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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

THE KOALA,

Plaintiff,

v.

PRADEEP KHOSLA; DANIEL
JUAREZ; and JUSTIN PENNISH,

Defendants.

CASE NO. 16cv1296 JM(BLM)

ORDER DENYING MOTION FOR
PRELIMINARY INJUNCTION;
GRANTING MOTION TO DISMISS;
GRANTING LEAVE TO AMEND

Plaintiff The Koala moves for a preliminary injunction to compel Defendants to provide funding to support their print media publication. Defendants Pradeep Khosla, Daniel Juarez and Justin Pennish oppose the motion and separately move to dismiss the complaint. The Koala opposes the motion to dismiss. Having carefully considered the court record, pertinent legal authorities, and the arguments of counsel, the court denies the motion for preliminary injunction, grants the motion to dismiss, and grants Plaintiff 14 days leave to amend from the date of entry of this order.

BACKGROUND

Alleging that its First Amendment rights were violated, The Koala seeks declaratory and injunctive relief to compel Defendants to provide/restore funding to support their print media publication. The Koala is an unincorporated, expressive student association and registered student organization (“RSO”) of the University of California San Diego (“UCSD”). Defendant Pradeep Khosla (“Chancellor”) is the

1 Chancellor of UCSD and responsible for the organization, operation, and internal
2 administration of the campus. Defendant Daniel Juarez (“President”) is the President
3 of the Associated Students of UCSD (“Associated Students”). The Associated Students
4 is the official student government for UCSD. Defendant Justin Pennish (“Financial
5 Controller”) is the Financial Controller of Associated Students and responsible for the
6 allocation and expenditure of funds. All Defendants are sued in their official
7 capacities. The Koala seeks prospective relief only, not damages. Plaintiff’s claims
8 arise from the following generally described allegations.

9 The Associated Students

10 The Associated Students is a student government organization of UCSD. The
11 mission of the Associated Students is to “exercise the rights and responsibilities of
12 students to participate in the governance of the University; to manage, invest and
13 maintain the assets of the Association; to create and execute programs which serve the
14 collective interests of the undergraduate population; and to advocate for students
15 within the University, the community, the state, and the nation.” (RJN ¶¶ 5, 7)

16 UCSD collects campus activity fees from its students and allocates the income
17 to Associated Students. Following UCSD policy, Associated Students is to provide
18 “financial and other tangible support for student activities and organizations ... to
19 further discussion among students of the broadest range of ideas,” and “to stimulate
20 on-campus discussion and debate on a wide range of issues from a variety of
21 viewpoints.” The funding decisions “must be viewpoint-neutral in their nature; that is,
22 they must be based upon considerations which do not include approval or disapproval
23 of the viewpoint of the Registered Campus Organization or any of its related programs
24 or activities.” (RJN ¶ 7).

25 The President and Financial Controller make initial funding recommendations
26 to the legislative branch of the Associated Students, referred to as the Senate. The
27 Senate is tasked with representing “the interests and opinions of the UCSD
28 undergraduates” and is responsible for “writ[ing] and maintain[ing] the rules, policies

1 and procedures.”

2 For the 2015-2016 academic year, budgeted revenues of Associated Students
3 were about \$3.7 million. Of that amount, the office of Student Organizations was
4 allocated about \$432,000. Prior to the Senate’s November 18, 2015 amendment to the
5 Standing Rules, RSOs, like The Koala, could receive up to a maximum of \$1,000 per
6 quarter for printed media costs. The 2015-2016 budget contained a \$17,000 line item
7 for these printed media costs. The Funding Guide also noted that the receipt of funding
8 was not guaranteed and that not all media organizations “may not be fully funded in
9 every circumstance for budgetary or other reasons.” While ten or more RSOs requested
10 print media funding between 2010 and 2013, for the Fall of 2015 only two RSOs
11 applied for funding. Plaintiff was one of those and received \$634 in funding for the
12 Fall of 2015 and was approved for \$453 for the Winter of 2016.

13 On November 18, 2015, the Senate, on a 22-2 vote, passed the Media Act.
14 Among other things, the Media Act eliminated funding for all printed media, a funding
15 source for RSOs like Plaintiff. It is this decision that gives rise to Plaintiff’s request
16 to restore or provide access to funding.

17 Plaintiff’s Claims

18 The Koala publishes a satirical student newspaper at UCSD. It publishes on
19 average two to three publications per year. (Cart Decl. ¶2). The publications are
20 available in print and on-line. According to Plaintiff, the publications’s content has
21 provoked significant controversy over the years. On November 16, 2015, Plaintiff
22 published an article entitled “UCSD Unveils New Dangerous Space on Campus.” The
23 article satirized the concept of “safe places” on college campuses and referenced ethnic
24 and sexist stereotypes and employed racial epithets. Following publication of the
25 article, both on the internet and in print, UCSD received numerous complaints about
26 the article’s perceived offensiveness. (FAC ¶52).

27 On November 18, 2015, UCSD released a statement denouncing the publication
28 and its use of “offensive and hurtful language.” That evening, the Associated Students

1 held its regular meeting where the Vice Chancellor of Student Affairs read the official
2 statement denouncing the Koala for its article and several speakers objected to
3 continued funding of The Koala. Ultimately, the Senate voted to end funding for RSOs
4 seeking print media funding. The elimination of funding has allegedly caused Plaintiff
5 to reduce the number of its yearly print publications (but not the on-line publications).¹

6 In broad brush, Plaintiff contends that Defendants violated the Free Press and
7 Free Speech Clauses of the First Amendment by “categorically refusing to provide
8 campus activity fee funding for the publication of student print media.” (FAC ¶¶ 84-
9 87). Plaintiff seeks prospective injunctive relief, and not compensatory damages for
10 lost funding.

11 DISCUSSION

12 The Motion for Preliminary Injunction

13 “The purpose of a preliminary injunction is merely to preserve the relative
14 positions of the parties until a trial on the merits can be held.” University of Texas v.
15 Camenisch, 451 U.S. 390, 395 (1981). Preliminary injunctive relief is available if the
16 party meets one of two tests: (1) a combination of probable success on the merits and
17 the possibility of irreparable harm, or (2) the party raises serious questions and the
18 balance of hardship tips in its favor. Arcamuzi v. Continental Air Lines, Inc., 819 F.2d
19 935, 937 (9th Cir. 1987). “These two formulations represent two points on a sliding
20 scale in which the required degree of irreparable harm increases as the probability of
21 success decreases.” Id. Under both formulations, however, the party must demonstrate
22 a “fair chance of success on the merits” and a “significant threat of irreparable injury.”
23 Id.; Stuhlbarg Int’l Sales Co., Inc. v. John D. Brush & Co., Inc., 240 F.3d 832, 840-41
24 (9th Cir. 2001). Further, courts are required to consider the public interest where the
25 public interest may be affected. In re Excel Innovations, Inc., 502 F.3d 1086, 1093 (9th
26 Cir. 2007).

27
28 ¹ Defendants represent that print media funding was on the Senate’s agenda prior
to publication of the article; and that a decision to terminate funding was also reached
prior to learning of the publication of the dangerous places article.

1 Before turning to the relief requested, the court addresses Defendants' argument
2 that this entire action is barred by the Eleventh Amendment.

3 **The Eleventh Amendment**

4 The Eleventh Amendment provides:

5 "The Judicial power of the United States shall not be construed to extend
6 to any suit in law or equity, commenced or prosecuted against one of the
7 United States by Citizens of another State, or by Citizens or Subjects of
any Foreign State."

8 The Eleventh Amendment extends to suits by citizens against their own States.
9 Board of Trustees of the Univ of Alabama v Garrett, 531 U.S. 356, 363 (2001). The
10 ultimate guarantee of the Eleventh Amendment is that non-consenting States or their
11 agencies may not be sued by private individuals in federal court. Id. Congress may
12 abrogate the States' Eleventh Amendment immunity when it both unequivocally intends
13 to do so and "act[s] pursuant to a valid grant of constitutional authority." Kimel v.
14 Florida Bd. of Regents, 528 U.S. 62, 73 (2000).

15 Under the doctrine developed in Ex parte Young, 209 U.S. 123, 166 (1908),
16 actions brought against state officials to enjoin them from continuing to enforce
17 allegedly unconstitutional state laws are not necessarily deemed actions against the
18 state and are, therefore, not barred by the Eleventh Amendment. The Supreme Court
19 recognizes that the "general criterion for determining when a suit is in fact against the
20 sovereign is the effect of the relief sought." Pennhurst State School and Hospital v.
21 Halderman, 465 U.S. 89, 107 (1984). The doctrine rests on the premise, or "fiction,"
22 "that when a federal court commands a state official to do nothing more than refrain
23 from violating federal law, he is not the State for sovereign-immunity purposes. The
24 doctrine is limited to that precise situation, and does not apply 'when 'the state is the
25 real, substantial party in interest [] as when the 'judgment sought would expend itself
26 on the public treasury or domain, or interfere with public administration.'" Id.
27 "Naming state officials as defendants rather than the state itself will not avoid the
28 Eleventh Amendment when the state is the real party in interest. The state is the real

1 party in interest when the judgment would tap the state's treasury or restrain or compel
2 government action." Almond Hill Sch. v. U.S. Dep't of Agric., 768 F.2d 1030, 1033
3 (9th Cir. 1985).

4 "Ex parte Young cannot be used to obtain an injunction requiring the payment
5 of funds from the State's treasury." Virginia Office for Protection and Advocacy v,
6 Stewart, 563 U.S. 247, 256-57 (2011). Prospective financial consequences to the state
7 are acceptable, and do not interfere with a state's Eleventh Amendment rights, where
8 the fiscal effects "are necessarily incident to compliance with prospective orders."
9 Almond Hill, 768 F.2d at 1034.

10 Here, the relief requested in the FAC constitutes a claim against the state treasury
11 and interferes with the state's administration of UCSD. At the heart of Plaintiff's claim
12 is a request to provide/restore funding from the state. Plaintiff seeks the restoration of
13 funding for those RSOs who previously received funding for print media. The funding
14 is not incidental to Plaintiff's claims. Rather, the receipt of funding is Plaintiff's
15 remedy. Plaintiff cannot avoid the Eleventh Amendment by recasting its claim as one
16 for prospective injunctive relief, when that relief is solely dependent upon obtaining
17 funds from the state treasury.

18 While Plaintiff characterizes its remedy as one for prospective injunctive relief
19 only, Plaintiff ignores that this remedy would require direct payments by the state from
20 its treasury to Plaintiff and other RSOs who had their funding eliminated when the
21 Associated Students determined to no longer fund any print media request. In Council
22 31 of Am. Fed. of State, County & Munic. Workers, AFL-CIA v. Quinn, 680 F.3d 875
23 (7th Cir. 2012), plaintiff brought an action to enjoin the State of Illinois from
24 implementing a pay freeze for state employees. The Seventh Circuit concluded that
25 plaintiff's claims were barred by the Eleventh Amendment because the request for
26 injunctive relief to enjoin implementation of the pay freeze "would require direct
27 payments by the state from its treasury" to state employees. Such a result "would have
28 an effect upon the state treasury that is not merely ancillary but is the essence of the

1 relief sought,.” Id. at 882-83.

2 In recognition of the limitations placed on Plaintiff’s claims in federal court by
3 the Eleventh Amendment, Plaintiff argues that it is entitled to seek “an injunction
4 against enforcement of the Media Disqualification that prevents it from seeking funds
5 available to other student groups.” (Oppo. at p.6:23-25). Based upon the FAC’s
6 current allegations however, the Eleventh Amendment bars Plaintiff’s claims in federal
7 court. Both §1983 claims are premised upon the allegations that Plaintiff’s First
8 Amendment rights were violated by Defendants “categorically refusing to provide
9 campus activity fee funding for the publication of student print media.” (FAC ¶¶85,
10 87). Plaintiff claims that the elimination of funding to all print media RSOs by the
11 Associated Students’ Senate violated its First Amendment rights and the remedy it
12 seeks is “to obtain funding for publication of student print media.” (FAC ¶¶ 2-4, 85,
13 87). While characterized as injunctive relief, the relief would have more than an
14 incidental impact on the “state treasury that is not merely ancillary but is the essence
15 of the relief sought.” Id. As currently pled, particularly in light of the weakness of
16 Plaintiff’s federal claims, as discussed in the following section, the present allegations
17 caution against applying the Ex parte Young doctrine.

18 Plaintiff also argues that the present circumstances are similar to the welfare
19 cases. In Graham v. Richardson, 403 U.S. 365 (1971), Arizona and Pennsylvania
20 welfare officials were prohibited from denying welfare benefits to otherwise qualified
21 recipients who were aliens. The Supreme Court reasoned that imposing lengthy
22 residency requirements on aliens, as a condition to the receipt of welfare benefits,
23 violates federal law. In Edelman v. Jordan, 415 U.S. 651, 668 (1974), the Supreme
24 Court noted that prospective relief requiring the payment of welfare funds was the
25 necessary result of compliance with federal law. Application of Ex parte Young is not
26 always a clear-cut determination but must be viewed in light of the federal claims. Id.
27 at 667. As discussed in the following section, the claims alleged do not sufficiently
28 establish a right to relief. Amendment of the complaint may correct this deficiency.

1 Plaintiff also relies on Arizona Students' Ass'n v. Arizona Board of Regents, 824
2 F.3d 858 (9th Cir. 2016) to support its claims. There, the district court determined that
3 the Eleventh Amendment barred claims against the Arizona Board of Regents
4 ("ABOR"). The Ninth Circuit affirmed the dismissal of ABOR but held that the district
5 court erred by not granting plaintiff leave to amend to name appropriate state officials
6 and to assert claims for prospective relief to conform to the Ex parte Young doctrine.
7 The district court also erred in determining that the plaintiff failed to state a claim for
8 First Amendment retaliation - a claim not asserted by The Koala.

9 Here, the court concludes that the present allegations fail under the Eleventh
10 Amendment. Plaintiff requests leave to amend the FAC; and the court concludes that
11 there may be circumstances to support application of the Ex parte Young doctrine.
12 Accordingly, the court grants Plaintiff leave to amend. See Fed.R.Civ.P. 15(a)(2).

13 The court now turns to the merits of Plaintiff's claims and the requirement of
14 irreparable harm.

15 **The Merits**

16 Plaintiff broadly contends that the elimination of public funds for all print media
17 expenses by RSOs violates the First Amendment. The Supreme Court "has adopted a
18 forum analysis as a means of determining when the Government's interest in limiting
19 the use of its property to its intended purpose outweighs the interest of those wishing
20 to use the property for other purposes." Cornelius v. NAACP Legal Def. & Educ.
21 Fund, Inc., 473 U.S. 788, 800 (1985). The court initially looks to the nature of the
22 forum to balance the government's interest against the rights granted by the First
23 Amendment.

24 Here, the parties appear to agree that campus activity funding of RSOs is a
25 limited public forum. (Oppo. MTD at p.16:17). Unlike a traditional or designated
26 public forum where government action must be narrowly tailored to serve compelling
27 state interests, government actions in a limited public forum only need to be
28 "reasonable in light of the purpose of the forum." Seattle Mideast Awareness

1 Campaign v. King Cty., 781 F.3d 489, 499 (9th Cir. 2015).

2 To identify the relevant limited public forum for purposes of a First Amendment
3 analysis, the court focuses “on the access sought by the speaker.” Cornelius, 473 U.S.
4 at 801. As Plaintiff seeks to restore and obtain access for funding for print media, the
5 court agrees with Defendants, based upon the FAC’s current allegations, that the
6 relevant forum consists of Associated Students’ funding of student print publications.
7 Plaintiff seeks to expand the relevant forum to include Associated Students’ rules and
8 practices and funding activities of RSOs. (FAC ¶29). The court rejects Plaintiff’s
9 attempt to expand the scope of the forum beyond the funding of print media
10 publications. The Associated Students is a student government organization charged
11 with serving the diverse collective interests of the undergraduates at UCSD. The funds
12 raised through the student activities are about \$3.7 million. These funds support
13 student organizations for such events as tournaments, competitions, sports clubs,
14 concerts and other activities. To provide context, Plaintiff seeks to restore access to
15 the \$17,000 in budgeted funds for print media publications (Plaintiff received \$634 in
16 funding for Fall of 2015).

17 Having defined the limited public forum at issue, the court looks to the actions
18 taken to close the forum to all RSOs receiving print media funding. “In a limited
19 public forum, restrictions that are viewpoint neutral and reasonable in light of the
20 purpose served by the forum are permissible.” DiLoreto v. Downy Unif. Sch. Dist. Bd.
21 Of Ed., 196 F.3d 958, 965 (9th Cir. 1999) (citing Rosenberger v. Rector & Visitors of
22 the Univ. of Va., 515 U.S. 819, 829 (1995)). Rather than address the alleged
23 restrictions in context of a limited public forum, Plaintiff largely responds to First
24 Amendment issues in the context of a public forum.

25 In Rosenberger, a university student organization which published a newspaper
26 with a Christian editorial viewport challenged the university’s decision to deny funding
27 for printing costs available to other student groups. The student organization was
28 denied funds because it was considered a religious organization in light of its content.

1 The Supreme Court found that the government in a limited public forum may not
2 engage in viewpoint discrimination. Id. The ban on the use of student activity fees to
3 publish Christian-themed newspapers, but not to other publications, is an “egregious
4 form of content discrimination.” Id.

5 Here, based upon the limited record before the court, the elimination of funding
6 for all print media appears both content and viewpoint neutral within the meaning of
7 Rosenberger. Associated Students do not provide funding for print media publications
8 to any RSO. While Plaintiff has cited negative complaints and comments made by the
9 public, students, and certain Defendants for the proposition that it was singled out for
10 its satirical expression, Plaintiff fails to cite legal authorities where the motivation, and
11 not the conduct, of some government actors (the Senate of Associated Students) is
12 determinative on First Amendment issues in context of a limited public forum.²

13 Finally, Plaintiff asserts that it states a claim for retaliation under the First
14 Amendment. The difficulty with this argument is that Plaintiff does not allege a
15 retaliation claim. Plaintiff may, however, amend the complaint to allege such claim.

16 In sum, the court concludes that Plaintiff fails to demonstrate more than a remote
17 likelihood of success on the merits based upon the FAC’s present allegations and
18 evidentiary matters submitted to the court. As Plaintiff requests leave to amend, the
19 court grants 14 days leave to amend from the date of entry of this order.

20 **Irreparable Harm**

21 In light of its merits-based arguments, Plaintiff submits that the loss of First
22 Amendment rights is sufficient, in light of the strong policy favoring upholding First

23
24 ²The court notes that the vast majority of the authorities cited by the parties
25 predate the so-called digital revolution. Publication, once exclusively within the realm
26 of print media, is now also communicated digitally on-line and on social media sites.
27 In the present case, there is no evidence to suggest that The Koala was impacted in any
28 manner in its digital publications. Further, the evidentiary record submitted by the
parties does not focus on print media versus digital media. There is no showing that
print media (total printing budget for Plaintiff in Fall 2015, \$634, and Winter 2015,
\$453) plays a significant role in disseminating Plaintiff’s message to a computer-
literate student body. Finally, the court notes that some of the negative comments
about the article originated from digital readers - readers who continue to receive
unimpeded access to the Koala.

1 Amendment rights, to establish the requisite injury. This argument is not persuasive
2 because, based on the FAC's allegations, Plaintiff fails to state a §1983 claim.

3 In sum, the court concludes that Plaintiff fails to establish the requisite
4 combination of success on the merits and irreparable harm. The motion for preliminary
5 injunction is denied.


6 The Motion to Dismiss

7 For the above stated reasons, the court grants the motion to dismiss with leave
8 to amend.

9 In sum, the court denies the motion for preliminary injunction, grants the motion
10 to dismiss, and grants Plaintiff 14 days leave to amend from the date of entry of this
11 order.

12 **IT IS SO ORDERED.**

13 DATED: November 1, 2016

14 
15 Hon. Jeffrey T. Miller
United States District Judge

16 cc: All parties

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