



FIRE

Foundation for Individual
Rights and Expression

June 16, 2022

Carlos O. Cortez, Ph.D.
Chancellor's Office
San Diego Community College District
3375 Camino Del Rio South
San Diego, California 92108

Sent via U.S. Mail and Electronic Mail (ccortez@sdccd.edu)

Dear Chancellor Cortez:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech, expression, and conscience, and other individual rights on campus, is concerned by your decision to block Professor Inna Kanevsky from the @ChancellorSDCCD Twitter account based on tweets criticizing your actions as chancellor, and by the related request of an administrator that Kanevsky delete a critical tweet. When public institutions like SDCCD, or their officials, open online forums for commentary, the exclusion of disfavored views or speakers from those spaces violates the First Amendment. Likewise, public college administrators may not use their authority to censor faculty members' speech on their personal social media accounts.

I. SDCCD Chancellor Blocks Kanevsky on Twitter and Dean Orders Her to Delete Tweet Critical of Administrators

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us. To these ends, please find enclosed an executed privacy waiver authorizing you to share information about this matter.

SDCCD planned to hold an investiture ceremony recognizing you as the district's new chancellor on May 31, and featuring author and activist Alice Walker as the keynote speaker.¹ The decision to invite Walker drew criticism from individuals and organizations within the

¹ Gary Robbins, *Author Alice Walker will give key speech at investiture of San Diego Community College chancellor*, SAN DIEGO UNION-TRIB. (Apr. 29, 2022), <https://www.sandiegouniontribune.com/news/education/story/2022-04-29/alice-walker-san-diego-community-college-chancellor>.

district and local community who accused Walker of amplifying anti-Semitic conspiracy theories.²

Inna Kanevsky, a professor in the Department of Psychology at San Diego Mesa College, was among those critics. On May 16, Kanevsky tweeted, “Very disappointed that plans for @ChancellorSDCCD investiture will proceed with inclusion of Alice Walker, who in recent years turned to promoting antisemitism. Viewing this as an action harming Jewish faculty and students, I stand with my colleagues in urging nonattendance.”³ In a reply to a tweet from the SDCCD chancellor account promoting the investiture, Kanevsky wrote, “Please consider NOT harming the Jewish students and faculty by having such an antisemitic ‘superstar’ speak. Would you invite a known racist or homophobe?”⁴

Minutes later, Kanevsky posted two screenshots. One was of a Twitter direct message you sent her in response to her tweets: “First I wonder why you haven’t written me directly. Second, I appreciate your right to free speech, but I’m not gonna let you troll me online. Respect goes both ways.”⁵ The other screenshot showed the @ChancellorSDCCD Twitter account had blocked her.⁶ As of the date of this letter, Kanevsky is still blocked from interacting with the account.

On May 23, SDCCD canceled the investiture.⁷ In a statement, you noted that “concerns have been expressed about the political beliefs and writings of the investiture keynote speaker, Alice Walker.”⁸

Two days later, in a conversation with Social/Behavioral Sciences and Multicultural Studies Dean Pearl Ly, Kanevsky expressed frustration with what she considered the failure of college leadership to condemn Walker’s anti-Semitic beliefs and to show support for Jewish faculty.

² Gary Robbins, *Author Alice Walker’s controversial remarks will not cost her a speaking engagement in San Diego*, SAN DIEGO UNION-TRIB. (May 3, 2022), <https://www.sandiegouniontribune.com/news/education/story/2022-05-03/alice-walkers-jewish-speaking>.

³ @Dr_Inna, TWITTER (May 16, 2022, 4:31 PM PT), https://twitter.com/Dr_Inna/status/1526343825479806976.

⁴ @Dr_Inna, TWITTER (May 16, 2022, 4:47 PM PT), https://twitter.com/Dr_Inna/status/1526348706768752640.

⁵ @Dr_Inna, TWITTER (May 16, 2022, 5:11 PM PT), https://twitter.com/Dr_Inna/status/1526354775494692864.

⁶ @Dr_Inna, TWITTER (May 16, 2022, 5:14 PM PT), https://twitter.com/Dr_Inna/status/1526355488467693568.

⁷ Gary Robbins, *SDCC cancels investiture of chancellor due to uproar over Alice Walker speech*, SAN DIEGO UNION-TRIB. (May 23, 2022), <https://www.sandiegouniontribune.com/news/education/story/2022-05-23/san-diego-community-college-investiture-walker>.

⁸ *May 31 Investiture Canceled*, SAN DIEGO CMTY. COLL. DIST., <https://www.sdccd.edu/about/leadership/chancellor/investiture.aspx> (last visited June 10, 2022) [<https://perma.cc/92JD-PEEQ>].

According to Kanevsky’s email memorializing the conversation, Ly told her that some people will just “have a different opinion.”⁹

On May 29, Kanevsky tweeted, “My copies of the books on antisemitism arrived. Some examples of things @SDCCD chancellor and my dean think are just differences in political views,” accompanied by screenshots of passages from the books.¹⁰ Ly direct messaged Kanevsky, “Inna – I respectfully ask you to remove this tweet. It is defamatory and threatens me professionally and personally. Please consider that I have a young child to protect.”¹¹ Kanevsky deleted the tweet.

II. SDCCD’s Censorship of Kanevsky’s Social Media Expression Violates the First Amendment

SDCCD’s actions in response to Kanevsky’s online speech violate the First Amendment, under which the district has no authority to censor disfavored expression in the online public forums it creates. The First Amendment likewise precludes SDCCD administrators from demanding a faculty member delete social media posts containing protected speech.

A. Blocking Kanevsky from the @ChancellorSDCCD Account Amounts to Unconstitutional Viewpoint Discrimination

It has long been settled law that the First Amendment is binding on the decisions and actions of public institutions of higher education like SDCCD,¹² including those not only bearing on speech within physical forums, but also expression in interactive, online forums. More specifically, “social media is entitled to the same First Amendment protections as other forms of media.”¹³ As the Supreme Court has observed, “in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views,” but the answer today is clear: “It is cyberspace . . . and social media in particular.”¹⁴

In recent years, a wide range of courts across the country have held government actors’ social media pages to be public forums subject to First Amendment limitations.¹⁵ When government actors display their official titles on their social media accounts and use them to disseminate information regarding their official activities or to communicate with constituents, they act

⁹ Email from Inna Kanevsky to Gregory Smith, Vice Chancellor, Human Resources, SDCCD (May 25, 2022, 12:27 PM).

¹⁰ Screenshot enclosed.

¹¹ *Id.*

¹² *Healy v. James*, 408 U.S. 169, 180 (1972).

¹³ *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019), *vacated as moot sub nom. Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220 (2021).

¹⁴ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

¹⁵ *See, e.g., Windom v. Harshbarger*, 396 F. Supp. 3d 675 (N.D.W. Va. 2019) (First Amendment challenge survives motion to dismiss where constituent blocked from legislator’s “politician” Facebook page); *One Wis. Now v. Kremer*, 354 F. Supp. 3d 940 (W.D. Wis. 2019) (granting summary judgment to nonprofit entity blocked on Twitter by state assembly members); *Leuthy v. LePage*, No. 17-cv-00296, 2018 U.S. Dist. LEXIS 146894, *36–43 (D. Me. Aug. 29, 2018) (governor’s Facebook page was limited public forum); *Dingwell v. Cossette*, 327 F. Supp. 3d 462 (D. Conn. 2018) (applying *Knight* in holding critic blocked from police Facebook page sufficiently alleged his First Amendment rights were violated).

under color of state law and must comply with the First Amendment, even if the page has both “personal” and “official” elements.¹⁶

Numerous court decisions firmly establish that the interactive components of a government actor’s social media account, such as comment sections where the public may engage with the account’s posts, are public forums. Because these interactive areas are public forums, restrictions on access or content are permissible only if “narrowly drawn to achieve a compelling state interest,” and viewpoint discrimination is impermissible, even if there are other avenues for users to express themselves.¹⁷

The @ChancellorSDCCD Twitter account is analogous to the elected officials’ social media accounts in these cases. The user name references your official title, the account bio prominently displays that title and tags the official @SDCCD account,¹⁸ and the account is regularly used to communicate with members of the SDCCD community and convey information about happenings in the district.¹⁹ Consequently, the account’s administration must comply with the First Amendment. The interactive space below each of the account’s posts is accessible to the general public for comment, creating a public forum where viewpoint discrimination is prohibited. The act of blocking Kanevsky in response to her tweets criticizing the planned Alice Walker appearance is a clear instance of viewpoint discrimination that violates Kanevsky’s First Amendment rights, and that violation continues each day the block remains in place.

¹⁶ *West v. Shea*, 500 F. Supp. 3d 1079, 1082–83, 1086 (C.D. Cal. 2020); *see also Sanchez v. Tubbs*, No. 2:19-cv-326-JAM-EFB, 2020 U.S. Dist. LEXIS 156114 (E.D. Cal. Aug. 27, 2020) (granting plaintiff leave to file complaint alleging his First Amendment rights were violated by mayor who, in response to plaintiff’s criticism, blocked him from Facebook account maintained under the name “Mayor Tubbs”).

¹⁷ *Knight*, 928 F.3d at 238–39; *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 575 (S.D.N.Y. May 23, 2018) (upheld on appeal by the Second Circuit, *see supra* note 12) (quoting, in part, *Int’l Soc’y for Krishna Consciousness, Inc., v. Lee*, 505 U.S. 672, 678–79 (1992)); *see also Davison v. Randall*, 912 F.3d 666, 682 n.3, 686–88 (4th Cir. 2019) (“interactive component” of county political figure’s Facebook page, “in which the public can post comments, reply to posts” and “like” comments and posts was a public forum, and politician unconstitutionally blocked her constituent because of his views); *Lewis v. Jones*, 440 F. Supp. 3d 1123 (E.D. Cal. 2020) (issuing preliminary injunction ordering sheriff to unblock critics from Facebook page, noting evidence of viewpoint discrimination where sheriff deleted critical posts by Black Lives Matter member and blocked her after she commented on a post in which the sheriff expressly criticized her and BLM); *Price v. City of New York*, No. 15-cv-5871, 2018 U.S. Dist. LEXIS 105815, *25–46 (S.D.N.Y. June 25, 2018) (where NYPD precinct blocked Twitter user, whether the forum was a “public, designated, or nonpublic forum” was immaterial, as “viewpoint discrimination that results in the intentional, targeted expulsion of individuals . . . is unlawful in *any* forum,” including nonpublic forums) (emphasis in original).

¹⁸ *Carlos Osvaldo Cortez, @ChancellorSDCCD*, TWITTER, <https://twitter.com/ChancellorSDCCD>.

¹⁹ *See, e.g., @ChancellorSDCCD*, TWITTER (June 4, 2022, 4:32 PM PT), <https://twitter.com/ChancellorSDCCD/status/1533230300502773760> (linking to employment opportunities at SDCCD), *@ChancellorSDCCD*, TWITTER (May 26, 2022, 8:45 PM PT), <https://twitter.com/ChancellorSDCCD/status/1530032394794696704> (congratulating San Diego City College president and students on commencement), *@ChancellorSDCCD*, TWITTER (May 21, 2022, 1:17 PM PT), <https://twitter.com/ChancellorSDCCD/status/1528107620598525955> (informing students they can win \$500 by creating a video sharing why they are excited to return to San Diego City College), *@ChancellorSDCCD*, TWITTER (May 18, 2022, 3:48 PM PT), <https://twitter.com/ChancellorSDCCD/status/1527058558172659712> (announcing new president of San Diego Mesa College).

B. Kanevsky's Deleted Tweet Was Constitutionally Protected Speech

The First Amendment's prohibition on viewpoint discrimination means SDCCD also cannot require faculty to delete social media posts expressing protected criticism of administrators, including Kanevsky's tweet that Dean Ly inaccurately characterized as "defamatory."

It is a "core postulate of free speech law" that the "government may not discriminate against speech based on the ideas or opinions it conveys."²⁰ There is no question that Ly asked Kanevsky to delete her tweet about "things @SDCCD chancellor and my dean think are just differences in political views" based on the tweet's viewpoint. That is flatly unconstitutional, and government actors cannot evade the First Amendment's bar on viewpoint discrimination by improperly labeling speech as "defamatory."

Kanevsky's tweet did not satisfy the strict legal standard for defamation, which consists of "a publication that is false, defamatory, unprivileged, and has a tendency to injure or cause special damage."²¹ As a California court has explained:²²

Because the statement must contain a provable falsehood, courts distinguish between statements of fact and statements of opinion for purposes of defamation liability. Although statements of fact may be actionable as libel, statements of opinion are constitutionally protected.

The First Amendment "protects statements that cannot reasonably be interpreted as stating actual facts about an individual made in debate over public matters in order to provide assurance that public debate will not suffer for lack of imaginative expression or the rhetorical hyperbole which has traditionally added much to the discourse of the United States."²³ In other words, "extravagant exaggeration that is employed for rhetorical effect" cannot constitute defamation.²⁴

Kanevsky's tweet was an expression of her frustration with your and the dean's response to criticism of Alice Walker as anti-Semitic. Kanevsky's reference to writings on Nazi beliefs about Jews was employed for rhetorical effect to highlight, in her view, the need for SDCCD administrators to vocally condemn anti-Semitic beliefs, and the folly of treating anti-Semitism as merely an alternative political view. Kanevsky's speech was not a "provably false" statement of fact but instead reflected her subjective perception of your and the dean's attitude toward anti-Semitism. As Kanevsky's tweet was not defamatory, and there is no plausible argument that it in any way constituted unprotected speech, SDCCD had no lawful reason to compel her to delete it.

²⁰ *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019).

²¹ *Hawran v. Hixson*, 209 Cal. App. 4th 256, 277 (2012).

²² *McGarry v. Univ. of San Diego*, 154 Cal. App. 4th 97, 112 (2007) (citation omitted).

²³ *Clifford v. Trump*, 339 F. Supp. 3d 915, 926 (C.D. Cal. 2018), *aff'd*, 818 F. App'x 746 (9th Cir. 2020) (cleaned up).

²⁴ *Id.*

If Ly's message to Kanevsky asking her to remove the tweet was intended only as a request that Kanevsky was free to reject, Ly did not make that clear. Administrators must be careful to distinguish between demands and non-mandatory requests. Ly's message to Kanevsky was likely received as a demand, especially since it came from one of her superiors and intimated that the speech was unlawful.

III. Conclusion

By virtue of their status as government actors, administrators at public colleges necessarily open themselves up to criticism—even strident criticism—from faculty, students, politicians, and the general public. Administrators may respond to criticism with counterspeech or choose to ignore it, but they may not, consistent with the First Amendment, wield the power of censorship to silence their critics.

FIRE calls on SDCCD to immediately unblock Kanevsky from interacting with the @ChancellorSDCCD Twitter account and to affirm that her online speech will be free from institutional censorship going forward. We request receipt of a response to this letter no later than the close of business on June 30, 2022.

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Terr', written over a horizontal line.

Aaron Terr
Senior Program Officer, Individual Rights Defense Program

Cc: San Diego Community College District Board of Trustees

Encl.

Authorization and Waiver for Release of Personal Information

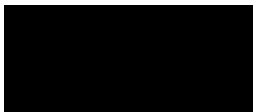
I, Inna Glaz Kanevsky, do hereby authorize San Diego Community College District (the "Institution") to release to the Foundation for Individual Rights in Education ("FIRE") any and all information concerning my employment, status, or relationship with the Institution. This authorization and waiver extends to the release of any personnel files, investigative records, disciplinary history, or other records that would otherwise be protected by privacy rights of any source, including those arising from contract, statute, or regulation. I also authorize the Institution to engage FIRE and its staff members in a full discussion of all information pertaining to my employment and performance, and, in so doing, to disclose to FIRE all relevant information and documentation.

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights in Education, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

If the Institution is located in the State of California, I request access to and a copy of all documents defined as my "personnel records" under Cal. Ed. Code § 87031 or Cal. Lab. Code § 1198.5, including without limitation: (1) a complete copy of any files kept in my name in any and all Institution or District offices; (2) any emails, notes, memoranda, video, audio, or other material maintained by any school employee in which I am personally identifiable; and (3) any and all phone, medical or other records in which I am personally identifiable.

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights in Education, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

I also hereby consent that FIRE may disclose information obtained as a result of this authorization and waiver, but only the information that I authorize.



6/16/2022

Date



Dr. Pearl Ly

Today

6:36 Tweet

Inna Kanevsky @Dr_Inna

My copies of the books on antisemitism arrived. Some examples of things @SDCCD chancellor and my dean think are just differences in political views:

1:16 PM · 29 May 22 from Encinitas, CA · Twitter for iPhone

2 Retweets 14 Likes

Tweet your reply



Inna - I respectfully ask you to remove this tweet. It is defamatory and threatens me professionally and personally. Please consider that I have a young child to protect.

7:54 AM



Start a message

