IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Case No: S164272

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS OF CALIFORNIA, INC., et al.,

Plaintiffs-Respondents,

v.

CITY OF LOS ANGELES, et al.,

Defendants-Petitioners.

APPLICATION TO FILE AMICUS BRIEF AND [PROPOSED] AMICUS BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AND AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO AND IMPERIAL COUNTIES IN SUPPORT OF PLAINTIFFS-RESPONDENTS' BRIEF ON THE MERITS

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Pursuant to California Rule of Court 8.520(f), proposed *amici curiae* American Civil Liberties Union of Southern California, American Civil Liberties Union of Northern California, and American Civil Liberties Union of San Diego and Imperial Counties respectfully request leave to file the attached brief in support of Plaintiffs-Appellant. This request is timely made within thirty days after March 30, 2009, the date on which Defendants-Petitioners filed their reply brief.

Interest of *Amici Curiae*

Proposed *amici* are the three California affiliates of the American Civil Liberties Union, a national, nonprofit, nonpartisan civil liberties organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nations' civil rights law. Since their founding, the national and local ACLU affiliates have had an abiding interest in the promotion of the guarantees of liberty and individual rights embodied in the federal and state constitutions rights, including the freedom of speech guaranteed by the First Amendment to the United States Constitution and the Liberty of Speech Clause of the California Constitution.

The California affiliates of the ACLU have been involved in a number of cases regarding the Liberty of Speech Clause of the California

Constitution, including submission of amicus briefs and/or participation in the oral arguments in *Robins v. Pruneyard Shopping Center* (1979) 23 Cal. 3d. 899, *Fashion Valley Mall v. National Labor Relations Board* (2007) 42 Cal.4th 850, *Golden Gateway Center v. Golden Gateway Center Tenants Association* (2001) 26 Cal. 4th 1013, and *San Leandro Teachers' Association v. Governing Board of the San Leandro Unified School District*, Cal S.Ct. Case No. S156961 (argument set May 5, 2009), and representing plaintiffs in *Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal. 4th 352, *U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory* (1984) 154 Cal.App.3d 1157, *Lopez v. Tulare Joint Union High School District* (1995) 34 Cal.App.4th 1302, and *Danskin v. San Diego Unified Sch. Dist.* (1946) 28 Cal.2d 536. *Danskin* established free speech rights of non-school personnel on school campuses and *U.C. Nuclear Weapons Labs* used an incompatible use test to allow public access to a nontraditional public forum, both of which are important precedents to be considered in this case.

Because this case concerns important questions concerning the interpretation of the Liberty of Speech Clause, proper resolution of the matter is of significant concern to *amici* and their members. *Amici* believe their expertise in constitutional issues, including the application of the

Liberty of Speech Clause on public property will make this brief of service to the Court.

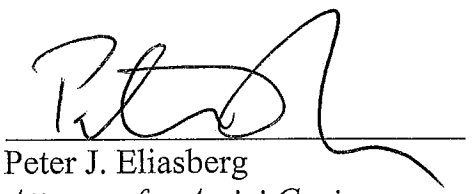
April 29, 2009

Respectfully submitted,

ACLU FOUNDATION OF SOUTHERN CALIFORNIA

ACLU FOUNDATION OF NORTHERN CALIFORNIA

ACLU FOUNDATION OF SAN DIEGO AND IMPERIAL COUNTIES



Peter J. Eliasberg
Attorney for Amici Curiae

INTRODUCTION

The Court has before it two questions from the United States Court of Appeals for the Ninth Circuit, as modified by this Court: 1) Is the Los Angeles International Airport a public forum under the Liberty of Speech Clause of the California Constitution? 2) If so, does the ordinance at issue violate the California Constitution? To answer these questions, the Court will need to answer two other questions: a) How are courts to determine what constitutes a public forum under the Liberty of Speech Clause? and 2) How do courts evaluate the validity of speech restrictions in public forums, as defined by the Liberty of Speech clause?

How the Court answers these questions will not only resolve the dispute between the parties. The answers will almost certainly also have profound implications for whether the government will largely be able to restrict vital forms of expression solely to parks, sidewalks, or the speakers' own property, or instead whether citizens will have a right to engage in expressive activity on a wide range of public property so long as it does not interfere with the principal uses of that property.

Plaintiffs (hereinafter "ISKCON"), relying on numerous cases from this Court and the Courts of Appeal, have already demonstrated in their brief that the Los Angeles International Airport is a public forum under the Liberty of Speech clause. *Amici* agree with that analysis. We submit this brief to give the Court additional insight on the questions before it.

Specifically, *amici* will demonstrate that the federal forum analysis, which the Defendants urge this Court to adopt, is both difficult to apply and inconsistent with the text and purposes of the Liberty of Speech Clause. Accordingly, we urge this Court to reaffirm that the proper approach under the Liberty of Speech Clause for analyzing the exclusion of a form of expression from public property requires practical consideration of whether the excluded speech is functionally compatible with the forum in which it is to be expressed and close scrutiny of content discrimination. [1]

ARGUMENT

I. THIS COURT SHOULD NOT ADOPT THE FEDERAL FORUM DOCTRINE IN APPLYING CALIFORNIA'S LIBERTY OF SPEECH CLAUSE.

The City of Los Angeles invites this Court to utilize the federal forum doctrine to determine whether Los Angeles International Airport is a public forum under the Liberty of Speech Clause. For the reasons set forth below, the Court should reject this invitation.

A. This Court Has Frequently Interpreted the Liberty of Speech Clause to Be More Protective of Speech than the First Amendment.

California has a venerable tradition of interpreting the Liberty of Speech Clause to protect more speech than is guaranteed by the First Amendment to the United States Constitution. (*See, e.g.*, *In re Lane* (1969)

[1] *Amici* do not address the more fact-specific question whether, under the basic incompatibility test, Defendants' complete ban on ISKCON's expressive activity in LAX is permissible.

71 Cal.2d 872; *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899.) Most recently, in *Fashion Valley Mall v. National Labor Relations Board*, this Court affirmed its commitment to protecting speech in privately owned public spaces as well as its departure from federal constitutional doctrine in this area. (*Fashion Valley Mall v. National Labor Relations Board* (2008) 42 Cal.4th 850, 860-84 (*Fashion Valley*)*; Hudgens* v. *NLRB* (1976) 424 U.S. 507, 518 (First Amendment does not restrict private property owner from restricting speech in shopping center).).

This Court has also held that a "marketing order," which compels a speaker to fund speech in the form of advertising that he or she otherwise would not fund violates the Liberty of Speech Clause, even where the message is about a lawful product or service and is not otherwise false or misleading. (*Gerawan Farming Inc. v. Lyons* (2000) 24 Cal.4th 468, 475 (*Gerawan Farming*).). By contrast, the United States Supreme Court has upheld an almost identical "marketing order" against a First Amendment challenge. (*See Glickman v. Wileman Brothers & Elliott, Inc.* (1997) 521 U.S. 457. *Compare also In Re Hoffman* (1967) 67 Cal.2d 845, 850 (privately owned train station open to leafletters who did not interfere with the use of the property) *with, International Society for Krishna Consciousness, Inc. v. Lee* (1992) 505 U.S. 672 (*Krishna Consciousness*) (publicly owned airport terminals not a public forum under the First Amendment.).)

This Court's most relevant prior precedent to the issues before it provides another example of the more speech protective nature of the Liberty of Speech Clause, as compared with the First Amendment. In *In re Hoffman*, the Court held: "The primary uses of municipal property can be amply protected by ordinances that prohibit activities that interfere with those uses. Similarly, the primary uses of railway stations can be amply protected by ordinances prohibiting activities that interfere with those uses. In neither case can [speech] be prohibited solely because the property involved is not maintained primarily as a forum for such activities." 67 Cal.2d at p.850. *Amici* urge the Court to reaffirm *In Re Hoffman* by holding that under California law, the validity of exclusions of speech from government property should be judged by whether the speech at issue in fact interferes with the actual use of the property in question. (*See id.* at 851 ("the test is not whether petitioners' use of the station was a railway use but whether it interfered with that use").)

The federal public forum doctrine scrutinizes speech restrictions on public property, outside of parks and sidewalks, differently from the approach used in *In Re Hoffman*. It focuses on the government's self-described intended use of the location. If the court determines that creating a forum for speech is not the intended use of the property, it applies a very deferential scope of review to exclusions of speech. That review both ignores whether the excluded speech would interfere with the actual use of

the property and permits content-based discrimination, despite the well-recognized dangers of such discrimination.

B. The Federal Forum Doctrine Has Been Repeatedly Criticized By Scholars and Judges.

Almost since its inception, the federal forum doctrine has been criticized by scholars and jurists as both difficult to apply and insufficiently protective of speech. (*See, e.g., United States v. Kokinda*, (1990) 497 U.S. 720, 740, n. 1 (*Kokinda*) (citing scholarly criticism) (Brennan, J., dissenting); Daniel Farber & John Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication* (1984) 70 Va. L. Rev. 1219; *People for the Ethical Treatment of Animals v. Giuliani* (S.D.N.Y. 2000) 105 F.Supp.2d 294, 307-309 (*People for the Ethical Treatment of Animals*).).

Indeed, in the years since the doctrine was first clearly laid out in *Perry Educ. Ass'n v Perry Local Educators Ass'n* (1983) 460 U.S. 37 (*Perry*), it has garnered the rare and dubious distinction of being almost unanimously condemned by legal scholars. (*See* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum* (1987) 34 UCLA L. Rev. 1713, 1715 (*Governance and Management*)(The federal forum doctrine "has received nearly universal condemnation from commentators.").). For example, Professor Geoffrey

Stone, one of the nation's preeminent legal scholars on free expression has written:

> Whether the first amendment guarantees individuals a right to engage in expressive activities on public property should turn not on the common law property rights of the government and such artificial and fictitious concepts as 'first amendment easements,' 'adverse possession,' and 'public trust,' but on a reasonable accommodation of the competing speech and governmental interests. Existing doctrine, with its myopic focus on formalistic labels, serves only to distract attention from the real stakes in these disputes.

(Geoffrey R. Stone, *Content-Neutral Restrictions* (1987) 54 U.Chi. L.Rev 46, 93). Numerous other scholars have condemned the federal public forum doctrine the City asks this Court to adopt. (*See, e.g.*, Laurence H. Tribe, *American Constitutional Law* 993 (2d ed. 1988) ("[A]n excessive focus on the public character of some forums, coupled with inadequate attention to the precise details of the restrictions on expression, can leave speech inadequately protected in some cases, while unduly hampering state and local authorities in others") (footnotes omitted); Post, *Governance and Management, supra,* 34 UCLA L. Rev. at p. 1715 ("The [United States Supreme] Court has yet to articulate a defensible constitutional justification for its basic project of dividing government property into distinct categories, much less for the myriad of formal rules governing the regulation of speech within these categories. These rules have proliferated to such an extent as to render the doctrine virtually impermeable to common sense."); Keith Werhan, *The Supreme Court's Public Forum*

Doctrine and the Return of Formalism (1986) 7 Cardozo L. Rev. 335, 341 ("There is no reason grounded in the first amendment to make a virtually 'all-or-nothing' distinction between access claims to a 'traditional' public forum and claim of access to a 'non-forum' and the Court has offered no reason. The claims of access in both instances are functionally identical. The first amendment issue in both is the same; the same first amendment analysis should be applied."); Thomas C. Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis* (1986) 55 Geo. Wash. L. Rev. 109, 110 ("[C]onceptual approaches such as that embodied in the nonpublic-forum doctrine simply yield an inadequate jurisprudence of labels."); Note, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property* (1982) 35 Stan. L. Rev. 121, 121-22 ("[T]he practice of dividing publicly owned places into public forums and nonforums distracts courts from the real interests at issue and results in inadequate protection of first amendment values.")).

Given such extensive criticism of the federal forum doctrine, it is appropriate -- and consistent with California precedent -- for the Court to apply a more speech-protective mode of analysis under the Liberty of Speech Clause of the California Constitution. Indeed, this Court has on numerous occasions relied on strong dissenting opinions and/or academic criticism as a basis not to follow the United States Supreme Court' interpretation of the First Amendment when interpreting the Liberty of

Speech Clause. (*See, e.g., Gerawan Farming, supra*, 24 Cal.4th at pp. 504-05, 511-12; *People v. Teresinski* (1982) 30 Cal.3d 822, 836-37).).[2]

C. The Federal Forum Doctrine Is Difficult to Apply and Leads to Inconsistent Results.

The federal forum doctrine requires that courts first categorize the government property where the speech was sought to occur as 1) a "traditional" public forum, such as a street, sidewalk or park, 2) a "limited" or "designated public forum," *i.e.* "public property which the state has opened for use by the public as a place for expressive activity," or 3) a "nonpublic forum," *i.e.* "[p]ublic property which is not by tradition or designation a forum for public communication." (*Perry, supra*, 460 U.S. at ps. 45-46; *Clark v. Burleigh* (1992) 4 Cal. 4th 474, 483 (*Clark*)).[3]

Different levels of scrutiny apply to each type of forum. For both traditional and designated forums, strict scrutiny applies to content-based restrictions, and the government may impose reasonable time, place and

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[2] For the reasons stated herein, all the factors set forth in *Teresinski* justify upholding stronger protection for speech under California law in this case: (1) "the language or history of the California provision" at issue; (2) whether federal law "limits rights established by earlier precedent in a manner inconsistent with the spirit of the earlier opinion"; (3) "the vigor of the dissenting opinions," if any, "and the incisive academic criticism of those decisions," if any; and (4) whether following federal law would "overturn established California doctrine affording greater rights." (*Teresinski*, supra, 30 Cal.3d at pp. 836-837).

[3] The Court in *Clark* limited its inquiry to whether a candidate's statement in a pamphlet produced by a county registrar constituted a nonpublic forum under the First Amendment, and explicitly did not consider what standards apply under Article I, § 2 of the California Constitution. (*Clark, supra,* 4 Cal.4th at p. 481-82.)

manner restrictions that are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. (*Clark, supra*, 4 Cal. 4th at p. 483.) In a designated public forum, however, the state may limit the class of speakers entitled to participate or limit access to speech on a particular subject matter. (*Arkansas Educ. Television Comm'n v. Forbes* (1998) 523 U.S. 666, 679 (*Forbes*).) In all other types of government property, *i.e.* nonpublic forums, "the State may reserve the forum for its intended purposes," subject only to reasonableness review and a prohibition against viewpoint discrimination. (*Perry, supra*, 460 U.S. at p.46.)

Given the broad range of uses different types of government property can have at different times and for different speakers, the first step of labeling the forum can be exceedingly complex. In the words of one federal court, "The designated public forum has been the source of much confusion. As that court put it, with considerable understatement, "[t]he contours of the terms 'designated public forum' and 'limited public forum' have not always been clear." *Hopper v. City of Pasco* (9th Cir. 2001) 241 F.3d 1067, 1074. The complexity of the forum determination is well-illustrated by court decisions relating to speech restrictions on public school campuses.

Federal and California courts have sometimes held that school campuses are nonpublic forums to justify the exclusion of outside speakers.

(*Reeves v. Rocklin Unified Sch. Dist.* (2003) 109 Cal.App.4th 652 (*Rocklin*) (school was nonpublic forum as to anti-abortion members who sought to distribute literature on campus; exclusion was reasonable to maintain order); *DiLoreto v. Downey* (1999) 87 Cal.Rptr.2d 791 (*DiLoreto*) (school district's exclusion of Ten Commandments banner from baseball field did not violate state constitutional speech rights because the advertising space was a nonpublic forum); *DiLoreto v. Downey* (1999) 196 F.3d 958 (9th Cir. 1999) (baseball field fence opened for commercial advertising was a nonpublic forum and school could exclude banner that was disruptive to school's educational purpose).)

However, schools are used for many expressive activities, both during and after school hours. Under California's Civic Center Act, public school campuses are available for the use of community groups to "meet and discuss, from time to time, as they may desire, any subjects and questions that in their judgment pertain to the educational, political, economic, artistic, and moral interests of the citizens of the communities in which they reside." (Education Code § 38130 *et seq.*) Where schools open up their facilities to outside speakers on a particular subject, for community use, or for public discussion in school board meetings, the state may not exclude certain speakers based on their ideology or the content of their speech. (*Good News Club v. Milford Cent. Sch.* (2001) 533 U.S. 98 (*Good News Club)* (state law allowing use of school district property after school

hours for community use created limited public forum; exclusion of religious group violated First Amendment); *Widmar v. Vincent* (1981) 454 U.S. 263, 267-68 (*Widmar*) (general access to student groups created designated public forum in university); *City of Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n* (1976) 429 U.S. 167, 176 ("when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech"); *Danskin v. San Diego Unified Sch. Dist.* (1946) 28 Cal.2d 536 (*Danskin*) (pre-federal forum case applying "clear and present danger" test to exclusion of speakers who refused to disclaim affiliation with subversive groups from "civic center" on school property).)

Moreover, the forum analysis is not always applied to review the constitutionality of speech restrictions on public school campuses. For example, because public school students do not "shed their constitutional rights to freedom of speech . . . at the schoolhouse gate," student expression at school cannot be censored unless it would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" or "collide with the rights of other [students]." (*Tinker v. Des Moines Community Sch. Dist.* (1969) 393 U.S. 503, 509, 513 (*Tinker*). *Cf. Hazelwood Sch. Dist. v. Kuhlmeier* (1988) 484 U.S. 260, 271-72 (school has more authority to limit student speech in a school-sponsored newspaper

which may bear the imprimatur of the school); *Bethel Sch. Dist. No. 403 v. Fraser* (1986) 478 U.S. 675 (First Amendment allowed discipline for student's lewd and indecent speech in school-sponsored speech).)[4]

Similarly, the free speech rights of teachers on campus are analyzed without reference to the forum doctrine. (*See Givhan v. Western Line Consolidated Sch. Dist.* (1979) 439 U.S. 410 (teacher's private conversations with principal concerning race discrimination protected by First Amendment); *Los Angeles Teachers Union v. Los Angeles City Bd. of Educ.* (1969) 71 Cal.2d 551 (school employer cannot prohibit teachers from circulating petition related to public financing of private schools during duty-free periods on school premises); *California Teachers Ass'n v. Governing Bd. of San Diego Unified Sch. Dist.* (1996) 45 Cal.App.4th 1383 (*California Teachers Ass'n*) (school district can restrict teachers from wearing political buttons in instructional setting only).) When schools are not considered designated public forums, they are nonpublic forums, or not forums at all. (*Clark, supra*, 4 Cal.4th at p. 483, n. 9.) However, it is clear that for speakers—like teachers and students—who have regular access to

[4] California's public school students are statutorily entitled to more speech protection than has been recognized by post-*Tinker* U.S. Supreme Court decisions under the First Amendment. (*See* Education Code § 48907; *Lopez v. Tulare Joint Union High Sch. Dist.* (1995) 34 Cal.App.4th 1302, 1318 (holding that the predecessor to § 48907 was the "statutory embodiment" of *Tinker* and that its "language cannot reasonably be construed to indicate any legislative intent that the rights protected by statute would expand or contract according to subsequent developments in federal law").)

government property that is not open to the public, the "nonpublic" character of that property does not open the door to censorship based on the content of their speech.

Thus, depending on the speaker, the audience, the subject matter, the time of day, and the exact place speech occurs on a particular piece of government property, the federal forum doctrine may or may not apply, and may require different results just as to the first step of the inquiry—what type of forum is at issue. Any doctrine of this complexity creates enormous problems for judges attempting to apply it to the particular facts of the cases before them.

For example, judges have struggled to determine what constitutes a designated public forum as opposed to a non-public forum as well how to evaluate the legitimacy of certain kinds of content restriction in forums that are not entirely open to the public. Content discrimination in a designated public forum is still subject to strict scrutiny, while the scope of the subject matter allowed within the forum—and hence the permitted content of any speech—remains within the control of the government. But how is a judge to determine whether a restriction is content based discrimination within a designated public forum and therefore subject to strict to strict scrutiny, or a subject matter restriction that defines the scope of the forum, and thus subject to little or no judicial review?

After reviewing the relevant U.S. Supreme Court decisions and controlling decisions of the Second Circuit Court of Appeals, a federal district court in New York observed:

> It appears therefore that the case law identifying the limited public forum has defined it as (1) a term synonymous and used interchangeably with a designated public forum; (2) a distinct subcategory of the designated forum; and (3) an outgrowth of a nonpublic forum. And the pertinent standard of First Amendment review has been applied either as strict scrutiny or as the minimal standard of reasonableness, or both. Where does this analysis lead, and what conclusions may a court draw from it when presented with a controversy whose resolution rests precisely on the application of these principles? To say that the ambiguities described have left this Court benumbed and bewildered is only modestly overstated.

(People for the Ethical Treatment of Animals, supra, 105 F.Supp.2d at p. 309.)

Moreover, as explained in detail below, an enormous amount rides on how a court answers the complex question of what kind of forum is at issue. If a court determines that Los Angeles International Airport, a public school, or another government property is a non-public forum, the decision will not only open the door to all but "unreasonable" *content neutral* speech restrictions, it will also permit government officials to engage in *content based* discrimination and limit judicial review to a reasonableness inquiry.

D. The Federal Forum Doctrine Provides Insufficient Protection against Content-Based Discrimination.

1. The Federal Doctrine Limits Full Protection to Speech that Occurs in Streets and Parks.

The federal forum doctrine drastically departs from the general constitutional distrust of content discrimination. While content-based restrictions on speech occurring in streets and parks receive strict scrutiny, if the location of the speech is defined as a nonpublic forum (or in some formulations, a "limited" public forum), the federal scheme provides almost *no* protection against content discrimination. Thus, freedom against government attempts to skew the public debate by restricting speech on some subjects while permitting speech on other subjects on all public property that is not a traditional public forum has been transformed into a privilege rather than a right. Any protection depends on the government's willingness to open up the property for expressive purposes.

As Justice Kennedy has pointed out, this approach, which turns on the government's subjective intent for how the property is principally to be used, is not only unprotective of speech, but it also relies on a legal fiction. The "principal purpose of streets and sidewalks . . . is to facilitate transportation, not public discourse and . . . the purpose for the creation of public parks may be as much for beauty and open space as for discourse." (*Krishna Consciousness*, *supra*, 505 U.S. at 696-97 (Kennedy, J. concurring).) Given the insubstantial and unreliable protection provided by this approach, perhaps it should not be surprising that even a public sidewalk—usually considered a quintessential public forum—has been

characterized as a nonpublic forum, where speech restrictions were subject only to reasonableness review. (*Kokinda*, *supra*, 497 U.S. at p. 732 (sidewalk adjacent to post office held to be *nonpublic* forum because "the purpose of the forum in this case is to accomplish the most efficient and effective postal delivery system").)

2. Contrary to Core Constitutional Principles of Free Speech, the Federal Forum Doctrine Allows Content Discrimination through the Government's Definition of a Designated Forum and within any Nonpublic Forum**.**

Protection against content discrimination is a core concern of constitutional free speech protections. This concern is based on a very good reason: government manipulation of public debate through content-based restrictions distorts the marketplace of ideas that is so central to the success of our democratic system of government.

> Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' . . . Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government . . . may not select which issues are worth discussing or debating in public facilities.

(*Police Dept. of Chicago v. Mosley* (1972) 408 U.S. 92, 96, quoting *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 270. *See R.A.V. v. City of St. Paul* (1992) 505 U.S. 377, 388, (*R.A.V.*) quoting *Simon & Schuster v. Members of the N.Y. State Crime Victims Board,* (1991) 502 U.S. 105, 116

("content discrimination 'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace'"); *Consolidated Edison Co. v. Public Service Comm'n* (1980) 447 U.S. 530, 538 ("To allow a government the choice of permissible subjects for public debate would be to allow the government control over the search for political truth."). *See also* Susan H. Williams, *Content Discrimination and the First Amendment* (1991) 139 U. of Pa. L. Rev. 615, 674, 676-96 ("If . . . a law disadvantages one content category of speech, then it can lead to serious social harms, including distortion of the public debate, interference with the democratic process, and a possible consequent loss of political legitimacy"); Stone, *Content-Neutral Restrictions*, *supra*, 54 U. Chi. L. Rev. at p. 55 (content based speech restrictions are problematic because they distort the public debate).).

Accordingly, "[c]ontent–based regulations are presumptively invalid." (*R.A.V., supra,* 505 U.S. at p. 382.) In fact, even within categories of *unprotected speech*, content discrimination is subject to strict scrutiny. (*Id.* at p. 386 ("fighting words" that otherwise may be prohibited may not be regulated based on their subject matter or message).) The federal forum doctrine, by contrast, has the anomalous effect of allowing content discrimination on any public property other than traditional public forums.

Having eliminated any *right* to speak on government property other than the traditional public forum, the federal forum doctrine undercuts the core constitutional value of prohibiting content discrimination by affirmatively allowing content discrimination in nontraditional public forums in two ways. First, by allowing the government to designate the speakers and issues for discussion in designated and/or limited public forums, the government is entitled to exclude certain messages. The very act of defining the subject matter to be permitted in a designated or nonpublic forum is content-based regulation, but seems to be subject to no scrutiny whatsoever. *See* Laurence H. Tribe, *Constitutional Choices* at p. 206-07 (Harvard Univ. Press 1985) (noting that the public forum doctrine applied in *Perry* has the effect of endorsing content discrimination on public property). Second, within a nonpublic forum, restrictions need only be "reasonable" and viewpoint-neutral; content-based restrictions are permissible. (*Perry*, 460 U.S. at p. 46.)

The failure of the federal doctrine to protect against content discrimination makes the doctrine particularly ill-suited for adoption as the standard under the California Constitution when one considers the text and history of our Constitution generally and the Liberty of Speech clause in particular. Speech holds a special value under the California Constitution, "because of the obligation and right of our citizens to be actively involved in government through the processes of initiative, referendum and recall

which distinguish our state constitutional system." (*U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory* (1984) 154 Cal.App.3d 1157, 1163 (*U.C. Nuclear Weapons Labs*).

In addition, a doctrine that allows a wide range of content discrimination on publicly owned property is inconsistent with the actual text of the Liberty of Speech Clause. That clause provides: "Every person may freely speak, write and publish his or her sentiments *on all subjects*, being responsible for the abuse of this right." (Art I, Sec. 2 (emphasis added).).

Our Constitution's robust commitment to freedom of speech has included vigilance against content discrimination exceeding that found in decisions based on the First Amendment. For example, in *Wirta v. Alameda-Contra Costa Transit Dist.* (1967) 68 Cal.2d 51 (*Wirta*), this Court held that a public bus system's categorical exclusion of political advertisements—except those related to a specific election—was subject to the strictest scrutiny and could not be justified. By contrast, the United States Supreme Court upheld a broader political speech restriction in public bus advertising in *Lehman v. City of Shaker Heights* (1974) 418 U.S. 298 (public transit system was not a public forum; restriction on political, but not commercial, advertising was reasonable and did not violate First or Fourteenth Amendments). (*See also Fashion Valley, supra*, 42 Cal.4th at p.

869 (applying strict scrutiny to content-based regulation on private property).).

3. Prohibitions on Viewpoint Discrimination Are Insufficiently Protective of Free Speech**.**

Because the federal doctrine allows content discrimination subject to mere reasonableness review in less public forums, it is particularly important that courts strongly enforce the remaining prohibition against viewpoint discrimination. However, this is a difficult enterprise because the distinction between viewpoint and content discrimination depends almost entirely upon how one frames the debate at issue. For example, in *Boos v. Barry*, the United States Supreme Court considered an ordinance that banned the display of any sign within 500 feet of a foreign embassy if the sign tended to bring that foreign government into "public odium" or "public disrepute." (*Boos v. Barry* (1988) 485 U.S. 312, 315 (*Boos*).) While it seems obvious that the ordinance sought to regulate only messages communicating viewpoints *against* foreign governments, and would allow messages in support of foreign governments, the Court nevertheless held that the restriction was viewpoint-neutral. (*Id.* at p. 319 ("The display clause determines which viewpoint is acceptable in a neutral fashion by looking to the policies of foreign governments").)

As one constitutional scholar has noted, "it is hard to identify a content-discriminatory regulation that does not restrict the expression of a

viewpoint in some hypothetical debate." (Alan E. Brownstein, *Alternative Maps for Navigating the First Amendment Maze* (1999) 16 Constitutional Commentary 101, 105.) For example, if a school imposed a ban on speech related to homosexuality while students were organizing to establish a club focused on sexual orientation and gender identity issues, the restriction would be viewpoint neutral on its face, but viewpoint discriminatory in its effect. (*See Faith Ctr. Church Evangelistic v. Glover* (9th Cir. 2007) 480 F.3d 891, 912-13 (citing *Boos, supra*, as exemplifying "the difficulty of identifying whether a regulation excludes an entire category of speech or restricts a prohibited viewpoint"); *Tucker v. State of Cal. Dept. of Educ*. (9th Cir. 1996) 97 F.3d 1204, 1216 ("[T]he line between content and viewpoint discrimination is a difficult one to draw. . ."); *Peck ex rel. Peck v. Baldwinsville Central Sch. Dist.* (2d Cir. 2005) 426 F.3d 617, 630 ("drawing a precise line of demarcation between content discrimination . . . and viewpoint discrimination . . . is, to say the least, a problematic endeavor").) This "problematic endeavor" is too weak a reed to support the constitutional guarantee of liberty of speech in less public forums.

By focusing on the government's intended use of the property, the federal forum doctrine allows the government to define the limitations on speech by its own characterization of the forum. Since government property is rarely intended primarily for communication, the doctrine can have the effect of limiting more speech than it protects. Justice Kennedy

and others have criticized the forum doctrine as allowing the government to determine when it can restrict speech on public property.

> Our public forum doctrine ought not to be a jurisprudence of categories rather than ideas or convert what was once an analysis protective of expression into one which grants the government authority to restrict speech by fiat.

(Krishna Consciousness, *supra*, 505 U.S. at p. 693-94.). Instead, Justice Kennedy recommended an objective standard similar to that employed by this Court in *In re Hoffman*—whether "the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses." (*Id.* at p. 698; *In re Hoffman*, *supra*, 67 Cal.2d at p. 850-51.)

II. UNDER THE LIBERTY OF SPEECH CLAUSE, THE PROPER TEST FOR EVALUATING A BAN ON A FORM OF EXPRESSION FROM PUBLICLY OWNED PROPERTY IS WHETHER THAT FORM OF EXPRESSION IS BASICALLY INCOMPATIBLE WITH THE ACTUAL USES OF THE PROPERTY

While the federal forum doctrine is confusing and insufficiently protective of speech, this Court and the Courts of Appeal have already set forth an approach for evaluating speech restrictions in public areas owned by the government that is workable and consistent with the constitutional values embodied in the Liberty of Speech Clause. That approach provides that all government property is a public forum. (*See U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory*

(1984) 154 Cal.App.3d 1157, 1164 (*U.C. Nuclear Weapons Labs*) ("This [public forum] concept is a continuum, with public streets at one end and government institutions like hospitals and prisons at the other end."); *see also Prisoners Union v. Department of Corrections* (1982) 135 Cal.App.3d 930, 935 (*Prisoners Union*).).[5]

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[5] Defendants are correct that there is some inconsistency about whether the basic incompatibility test is used to determine whether government property is a public forum under California law or whether it determines the permissibility of a speech restriction on government property. In *UC Nuclear Weapons Labs*, the Court of Appeal stated that all publicly-owned property is a public forum, so that complete exclusion of a form of expression from that property is only permissible if the government shows that the expression is "basically incompatible" with the intended uses of the property. (135 Cal.App.3d at pp.1164-65). By contrast, the United States Court of Appeals for the Ninth Circuit has utilized the "basic incompatibility" test to determine whether that an area is a "public forum" for purposes of the Liberty of Speech Clause, concluding that it is a public forum if the government cannot show that the expression to be excluded from the government property is "basically incompatible" with the property. (*Kuba v. 1-A Agricultural Ass'n* (9th Cir. 2004) 387 F.3d 850, 857.).) Having concluded an area was a public forum, the Ninth Circuit then applied the time, place and manner test to evaluate the permissibility of regulations that restricted speech within the forum, but did not exclude it entirely. *Id.* at 858-63. Presumably, if the court had concluded, based on its application of the basic incompatibility test, that the area was not a public forum under the Liberty of Speech clause it would have upheld the restrictions as reasonable and therefore permissible.

Amici believe that the better reading of *In Re Hoffman*, *Prisoners Union* and *UC Nuclear Weapons Labs* is that all government owned property is a public forum under the Liberty of Speech Clause. However, the difference between this approach and the one utilized by the Ninth Circuit in *Kuba* and *Carreras* will be irrelevant in those cases where the issue is the validity of a complete exclusion of a form of expression, as is the case here, since under both approaches a complete exclusion will be struck down unless the government demonstrates that the expression is basically incompatible with the intended use of the forum. (*See Prisoners' Union*, *supra*, 135

However, the fact that government property is a public forum is only the first step in determining whether excluding expression from the forum is permissible. Courts must next determine whether the expressive activity that is excluded from the forum is "basically incompatible" with the actual uses of the property. (*See U.C. Nuclear Weapons Labs, supra,* 154 Cal.App.3d at p. 1165; *Prisoners Union, supra,* 135 Cal.App.3d at p. 935. *Cf. In Re Hoffman, supra,* 67 Cal.2d at p.851 ("[T]he test is not whether the [leafletters'] use of the station was a railway use but whether it interfered with that use.")). If the government cannot make a showing of basic

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Cal.App.3d at p. 939 (government may not exclude leafletters from prison parking lot since it cannot demonstrate basic incompatibility); *Carerras v. City of Anaheim* (9th Cir. 1985) 768 F.2d 1039, 1043-47 (complete ban on solicitation in parking areas and pedestrian walkways outside Anaheim Stadium and exterior walkways of Anaheim Convention Center violates Liberty of Speech Clause because activity is not basically incompatible with those areas)), *overruled on other grounds by Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352.).)

The difference between the approaches will only matter, if at all, where the challenged restriction is not a complete exclusion of a form of expression from government property but instead a restriction on the time or place the expression may be employed within the forum. Under those circumstances, the court need not employ the basic incompatibility test, but can instead simply apply the time, place or manner test – whether the restrictions are reasonable and narrowly tailored to serve a significant government interest, while leaving open ample alternative channels of communication. (*Clark, supra,* 4 Cal. 4th at p. 483.). Under the federal forum doctrine, however, the court would employ the far less speech protective reasonableness test to a complete exclusion of a form of expression from a non-public forum, a ban on certain content within a non-public forum, or a restriction on the time or place of expression *within* a non-public forum.

incompatibility, then it may not entirely exclude the form of expression from the forum. What that approach would mean in this case is that the government may not entirely exclude charitable solicitation from LAX unless it can show that it is basically incompatible with the actual use of the airport. [6]

Rather than focusing on categorizing LAX as a particular type of forum, therefore, the inquiry focuses on whether in-hand solicitation interferes with passengers' use of the airport and the City's ability to maintain order and security within the airport. This Court's opinion in *In Re Hoffman*, where the Court struck down a broad ban on leafleting within a private train station is therefore particularly relevant here. In that case, the Court explicitly rejected the city's argument that the leafletters' presence went beyond the railroads' consent "to open their property . . . for a limited and specific purpose only, namely, for the use of the transportation facilities offered." (*In Re Hoffman*, *supra*, 67 Cal.2d at p. 848.)[7] Instead, the Court held that the primary uses of both municipal property and railway stations "can be amply protected by ordinances

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[6] The basic incompatibility test should not include consideration of alternative channels for communication. "Absent the presence of some conflicting interest" that could not be protected without censorship of the speaker's message, "[i]t is immaterial that another forum, equally effective, may have been available." *In re Hoffman*, 67 Cal.2d at 852, n. 7.

[7] California decisions under the First Amendment and those that "cite federal law that subsequently took a divergent course," are persuasive in interpreting California's Liberty of Speech clause. (*Fashion Valley*, *supra*, 42 Cal.4th at p. 864, n. 6.)

prohibiting activities that interfere with those uses," and that speech activities cannot be prohibited "solely because the property involved is not maintained primarily as a forum for such activities." (*Id.* at p. 850-51.) Since the leafletters' activities did not interfere with the use of the station, impede the movement of passengers or trains, block access, or otherwise interfere with the railroad employees' conduct of their business, application of the loitering ordinance to exclude them was unconstitutional. (*Id.* at p. 851.)

The relevant differences in terms of compatibility may include security concerns and the differences between in-hand solicitation and leafleting. However, a blanket ban on solicitation could only be justified by a showing that there is no manner of solicitation that would be compatible with the safe operation and use of LAX.

Assuming the government cannot make this showing of "basic incompatibility" does *not* mean that solicitors would necessarily have free rein in the airport, for example, to solicit passengers in the process of buying their tickets and checking in. This Court, the Courts of Appeal, and the federal courts applying California law, have all recognized the government's right to impose reasonable time, place and manner restrictions within a forum, even if the government may not entirely ban the expression from the forum. (*See Hoffman, supra,* 67 Cal.2d at p. 845 (holding that leafletters may not be excluded from Union Station because

their activities did not interfere with the purposes of the railway station, but stating that narrower restrictions that barred leafletters from areas such as ticket windows and turnstiles would be permissible); *Prisoners Union*, *supra*, 135 Cal.App.3d at p. 940 (enjoining complete ban on leafleting in parking lot of a prison but stating that "it is quite clear that prison authorities would be entitled to impose reasonable restrictions as to time, place, and manner of use."); *Kuba v. 1-A Agricultural Association* (9th Cir. 2004) 387 F.3d 850, 857-58 ("[T]his holding [that the Cow Palace is a public forum under California law] does not give demonstrators free rein . . . . The [government] may impose reasonable time, place and manner restrictions" using "federal time, place and manner standards.".).)

A. The Functional Incompatibility Test is Deeply Rooted In California Law

California constitutional jurisprudence has long looked to whether speech activities were consistent with the *use* of particular forums, rather than the intent of the government or property owner. As explained above, in *In Re Hoffman*, this Court considered whether a city ordinance could be applied to prevent anti-war activists from leafleting in a railway station. Since the leafletters' activities did not interfere with the use of the station, impede the movement of passengers or trains, block access, or otherwise interfere with the railroad employees' conduct of their business, application

of the loitering ordinance to exclude them was unconstitutional. (*Id.* at p. 851.)[8]

California's test governing private property owners' ability to restrict speech is also tied to practical considerations regarding their use of the property. "Shopping malls may enact and enforce reasonable regulations of the time, place and manner of . . . free expression to assure that these activities *do not interfere with the normal business operations* of the mall . . . ." (*Fashion Valley, supra*, 42 Cal.4th at p. 870, emphasis added.) In *Fashion Valley*, the Court applied strict scrutiny to content discrimination by shopping centers, striking down a rule against "speech that urges a boycott of one or more of the stores in the mall," despite

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[8] Federal courts interpreted the First Amendment in a manner similar to this Court's approach *In Re Hoffman*, until the United States Supreme Court embarked on a different course in cases like *Perry* and *Kokinda*. In *Grayned v. City of Rockford*, the U.S. Supreme Court explained:

> The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' Although a silent vigil may not unduly interfere with a public library . . . , making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. *The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time*. Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest.

(*Grayned v. City of Rockford* (1972) 408 U.S. 104, 116-117, emphasis added, citations omitted).

arguments that such content *did* interfere with the normal operations of the businesses there. (*Id.*)

Courts of Appeal in California followed the incompatible use test in *Prisoners Union*, *supra*, and *U.C. Nuclear Weapons Labs, supra*. In *Prisoners Union*, the court rejected the "all-or-nothing" argument that leafleting could not be allowed in a prison parking lot because characterizing the property as a "public forum" would render the government unable to maintain sufficient control for security purposes. (135 Cal.App.3d at pp. 939-41.) Holding that the record did not contain evidence that the Prisoners Union's activities had actually interfered with security or other practical concerns of the prison and that the prison parking lot was particularly appropriate for the union's communicative purposes, the court ordered that the prison be enjoined from prohibiting the Prisoners Union from distributing literature to visitors of the prison. (*Id.*)

In *U.C. Nuclear Weapons Labs, supra*, the Court of Appeal applied a "basic incompatibility" test to uphold an injunction requiring the Lawrence Livermore Laboratory to allow opponents of the Laboratory's work to display literature and show slideshows in the Laboratory's Visitor Center. The court held that under California's Liberty of Speech Clause, the visitors center fell "somewhere in the middle of the continuum" of public places and that distribution of literature opposing the government's work was compatible with both the purpose and function of the visitors center as a

location for informing the public about nuclear power. (154 Cal.App.3d at p. 1168).

B. The Functional Incompatibility Test Has Been Endorsed By Scholars and Jurists

As explained above, an avalanche of criticism has fallen on the federal forum doctrine. By contrast, numerous scholars have endorsed the basic incompatibility test. For example, Professor Stone has stated: "The appropriate standard [to evaluate content neutral speech restrictions on public property should be that stated by the Court in *dictum* in *Grayned* [*v. City of Rockford* (1972) 408 U.S. 104]: the 'critical question' in every case should be 'whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.'" (*Content-Neutral Restrictions*, *supra*, 54 U.Chi. L.Rev at p.94; *cf.* Farber and Nowak, *The Misleading Nature of Public Forum Analysis*, *supra*, 70 U. Va. L. Rev. at p. 1264 (criticizing the public forum doctrine and proposing instead a "focused balancing test," which would be similar to the basic incompatibility test).).

Justice Kennedy has also recommended an objective standard similar to that employed by this Court in *In Re Hoffman*—whether "the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government indicate that expressive activity would be appropriate and compatible with those

uses." (*Krishna Consciousness, supra,* 505 U.S. at p. 698 (Kennedy, J. concurring).). Justice Blackmun criticized the Court's public forum doctrine in *Cornelius v. NAACP Legal Defense & Educ Fund* (1985) 473 U.S. 788, 822 (Blackmun, J., dissenting). He went on to recommend an approach similar to the basic incompatibility test, stating that evaluating speech restrictions on public property "requires that we balance the First Amendment interests of those who seek access for expressive activity against the interests of other users of the property and the interests served by reserving the property for its intended uses." (*Id.*)

C. The Functional Incompatibility Test Protects the Government's Ability to Control its Facilities while Protecting Speakers from Content Discrimination.

By focusing on the incompatibility of particular speech with the actual use of public property, the functional incompatibility test preserves the government's interest in controlling its facilities and avoiding disruption of its day-to-day operations, while not turning a blind eye to content discrimination in non-public forums.

The only rationale for according diminished speech protection in less public forums – government property other than streets, sidewalks, and parks -- is that the government's primary, non-expressive use of the forum should not be undermined by expressive activities. However, as long as the communication does not interfere with the government's use of and reasonable control over the forum, the California Constitution should not

categorically allow more content discrimination in a less public forum than in one that is completely open to the public. To protect the government's use of a forum, courts should consider objective facts about the forum: who has access to it, the degree and regularity of access enjoyed by the speaker, the physical limitations of the forum, and the use to which it is actually put.[9] Speech that falls within the reasonable boundaries of those factors, such that it does not disrupt the government's or other participants' use of the forum, should be accorded protection, and any content-based regulation of such speech should be permitted only if it satisfies strict scrutiny.[10]

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[9] While the identity of the speaker and his relationship to the forum is not particularly relevant in this case, it will be in other cases, particularly where the government property is not widely used by the public. For example, in Prisoners Union, the relationship between the message – prison reform – and the target audience – family and friends of prisoners – was factually important to the outcome of that case. Similarly, in *U.C. Weapons Lab*, the provision of literature related to nuclear power in the lab's visitor center was directly related to the function or use of the forum at issue. (*Prisoners Union*, *supra*, 135 Cal.App.3d at p. 941 ("It would appear . . . that the parking lot of a prison is, for purposes of the communications proposed, a peculiarly appropriate forum."); *U.C. Weapons Lab*, *supra*, 154 Cal.App.3d at p. 1169 ("we consider it critically important for a government facility whose primary purpose it to describe and explain government activity or policy . . . to accommodate a meaningful exchange of views by the public"). *See also San Leandro Teachers' Association v. Governing Board of the San Leandro Unified School District*, Cal S.Ct. Case No. S156961 (argument set May 5, 2009) (whether Article I, section 2 assures that an employee organization may distribute its message to its members concerning electoral politics via school mailboxes).)

[10] In *In Re Hoffman*, *Prisoners Union*, and *U.C. Nuclear Weapons Labs*, *supra*, speakers were excluded from the respective forums without

It is important to note that an inquiry focused on objective factors would not change the outcomes of many California cases previously decided under the federal forum doctrine. For example, based on the facts presented in *Rocklin, supra,* the abortion protestors who sought access to that public school campus could appropriately be excluded as disruptive to the orderly operation of the school, a governmental interest long accepted as compelling. (*Rocklin, supra*, 109 Cal.App.4th 652. *Tinker*, *supra*, 393 U.S. 503; Educ. Code § 48907.)

Lopez v. Tulare Joint Union High School Dist. (1995) 34 Cal.App.4th 1302 (*Lopez*) and *Leeb v. Long* (1988) 198 Cal.App.3d 47 (*Leeb*) addressed federal and state constitutional protections for student speech and were informed by the terms of Education Code § 48907, which grants more protection to student speech than has been recognized by the U.S. Supreme Court. However, the interests cited in those cases as justifying schools' restrictions on student speech would also be available under the incompatible use test. The educational goal of teaching

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particular reference to the content of their messages, and the opinions in those cases therefore did not have occasion to scrutinize the restrictions as content-based. However, it follows from this Court's decision in *Fashion Valley*, *supra*, that strict scrutiny is appropriate in the event speech compatible with the forum is restricted based on its content. (*Fashion Valley*, *supra*, 42 Cal.4th at p. 870 (shopping centers are free to adopt regulations to ensure that speech activities do not interfere with normal business operations, but regulations that limit speech based on its message are subject to strict scrutiny).)

journalistic standards in a school sponsored film project—as opposed to an independent student publication—constitutes a government use that could justify regulations against profanity. (*Lopez*, 34 Cal.App.4th at p. 1329 (speech regulations prohibiting profanity in classroom film project upheld as narrowly drawn to achieve a compelling state interest).) Similarly, a school district's interest in avoiding liability for defamation would pose a serious enough threat to the orderly operations of the school to justify censorship of *actionable* defamation, as the Court of Appeal held in *Leeb v. Long*. (198 Cal.App.3d at p. 62 ("[f]reedom of speech may not be allowed to hinge on the subjective pique of an offended prospective plaintiff in a frivolous and doubtful lawsuit," but prior restraint of school-sponsored newspaper is permissible where an offended plaintiff "would have a clear chance of prevailing in a tort action against the school district").

CONCLUSION

The federal forum doctrine produces arbitrary results that are not sufficiently protective of speech, particularly with respect to content-based regulations in nontraditional public forums. According to this Court's precedents under the Liberty of Speech Clause, "[n]o doctrinal pigeonholing, complex formula, or multipart test" can obscure the conclusion that "a public sidewalk adjacent to a public building to which citizens are freely admitted is a natural location for speech to occur" in

California. (*Kokinda, supra*, 497 U.S. at 743 (Brennan, J., dissenting).) With respect to government property that is less open to the public, but compatible with some communicative use, the same considerations that have governed this Court's analysis of shopping malls and train stations should apply. In other words, the Liberty of Speech Clause should bar the government from banning forms of expression on its property unless it can demonstrate that the expression is basically incompatible with the actual use of the property.

Dated: April 29, 2009

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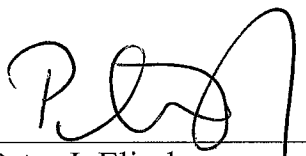
CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to 8.204(c) of the California Rules of Court, the enclosed brief is produced using 13-point or greater Roman type, including footnotes, and contains 7,236 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: April 29, 2009 Respectfully submitted,

By: 

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PROOF OF SERVICE

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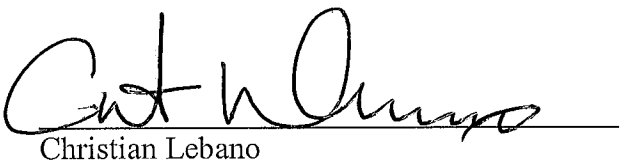

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