



Foundation for Individual Rights in Education

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February 22, 2010

Utsav Gupta
Associated Students President
Associated Students Department
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Chancellor Marye A. Fox
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URGENT

Sent via U.S. Mail and Facsimile (858-534-1505; 858-534-6523)

Dear Mr. Gupta and Chancellor Fox:

As you can see from the list of our Directors and Board of Advisors, the Foundation for Individual Rights in Education (FIRE; thefire.org) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, due process, academic freedom and, in this case, freedom of speech on America's college campuses.

We are gravely concerned about unconstitutional and morally questionable actions taken by Mr. Gupta as President of Associated Students of University of California, San Diego (ASUCSD). Mr. Gupta and ASUCSD investigated a program aired by Student Run Television (SRTV) because of its content, used a paperwork technicality as a pretense for shutting down SRTV on the basis of content, explicitly noted that SRTV will be shut down until "we can be sure that such hateful content can never be aired again," and froze funding to all student media organizations at UCSD on the basis of content concerns. In acting arbitrarily and on the basis of content concerns, Mr. Gupta has demonstrated an alarming misunderstanding of the university's obligation to uphold the First Amendment when distributing funds to student organizations.

ASUCSD, which is responsible for distributing a significant portion of the mandatory student activity fee collected by UCSD from every student, acts in this

role as an authorized agent of the university and is equally bound by the First Amendment. Just as UCSD itself cannot punish students or student organizations for engaging in speech protected by the First Amendment, neither can its agent, ASUCSD. As a state institution, UCSD must understand that it has a non-delegable duty to ensure that the First Amendment rights of its students are protected and that the university and its administrators will be legally liable if these rights are not respected. FIRE urges Mr. Gupta to *immediately* reverse the unconstitutional freezing of student media funds and to stop censoring student organizations on the basis of content. If Mr. Gupta will not do so, then it becomes the responsibility of UCSD's administration to immediately take action to correct this violation of the Bill of Rights.

This is our understanding of the facts; please correct us if you believe we are in error. According to the ASUCSD Standing Rules, SRTV is an organization classified with various other student-run media organizations, such as KSDT Radio, as a "service" of ASUCSD that ASUCSD's Office of Student Services "oversees" as "the overall governing body of the station." According to the Standing Rules, SRTV operates with the following mission:

- i. SRTV's primary mission is to enrich the university experience of UCSD students with a television broadcast environment **created, maintained, and perpetuated by students themselves.**
- ii. SRTV intends to meet this mission by providing the UCSD community with information and student programming including video, news, music, and **entertainment of a diverse nature**, which usually cannot be obtained elsewhere in San Diego or which serves student interests.
- iii. SRTV's major objective is to **afford any interested UCSD student facilities** for training in television arts and science topics which are not part of a regular formal UCSD instruction program and a regular broadcast medium **for artistic and informative expression.** [Emphases added.]

The Standing Rules also provide that student "[p]roducers shall be ultimately responsible for the content of the show they produce." The only named content restrictions on productions involve bans on unauthorized copyrighted material and obscene material, and limitations on "patently offensive indecent material that does not rise to the level of obscenity," which is restricted to the hours of 10:00 p.m. to 6:00 a.m. The Standing Rules refer also to UCSD's Triton Cable Use Guidelines, which do not include additional restrictions but which explain that content restrictions follow the current rules of the Federal Communications Commission.

The Standing Rules further provide generally for prior review: "All content to be aired on SRTV must be approved via a standard approval form, authorized by the General Managers [of SRTV] and AVP Student Services [an ASUCSD position]." The form that is used, named "SRTV Program Proposal Form," requires producers to provide the working title of the programming, a program description (in approximately six lines), number of programs, length, estimated development and production time, studio and equipment requirements, and a certification that the program "adhere[s] to the Triton Cable Use Policy and the SRTV Charter." (The "charter" apparently refers to the Standing Rules provisions. ASUCSD Bill #360 appears to have passed by consensus on or about April 18, 2007, dissolving the charters of SRTV and KSDT.)

The Standing Rules further provide processes for handling “[c]omplaints” and “[n]on-compliance” regarding SRTV and its broadcasts. For instance:

If the General Manager should violate this section or fail to adequately perform the duties of General Manager, the Associate Vice-President Student Services, in consultation with the President, may suspend the General Manager, by informing that person in writing and notifying the Council of the suspension and submitting a bill for dismissal of the General Manager at the next regular Council meeting. This notification and must be submitted at least two academic days before the Council meeting in which the dismissal will be considered and must include the specific violation or duty neglected. If the Council does not remove the General Manager, the suspension shall terminate immediately. The General Manager may only be suspended once for an alleged infraction.

Finally, the Standing Rules provide that “At any time, the AVP Student Services in conjunction with the AS President can shut it [SRTV] down at any point.” This provision does not, however, provide carte blanche to ASUCSD officials to act arbitrarily or capriciously, to investigate and punish protected expression that is produced by student producers, or to violate the procedures for handling complaints and non-compliance as given in the Standing Rules.

At night on February 18, 2010, student organization *The Koala* broadcast on SRTV a defense of a highly controversial party invitation that had elicited many strong reactions, including campus debate about freedom of expression. The broadcast included language that many persons on campus found highly offensive. In response, Mr. Gupta took immediate, unconstitutional action. In a February 19 message to “UC San Diego” printed at <http://publications.ucsd.edu/battlehate/response.php>, Mr. Gupta wrote that the program was “deeply offensive and hurtful.” He added that *The Koala* “was not properly authorized to display content on SRTV,” demonstrating that he had investigated *The Koala*’s license to broadcast because of the broadcast’s expression.

Mr. Gupta’s February 19 message added that he had personally “revoked the SRTV Charter for review” and that “[w]e will only open it again when we can be sure that such hateful content can never be aired again on our student funded TV station.” He did not mention any notice, hearing, or adherence to any procedures regarding complaints or non-compliance. Similarly, *The San Diego Union-Tribune* reported on February 20 that

Gupta shut down the student-run TV station Thursday night about 11:30, **as soon as he heard about the material being aired**. He said the blackout will last until a new task force can rewrite rules for campus media. He said he’s investigating how *Koala* staffers were able to record the show without approval. [Emphases added.]

Mr. Gupta also froze the funding to all (about three dozen) student media organizations because of the content of *The Koala*’s expression:

Alongside this initiative, I have frozen all student media organization funding. *The Koala* has long since been a controversial publication at UC San Diego and is

primarily funded by our student fees. I do not believe we should continue funding this organization with our fees.

A February 20 e-mail to the affected organizations from Peter Benesch, ASUCSD Vice President, Finance and Resources, and Andrew Ang, ASUCSD Associate Vice-President, Student Organizations, spelled out the following:

The Associated Students President has issued a moratorium on all Student Media Organization Funding, effective immediately.

Such a moratorium prevents any funds to be allocated for Spring Quarter publications. In addition, any funds allocated in previous quarters can no longer be spent or accessed. However, any outstanding monetary commitments with publishers that have been placed by yesterday's date, February 19, 2010, will be honored.

According to the ASUCSD document "Student Org. Media Final Allocations - Winter 2010" at <http://as.ucsd.edu/finance/docs/FinalAllocMediafa09.01-08-10-13-26-52.pdf>, the Winter 2010 allocations were approved by the ASUCSD council on December 2, 2009, for fourteen organizations in the amount of \$25,911.72.

Mr. Gupta's February 19 message further noted that "[w]e must develop effective policies to ensure that our fees do not go to the support [of] the hateful speech that targets members of our community."

In subsequent communications, Mr. Gupta verified that his actions were due to content considerations. On a video at <http://www.trtvucsd.com/> posted on February 22, for example, he claimed that "this is not an issue of free speech" but quickly said that "there are students getting hurt ... and it's fair to call a time out," referring to the media funding freeze. He also sent an e-mail to the affected organizations at 1:30 a.m. on February 21, stating why he made the decision:

I decided to freeze all media funding from the Associated Students until we can figure out what the student body would like from their student government and what they would like to see come out of their fees.

I would not take these actions if I did not believe they were **necessary to prevent further fracturing of the student body on an issue** that should have an understanding - where our student fees go and what types of media they support. **I cannot sit idle and watch as a segment of our student population tells me that the campus life is so unsupportive that they want to withdraw from this University, and that some of their own money goes to support everything they see wrong with this campus.**

If students want new policies, I will **suggest a referendum on the ballot to put in place the policies that come out** of the campus-wide and 100% public

committee I am charging. If students don't want new policies, the committee can recommend so, and funding will continue the way it has always been.

To me, it's important that we figure at least what steps we will take **before we continue along a path that is generating significant protest from some students.** [Emphases added.]

According to Mr. Gupta's video, he is convening a new "committee" this Thursday or Friday and that one of the charges of the committee is to decide whether or not to maintain the freeze on student media funding. This is unacceptable. The freeze violates the First Amendment rights of the affected organizations—rights that UCSD as a public entity and its agent, ASUCSD, are legally and morally bound to uphold. The freeze must be lifted immediately in order to avoid continuing, substantial harm to each organization, for which UCSD and ASUCSD are already liable.

Mr. Gupta has acted arbitrarily and appears to have no authority to unilaterally freeze student media funding that had already been approved. He also has demonstrated either ignorance or misunderstanding of the constitutional principles of "viewpoint neutrality" and "content neutrality." As the agent of a state university, the ASUCSD has an obligation to distribute student funds to student organizations in a viewpoint-neutral manner and may not make funding or de-funding decisions on the basis of content or viewpoint. This constitutional duty overrides every university or ASUCSD policy, including a supposed right to "shut down" SRTV—a forum created for student use with very few content restrictions—because of protected speech. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995) ("[F]or the University, by regulation, to cast disapproval on particular viewpoints of its students 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").

ASUCSD must distribute funds to student organizations based on objective criteria, regardless of the viewpoints espoused, whether or not ASUCSD members find those points of view objectionable, and regardless of concerns about content. Disregarding this principle in funding decisions is not only morally wrong, but unconstitutional.

Moreover, it is unconstitutional to put to a student referendum any content-based funding policies involving mandatory fees. *See Bd. of Regents v. Southworth*, 529 U.S. 217, 235 (2000) (overturning a referendum allowing students, by majority vote, to fund or defund student groups because "[i]t is unclear to us what protection, if any, there is for viewpoint neutrality in this part of the process."). When students pay mandatory fees, the fees must be distributed in a viewpoint-neutral and content-neutral manner. *See id.* ("To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires"). There is a good reason that the Supreme Court has ruled in this way. Although students might prefer that their mandatory fee only support organizations that each student personally supports, the fee in fact contributes to a university's "marketplace of ideas" and the overall education of all students who pay the fee, even when students find the expression of various organizations highly offensive.

That the First Amendment’s protections fully extend to public universities like UCSD is settled law. See, for example, *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).

Even highly offensive material, including profanity, is fully protected under the First Amendment. We strongly encourage you and your colleagues to read the landmark U.S. Supreme Court cases of *Cohen v. California*, 403 U.S. 15 (1971), and *Hustler Magazine, Inc., et al. v. Jerry Falwell*, 485 U.S. 46 (1988). In *Cohen v. California*, the Court ruled that a Vietnam War protester’s jacket bearing the words “Fuck the Draft” was constitutionally protected expression even when worn in a courthouse. Similarly, in *Hustler Magazine v. Falwell*, the Court ruled that the First Amendment protects even extraordinarily offensive satire and 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. Taken together, these cases decisively and clearly protect offensive material, farce, profanity, and exaggeration, and, in fact, even recognize that the “right to offend” serves a vital societal function.

Furthermore, Mr. Gupta has investigated and punished protected expression that was produced by student producers, and has violated the procedures for handling SRTV complaints and non-compliance issues as given in the Standing Rules. Even the broadcast of racial epithets through SRTV is clearly and fully protected, and no UCSD administrator, student, or faculty member may punish students or student organizations because of such content. Nor may those in charge of funding or disciplinary decisions falsely characterize such content as “threatening” in order to achieve a goal of censorship by other means. Furthermore, it is morally repugnant for Mr. Gupta to proceed with a “fishing expedition” in order to find a minor paperwork violation because of a protected broadcast and then to use that violation as a pretext for shutting down the station.

FIRE therefore asks that you immediately do the following:

- 1) Lift the “moratorium” on funding for the affected organizations.
- 2) Put SRTV back on the air.
- 3) Follow the Standing Rules as stated if there is a desire to prosecute the General Manager for failing to ensure that *The Koala* had fully completed its approval form.
- 4) Refrain from investigating student organizations and publications because they have communicated protected speech.

If ASUCSD is unable or unwilling to meet its constitutional responsibilities and to restore the rights of the affected organizations, UCSD administrators are obligated to intervene and take immediate action. As leaders in institutional governance, models for students, and the ultimate authority in disciplinary matters, UCSD administrators have a legal duty to step in where ASUCSD has failed and to check any attempt to trample upon students’ most basic freedoms. By fulfilling this responsibility as a public official, Chancellor Fox can teach the ASUCSD leadership that it must respect the moral and legal rights of UCSD students and help to instill in

them an understanding of the full repercussions of repeatedly and recklessly defying the Constitution.

Although FIRE itself does not litigate, if the university decides to continue to allow such infringement on the rights of its students, we are committed to using all of our resources in support of students' expressive rights and toward seeing this matter through to a just and moral conclusion.

Given the urgency of these matters, FIRE requests an immediate response.

Sincerely,

A handwritten signature in black ink, appearing to read "Adam Kissel". The signature is fluid and cursive, with the first name "Adam" being more prominent than the last name "Kissel".

Adam Kissel
Director, Individual Rights Defense Program

cc:

Penny Rue, Vice Chancellor of Student Affairs

Sandra Daley, Associate Chancellor and Chief Diversity Officer

Glynda Davis, Assistant Chancellor for Diversity

Daniel W. Park, Chief Campus Counsel and Associate General Counsel

Jeff Gattas, Executive Director, University Communications and Public Affairs

Peter Benesch, Vice President, Finance and Resources, Associated Students of UCSD

Andrew Ang, Associate Vice President, Student Organizations, Associated Students of UCSD