



March 7, 2007

VIA U.S. MAIL AND FACSIMILE

President Robert A. Corrigan
President's Office, ADM 562
1600 Holloway Avenue
San Francisco, CA 4132

Re: SFSU College Republicans – SOHP Hearing on March 9, 2007

Dear Dr. Corrigan:

On behalf of the American Civil Liberties Union of Northern California ("ACLU"), I am writing you concerning the Student Organization Hearing Panel ("SOHP") scheduled for March 9, 2007. This hearing is in response to a student complaint filed against the College Republicans, based on events that occurred on October 17, 2006 at a public rally sponsored by that student organization. Because this hearing raises the possibility of sanctions being imposed for the exercise of First Amendment rights, an issue of paramount concern to the ACLU, we would like to address the important constitutional principles that we believe are at stake. We hope that you will share this letter with the members of the panel, as well as any interested parties, and that it will be relevant and helpful to the panel's review process.

The ACLU strongly supports SFSU's commitment and responsibility to promote a campus atmosphere of tolerance and nondiscrimination so that equal educational opportunity is available to all. However, the core purpose of the First Amendment is to prevent government punishment of protected political speech — including views that are highly controversial, offensive or even hostile toward others. Public universities, in particular, have a responsibility to support the diverse exchange of beliefs and to keep the marketplace of ideas functioning and free of censorship. As we will discuss further below, and based on the facts as we understand them concerning the October 17 rally, sanctioning the College Republicans based on this complaint would violate the First Amendment's protection for freedom of expression.

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I. The Rally and Its Aftermath

On October 17, 2006, the SFSU College Republicans held an “anti-terrorism” rally in Malcolm X Plaza. During the rally, members of the group stepped on two handmade butcher paper flags designed to replicate the flags of the groups Hamas and Hezbollah, organizations that the College Republicans believe to be terrorist groups. These flags incorporate the Arabic symbol for God, and that symbol was apparently duplicated in the handmade flags.

This action of stepping on the flags was intended to express the College Republican’s condemnation of Hamas and Hezbollah, and to express the College Republicans’ support for victims of terrorist acts. Some of the onlookers at the rally were deeply offended by this disrespectful treatment of the flag, and what they felt was hostility being expressed to the Muslim religion. Some approached the stage to express their anger, and to prevent the flags containing the religious symbol from being stepped on. In response, attempts were made to modify the makeshift flags by removing the word Allah. Angry and heated arguments ensued, and ultimately the Hamas flag was given to one of the outraged onlookers.

Four days after the event, the College Republicans were notified that a student complaint had been filed against them for committing “acts of incivility” and “inciting violence.” The SOHP investigation has led to the March 9 hearing panel and the possibility that sanctions will be imposed on the College Republicans for their actions with respect to the flags.

II. The First Amendment’s Protection for “Offensive” Speech

The protection of constitutional rights often involves a balancing of important but conflicting interests. In this case, the expression of the political viewpoint of some students has been perceived as deeply offensive and hostile to the religious feelings and viewpoints of other students. While the University does and should have a responsibility to maintain a safe environment so that all students can have an equal opportunity to learn, in exercising that responsibility it is vital to preserve the free speech rights established by the First Amendment. In this case, based on the facts that have been reported, imposing sanctions on the College Republicans would violate the First Amendment rights of the group and its members.

First, the expressive conduct at issue in this case is protected by the First Amendment. Though stepping on Hamas and Hezbollah flags is not an act of pure speech, it is an expressive act of communication that falls squarely within the zone of core constitutional protection. The U.S. Supreme Court set forth this test for whether expressive conduct is protected by the First Amendment: “whether [a]n intent to convey a particularized message was present and [whether] the likelihood was great that the message would be understood by those who viewed it.” *Texas v. Johnson*, 491 U.S. 397, 404 (1989). The context of the act is also central to the analysis. In this seminal flag-burning case, the “expressive, overtly political nature of [the group’s] conduct was both intentional and overwhelmingly apparent.” *Texas v. Johnson*, 491 U.S. at 406. The College Republicans intended to communicate an “anti-terrorist” message by standing on Hamas and Hezbollah flags to express their condemnation of these groups, and to do so in a forum where their message would be heard and understood by those attending the rally. The expression of such political views is at the heart of First Amendment freedoms.

Second, the suggestion that the College Republicans’ actions qualify as “incitement” is not legally supportable. For speech to be lawfully restricted by government on these grounds, the speech must meet three criteria: (1) express advocacy of law violation; (2) the advocacy must call for *immediate* law violation; and (3) the immediate law violation must be *likely* to occur. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). None of these elements are satisfied here, as the College Republicans did nothing to advocate any violation of the law.

Third, the fact that the College Republicans’ viewpoint, and the means they chose to express themselves, was offensive or even abhorrent to some does not override the protection provided by the First Amendment. In fact, the Supreme Court has given us a clear statement of that principle in a case involving desecration of the United States flag:

We are aware that desecration of the flag is deeply offensive to many. But the same might be said, for example of virulent ethnic and religious epithets..., vulgar repudiations of the draft, ... and scurrilous caricatures.... ‘If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.’

U.S. v. Eichman, 496 U.S. 310, 318-19 (1990) (citations omitted). While “civility” and respect for the views of others is an important and worthy goal for the University community, it cannot be used as the defining test for what expression is constitutionally protected.

Fourth, the angry reaction of those in the audience who felt a sacred symbol was being desecrated is certainly understandable. In the post- 9/11 era in this country, Muslims have been subjected to many acts of discrimination, both by the government and by private actors. The ACLU is working closely with other organizations to protect and defend the rights of victims of such unlawful discrimination and anti-Muslim bias, and we understand that balancing free speech rights with equal protection rights can be a difficult and delicate task. However, while the expressive conduct of the College Republicans clearly angered and deeply disturbed some listeners at the rally, this does not deprive the speech or the speakers of constitutional protection. A cardinal tenet of the First Amendment is that free speech “may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.” *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). The U.S. Supreme Court has long since rejected the idea of a “hecklers’ veto” that would result from letting the audience response determine the protection afforded free expression. *Terminiello v. Chicago*, 337 U.S. 1.¹

Finally, the College Republicans’ expression does not constitute “hostile environment” harassment under the law, as has been alleged in this matter. The Supreme Court has held that for student conduct to constitute punishable “hostile environment” harassment, it must be “so severe, persistent, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.” *Davis v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999). Speech at a political rally that neither targets specific individuals nor is severe or persistent enough to bar the educational access of others does not cross this constitutional line. While there are lawful ways for the University to respond to incidents that ignite ideological clashes or single out certain groups and to acknowledge the impact of such speech on the community, the imposition of discipline is an unconstitutional response under this set of facts.

¹ While fully recognizing that disrespectful and contemptuous treatment of the United States flag in public may cause justifiable outrage among onlookers, the United States Supreme Court in no less than five “flag desecration” cases has held that punishment for such actions would violate the First Amendment. *Street v. New York*, 394 U.S. 576 (1969); *Smith v. Goguen*, 415 U.S. 566 (1974); *Spence v. Washington*, 418 U.S. 405 (1974); *Texas v. Johnson*, 491 U.S. 397; *United States v. Eichman*, 496 U.S. 310.

III. Conclusion

The ACLU supports the University's efforts to create a diverse campus community that is a safe learning environment for all, free from discrimination and harassment. Institutional vigilance to this obligation is a vital component of providing a fair, open and equal educational opportunity. However, this laudable goal must be pursued in a manner that also extends full support to free and open dialogue, even when difficult or controversial issues arise or when the speech is offensive and stirs some people to anger. Because the College Republicans were engaging in protected First Amendment activity at their rally, official punishment of the group or its members would violate the Constitution. Therefore, we strongly urge the administration of San Francisco State University not to impose punitive sanctions in response to this incident.

If there is a cure in the marketplace of ideas for speech one disagrees with, that cure is counter-speech, not censorship. This principle is evident in aspects of this incident to date. The "anti-terrorism" rally of the College Republicans, and their explicit condemnation of Hamas and Hezbollah, was intended to counter viewpoints expressed on campus in support of these organizations. And, after this incident, the Associated Students board exercised its free speech rights by unanimously adopting a resolution condemning the group, finding that, "The actions on the part of the College Republicans amount to no more than hateful religious intolerance." *AS/ Passes Resolution Against Flag Stomping: Organization says College Republicans were in the Wrong*, Jason Shuffler, The Golden Gate Xpress, November 28, 2006. The University should do what it can to foster and support a robust exchange of student ideas and viewpoints.

If this incident raises University concerns about bias or hostility on the SFSU campus, there are ways to respond that deepen student engagement with those issues, educate students regarding community diversity, and take positive steps to promote equality and understanding. The University should use this controversial moment as an opportunity to foster productive dialogue through hosting a community meeting, facilitating an educational debate, or conducting an all-school training. The University has used such affirmative steps in the past in the midst of similar campus controversies, and we urge that such measures be considered instead of punitive sanctions that would violate free speech rights.

The United States Supreme Court should have the last word:

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength.

Cohen v. California, 403 U.S. 15, p. 24-25 (1971)

Yours truly,



Alan L. Schlosser
Legal Director

cc: Joey Greenwell, Director of Student Programs