



February 24, 2010

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Dear Chancellor Fox & Mr. Gupta:

I am writing to address the First Amendment issues raised by Mr. Gupta's statement of February 19, 2010, posted at www.battlehate.ucsd.edu, which states that Mr. Gupta, as Associated Students President, "revoked the SRTV Charter for review" to prevent the airing of "hateful content" and has "frozen all student media organization funding" pending development of "policies to ensure that our fees do not go to the support the hateful speech" such as that aired on SRTV by *The Koala*.

As I have stated in letters to Chancellor Fox, the ACLU agrees that the proper response to offensive speech is more speech, not less. We join the university and student government in speaking out against offensive and hurtful racial stereotypes, and we support all appropriate measures to support individual students, ensure their safety, develop a campus culture of respect and civility, and promote diversity on campus.

However, neither the university nor student government may legally cross the line into censorship of protected speech. I concur with FIRE's letter to you of February 22 that the First Amendment prohibits both UCSD and its student government from retaliating against SRTV or any other student media organization because of the viewpoints expressed by any such organization. I add only the following comments.

Section 4.2 of the ASUCSD Standing Rules opens up SRTV to students as "a regular broadcast medium for artistic and informative expression" and makes student producers "ultimately responsible for the content of the show they produce," without any restrictions except for prohibitions on copyrighted and "obscene" material and time limitations on "indecent" material. SRTV is therefore at least a "limited public forum ... that the government intentionally has

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opened to certain groups” for free expression. *Legal Aid Services of Oregon v. Legal Services Corp.*, 587 F.3d 1006, 1016 n.7 (9th Cir. 2009).

The same is true for all student media organizations funded by ASUCSD. As stated in section 2.3(g) of the Standing Rules, “The allocation of funds to student organizations does not represent an endorsement or the official position of the ASUCSD, the University of California, or the Regents of the University of California.” Section 2.3(l) further states that “UCSD is not responsible for the contents of the publications of Student Media” and requires all student media funded by ASUCSD to print a detailed disclaimer that their publications “are not endorsed by and do not represent the views, opinions, policies, or positions of the ASUCSD, GSAUCSD, UC San Diego, the University of California and the Regents or their officers, employees, or agents.” It is therefore clear that student media funding is “a university program for subsidizing and distributing student publications” that qualifies at least as a limited public forum for student expression. *Legal Aid Services*, 587 F.3d at 1016 n.7.

In such a forum, “when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers,” a university may not deny or limit funding because of the “particular views taken by speakers on a subject.” *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 829, 834 (1995). As the Court noted, “If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one.” *Id.* at 831.

Therefore, neither UCSD nor ASUCSD may cancel SRTV programming or freeze funding to other student media organizations due to the viewpoints expressed by certain students on SRTV, even if those viewpoints are considered “hateful.” Nor may UCSD or ASUCSD assert the right to regulate the viewpoints expressed by student media in the future. *See Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973).

It is particularly problematic to take action against student media that had nothing to do with the offensive speech broadcast over SRTV. In any case, ASUCSD may not deny funding to any student media organization due to viewpoints expressed in its publication. As stated in the 2009-2010 Associated Students Media Handbook (p. 14), “Neither the administration nor the students can ... censor or confiscate a publication, withdraw or reduce its funding ... or take any other action that is motivated by an attempt to control, manipulate or punish past or future content.”

The actions of AS President Gupta cannot be justified on the ground that the SRTV broadcast contained unprotected “fighting words.” Unless specifically “directed to the person of the hearer,” offensive or abusive epithets are not “fighting words” as defined in First Amendment law. *Cohen v. California*, 403 U.S. 15, 20 (1971); *cf. United States v. Eichman*, 496 U.S. 310, 318 (1990). A television broadcast therefore cannot qualify as fighting words.

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Nothing in our position should be taken to minimize the damage recently done to UCSD's community. We acknowledge the depth of the hostility and pain experienced by black students at UCSD. We call on the administration to "foster by persuasion and example" a culture of civility and respect. *Texas v. Johnson*, 491 U.S. 397, 418 (1989). We also join in demands for genuine promotion of diversity on campus.

But censorship is not the answer to UCSD's problems. Censorship is a blunt instrument that endangers all speech and often has the unintended effect of promoting the censored message. As I previously noted in a letter to Chancellor Fox, respect for the First Amendment is essential in the struggle for racial equality. The First Amendment protected the speech of the civil rights movement against state repression, as it protects the speech of student protestors today. The censorship of one person's speech today may lead to censorship of your speech another day.

I look forward to your response to this letter as soon as possible. Please let me know if you have any questions or concerns.

Sincerely,

David Blair-Loy
Legal Director