



PO Box 87131
San Diego, CA 92138-7131
T/ 619.232.2121 (direct: 619.398.4496)
F/ 619.232.0036
www.aclusandiego.org
davidloy@aclusandiego.org

December 1, 2015

VIA ELECTRONIC MAIL

President Dominick Suvonnasupa
Associated Students UCSD Council
University of California, San Diego
9500 Gilman Drive MC 0077
La Jolla, CA 92093
aspresident@ucsd.edu

Re: Unconstitutional Termination of Student Media Funding

Dear President Suvonnasupa:

In the hope of avoiding litigation, I am writing to ask the AS Council to reverse its recent decision to terminate student media funding in response to a recent article published by *The Koala*.

The AS Council is an arm of the University of California governed by the Constitution. The First Amendment covers the article in question. The Council violated the First Amendment because it singled out the student press and acted because of the viewpoint of the article.

The ACLU stands with the UCSD administration and AS Council in condemning the article. But condemnation does not justify censorship. Freedom of speech is essential to the struggle for justice. Neither can or should be sacrificed to the other. We call upon the Council to correct its mistake in recognition that the First Amendment is inseparable from the cause of justice.

1. BACKGROUND

The information in this letter is taken from public sources, but please let me know if I have misunderstood any relevant facts.

a. Student government

According to the Regents of the University of California, “the Associated Students on the several campuses of the University are official units of the University exercising authorities concerning student affairs by delegations from The Regents, the President, and the Chancellors.”¹ In the UC system, student governments “provide financial and other tangible support for student activities and organizations” to “further discussion among students of the broadest range of ideas.”²

The UCSD Chancellor is responsible for ensuring that “[t]he allocation and expenditure of . . . funds by student governments shall be in accordance with all applicable University policies” and “consistent with legal requirements.”³

b. Campus activity fees

UCSD collects campus activity fees (CAF) from students. The AS Council controls CAF funds. ASUCSD Standing Rules, Title V, § 1.7(a)(3). The Council allocates CAF funds to registered student organizations, including but not limited to student media. *Id.* §§ 2.4, 2.5. According to university policy, a primary purpose of such funding is “to stimulate on-campus discussion and debate on a wide range of issues from a variety of viewpoints.”⁴

Accordingly, UC policy mandates that the decision to fund student organizations “must be made without regard to the viewpoint” of a particular organization “or its program or activity,” and “must be based on considerations which do not include approval or disapproval of the viewpoint” of an organization “or any of its related programs or activities.”⁵

“The allocation of funds to student organizations does not represent an endorsement or the official position of the ASUCSD, the University of California, or the Regents of the University of California.” Standing Rules, Title V, § 2.5(f). Student media funded with CAF income must contain a disclaimer that “the content, opinions, statements and views expressed . . . are not endorsed by and do not represent the views, opinions, policies, or positions of the ASUCSD, GSAUCSD, UC San Diego, the

¹ <http://regents.universityofcalifornia.edu/governance/policies/3301.html> (visited Nov. 30, 2015).

² <http://policy.ucop.edu/doc/2710526/PACAOS-60> § 61.13 (visited Nov. 30, 2015).

³ <http://policy.ucop.edu/doc/2710526/PACAOS-60> § 67.00 (visited Nov. 30, 2015).

⁴ <http://policy.ucop.edu/doc/2710528/PACAOS-80> § 86.20 (visited Nov. 30, 2015).

⁵ <http://policy.ucop.edu/doc/2710528/PACAOS-80> §§ 86.20, 86.30 (visited Nov. 30, 2015).

University of California and the Regents or their officers, employees, or agents.”
Standing Rules, Title V, § 2.5(1)(2).

In addition to student media, the AS Council funds a wide range of expression by student organizations.⁶ For example, in the 2015-16 fall quarter, the Council funded:

- African Student Association: African Theme Thanksgiving;
- Chabad at UCSD: Learning with Chabad;
- College Democrats at UCSD: Political Rhetoric Discussion, City Council Primary Strategizing, Primary Election Showdown, Democratic Debate Watch Party, College Democrats at UCSD;
- Indian Student Association: Diwali;
- Multi-Asian Student Association: Asian Night Market & Cultural Movie Night
- Muslim Student Association: general meeting;
- SAJE & Union of Jewish Students: “Learning Events” that educate “UCSD Students about Jewish law and ideology”;
- SangamSD: Fall Banquet 2015, to “educate those in attendance about South Asian culture”;
- Triton Art: Artist Talk; and
- United Jewish Observance: Shabbat Week.

c. Current dispute

The Koala is one of several registered student organizations receiving CAF funding. On November 16, 2015, *The Koala* posted an article entitled “UCSD unveils new dangerous space on campus.”⁷ The article mocks “trigger warnings” and “[s]afe spaces” in terms that are outrageous and offensive, including repugnant epithets.

Two days later, the UCSD administration denounced *The Koala* as “profoundly repugnant, repulsive, attacking and cruel” and called “on all students, faculty, staff and community members to join us in condemning this publication and other hurtful acts.”⁸ On the same date, the AS Council met. After speakers objected to funding *The Koala*, a motion was made to delete Title V, § 2.4(d)-(f) of the Standing Rules, which cover the process for funding student media.

According to the live blog of the meeting, <http://as.ucsd.edu/site/news> (visited Nov. 30, 2015), AS Council members made the following comments:

⁶ See <http://as.ucsd.edu/finance/viewSubmissionStatus.php> (visited Nov. 30, 2015) for the complete list of funded organizations and events.

⁷ <http://thekoala.org/2015/11/16/ucsd-unveils-new-dangerous-space-on-campus/> (visited Nov. 30, 2015).

⁸ <http://goo.gl/FMhhwR> (visited Nov. 30, 2015).

- President Suvonnasupa: The question is do we fund media at all? It expresses an opinion of that group. Should student fees be used to fund these events? There is a difference between print and event in my opinion.
- AVP Juarez: Objectivity does not exist. I'm really upset what has come out of this publication.
- Senator Roberts: We nix them now does not mean that others who are funded by this cannot find alleyways to find different ways of funding. But we should nix this media funding now.
- Senator Pennish: I think alternate funding needs to be secured. It shouldn't be to pull funding away because some groups benefit and are positive to the campus.
- Senator Hunter: Is there a way to receive a list of current orgs who use this funding? By cutting media funding, we will also be cutting other publication. To say it was allocated in funding and back out, it won't look good on our point.
- Senator Vu: Campus climate has gotten so bad across the country. I feel like this should happen so we can represent our constituents.

The motion was then approved, with a statement that “standing rules supersede the Funding Guide with respect to media funding. AS does not fund printed media.” The Council’s action resulted in termination of CAF funding for student media but not other student organizations.

2. LEGAL ANALYSIS

In allocating CAF funds, the AS Council is a state actor governed by the Constitution. The First Amendment protects *The Koala*, no matter how offensive and outrageous the article in question. By terminating student media funding, the Council violated the First Amendment because it singled out the student press and acted because of *The Koala*'s viewpoint.

a. The AS Council is a state actor governed by the Constitution.

According to UC policy, the AS Council presides over a recognized student government, acting as an official unit of the university exercising powers delegated by the administration. As a result, the AS Council is governed by the Constitution, because “it has been delegated a public function by the State.” *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 296 (2001). The Council “is intertwined with the state in collecting, budgeting, and allocating funds to create a forum for speech, and therefore, the [AS Council] acts under the color of state law.”⁹ *Amidon v. Student*

⁹ As an entity, the Council may be immune from suit, but individual members responsible for adopting or implementing its decision are subject to suit for declaratory and injunctive relief or damages. *Hafer v. Melo*, 502 U.S. 21, 30-31 (1991); *Flint v. Dennison*, 488 F.3d 816, 825 (9th Cir. 2007); *Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, 1035-36 & n.2 (9th Cir. 1999). They may be entitled to

Ass'n of State Univ. of New York, 399 F. Supp. 2d 136, 145 (N.D.N.Y. 2005), *aff'd*, 508 F.3d 94 (2d Cir. 2007).

b. *The Koala* article is protected speech.

Disgusting though it is, *The Koala* article is protected speech. The First Amendment protects speech that is offensive and distasteful. *Snyder v. Phelps*, 562 U.S. 443, 448 (2011) (pickets near Marine's funeral stating "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags"); *United States v. Eichman*, 496 U.S. 310, 318 (1990) ("virulent ethnic and religious epithets"); *Cohen v. California*, 403 U.S. 15, 20 (1971) (jacket stating "Fuck the Draft").

Even "low-grade entertainment" that is "sophomoric and offensive" is "inherently expressive and thus entitled to First Amendment protection." *IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 388, 391 (4th Cir. 1993). Speech "is not actionable simply because it is base and malignant." *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1199 (9th Cir. 1989) (citation and quotation marks omitted). Because "governmental officials cannot make principled distinctions in this area," the First Amendment does not permit censorship based on disgust. *Cohen*, 403 U.S. at 25. Any judgments about the value of protected expression "are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000).

In any event, by participating in the debate over safe spaces on campus, however outrageously, *The Koala* addressed a matter of public concern that "relates to broad issues of interest," and it "cannot be restricted simply because it is upsetting or arouses contempt," no matter how "inappropriate or controversial" it may be. *Snyder*, 562 U.S. at 453-54, 458. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). The First Amendment protects "not only informed and responsible criticism but the freedom to speak foolishly and without moderation." *Baumgartner v. United States*, 322 U.S. 665, 674 (1944).

This case does not involve unlawful harassment, which does not arise from outrage or offense alone. *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 708, 710 (9th Cir. 2010) ("There is no categorical 'harassment exception' to the First

indemnification and defense from the university, but that is a matter on which I cannot advise. In addition, university officials may be personally liable for knowingly acquiescing in the Council's action. *See OSU Student Alliance v. Ray*, 699 F.3d 1053, 1075 (9th Cir. 2012) (if "an immediate supervisor knew about the subordinate violating another's federal constitutional right to free speech," and "acquiesce[d] in that violation," supervisor is liable for "free speech violations").

Amendment’s free speech clause,” and speech cannot be censored when its alleged “offensive quality was based entirely on [its] meaning”); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (“speech that is merely offensive to some listener” cannot be harassment); *Lela v. Bd. of Trustees of Cmty. Coll. Dist. No. 516*, No. 14 CV 5417, 2015 WL 351243, at *6 (N.D. Ill. Jan. 27, 2015) (“prohibitions against discrimination and harassment” do not encompass “all offensive speech regarding sex, disability, race, or other classifications”). The mere publication of an article is not conduct sufficiently severe or pervasive “to have the systemic effect of denying” students “equal access to an educational program or activity,” as required to show harassment under Title IX. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 652 (1999). Accordingly, *The Koala* article is protected speech.

c. The AS Council unconstitutionally singled out student media.

The AS Council’s decision to terminate student media funding unconstitutionally singled out the student press, regardless of motivation. Though the media are subject to generally applicable regulations, the First Amendment prohibits discrimination against the press, including the student press. A public entity may not take action that “singles out” student media by depriving such “publications of a source of revenue.” *The Pitt News v. Pappert*, 379 F.3d 96, 111 (3d Cir. 2004) (striking down law that targeted “media associated with the Commonwealth’s universities and colleges”).

If it violates the First Amendment to impose a financial burden on student publications by prohibiting certain forms of advertising in them, *id.* at 111-12, it certainly violates the First Amendment to strip them of CAF funding while continuing to fund other student organizations. Therefore, the Council’s decision to terminate funding for student media unconstitutionally “singled out the press for special treatment.” *Minneapolis Star & Tribune Co. v. Minnesota Com’r of Revenue*, 460 U.S. 575, 582 (1983) (striking down tax on press but not other businesses).

The Council’s decision is unconstitutional regardless of any “improper censorial motive.” *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987). Illicit “intent is not the *sine qua non* of a violation of the First Amendment.” *Minneapolis Star*, 460 U.S. at 592; *cf. OSU Student Alliance v. Ray*, 699 F.3d 1053, 1075 (9th Cir. 2012) (“[F]ree speech violations do not require specific intent.”). Accordingly, the decision to terminate student media funding was unconstitutional on its face and must be reversed.

d. The AS Council acted unconstitutionally because of viewpoint.

The AS Council violated the First Amendment by taking action based on the viewpoint of *The Koala* article. By allocating CAF funds to student organizations, the AS Council operates a limited public forum for the speech of those organizations, and in

doing so the Council may not take action based on the viewpoint of that speech.¹⁰ *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 829 (1995); see also *Amidon v. Student Ass'n of State Univ. of New York at Albany*, 508 F.3d 94, 100 (2d Cir. 2007) (“A pool of student activity fees to fund private speech is a limited public forum in which forum principles apply,” prohibiting “denial of funding in a viewpoint-discriminatory manner.”); cf. *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973) (“[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”).

Under UC policy, CAF funding provides a forum “to stimulate on-campus discussion and debate on a wide range of issues from a variety of viewpoints.” In that forum, racism may be a “topic of debate,” and it is “offensive to the First Amendment” to retaliate against the expression of certain “views on that problem.” *Rosenberger*, 515 U.S. at 831. Therefore, as an arm of the university, the AS Council may not take action because some have “scoffed at its goals,” while it continues “permitting, even encouraging, conduct that would further the viewpoint expressed in the University’s goals.” *IOTA XI*, 993 F.3d at 393.

The Council is not immunized because it terminated all student media funding. The question is whether *The Koala*’s speech “was a substantial or motivating factor” in the Council’s action. *Mendocino Env’tl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999). The record demonstrates that the Council’s decision was substantially motivated by *The Koala* article, which makes the decision invalid regardless of whether it was limited to *The Koala*. Those “who are offended by the ideas being discussed” in a forum “certainly are not entitled to shut down an entire forum simply because they object to what some people are saying.”¹¹ *Rodriguez v. Maricopa County. Cmty. Coll. Dist.*, 605 F.3d 703, 711 (9th Cir. 2010). Therefore, the Council’s decision to terminate student media funding must be reversed.

3. CONCLUSION

Nothing in this letter endorses the content or viewpoint of *The Koala*. The ACLU joins the AS Council in condemning the article in question, which understandably outraged students of color and others. As we have done before, we call on UCSD to “foster by persuasion and example” a culture of civility and respect, *Johnson*, 491 U.S. at 418, and take concrete actions to promote diversity, equity, and inclusion. Certainly, UCSD officials may express opinions about *The Koala*, and students may protest it.

¹⁰ The disclaimers provided in the Standing Rules confirm that student organizations “are not the University’s agents, are not subject to its control, and are not its responsibility,” and thus their speech is not attributable to UCSD or the AS Council. *Rosenberger*, 515 U.S. at 835.

¹¹ Even if the Council could close the entire forum, the relevant forum is funding for all registered student organizations, not just student media. As discussed above, the Council may not terminate student media funding while continuing to fund other student organizations.

“The Constitution embraces such a heated exchange of views, even (perhaps especially) when they concern sensitive topics like race.” *Rodriguez*, 605 F.3d at 708. The function of education “is to stimulate thought, to explore ideas, to engender intellectual exchanges. Bad ideas should be countered with good ones,” not punished by administrators. *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1032 (9th Cir. 1998).

A strong First Amendment is not only compatible with equality but essential to its pursuit. Many landmark civil rights decisions arose from unconstitutional suppression of demonstrations and dissent. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Edwards v. South Carolina*, 372 U.S. 229 (1963). “Free speech has been a powerful force for the spread of equality under the law; we must not squelch that freedom because it may also be harnessed by those who promote retrograde or unattractive ways of thought.” *Rodriguez*, 605 F.3d at 709-10.

Freedom of speech is indivisible. History teaches that the first victim of censorship is never the last. As recent events in Ferguson remind us, people of color fighting for justice continue to suffer censorship, which the ACLU went to court to defeat. We ask the AS Council to remember that freedom of speech remains a pillar of the movement for justice and equity.

I look forward to hearing that the AS Council has reversed its unconstitutional decision to terminate student media funding. Please let me know if you have any questions.

Sincerely,



David Loy
Legal Director

cc: Pradeep Khosla, Chancellor
Daniel Park, Chief Campus Counsel