

# CLIENT NEWS BRIEF

## Student Newspaper Sues University After All Print Media Is Defunded Following The Publication Of A Satirical Article

A University of California San Diego (UCSD) student newspaper, The Koala, brought suit against UCSD officials alleging that they defunded all print media in violation of the First Amendment. In *The Koala v. Khosla* (9th Cir. 2019) 931 F.3d 887, the Ninth Circuit sided with the student newspaper, reversing in part and vacating in part a district court's dismissal of the complaint, holding that the Eleventh Amendment did not bar The Koala's claims, and allowing the case to proceed.

### Background

The Koala is a UCSD student organization that publishes a newspaper featuring art and satirical writing. In 2015, The Koala published an article which mocked the concept of "safe spaces" on college campuses. The publication included numerous ethnic and sexist stereotypes, generating various complaints and prompting UCSD to publicly denounce the article. Two days later, the UCSD student government passed the Media Act (the Act), eliminating student organization funding for all print media. Thereafter, The Koala brought suit against UCSD, alleging multiple violations of the First Amendment. Specifically, The Koala argued that in violation of the Free Press Clause, the Act intentionally singled out and financially burdened The Koala, and that it did so in retaliation against the publication of the "safe spaces" article. The Koala also argued that funds for student organizations were a limited public forum and the Act's exclusion of The Koala from the forum was viewpoint discrimination and violated the Free Speech Clause. UCSD filed a motion to dismiss these claims, and the district court granted the motion, concluding that The Koala's claims were barred by the Eleventh Amendment. The Koala appealed to the Ninth Circuit.

### Ninth Circuit Opinion

The Ninth Circuit reversed in part and vacated in part the district court's dismissal of the complaint, allowing The Koala could move forward with its claims. First, the Ninth Circuit analyzed whether The Koala's claims should be barred by the sovereign immunity doctrine under the Eleventh Amendment, which generally prevents a state and state government actors from being sued in federal court without the state's consent. The Ninth Circuit found that because The Koala was seeking only a return of their *eligibility to apply for funding*, and not an order directing the state to provide funding, the claims were not barred by the Eleventh Amendment.

The Ninth Circuit then analyzed each of The Koala's claims individually, starting with the freedom of the press claim. The Koala argued that the Act targeted student press by defunding it and that it was "substantially motivated by discrimination," while UCSD argued that the Act did not implicate the Free Press Clause because it applied equally to all student organizations. The Ninth Circuit sided with The Koala and found that The Koala stated a viable cause of action, vacating the lower court's decision.

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Next, the Ninth Circuit addressed The Koala's freedom of speech claim, which argued that UCSD created a limited public forum (funds for student organizations) and then closed off a portion of that forum (print media) with the intent specifically to deny The Koala access to it. While The Koala asserted that the forum consisted of the entire student activity fund, UCSD claimed that the forum was specifically limited to the media funds and that regardless of how the forum was defined, they were free to close it. The Ninth Circuit agreed with The Koala and concluded that the entire student activity fund was the relevant forum for assessing the appropriateness of UCSD's actions. Because the district court came to a different conclusion, the Ninth Circuit vacated the order granting the motion to dismiss the claim and remanded the decision for consideration under the appropriate forum framework.

Lastly, with regard to their retaliation claim, The Koala argued that the Act was passed in direct response to the "safe spaces" article and intended to silence The Koala's content. UCSD claimed that the government's motive is irrelevant when it enacts a rule that is content neutral and intended to apply generally (i.e., applies to all print media). The Ninth Circuit sided with The Koala, holding that the Act did not apply equally to all student organizations, as it banned only print media organizations from obtaining student activity fee funding. The Koala was also found to have alleged an adequate nexus between its speech and the implementation of the Act.

## Takeaways

Universities and community colleges should keep this decision in mind when responding to controversial matters. This is especially true in instances where the college's actions may be viewed as retaliatory or an attempt to silence or regulate student speech, even if the action does not exclusively target the speaker.

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