May 31, 2024

James T. Harris
Office of the President
University of San Diego
Hughes Administrative Center 229
5998 Alcalá Park
San Diego, California 92110

Sent via U.S. Mail and Electronic Mail (president@sandiego.edu)

Dear President Harris:

FIRE[1] is concerned by an email from University of San Diego administrators to the campus community regarding subjectively objectionable posts on social media apps like Fizz. While Fizz (or any social media app) may serve as a platform for posts people may find offensive or hateful, California law and USD's commitment to free speech preclude USD from punishing offensive-but-protected speech. We therefore urge USD to clarify to its community that it will not investigate Fizz posts simply because someone finds them offensive, and that no student will face punishment for posts protected by California law and university policy.

Our concerns arise out of an April 26 email to the USD community signed by four university administrators and "Leaders of the Associated Student Government" that criticized the "highly inappropriate and offensive nature of posts on Fizz," including "instances of cyberbullying" and "behaviors that are clearly racist, bigoted and intended to demean."[2] The email urged that no one "should be the target of online harassment, bias, intimidation and threatening behavior."[3] In what appears to be an effort to chill students into restricting their expression for fear of punishment, the email added that even though Fizz promises anonymity, "there has been at least one instance where the Department of Public Safety [was] able to identify the

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[1] As you may recall from prior correspondence, the Foundation for Individual Rights and Expression defends freedom of expression, conscience, and religion, and other individual rights on America's university campuses. You can learn more about our expanded mission and activities at thefire.org.

[2] Email from ASG and USD Leaders to the USD community (Apr. 26, 2024, 10:04 AM) (on file with author). Signatories of the letter included Vice President for Student Affairs Charlotte Johnson, Vice President for Mission Integration Michael Lovette-Colyer, Assistant Vice President and Dean of Students Nicole Whitner, and Assistant Vice President for Public Safety James Miyashiro.

[3] *Id.*

author of a problematic post."[4] The email continued by saying posts "that may be considered violations of the Student Code of Conduct and/or criminal laws will be investigated and, in … instances where the violator is identified, the appropriate consequences will follow."[5] The email then doubled down by urging students to not just continue reporting "incidents on Fizz," but to come forward if they "can identify people behind the troubling posts."[6]

The email proposes a course of university action—including punishment—that would violate California's Leonard Law, as well as USD's commitment to safeguard its students' freedom of speech. As you are no doubt aware, the Leonard Law prohibits universities from "mak[ing] or enforce[ing] a rule subjecting a student to disciplinary sanctions solely on the basis of … speech" that the First Amendment would protect off-campus.[7] This is mirrored in USD's binding commitment to "creating and maintaining an environment in which a variety of ideas can be reasonably expressed, discussed and critically examined."[8] Students reading this commitment would reasonably believe—based on the policy's language itself, and certainly against the backdrop of the Leonard Law—that they have expressive rights commensurate with those the First Amendment guarantees. And telling students that USD's Department of Public Safety may seek to identify them, and that they face punishment for anonymous online speech merely because someone finds it "inappropriate and offensive," is utterly incompatible with the Leonard Law and USD policy.

Despite the university's Catholic identity, USD is unlikely to escape the Leonard Law's ambit as "controlled by a religious organization."[9] While no California state court has interpreted this term in the context of the Leonard Law specifically, a court has interpreted it in the context of Title IX's federal exemption for religious institutions, which uses the same language.[10] Using the Department of Education's definitions, a California federal district court held that a school is "controlled by a religious organization" when it "requires its faculty, students or employees to be members of, or otherwise espouse a personal belief in, the religion of the organization" that controls it.[11] Even assuming USD is "controlled by a religious organization," it would still have to demonstrate that the Leonard Law's application is inconsistent with its "religious tenets,"[12] which seems unlikely, given USD's above-noted free speech commitments. And in

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[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] Calif. Educ. Code § 94367(b).

[8] *Policy Governing Assembly on Campus*, UNIV. OF SAN DIEGO (adopted July 16, 2020), https://www.sandiego.edu/legal/policies/community/institutional/assembly.pdf [https://perma.cc/9T24M7TD].

[9] Calif. Educ. Code § 94367(c).

[10] *See* 20 U.S.C. § 1681(a)(3).

[11] *Maxon v. Fuller Theological Seminary*, 549 F. Supp. 3d 1116, 1125-26 (C.D. Cal. 2020) (citing Memorandum of Harry M. Singleton, Assistant Secretary for Civil Rights, to Regional Civil Rights Directors (Feb. 19, 1985)).

[12] Calif. Educ. Code § 94367(c).

any event, those commitments are *contractual* in nature,[13] and the Leonard Law's "religious organization" allowance would not create an exception to USD's contractual obligations.

For freedom of speech to be meaningful, expression that others may find offensive or even hateful must fall within the protection of any law or policy that purports to ensure free speech.[14] For example, as the Supreme Court explained in holding the First Amendment protects protesters bearing insulting signs outside of soldiers' funerals: "As a Nation we have chosen … to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[15] If USD truly is committed "to creating and maintaining an environment in which a variety of ideas can be reasonably expressed, discussed and critically examined" on its campus,[16] it must be willing to accept that some members of its community will express viewpoints that others claim are "racist," "bigoted," "demeaning," "biased," or "offensive."

To the extent USD has authority to investigate online expression that may represent a true threat or actionable harassment, it must ensure the exacting legal standards are met. To be an unprotected true threat, speech must "communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals,"[17] and the speaker must consciously disregard a substantial risk that their speech would place another in fear of serious physical harm.[18] This specifically excludes rhetorical hyperbole, the endorsement of violence,[19] or even the assertion of the "moral propriety or even moral necessity for a resort to force or violence"[20] (and, for obvious reasons, also excludes speech simply deemed "offensive," "biased," etc.). For speech to constitute actionable harassment, it must be (1) unwelcome, (2) discriminatory on the basis of gender or another protected status, *and* (3) "so severe, pervasive, and objectionably offensive that it can be said to deprive the

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[13] The "basic legal relation between a student and a private university or college is contractual in nature" and its "bulletins, circulars, and regulations … made available to the matriculant become a part of the contract." *Zumbrun v. Univ. of S. Cal.*, 25 Cal. App. 3d 1, 10 (Ct. App. 1972); *see also Tecza v. Univ. of San Francisco*, 532 F. App'x 667, 668–69 (9th Cir. 2013) (holding University of San Francisco's Student Disability Services Handbook to be a binding legal contract).

[14] *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (invalidating ordinance that prohibited placing on any property symbols that "arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender"). In this regard, the Supreme Court has refused to allow a limitation on speech viewed as "hateful" or demeaning "on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground." *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017); *see also Texas v. Johnson*, 491 U.S. 397, 414 (1989) (First Amendment protects burning American flag under its "bedrock principle" that government actors "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *Cohen v. California*, 403 U.S. 15, 25 (1971) (First Amendment prohibited punishing the wearing of a jacket with the words "Fuck the Draft").

[15] *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).

[16] *Policy Governing Assembly on Campus*, *supra* note 6.

[17] *Virginia v. Black*, 538 U.S. 343, 359 (2003).

[18] *See Counterman v. Colorado*, 143 S. Ct. 2106, 2134 (2023).

[19] *Watts v. United States*, 394 U.S. 705, 708 (1969) (man's statement, after being drafted to serve in the Vietnam War—"If they ever make me carry a rifle the first man I want to get in my sights is L. B. J."—was rhetorical hyperbole protected by the First Amendment, not a true threat to kill the president)).

[20] *Noto v. United States*, 367 U.S. 290, 297–98 (1961).

victim[] of access to the educational opportunities or benefits provided by the school."[21] As the U.S. Department of Education has made clear, harassment "must include something beyond the mere expression of views, symbols, or thoughts that some person finds offensive."[22] USD may investigate true threats or harassment, but only within these speech-protective confines.

Free speech principles that traditionally protect not only a speaker's right to speak but to do so anonymously also bar USD from investigating or punishing protected Fizz posts.[23] The Supreme Court has recognized that anonymous speakers may have a variety of motivations for remaining so,[24] and that anonymous speech "is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent."[25] USD should unmask anonymous speakers only if their speech is not protected.

All told, the threat to unmask and investigate those behind "problematic" anonymous posts—especially without a statement that this would occur only in cases of true threats or actionable harassment—is likely to produce a chilling effect intended to have students self-censor out of fear of discipline.[26] Investigating "problematic" posts that free speech principles protect simply cannot proceed without violating USD's commitment to free expression. However, this commitment does not shield Fizz posts from criticism by students, faculty, or the broader community. Such criticism is a form of the "more speech" remedy our nation has chosen over censorship[27] in lieu of silencing opinions through, for example, threats of official punishment such as those embodied in the email USD's administrators joined.We request a substantive response to this letter no later than close of business June 14, confirming that USD will clarify to its community that it will not investigate Fizz posts simply because some are offended or hurt by their content, and that no student faces punishment for posts that contain protected speech.

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[21] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999); *Grabowski v. Ariz. Bd. of Regents*, 69 F.4th 1110, 1113 (9th Cir. 2023) (bullying claim analyzed under *Davis* harassment standard).

[22] U.S. Dep't of Educ., Dear Colleague Letter from Gerald A. Reynolds, Assistant Sec'y for Civil Rights (July 28, 2003), https://www2.ed.gov/about/offices/list/ocr/firstamend.html.

[23] *See, e.g., Watchtower Bible & Tract Soc. of N.Y. v. Village of Stratton*, 536 U.S. 150, 166–67 (2002) (striking down ordinance requiring canvassers to identify themselves to mayor's office); *Justice for All v. Faulkner*, 410 F.3d 760, 764–65 (5th Cir. 2005) (striking down college policy requiring leaflets distributed on campus to identify their authors).

[24] *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341–42 (1995) (an author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible).

[25] *Id.* at 357, 360 (Thomas, J., concurring) ("There is little doubt that the Framers engaged in anonymous political writing. The essays in the Federalist Papers, published under the pseudonym of 'Publius,' are only the most famous example of the outpouring of anonymous political writing that occurred during the ratification of the Constitution.").

[26] *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992).

[27] *Whitney v. California*, 274 U.S. 357, 377 (1927).

Sincerely,

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Cc: University of San Diego Associated Student Government
Charlotte Johnson, Vice President for Student Affairs
Michael Lovette-Colyer, Vice President for Mission Integration
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