



**Foundation for Individual Rights in Education**

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February 23, 2010

Chancellor Marye A. Fox  
University of California, San Diego  
9500 Gilman Drive, MC 0005  
La Jolla, California 92093-0005

*Sent via U.S. Mail and Facsimile (858-534-6523)*

Dear Chancellor Fox:

As you know, the Foundation for Individual Rights in Education (FIRE) is a national nonpartisan, nonprofit educational and civil liberties organization working to defend and promote individual rights at our nation's colleges and universities. FIRE has written you several times in recent years to discuss our concerns with the University of California, San Diego's (UCSD's) actions in particular matters concerning freedom of expression on your campus. FIRE wrote you yesterday regarding violations of freedom of expression by Associated Students of UCSD President Utsav Gupta. Prior to that, we wrote you on December 17, 2008, asking you to review UCSD's policies affecting campus speech in light of recent legal developments. In your response of January 12, 2009, you thanked FIRE for our dedication to the First Amendment and assured us that UCSD "appreciate[s] the importance of protecting the free speech rights of all members of the campus community."

In light of the current controversy roiling your university, FIRE writes today with an urgent reminder of UCSD's binding legal obligation, as a public institution, to respect the First Amendment rights of its students. We are gravely concerned about the possibility of punishment for students engaging in protected expression both on and off campus. UCSD cannot and must not discipline or investigate students on the basis of protected expressive activity. Despite the political pressure on your administration to punish protected expression, it is crucial that UCSD remain stalwart in its defense of freedom of speech, especially when the speech at issue is unwelcome, unpleasant, or controversial.

This is our understanding of the facts; please correct us if you believe we are in error.

On the night of Monday, February 15, members of one or more UCSD fraternities allegedly organized and hosted an off-campus party. (No UCSD fraternity has admitted to any official sanction of or involvement in the party.) The invitation

for the party, dubbed the “Compton Cookout,” encouraged attendees to embrace racial stereotypes of African-Americans in order to “celebrate” Black History Month. The invitation, distributed online via the social networking site Facebook, read in full:

February marks a very important month in American society. No, i’m not referring to Valentines day or Presidents day. I’m talking about Black History month. As a time to celebrate and in hopes of showing respect, the Regents community cordially invites you to its very first Compton Cookout.

For guys: I expect all males to be rockin Jersey’s, stuntin’ up in ya White T (XXXL smallest size acceptable), anything FUBU, Ecko, Rockawear, High/low top Jordans or Dunks, Chains, Jorts, stunner shades, 59 50 hats, Tats, etc.

For girls: For those of you who are unfamiliar with ghetto chicks-Ghetto chicks usually have gold teeth, start fights and drama, and wear cheap clothes - they consider Baby Phat to be high class and expensive couture. They also have short, nappy hair, and usually wear cheap weave, usually in bad colors, such as purple or bright red. They look and act similar to Shenaynay, and speak very loudly, while rolling their neck, and waving their finger in your face. Ghetto chicks have a very limited vocabulary, and attempt to make up for it, by forming new words, such as “constipulated”, or simply cursing persistently, or using other types of vulgarities, and making noises, such as “hmmg!”, or smacking their lips, and making other angry noises,grunts, and faces. The objective is for all you lovely ladies to look, act, and essentially take on these “respectable” qualities throughout the day.

Several of the regents condos will be teaming up to house this monstrosity, so travel house to house and experience the various elements of life in the ghetto.

We will be serving 40’s, Kegs of Natty, dat Purple Drank- which consists of sugar, water, and the color purple , chicken, coolade, and of course Watermelon. So come one and come all, make ya self before we break ya self, keep strapped, get yo shine on, and join us for a day party to be remembered- or not.

According to a February 18th statement by “Jiggaboo Jones,” a self-proclaimed “Internet star radio personality” whose picture was featured on the invitation, the purpose of the party was to celebrate the release of his new DVD. So far as FIRE can determine, “Jiggaboo Jones,” also known as Nipsey Washington, is not a UCSD student but is primarily a disc jockey and comedian whose persona relies on a “shock jock” brand of deliberately provocative expression. As even a cursory visit to his various promotional websites makes abundantly clear, Jones seeks to offend by embracing racist caricatures in a broad, vulgar, and seemingly uncritical fashion. The idea of a “Compton” party with this theme appears to be partly an allusion to Compton’s significant place in the history of the musical genre of gangsta rap, notably in the seminal album *Straight Outta Compton* (1988) by hip hop group N.W.A.

The event itself seems to have concluded without incident. However, on Tuesday, February 16, you and Vice Chancellor of Student Affairs Penny Rue issued a campus-wide statement regarding the invitation. The statement read:

We were distressed to learn that over the weekend an offensively themed student party, mocking the commemoration of Black History Month, took place off campus. We strongly condemn this event and the blatant disregard of our campus values. Although the party was not a UC San Diego student-organization sponsored event, participants did include UC San Diego students and that causes us great concern.

As stated in our Principles of Community, <http://blink.ucsd.edu/HR/policies/POC/principles-of-community.html>, we reject acts of discrimination based on race, ethnicity, gender, age, disability, sexual orientation, religion, and political beliefs, and, we will confront and appropriately respond to such acts. We reaffirm our Principles of Community <http://blink.ucsd.edu/HR/policies/POC/principles-of-community.html> and encourage the campus to join us in our affirmation.

On Wednesday, February 17, Vice Chancellor Rue and Associate Chancellor and Chief Diversity Officer Sandra Daley issued another statement to all UCSD students, expressing sympathy for those offended by the invitation. The statement announced that “Student Life staff are conducting a full investigation of the incident and the role of registered student organizations in it” in order to “determine if this violation of our Principles of Community is also a violation of our code of conduct.” Rue and Daley further noted that the “remedy for dangerous, offensive or extreme speech is more speech, not less,” and they urged students to engage in “[c]ritical conversations among trusted friends, College-based events, [and] vigorous classroom debate.”

On Thursday, February 18, members of the California State Legislature held a press conference in Sacramento to denounce the party and the invitation and to call for the punishment of involved students. State Representative Isadore Hall III, whose district includes Compton, urged the expulsion “of any student participating in this vicious, malicious and egregious act.” Hall further stated that he did not want the fraternities “to merely apologize for their actions”; rather, he said that he “want[ed] names” of student participants. According to *The Sacramento Bee*, UCSD spokesman Jeff Gattas “assure[d] lawmakers that the university shared their anger and would investigate circumstances surrounding the off-campus party,” but would not comment on whether the university would expel students for racist but protected speech. (“Lawmakers demand probe of ‘Compton Cookout,’” Jim Sanders, 2/18/10.)

On Thursday night, members of student organization *The Koala* broadcast a defense of the party on UCSD’s Student Run Television (SRTV). (The broadcast does not seem to have been recorded and, to date, no copies of the broadcast are available.) Shortly thereafter, Associated Students President Utsav Gupta shut down the station and froze funding for all student media at UCSD. Due to the significant constitutional problems presented by Gupta’s actions, FIRE has addressed these events in a separate letter sent to your office yesterday by my colleague Adam Kissel.

On Friday, February 19, you and Vice Chancellor Rue attended a rally held by the Black Student Union to denounce the invitation, the party’s attendees, and the broadcast by members of *The Koala*. According to the *California Review*, Rue told the rally that “We need more speech. We might not be able to shut them up, but our voices can be so loud that they cannot be heard!” (“The UCSD Overreaction & the Death of Free Speech,” Alec Weisman, 2/21/10.) Also on Friday, the Los Angeles branch of the National Association for the Advancement of Colored People (NAACP) issued a public condemnation of the event and called for the punishment of those students involved. The group’s statement maintained that failing to punish participating students would “send a less than clear message that such future reckless or intentional behavior will not be tolerated, which may embolden the perpetrators, and future perpetrators’ beliefs that they will not suffer any serious consequences concerning acts of discrimination and racism, which may cause such actors to act out their racist tendencies in the future.”

At the time of this writing, no punishments from UCSD officials have been meted out to any student or student organization, at least to FIRE’s knowledge. FIRE appreciates your repeated calls for students to answer the speech they abhor with yet more speech, as well as your seeming sensitivity to the clear First Amendment issues this situation presents. However, we are troubled by San Diego Six News’ recent report that UCSD has “three attorneys and other investigators” still working on the case. Further, UCSD’s “What We Are Doing” website includes this statement:

We’ve launched aggressive investigations: We strongly believe that activities such as the racially themed party do not reflect our campus community. **Chancellor Fox has directed Vice Chancellor Penny Rue to aggressively investigate the incidents for violations of the Student Code of Conduct.** The Director of Student Policy and Judicial Affairs, Tony Valladolid, is leading an investigation related to the off campus party, and the UC San Diego Police are investigating the racist message found on campus. We take any racial incident seriously, and are exhaustively investigating the incidents. **Violations of the Student Code of Conduct range from expulsion to a letter of censure. Potential sanctions for violations of the Conduct Code may be more severe if the violations are connected with, arise from, or are motivated by bias or hate.** Criminal activity will be prosecuted. [Emphases added.]

Such statements deepen FIRE’s concern that despite UCSD’s commendably level-headed reaction thus far, your administration is not only under undue outside pressure from state legislators and others to punish protected speech, but also is preparing to do so—if not directly, then by finding a pretext to punish students for protected speech by other means. To be clear: **As a public institution, UCSD may neither punish nor investigate students for expression protected by the First Amendment.**

That the protections of the First Amendment extend fully to the public university campus is long-settled law. See, for example, *Keyishian v. Board of Regents*, 385 U.S. 589, 605–06 (“[W]e have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government’s ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment”); *Healy v. James*, 408 U.S. 169,

180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools’”) (citation omitted); *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) (“With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities”).

However offensive it may be, the party invitation is entirely protected by the First Amendment. The principle of freedom of speech does not exist to protect only non-controversial speech; indeed, it exists precisely to protect speech that some members of a community may find controversial or offensive. The right to free speech includes the right to say things that are deeply offensive to many people, and the Supreme Court has explicitly held, in rulings spanning decades, that speech cannot be restricted simply because it offends people. In *Street v. New York*, 394 U.S. 576, 592 (1969), the Court held that “[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.” In *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973), the Court held that “the 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.’” In *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), the Court held that “a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.” In *Texas v. Johnson*, 491 U.S. 397, 414 (1989), the Court explained the rationale behind these decisions well, saying that “[i]f 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.” Under these standards, there can be no question that the language employed by the invitation is protected by the First Amendment.

Furthermore, UCSD may not “aggressively investigate” protected expression in an attempt to discover other, pretextual grounds for punishment of protected speech. The investigation of protected speech is a violation of the rights of the person investigated. *Sweezy v. New Hampshire*, 354 U.S. 234, 245, 248 (1957). As University of Alaska President Mark Hamilton wrote in a similar case:

[R]esponses to complaints or demands for action regarding constitutionally guaranteed freedoms of speech CANNOT BE QUALIFIED. Attempts to assuage anger or to demonstrate concern by qualifying our support for free speech serve to cloud what must be a clear message. Noting that, for example, “The University supports the right to free speech, but we intend to check into this matter,” or “The University supports the right of free speech, but I have asked Dean X or Provost Y to investigate the circumstances,” is unacceptable. There is nothing to “check into,” nothing “to investigate.”

Merely waiting for the investigation to run its course does not absolve UCSD of its responsibility to cease the investigation.

FIRE is also deeply concerned by Rue's and Daley's consideration of the possibility that a violation of UCSD's Principles of Community may also serve as a violation of UCSD's code of conduct. Any determination by you or your administration that the Principles of Community are not merely aspirational, but rather comprise mandatory beliefs, attitudes, and demeanors, would unquestionably violate the First Amendment. For example, the Principles of Community state that UCSD is "committed to the highest standards of civility and decency toward all." As a statement of institutional values, without any possibility of official enforcement, this moral code is perfectly acceptable. But if this commitment to "civility and decency toward all" were to constitute required behavior, subject to punishment if not observed, then UCSD would be violating the First Amendment rights of its students to freedom of expression and freedom of conscience.

Specifically, if the Principles are deemed enforceable via the code of conduct, they are constitutionally impermissible for both overbreadth and vagueness. The Principles rely on impermissibly vague terms—for example, "dignity," "mutual respect," "civility and decency," and "abusive or demeaning treatment"—that could, in application, mean virtually anything. A regulation is said to be unconstitutionally vague when it does not "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). Students at UCSD would be forced to guess what their peers and your administration might deem insufficiently respectful and as a result would likely self-censor to such a degree that expression on campus would be chilled. Moreover, even assuming that a student was able to figure out which speech is and is not "abusive" or "demeaning," the fact that a student seemingly may be punished simply for being uncivil means that engaging in wide swaths of constitutionally protected expression may serve as grounds for punishment. Such a result is simply unacceptable under the First Amendment.

In *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the Supreme Court ruled that the First Amendment protects even the most outlandishly offensive parody—in that case, a cartoon suggesting that the Reverend Jerry Falwell lost his virginity in a drunken encounter with his mother in an outhouse. This blatantly "demeaning" speech is protected under the First Amendment, and such expression likewise must be protected at UCSD. UCSD is free to criticize such expression but is bound not to punish or prohibit it. Indeed, transforming the Principles of Community into official policy would render them subject to legal challenge. In November of 2007, U.S. Magistrate Judge Wayne Brazil issued a preliminary injunction prohibiting San Francisco State University (SFSU) and the California State University (CSU) System as a whole from enforcing a "civility" policy which had served as the basis for an investigation of an SFSU student group that had engaged in protected but unpopular political speech on campus. The injunction led to a settlement in March 2008 that permanently revised the CSU System's civility policy, affecting more than 400,000 students. *College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007).

Finally, FIRE recognizes that political pressure has been brought to bear on your institution inappropriately by politicians who might sincerely want to stamp out distasteful speech, but who also may see in this case an opportunity to score easy political points by calling for investigation and punishment. This is regrettable. While we recognize the deeply felt distaste for the expression at issue here, we would have hoped that elected officials who have sworn to defend

the Constitution would have, at the least, a working understanding of the venerable principles underlying the First Amendment. Sadly, the calls put forth for suspension or expulsion of students engaged in offensive yet protected behavior demonstrate that such understanding is lacking. However, misunderstandings about freedom of speech—however politically potent or commonly held—provide no excuse for any confusion on the part of you or your administration about UCSD’s legal and moral obligations in this matter.

As a practical matter, you should also consider that capitulating to politically based but legally illegitimate calls for punishment on this issue will only encourage further such demands from those inclined to value political gain over the constitutional protection of individual rights. You are likely to find that when you have once given in to political pressure to take action against UCSD students or faculty, it will be far more difficult to say “no” to the next person or group that demands that you appease them through actions that may be immoral, unconstitutional, or simply against the best interests of UCSD’s students or faculty.

FIRE appreciates the difficulty of the situation in which your administration now finds itself. Yet as you know, answering that speech with which we most vigorously disagree with still more speech—rather than investigation, censorship, and punishment—is the only legally and morally acceptable choice. The outrage felt by many in the UCSD community has presented you with an opportunity to teach your students a lesson about the uniquely American value of freedom of expression and the vast understanding and wisdom to be gained by confronting those views we abhor with our own deeply held truths.

Both you as Chancellor and UCSD as an institution have the right to express opinions about this situation. But if you violate students’ rights to free expression, you risk turning those students holding views you reject into legitimate victims of injustice, distracting the community from the other messages you have been communicating.

FIRE urges you to unequivocally and publicly abandon any consideration of punishing students for protected expression. No end runs around the First Amendment are permissible, whether by determining that the Principles of Community are enforceable via the code of conduct or by finding other pretextual grounds for punishment. We further ask that you immediately cease investigating protected student expression and announce to the UCSD campus that you will never investigate speech protected by the First Amendment.

I look forward to hearing from you. Due to the time-sensitive nature of this matter, we request a response as soon as possible.

Sincerely,



Will Creeley  
Director of Legal and Public Advocacy

cc:

Sandra Daley, Associate Chancellor and Chief Diversity Officer  
Glynda Davis, Assistant Chancellor for Diversity  
Daniel W. Park, Chief Campus Counsel & Associate General Counsel  
Penny Rue, Vice Chancellor of Student Affairs  
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