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March 19, 2010

Chancellor Robert J. Birgeneau
Office of the Chancellor
University of California at Berkeley
200 California Hall #1500
Berkeley, California 94720-1500

Sent by U.S. Mail and Facsimile (510-643-5499)

Dear Chancellor Birgeneau:

As you may recall, the Foundation for Individual Rights in Education (FIRE; thefire.org) wrote you on February 12, 2009, regarding the University of California at Berkeley's (Berkeley's) unconstitutional decision to charge a student group, the Objectivist Club of Berkeley, over $3,000 for security for a controversial speech. We were pleased to receive a response on February 25, 2009, from Chief Campus Counsel and Associate General Counsel Michael R. Smith correcting the error and agreeing with FIRE that "security costs for campus events should be based upon content-neutral criteria, and not the anticipated audience reaction to the message of the speaker." Thank you for your administration's prompt response and your recognition of the essentiality of First Amendment protections at public institutions such as yours.

FIRE now writes you with a new concern regarding the threat to freedom of expression posed by Berkeley's policies on naming student organizations as well as related guidelines and policies, which go so far as to ban the word "California" from names of registered student organizations. These policies have unduly restricted Berkeley student groups including student publication *The California Patriot*, which has had to register with a different name than the one it actually uses in its publications. We urge you to lift Berkeley's unconstitutional bans and permit *The California Patriot* and similarly affected organizations to register under their actual, longstanding names.

This is our understanding of the facts; please inform us if you believe we are in error.

Berkeley's "NAME Guidelines" policy (available at http://students.berkeley.edu/osl/studentorganizations.asp?id=2762) states the following, in relevant part:

> Organization names must be in compliance with the Berkeley Campus Regulations and the Office of Marketing and Business Outreach policies.
>
> - The following names and corresponding variations may not be used in your student group name*:
>   - UC Berkeley
>   - California
>   - Cal
>   - UC
>   - UCB
> - 'Berkeley' can be used in your student group name only if it is used as a reference to geographic location, such as:
>   - at Berkeley
>   - of Berkeley [Emphasis in original; link removed.]

The policy provides several examples of group names that would not be approved under the policy, including "California Public Speaking Group," "Public Speaking Group at California," and "Public Speaking Group at UC Berkeley." The policy further provides that "Groups established[1] prior to this policy's implementation can use these terms in their student group name" (emphasis removed).

The California Patriot has been published at Berkeley by a group of Berkeley students since 2000. Recently, when the group sought to become a registered student organization, *The California Patriot* found that under Berkeley's policy, it would not be allowed to register under its longstanding name. The group thus registered under the name The Patriot Group while continuing to publish under the publication's name.

Further policies at Berkeley and in the UC System, enumerated below, similarly restrict the use of Berkeley's name.

1. "Berkeley Campus Regulations Implementing University Policies" (dated May 9, 2009, and available at http://students.berkeley.edu/uga/regs.stm), section 151, provides that "[o]nly an organization that is officially sponsored by or affiliated with the University or a unit of the Berkeley campus may use the name of the University of California, Berkeley or abbreviations thereof as part of its own name."

2. Berkeley's Office of Marketing and Business Outreach links to a 1985 document, "Delegation of Authority—Policy to Permit Use of the University's Name" (numbered DA 0864 and available at http://www.ucop.edu/ucophome/coordrev/da/da0864.html), which includes the following provisions:

[1] It is unclear whether this exception applies to groups that were established but not registered prior to the policy's implementation. It appears to be a "grandfather" provision only for groups that had already been registered. Indeed, this is how it was reasonably construed by *The California Patriot*.

[A]uthority to permit the use of the University's name is delegated as follows:

1. Each Chancellor is delegated, within his area of jurisdiction, authority to permit use of campus names (e.g., University of California, Davis), and/or abbreviations (e.g., UCLA), or any other name of which said designations or abbreviations are a part.
2. The Senior Vice President—Administration is delegated authority to permit use of the name "University of California", the abbreviation "UC", any other name or abbreviation that has Universitywide application or is of concern to more than one campus, or any other name of which said designation or abbreviation is a part.

[…]

NON-COMMERCIAL USE BY ORGANIZATIONS AND GROUPS

Use of the University's name to designate such groups as professional associations, employee organizations, athletic, cultural, **and other interest groups** may be granted when deemed to be in the best interests of the University. (For use of the University's name by registered campus organizations, see latest edition of University of California Policies Applying to Campus Activities, Organizations, and Students). **If any doubt exists as to whether the use will contribute to the best interests of the University, permission shall be withheld.**

[…]

Permission shall be granted with the understanding that **it may be withdrawn at any time the authorizing official determines that further usage will not be in the best interests of the University** or that there has been a failure to adhere to the basis on which the request to use the name or abbreviation was originally submitted and approved. [Emphasis added.]

3. Berkeley's "UC Berkeley® Trademark Guidelines and Requirements" (available at http://ombo.berkeley.edu/sites/ombo.berkeley.edu/files/content/TrademarkGuidelinesAndRequirements0102207.pdf) "apply to the use of campus Trademarks ('Marks') on products, **in all forms of media**, such as print advertising or the Internet, **and include use of Internet domain names**." (Emphasis added.) These guidelines and requirements "pertain to persons and organizations affiliated with the campus as well as to outside entities and agencies," and state, in relevant part:

b) It is **unacceptable** to combine "Berkeley" with "Bears," "Golden Bears," "Athletics," or any athletic team designation (i.e., "Berkeley Football"). The athletic teams should **only** be referred to as "California Golden Bears," "Cal Bears," or "University of California Golden Bears".

[…]

d) The University's marks **should always present a positive image**.

> […]
>
> f) […] The University Seal may not be **defaced, altered, overprinted, or dismantled in any manner**.
>
> g) University marks **are not to be associated with alcohol, tobacco, condoms, gambling products, items which could be used to maim or kill**, or that could present a high liability exposure. For example, **University marks should not be used in conjunction with knives, guns, or cigarette lighters**.
>
> h) The University's marks will not be approved for use in association with certain other mark(s), words or phrases, for example: the Playboy bunny, Coed Naked, profanity, ethnic/gender/religious slurs, pro-hazing designs or designs that are deemed to be in poor taste. **Further, art that is in some way degrading or demeaning, or reflects poorly on the UC Berkeley image, will not be approved.** [Emphases added.]

4. Berkeley's "Policy on the Use of the University Name, Seals, and Trademarks" (available at http://ombo.berkeley.edu/forms/policies/campuspolicy) provides, in relevant part:

> The name "University of California" and all abbreviations thereof are property of the State of California under Education Code section 92000 and may not be used to imply, either directly or indirectly, the University's endorsement, support, favor, association with, or opposition to an organization, product, or service without permission of the University. Education Code Section 92000 conveys the unique value of the University's and Campus' name by **making a violation of the section a misdemeanor**.
>
> In addition to statutory protection, the University's and Campus' names and seals are protected by state and federal trademark law. The Campus' logos, designs, and visual images are also protected by trademark and copyright law. Unauthorized uses of any of these names and trademarks may constitute trademark and/or copyright infringement as well as an unfair business practice.
>
> This policy, and the guidelines set forth herein, **apply to all media, including, without limitation, print, radio, television, video, motion pictures, and all forms of electronic media (e.g. Internet Web sites and electronic mail).** [Emphasis added.]

5. Several provisions in California Education Code section 92000 are similarly restrictive:

> 92000. (a) The name "University of California" is the property of the state. No person shall, without the permission of the Regents of the University of California, use this name, or any abbreviation of it or any name of which these words are a part, in any of the following ways:
> (1) To designate any business, social, political, religious, or other organization, including, but not limited to, any corporation, firm, partnership, association, group, activity, or enterprise.

> (2) To imply, indicate or otherwise suggest that any such organization, or any product or service of such organization is connected or affiliated with, or is endorsed, favored, or supported by, or is opposed by the University of California.
>
> (3) To display, advertise, or announce this name publicly at, or in connection with, any meeting, assembly, or demonstration, or any propaganda, advertising, or promotional activity of any kind which has for its purpose or any part of its purpose the support, endorsement, advancement, opposition, or defeat of any strike, lockout, or boycott or of any political, religious, sociological, or economic movement, activity, or program.

We trust that you understand that the First Amendment's guarantee of freedom of expression fully extends to public universities including Berkeley. See, e.g., *Keyishian v. Board of Regents*, 385 U.S. 589, 605–06 (1967) ("[W]e have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment"); *Healy v. James*, 408 U.S. 169, 180 (1972) (citation omitted) ("[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'"); *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) ("With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities"). As a public institution, Berkeley is both legally and morally bound by these and other decisions of the United States Supreme Court.

By applying the above policies in order to ban mentions of Berkeley's name in a wide variety of non-commercial contexts, such as in *The California Patriot* organization's name, Berkeley has abused its power as a state entity and has unconstitutionally threatened freedom of expression, especially with regard to Berkeley's own students. Berkeley may reasonably restrict the commercial use of its name and may reasonably intervene when there is legitimate confusion regarding official use of Berkeley's name. Berkeley may not, however, categorically ban words as ubiquitous as "California" from student organization names or Internet domain names simply because they use an abbreviation of the name of the school—and certainly not in order to "always present a positive image" as judged by university officials.

Moreover, a wide variety of possible domain names and websites that might use Berkeley's name and logo in whole or in part have no commercial purpose and do not reasonably tend to confuse or mislead readers into believing that they are officially sanctioned or endorsed by Berkeley. Courts have determined that so-called "cybergriping" websites, which are generally dedicated to harsh criticism of a business and which often use the business's marks, are usually considered constitutionally protected speech.

In *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161 (C.D. Cal. 1998), a federal court ruled that Bally Total Fitness (Bally) could not stop a man from operating a website called "Bally Sucks," which included a modified Bally logo on the front page and used the term "ballysucks" in the URL of the website. In that case, Bally, similarly to the policies above,

argued (among other things) that allowing a critic to use its mark was likely to cause confusion among those who were searching for its official website. The court found against Bally, ruling that there was no likelihood of consumer confusion and that "[a]pplying Bally's argument would extend trademark protection to eclipse First Amendment rights. The courts ... have rejected this approach by holding that trademark rights may be limited by First Amendment concerns." 29 F. Supp. 2d at 1166, citing *L.L. Bean, Inc. v. Drake Publishers, Inc*., 811 F.2d 26 (1st Cir. 1987), *cert. denied*, 483 U.S. 1013 (1987). In *Taubman Co. v. Webfeats*, 319 F.3d 770, 775 (6th Cir. 2003), the Sixth Circuit determined that "any expression embodying the use of a mark not 'in connection with the sale ... or advertising of any goods or services,' and not likely to cause confusion, is ... necessarily protected by the First Amendment." In that case, the defendant had established five different websites, such as taubmansucks.com and willowbendmallsucks.com, that criticized plaintiff Taubman and his business "The Shops at Willow Bend" with the purpose of hurting his business and reputation. *Id.* at 772.

Furthermore, Berkeley may not seek to silence protected expression by declaring that it is illegal. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963) (holding that "threat of invoking legal sanctions" from state actor may constitute "informal censorship" and thus require injunctive relief). Yet, Berkeley does just this in its "Policy on the Use of the University Name, Seals, and Trademarks" by invoking California Education Code section 92000 in the context of Berkeley's speech restrictions and by noting that violations of such restrictions are punishable as misdemeanors. As a state actor, Berkeley may not censor by instilling fear in those who seek to engage in protected speech. *Laird v. Tatum*, 408 U.S. 1, 11 (1972) (holding that indirect prohibition on protected speech may give rise to constitutional challenge due to resulting chilling effect on speech).

Berkeley's restrictive policies are also a form of unconstitutional prior restraint, chilling and preventing protected expression that might otherwise have come to pass were it not for this ban. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity").

Moreover, the listed provisions of Education Code section 92000 appear to be facially unconstitutional in themselves. For example, naming an organization "Berkeley Should Change Its Policies Today!" (apparently banned under section 1) or "Berkeley Has Opposed Our Organization!" (banned under section 2) is core political speech protected by the First Amendment and thus may not be banned. Facebook.com "groups," for instance, frequently use such language, and such names may not be banned. Worse, section 3 even prohibits "announc[ing]" the name of Berkeley at public meetings and prohibits display of the name of Berkeley in "any kind" of "propaganda" regarding "any political, religious, sociological, or economic movement, activity or program." To ban the mere mention or display of Berkeley's name in such political contexts is a severe violation of the First Amendment, banning precisely the kind of political speech at the heart of the First Amendment's protection.

Please know that while you are not responsible for the existence of the California Education Code or Universitywide policies, you and other agents of Berkeley *may not* enforce such provisions and policies unconstitutionally. DA 0864 (item 2 above) makes clear that you are "delegated … authority to permit use of campus names," and you must permit all uses of campus

names that are protected by the First Amendment or by additional protections in the California Constitution.

Finally, I should note that in 2005, after the University of California–Santa Barbara tried to force the independently hosted website "www.thedarksideofucsb.com" to remove the letters "ucsb" from its website URL—alleging that the website owner was "guilty of a misdemeanor" for using the letters—FIRE successfully intervened to protect the owner's rights. Similarly, in 2009, after intervention from FIRE, University of California–Los Angeles withdrew its unconstitutional demand that a former student take down a website named "ucla-weeding101.info" that criticized the university.

We urge you to immediately permit *The California Patriot* to be a registered student organization under its actual name, and to allow similarly restricted groups to do the same. Further, FIRE asks you to revise Berkeley's unconstitutional policies described above. FIRE hopes to resolve this situation amicably and swiftly; we are, however, prepared to see this situation through to a just and moral conclusion. We ask that you respond by April 9, 2010.

Sincerely,

Adam Kissel
Director, Individual Rights Defense Program

cc:
Mark Yudof, President, University of California
Harry Le Grande, Vice Chancellor for Student Affairs, University of California at Berkeley
Jonathan Poullard, Dean of Students, University of California at Berkeley
Mark Lucia, Attorney for Students, University of California at Berkeley