC attempted several times to persuade Plaintiffs to simply apply for a permit pursuant to KCC's policies. Instead, Plaintiffs chose their misguided principles over complying with the lawful and constitutionally compliant policies of KCC. In such circumstances, this Court, like many before it, must find that Plaintiffs are not likely to succeed on the merits of their claims, that the risk of public harm outweighs the avoidable injury to Plaintiffs, and Plaintiffs injuries, if any, are not irreparable.<sup>1</sup>

## **STATEMENT OF FACTS**

### **A. Background**

Young Americans for Liberty ("YAL") is a politically motivated organization that describes itself as the "largest, most active, and fastest-growing pro-liberty organization on America's college campuses," claiming more than 900 chapters and 308,927 youth activists nationwide.<sup>2</sup> YAL describes that its mission "is to identify, educate, train, and mobilize youth activists committed to 'winning on principle.'"<sup>3</sup> YAL sponsors many events encouraging members to become active on their respective campuses and increase membership. One such event, titled the "Fight For Free Speech" campaign, seeks to "challenge and reform the restrictive speech codes on your campus."<sup>4</sup> Among the activism project's "four most important goals" is to

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<sup>1</sup> During the Rule 16 Scheduling Conference held on April 21, 2017, this Court discouraged Defendants from filing a Motion to Dismiss due to potential factual questions at issue. Because Plaintiffs' Motion asks the Court to determine whether Plaintiffs are likely to succeed on the merits, Defendants may seek dispositive relief based on the ruling if appropriate.

<sup>2</sup> *About Young Americans For Liberty*, Young Americans for Liberty, <http://www.yaliberty.org/about> (last visited June 16, 2017).

<sup>3</sup> *Mission*, Young Americans for Liberty, <http://www.yaliberty.org/about/mission> (last visited June 16, 2017).

<sup>4</sup> *Fight For Free Speech Activism*, Young Americans for Liberty, <http://www.yaliberty.org/activism/freespeech> (last visited June 16, 2017).

“[e]arn media attention for your event to expand its outreach.”<sup>5</sup> The campaign also encourages members engaging in this “activism” effort to have video footage of any encounter with administration during the campaign in order to “gain legal standing,” further stating, “If a college or university is continually put into a bad light by the media for representing student’s rights on campus, the administration will be more likely to change the problematic speech codes before they start to lose donors.”<sup>6</sup>

Currently, Plaintiff YAL at KCC is not a registered student organization at KCC (Plaintiffs’ Complaint, Dkt. 1, ¶14). While Plaintiffs allege that at the time of the events at issue YAL at KCC “was in the process of becoming an officially registered student organization at KCC” (*Id.*), neither Plaintiff Gregoire nor anybody else purporting to represent YAL has asked to register YAL at KCC as a student organization or been denied the ability to register (Affidavit of Drew Hutchinson, attached as Exhibit 1, ¶3).<sup>7</sup>

Plaintiff Withers was a KCC student in the fall of 2016 but did not register for the following term (Affidavit of Colleen Wright, attached as Exhibit 2, ¶3). Plaintiff Gregoire was not a KCC student in the fall of 2016 (*Id.*, ¶4).

## **B. KCC’s Policies**

### **1. Solicitation Policy**

KCC’s Solicitation Policy (“Policy”) is contained within its 2016-2017 Student Handbook (Dkt. 1-3, PgID 125-127). The Policy begins,

Soliciting activities on campus are permitted only when the activities support the mission of Kellogg Community College

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> The process for becoming a Registered Student Organization at KCC is set forth in the Student Handbook (Dkt. 1-3, PgID 81). The complete Handbook is attached as Exhibit 3 to Plaintiffs’ Complaint (Dkt 1-3, PgID 48-143).

(KCC) or the mission of a recognized college entity or activity. Non-College organizations may conduct solicitation activities on campus only when lawfully sponsored by a recognized College entity.<sup>8</sup>

(Dkt. 1-3, PgID 125). KCC's "mission" is clearly displayed on its website, which states: "We are dedicated to providing accessible, high-quality education to enrich our community and the lives of individual learners."<sup>9</sup> The stated purpose of the Policy "is to ensure an atmosphere conducive to learning, the reasonable conduct of public business, unobstructed access to the College for its students, faculty, employees, occupants and the public, and maintenance of the College grounds" (Dkt 1-3, PgID 125, §1(a)).<sup>10</sup> "Solicitation" governed by the Policy is defined as "activities or events, normally in short duration, as the carrying or displaying of signs or placards, leafleting, campaigning, marches, rallies, parades, demonstrations, protests, assemblies, speeches, circulation of petitions, and/or any public demonstration on the grounds" (*Id.*, PgID 126, §1(c)).

All requests to solicit must be made in writing to the Student Life office "on a form supplied by KCC" (*Id.*, §2(a)). Student Life has "the authority to approve, modify or deny an application for solicitation in order to assure the reasonable conduct of public business, the educational process, unobstructed access to the College for its students, faculty, employees, occupants and the public, and to maintain the College grounds (*Id.*, §2(b)). The Policy plainly states, "***Student Life will not take the content of the speech into consideration when approving,***

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<sup>8</sup> "Recognized College organizations" include College departments and groups that are officially recognized by the College as determined by Student Life" (Dkt. 1-3, PgID 126, ¶1(d)).

<sup>9</sup> *About KCC*, Kellogg Community College, <http://www.kellogg.edu/about/> (last visited June 16, 2017).

<sup>10</sup> The Policy defines the "grounds of the College" as "all lands and buildings of all campuses of Kellogg Community College and include the exterior walls and surfaces of the buildings, entrances, porches, outside staircases, sidewalks, parking lots and all fixtures" (*Id.*, §1(b)).



*modifying or denying an application*” (*Id.*, §2(c), emphasis added). All decisions by Student Life must be made promptly (*Id.*, §2(d)).

The Policy sets forth several “governing conditions” which serve as time, place and manner restrictions. For example, approved solicitation on the College grounds is permitted only between the hours of 8:00 a.m. and 8:00 p.m. “and shall at no time block any entrance or exit of the buildings, or impede free access to the buildings or parking lots by its students, faculty, employees, occupants or the public” (*Id.*, PgID 126-127, §3(d)). Solicitation must also not “impede or interfere with College business, the educational process, or public access to and use of the College grounds” (*Id.*, PgID 127, §3(e)). KCC “reserves the right to stop any solicitation when it interferes with or disrupts the normal activities of the College; interferes with the educational process; or violates any of the conditions covering solicitation under this policy” (*Id.*). “Persons engaged in solicitation must comply with all College policies, and local, state and federal ordinances and statutes” (*Id.*, §3(j)). The Policy also has content-neutral restrictions regarding the size and location of signs and banners ((*Id.*, §§3(f)-(h)).

Where an information table is requested, any table “must be set up in a place which does not interfere with normal business or impede resident traffic in any way” (*Id.*, PgID 126, §3(b)), and those doing the soliciting cannot “[r]equire individuals to stop at their table or physically stop them,” “[l]eave their table and approach individuals,” “[c]all out or otherwise harass individuals as they pass the table,” or “[i]mpede foot traffic through the area or create any safety hazard or blocked exit” (*Id.*, §3(c)).<sup>11</sup>

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<sup>11</sup> Solicitors also cannot require individuals to give their address or telephone number in order to receive information or qualify for some benefit, such as a raffle or drawing, and cannot advertise or promote alcohol or other drugs (*Id.*).

Anyone who disagrees with the decision made by Student Life may appeal to the Dean of Student Services (*Id.*, §2(e)).

## **2. Code of Conduct for Students**

The Code of Conduct for Students (“Code”) is also contained within the Handbook (Dkt. 1-3, PgID 102-109). “Selling or soliciting goods or services on campus without written permission from the Student Life Office, or not adhering to the Solicitation Policy after receiving approval for solicitation on campus” is a violation of the Code of Conduct (*Id.*, PgID 105). In addition, “Students and student organizations are expected to comply with and respond appropriately to the reasonable and lawful requests of College officials in the performance of their duties. A failure to properly comply with a verbal warning or sanction may also be considered failure to comply with an official request” (*Id.*, PgID 104).

The Code states that “Students or student organizations involved in violations of any federal, state, or local laws may be subject to disciplinary action. Disciplinary action imposed by the College may precede and/or be in addition to any penalty imposed by an off-campus authority” (*Id.*, PgID 103). In addition, the Code notes, “Unauthorized entry into, presence in, or use of College facilities, equipment or property which has not been reserved or accessed through appropriate College officials is prohibited” (*Id.*, PgID 105). The Code also sets forth sanctions for violation (*Id.*, PgID 105-106).

## **C. Plaintiffs Actions**

Plaintiffs are not alleging that they were ever denied any request to solicit pursuant to the Solicitation Policy. Rather, Plaintiffs are claiming that when Plaintiff Gregoire followed the Policy and was given permission to solicit, she was not able to get as many students to sign up for YAL at KCC as she wanted (Dkt 1, PgID 21, ¶144). Plaintiffs do not allege that this was

because Ms. Gregoire was banished to the hinterlands of the grounds. To the contrary, Ms. Gregoire was given a table in the Student Center (*Id.*, PgID 20, ¶137), arguably the most populated and heavily trafficked spot on KCC's property. Plaintiffs do not allege that the assignment to the Student Center was content-driven in any way. Plaintiffs argue that Ms. Gregoire was unsuccessful in her recruitment efforts because she was not allowed to approach students or call out to them (*Id.*, PgID 21, ¶140), a content-neutral part of Solicitation Policy (Dkt. 1-3, PgID 126, §3(c)).

On September 20, 2016, unhappy with the results of following the admittedly content-neutral policy, with no threat that a request to solicit would be denied given that one had previously been granted, Plaintiffs affirmatively chose to violate the Policy. They chose not to register with Student Life, and they chose not to conduct their Solicitation in a location approved by KCC. Instead, they attempted to speak with students walking past on a sidewalk (Dkt. 1, PgID 21-22, ¶¶149-150).

After KCC received a report regarding Plaintiffs' behavior (Exhibit 2, ¶4), Plaintiffs were informed by at least two employees that they were in violation of the Policy but could continue soliciting in the Student Center if they filled out the appropriate paperwork with Student Life (Dkt. 1, PgID 22-23, ¶¶157-174). Plaintiffs acknowledged that they knew they did not have permission to solicit, but stated that they were going to continue soliciting where they were, on the sidewalk, without registering with Student Life, because they had a First Amendment right to do so (*Id.*, PgID 24, ¶175). Public safety then approached Plaintiffs at least three times, advised them that they were in violation of the Policy, and asked them to fill out the Student Life form and move to an area approved by Student Life or stop soliciting (Affidavit of Harold West, attached as Exhibit 3, ¶7). On each occasion, Plaintiffs acknowledged that they were aware of

the Policy, that they were aware that they were acting in violation of it, but that they intended to continue their activities because they had a First Amendment right to do so (Dkt. 1, PgID25, ¶¶178-184). Plaintiffs were told that they would be arrested if they did not stop soliciting or comply with the Policy (*Id.*, ¶¶182-184). All but Plaintiff Withers, the only active KCC student, chose to continue their actions in violation of the Policy and were arrested (*Id.*, PgID 26, ¶¶187-189).

### **ARGUMENT**

A preliminary injunction is extraordinary relief “designed to protect the status quo pending final resolution of a lawsuit.” *Michigan State A. Philip Randolph Institute v. Johnson*, 209 F. Supp. 3d 935, 942 (E.D. Mich. 2016). As the Sixth Circuit has explained, “There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction; it is the strong arm of equity, that never ought to be extended unless to cases of great injury....” *Detroit Newspaper Publishers Ass’n v. Detroit Typographical Union No. 18, Int’l Typographical Union*, 471 F.2d 872, 876 (6th Cir. 1972).

The Court must balance and consider four factors before it may issue a preliminary injunction: (1) the likelihood of Plaintiffs’ success on the merits; (2) whether Plaintiffs will suffer irreparable injury without the injunction; (3) the harm to others which will occur if the injunction is granted; and (4) whether the injunction serves the public interest. *Johnson*, 209 F. Supp. 3d at 942.

Plaintiffs have the burden of proof on each factor. “None of these factors, standing alone, is a prerequisite to relief; rather, the court should balance them.” *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 653 (6th Cir. 1996). In the Sixth Circuit, however, “the demonstration of some

irreparable injury is a *sine qua non* for issuance of an injunction,” *Patio Enclosures, Inc. v. Herbst*, 39 Fed. Appx. 964, 967 (6th Cir. 2002), and “a finding that there is simply no likelihood of success on the merits is usually fatal.” *Gonzales v. Nat’l Board of Medical Exam’rs*, 225 F.3d 620, 625 (6th Cir. 2000).

**I. PLAINTIFFS ARE NOT LIKELY TO PREVAIL ON THE MERITS.**

**A. Plaintiffs Cannot Prevail On Their First Amendment Claim.**

“State colleges and universities are not enclaves immune from the sweep of the First Amendment. However, the First Amendment does not guarantee access to property simply because it is owned or controlled by the government.” *Bowman v. White*, 444 F.3d 967, 974 (8th Cir. 2006). “The standards by which limitations on speech must be evaluated ‘differ depending on the character of the property at issue.’” *Frisby v. Schultz*, 487 U.S. 474, 479, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988), quoting *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). The three types of fora are: (1) the traditional public forum; (2) the public forum created by government designation; and (3) the nonpublic forum. *Frisby* at 479-480.

“The government does not create a designated public forum by inaction or by permitted limited discourse, but only by intentionally opening a nontraditional public forum for public discourse.” *Arkansas Educational Television Comm’n v. Forbes*, 523 U.S. 666, 677, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998) (internal quotation omitted). KCC’s campus is a limited public forum. *See Gilles v. Garland*, 281 F. App’x 501, 511 (6th Cir. 2008) (“Plaintiff has failed to persuade us to depart from the great weight of authority, which has rejected the notion that open areas on a public university campus are traditional public fora. Accordingly, we find no error in the district court’s determination that the subject open areas at Miami University represent

limited public fora”). A campus is unlike a public street, park, sidewalk or theater, but is an institution of higher education that is devoted to its mission of providing public education. *Gilles v. Miller*, 501 F. Supp. 2d 939, 9478 (W.D. Ky. 2007). The purpose of KCC’s campus is to provide an education to its students, “not to provide a venue for expression of public views that are not requested or sponsored by any member of the campus community.” *ACLU v. Mote*, 423 F.3d 438, 444 (4th Cir. 2005). In *Miller*, the University’s solicitation policy contained in its Student Handbook allowed solicitation only by those organizations or people who were sponsored by a registered University organization or University department. KCC’s Policy is nearly identical, restricting solicitation to those non-College organizations that are sponsored by a recognized College entity. “Thus, the open areas are not open to all speakers, rather only those who met the [KCC] criteria are allowed to solicit.” *Miller* at 948. “By implementing a policy providing for access to the campus’ facilities by outsiders, [KCC] had made the campus a limited public forum.” *Id.*

As a limited public forum, KCC is permitted to “reserve[e] its forum for certain groups or for the discussion of certain topics.” *Id.*, quoting *Good News Club v. Milford Central School*, 533 U.S. 98, 106, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001). The only restriction on its ability to do so is that it must not engage in viewpoint discrimination, and the restrictions placed on soliciting must be “reasonable in light of the purpose served by the forum.” *Id.*, quoting *Good News Club*, 533 U.S. at 107. Therefore, “once a limited forum has been created, entities of a ‘similar character’ to those allowed access may not be excluded.” *Warren v. Fairfax County*, 196 F.3d 186, 190-91 (4th Cir. 1999). “Whether a person is of a ‘similar character’ to others permitted to speak in the forum depends on the purpose of the limited forum.” *Goulart v. Meadows*, 345 F.3d 239 (4th Cir. 2003).

**1. KCC does not engage in viewpoint discrimination.**

Plaintiffs contend that KCC's Speech Permit Policy requires viewpoint discrimination because the Policy states that solicitation is "permitted only when the activities support the mission of Kellogg Community College (KCC) or the mission of a recognized college or activity." As courts have repeatedly found, such a mission-related limitation is lawful. *Miller* at 948. KCC, as an institution of higher education, has a significant interest in "protecting the educational experience of the students in furtherance of [KCC's] educational mission." *Bowman* at 980. KCC "furthers this educational mission" by requiring that such solicitation comport with its mission "because speech is thereby limited to matters in which at least one group of students is interested." *Miller*, 501 F. Supp. at 949; see *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 829, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995).

As in *Miller*, Plaintiffs fail to provide any evidence that the Policy results in viewpoint discrimination as applied to anyone who has gone through the request process. Likewise, Plaintiffs fail to show how KCC's Policy would prohibit anyone from soliciting based on viewpoint on a particular topic. See *Bourgault v. Yudof*, 316 F. Supp. 2d 411, 420 (N.D. Tex. 2004). Plaintiffs were not rejected because of their viewpoint; they failed to register properly for the ability to solicit on KCC's campus, which is a limited public forum. As a limited public forum, KCC has every right to regulate the types of solicitation on campus, so long as those regulations are reasonable and viewpoint-neutral.

Further, contrary to Plaintiffs' assertion, the Policy as written clearly does not grant Student Life the "unbridled discretion" to grant or deny requests to solicit on campus. Plaintiffs contend that the Policy neither includes affirmative protection for viewpoint neutrality nor provides adequate safeguards to protect against improper exclusion of viewpoints. To the

contrary, the Policy explicitly states that “Student Life will not take the content of the speech into consideration when approving, modifying or denying an application,” for solicitation. The Policy specifically prohibits content-based decision-making by Student Life and “set[s] forth specific, narrowly drawn and clear criteria to guide” Student Life in its approval, modification or denial of an application for solicitation. *Southworth v. Board of Regents of University of Wisconsin System*, 307 F.3d 566, 588 (7th Cir. 2002).

The Policy also provides a process for students to appeal decisions made by Student Life, with final decisions made by the Dean of Student Services. The appeal process “further limit[s] [Student Life’s] discretion and their ability to use that discretion to discriminate on the basis of viewpoint....” *Southworth*, 307 F.3d at 588. In other words, the Policy grants the freedom to express disagreement with a decision made by Student Life, and Plaintiffs had the ability and opportunity to dispute any denial of their ability to solicit on campus. However, Plaintiffs have not identified a single situation in which a request to solicit was denied by Student Life, and by declining to properly follow the request process outlined in the Policy, Plaintiffs cannot provide any evidence that the Policy as written gives unbridled discretion for Student Life to deny solicitation applications based on viewpoint.

Plaintiffs also allege that the Policy does not provide for objective criteria to limit Student Life’s discretion to permit some types of solicitation but not others. The court in *Southworth*, however, rejected a similar argument, stating that, “while the [Policy] provide[s] some flexibility, the possibility of viewpoint discrimination is greatly reduced by the many other factors procedural safeguards and appeals process.” 307 F.3d at 590. Plaintiffs’ reference to *OSU Student All. v. Ray*, 699 F.3d 1053 (9th Cir. 2012), as a “closely analogous” case is also misguided. In *Ray*, the University not only had an unwritten policy that it enforced against the



plaintiffs, but “[i]t was also unannounced and had no history of enforcement.” *Id.* at 1064. Further, “The policy created no standards to cabin discretion through content or history of enforcement, and it set no fixed standard for a distinction between [permissible and impermissible solicitation on campus].” *Id.* As mentioned above, KCC’s written Policy outlines clearly the criteria Student Life must consider when accepting or denying a solicitation application. The Policy is provided through a Student Handbook, which is available to all students who enroll with KCC, and Plaintiffs do not provide any valid evidence that the Policy was enforced selectively against some groups but not others.

Plaintiffs claim that Spectrum “and another political group” were given the power to “roam the Student Center freely, approaching students with literature” (Pl’s Brief at 12). First, unlike YAL at KCC, Spectrum is a registered student organization (Dkt. 1-3, PgID 78, 80), which unlike a non-college organization does not require sponsorship to solicit on campus, so YAL and Spectrum are not similarly situated. Second, Plaintiffs do not cite which “political group” was permitted to solicit in the Student Center without being stopped, and therefore Defendants cannot ascertain whether it enforced its Policy any differently from the present case. KCC received a report regarding Plaintiffs’ solicitation and took action based on that report. Third, nowhere in KCC’s Policy does it state that solicitation must occur only at information tables in the Student Center. Plaintiffs allege this throughout their Motion, but they misinterpret the Policy’s clear statement that solicitation, if approved beforehand, can occur on the College grounds (“Use of the College grounds by an individual or organization for solicitation is permitted only if the solicitation has been approved by Student Life”). “College grounds” encompasses more than just an information table in the Student Center, but includes “all lands and buildings of all campuses of Kellogg Community College and include the exterior walls and

surface buildings, entrances, porches, outside staircases, sidewalks, parking lots and all fixtures.” The Policy does provide the process organizations must go through in order to use an information table to solicit, but use of a table in the Student Center is not required.

**2. KCC’s time, place and manner restrictions do not violate Plaintiffs’ First Amendment rights.**

Time, place, and manner regulations of protected speech will survive constitutional scrutiny “so long as they are [content neutral], designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.” *Richland Bookmart, Inc. v. Knox County, Tenn.*, 555 F.3d 512, 520 (6th Cir. 2009), quoting *City of Renton v. Playtime Theatres*, 475 U.S. 41, 47, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). A solicitation policy “need only be reasonable; it need not be the most reasonable or the only reasonable limitation.” *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 808, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). Further, “unlike content-based regulations that are subject to the ‘most exacting scrutiny,’ regulations ‘unrelated to the content of the speech are subject to an intermediate level of scrutiny.’” *Richland*, 555 F.3d at 521, quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994).

As discussed above, Plaintiffs’ argument that KCC’s Policy is content-based ignores both the clear content-neutral directive of the Policy and the lack of any evidence of any denial of permission to solicit based on content. KCC’s Policy opens up the campus to solicitation by those non-College organizations that are lawfully sponsored by a recognized College entity. Such a policy “is content-neutral on its face.” *Miller*, 501 F. Supp. at 948; *see also Bloedorn v. Grube*, 631 F.3d 1218, 1236 (2011).

The YAL was at all relevant times a non-College entity which failed to seek sponsorship by any of the various recognized College entities. KCC simply prohibited Plaintiffs from

soliciting on campus because they failed to seek permission first. When Plaintiff Gregoire went through the process in an earlier term in order to solicit for the YAL, she was granted permission to do so. That Plaintiffs were unsatisfied with the results of that solicitation does not indicate that KCC's Policy is an infringement on their First Amendment rights.

Moreover, the Policy is narrowly tailored to serve a significant government interest. "A regulation is narrowly tailored when it furthers a significant government interest that would be achieved less effectively without the regulation." *Bowman*, 444 F.3d at 980. The Policy "does not, however, need to be the least restrictive means of regulation possible." *Id.* The most important significant interest in maintaining this solicitation policy is "protecting the educational experience of the students in furtherance of the University's educational mission. This interest is significant because an educated electorate is essential to the vitality of our democracy and a lack of proper education diminishes the value of our free speech rights." *Id.* "A second significant interest is in ensuring public safety. Like education, safety is a fundamental human need without which the desire to speak one's mind becomes moot." *Id.* "Finally, a third significant interest [...] is the fostering of a diversity of uses of [KCC] resources." *Id.*

Plaintiffs contend that the Policy does not satisfy intermediate scrutiny because "Defendants' policies prohibit even a few students from speaking without a permit and in any location other than an information table in the Student Center." (Pl's Brief at 17). First, KCC's Policy does not prohibit students from speaking on its campus; it merely provides a procedure for students and organizations to solicit on campus. Further, the Policy clearly does not require that approved solicitation be conducted only with an information table in the Student Center; the Policy provides for this option, but also anticipates activity conducted pursuant to the Policy elsewhere on the grounds.

Next, Plaintiffs argue that the permit requirement, which “requires ‘ten (10) business days’ advance notice to speak,” is an effective ban on spontaneous speech which violates the First Amendment. (Pl’s Brief at 18). This is simply an inaccurate statement. The ten-day notice is for those organizations who wish to use an information table in the Student Center to engage in solicitation, which, as mentioned above, is not the only way students and organizations may solicit on campus. The request process in the Policy states that all decisions “shall be made as promptly as possible.” Further, a permit requirement on a college campus for non-College groups satisfies intermediate scrutiny because such a permit requirement “is justified to ‘coordinate multiple uses of limited space,’ ‘assure preservation of the campus,’ ‘prevent uses that are dangerous’ to students or other people, and ‘to assure financial accountability for damage,’” caused by the event. *Bowman*, 444 F.3d at 981, quoting *Thomas v. Chicago Park District*, 534 U.S. 316, 322, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002). And Plaintiffs’ acknowledge that they were told that they could continue their activity on September 20, 2016, if they properly filed their paperwork with Student Affairs.

Finally, KCC’s Policy leaves open ample alternative channels for communication for non-College organizations who do not go through the request process yet seek to solicit on KCC’s campus. KCC is a large campus located in Battle Creek, Michigan, and “[s]urrounding the campus on every side are public streets and sidewalks from which [Plaintiffs] can [convey their] message to [KCC] community members as they enter and exit the campus apparently without any limitations imposed by [KCC].” *Bloedorn*, 631 F.3d at 1241. Therefore, Plaintiffs have access to students by soliciting right outside of the campus, and “can avoid the limitations imposed by the permitting scheme simply by speaking to students as they enter and exit the

campus from [KCC's] several well-marked entrance and exit points.” *Id.* As a result, the Policy survives intermediate scrutiny.

### **3. KCC's Policy is not overbroad.**

Plaintiffs will be unable to succeed on the merits of their claim that the Policy is overbroad for the same reasons mentioned above. Under the traditional test for assessing restrictions on expressive conduct, the Policy must be upheld if “(1) it is unrelated to the suppression of expression, (2) it furthers an important or substantial government interest, and (3) it does not burden substantially more speech than necessary to further the interest.” *Yoder v. University of Louisville*, 526 F. App'x 537, 547 (6th Cir. 2013). Plaintiffs bear the burden of showing that the Policy reaches “a substantial amount of protected free speech, judged in relation to the [Policy's] plainly legitimate sweep.” *Id.*

First, Plaintiffs are incorrect that the Policy bans “all speech everywhere on campus other than at a table in the Student Center – and that only with a permit applied for ten business days in advance.” (Pl's Brief at 21). KCC's Policy allows for this option, but the Policy allows solicitation on the College grounds so long as the organization properly follows the request process. Plaintiffs acknowledge that they were advised that they could continue soliciting that same day if they registered. Moreover, even if it were the case that non-College groups must solicit on an information table in the Student Center, KCC, as a limited public forum, would be permitted in enforcing this restriction. As the Court wrote in *Bloedorn*:

“[T]he University is under no obligation to open its campus to outside, non-sponsored speakers; the First Amendment does not guarantee access to property for speech activities simply because the property is government owned. Necessarily then, there is no requirement that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.

*Bloedorn*, 631 F.3d at 1233.

Further, as Defendants have already demonstrated, KCC's Policy does not give its officials unlimited discretion to prohibit solicitation on its campus. The Policy clearly outlines the issues Student Life must take into consideration when deciding to grant, modify or deny a request for solicitation on its campus. The Policy also contains an appeal process if groups are dissatisfied with Student Life's decision.

Finally, the Policy does not burden substantially more speech than is necessary. Plaintiffs were not arrested for hand-billing and engaging in one-on-one conversations with passersby – they were arrested for trespassing as a result of not following properly the Policy's request process and refusing to leave KCC's property after several warnings. As a result, KCC's Policy is not overbroad, and Plaintiffs will be unable to succeed on the merits of their First Amendment claims.

**B. Plaintiffs Cannot Prevail On Their Fourteenth Amendment Claim.**

**1. KCC's Policies are not vague.**

Plaintiffs will be unable to succeed on the merits of their vagueness claim. In order to prevail, Plaintiffs “must establish that “[the Policy’s] prohibitive terms are not clearly defined such that a person of ordinary intelligence can readily identify the applicable standard for inclusion and exclusion.” *Yoder*, 526 F. App'x at 548, quoting *United Food & Commercial Workers Union Local 1099 v. Southwest Ohio Regional Transit Authority*, 163 F.3d 341, 358-359 (6th Cir. 1998). “[A] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.” *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19, 130 S. Ct. 2705, 2719, 177 L. Ed. 2d 355 (2010), quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). The Policy clearly states that groups wishing to solicit on campus must

go through the request process as outlined in the Policy. Plaintiffs failed to do so. Therefore, they cannot now argue that the Policy as applied to them was unconstitutionally vague.

As discussed above, the Policy does not give Student Life the unbridled discretion to decide whether requests to solicit support KCC's mission. The Policy has objective criteria in place for Student Life to consider when reviewing a solicitation application. These include the ability to accept, modify or deny an application "in order to assure the reasonable conduct of public business, the educational process, unobstructed access to the College for its students, faculty, employees, occupants and the public, and to maintain the College grounds." Plaintiffs argue that the Policy contains no objective criteria for requesting an information table, but admit that Plaintiff Gregoire previously was approved for such a table. Plaintiffs present no facts suggesting that the Policy has been administered in any way other than indicated on its face – in a content-neutral fashion designed to make sure that solicitation does not interrupt the functioning of members of the campus.

Finally, that the Policy does not list "arrest" as a sanction for trespass does not mean that the Policy is vague. The Policy specifically states that those engaged in solicitation must comply with all College policies, and local, state and federal ordinances and statutes; the Code of Conduct specifically states that disciplinary action imposed by the College may precede and/or be in addition to any penalty imposed by an off-campus authority; and trespass is explicitly prohibited under State law, MCL §750.552. As the Court wrote in *Gilles v. Blanchard*, 477 F.3d 466, 470 (7th Cir. 2007), "Public property is property, and the law of trespass protects public property, as it protects private property, from uninvited guests." The facts in this case are virtually identical to those in *Bloedorn, supra*, where the plaintiff, a non-student preacher, began preaching on the University campus without seeking a permit from the University before doing

so, was told he needed a permit, refused to comply with the request process, continued to preach, was warned that he could be arrested for trespassing if he did not stop preaching or obtain a permit first, again refused to fill out the request form, and was arrested for trespass. The court rejected all of the plaintiff's arguments that the University's speech policy violated his constitutional rights, which the Court should do here as well.

**2. Plaintiffs cannot show that similarly-situated groups or individuals were treated differently.**

Further, as discussed above, Plaintiffs fail to show that they will likely succeed on their Fourteenth Amendment claim because they cannot show that any group who failed to follow properly the request process to solicit on campus was allowed to continue to solicit. Plaintiffs did not go through the process to indicate when they wanted to speak, what type of speech they intended to engage in (leafletting, parade, etc.) or how many people would be involved, so Student Life did not have an opportunity to determine what location(s) would be both appropriate and available. Spectrum is a registered student organization and thus has greater privileges than a non-College group that attempts to solicit on campus. And Plaintiffs fail to identify the other "political group" that was permitted to solicit signatures from students on campus, and therefore KCC cannot determine whether such a group is similarly situated to YAL. Because Plaintiffs cannot show that any uninvited non-College group was permitted to solicit on campus, their Fourteenth Amendment claim also fails. *See Blanchard*, 477 F.3d at 472.

**II. PLAINTIFFS HAVE NOT DEMONSTRATED THAT THEY WILL SUFFER IRREPARABLE HARM IF AN INJUNCTION IS NOT ISSUED.**

A showing of irreparable harm is an essential prerequisite to injunctive relief. "To be granted an injunction, the plaintiff must demonstrate, by clear and convincing evidence, actual irreparable harm or the existence of an actual threat of such injury." *Patio Enclosures*, 39 Fed.



Appx. at 969. “Mere injuries, however substantial, are not enough.” *Hudson v. Caruso*, 748 F. Supp. 2d 721, 730 (W.D. Mich. 2010). Instead, “the harm alleged must be both certain and immediate, rather than speculative or theoretical.” *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991). Further, this factor “contemplates the inadequacy of alternative remedies available to the plaintiff.” *Contech Casting, LLC v. ZF Steering Systems, LLC*, 931 F. Supp. 2d 809, 818 (E.D. Mich. 2013). “Thus, irreparable harm will not be found where alternatives already available to the plaintiff make an injunction unnecessary.” *Id.* (citation omitted).

All of the injuries Plaintiffs allegedly suffered as a result of this incident occurred in the past. “[It] is well established that ‘a preliminary injunction cannot be issued based on past harm. The purpose of a preliminary injunction is to prevent *future* irreparable harm.’” *Rouse v. Caruso*, No. CIV 06-10961, 2007 WL 909583, at \*6 (E.D. Mich. Mar. 23, 2007), quoting *Fisher v. Goord*, 981 F.Supp. 140, 168 (W.D.N.Y. 1997) (Exhibit 3). Plaintiffs attempt to circumvent this argument by asserting that they are chilled from future expression (Pl’s Brief at 24). All Plaintiffs have to do to be able to engage in free speech is go through the Policy process. Plaintiffs have not shown that a single organization has ever been denied the right to freely speak on the KCC campus after doing so, or that any person has been arrested after obtaining the required permission. Plaintiffs, not KCC, control whether they comply with the law in the future, and therefore control whether they engage in activity that subjects them to lawful arrest.

Plaintiffs also cannot show irreparable harm because they have not attempted to resolve their issue with the Policy through other avenues. *Contech Casting*, 931 F. Supp. 2d at 820. Had Plaintiffs been denied permission to engage in the requested speech, they could have gone

through KCC's appeals process. Because they have not exhausted the College process, they cannot show that continuing to enforce the Policy will cause them irreparable harm.

Finally, Plaintiffs got exactly the result they desired. YAL coaches students to "earn media attention" and to put colleges and universities "in a bad light by the media" in order to pressure them to change their policies. Plaintiffs understood that arrest was imminent if they continued their actions, and all but one chose to go through it.

### **III. THE BALANCE OF HARMS WEIGHS IN DEFENDANTS' FAVOR.**

Although any infringement on First Amendment rights should be prevented and remedied expeditiously, enjoining the Policy will not cure Plaintiffs' alleged harm here because they did not even attempt to comply with the Policy. KCC's campus is a limited public forum, and the law is clear that colleges and universities may enforce speech and solicitation policies against individuals who attempt to solicit on campus so long as those policies are reasonable and viewpoint neutral. Defendants have established that Plaintiffs are not likely to succeed on the merits of their claim that the Policy is unreasonable and restricts speech based on the message it conveys. Any harm that Plaintiffs allegedly suffered occurred in the past, and the injunction would not prevent imminent harm to Plaintiffs.

Further, although KCC could adopt a temporary policy if the injunction is issued, KCC will suffer harm given that it will be forced to adopt a new policy when the enjoined valid Policy was never actually challenged in the first place. Having no Policy at all in the interim would also cause harm to KCC because it would hinder the achievement and maintenance of KCC's limited public forum, especially if non-College organizations are free to solicit on campus without restriction. As a result, the balance of harms weighs against issuing an injunction.

**IV. THE PUBLIC INTEREST WILL BE HARMED IF THE COURT ISSUES THE INJUNCTION.**

KCC has a valid Policy; it neither infringes against persons' First Amendment rights nor is it unconstitutionally vague. It has been applied by officials accurately and consistently, and officials took prompt action to enforce the Policy when they were notified that Plaintiffs were violating it. Plaintiffs were given numerous opportunities to cure their failure to comply with the Policy, and they were arrested once it was clear that they were not going to cooperate. Institutions of higher education would be harmed if the Court were to issue the injunction under these circumstances. Although courts are the final arbiters of questions related to "whether a public university has exceeded its constitutional restraints," *Bloedorn*, 631 F.3d at 1234, quoting *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, 561 U.S. 661, 686, 130 S. Ct. 2971, 2988, 177 L. Ed. 2d 838 (2010), the Supreme Court stated: "Cognizant that judges lack the on-the-ground expertise and experience of school administrators, however, we have cautioned courts in various contexts to resist substituting their own notions of sound educational policy for those of the school authorities which they review." Since KCC's Policy is a constitutionally valid one, the Court should not issue an injunction here.

**CONCLUSION**

Plaintiffs are unlikely to succeed on the merits of their constitutional claims and have not suffered irreparable harm. Moreover, the harm that will result if an injunction is issued weighs

in Defendants' favor, and the public interest will be harmed if the Policy is enjoined. As a result of the foregoing, Defendants respectfully request that this Court deny Plaintiffs' Motion for Preliminary Injunction.

Respectfully submitted,

/s/Megan P. Norris (P39318)  
Miller, Canfield, Paddock and Stone, P.L.C.  
Attorneys for Defendants  
150 West Jefferson, Suite 2500  
Detroit, MI 48226  
(313) 963-6420  
[norris@millercanfield.com](mailto:norris@millercanfield.com)

Dated: June 21, 2017

**CERTIFICATE OF SERVICE**

I hereby certify that on June 21, 2017, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all attorneys of record.

/s/Megan P. Norris  
Miller, Canfield, Paddock and Stone, P.L.C.  
150 West Jefferson, Suite 2500  
Detroit, MI 48226  
(313) 963-6420  
[norris@millercanfield.com](mailto:norris@millercanfield.com)

### **Index of Exhibits**

<b>Exhibit</b>	<b>Description</b>
1.	Affidavit of Drew Hutchinson
2.	Affidavit of Colleen Wright
3.	Affidavit of Harold West

29381521.1\133863-00027

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

YOUNG AMERICANS FOR LIBERTY AT  
KELLOGG COMMUNITY COLLEGE,  
MICHELLE GREGOIRE, and BRANDON  
WITHERS,

Plaintiffs,

Case No. 1:17-cv-58-RJJ-RSK

v.

Hon. Robert J. Jonker

KELLOGG COMMUNITY COLLEGE; The Trustees of Kellogg Community College – STEVE CLAYWELL, JILL BOOTH, MATTHEW A. DAVIS, REBA M. HARRINGTON, JONATHAN D. BYRD, JULIE CAMP SEIFKE, PATRICK A. O'DONNELL – all individual and all in their official capacities as members of the Board of Trustees of Kellogg Community College; MARK O'CONNELL, President of Kellogg Community College, in his official and individual capacities; KAY KECK, Vice President for Student and Community Services of Kellogg Community College, in her official and individual capacities; TERAH ZAREMBA, Dean of Student Services of Kellogg Community College, in her official and individual capacities; DREW HUTCHINSON, Manager of Student Life of Kellogg Community College, in his official and individual capacities; and HAROLD WEST, Chief of Public Safety and Director, Student Relations, in his official and individual capacities,

Defendants.

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**AFFIDAVIT OF DREW HUTCHINSON**

STATE OF MICHIGAN

COUNTY OF CALHOUN

DREW HUTCHINSON, being first duly sworn, deposes and says that:

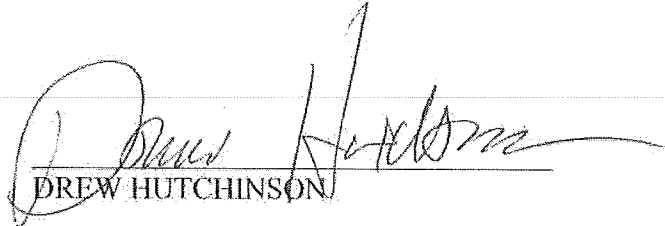
1. This affidavit is based on personal knowledge and I am competent to testify to the matters herein.

2. I am the Manager of Student Life of Kellogg Community College ("KCC"). In this capacity I am familiar with and reviewed KCC's student handbook, website, and solicitation policies. I was also actively involved in the matters leading up to the current dispute between Plaintiffs and Defendants.


3. Neither Plaintiff Gregoire nor anybody else purporting to represent YAL has asked to register Young Americans for Liberty at KCC as a student organization or been denied the ability to so register.

4. On September 20, 2016, the Office of Student Life received a report of inappropriate solicitation, which I reported to the Office of Public Safety.

Further Affiant sayeth not.

  
DREW HUTCHINSON

Subscribed and sworn to before me  
on this 20<sup>th</sup> day of June, 2017.

  
Notary Public

**Theresa Jo Kitz  
Notary Public  
Wayne County, MI  
My Comm. Expires 3/26/2023**

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KAY KECK, Vice President for Student and  
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and individual capacities; DREW HUTCHINSON,  
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and HAROLD WEST, Chief of Public Safety  
and Director, Student Relations, in his official  
and individual capacities,

Defendants.

---

**AFFIDAVIT OF COLLEEN WRIGHT**

STATE OF MICHIGAN

COUNTY OF CALHOUN

COLLEEN WRIGHT, being first duly sworn, deposes and says that:

1. This affidavit is based on personal knowledge and I am competent to testify to the matters herein.



2. I am the Registrar of Kellogg Community College ("KCC"). In this capacity I am familiar with and reviewed KCC's student handbook, website, and solicitation policies. I have reviewed KCC business records regarding the enrollment history of the individual Plaintiffs.

3. Plaintiff Withers was a KCC student in the fall of 2016 but did not register for the following term.

4. Plaintiff Gregoire was not a KCC student in the fall of 2016.

Further Affiant sayeth not.

  
COLLEEN WRIGHT

Subscribed and sworn to before me  
on this 20<sup>th</sup> day of June, 2017.

  
Notary Public

29376665.1\133863-00027

**Theresa Jo Kitz  
Notary Public  
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Defendants.

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**AFFIDAVIT OF HAROLD WEST**

STATE OF MICHIGAN

COUNTY OF CALHOUN

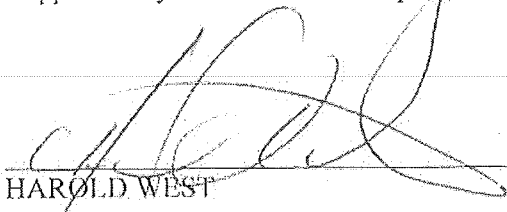
HAROLD WEST, being first duly sworn, deposes and says that:

1. This affidavit is based on personal knowledge and I am competent to testify to the matters herein.

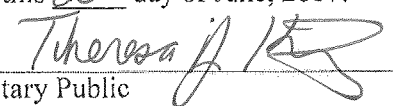
2. I am the Chief of Public Safety of Kellogg Community College ("KCC"). In this capacity I am familiar with and reviewed KCC's student handbook, website, and solicitation policies. I was also actively involved in the matters leading up to the current dispute between Plaintiffs and Defendants, and I have reviewed KCC business records regarding the enrollment history of the individual Plaintiffs.

7. Public Safety approached Plaintiffs to advise them of their violation of KCC policies and instructed the Plaintiffs on how to become compliant. At least three times, public safety officers advised Plaintiffs that they were in violation of the Policy, and asked them to fill out the Student Life form and move to an area approved by Student Life or stop soliciting.

Further Affiant sayeth not.

  
HAROLD WEST

Subscribed and sworn to before me  
on this 20<sup>th</sup> day of June, 2017.

  
Notary Public

**Theresa Jo Kitz**  
**Notary Public**  
**Wayne County, MI**  
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