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**UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII**

**MERRITT BURCH and ANTHONY
VIZZONE**)

Plaintiffs,)

v.)

**UNIVERSITY OF HAWAII
SYSTEM, DAVID LASSNER,
DONALD STRANEY, ELLEN
KUSANO and LEOMI BERGKNUT,**)

Defendants.)

Case No.)

**COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF
AND DAMAGES; EXHIBITS A-E;
SUMMONS**

JURY TRIAL DEMANDED

Plaintiffs Merritt Burch and Anthony Vizzone complain of Defendants and allege:

I. INTRODUCTION

1. “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). This is particularly true of public universities, where “[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding.” *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). The freedoms of speech, assembly, and petition must be zealously guarded because “[t]he college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas.’” *Healy v. James*, 408 U.S. 169, 180 (1972). Recognizing the gravity of these principles, the United States Supreme Court has held that “state colleges and universities are not enclaves immune from the sweep of the First Amendment,” *id.*, and it has stressed that “[t]he first danger to liberty lies in granting the State the power” to limit these freedoms “against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995).

2. Despite the fact that “state-operated schools may not be enclaves of totalitarianism,” and that neither “students [nor] teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” *Tinker v. Des*

Moines Indpt. Comm. Sch. Dist., 393 U.S. 503, 506, 511 (1969), the University of Hawaii-Hilo (“UH Hilo”) has adopted and enforced excessive restrictions on the rights of student organizations, and limited student speech in open areas of the campus. UH Hilo officials ordered Plaintiffs to cease approaching their fellow students to offer them copies of the United States Constitution and then later chilled their expression by telling them “this isn’t really the 60s anymore” and “people can’t really protest like that anymore.” Further, UH Hilo unconstitutionally restricts access to open areas on campus by requiring students to seek permission to speak at least seven business days in advance and by limiting the areas where students may engage in spontaneous expressive activities to only 0.26% of UH Hilo’s 115-acre campus.

3. This is a civil rights action to protect and vindicate the First and Fourteenth Amendment rights of Merritt Burch and Anthony Vizzone and their fellow students at UH Hilo. By policy and practice, UH Hilo unlawfully restricts students’ constitutional rights to free expression, and it has restricted the Plaintiffs’ constitutional rights specifically. Accordingly, UH Hilo’s policies and enforcement practices are challenged on their face and as applied to Ms. Burch and Mr. Vizzone. This action seeks declaratory and injunctive relief, damages, and attorneys’ fees.

II. JURISDICTION AND VENUE

4. This action arises under the United States Constitution, particularly the First and Fourteenth Amendments, and the Civil Rights Act, 42 U.S.C. §§ 1983 and 1988.

5. This Court has original jurisdiction over these federal claims pursuant to 28 U.S.C. §§ 1331 and 1343.

6. This Court has authority to grant the requested declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 and Federal Rule of Civil Procedure 57.

7. This Court has authority to issue the requested injunctive relief pursuant to 42 U.S.C. § 1983 and Federal Rule of Civil Procedure 65.

8. This Court has authority to award attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

9. Venue is proper in the United States District Court for the District of Hawaii pursuant to 28 U.S.C. § 1391(b) because the events giving rise to the instant claim occurred within this District and because at least one Defendant resides in this District.

III. PLAINTIFFS

10. Plaintiff Merritt Burch is, and was at all times relevant to this Complaint, a resident of Kurtistown, Hawaii, and she is presently a student at the University of Hawaii at Hilo pursuing a bachelor of science degree in molecular

biology. She is the current president of the Young Americans for Liberty (“YAL”) chapter at UH Hilo. YAL is a pro-liberty organization, with more than 500 chapters and 162,000 youth activists on America’s college campuses nationwide. Its mission is to “to identify, educate, train, and mobilize young people committed to winning on principle.”

11. Plaintiff Anthony Vizzone is, and was at all times relevant to this Complaint, a resident of Keaau, Hawaii, who is presently a student at the University of Hawaii at Hilo pursuing a bachelor of science degree in computer science. He is the current treasurer of the YAL chapter at UH Hilo.

IV. DEFENDANTS

12. Defendant University of Hawaii System (“UH System”) is a public university system organized and existing under the laws of the State of Hawaii. The UH System includes 10 campuses, including the University of Hawaii at Hilo, and dozens of educational, training and research centers across the Hawaiian Islands. The UH System has a total enrollment of 60,330 students, and a fiscal year 2012 budget of \$902.3 million. The UH System is properly sued pursuant to Haw. Rev. Stat. § 304A-108.

13. Defendant David Lassner is, and was at all times relevant to this Complaint, Interim President of the University of Hawaii System. He is the UH System’s chief executive officer, responsible for the UH System’s administration

and policy-making, including the policies and procedures challenged herein that were applied to deprive Ms. Burch and Mr. Vizzone of their constitutional rights. Defendant Lassner acquiesced in, sanctioned, and supported the actions of Defendants Ellen Kusano and Leomi Bergknut in enforcing these policies against Ms. Burch and Mr. Vizzone. Defendant Lassner acted under color of state law when he violated Ms. Burch's and Mr. Vizzone's constitutional rights to free expression. Defendant Lassner is sued in his official capacity.

14. Defendant Donald Straney is, and was at all times relevant to this Complaint, the Chancellor of the University of Hawaii at Hilo, a public university organized and existing under the laws of the State of Hawaii. He is the chief executive officer of the University of Hawaii at Hilo, responsible for enactment and enforcement of UH Hilo policies, including the policies and procedures challenged herein that were applied to deprive Ms. Burch and Mr. Vizzone of their constitutional rights. Defendant Straney acquiesced in, sanctioned, and supported the actions of Defendants Ellen Kusano and Leomi Bergknut in enforcing these policies against Ms. Burch and Mr. Vizzone. Defendant Straney acted under color of state law when he violated Ms. Burch's and Mr. Vizzone's constitutional rights to free expression. Defendant Straney is sued in his official capacity.

15. Defendant Ellen Kusano is, and was at all times relevant to this Complaint, Director of Student Affairs at the University of Hawaii at Hilo. She is

responsible for overseeing regulation of and compliance by all Registered Independent Student Organizations (“RISOs”), including under the policies and procedures challenged herein that were applied to deprive Ms. Burch and Mr. Vizzone of their constitutional rights. Defendant Kusano acted under color of state law when she violated Ms. Burch’s and Mr. Vizzone’s constitutional rights to free expression. Defendant Kusano is sued both in her individual and official capacities.

16. Defendant Leomi Bergknut is, and was at all times relevant to this Complaint, the Student Leadership Development Coordinator at the University of Hawaii at Hilo. She also oversees training and regulation of RISOs, including the policies and procedures challenged herein that were applied to deprive Ms. Burch and Mr. Vizzone of their constitutional rights. Defendant Bergknut acted under color of state law when she violated Ms. Burch’s and Mr. Vizzone’s constitutional rights to free expression. Defendant Bergknut is sued both in her individual and official capacities.

V. STATEMENT OF FACTS

A. Violation of Plaintiffs’ Constitutional Rights

(1) Campus Center Plaza Incident

17. From January 14 through January 16, 2014, Ms. Burch and other members of the UH Hilo YAL chapter participated in a university-sponsored event

to introduce campus students to UH Hilo's various student organizations. YAL and other student groups congregated at tables set up in the Campus Center Plaza, a concrete patio located near the main entrance of campus. The activity, known as "tabling," allows student groups to display information about their activities and to speak with students who might be interested in joining.

18. When they arrived at the Campus Center Plaza on January 16, 2014, Ms. Burch and another YAL member found that the only available table that could accommodate their banner was in the corner of the plaza, removed from the main flow of pedestrian traffic.

19. About half-an-hour before the end of the event, Ms. Burch and the other YAL member became discouraged by the minimal number of students approaching their remote table and decided to engage students directly in the same way they had seen other groups do that day. For instance, they witnessed members of the Accounting Club approach students asking them to buy "chili tickets" for a club fundraiser. Accordingly, Ms. Burch and her fellow YAL member got up from behind their table to hand out the copies of the United States Constitution and two other cards explaining YAL's mission.

20. Ms. Burch and the other YAL member walked toward the middle of Campus Center Plaza. As students walked by, Ms. Burch and the other YAL member asked if the passerby wanted a copy of the Constitution. Every student

who was offered a Constitution took a copy. No suggestion was made that Ms. Burch or any other YAL member acted in a disruptive manner or annoyed other students, and no complaints were made about their activities.

21. Nevertheless, as they began handing out copies of the Constitution, Ms. Burch and the other YAL member noticed a woman watching them, who was later identified as Defendant Ellen Kusano, University Director of Student Affairs. After about 15 minutes, Defendant Kusano drew near, and, without identifying herself, instructed Ms. Burch and other YAL members not to approach students to “solicit information.” In an authoritative tone, she directed the Plaintiff to “go back behind your table and wait for the students to come to you.” During this exchange Defendant Kusano pointed repeatedly to the YAL table in the far corner of Campus Center Plaza.

22. Defendant Kusano explained that the University had a policy to prevent RISOs from approaching other students during tabling events. The YAL member accompanying Ms. Burch responded that she and Ms. Burch had a “constitutional right to hand out this document.” Defendant Kusano answered, “It’s not about your rights in this case, it’s about the University policy that you can’t approach people.” When Ms. Burch asked whether it was “unconstitutional on campus to hand out copies of the Constitution,” Defendant Kusano responded,

“This isn’t about your rights. In the RISO Handbook it says that you can’t approach people.”

23. The next day, on January 17, 2014, Defendant Leomi Bergknut, the Student Leadership Development Coordinator, sent an email at 1:18 a.m, to all RISO presidents, vice presidents, and advisers at UH Hilo. An attached document contained the following statement:

Reminder: When using a public venue such as the Campus Center Plaza, RISOs may not approach people to solicit information. Although we support a diverse intellectual and social atmosphere on campus, we also believe that each person should be able to freely choose whether to listen to your solicitation or not. At all times, during a RISO’s use of any campus facility, there shall be RISO members present. – from RISO Handbook

24. As a direct result of Defendant Kusano’s and Defendant Bergknut’s actions, YAL members Ms. Burch and Mr. Vizzone curtailed expressing their beliefs or distributing literature while on campus for fear of being punished under University policies.

25. Additionally, Ms. Burch, Mr. Vizzone, and other YAL members have limited their expressive activities out of fear of being punished pursuant to policies set forth in the University’s RISO Handbook.

(2) RISO Orientation Meeting

26. On January 23, 2014, Ms. Burch and Mr. Vizzone attended a RISO orientation meeting at which Defendant Bergknut reiterated: “The University policy [for events] says that RISOs can’t approach people. We run a diverse campus and people can feel intimidated and it’s like they [the students] can’t say no. We have a free speech zone for students to use and it’s between the theater and new student services building.”

27. Defendant Bergknut asked Ms. Burch and Mr. Vizzone about YAL’s plans for spring semester. They responded that they were “thinking about protesting the NSA’s spying.” Defendant Bergknut asked what the letters N-S-A mean, and when Mr. Vizzone clarified that they meant the National Security Agency, Defendant Bergknut suggested that they hold their events “in the free-speech zone” rather than in the larger more accessible parts of campus where students are more likely to congregate.

28. As set forth in UH Hilo policies, the “Free Speech Zone” is the only public location on campus where students may express themselves without obtaining University permission in advance. It is an area located on the edge of campus between the theater and the student services building. Ms. Burch and Mr. Vizzone estimate that the area is approximately .3 of an acre, or about .26% of UH Hilo’s 115-acre campus. The tiny area slopes downward towards a muddy ravine

and the sidewalks that surround it are on a steep upward incline from the zone itself. This area is illustrated on the University of Hawaii at Hilo Main Campus Map highlighted in yellow. (*See* Exhibit A, Main Campus Map, modified with color, and related photographs).

29. When Ms. Burch expressed concern that the “free speech zone” was in an area of campus with minimal pedestrian traffic, Defendant Bergknut counseled them to do “PR and advertising” which could lead them to “be surprised about the people that show up.” Defendant Bergknut then ended the conversation by saying, “This isn’t really the 60’s anymore. People can’t really protest like that anymore, times have really changed since the movement back then.”

30. Defendant Bergknut’s actions caused Ms. Burch and Mr. Vizzone to curtail expressing their beliefs or distributing literature while on campus for fear of being punished under UH Hilo policies.

(3) Reservation of Campus Facilities

31. Besides the “free speech zone” area, only two other outdoor campus locations are available to students to engage in free expression with the UH Hilo student body – the Campus Center Plaza and the Library Lanai. UH Hilo policies require that students request a reservation at least seven working days in advance to obtain permission to hold expressive activities at either of those areas. Requests

must be made through the Campus Center, which is directed by Defendant Ellen Kusano.

32. On March 3, 2014, Ms. Burch requested use of the Library Lanai from 9:00 a.m. through 2:00 p.m. on April 24, 2014, to hold an even called “War on YOUth” to attract attention to the rate of government spending and the responsibility that current students will have for repaying the national debt currently being incurred by government borrowing. As part of the activity the UH Hilo YAL group planned to set up a banner and distribute literature to raise awareness about the issue.

33. The request was received and assigned control number 140431. The confirmation of the request contained the following warning: “DO NOT PUBLICIZE THIS EVENT UNTIL CONFIRMATION EMAIL IS RECEIVED.” (Capitalization is in the original.)

34. On information and belief, reservation requests are usually approved or denied within a few days. However, sixteen days after submitting a request, the University had not authorized YAL’s “War on YOUth” event in the Library Lanai. Therefore, on March 19, 2014, Ms. Burch went to the Student Center to inquire about the status of the reservation request. A staff member at the Student Center could not explain to Ms. Burch why the YAL event had not been approved. Later

that day, Ms. Burch received electronic confirmation for the YAL event only after she raised concerns in person about the delay.

35. The Reservation Policy for use of the Campus Center Plaza and the Library Lanai imposes a prior restraint on Plaintiffs' expressive activities and unconstitutionally impeded their ability to publicize their event.

36. Defendant's discriminatory treatment of Plaintiffs' request to use the Library Lanai for expressive purposes also constituted an as-applied violation of Ms. Burch's and Mr. Vizzone's constitutional rights.

B. The UH System's and UH Hilo's Policies

37. The Board of Regents of the UH System ("BOR") promulgates Administrative Rules pursuant to Haw. Rev. Stat. §304A-103. Pursuant to Chapter 13 of the Board of Regents' Bylaws and Policies ("BOR Chapter 13"), the UH System President may delegate responsibility for promulgating practices and procedures governing the use of university owned or operated facilities to the chief executive officers of the institutions within the system, including UH Hilo. § 20-13-2. (*See* Exhibit B).

38. BOR Chapter 13 provides that "[t]he president or a designee shall designate one or more appropriate public forum areas on campus where individuals may assemble and engage in public speech activities." § 20-13-6(a). It further provides that any use of a designated public forum area "must comply with

university and campus rules and policies,” § 20-13-6(b), and “[w]hen a location other than a designated public forum area is utilized for public speech activities, the practices and procedures governing the time, place, and manner of such activities to be established shall be observed.” § 20-13-6(c).

39. Pursuant to BOR Chapter 13, UH Hilo adopted and published a “Facilities Use Policy.” (*See* Exhibit C). This policy and the regulations UH Hilo has devised to implement the policy are constitutionally flawed for the reasons outlined in paragraphs 40 to 56 of this complaint.

40. The Facilities Use Policy designates the campus’s “Public Forum Area,” where “individuals may assemble and engage in public speech activities,” as the “lawn area between Student Service Building and the Theater.”

41. The “Public Forum Area” as defined in the UH Hilo policy is the so-called “Free Speech Zone,” the .3-acre area described in Paragraph 28 above, to which Defendant Bergknut directed Ms. Burch and Mr. Vizzone for their NSA protest event.

42. The Facilities Use Policy further provides limited areas for students and student groups to post and/or display written material “on designated bulletin boards,” and forbids attaching notices, posters, announcements and other printed and written material “to any structure or natural feature on campus, including, but

not limited to, the sides or doors of building [sic], the surface of walkways or streets, posts, waste receptacles, benches and trees.”

43. The UH Hilo Registered Independent Student Organizations Handbook (“RISO Handbook”) identifies only two other outdoor campus facilities for students to hold events – the Campus Center Plaza and the Library Lanai. (*See* Exhibit D). The reservation process for securing permission to use either the Campus Center Plaza or the Library Lanai requires at least seven working days before a reservation may be confirmed. For example, the reservation form for the Library Lanai states:

After agreeing to these regulations [for using the space], the next step will take you to the online reservation form to request the Library Lanai. Until an email confirmation is sent by the Campus Center to you, the request is not final. Seven working days lead time is required for all reservations. Please do not publicize your event’s location until receiving confirmation of your reservation.

...

A confirmed reservation must be officially canceled 24 hours in advance. If the reservation is during non-regular hours, it must be cancelled 48 hours in advance. Non-cancellation may result in service fees and/or may cause suspension of scheduling privileges for a month.

44. The UH Hilo campus has many suitable open areas and sidewalks beyond the free speech areas where student expressive activity, including distribution of literature, will not interfere with or disturb access to university

buildings or sidewalks, impede vehicular or pedestrian traffic, or in any way substantially disrupt the operations of campus or the university's educational functions.

45. The Facilities Use Policy and the RISO Handbook do not provide standards to guide the discretion of the public officials of UH Hilo tasked with reviewing requests to use the "free speech area" or other designated public fora or to evaluate requests for additional time, thus empowering such public officials to administer the policy arbitrarily or on the basis of impermissible factors.

46. The policies function as a licensing scheme with which students must comply before engaging in the exercise of their free speech rights.

47. Students are subject to disciplinary action for violating the Facilities Use Policy, which states that "violation of any University of [sic] campus rules and policies, any of the practices and procedure contained herein, or the terms of any executed use or rental agreement shall be grounds to terminate or deny the right of an organization or individual to use campus facilities at the University."

48. Section 20-13-7 of the BOR Bylaws and Policies prohibits "solicitation" in "any building, structure, facility, or on any grounds, sidewalks, or streets on the campus of any institution." The policy does not define the term "solicitation."

49. However, the policy expressly excludes numerous activities from the prohibition, including (but not limited to): sales of newspapers or magazines; collections of membership fees or dues by RISOs; collections of admission fees for campus events; fundraising activities sponsored by RISOs; and fundraising activities sponsored by the University.

50. Apart from these enumerated exceptions, the Policy vests Defendants with unbridled discretion to expand or restrict the definition of “solicitation,” and expressly authorizes the president to “except other forms of solicitation” if he “determines this to be in the best interest of the university.” The rules governing solicitation are also set forth in UH Hilo’s “Facilities Use Policy.”

51. The RISO Handbook further provides:

[I]f you are fundraising, recruiting members, providing information, taking a survey, you need to let people know this without their having to actually go to your table or booth. When using a public venue, RISOs may not approach people to solicit them. Although we support a diverse intellectual and social atmosphere on campus, we also believe that each person should be able to freely choose whether to listen to your solicitation or not.

52. Students are subject to disciplinary action for violating the RISO Handbook, which states that “[a]ll UH Hilo students participating in RISOs are expected to behave in a civil manner,” and that “[s]tudents who choose to violate

the rights of others and disrupt activities through impermissible behavior will be subject to disciplinary action under the UH Hilo Student Conduct Code.”

53. BOR Chapter 13, the Facilities Use Policy, and the RISO Handbook have a chilling effect on Ms. Burch’s and Mr. Vizzone’s rights, and those of all students of the UH System and the University of Hawaii at Hilo, to engage freely and openly in expressive activities, including distributing literature.

54. Ms. Burch and Mr. Vizzone wish to engage in expressive activities, including distributing literature, on the UH Hilo campus without the need to obtain advance approval from university officials, but they have continued to submit to UH Hilo’s licensing scheme since being censored by Defendant Kusano and Defendant Bergknut for fear of disciplinary action.

55. UH Hilo repeatedly has been put on notice that its speech policies are unconstitutional. In late 2008, the Foundation for Individual Rights in Education (“FIRE”), a non-partisan, non-profit, civil liberties organization that protects free expression on college and university campuses, and to whose Student Network plaintiffs belong, sent a certified letter to UH Hilo’s Chancellor informing him that the university maintained unconstitutional speech codes. As *The Chronicle of Higher Education* reported, this letter was part of a national mailing to put senior officials of public universities with unconstitutional speech codes on notice that they could be sued for violating students’ rights. (See Exhibit E). UH Hilo

received a second letter with a similar warning in 2010. Since 2010, UH Hilo has been listed every year in FIRE's annual "Spotlight on Speech Codes" report as a "red light" school, namely one with policies, such as those at issue in this case, that "clearly and substantially" restrict freedom of speech. UH Hilo has had ample notice of its policies' infirmities and time in which to reform them, but has ignored these notifications and persisted in violating students' expressive rights.

56. Defendants' policies and actions create a hostile atmosphere for free expression on campus, chilling the speech of other UH Hilo students who are not before the Court.

VI. CAUSES OF ACTION

FIRST CAUSE OF ACTION

As-Applied Violation of Plaintiff's Right to Free Speech Under the First and Fourteenth Amendments (42 U.S.C. § 1983)

57. Plaintiff repeats and realleges each of the foregoing allegations in Paragraphs 1-56 of this Complaint.

58. The First and Fourteenth Amendments extend to campuses of state colleges and universities. *Healy v. James*, 408 U.S. at 180.

59. All of the acts of Defendants, their officers, agents, employees, and servants were executed, and are continuing to be executed, by the Defendants under the color and pretense of the policies, statutes, ordinances, regulations, customs, and usages of the State of Hawaii.

60. The College bears the burden of justifying any regulation of expressive activity in the public areas of the campus.

61. By stopping Plaintiffs' lawful activities distributing copies of the U.S. Constitution on the UH Hilo campus without prior approval and outside the "free speech zone," Defendants have explicitly and implicitly chilled Plaintiffs' free expression, and have deprived Plaintiffs of their clearly established rights to freedom of speech and expression secured by the First and Fourteenth Amendments to the Constitution of the United States. Defendant Kusano and Defendant Bergknut violated a clearly established constitutional right of which all reasonable college administrators and staff should have known, rendering them liable to Ms. Burch and Mr. Vizzone under 42 U.S.C. § 1983.

62. The denial of constitutional rights is irreparable injury *per se*, and Ms. Burch and Mr. Vizzone are entitled to declaratory and injunctive relief. As a consequence of being denied their First Amendment rights, including but not limited to the ability to distribute copies of the U.S. Constitution, Plaintiffs experienced significant emotional pain and anguish.

63. Plaintiffs are entitled to a declaration that Defendants violated their First Amendment rights. Additionally, Plaintiffs are entitled to damages in an amount to be determined by the evidence and this Court, and the reasonable costs of this lawsuit, including their reasonable attorneys' fees.

SECOND CAUSE OF ACTION

Facial Challenge to Violation of Right to Free Speech Under the First and Fourteenth Amendments (42 U.S.C. § 1983) – Prior Restraint

64. Plaintiffs repeat and reallege each of the foregoing allegations in Paragraphs 1-63 of this Complaint.

65. Students have a First Amendment right to engage in expressive activities and to distribute written materials in the public areas of a state college without obtaining advance permission from government officials. *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981); *Papish v. Board of Curators of Univ. of Mo.*, 410 U.S. 667 (1973); *Jews for Jesus, Inc. v. City Coll. of San Francisco*, No. C 08-03876 MHP, 2009 WL 86703, at *3 (N.D. Cal. Jan. 12, 2009).

66. A permitting requirement is a prior restraint on speech and therefore bears a heavy presumption against its constitutionality. *Berger v. City of Seattle*, 569 F.3d 1029, 1037 (9th Cir. 2009). The presumptive invalidity and offensiveness of advance notice and permitting requirements stem from the significant burden they place on free speech.

67. The policies and conduct of Defendants restricting all First Amendment protected speech by requiring an advance application to engage in such activity before allowing expressive activities on the University campus grounds constitute an unconstitutional prior restraint on First Amendment rights.

68. Laws that subject the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, are unconstitutional. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969). Defendants’ policies vest unfettered discretion in University administrative personnel to restrict constitutionally protected expression.

69. As a direct result of the Defendants’ continued maintenance of BOR Chapter 13, the Facilities Use Policy, and the RISO Handbook, Plaintiffs and other similarly situated students have been, and will continue to be, irreparably injured in that they have been, and will be, deprived of their right to free speech under the First and Fourteenth Amendments to the Constitution.

70. As a consequence of the Defendants’ violation of Plaintiffs’ and other similarly situated students’ First and Fourteenth Amendment rights, Plaintiffs are entitled to injunctive relief, and the reasonable costs of this lawsuit, including their reasonable attorneys’ fees.

THIRD CAUSE OF ACTION

Facial Challenge to Violation of Right to Free Speech Under the Plaintiffs’ First and Fourteenth Amendment Rights (42 U.S.C. § 1983) – Overbreadth

71. Plaintiffs repeat and reallege each of the foregoing allegations in Paragraphs 1-70 of this Complaint.

72. The University bears the burden of justifying any regulation of expressive activity in the public areas of the campus. Any restrictions on speech in public areas must serve a substantial public interest and must be narrowly tailored and applied so as not to burden more speech than is essential.

73. Even purportedly neutral regulations, such as time, place, or manner restrictions, must be narrowly tailored and must not burden more speech than necessary to achieve a substantial governmental interest.

74. The University cannot legitimately declare the vast majority of public areas on campus to be “non-public forums.” *McGlone v. Bell*, 681 F.3d 718 (6th Cir. 2012). Nor can the University identify a substantial governmental interest to be served by preventing individuals from speaking through the distribution of literature in the public areas of campus.

75. The policy restricting all unscheduled First Amendment protected speech to a designated free speech zone at the University is unconstitutionally overbroad because it does not serve a significant governmental interest, is not narrowly drawn, and impermissibly restricts student expression.

76. The policies restricting speech on campus burden far more speech than is necessary to serve the asserted interest. Rather than being narrowly tailored to protect speech as the Constitution requires, the University policies give University officials excessive power to preclude speech.

77. As a direct result of the Defendants' continued maintenance of BOR Chapter 13, the Facilities Use Policy, and the RISO Handbook, students at UH Hilo are deprived of their right to free speech under the First and Fourteenth Amendments to the Constitution.

78. As a legal consequence of the Defendants' violation of Plaintiffs' and other similarly situated students' First and Fourteenth Amendment rights, as alleged above, Plaintiffs are entitled to injunctive relief, and the reasonable costs of this lawsuit, including their reasonable attorneys' fees.

FOURTH CAUSE OF ACTION

Facial Challenge to Violation of Right to Free Speech Under the Plaintiffs' First and Fourteenth Amendment Rights (42 U.S.C. § 1983) – Vagueness

79. Plaintiffs repeat and reallege each of the foregoing allegations in Paragraphs 1-78 of this Complaint.

80. A state enactment is void for vagueness if the prohibitive terms are not clearly defined such that a person or ordinary intelligence can readily identify the applicable standard for inclusion and exclusion. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

81. Defendants' policies restricting speech fail adequately to advise the students subject to discipline of the obligations the policies create, and are

unconstitutionally vague on their face in violation of the First Amendment and of the due process guarantee of the Fourteenth Amendment to the U.S. Constitution.

82. Vague and undefined policies also vest the public officials who must enforce them with unbridled discretion that may be exercised in an inconsistent or discriminatory manner.

83. Defendants' policies do not provide standards to guide the discretion of public officials at the University as to whether the Facilities Use Policy and RISO Handbook apply to particular acts of free expression in the first instance, or for reviewing requests to use campus areas. This empowers such public officials to administer the policy on the basis of impermissible factors or through arbitrary application.

84. The policies set forth in the Facilities Use Policy and RISO Handbook with respect to solicitation are unconstitutionally vague. The policies prohibit "solicitation" in "any, building, structure, facility, or on any grounds, sidewalks, or streets of the University," but fail to define what constitutes a "solicitation." The policies contain a list of activities that "shall not be deemed solicitations," and provide the President "or his/her designee" with unbridled discretion to "accept other forms of solicitation if the President determines this to be in the best interest of the University." The policies provide no criteria that enable students to understand what the prohibition of "solicitation" entails.

85. Because of Defendants' policies and actions, Plaintiffs have suffered, and continue to suffer irreparable harm. Plaintiffs are therefore entitled to injunctive relief, and the reasonable costs of this lawsuit, including their reasonable attorneys' fees.

FIFTH CAUSE OF ACTION

Section 1983 *Monell* Claim (Defendant University of Hawaii System)

86. Plaintiff repeats and realleges each of the foregoing allegations in Paragraphs 1-85 of this Complaint.

87. A government body such as the UH System here may be held liable under 42 U.S.C. § 1983, when the execution of government policy or custom that may be fairly said to represent its official policy inflicts injury on a plaintiff. Section 1983 also allows liability for constitutional violations committed by government employees if the government body itself is responsible for causing constitutional deprivations. *Monell* liability can further rest on ratification by a final policymaker, or for damages caused by a failure to train employees that leads to the deprivation of constitutional rights.

88. In prohibiting Ms. Burch and Mr. Vizzone from distributing copies of the Constitution on the UH Hilo campus without obtaining prior approval and limiting their activities to the "free speech areas," Defendants violated Ms. Burch's

and Mr. Vizzone's clearly established rights under the First and Fourteenth Amendments to the United States Constitution.

89. Defendants Kusano and Bergknut interfered with and prevented Ms. Burch and Mr. Vizzone from freely distributing written materials on the UH Hilo campus. And further, the UH System and UH Hilo promulgated policies limiting student speech activities to designated "free speech areas," and required prior approval to use other limited facilities.

90. The UH System fails to train its administrators and employees adequately with respect to the First Amendment rights of college students, displaying deliberate indifference to the student body's constitutional rights.

91. On information and belief, the UH System failed to supervise and discipline its administrators and employees for unlawfully interfering with the First Amendment right of students to engage in expressive activities and distribute written materials in the public areas of a state college without obtaining advance permission from government officials, displaying deliberate indifference to its students' constitutional rights.

92. These unconstitutional policies, customs, and practices of the UH System were the moving force behind the violation of constitutional rights by Defendant Kusano and Defendant Bergknut.

93. As a direct and proximate result of the UH System's unconstitutional policies, customs and practices, Ms. Burch's and Mr. Vizzone's First Amendment rights have been curtailed, resulting in significant emotional pain and anguish. Plaintiffs are thus entitled to a declaration that Defendants violated their First Amendment rights. Additionally, Plaintiffs are entitled to damages in an amount to be determined by the Court, and the reasonable costs of this lawsuit, including their reasonable attorneys' fees.

SIXTH CAUSE OF ACTION

Declaratory Judgment and Injunction (28 U.S.C. § 2201, et seq.)

94. Plaintiffs repeat and reallege each of the foregoing allegations in Paragraphs 1-93 of this Complaint.

95. An actual controversy has arisen and now exists between Plaintiffs and Defendants concerning Plaintiffs' rights under the United States Constitution. A judicial declaration is necessary and appropriate at this time as to Counts I through V above.

96. Plaintiffs desire a judicial determination of their rights against Defendants as they pertain to Plaintiffs' right to speak, assemble, and distribute literature on the outdoor campus areas of the University of Hawaii at Hilo without being subjected to a prior restraint or "time, place, and manner" regulations that are

unreasonable, that are not narrowly tailored to serve a substantial governmental interest, and that do not leave open ample alternative channels of communication.

97. To prevent further violation of Plaintiffs' constitutional rights by Defendants, it is appropriate and proper that a declaratory judgment issue, pursuant to 28 U.S.C. § 2201 and Fed. R. Civ. P. 57, declaring the UH System's and the University's policies unconstitutional.

98. Furthermore, pursuant to 28 U.S.C. § 2202 and Fed. R. Civ. P. 65, it is appropriate and hereby requested that this Court issue a permanent injunction prohibiting the Defendants from enforcing their restrictions on Plaintiffs' expressive activities to the extent they are unconstitutional, to prevent the ongoing violation of Plaintiffs' constitutional rights. Plaintiffs and their fellow students are suffering irreparable harm from continued enforcement of the UH System's and University's unconstitutional policies, monetary damages are inadequate to remedy their harm, and the balance of equities and public interest both favor a grant of injunctive relief.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Merritt Burch and Anthony Vizzone respectfully request that the Court enter judgment against Defendants and provide Plaintiffs the following relief:

A. A declaratory judgment stating that Defendants' speech codes are unconstitutional facially and as-applied and that they violate the Plaintiffs' rights as guaranteed under the First and Fourteenth Amendments to the United States Constitution;

B. A permanent injunction restraining enforcement of Defendants' unconstitutional speech codes and enforcement practices;

C. A declaratory judgment that Defendants' censorship of expressive activity of distributing copies of the U.S. Constitution without prior approval and outside the "free speech zone" violated the First and Fourteenth Amendments;

D. Monetary damages in an amount to be determined by the Court to compensate for the Defendants' application of the illegal speech codes to interfere with expressive activity of distributing copies of the U.S. Constitution without prior approval and outside the "free speech zone;"

E. Plaintiffs' reasonable costs and expenses of this action, including attorneys' fees, in accordance with 42 U.S.C. § 1988, Cal. Code Civ. Proc. § 1021.5, and other applicable law; and

F. All other further relief to which Plaintiffs may be entitled.

VIII. DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury of all issues properly triable by jury in this action.

DATED: April 24, 2014

Robert Corn-Revere (*pro hac vice application
concurrently filed*)

Ronald G. London (*pro hac vice application
concurrently filed*)

Lisa B. Zycherman (*pro hac vice application
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