



PO Box 87131
San Diego, CA 92138-7131
T/ 619-232-2121
F/ 619-232-0036
www.aclusandiego.org

November 4, 2011

Gregory Toya, Ed.D.
Associate Dean of Students
California State University San Marcos
333 S. Twin Oaks Valley Rd.
San Marcos, CA 92096-0001

Dear Dr. Toya:

On behalf of CSUSM, you sent letters alleging code of conduct violations against several students. I understand the allegations arise from the students' distribution of a recent issue of *The Koala*. The issue contained a photograph of two women without shirts on, with a question mark over one woman's face and the face of a female CSUSM student running for Homecoming King superimposed on the other woman's face.

However distasteful, the photograph and accompanying text were self-evidently a parody on the idea that a woman was running for Homecoming King. No reasonable person would interpret them as stating facts about any person depicted. Her candidacy for Homecoming King implicated numerous issues of public importance relating to cultural constructions of gender and sexuality and was therefore fair game for public comment, praise, criticism, or parody.

CSUSM's actions violate the First Amendment to the extent they are based on the content of *The Koala*.¹ The First Amendment protects virtually all speech, no matter how unorthodox, offensive, or distasteful. *See, e.g., United States v. Eichman*, 496 U.S. 310, 318 (1990) ("virulent ethnic and religious epithets"); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (flag burning); *Cohen v. California*, 403 U.S. 15, 20 (1971) ("Fuck the Draft").

The Supreme Court has been emphatic on the fundamental importance of free speech. "If there is a bedrock principle underlying the First Amendment, it is that the

¹ If there are grounds for the allegations other than content of *The Koala*, I would appreciate knowing what they are. I will be glad to provide appropriate signed waivers if necessary.

Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, 491 U.S. at 414.

In particular, the First Amendment protects parodies of public figures, no matter how obnoxious or distasteful.² *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 48 (1988) (parody stating that public figure's first sexual encounter was "drunken incestuous rendezvous with his mother in an outhouse"); *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1191 (9th Cir. 1989) (parody of anti-pornography activist containing sexually explicit images and offensive text).

The First Amendment protects "outrageous and outlandish statements" often contained in parodies. *Dworkin*, 867 F.2d at 1194. Speech "is not actionable simply because it is 'base and malignant'" and "may not be suppressed simply because it is offensive." *Id.* at 1199. Though *The Koala* parody "is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric." *Cohen*, 403 U.S. at 25. Because "governmental officials cannot make principled distinctions in this area," the First Amendment does not permit censorship based on distaste or disgust. *Id.*

The parody is not legally obscene speech unprotected by the First Amendment.³ By commenting, however distastefully, on a woman's candidacy for Homecoming King, the parody "expressed opinions about matters of public concern" and is therefore not legally obscene. *Dworkin*, 867 F.2d at 1198.

Nor is the parody "harassment" under state or federal law. To qualify as workplace or educational "harassment," conduct must be objectively severe and pervasive under governing law. It is not severe and pervasive to distribute a single periodical containing the parody to a campus of over 9000 students with over 1500 employees. Any construction of harassment law to the contrary would bring it into clear conflict with the First Amendment. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (to show harassment, "it is certainly not enough that the speech is merely offensive to some listener").

For similar reasons, state law also protects *The Koala's* speech. CSUSM shall not "make or enforce a rule subjecting a student to disciplinary sanction solely on the basis

² The student running for Homecoming King became a limited purpose public figure by injecting herself into the public question whether a woman can be Homecoming King. *Hustler Magazine v. Falwell* applies to limited purpose public figures. *Clyburn v. News World Comm., Inc.*, 705 F. Supp. 635, 643 (D.D.C. 1989).

³ There is no apparent reason to believe the women depicted in the photograph are under 18.

of conduct that is speech or other communication that, when engaged in outside a campus of those institutions, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution.” Education Code § 66301(a). This statute guarantees, at a minimum, that college “students have the same free speech rights on campus that they have off-campus.” *Crosby v. South Orange County Community College Dist.*, 172 Cal.App.4th 433, 441 (2009). Because *The Koala* parody is protected speech off-campus, it is protected speech on campus.

CSUSM cannot investigate or prosecute students due to the content of *The Koala* parody. Nor can CSUSM use any otherwise justified allegations as a pretext or cover to inquire into authorship, publication, distribution, or any other aspect of *The Koala's* production. Especially in the academic context, the mere fact of improper investigation violates the First Amendment. See *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). While CSUSM is free to speak out against *The Koala*, it is not free to investigate, discipline, or retaliate against anyone because of its content.

Thank you for reading this letter. Please contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Blair-Loy', with a stylized flourish extending to the right.

David Blair-Loy
Legal Director