



October 19, 2018

President Lynnette Zelezny
Office of the President
California State University, Bakersfield
9001 Stockdale Highway
Bakersfield, California 93311

Sent via Electronic Mail (lzelezny@csub.edu)

URGENT

Dear President Zelezny:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

FIRE is concerned by the threat to freedom of expression at California State University, Bakersfield, posed by the university's suppression of political expression pursuant to a posting policy that extends unconstitutionally unfettered discretion to campus administrators.

I. Statement of Facts

The following is our understanding of the pertinent facts. We appreciate that CSU Bakersfield may have additional information to offer and invite you to share it with us. However, if the facts here are substantially accurate, CSU Bakersfield has violated its obligations under the First Amendment.

A. *CSU Bakersfield Has Twice Refused to Permit a Student to Post Political Flyers*

Tristan Wieser is an undergraduate student enrolled at CSU Bakersfield. Wieser is in favor of Proposition 6, a proposition which "[r]epeals a 2017 transportation law's taxes and fees" and

will impact certain “state fuel and vehicle taxes”¹ if voters approve it on November 6, 2018.² Wieser is not paid or compensated by the “Yes on Prop. 6” campaign.

In early October, Wieser received permission to post flyers in support of “Yes on 6” in designated areas, and was provided a stamp indicating that the flyers were “approved for posting.” Wieser posted these flyers in one of the permitted areas at Dorothy Donohue Hall.

However, when Wieser returned to the Campus Programming Office to seek permission to post the same flyer in other permitted areas, a CSU Bakersfield administrator refused to grant him permission. That administrator, who Wieser later identified as Emily Poole, explained that CSU Bakersfield could not grant approval because the flyer advocated for or against a specific proposition. She suggested to Wieser that approval might be granted if the flyer concerned a public forum or event.

On October 16, at approximately 3:00 – 4:00 p.m., Wieser again visited the Campus Programming Office and sought permission to post a flyer on campus. This flyer promoted an event, the “Bakersfield Gas Tax Repeal Rally,” featuring speakers in support of Proposition 6, including Assemblyman Vince Fong, who represents the Bakersfield area in the California State Assembly. The rally is scheduled to take place this coming Wednesday, October 24, in Bakersfield. Although this flyer promoted an event, Wieser was again denied permission to post it on campus. The same administrator explained to Wieser that permission could not be granted because the event would not present perspectives opposed to Proposition 6.

Representative copies of the two flyers Wieser has sought to post on campus are enclosed.

B. CSU Bakersfield’s Publicity Policy or Posting Guidelines

On October 17, Wieser visited the Office of Student Involvement and inquired about the “Publicity Policy Guidelines,” which are referenced in the Office of Student Involvement’s “Runner Source.”³ Wieser was directed back to the Campus Programming Office, which provided him with a copy of the “Posting Guidelines.”

The Posting Guidelines govern “on-campus publicity,” and open several areas of campus for students to post flyers. These locations include certain bulletin boards in Dorothy Donohue

¹ *California Secretary of State*, “Official Voter Information Guide November 2018,” 7, <https://vig.cdn.sos.ca.gov/2018/general/pdf/complete-vig.pdf>.

² As a non-partisan organization, FIRE takes no position on the merits of Proposition 6.

³ California State University, Bakersfield, Office of Student Involvement, Runner Source – Student Organization Handbook, https://www.csub.edu/studentorg/_files/Runner%20Source%202017-2018.pdf.

Hall and other wooden or bulletin boards on campus, both indoors and out. CSU Bakersfield’s freedom of speech policy identifies these as “designated posting areas[.]”⁴

The Posting Guidelines provide that “[a]ll materials to be posted on campus must be approved by the Campus Programming office with a stamp”⁵ and “[m]aterials that are not deemed appropriate (language, image, alcohol promotion, etc.) will not be approved.” The guidelines provide that “[m]aterials that are politically related will not be approved unless it is promoting a specific event.” Violations of the guidelines “will result in disciplinary action[.]” CSU Bakersfield’s “Interim Policy on Time, Place, and Manner of Free Expression” incorporates the university’s “Posting Policy,” including the requirement that materials be approved in advance, and warns that violations of policy “may constitute a misdemeanor” and subject a student to disciplinary action.⁶

II. CSU Bakersfield’s Posting Guidelines and Their Application to Wieser Abridge the First Amendment

It has long been settled law that the First Amendment is binding on public colleges like CSU Bakersfield. *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.’”) (internal citation omitted); *see also DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) (on public campuses, “free speech is of critical importance because it is the lifeblood of academic freedom”). The protection of the First Amendment extends to the distribution or posting of written materials, including those distributed or posted on the campus of a public university. *See, e.g., Papish v. Bd. of Curators of Univ. of Missouri*, 410 U.S. 667, 670 (1973) (holding that public university’s expulsion of student for distributing newspaper violated First Amendment).

⁴ California State University, Bakersfield, “Interim Policy on Time, Place, and Manner of Free Expression” (rev. Dec. 9, 2016), <http://www.csub.edu/bas/police/services/Freespeech/index.html>.

⁵ CSU Bakersfield’s policies are in conflict as to who is authorized to approve the content of posted flyers. First, the “Publicity Policy Guidelines” identify the “Campus Programming office” as responsible for the approval process. Second, the Office of Student Involvement’s “Runner Source” sets forth “Posting Guidelines” that explain that “[a]ll materials to be posted on campus must be approved by the Office of Student Involvement[.]” Third, the “Interim Policy on Time, Place, and Manner of Free Expression,” *supra* note 4 and linked prominently from the university’s main website, delegates this authority to the Office of the Director of the Student Union and Organizational Governance.

⁶ Interim Policy on Time, Place, and Manner of Free Expression, *supra* note 4.

CSU Bakersfield’s Posting Guidelines, and the university’s application of those guidelines to Wieser’s flyers, abridge the First Amendment in at least two significant respects. First, the Posting Guidelines extend unfettered discretion to administrators to determine what “language” or “image[s]” are not “appropriate,” and fail to define when materials may be prohibited because they are “politically related.” Second, the university breached its own Posting Guidelines by refusing Wieser permission to post flyers promoting a politically-related “event,” which is expressly permitted by the policy. In asserting that the policy only permits flyers for events promoting multiple perspectives, CSU Bakersfield engaged in unconstitutional viewpoint discrimination.

A. *The Posting Guidelines’ Failure to Define ‘Politically Related’ Materials is Fatal in Any Forum*

CSU Bakersfield’s Posting Guidelines fail to define what constitutes prohibited “politically related” materials. Because of this failure, the Posting Guidelines unconstitutionally grant administrators unfettered discretion to grant or deny permission based on whether the “language” and “image[s]” on the flyers are “appropriate.” As a result, the Posting Guidelines would not survive any level of judicial scrutiny, whether the bulletin boards amount to a designated public forum, limited public forum, or nonpublic forum.

The Supreme Court of the United States recently confronted, in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (June 14, 2018) *Mansky*, a Minnesota statute barring “political” apparel inside of a polling place during an election. *Mansky* at 1883. In *Mansky*, the polling place was deemed a nonpublic forum, and the state’s interest in protecting the voting process was “an interest more significant” than the compelling interest in *Burson*, which upheld a content-based restriction on political speech in a public forum. *Mansky* at 1886; see *Burson v. Freeman*, 504 U.S. 191, 198–99 (1992). Nevertheless, the statute failed to satisfy even the “forgiving test” afforded to nonpublic forums, because its failure to define “political” meant it could not satisfy the requirement that a “reasonable line” be drawn. *Mansky* at 1888–91. This was so even though county officials provided election judges with guidance on when to enforce the ban. *Mansky* at 1884.

The *Mansky* Court recognized that the “unmoored” use of the term “political” meant there was no “sensible basis for distinguishing what” speech was permitted and what speech was not. *Mansky* at 1888. The word “political,” the Court observed, was “expansive” in nature, which could “encompass anything ‘of or relating to government, a government, or the conduct of governmental affairs,’ . . . or anything ‘[o]f, relating to, or dealing with the structure of government, politics, or the state[.]’” *Mansky* at 1888 (quoting Webster’s Third New International Dictionary 1755 (2002) and American Heritage Dictionary 1401 (3d ed. 1996)).

As the *Mansky* court observed, the inability to provide a reasonably precise definition precluded fair enforcement:

A rule whose fair enforcement requires an election judge to maintain a mental index of the platforms and positions of every candidate and party on the ballot is not reasonable. Candidates for statewide and federal office and major political parties can be expected to take positions on a wide array of subjects of local and national import. [...] Would a “Support Our Troops” shirt be banned, if one of the candidates or parties had expressed a view on military funding or aid for veterans? What about a “#MeToo” shirt, referencing the movement to increase awareness of sexual harassment and assault?

Mansky at 1889–90.

The policy enacted by CSU Bakersfield is even more expansive — and thus even more plainly unconstitutional — for at least three reasons. First, CSU Bakersfield’s policy encompasses not just that which is “political,” but expression which is ostensibly “politically *related*.” Second, unlike the Minnesota statute and policies, which provided some “authoritative guidance regarding implementation” and identifying what was “political,” CSU Bakersfield’s policy provides no guidance whatsoever. Third, the policy also prohibits materials “not deemed appropriate” by virtue of their “language, image, alcohol promotion, etc.” This is not merely expansive; it’s open-ended.

The lack of definition grants administrators the ability to draw lines based on their own views or perceptions about the merit of the expression. Left unclear is whether “political” material encompasses matters or speakers only if they are on a ballot, or whether it also prohibits material that mentions issues or policies likely to be impacted by political processes. If the rule is predicated on whether a candidate, proposition, or issue is on a ballot, how far in advance of an election are those matters deemed sufficiently “political” to be proscribed under the university’s policy? No answers are provided, leaving such determinations at the whim of CSU Bakersfield administrators. The First Amendment does not permit such discretion.

At CSU Bakersfield, the lack of any reasonably drawn line will lead to inconsistent results and the chilling student or faculty expression on matters of public importance deemed “political” in nature. For example, voters in Kern County — in which CSU Bakersfield is situated — will vote on three measures concerning marijuana on November 6. The university’s campus itself, on October 18, hosted a “community conversation” concerning marijuana policy in Kern

County – an event promoted through posters approved for display on campus. This is, of course, wholly unobjectionable; a university *should* facilitate discourse for the community in which it sits. But to deny students and faculty the right to speak about such matters in the absence of an “event” or university sponsorship, as CSU Bakersfield’s policy does, is to violate the First Amendment.

The lack of clear definitions is also problematic because decisions are not necessarily made by the same person. Indeed, CSU Bakersfield’s policies identify three different offices – each with multiple staff members of their own – with the authority to accept or reject submitted flyers.

B. CSU Bakersfield Has Established Designated Public Fora in the Bulletin Boards

Because CSU Bakersfield’s policy does not provide a clear definition of what political expression is permitted, the policy would fail any First Amendment analysis, even a under the most deferential nonpublic forum analysis. Yet it is clear that the bulletin boards (and similar posting areas) are designated public fora: The university’s own freedom of expression policy, certainly drafted with rudimentary First Amendment concepts in mind, expressly refers to the posting areas as “designated” areas for expression.

Because the posting areas are designated fora, content-based restrictions “are presumptively unconstitutional” and must satisfy strict scrutiny – that is, the government (here, CSU Bakersfield) must show that the regulation is “narrowly tailored to serve compelling state interests.” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Stated differently, the government bears the burden of demonstrating that the “regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.” *Perry Educ. Ass’n. v. Perry Local Educators Ass’n.*, 460 U.S. 37, 45 (1983). This is particularly true where, as here, the regulation burdens political expression. *Boos v. Barry*, 485 U.S. 312, 321 (1988) (a “content-based restriction on political speech in a public forum . . . must be subjected to the most exacting scrutiny”).

Even assuming the broad definitions employed by the policy advance a compelling state interest, CSU Bakersfield’s Posting Guidelines fail strict scrutiny for at least two reasons.

First, the policy is not narrowly tailored. A regulation of speech is not narrowly tailored when it fails to narrowly address problems of legitimate government concern and “sweeps within its ambit” protected speech. *Thornhill v. Ala.*, 310 U.S. 88, 97 (1940). A statute is said to be narrowly tailored only if it (1) directly advances the government interest; (2) is not overinclusive, restricting a significant amount of speech that doesn’t implicate the interest;

and (3) and is the least restrictive means available to serve the interest. As applying the Supreme Court's analysis in *Mansky* to the instant situation makes abundantly clear, CSU Bakersfield's policy broadly applies to speech touching upon an all but limitless range of expression concerning matters of public concern. If the statute struck down by the *Mansky* Court could not survive a deferential analysis, CSU Bakersfield's policy is certainly not narrowly tailored to serve any compelling interest.

Second, the policy's requirement of prior review is not coupled with narrow, objective criteria to guide the licensing of permitted postings. Where, as here, "expression is conditioned on governmental permission, such as a licensing system . . . , the First Amendment generally requires procedural protections to guard against impermissible censorship." *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 871 (2d Cir. 2008), as modified (Mar. 26, 2009) (citing *Freedman v. State of Md.*, 380 U.S. 51, 58 (1965)). Courts will strike down permitting systems "without narrow, objective, and definite standards to guide the licensing authority." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969); see also *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988) (permit requirements must have clearly delineated standards). The *Shuttlesworth* Court struck down an ordinance requiring a permit for parades and demonstrations where it vested "virtually unbridled authority" in government actors to decide what permits to grant or deny. 394 U.S. at 150. Here, there are no standards whatsoever to guide the approval or denial of materials for posting.

C. CSU Bakersfield Breached the Express Provisions of the Posting Guidelines

Even assuming for the sake of argument that the Posting Guidelines are not constitutionally infirm, CSU Bakersfield departed from its express provisions in denying Wieser's request for permission to post a flyer promoting an event in support of the Proposition 6 campaign. This refusal is contrary to the Posting Guidelines' exception that "politically related" materials may be approved if they are "promoting a specific event."

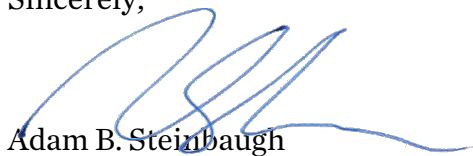
Instead of following its own policy, a CSU Bakersfield administrator grafted onto this exception the requirement that the "specific event" include contrasting viewpoints, or that it not favor one side over another. Not only is this reading unsupported by the policy itself, it reflects the policy's failure to draw clear lines reasonably capable of consistent application. Moreover, a refusal to allow expression on the basis that it will not facilitate opposing views is tantamount to viewpoint discrimination and prohibited by the First Amendment.

III. Conclusion

As a public institution bound by the First Amendment, CSU Bakersfield must not burden student political expression on the basis that it is political. The university must amend its policies to facilitate, rather than frustrate, student expression – whether it is for, against, or takes no position on the conclusion voters should reach.

Be advised that FIRE is committed to using all of the resources at our disposal to see this matter through to a just conclusion. Given the urgent nature of this matter, as the rally is set to take place next week and the election is in eighteen days, we request receipt of a response to this letter no later than the close of business on Monday, October 22, 2018.

Sincerely,



Adam B. Steinbaugh
Director, Individual Rights Defense Program

Encl.



KEY FACTS & How You Can Help!

FACT 1: THE HIGH COST TO YOU

California's cost-of-living is skyrocketing higher and working families can barely keep up. The new gas and car tax hikes will cost the typical family of four more than \$700 per year! That's not pennies, that's real money.

FACT 2: POLITICIANS STEAL THE MONEY

Not a single penny of the gas and car tax is earmarked for road repairs. Politicians can spend the funds any way they want – and they have shown a pattern of diverting funds away from road repairs.

FACT 3: WASTEFUL SPENDING

Of the little bit of money actually spent on roads, Caltrans is notoriously wasteful with the money. In fact, an independent audit revealed billions in waste and projects cost taxpayers 470% more than the national average.

FACT 4: A BETTER ALTERNATIVE

We already pay one of the highest gas tax rates in the nation – and that money is more than enough to fix our roads if the politicians would simply stop fraudulently diverting the money. A coalition has filed a ballot measure to put this better alternative to a public vote at the next election.

Find out more facts at www.GasTaxRepeal.org



Follow our Chairman, Carl DeMaio, @CarlDeMaio on Twitter & Facebook
Listen for daily radio campaign updates on www.DeMaioReport.com

**Paid for by Reform California - Yes on 6, FPPC #1268914
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Funding Details at www.fppc.ca.gov

**YES
ON 6**

REPEAL THE GAS TAX

Bakersfield Gas Tax Repeal Rally

Keynote Speakers:



Carl DeMaio

Gas Tax Repeal Initiative
Leader and Chairman of
Reform California



Assemblyman Vince Fong
Representative of the 34th
Assembly District



Justin Mendes
Candidate for the 32nd
Assembly District



Konstantinos Roditis
Candidate for
State Controller

Help us repeal the
gas tax and defend
California's working
families by voting
YES on PROP 6!



Wed. October 24th @ 8:00am

**Abate a Weed Incorporated
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Bakersfield, CA 93312**

RSVP NOW at:

www.gastaxrepealevents.com

- **FREE Yes on 6 lawn signs, gas pump stickers, and other materials!**

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