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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

AARON FLINT, Plaintiff, vs. GEORGE DENNISON, in his official capacity as President of The University of Montana-Missoula, *et al.,* Defendants.	Cause No. CV 04-85-M-DWM **DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

Defendants George Dennison, in his official capacity as The University of Montana President, the Associated Students of The University of Montana ("ASUM"), Kyle Engelson, in

his official capacity as the ASUM Elections Committee Chair, and Justin Baker, Averiel Wolff, Sophia Alvarez, Anna Green, Kris Monson, Derek Duncan, and Katie Boeckx in their official capacities as ASUM Elections Commissioners, through their counsel, hereby submit this Brief in Opposition to Plaintiff's Motion for a Preliminary Injunction.

INTRODUCTION

Plaintiff seeks injunctive relief to enjoin enforcement of the spending limit applicable to elections for ASUM, the student government for The University of Montana. Plaintiff's entire case is premised on the untenable argument that there is no difference, for purposes of First Amendment analysis, between elections for a position in student government at a university and elections to actual governmental bodies such as Congress or the state legislature. This argument ignores controlling U.S. Supreme Court authority, which applies a deferential standard of review to regulations furthering a university's educational mission, even when the First Amendment might prohibit such regulations outside the school setting. As demonstrated in Point I(A), *infra*, "First Amendment rights must be analyzed in 'light of the special characteristics of the school environment.'" *Widmar v. Vincent*, 454 U.S. 263, 268 n. 5 (1981) (citation omitted). 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. The governing test is one of reasonableness, not strict scrutiny.

Student government at The University of Montana is first and foremost a part of the educational mission of the University. Spending limits for ASUM elections help assure that access to participation in student government – and to the educational opportunity it affords – is open to all, and is not reserved for students who are able to spend unlimited funds on a student government campaign. Nothing in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), upon

which plaintiff places almost exclusive reliance, remotely suggests courts must ignore the critical differences between student government and real government in reviewing a student government election regulation. The sole judicial decision to apply *Buckley* to a student government spending limit, *Welker v. Cicerone*, 174 F. Supp. 2d 1055 (C.D. Cal. 2001), simply failed to undertake the required analysis, dismissing in a footnote the critical and controlling point that First Amendment analysis is far different in the university setting than in other settings. That mistake undermines the validity of the *Welker* decision, which is not controlling in any event.

Moreover, even if strict scrutiny were applicable, ASUM's spending limits satisfy the First Amendment because they are narrowly tailored to further the University's compelling interests in promoting its educational mission and achieving its goal of diversity in student programs. *See* Point I(B), *infra.* Thus, plaintiff cannot show probable success on the merits.

Plaintiff also fails to meet the other requirements for injunctive relief. Point II demonstrates that plaintiff cannot establish irreparable harm, and Point III demonstrates that he has not shown a combination of serious questions on the merits and a balance of hardships tipping sharply in his favor. For all these reasons, the motion should be denied.

STATEMENT OF FACTS

Since its inception in 1906, ASUM has fallen entirely under the educational mission of The University of Montana. Declaration of Hayden Ausland ("Ausland Declaration"), ¶¶ 3-8.[1] 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." ASUM Const., art. 2, § 1; *see also id.* at art. 2, § 4 (ASUM

[1] Professor Ausland, who holds a professorship in Classics at The University of Montana, has served for the past 13 years as a senior faculty advisor to ASUM. *Id.* at ¶¶ 1-2. His declaration details the history of ASUM at The University of Montana.

government and activities must comply with Montana state law and the policies of the Montana State Board of Regents) (Exhibit 5 to Ausland Declaration).

ASUM offers students experience in many forms of leadership, through which they develop a variety of skills to handle the responsibilities arising in student government. ASUM senators and executives have traditionally attended a special seminar or retreat each fall semester. *See* ASUM Bylaws, art. II § 2(D) and art. III, § 2(D) (Exhibit 6 to Ausland Declaration). These sessions may cover parliamentary procedure, service-learning or the promotion of leadership skills. Ausland Declaration ¶ 7. Students must have at least a 2.0 cumulative grade-point average to run for ASUM office, further confirming the academic context of ASUM elections. ASUM Const., art. 7 § 1 (Exhibit 5 to Ausland Declaration).

ASUM senators and executives learn how to address conflicting interests of diverse constituencies; how to make recommendations about the allocation of budgetary resources; how to negotiate with administrators over matters such as tuition and fee increases, and how to draft policies and priorities for numerous student programs. The ASUM Senate gives students practical experience in deliberation and legislation by working within the framework of the ASUM By-Laws and Constitution towards policy goals. This learning and experience form a significant part of these students' education. Ausland Declaration at ¶¶ 6, 8; *see also* Declaration of Gale Price ("Price Declaration") at ¶ 6.

Because of ASUM's education function, the University has a critical interest in assuring that the election process for ASUM be fair and open to all qualified students, regardless of their means. Spending limits for ASUM elections, in place since 1970, Ausland Declaration ¶ 9, assure that election to ASUM does not depend on the amount of personal or family resources that a student can spend on an election campaign.

This is particularly important at The University of Montana because of the acute financial needs of many of its 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% are eligible for federal Pell Grants, which go to the neediest students. Declaration of Myron Hanson, Director of Financial Aid, at ¶ 4. Indeed, a large percentage of the Pell Grant recipients at The University of Montana have family incomes so low that their federal application shows an Expected Family Contribution (EFC) of zero – the lowest possible amount. *Id.* at ¶ 5. A relative handful of students at The University of Montana have the financial resources to spend significant funds on campaigns for student office, while the majority of students clearly do not. *Id.* at ¶ 10. 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. *Id.*; *see also* Declaration of Gale Price at ¶ 9.

To make ASUM elections the province only of economically elite students 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." Ausland Declaration at ¶ 9.[2] *See also* Hanson Declaration at ¶ 10.

The spending limits also serve the University's important educational interest in promoting diversity in its programs. The University places great importance on attracting and

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[2] 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." Exhibit 1 to Declaration of Charles Couture ("Couture Declaration").

retaining students from highly diverse backgrounds. Providing these students with equal educational opportunities in extracurricular programs is therefore important to the University's mission. Couture Declaration at ¶¶ 5-6. 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. *Id.* at ¶ 8. In the absence of spending limits, ASUM officers and Senators will be less likely to include an economically, racially and ethnically diverse cross-section of students at The University of Montana. *Id.* at ¶¶ 9-10. This would be to the detriment of all students.

Consistent with the University's goal to provide opportunity for higher education regardless of wealth, ASUM's Bylaws also provide for partial funding of student campaigns. Price Declaration at ¶ 10. Candidates are reimbursed for the first $10 of their campaign spending, plus 50% of their expenditures over that amount, up to the spending limit. These funds come from the ASUM budget. ASUM Bylaws, art. V, § 2(G)(4) (Exhibit 6 to Ausland Declaration). ASUM cannot afford to provide matching funds for expenditures if there is no spending limit. Price Declaration at ¶ 10. The spending limits therefore serve an important function in budgeting the University's resources.

Plaintiff violated the spending limits in both his 2003 and 2004 elections, but failed to file suit challenging the limits until after the 2004 election. Plaintiff's election was set aside because of the violation, but a vacancy currently exists in the ASUM Senate to which plaintiff is entitled to seek appointment. Price Declaration at ¶ 14. This vacancy is expected to be filled shortly after the fall term begins. *Id.*

ARGUMENT

Plaintiff's request for preliminary injunctive relief requires him to show "either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips in [his] favor." *Roe v. Anderson,* 134 F.3d 1400, 1402 (9th Cir. 1998), *aff'd sub nom. Saenz v. Roe*, 526 U.S. 489 (1999). The required degree of irreparable harm increases as the probability of success decreases. *Id.* Plaintiff's application fails to meet either test.

I. PLAINTIFF IS UNLIKELY TO SUCCEED ON THE MERITS.

A. The First Amendment Allows Universities Wide Latitude to Regulate Student Government in Furtherance of the University Educational Mission.

The U.S. Supreme Court has cautioned that courts must grant deference 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 should be mindful of their "responsibility to safeguard . . . academic freedom, 'a special concern of the First Amendment.'" *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226 (1985) (citation omitted). 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[,]'" *Widmar v. Vincent,* 454 U.S. 263, 276 (1981) (quoting *Sweezey v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring), as well as the right to "make academic judgments as to how best to allocate scarce resources." *Id.* at 276. As a result, 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.

The Supreme Court's 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 the First Amendment rights of students, the policies will be upheld if they are viewpoint-neutral. 529 U.S. 217, 233 (2000) (rejecting First Amendment challenge to mandatory student activity fees used to support extracurricular student speech, while acknowledging that students were thus forced to subsidize speech they found objectionable or offensive). Plaintiff here has not even alleged that the ASUM spending limit is anything but viewpoint-neutral, nor could he; the spending limit applies across the board to all candidates.

Because ASUM exists to support the educational mission of The University of Montana, *see* Statement of Facts*, supra,* at 3-4, the University is entitled to wide latitude in deciding what types of rules and procedures will govern the election process that decides which students will have the opportunity of serving as an ASUM officer or senator. The spending limits for ASUM elections are a reasonable means of assuring students that they need not have substantial personal or family resources in order to have a fair opportunity to campaign and win election to ASUM. This is particularly important given the acute financial needs of many students at The University of Montana. *See* Statement of Facts, *supra* at 5. Moreover, the learning experience afforded by student government is enhanced for all its participants when its membership includes students of diverse backgrounds. *Id.* at 6; *see Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (noting that fostering diversity in student body serves a compelling educational interest). Finally, the learning experience afforded by student government extends to the election process itself and the students' role in running elections and enforcing applicable rules and appeal procedures. Ausland Declaration at ¶¶ 10-12; Price Declaration at ¶7. Regulation of student elections thus

clearly implicates the University'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 the University's goal to provide opportunity for higher education regardless of wealth, ASUM's bylaws also provide for partial funding of student election campaigns. These funds come from the ASUM budget. If wealthy students could spend unlimited amounts on their campaigns, ASUM simply could not afford to provide unlimited matching funds for students lacking such financial resources. Price Declaration, ¶ 10. The spending limits therefore serve an important function in allowing the University to determine "how best to allocate scarce resources." *See Widmar*, 454 U.S. at 276.

Plaintiff's reliance on *Buckley*, which struck down spending limits applicable to congressional campaigns, is misplaced. Nothing in *Buckley* purports to hold that regulations governing election to student government office are subject 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). 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. 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. ASUM Const., art. 2, § 4. To ignore the critical distinctions between student government elections and real elections trivializes the First Amendment.

In a case similar to the one before this Court, the 11th Circuit upheld against a First Amendment challenge election regulations adopted by a student government association. *See 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 that prohibited distribution of campaign materials except for 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. *Id.* at 1345.

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 11th 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. Because *Alabama Student Party* determined that student governments and their associated campaigns constituted "a forum reserved for . . . a supervised learning experience for students interested in politics and government," it held that the university was "entitled to place reasonable restrictions on this learning experience." *Id.* at 1347. The Court concluded, "[i]n 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.*[3] *Cf.*

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[3] Relying on *Widmar,* the dissenting opinion in *Alabama Student Party* 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. *Id.* at 1352-1354 (Tjoflat, J., dissenting). This reasoning reflects a misunderstanding of *Widmar* and has not survived later decisions such as *Rosenberger v. Rector and Visitors of the University of Virginia,* 515 U.S. 819 (1995), and *Southworth. Widmar* struck down a university policy of excluding student religious groups from meeting on campus, where the university routinely allowed a wide variety of non-religious groups to meet on campus. In *Widmar*, 454 U.S. at 277 & 277 n. 20, the Court emphasized that its holding was based on the university's selective exclusion of disfavored groups, and that it should not be read

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 (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 "the fundamental purpose of Baruch College is to educate students").

Plaintiff cites a number of decisions applying *Buckley* to strike down spending limits, Plaintiff's Memorandum at 12-13, but these decisions are inapposite because they address public elections for state or municipal office, not student government elections. 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). The *Welker* decision, however, is deeply flawed. *Welker* dismissed in a footnote the critical point that First Amendment review is far more deferential in a university setting than would be true in the case of regulations affecting elections for governmental office. *Id.* at 1065 n. 6. *Welker* thus mistakenly assumed that *Buckley*'s exacting scrutiny of congressional spending limits applies wholesale to student elections. *Id.* at 1065 ("The court sees no reason to distinguish between applying *Buckley* to state political elections and political elections at state universities."). In addition, the District Court in *Welker* apparently was not aware of, or did not acknowledge, the Supreme Court's

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to undermine the traditional deference afforded to a university's academic judgments concerning the best means to foster its educational mission. Moreover, the Supreme Court's later decision in *Rosenberger* explained that viewpoint neutrality, not content neutrality, is the touchstone for constitutionality of restrictions on a university-created forum. 515 U.S. at 829-830. Finally, *Southworth* confirms that, regardless whether a particular university activity is labeled as a public forum, a regulation that is viewpoint-neutral will survive First Amendment scrutiny. 529 U.S. at 230, 233-234. *See also Cogswell v. City of Seattle*, 347 F.3d 809, 814-816 (9th Cir. 2003), *cert. denied,* __ U.S.__, 2004 WL 540766, 72 U.S.L.W. 3615 (U.S. May 17, 2004) (explaining distinction between content neutrality and viewpoint neutrality). While ASUM elections are not even a limited public forum given their educational mission, they clearly would be constitutional under these precedents even if they were so regarded.

decision in *Southworth,* which confirms that viewpoint-neutral university regulations will be upheld even when they burden student speech rights.

Because it uncritically accepted the contention that *Buckley* was controlling in the context of student government elections, *Welker* rejected out of hand the university's interest in imposing spending limits as a means of assuring equal access to student government for students of limited means, relying solely on the fact that *Buckley* did not find this interest sufficiently compelling to meet the exacting scrutiny applicable to spending limits for public office.[4] This was clear error. As explained above, in light of their educational missions, universities may regulate speech more broadly than would be permissible in the context of elections for federal or state office. The governing test is one of reasonableness, not strict scrutiny.

Welker also misapprehends the *Alabama Student Party* holding, mistakenly concluding that it relies solely on a university's right to allocate "scarce resources" and thus is inapplicable to limits on student spending. *Welker,* 174 F. Supp. 2d at 1063-1064. *Alabama Student Party*, however, relies 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.'" *See Alabama Student Party*, 867 F.2d at 1345 (quoting *Widmar*, 454 U.S. at 276). Thus, *Alabama Student Party* emphasizes that student government is "a supervised learning experience for students interested in politics and government[,]" *id.* at 1347, and observes that "'[a]cademic freedom thrives not only on the

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[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 (citation internal quotations omitted). But 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, 401-402 (2000) (Breyer, J., joined by Ginsburg, J., concurring).

independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself.'" *Id.* (quoting *Regents of the University of Michigan*, 474 U.S. at 226 n. 12). Moreover, the regulations at issue in *Alabama Student Party* did not merely involve regulation of campus activities and facilities, but also limited campaigning off campus. *Id.* at 1352 (Tjoflat, J., dissenting).

In addition, because the University provides matching funds to ASUM student candidates, the spending limits at issue here do implicate the university's judgment as to "how best to allocate scarce resources." *Widmar*, 454 U.S. at 276. Accordingly, *Welker* -- putting aside the legal error of its analysis -- also is distinguishable on its facts.

For all the above reasons, ASUM's spending limits reflect the university'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 (citation omitted). Accordingly, they are fully constitutional under the First Amendment, and plaintiff therefore is unlikely to succeed on the merits.

B. Even if Strict Scrutiny Were Applicable to Student Government Spending Limits, ASUM's Limits Satisfy the First Amendment.

Even if, contrary to the authorities cited above, *Buckley*'s exacting scrutiny standard were applicable to student elections, the 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 Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (citation omitted). In recent years, the Supreme Court has upheld a number of electoral regulations against First Amendment challenge even while applying strict scrutiny. *See 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); *Burson v. Freeman*, 504 U.S. 191 (1992) (applying strict scrutiny to state ban on electioneering activity near polling places, but upholding ban). By the same token, even if *Buckley* required exacting scrutiny of student spending limits, that would not mean that the limits are automatically unconstitutional.

Buckley carefully listed the three specific governmental interests that had been offered as justifying 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 that could 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.

Buckley did not address whether a university's interest in structuring its educational program to provide equal access to students of limited means, or its interest in the educational benefits of diversity, forms a compelling basis for spending limits in student government elections. Accordingly, nothing in *Buckley* forecloses this Court from finding those interests to be sufficiently compelling to survive strict scrutiny. Because the same facts discussed above in Point I demonstrate that these interests are not merely permissible, but compelling, this section will not repeat those facts, but will briefly highlight the educational benefits of diversity as a compelling governmental interest, and explain why the limits are narrowly tailored.

1. The University Has a Compelling Education Interest in Promoting Diversity.

Fifty years ago, the Supreme Court stated, "[e]ducation 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). Based on the importance of education and on the educational benefits from diversity, the Supreme Court recently affirmed the principle that diversity in education is a compelling state interest. In *Grutter v. Bollinger*, 539 U.S. 306, 306 (2003), the Supreme Court upheld against a Fourteenth Amendment challenge the use of racial classifications as part of the affirmative action policy used in the admissions process at the University of Michigan Law School. 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 (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.

Diversity is especially important in an educational activity like the ASUM, which provides leadership training and experience with governance. Couture Declaration, ¶¶ 7-8. *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, its

observations about the educational benefits of diversity are no less applicable to students of diverse economic backgrounds.

Moreover, a spending limit also promotes racial and ethnic diversity in ASUM. For example, Native American students at The University of Montana are disproportionately likely to come from lower-income families, and would therefore face greater barriers in winning a student government seat if spending were unlimited. Couture Declaration, ¶ 9.

In *Grutter*, the Supreme Court held that diversity in education was sufficiently compelling so that a state university could employ a racial classification that would otherwise be impermissible under the Fourteenth Amendment. The interest in diversity in education therefore surely is sufficiently compelling to satisfy First Amendment exacting scrutiny of a student government spending limit as well.

2. The ASUM's spending limits are narrowly tailored to obtain the educational benefits that flow from diversity in education.

Part I of this Memorandum demonstrates that a test of reasonableness, not narrow tailoring, governs the constitutionality of ASUM's spending limits. Nonetheless, the record shows that the 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 (which is 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. Conducting the elections without spending limits would provide an enormous advantage to students who have significant financial resources. Price Declaration at ¶¶ 8-10. 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 the 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 who have no need of the ASUM funding. ASUM does not have sufficient funds to provide unlimited matching funds to students. *Id.* at ¶ 10. Again, without mandatory limits, students with limited financial resources will have less access to the learning experience provided by student government participation and all students will be deprived of the educational benefit of a diverse ASUM.

Limits on contributions are also insufficient to promote economic or racial diversity because contribution limits are completely unrelated to providing the means for less wealthy students to run for office.[5] The 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. There are two debates during the course of the campaign that are sponsored by ASUM at the University Center, and the student newspaper publishes free profiles of all students running. Candidates can talk to students at the Oval or contact people by email, which cost very little. Candidates can ask their supporters to talk to their friends on the candidates' behalf. Candidates can attend meetings of the many student groups on campus to explain positions, again with little or no spending. *Id.* at ¶ 13.

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[5] 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. Price Declaration at ¶ 12.

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

II. PLAINTIFF HAS NOT DEMONSTRATED IRREPARABLE HARM.

While Plaintiff contends he is entitled to a presumption of irreparable harm because a First Amendment violation is alleged, the presumption does not apply when Plaintiff's First Amendment arguments lack merit. *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1214 (9th Cir. 1984). Because Plaintiff has not made a showing of a likely First Amendment violation, *see* Point I, *supra,* he is not entitled to a presumption of harm.

III. PLAINTIFF HAS NOT DEMONSTRATED A SERIOUS QUESTION GOING TO THE MERITS AND A BALANCE OF HARDSHIPS TIPPING SHARPLY IN HIS FAVOR.

For the same reasons stated above in Point I, Plaintiff has not demonstrated a serious question going to the merits. Apart from the District Court decision in *Welker*, which failed to accord the deference due to the university regulations at issue, there is no authority holding that limits on student government expenditures are unconstitutional or even subject to strict scrutiny. Nor can Plaintiff show that the balance of hardships tips "sharply in his favor" as Ninth Circuit cases have required. *Sun Microsystems Inc. v. Microsoft Corp.,* 188 F.3d 1115, 1118 (9th Cir. 1999); *see also Lydo Enterprises,* 745 F.2d at 1212 (balance must tip "decidedly" in plaintiff's favor) (citation omitted).

As this Court noted in its order denying Plaintiff's request for a TRO, Plaintiff's campaigning was unaffected by the spending limit, as he deliberately chose to flout the election rules during his campaign. Order 2 (May 6, 2004). The next election will not take place until spring 2005, making an injunction against the spending limit unnecessary. Plaintiff's claim of

harm is based solely on being disqualified from his Senate seat after his admitted violation. A preliminary injunction, however, is intended to preserve the status quo when there is insufficient time for a trial on the merits. Plaintiff has known of the spending limits at least since running in his first campaign in 2003, yet failed to file suit against the limits until May 5, 2004, a year later. Plaintiff "could have challenged the regulations after his first censure but chose not to." *Id.* at 3. Had Plaintiff filed his suit in a timely manner, a trial on the merits could have been completed prior to the 2004 election, making a request for preliminary relief unnecessary. Plaintiff's own delay in challenging the limits undermines his claim of urgency. *See Lydo Enterprises*, 745 F.2d at 1213 ("[a] delay in seeking a preliminary injunction is a factor to be considered in weighing the propriety of relief)*, accord*, *Friends of the Clearwater v. McAllister*, 214 F. Supp. 2d 1083, 1086 (D. Mont. 2002).

In addition, any harm from being excluded from the Senate seat is mitigated because a Senate vacancy currently exists. Price Declaration at ¶ 14. The vacancy will be filled by appointment at the beginning of the fall term, at the time of the second ASUM meeting, and Plaintiff can apply for the appointment. *Id.* Student government does not meet during the summer. Plaintiff's failure to take advantage of the opportunity for review by the Constitutional Review Board, which is empowered to set aside a punishment for violation of the election rules even if the spending limit is upheld, also militates against any argument for tipping the hardships in Plaintiff's favor. *See Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995) ("If the harm complained of is self-inflicted, it does not qualify as irreparable.").

While Plaintiff also cites the censure on his record as imposing harm on him, this cannot support his request for injunctive relief. Plaintiff was censured not only for violating the spending limits, but also for the false statements he made in filing his disclosure report and

failing to report the excess expenditures. Price Declaration at ¶ 3. He has not challenged the constitutionality of the reporting requirement. Accordingly, even if an injunction against the spending limit were issued in this case, a censure would remain on his record.

In contrast to Plaintiff's lack of cognizable harm, the discussion in Point I, *supra*, shows that the University's interests will be seriously harmed if the injunction against the spending limit is granted. The University itself has First Amendment rights at stake, because it is entitled to autonomy in determining how to carry out its educational mission. *See supra* at 7-17. This autonomy would be infringed by an injunction. Moreover, each of the declarations submitted on behalf of Defendants demonstrates the strong public interest in maintaining spending limits in University elections. *See Lydo Enterprises,* 745 F.2d at 1213 (injunction causes harm when city is prevented from enforcing an ordinance). Accordingly, the balance of hardships does not tip sharply in Plaintiff's favor; indeed, the opposite is true.

CONCLUSION

The motion for preliminary injunction should be denied.

Respectfully submitted this _____ day of June, 2004.

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