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March 7, 2007

President Robert A. Corrigan
President's Office, ADM 562
1600 Holloway Avenue
San Francisco, California 94132

URGENT

Sent via U.S. Mail and Facsimile (415-338-6210)

Dear President Corrigan:

It is with both deep disappointment and renewed resolve that FIRE is forced to write to you again to voice our grave concern about the threat to free expression posed by San Francisco State University's (SFSU's) ongoing investigation of the SFSU College Republicans for the content of an anti-terrorism rally held October 17, 2006.

FIRE has learned that SFSU's Student Organization Hearing Panel (SOHP) plans to hold a hearing this Friday, March 9, to adjudicate the October 26, 2006 complaint against the College Republicans. The College Republicans stand accused of "attempts to incite violence and create a hostile environment" and "actions of incivility" for "walking on a banner with 'Allah' written in Arabic script." The banners in question were pieces of butcher paper on which the College Republicans had drawn the flags of Hamas and Hezbollah.

FIRE strongly urges SFSU to cancel the SOHP hearing immediately and end any further investigation of the College Republicans in recognition of the plain fact that as a public institution, SFSU *cannot* lawfully punish the College Republicans for engaging in protected symbolic political expression. It is imperative that SFSU recognize that it is both legally and morally bound to respect the right to free expression as guaranteed to its students by the Constitution of the United States, by the California constitution, and by its own institutional commitments to free speech.

Legally speaking, this is not a close call, and the administrators involved in this action risk being held individually liable in a court of law for violating the constitutional rights of the accused students. Even if every allegation in the complaint is true, there are ***no*** lawful grounds for punishment or even further investigation.

As we made clear in our previous letter, the College Republicans' actions cannot lawfully be found to constitute "incitement" or "hostile environment" harassment. Incitement occurs when a speaker exhorts his or her supporters to engage in immediate unlawful action. By contrast, speech *cannot* constitute "incitement" if violence results because the audience *disagrees* with the speaker and wishes to silence him or her. As the U.S. Supreme Court held in *Brown v. Louisiana*, 383 U.S. 131 (1966), "[p]articipants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence." Indeed, the Court has repeatedly acknowledged that protected speech may often be "provocative and challenging," provoking "profound unsettling effects as it presses for acceptance of an idea" in the mind of a listener, and even stirring anger and unrest. *Terminiello v. Chicago*, 337 U.S. 1 (1949). The College Republicans' speech was exactly the type of provocative political speech the First Amendment is designed to protect.

Similarly, the isolated expressive activity in question here fails *in every respect* to meet the strict legal threshold for harassment. The Supreme Court has defined "hostile environment" harassment in the educational setting to be behavior "so severe, pervasive, 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 (1999). The actions of the College Republicans during one "anti-terrorism" rally cannot possibly constitute behavior "so severe, pervasive and objectively offensive" as to be punishable "hostile environment" harassment. To maintain otherwise is simply untenable.

As for the university's argument that the issue is not flag desecration but instead is—as a university spokesperson told a columnist for the *San Francisco Chronicle*, "the desecration of Allah"—I simply do not believe that you or anyone at your university seriously believes that a public university in America can punish the desecration of a religious symbol. If, perhaps, your legal counsel is telling you that the Supreme Court's decision in *Virginia v. Black*, 538 U.S. 343 (2003) allows the state to ban the desecration of religious symbols, this is wholly incorrect, and requires not a misreading but rather a deliberate twisting of that decision. In fact, *Black* states that "burning a cross at a political rally would almost certainly be protected expression," and only permits the regulation of cross burning when the burning cross is intended to convey "a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." This decision was explicitly based on cross burning's "long and pernicious history as a signal of impending violence," given that it is "inextricably intertwined with the history of the Ku Klux Klan." No one watching the video of the College Republicans' protest could reasonably conclude that the students watching the protest had any fear that they were immediately about to be harmed or killed. Any argument based upon *Virginia v. Black* would be an argument made in bad faith and would not be taken seriously in a court of law.

Any punishment enforced against the College Republicans under SFSU's student conduct policies as a consequence of their exercise of their First Amendment rights is an unlawful deprivation of constitutional rights under 42 U.S.C.S. § 1983 for which SFSU administrators can be sued in their individual capacities. Moreover, when the law is as clearly established as it is in this case—the Supreme Court's well-known and unequivocal holding in *Texas v. Johnson*, 491

U.S. 397 (1989) that flag desecration is constitutionally protected—any claims of immunity on the part of the individual administrators will likely fail. State officials and employees are offered only *qualified* immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Davis v. Scherer*, 468 U.S. 183 (1984).

Existing First Amendment law leaves no doubt that the College Republicans' expressive activity enjoys complete protection under the First Amendment. No reasonable person could claim otherwise. As such, your persistence in pursuing potential disciplinary sanctions against the College Republicans effectively waives immunity from liability under § 1983. To be clear, if you continue to ignore your constitutional obligations, you risk personal liability for depriving your students of their rights.

We ask you to stop these proceedings immediately. There is nothing to investigate other than constitutionally protected expression. I believe everyone at SFSU knows this. Be assured that neither the law nor the public will long tolerate such brazen attempts to circumvent the Bill of Rights.

Due to the urgent nature of this matter, we request a response by tomorrow, Thursday, March 8, 2007.

Sincerely,

Greg Lukianoff
President

cc:
John M. Gemello, Provost and Vice President for Academic Affairs, SFSU
J. E. Saffold, Dean of Students and Vice President for Student Affairs, SFSU
Kevin Bowman, Associate Vice President for Student Affairs, SFSU
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Joey Greenwell, Director, Office of Student Programs and Leadership Development, SFSU
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Nat Hentoff, *The Village Voice*
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