

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

CLAYTON SMITH AND JOHN SCHWERTZ JR.
Plaintiffs

V.

**TARRANT COUNTY COLLEGE DISTRICT AND
ERMA JOHNSON HADLEY, INTERIM CHANCELLOR
TARRANT COUNTY COLLEGE DISTRICT,
IN HER OFFICIAL CAPACITY**
Defendants

2020年12月25日

CIV. ACT. NO 4-09CV-658-Y

Amended Complaint

Plaintiffs, by counsel and pursuant to the Federal Rules of Civil Procedure, assert the following.

I. INTRODUCTION

1. This is a civil action under 42 U.S.C § 1983 to protect and rectify the First Amendment rights of Texas citizens who are or have been students on campuses in the Tarrant County College District (TCCD). By policy and practice, TCCD and its administration unlawfully restrict the First Amendment rights of Tarrant County College (TCC) students and the public. TCCD's policies are facially overbroad and prohibit the exercise of First Amendment rights on college campuses in traditional public forums and designated public forums. The implementation and administration of district policies by administrators violate plaintiffs' state law and First Amendment rights. These illegal and

unconstitutional defects give rise to both facial and as-applied challenges to TCCD policies and Handbook and their application.

2. Jurisdiction for this case is based on 28 U.S.C. §§ 1331, 1343, 1367, 2201, 2002 and 42 U.S.C. §§ 1983 and 1988. Venue is proper under 28 U.S.C. 1391 in the Northern District of Texas, Fort Worth Division, because these claims arose in Tarrant County, Texas.

II. PARTIES

3. Clayton Smith and John Schwartz, Jr. have been students at the TCC Northeast campus in Hurst, Texas, are over the age of eighteen and reside in Tarrant County, Texas. Clayton Smith is eligible to return to TCC in January 2010, but cannot know at this time whether he will be a TCC student in the 2010 Spring semester. He sues to protect his rights as a student, non-student, citizen of Texas, and resident of Tarrant County. John Schwartz, Jr. intends to be a student at TCC in 2010.

4. Defendant Tarrant County College District is a public career community college serving Tarrant County, providing associate degrees. In 2008 its enrollment was approximately 39,596 students, and its Fall 2009 enrollment is reported to be approximately 43,000 students. TCCD was created pursuant to Texas law in 1965 by Tarrant County voters. The first TCC campus was established in Fort Worth in 1967 as the South Campus, followed by the Northeast Campus in the City of Hurst and North Richland Hills. The Northwest Campus is in Fort Worth. The Southeast Campus is in the City of Arlington. A downtown Fort Worth campus, called the Trinity River Campus, opened in August 2009. The chief administrator of the TCCD colleges is Defendant Interim Chancellor Erma C. Johnson Hadley.

III. STATEMENT OF FACTS

5. This lawsuit arises from the plaintiffs' plan to assemble, demonstrate, and express their view opposing Texas law on concealed weapons and TCCD's policy prohibiting carrying concealed weapons on campus. The plaintiffs filed this lawsuit because they intended to participate in a nationwide demonstration starting November 9, 2009, sponsored by a group called Students for Concealed Carry on Campus (SCCC). Plaintiffs planned to wear empty holsters to symbolize their opposition to current Texas law and to the TCCD Handbook provisions prohibiting concealed weapons from being carried on campus premises. Plaintiffs intended to distribute literature, discuss their views with others and wear T-shirts depicting holsters with a circle around the holster with a line through it. TCCD administrators forbade wearing the empty holsters on any part of the campus or in any classroom. TCCD's Student Handbook prohibited students from engaging in all protest activities unless the students first applied for a permit, which, if issued, allowed restricted demonstrations only at a college-designated free speech zone, of which there is only one zone on each campus.

6. This dispute originated on March 28, 2008, when Brett Poulos, a student on the TCC South Campus, and a Media Liaison for the national organization Students for Concealed Carry on Campus (SCCC), informed the TCC administration there would be a protest on the TCC South Campus, as well as on 130 other college campuses throughout the United States, entitled "Empty Holster Protest." Participating students, during the week of April 21, 2008, would wear empty holsters on campus to protest state laws and school policies that prohibit carrying concealed handguns on campuses. The empty holster, Mr. Poulos stated, symbolized his and SCCC's contention that students,

faculty, and guests were left defenseless by state laws and school policies because no one on the campus would have a legal concealed weapon for protection.

7. TCCD administrators responded that students could not wear empty holsters on any campus, anywhere, at any time. The administrators' decision purported to rest on a TCCD policy that provided that TCCD could control the time, place, and manner of all protests. There were no guidelines for applying the policies. Further, passing out literature was prohibited by the Student Handbook, as was any type of demonstration, unless the student applied at least 24 hours in advance for a permit to hold a demonstration and the TCC administrators granted a permit to hold the demonstration. The Student Handbook provided that the demonstration could be held only in the college's designated free speech zone. Without the TCC permit, there could be no leafleting or demonstration. These restrictions were acquiesced to or approved by at least thirty TCCD administrators on four campuses, including then Chancellor De La Garza and present Interim Chancellor Hadley.

8. TCCD's authorization for these restrictions were found in the Student Handbook that was effective until December 8, 2009, and in a TCCD Board Policy that was in effect until it was purportedly revised on December 17, 2009. They were:

TCC has the responsibility and authority to formulate and enforce rules for student conduct.... Students are expected to abide by all rules and regulations. Failure to comply with these rules and regulations may be grounds for disciplinary action up to and including dismissal from colleges Handbook Section V.

The college may initiate disciplinary action against any students involved in disruptive activities" including "holding rallies, demonstrations, or any other form of public gathering without prior approval of the college." Handbook Section V.

Each campus has a free- speech zone. The director of student activities, who must be notified 24 hours in advance of scheduling speech time, can provide information about the free-speech zone. Handbook Section V.

If the College District creates a forum for the distribution of non- school literature the college district may impose time, place, and manner negotiations.... TCC Policy GF (LEGAL) issued 4/21/09.

9. Between April 2008 and April 2009 TCC administrators were asked on several occasions to change the policies. The administrators' decisions were criticized by several citizens and two national organizations that oppose unconstitutional restrictions on First Amendment rights on college campuses. TCCD refused to change its policies.

10. On April 10, 2009, plaintiff Clayton Smith sent TCC administrators an e-mail describing an event planned in conjunction with Students for Concealed Carry on Campus. The "Empty Holster Protest" would be part of a coordinated national protest planned for April 20-24, 2009, in which students and faculty would peacefully attend class and perform other daily tasks while wearing empty holsters. Plaintiff Smith emphasized that the holsters were to be completely empty. The participants intended to hand out flyers on campus explaining the protest and beliefs regarding carrying firearms on campus. Protestors would be wearing T-shirts symbolizing similar sentiments.

11. TCCD administrators forbade plaintiff Smith and other protestors from wearing empty holsters anywhere on campus. TCC restricted any protest on the Northeast Campus to its "Free Speech Zone," identified as the east front porch of the Student Center Building. Plaintiff Smith was forbidden from handing out flyers anywhere except behind a table in the assigned section of the Free Speech Zone. Smith was required to request permission to use the Free Speech Zone at least 24 hours prior to the protest. Smith refused to meet these requirements, so no protest was held

12. On October 30, 2009, plaintiff Smith informed defendants that an SCCC sponsored Empty Holster Protest would be led by him the week of November 9, 2009. He requested the administration advise him if TCCD's policies and procedures had changed. On November 1, 2009, Interim Chancellor Erma Johnson Hadley informed plaintiff Smith that the "campuses have specific requirements for those who wish to protest on campus." Rather than comply with TCCD's restrictions and requirements, Smith filed this lawsuit.

13. On November 6, 2009, this court entered a temporary restraining order, recognizing that the quarantine of expressive activity - by requiring prior administration approval, and if approval is given, limiting the protest to the designated free speech zones - granted the defendants the unfettered discretion to censor student speech. The court observed that the defendants had restricted the First Amendment rights of students seeking to symbolically support Second Amendment rights in those areas of the college that are traditional free speech areas like roads, sidewalks, common areas, and parks. Because defendants prohibited protected symbolic speech, quarantined free expression to a small area on each campus, maintained overbroad prohibitions against expressive conduct, and granted administrators unfettered discretion to decide the time, manner, and place for free speech activities, the court preliminarily concluded that the defendants restricted the free expression rights of plaintiffs.

14. Following the court's order, plaintiffs protested during the week of November 9, 2009, handing out literature, engaging in symbolic speech by wearing t-shirts and empty holsters and had discussions with people on the campus about their position. There were no incidents or disturbances. Plaintiffs plan to participate in an

SCCC Empty Holster Protest in April 2010. Smith intends to participate at TCC even if he is not an enrolled student. Plaintiffs hope non-students will participate with them. Plaintiffs do not want to be subject to TCCD sanctions should non-students join their protest.

15. In response to the court's order, defendants attempted to revise their policies and Student Handbook. Defendants' efforts resulted in policies and Handbook provisions of dubious validity and unquestioned unconstitutionality. The new policies and new Handbook provisions are ambiguous, contradictory and vague; they violate not only plaintiffs' First Amendment rights, but their right to due process under the Fifth and Fourteenth Amendments. The revised policies and Handbook provisions should be declared illegal, unconstitutional, and void.

16. Plaintiffs seek a declaratory judgment that the defendants' policies and Handbook provisions violate state law and the First, Fifth, and Fourteenth Amendments. Plaintiffs also seek permanent injunctive relief to prevent defendants from further enforcing the challenged policies in a manner inconsistent with plaintiffs' statutory and constitutional rights.

IV. STANDARD OF REVIEW

17. The United States Constitution's First Amendment prohibition against governmental restrictions on the exercise of speech, petition and assembly is the penultimate legal principle against which restrictions on speech, assembly and petition activities must be tested. The right to speak, assemble and petition is not unrestricted. One cannot speak, assemble, and petition any time, any place, or in any manner, particularly where justifiable restrictions assure that the rights of others are not

trampled under by protestors. In a college campus environment, the standard by which restrictions on First Amendment expression activities must be evaluated “differ depending on the character of the property at issue.” *Perry Education Assn. v. Perry Local Educators Assn.*, 460 U.S. 37(1983). There are four “environments” on college campuses, each with a standard of review of governmental restrictions.

A. Traditional Public Forums – Strict Scrutiny

18. Government regulation of traditional public forums, such as public streets, sidewalks, and park areas, must withstand strict scrutiny. See *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 346 (5th Cir. 2001). “There is a heavy presumption against the validity of such restraints on speech.” *Forsyth County v. National Movement*, 505 U.S. 123, 130 (1992). Such restrictions can survive strict scrutiny if they are content neutral, “narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication.” *Hays County Guardian v. Supple*, 969 F.2d 111, 118 (5th Cir. 1992). Traditional public forums exist on all five TCC campuses.

19. College trustees and administrators sometimes contend that no areas, including streets and sidewalks, within the confines of the campus, are traditional public forums. In so contending, the college district relies on its ownership of the campus property, including its streets and sidewalks, analogizing them to private streets and sidewalks. In *Roberts v. Haragan*, Texas Tech University took the position that because it owned the property, “the entirety of its campus [was] a limited public forum subject only to a reasonableness standard” of review of its regulation of First Amendment activities. 346 F.Supp.2d 853, 862 (N.D. Tex. 2004). This position rested on the assumption that because “the University owns all the land within its boundaries,” none of this area could

be considered an area open to the public, as distinguished from faculty, students and staff. *Id.* The *Roberts* court rejected this contention, concluding that the roads, sidewalks and common areas should be classified as traditional public forums. *Id.* at 863

20. A year after *Roberts*, the Fifth Circuit addressed the University of Texas' contention "that 'the University Campus' is a limited public forum" so that its restrictions on First Amendment activities should be tested against a lesser standard than the "strict scrutiny standard." *Justice for All v. Faulkner*, 410 F.3d 760, 766 (5th Cir. 2005). The Fifth Circuit, without discussion, accepted the University's contention that it owned or controlled the areas in question, but rejected the contention that the "reasonableness standard" applied. The court distinguished between campus areas used by students for First Amendment activities that are like traditional public forums, which the court called "designated public forums," and those forums that were not like streets, sidewalks, and parks, which it called "limited public forums." *Id.*

21. TCCD campuses contain traditional public forums. What makes streets and sidewalks "public" is that they are under the control of a governmental entity, be it a state, city, county, or state college district. TCC campuses are controlled by a governmental entity, and its streets, sidewalks, and common areas are open to the public. All TCCD policies, regulations, and practices must be authorized under Texas law, because public junior colleges are creatures of state law, essentially quasi-municipal entities. Tex. Educ. Code § 130.001 *et seq.* and *Southwestern Broadcasting Co. v. Oil Center Broadcasting Co.*, 210 S.W. 2d 230, 233 (Tex. Civ. App. – El Paso 1947).

22. Education Code § 57.352(b) provides that "[t]he governing board of an institution of higher education shall provide the policy direction for each institution of

higher education under its management and control.” Education Code § 130.084

provides:

The board of trustees of junior college districts shall be governed in the establishment, management and control of the junior college by the general law governing the establishment, management and control of independent school districts insofar as the general law is applicable.

TCCD policy recognizes these state law limits on Board authority in its “Policy and Law Development BE (LEGAL)” by providing: “The Board shall adopt such rules, regulations, and bylaws as it deems advisable and consistent with law.” The scope of TCCD’s management and control of the property making up its campus is determined by state law, not TCCD fiat. Streets, sidewalks and common areas controlled by governmental entities are public forums. A college cannot simply declare that its public streets, sidewalks and commons areas are not public forums.

23. The pinnacle provision restricting exclusive TCCD’s control over campus property is Texas Constitution art. I, § 27:

Citizens shall have the right, in a peaceable manner, to assemble together for their common good and to apply to those invested with the powers of government for redress of grievances or other purposes by petition, address, or remonstrance.

This state constitutional provision grants “citizens,” not just students and faculty, access to TCC campuses to assemble and petition governmental entities. TCCD policy, “Public Complaints and Hearings GB (LEGAL),” incorporates art. I, § 27, and is binding district policy. TCC campuses are open to the public, and governmental restrictions on First Amendment activities are subject to strict scrutiny in areas that are traditional public forums.

24. Some roads and sidewalks in TCC campuses are not all exclusively

controlled by TCCD. TCCD's South, Northwest, and Trinity River campuses are in the City of Fort Worth. The Southeast campus is in the City of Arlington. The Northeast campus is in the cities of North Richland Hills and Hurst. All are home-rule municipalities, empowered by their charters and state law to make laws applicable to their geographical boundaries that are not inconsistent with state law.

25. Transportation Code § 311.001(a) provides that “[a] home-rule municipality has exclusive control over and under the public highways, streets, and alleys of the municipality.” A public street is one that has been laid out and established according to law. The cities mentioned above have adopted such ordinances.

26. Some roads within the TCC campuses are dedicated to public use. Tex. Gov't Code §§ 212.004 and 212.043-048. The Northwest campus plat “does hereby dedicate to the public use forever the easements and rights-of-way as shown hereon.” The downtown campus plat dedicates “to the public use forever the easements and right-of-way as shown herein,” including a ten foot sidewalk easement bordering the Trinity River Campus. The initial plat for the Northeast campus represents that the district will dedicate to the public use all easements and rights-of-way, including a 50 foot wide street. The South campus plat dedicates the streets around the property and one through it (Folwell Boulevard). The perimeter roads on the Southeast campus are dedicated to the public. Defendants have the burden to prove that the streets and sidewalks on the campuses are under their exclusive control, restricted to the public, and not traditional public forums.

27. Education Code §§ 51.201-216 grants college districts some control of roads and streets on the campus. Section 51.201 makes all state laws applicable to “areas

under the control and jurisdiction of the state institutions of higher education of this state.” A junior college can promulgate rules and regulations for the welfare of students, faculty and property, specifically those regulating vehicular traffic, and it can hire police. Tex. Educ. Code §§ 51.202, 51.203 and 51.205.

28. TCCD’s areas that are open to the public, like streets, sidewalks and common areas are no different than streets, sidewalks and common areas open to the public under the control and jurisdiction of cities, counties and the state. All are traditional public forums, and government restrictions placed on First Amendment activities are subject to “strict scrutiny”.

29. Education Code § 51.209 permits college officials to refuse to “allow persons having no legitimate business to enter on property under the board’s control” and to “eject any undesirable person from the property” Non-student/faculty/staff members of the public who are peaceably exercising their free speech rights on campus are engaged in a legitimate activity. The district can only regulate and restrict those activities taking place on streets and sidewalks by lawful regulations that survive strict scrutiny analysis.

30. TCC campus roads and sidewalks are open to the public. They are not private roads or sidewalks. Even if these roads are not dedicated to the public under state or municipal laws, TCCD is a governmental entity that owns or controls the streets just as municipal streets are controlled by cities. Courts classify public streets as traditional public forums. Any college regulation of First Amendment activities must be content neutral and narrowly tailored to serve a significant government interest, and it must leave open ample alternative channels of communication.

31. Texas law and TCCD's policy "Student and Community Use of College District Facilities, Conduct on College District Premises GFA (LEGAL)" recognize that campus grounds are open to the general public. Tex. Educ. Code § 21.204. "Persons" cannot engage in disruptive activities "on the campus or property of the College District." Tex. Educ. Code §§ 37.123(b) and 51.935. If disruptive activities occur, a person can be asked for identification, and if it is not provided, that person can be excluded from the property and "if it reasonably appears that the person has no legitimate reason to be on campus" the person can be ejected. Tex. Educ. Code § 51.232. Peaceable petitioning, speech, and assembly are legitimate reasons. See Tex. Const. art. I, § 27. A person ejected from campus is entitled to a hearing. Tex. Educ. Code § 51.243. State law recognizes that these campus areas are open to the public, and the college district cannot legislate to impose restrictions on the public inconsistent with state law.

32. Pertinent here, Texas law and TCCD policy on student and community use of district facilities or premises GFA (LEGAL) prohibits any person from possessing a firearm on the premises of the campus, but provides:

"Premises," for purposes of this policy, means a building or a portion of a building. The term does not include any public or private driveway, street, sidewalk or walkway, parking lot, parking garage, or other parking area.
Penal Code 46.035(f)(3).

33. Plaintiffs acknowledge that campuses are not open to the public and students to engage in First Amendment activities at all times, in any manner, or at any place. First Amendment activities can be restricted by lawful policy adopted by the appropriate governmental entity, be it the state, city or college district. As to TCCD campuses, plaintiffs contend that the streets, sidewalks and common areas outside of buildings should be classified as traditional public forums for the purpose of establishing

the standard of review of the restrictions because they are not under the exclusive control of the college district. This classification assures the general public — not just students, faculty, and staff — that restrictions on their free speech activities that take place on streets, sidewalks and outdoor common areas meet the strict scrutiny test.

B. Designated Public Forums – Strict Scrutiny

34. After this court’s November 6, 2009 order, TCCD attempted to revise two TCCD Board policies. Until its attempted amendment on December 17, 2009, TCCD’s policy on use of district facilities, GF (REGULATION), dealt only with facilities, like buildings and equipment. Before revision, GF (REGULATION) provided that “[f]acilities and equipment at the College District are generally available for use by internal and external groups” and provided guidelines for priority on facility use. The regulation provided that “[a]ll non-education events will be presented to the campus president or designee for approval.” This requirement that permission be obtained to use facilities (buildings and equipment) was reasonable. This regulation provided that “[o]ff-campus organizations, businesses, and individuals will not be permitted to distribute literature on College District property.” The revised policy deletes this unconstitutional and illegal restriction.

35. TCCD’s December 17, 2009, attempted revision to policy GF (REGULATION) changes the scope of the previous policy, and begins by stating:

CATEGORY OF FACILITY

The property or buildings, owned or controlled by the College District are not open for assembly, speech, or other activities as are the public streets, sidewalks, and parks. The responsibility of the College District to operate and maintain an effective and efficient system of an institution of higher education requires that time, place, and manner of assembly, speech, and other activities on the grounds and in the buildings of the College District,

including any of the campuses, be regulated. Acting pursuant to the general authority of Texas Education Code, Chapter 51, and the Board adopts and promulgates rules regulated to use of buildings and grounds.

The revised facility policy covers campus grounds, buildings, and property “owned or controlled by the College,” and declares that no portions of the campus property, buildings, or grounds are like “public streets, sidewalks, and parks.” The provision in the old policy requiring permission to use building and equipment was changed and now provides that “[a]ll events other than those that are part of regularly scheduled classes must have reserved the facility and/or equipment through the campus president or designee. “Event” is defined in the revised Student Handbook as follows:

(7) event means something that occurs in a certain place during a particular interval of time; events include but are not limited to guest speakers, exhibits, tables, distribution of literature, signs, and public assemblies.

36. The revised GF (REGULATION) is almost identical in its declaration that no part of the campus can be categorized as a traditional public forum to Regents Rule § 6.1 that was before the Fifth Circuit in *Justice for All*, 410 F.3d at 768. In that decision, the court assumed, without discussion, that the streets and sidewalks on the University of Texas campus were “owned or controlled by the U.T. System.” *Id.*

37. If the streets, sidewalks and common areas are not considered traditional public forums, then they are designated public forums and “subject to strict scrutiny.” They are not limited forums that are reviewed under a less demanding standard for reasonableness. *Justice for All*, 410 F.3d at 765-66.

38. To decide whether a campus location is a designated public forum, the court looks at the government’s interest with respect to the forum, the nature of the forum

and its compatibility with the speech activity at issue. *Id.* The Fifth Circuit rejected the University of Texas' general assertion that the entire university campus was a limited public forum, pointing out that some portions of the campus could be classified as designated public forums while others would be limited public forums.

39. TCCD policies open TCC campuses to students and the public to exercise their rights to assemble and engage in free speech. Through its policies, TCCD "has designated the outdoor open areas of its campus generally accessible to students – such as plazas and sidewalks – as public forums for student speech" and therefore restrictions on speech activity "in such areas is subject to strict scrutiny." *Id.* at 769. These policies include:

a. TCCD Facilities Policy GF (REGULATION):

Facilities and equipment at the College District are generally available for use by internal and external groups on a priority bases with the following considerations:

b. TCCD Facilities Policy GF (LEGAL):

An officer or employee of the College District who is acting or purporting to act in an official capacity may not, because of a person's race, religion, color, sex, or nation origin:

1. Refuse to permit the person to use facilities open to the public and owned, operated, or managed by or on behalf of the College District;

* * * *

The College District may create a public forum of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983); Chiu v. Plano ISD, 260 F.3d 330 (5th Cir. 2001)

* * * *

Activities such as distributing literature, displaying signs, petitioning for change, and disseminating information concerning issues of public concern are protected by the First Amendment. *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997) (recognizing leafleting and commenting on matters of public concern as protected speech); *Boos v. Barry*, 485 U.S. 312 (1988) (recognizing public issue signs as protected speech); *Meyer v. Grant*, 486 U.S. 414 (1988) (recognizing the solicitation of signatures for a petition drive as protected speech).

If the College District creates a forum for the distribution of non-school literature, the College District may impose time, place, and manner regulations and may reserve its facilities for their intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 760 U.S. 37 (1983).

c. TCCD Policy GB (LEGAL):

The College District shall take no action abridging the freedom of speech or the right of the people to petition the Board for redress of grievances. *U.S. Const. Amend. I, XIV*

* * * *

Citizens shall have the right, in a peaceable manner, to assemble together for their common good and to apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address, or remonstrance. *Tex. Const. Art. 1, Sec. 27*

d. Student Rights Policy FLAA (LEGAL):

The College District shall take no action respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Board for a redress of grievances. *U.S. Const. Amend. I*

Students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. At school and school events, students have First Amendment rights, applied in

light of the special characteristics of the school environment.

Student expression that is protected by the First Amendment may not be prohibited absent a showing that the expression will materially and substantially interfere with the operation of the school or the rights of others.

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, (1969)

Activities such as distributing literature, displaying signs, petitioning for change, and disseminating information concerning issues of public concern are protected by the First Amendment. *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997) (recognizing leafleting and commenting on matters of public concern as protected speech); *Meyer v. Grant*, 486 U.S. 414 (1988) (recognizing the solicitation of signatures for a petition drive as protected speech).

40. TCCD roads, sidewalks and common areas under its control are both traditional public forums and designated public forums. Any restrictions of First Amendment activities, on students, faculty, staff or the public, in those campus areas must be content neutral, narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication.

C. Limited Public Forums and Non-Public Forums

41. The distinction between “designated forums” and “limited forums” is critical “because restrictions on speech in a designated forum are subject to strict scrutiny, whereas such restrictions in a limited forum are reviewed under a less demanding standard for ‘reasonableness.’” *Justice for All*, 410 F.3d at 765-66. The Fifth Circuit has set forth a “two-factor test” for designating areas on a campus “as either designated or limited,” requiring the court to “look to ‘(1) the government’s intent with respect to the forum, and (2) the nature of the forum and its compatibility with the speech at issue.’” *Id.*(citing *Chiu*, 260 F.3d at 346). While in *Justice for All* the court noted that

some portions of the campus could be “designated public forums” while other areas would be “limited forums,” this distinction rested on the unquestioned assumption that all the area on the campus was subject to the University’s exclusive control, resulting in there being no traditional public forms. On the TCC campuses there are areas within the campuses, including streets and sidewalks that are both traditional public forums and designated public forums.

42. Plaintiffs acknowledge that TCCD policy restrictions applicable to buildings, and in particular classrooms, are tested under the reasonableness standard, which requires that the restriction be viewpoint neutral, further an important or substantial governmental interest, and be no broader than necessary to facilitate that interest.

D. Defendants’ Prohibition of Plaintiffs’ Activities Was Not Content Neutral

43. Plaintiffs were not permitted to wear empty holsters in classrooms and on the campus based on an administrative decision. The TCCD administrative decision to prohibit plaintiffs from wearing empty holsters in classrooms was not viewpoint neutral and does not promote a substantial governmental interest in the least restrictive manner. Plaintiffs contest the administrative decree prohibiting wearing empty holsters because (1) there was no authority for the administrative decree, (2) it contravened district policy and state laws, and (3) it was not content neutral. The administrators who prohibited activity oppose concealed weapons on campus, the activity the protests promote.

44. TCC administrators, up to the Chancellor level, decided that protestors involved in the Empty Holster Protests could not wear empty holsters anywhere on campus. The justifications for this decision were (1) a concern that other students would

react to the empty holsters and “[t]his may frighten or excite many students and cause them concern over where the gun is,” which could be “potentially disruptive in the classroom,” and (2) wearing empty holsters, Deputy Chancellor Hadley speculated, could cause “any student [to] decide to wear a holster that is not empty” and the campus police could not monitor such activity, which “will cause chaos amongst our students and employees and would... be very disruptive of the learning process.” Thus, Chancellor DeLa Garza directed that protestors could not wear empty holsters anywhere on the campuses, including the administration designated speech zones. In numerous discussions between more than thirty TCCD administrators, including the Chancellor, Deputy Chancellor, the campus college Presidents and their outside legal counsel, there was no reference to any board policy authorizing the decision.

45. Plaintiffs’ protest was directed against two Handbook provisions.

FIREARMS AND WEAPONS

The possession of firearms, explosives, fireworks, or weapons of any kind on the College premises or at College-sponsored events is unlawful. Law enforcement officers, including College police, are permitted to have firearms while in the performance of their duties as defined by College policy and the Texas Penal Code. Even those with permits are not allowed to carry concealed handguns on College premises, in accordance with Texas law.

* * * *

FIREARMS AND WEAPONS

The possession of firearms, explosives, fireworks, or weapons of any kind on the College premises or at College sponsored events is unlawful in accordance with Texas law. Even those with permits are not allowed to carry concealed handguns on a college’s premises. Law enforcement officers, including College police, are permitted to have firearms while in the performance of their duties as defined by College policy and the Texas Penal Code.

These restrictive Handbook provisions have not been adopted by the Trustees as TCCD policies. They are administrative provisions. Administrators cannot make policy, they only administer it.

46. TCCD Board policy governing student and community conduct on campus, recognizes and incorporates state law. It bans weapons under Penal Code 46.03, but limits the ban to “premises,” defined “for purposes of this policy” as buildings, and “not public or private streets, sidewalks or walkways.” The Handbook provisions, one object of Plaintiffs’ protest, reflect administrative disagreement with plaintiffs’ position.

47. The administrators’ decisions to ban empty holsters rested on speculation and assumption, violating TCCD board policy on “Student Conduct Disruptions FLBH (LEGAL)”, which provides:

Student demonstrations and similar activities shall be prohibited when there is evidence that may reasonably lead school authorities to forecast substantial disruption of, or material interference with, normal school operations or approved school activities.

The evidence must support a “reasonable forecast of substantial disruption” of school operations; “undifferentiated fear” or mere apprehension of disturbance is not sufficient to justify restrictions on students’ otherwise legitimate right to freedom of expression.

There was no evidence on which administrators prohibited plaintiffs from wearing empty holsters, only “undifferentiated fear or mere apprehension of disturbance.” The administrative decision violated TCCD policy.

48. The administrative decision to prohibit wearing empty holsters on campus was made based on speculation that holsters on campus would cause others to carry concealed weapons on campus, a legal activity in some areas. Plaintiffs protested during the week of November 9, 2009. Plaintiffs wore empty

holsters. This did not overwhelm campus police nor cause others to wear weapons on campus.

49. The administrations' decision to prohibit empty holsters in the classroom was an overbroad restriction. Avoiding disruption in the classes is a substantial governmental interest. The administrators decided that other students concerns about where the gun might be would be disruptive. This concern could be addressed by a narrower restriction, like having plaintiffs ask permission from the professor to inform the class there is no gun. The decision was not content neutral.

V. TCCD'S REVISED POLICIES AND THE ADMINISTRATIONS' REVISED STUDENT HANDBOOK CONTRAVENE STATE LAW, TCCD BYLAW POLICY AND PLAINTIFFS' STATE AND FEDERAL RIGHTS TO ENGAGE IN SPEECH RELATED ACTIVITIES

49. On December 8, 2009, TCC administrators revised the Student Handbook, removing some, but not all, of the provisions that contravened this court's November 6, 2009, order. Some new provisions are ambiguous, vague, and contradictory, and they illegally and unconstitutionally restrict plaintiffs' right to engage in free speech activities. On December 17, 2009, the TCCD Board revised two policies related to expressive activities. Those revisions are invalid under state law and TCCD policy and have the effect of exposing plaintiffs to disciplinary action if they exercise their state law and federally protected free speech rights.

A. The Revised Board Policies Contravene State Laws and Board Policy

50. State law grants limited powers to a local college board, chancellor, president, and administration. Education Code § 130.002 reserves for junior college districts the authority not vested in the state coordinating board or Central Education

Agency. Education Code § 130.082(d) provides:

Said board shall act and proceed by and through resolutions or orders adopted or passed by the board and the affirmative vote of a majority of all members of the board shall be required to adopt or pass a resolution or order, and the board shall adopt such rules, regulations, and bylaws as it deems advisable, not inconsistent with this section.

51. Education Code § 57.352(b) describes the “Responsibility of Governing Boards,” specifying that “[t]he governing board of an institution of higher education shall provide the policy direction for each institution of higher education under its management and control.” This provision binds the TCCD board under its legal policy, “Board Legal Status Powers, Duties, and Responsibilities BAA (LEGAL),” reserving to the board the “policy direction of the College District” and requiring that the Board shall “adopt such rules, regulations, and bylaws as the Board deems advisable.” Under that legal policy and under Education Code § 130.082(d), policies and regulations of the district are only valid if adopted by an affirmative vote of all Board members. Administrators cannot establish district policy.

52. The chief administrative officer at TCCD is the Chancellor. TCCD “Policy and Bylaw Development BE (REGULATION)” authorizes the Chancellor to propose new policies and revise procedures to the board. Chancellor-approved policies and regulations then “go to the Board for consideration” in accordance with BE (LOCAL). “Policy and Bylaw Development BE (LOCAL)” provides that the district “shall be guided by Board-adopted written policies that are given appropriate distribution and are accessible to staff members, students, and community residents.”

53. The Chancellor cannot promulgate district policies, rules, or regulations. The Chancellor “may be empowered by the board to enforce rules and regulations

promulgated by the board.” Education Code § 51.210. TCCD policy “Chancellor Qualifications and Duties BFA 1 (LOCAL)” provides that the Chancellor shall “have general charge over the educational and business matters of the College District...” The Chancellor, while “the chief professional advisor to the Board” is not authorized to make policy or promulgate rules or regulations. Chancellors, like public school superintendents, do not have policy making authority. *Jett v. Dallas Ind. Sch. Dist.*, 70 F. 3d 1241, 1245 (5th Cir. 1993), Education Code §§ 13.351 and 130.084.

54. Administrative staff, faculty and employees operate under the direction and control of the Chancellor. Education Code § 130.084 provides that state law applicable to public school districts applies to public junior college districts. Education Code § 11.201 sets out the authority of superintendents and chancellors. A chancellor is the “educational leader and the chief executive officer” of the district, whose duties include assuming administrative responsibility and leadership for the operation and supervision of the program and staff and “managing the day-to-day operations of the district as its administrative manager.” Among the activities falling under the Chancellor’s purview is preparation and promulgation of the Student Handbook, which informs students of district policies, regulations and rules lawfully adopted by the Board. The Handbook must reflect board adopted policy, not create it.

55. TCCD has policies binding on the Board of Trustees. TCCD’s “Policy and Bylaw Development BE (LOCAL)” is itself binding on the Board. Relevant provisions include:

Within the context of current law, the College District shall be guided by Board-adopted written policies that are given appropriate distribution and are accessible to staff members, students, and community residents. Legally referenced policies contain provisions from federal and state

statutes and regulations, case law, and other legal authority that together form the framework for local decision making and implementation. These policies are binding on the College District until the cited provisions are repealed, revised, or superseded by legislative, regulatory, or judicial action.

* * * *

Board policies may be adopted, amended, or suspended by a two-thirds vote of the members of the Board present and voting at a meeting of the Board, providing that a proposed amendment has been submitted in writing to the Board President ten days prior to being voted upon at a regular meeting, and provided further that the Board President has transmitted (mailed) the proposed amendment in writing to the members of the Board at least seven days prior to the regular meeting at which the amendment is voted upon, except that the regular meeting date of the Board may be changed by majority vote of the members present, and by inclusion of this item on the regular agenda of the Board meeting at which it is to be considered.

Local policies become effective upon Board adoption or at a future date designated by the Board at the time of adoption.

Board policies must be adopted in accordance with these procedures.

56. In response to this court's November 6, 2009, order, defendants undertook to revise TCCD policy "Student Rights and Responsibilities Student Expression FLAA (LEGAL)." Even though the Board was advised it did not have this authority—which was communicated to the Board by including the December 11, 2009, memorandum with the agenda—the Board approved this item on the Consent Agenda. The Board's action was invalid under bylaw policy BE (LOCAL) because the proposed amendment was transmitted to Chancellor Hadley on Thursday, December 11, 2009. Based on that date, the amendment could not have "been submitted in writing to the Board President ten days prior to being voted upon at a regular meeting." And the Board President could not have "transmitted (mailed) the proposed amendment in writing to the members of the Board at least seven days prior to the regular meeting at which the amendment is voted upon...." Bylaw policy BE (LOCAL) was not complied with; the revision is invalid and

ineffective.

57. Board policy FLAA (LEGAL) was significantly revised, as reflected in the document submitted to the Board, which indicates the additions with “[]”:

The College District may prohibit expression by students if:

1. It materially and substantially interferes with school activities [as stipulated in the Student Handbook];
2. It materially and substantially interferes with the rights of others [as stipulated in the Student Handbook].

The board policy amendment to FLAA (LEGAL) is invalid and contrary to state law.

58. The amendment to FLAA (LEGAL) is invalid because of an additional problem that was recognized when the revision was proposed. In a Memorandum dated December 11, 2009, William Lace reported to defendant Hadley that even though the Board had been told repeatedly that it cannot modify ‘legal’ policies, the districts’ legal counsel and he thought an exception could be made because the section they wanted to change “does not have a citation of case law or statute law.” While the Education Code authorizes the board to pass regulations and policies under which the college is administered, the Board of a college district cannot pass laws. College district legal policy, as established in bylaw policy BF (LOCAL), prohibits the board from changing its legal policies unless the underlying laws they recite are changed or repealed.

59. Amended FLAA (LEGAL), in items 1 and 2 under “Limitation on Expression,” improperly changes the respective roles of the Board and the administration. On December 8, 2009, TCCD posted on its website a revised Student Handbook that added a new Section VI. This revised handbook was written by William Lace, a vice chancellor. There is no public record showing that the revised handbook was submitted

to or adopted as district policy by the TCCD Board.

60. FLAA (LEGAL) provides that student expression can be prohibited if it “materially and substantially interferes with school activities as stipulated in the Student Handbook.” By incorporating the Student Handbook into a Board policy FLAA (LEGAL), the Board improperly delegated to the administration the authority to promulgate rules and regulations governing student conduct.

61. The Student Handbook subsection on Disciplinary Procedure recites that students can be disciplined for “violating TCC regulations.” It provides:

Tarrant County College upholds all federal, state, and local laws and considers violation of these laws on College property or at any function authorized by the College, even if held off campus, as a cause for disciplinary action in addition to any action that might be taken by our criminal justice system.

Any student accused of violating TCC regulations concerning student conduct is subject to disciplinary action by the College.

Only the Board can adopt a regulation. The Handbook should incorporate regulations. But TCCD now treats the handbook like a regulation, and the Board, without any review, incorporates the Handbook as its policy.

62. The Handbook further provides under the subhead “Student Responsibilities”:

1. Students must acknowledge that the only legal authority for the operation of the College belongs to the Board of Trustees of the College who has delegated this authority to the administration.

* * * *

4. By enrolling, students assume the responsibility for complying with the rules and regulations of the College. Further, students must assist the College in the refinement of such regulations to provide the greatest educational opportunity to all.

* * * *

7. Students have the responsibility to comply with all regulations established by the Board of Trustees of TCC and the Laws of the State governing student conduct. Such regulations and laws as may now exist or may be subsequently enacted and adopted shall have precedence over the provisions of this document.

63. Finally, under subsection G, the Handbook provides:

2. This document shall be amended only at the direction of any student government association of Tarrant County College District, the College Administration, or the College Board of Trustees.

64. The purported amendment to TCCD policy FLAA (LEGAL) violates Texas law and is invalid because it assigns to administrators the function only the Board has of adopting policies and regulations by allowing administrators to adopt, repeal, or amend TCCD policy through changing the Student Handbook. Thus, the revised policy subjects students to Student Handbook prohibitions under which they might be disciplined or under which their rights might be abridged, based on administrative fiat and not under procedures adopted pursuant to law. TCCD policy FLAA (LEGAL) violates state law, bylaw policy, and is invalid.

**B. TCCD Policy and the Student Handbook in Effect Prior to the Lawsuit
Unconstitutionally Constituted a Prior Restraint on Free Speech**

65. Before this suit was filed, TCCD's policy GF (LEGAL) provided that if the district created a forum for distribution of non-school literature, the college could impose time, place and manner restrictions. The Student Handbook implemented this policy by creating designated free speech zones and requiring that an application be made and administratively approved before free speech activities could take place. There were no guidelines for administrative approval. This prior restraint on free speech is

unconstitutional. *Roberts v. Harrigan*, 346 F. Supp. 853 (N.D. Tex 2004); see *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 346 (5th Cir. 2001) and *Forsyth County v. Nationalist Movement*, 505,123,130 (1992). The court should declare unconstitutional the district's policies that supported a permit system, limited restricted speech to "zones," and constituted a prior restraint.

C. Revised GF (REGULATION) Does Not Establish Reasonable and Nondiscriminatory Regulations for Free Speech Activities

66. Revised facility policy GF (REGULATION) promulgates rules on use of grounds and property on campuses. It opens with the statement that district property is "not open for assembly, speech, or other activities as are the public streets, sidewalks, and parks." Based on this declaration, the policy "requires that time, place, and manner of assembly, speech, and other activities on the grounds and in the buildings of the College District, including any of the campuses, be regulated." GF (REGULATION) does not include any regulations on time, place, and manner of these activities other than providing priority guides for building use by "internal and external groups." There are no Board policies or regulations as to time, place, and manner restrictions applicable to students or the public.

67. The revised GF (REGULATION) provides:

In compliance with reasonable and nondiscriminatory regulations of the College District, students, faculty, or staff or their registered or non-registered organizations, may petition, post signs, distribute literature, set up tables and exhibits, for peaceably demonstrate [sic] on property owned or controlled by the College District, provided that the posting of signs and setting up of tables and exhibits may require prior authorization.

The policy does not include any "reasonable and nondiscriminatory regulations of the College District" other than prohibiting obscene or libelous literature.

68. On December 17, 2009, the Board purported to adopt a policy on student expression, “Student Rights and Responsibilities, Student Expression FLAA (LEGAL).” The revision authorizes prohibition of student expression if it “materially and substantially interferes with school activities as stipulated in the Student Handbook.” FLAA (LEGAL) delegates to the administration the Board’s duty to adopt policies about student rights and responsibilities. Student Handbook restrictions on student expression cannot substitute for “reasonable and nondiscriminatory regulations of the College District” that set forth the rights of the students and public to “petition, post signs, distribute literature, set up tables and exhibits [or] peaceably demonstrate on property owned or controlled by the College District.” Because the decision about what restrictions should apply to expression activities is left to the unfettered discretion of administrators, the policy is unconstitutional and contravenes state law.

D. The Student Handbook Cannot Be Used to Discipline Expression Activities and it is Ambiguous, Vague, and Contradictory and Unconstitutionally Restricts Expressive Activity

69. There are commendable changes in the revised Student Handbook:

Students, faculty/staff members are free to express their views, individually or in organized groups, orally or in writing or by other symbols, on any topic, in all parts of the campus, subject only to rules necessary to preserve the equal rights of others and the other functions of the College District. Teaching and other official functions of the College District will have priority in allocating the use of space on campus.

* * * *

Other Rules with Incidental Effects on Speech

(a) Other generally applicable or narrowly localized rules, written and unwritten, incidentally limit the time, place, and manner of speech, but are too numerous to compile or cross-reference here. For example, libraries typically have highly restrictive rules concerning noise; laboratories and rooms containing the electrical and mechanical infrastructure of the College District typically have safety rules and rules excluding persons

without specific business there; fire and safety codes prohibit the obstruction of exits and limit the constriction of the right to attend a class at all is subject to registration and payment of tuition; individual professors may have rules of decorum in their classrooms. These kinds of rules limit the right of students, faculty members, and staff members to enter and speak in the places to which these rules apply.

(b) Reasonable and non discriminatory rules of this kind generally control over the right of free speech guaranteed in this chapter. However, even these kinds of rules are subject to the constitutional right of free speech. Such rules must be viewpoint neutral. Such rules cannot regulate speech more restrictively than they regulate other activities that cause the problems to be avoided by the rule. Such rules should not restrict speech more than is reasonably necessary to serve their purpose. Such rules cannot ban unobtrusive forms of communication with no potential for disruption even in the specialized environment subject to the localized rule. Thus, for example, means of silent expression or protest confined to the speaker's immediate person, such as armbands, buttons, and T-shirts, are nearly always protected because they are rarely disruptive in any environment.

* * * *

(a) Students and faculty/staff members may display a sign on campus by holding or carrying it by hand or otherwise attaching it to their person. No advance permission is required.

* * * *

College District persons and organizations may set up tables from which to display literature, disseminate information and opinions, and raise funds, subject to the rules in this Section VI. No advance permission is required.

However, commendable provisions do not stand alone; read in context of the other Handbook provisions, they do not guarantee to students and the public free speech rights subject only to reasonable narrowly drawn restrictions.

70. The unconstitutional permit system has not been abolished. The revised Student Handbook, Section IX, "Student Bill of Rights and Responsibilities" provides:

2. Freedom of Inquiry and Expression
 - a. Freedom of speech is protected by the First

Amendment to the Constitution of the United States of America. However, institutions are permitted to identify areas for such expression and limit the time/length of such expression. The director of student activities must be notified 24 hours in advance for scheduling speech time.

The application of this provision is unclear. Does it apply only to speaking? Are students permitted to demonstrate by carrying signs, handing out leaflets, having discussions with others without prior notification? By threatening to withhold permission, the director of student activities can control when, where and how long “speech time” will be permitted. While subtly different from the previous advance-notice permit system, the provision is unconstitutional because the director of student activities, without any Board approved policy guidelines, is authorized to restrict the location and/or length of a student’s “freedom of speech” activity.

71. After notice has been given to the director of student affairs, and permission has been given for a place and time to set up a table, then Student Handbook Section VI, subsection “Tables”, permits students to “set up tables in any outdoor location on the campus and in large, open, indoor locations.” However, this provision requires that “[e]ach table have a sign or literature that identifies the College District person or organization sponsoring the table.” No substantial government interest is furthered by this prohibition on anonymous speech. The handbook permits anonymous signs and possibly anonymous literature distribution. Plaintiffs do not question the authority of campus police and administrators to ask them for identification. Plaintiffs object to the requirement that they have to identify themselves to everyone. The provision is not narrowly tailored to further a substantial government interest and is an unconstitutional restriction on anonymous protest. *Justice for All*, 410 F.3d at 772.

72. Subject to giving notice to the director of student activities and getting permission, Revised Student Handbook Section VI, subsection “General Rule on Distribution of Literature” provides:

General Rule on Distribution of Literature

- (a) Registered student, faculty/staff organizations, and academic and administrative units, may sell, distribute, or display literature on campus, subject to the rules in this section. Individual students and faculty/staff members may distribute or display literature but may not sell it. In either case, no advance permission is required.
- (b) “Literature” means any printed material, including any newspaper, magazine, or other publication, and any leaflet, flyer, or other informal matter, that is produced in multiple copies for distribution to potential readers.
- (c) Literature may be distributed only by academic and administrative units and members of registered student or faculty/staff organizations.
- (d) Distribution of literature in the classrooms and adjacent hallways is considered “disruption” as that term is defined in this Section VI and, therefore, is prohibited.

73. This provision incorporates defined terms found in Handbook Section VI, subsection “General Definitions – Categories of Speakers:”

- (1) “Academic or administrative unit” means any office or department of the College District;
- (2) “faculty/staff member” includes any person who is employed by the College District;
- (3) “off-campus person or organization” means any person, organization, or business that is not an academic or administrative unit, a registered student or faculty/staff organization, or a student or faculty/staff member;
- (4) “College District person or organization” includes academic and administrative units, registered student and faculty/staff organizations, and individual students and

faculty/staff members; this phrase describes the most inclusive category of potential speakers on campus; all person and organizations of any kind are either an “off-campus” person or organization” or a “College District person or organization”;

- (5) “registered student or faculty/staff organization” includes a registered student organization, a faculty/staff organization and any unit or subdivision thereof;
- (6) “student” means a person who is currently enrolled in the College District, or who is accepted for admission or readmission to the College District, or who has been enrolled at the College District in a prior semester or summer session and is eligible to continue enrollment in the semester or summer session that immediately follows, or who is attending an educational program sponsored by the College District while that person is on campus;

These definitions make the provision on distribution of literature internally inconsistent.

74. Subsection (a) of the provision on literature distribution permits official student, faculty, and administrative groups to distribute literature without permission. The subsection permits students to distribute but not sell literature. Plaintiffs do not intend to sell literature, but they did distribute literature during the November 2009 protest and intend to distribute literature during the SCCC planned protest in April 2010. What (a) gives, (c) takes away, since it allows “only... academic and administrative units and members of registered student or faculty/staff organizations” to distribute literature.

75. The revised Student Handbook prohibits students from distributing literature unless they are “members of registered student... organizations.” This blanket restriction on plaintiffs’ plan to distribute literature violates plaintiffs’ First Amendment constitutional rights. The subsection is ambiguous and contradictory, denying plaintiffs their due process right to notice about prohibited conduct that would subject them to sanctions. The subsection does not recite, reflect or implement on government policy

adopted under Texas law.

76. Under subsection “Not-for-Profit Literature Only” the Student Handbook contains these restrictions:

- (a) Except as expressly authorized by the TCCD *Policy and Regulation Manual* or by contract with the College District, no person or organization may sell, distribute, or display on campus any publication operated for profit. A registered student or faculty/staff organization may sell publications operated for profit as part of a fund-raiser authorized by, and subject to the limits of, this Section VI.
- (b) A publication is operated for profit if any part of the net earnings of the publication, or of its distribution, inures to the benefit of any private shareholder or individual.

This restriction prohibits plaintiffs from handing out, for example, free New York Times that contain articles or opinions about issues that support the protestors’ cause, but permits handing out the Weekly Standard or Nation, which are not-for-profit publications. A publication that has no “net earnings,” like the bankrupt Los Angeles Times can be handed out, but the profitable Wall Street Journal is prohibited. This restriction serves no substantial government interest, is overbroad, and places students at risk of discipline if they do not correctly determine whether there are “net earnings” and if so, whether those net earnings “inure” to the benefit of any individual.

77. The revised Student Handbook prohibits plaintiffs from participating in protests planned by SCCC because “cosponsorships” are prohibited. Section VI, subsection “Cosponsorship” provides:

Cosponsorship

- (a) Neither registered student, faculty/staff organization, nor individual students or faculty/staff members, may cosponsor any event on campus with an off-campus person or organization. Only academic or administrative units with authority delegated from the Chancellor of the

College District may cosponsor events with an off-campus person or organization.

(b) An event is a prohibited cosponsorship if an individual or a student or faculty/staff organization:

- (1) depends on an off-campus person or organization for planning, staffing, or management of the event; or
- (2) advertises the event as cosponsored by an off-campus person or organization; or
- (3) Operates the event as agent of, or for the behalf of, an off-campus person or organization, except for solicitation of charitable contributions; or

* * * *

- (6) engages in any other behavior that persuades the vice president for student services that an off-campus person or organization is in fact responsible for the event, in full or in substantial part.

78. SCCC is not an academic unit, registered student organization or a student or faculty member. Plaintiffs depend on SCCC to help plan the events they participate in. The literature plaintiffs hand out indicates SCCC is a sponsor of the event and plaintiffs carry out the event for the benefit of SCCC and its cause. Plaintiffs protested on campus in November 2009, and intend to protest in April 2010 as members of an organization made up of students nationwide. They will hand out Students for Concealed Carry on Campus literature and wear empty holsters, in furtherance of the plan of SCCC. SCCC is not a recognized campus organization. The revised Student Handbook "Cosponsorship" section prohibits plaintiffs' free speech activity with this provision.

79. The justification for prohibiting cosponsored events is:

- (d) The purpose of this rule is to preserve the limited space on campus for the use of students and faculty/staff members, and the rule will be interpreted to serve that purpose.

Space on the TCC campuses is hardly “limited.” The Northeast campus contains 187 acres, but the total building area takes up only 668,650 square feet. The Southeast campus is on 166.9 acres; the buildings occupy 371,775 square feet. The Northwest campus contains 193 acres; the buildings occupy 482,438 square feet. The South campus is similar. There are vast amounts of outdoor spaces on streets, sidewalks, parking lots common areas, and other open spaces where literature can be distributed.

80. There is no demand for protest event space at TCC. There have been almost no First Amendment activities on any of the campuses. From 2007 through 2009, while the permit system was in place, there was only one student protest, the one-person protest by Mr. Poulos for SCCC in March 2008. A preacher spoke on a campus for about two hours. A faculty member demonstrated how to protest to his students until campus police made him stop. Plaintiffs and one other student protested in November 2009. There are almost no student, faculty, or citizen protests on TCC campuses. One reason may be that of 44,000 students, none live on campus. Another reason may be the chilling effect of the TCCD policies. The Handbook justification for its restrictive policy is pretextual. Based on the historical facts, “the credibility of its rationale is diminished.” *Justice for All*, 410 F.3d at 770.

81. Plaintiff Clayton Smith, if he is not a student next semester, will be prohibited from participating with Plaintiff Schwertz in the Empty Holster protest in April 2010. Neither plaintiff can protest if a non-student is invited to join their protest and speaks to or discusses with others the message of the protest. A non-student cannot distribute literature on campus. These prohibitions are found in these Revised Student Handbook subsections:

Guest Speakers

Definitions

“Guest speaker” means a speaker or performer who is not a College student or faculty/staff member.

Who May Present

Registered student or faculty/staff organizations and academic and administrative units may present guest speakers on College District property. In the case of registered student organizations, advance permission from the vice president for student services is required. Individuals may not present a guest speaker.

82. If one of the plaintiffs, while not a student, speaks to others on the sidewalk during a protest, or leads a discussion with interested bystanders, this would be prohibited under the Handbook provision that defines “guest speakers” as those who “present a speech” or lead a discussion.” These prohibitions are not restricted to buildings, but apply to all “College District property.” Since individual students cannot participate in a protest where a non-student speaks or discusses issues, this provision denies students the right to have non-students participate in their protest if the non-student speaks, discusses, or hands out literature.

83. The Revised Student Handbook contains these restrictions:

Campus Visitor Rules

Visitors are welcome on the campus. However, when undesirable behavior on the part of the campus guest hinders or threatens the normal function of the campus, he/she will be asked to leave the campus, and, if this is not done, he/she will be arrested. Violators can be prosecuted under Texas law, although not all inclusive. The following acts are considered violation of College policy or state and local law.

* * * *

2. Disrupting classes or campus activities.
3. Posting or carrying unauthorized signs, posters, leaflets, etc.

* * * *

10. Attempting to organize or promote any unauthorized organizations or activities.
11. Violating any TCC regulations.

If plaintiff Smith, while a non-student, participates with plaintiff Schwertz in the April 2010 protest, Schwertz could be disciplined under the Handbook. Despite the Handbook's threat of arrest, Smith could not be punished so long as his conduct is peaceful and on streets, sidewalks, and common areas. Smith's participation would not violate a TCCD Board policy or any Texas law, which law guarantees the public the right to petition and assemble on public property. Smith would be in violation of only the TCCD Handbook. The restriction on the free speech activities involving non-student citizens is unconstitutional, prohibited by Texas law, and is not based on TCCD Board policy.

VI. CONCLUSIONS

84. At all relevant times, both defendants' acted under color, authority and pretense of governmental regulations and policies of Tarrant County College District. Defendants' policies and practices regarding free speech are unconstitutional on their face and as applied because they impermissibly restrict protected student expression and association, serve as prior restraint, and grant College officials unfettered discretion in restricting expression.

85. TCCD policies as applied to plaintiffs by the administration, which prohibit wearing empty holsters as a symbolic expression of their protest, are unconstitutional. The prohibition against this manner of symbolic speech in traditional public forums or designated public forums fails the applicable strict scrutiny test because no compelling governmental interest justifies the restriction. It is overbroad and leaves no

alternative forum available for this manner of expression. The prohibition against the symbolic speech of empty holsters in the classroom is subject to the reasonableness standard, whether the classroom is considered a limited designated free speech zone or a nonpublic zone, and no facts reasonably justify this restriction. Defendants' own handbook, as revised, would permit such symbolic speech in the classrooms. Defendants' prohibition is an unconstitutional content-based restriction.

86. By enacting and enforcing the speech-restrictive regulations, and by applying the policies as outlined above, Defendants place unconstitutional conditions on the receipt of the government benefits of a higher education at a state and county-supported college. If plaintiffs were to exercise their constitutional rights, they would be subject to discipline, including possible expulsion from the college. Defendants deprive plaintiffs of their established right to freedom of speech, expression and association secured by the First Amendment to the Constitution and Texas law by requiring they forfeit those rights in exchange for a governmental benefit.

87. Plaintiffs will be irreparably harmed by the challenged policies of defendants, which cannot be fully compensated by an award of monetary damages. Pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiffs are entitled to appropriate relief invalidating the unconstitutional TCCD policies.

88. Defendants claim they have ceased to violate the law by changing their policies and practices. They have not. Defendants have only changed their policies and Handbook for the worse. As set out above, their new policies and practices are unconstitutional, not properly adopted and violate state law. While actual abandonment of prior improper practices is a factor this court can consider in deciding whether to

exercise its powers to enjoin defendants from renewing prior unconstitutional practices, that is a matter relating to the exercise rather than the existence of judicial power. *City of Mesquite v. Aladdin Castle, Inc.*, 455 U.S. 283, 289 (1952) (“Mere voluntary cessation of allegedly illegal conduct does not moot a case”). Defendants, should they claim the new policies and practices mitigate against injunctive relief, have the burden to show it is “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *Id.* at 289, fr. 10. This is for the trial judge to decide.

VII. REQUESTED RELIEF

89. Plaintiffs request that the Court:

- a. Declare that the former and present sections of the Student Handbook and TCCD policies, as described in this Amended Complaint, were and are unconstitutional on their face because they violate the rights to freedom of speech, guaranteed to plaintiffs under the Constitution of the United States and by operation of Texas and federal law;
- b. Declare that the prior and revised sections of the Student Handbook and TCCD policies, as described in this Amended Complaint, were and are unconstitutional as applied or threatened to be applied to the activities of plaintiffs, because they violate plaintiffs’ rights to freedom of speech, guaranteed to plaintiffs under the Constitution of the United States and by operation of state and federal law;
- c. Issue a permanent injunction against Defendants, their agents, administrators, employees, and any other persons acting on their behalf, prohibiting them from enforcing said policies and Student Handbook provisions against plaintiffs and others for participation in the activities described in this Amended Complaint; and
- d. Grant to plaintiffs an award of their costs of litigation including reasonable attorneys’ fees and expenses.

Respectively submitted,

____ s/ Karin Cagle _____

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Certificate of Service

This document has been served on January 5, 2010, on defendants' counsel by ECF.

_____/s/ Karin Cagle_____
Karin Cagle