



FIRE

Foundation for Individual
Rights and Expression

December 9, 2022

Howard Gillman
Office of the Chancellor
University of California, Irvine
510 Aldrich Hall
Irvine, California 92697-1900

URGENT

Sent via U.S. Mail and Electronic Mail (chancellor@uci.edu)

Dear Chancellor Gillman:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is concerned by the University of California, Irvine's inconsistent enforcement of its ZotMail Electronic Communications policy. Specifically, UCI is reportedly preventing the Associated Graduate Students from sending an email explaining faculty members' rights in regards to a graduate student strike because the message is political. However, UCI has permitted other groups with differing political views to use the service for similarly political messages. For First Amendment purposes, whatever type of forum ZotMail may represent, UCI may establish viewpoint-neutral restrictions on use, but it cannot selectively restrict speech it does not like. Nor may it impose prior restraints on speech. We call on UCI to maintain and apply ZotMail policies in accordance with its constitutional obligations, and to end its unlawful practice of prior review of ZotMail messages.

I. UCI Prevents Associated Graduate Students, Associated Students from Sending ZotMail Messages About Graduate Strike

UCI's Associated Graduate Students requested to send a message over ZotMail explaining faculty rights during the ongoing campus graduate student strike.² The Associated Students of UCI also requested to send a message in solidarity with the striking graduate students. Both requests were denied for being political.

¹ For more than 20 years, FIRE has defended freedom of expression, conscience, and religion, and other individual rights on America's college campuses. You can learn more about our recently expanded mission and activities at thefire.org.

² The recitation here reflects our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us.

While UCI policy purports to prohibit messages that “advocate an individual’s or organization’s political or religious position,”³ UCI has both allowed other groups to send political messages in the past and sent political messages of its own through ZotMail. For example, in 2020, UCI permitted the Associated Graduate Students to send a message expressing support for Asian and Asian-American students in the wake of the COVID-19 pandemic—a clearly political message.⁴ Meanwhile, you sent a ZotMail message conveying condolences to those injured and killed in Charlottesville in 2017,⁵ and in 2016, following the election of President Donald Trump, the UC System President sent a ZotMail message expressing that diversity is central to the university system’s mission and committing to foster an inclusive environment.⁶ Just weeks ago, Dean of Students Rameen Talesh sent a ZotMail message offering support for the university’s “queer and trans friends and family” after the shooting in Colorado Springs.⁷ Each of these instances involved political speech on the part of university staffers or UCI itself—of which there are many examples over the years.

II. UCI Policies, Practices Concerning Email Lists Must Comply with the First Amendment

It has long been settled law that the First Amendment binds public universities like UCI,⁸ such that its actions and decisions—including maintenance of policies implicating student and faculty expression⁹—must comply with the First Amendment. The First Amendment applies to speech in physical forums as well as expression in interactive, online forums, including social media and e-mail lists.¹⁰ In exercising prior review over ZotMail messages and selectively enforcing the political messaging policy to favor approved views and burden disapproved ones, UCI violates students’ First Amendment rights.

A. UCI Cannot Discriminate Based on Viewpoint

While a university need not create a forum for student expression such as ZotMail, once it voluntarily establishes the forum—whether it be a limited public forum or a nonpublic

³ *ZotMail Guidelines*, Electronic Comm., UNIV. OF CAL., IRVINE (rev. Feb. 2021), <https://www.policies.uci.edu/policies/procs/800-20.php> [<https://perma.cc/2GVL-42S3>].

⁴ ZotMail message from Assoc. Graduate Students to Univ. of Cal., Irvine graduate students (Apr. 30, 2020, 4:55 AM) (on file with author).

⁵ ZotMail message from Gillman to Univ. of Cal., Irvine community (Aug. 13, 2017, 8:58 PM) (on file with author).

⁶ ZotMail message from Janet Napolitano, Univ of Cal. President, to Univ. of Cal. Students (Nov. 9, 2016, 4:12 PM).

⁷ ZotMail message from Dean of Students Rameen Talesh to Univ. of Cal., Irvine community (Nov. 22, 2022, 4:07 PM) (on file with author).

⁸ *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).

⁹ *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

¹⁰ *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 705 (9th Cir. 2009).

forum¹¹— viewpoint discrimination is unconstitutional. When authorities “target[] not subject matter but particular views taken by speakers on a subject,” it is a “blatant” violation of the speaker’s freedom of expression.¹² This freedom must include the freedom to express viewpoints unpopular with the general public or with university administrators.¹³ As the Supreme Court has made clear, “[v]iewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of ‘free speech.’”¹⁴

Here, the university has continuously sent a variety of subjectively political ZotMail messages and has allowed student groups to use the platform for this purpose. Not only is the university clearly selectively enforcing its ZotMail policy (or not enforcing it based on its terms at all), but the university undermines the need to prohibit political messages from ZotMail by continuously using the forum to express the university’s own political views.

B. Even if UCI Actually Followed its Policy and Applied it in a Viewpoint-Neutral Manner, Disallowing All “Political” Speech is Facially Unconstitutional

Because UCI’s ZotMail policy fails to define what constitutes prohibited “political” expression, it is unconstitutionally vague, and grants administrators unfettered discretion to subjectively determine which messages are approved.¹⁵ The Supreme Court’s decision in *Minnesota Voters Alliance v. Mansky*, which struck down a Minnesota law prohibiting voters from wearing political insignia inside a polling place on Election Day, is instructive.¹⁶ Although the Court determined the state had a right to prohibit certain apparel because polling locations are nonpublic forums, the state’s policy was not reasonable, as it allowed workers to subjectively determine what apparel was “political” when screening individuals at the polling place entrance without using objective standards which would have restrained that discretion.¹⁷ UCI’s purported prohibition on “political expression” on ZotMail suffers the same failings.

C. UCI Exercises an Unconstitutional Prior Restrain by Prohibiting These Messages

UCI has also erected an unconstitutional prior review of student expression by screening and approving all ZotMail messages before transmission. The Ninth Circuit has made clear that

¹¹ The Ninth Circuit, which binds UCI, has said that email lists and servers are limited or nonpublic forums. *Id.* at 710.

¹² *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

¹³ *Id.* at 836 (“For the University, by regulation, to cast disapproval on particular viewpoints . . . risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation’s intellectual life, its college and university campuses.”).

¹⁴ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 64 (1983).

¹⁵ *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1881 (2018).

¹⁶ *Id.*

¹⁷ *Id.*

prior review of student expression violates the First Amendment.¹⁸ UCI's practice is especially egregious, as it requires a week to review and approve or deny requests, all but preventing speech on urgent topics of concern.

UCI's ultimate denial of approval for the Associated Graduate Students and Associated Students' messages similarly imposes an unconstitutional prior restraint on their expression. A prior restraint is when the government prohibits expression before that expression takes place. Prior restraints are "the most serious and least tolerable infringement" of the First Amendment.¹⁹ Courts, including the Supreme Court, have long held that prior restraints are permissible only in the most severe circumstances, such as in the event of a demonstrated threat to national security.²⁰

III. UCI Must Allow the Students' Messages to be Sent Through ZotMail

UCI may establish certain, viewpoint-neutral restrictions on ZotMail and still meet its First Amendment obligations, but it cannot selectively enforce those restrictions to censor speech it does not like. Instead of resorting to brute censorship, UCI can meet messages it dislikes by sending messages of its own, including its own emails about the workers' strike. Countering views with others is a form of "more speech" permitted by the First Amendment.²¹

Given the urgent nature of this matter, as the strike continues and the groups aim to have their voices heard, we request a substantive response to this letter no later than the close of business on Friday, December 16, 2022, confirming that UCI will allow the Associated Graduate Students' and Associated Students' messages supporting the strike to be sent through ZotMail.

Sincerely,



Sabrina Conza
Program Officer, Campus Rights Advocacy

Cc: Stephanie N. Van Ginkel, Associate Dean of Students

¹⁸ *Burch v. Barker*, 861 F.2d 1149, 1159 (9th Cir. 1988); see also *Lovell v. Griffin*, 303 U.S. 444, 451 (1938) (striking down an ordinance requiring city manager review of literature before distribution).

¹⁹ *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

²⁰ See *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931).

²¹ *Whitney v. California*, 274 U.S. 357, 377 (1927).