FIRE
Foundation for Individual Rights and Expression

October 31, 2024

Adela de la Torre
C/o Brittany Santos-Derieg, Chief of Staff
Office of the President
San Diego State University
5500 Campanile Drive
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URGENT

Sent via U.S. Mail and Electronic Mail (bsantosderieg@sdsu.edu)

Dear President de la Torre:

FIRE, a nonpartisan nonprofit dedicated to defending freedom of speech,[1] is concerned by San Diego State University's investigation into a video posted on social media of two individuals, possibly SDSU students, dressed as Sean "Diddy" Combs and a bottle of baby oil—a reference to the rapper's parties which are at the "center of his federal criminal indictment on allegations of sexual abuse, trafficking and exploitation."[2] Regardless of whether anyone finds these costumes offensive, SDSU, as a public university bound by the First Amendment,[3] may not impose disciplinary measures[4] that violate students' expressive rights or launch chilling "investigations" of clearly protected expression. Therefore, we urge SDSU to promptly cease any investigation into the costume and announce that it is no longer looking into the matter.

[1] For more than 20 years, FIRE has defended freedom of expression, conscience, and religion, and other individual rights on America's university campuses. You can learn more about our mission and activities at thefire.org.

[2] Danielle Dawson, *SDSU looking into viral 'Diddy' Halloween costume with blackface,* FOX5 (updated October 29, 2024, 4:28 PM), https://fox5sandiego.com/news/local-news/sdsu-investigating-viral-diddy-halloween-costume-with-blackface (a spokesperson for the university said that while neither individuals are confirmed students at the university, SDSU is "working to confirm additional information, to include the location and name and affiliations of the individuals involved."). The recitation of facts here reflects our understanding of the situation. We appreciate that you may have additional information and invite you to share it with us.

[3] *Healy v. James*, 408 U.S. 169, 180 (1972) ("[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.'") (internal citation omitted).

[4] *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

It is well-established that freedom of expression "does not end at the spoken or written word, but includes conduct "intend[ed] to convey a particularized message" likely to "be understood by those who viewed it" as expressive.[5] While authorities may enforce content-neutral regulations that may *incidentally* impact expressive conduct, they cannot directly restrict conduct that has expressive elements.[6] This is what protects the act of saluting or refusing to salute a flag,[7] wearing black armbands to protest war,[8] or displaying a "seditious" red flag.[9] The individuals depicted in the video have the expressive right to wear their costumes—whether as a joke, to express an opinion, or any combination of the two—regardless of the subjective reaction of those who see them.

Investigations into this matter cannot be justified because others took offense. The Supreme Court has repeatedly, consistently, and clearly held that expression may not be restricted on the basis that others find it to be offensive or hateful.[10] In ruling that the First Amendment protects protesters holding insulting signs outside of soldiers' funerals, the Court reiterated this fundamental principle, remarking that "[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[11] Courts have found protected expression in "offensive and sophomoric" skits depicting women and minorities in derogatory stereotypes,[12] "racially-charged emails" to a college listserv,[13] and student organizations that the public viewed as "shocking and offensive."[14] The First Amendment's protection of subjectively offensive expression applies regardless of informative or entertainment value,[15] such as performances with actors in "blackface."[16]

Nor is the announcement of an investigation into this matter legitimately justified on suspicion that the costumes constituted harassment. In *Davis v. Monroe County Board of Education,* the

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[5] *Texas v. Johnson*, 491 U.S. 397, 404, 406 (1989).

[6] *Id.*

[7] *W. Va. Bd. of Educ. v. Barnette,* 319 U.S. 624, 633-34 (1943).

[8] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969).

[9] *Stromberg v. California*, 283 U.S. 359, 369 (1931).

[10] *E.g.*, *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (the Court has refused to limit speech viewed as "hateful" or demeaning "on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground."); *Johnson*, 491 U.S. at 414 (the government under the First Amendment "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

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

[12] *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 388–392 (4th Cir. 1993).

[13] *Rodriguez v. Maricopa Cnty. Comm. Coll. Dist.*, 605 F.3d 703, 705 (9th Cir. 2009) (the First Amendment "embraces such a heated exchange of views" at a public university, especially when they "concern sensitive topics like race, where the risk of conflict and insult is high.").

[14] *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 661 (1st Cir. 1974).

[15] *Winters v. New York*, 333 U.S. 507, 510 (1948) (holding that offensive magazine enjoyed First Amendment protection because "[t]he line between the informing in the entertaining is too elusive for the protection of that basic right. ... What is one man's amusement, teachers another's doctrine."); *see also Matal*, 137 S. Ct. at 1763 ("Giving offense is a viewpoint.").

[16] *Berger v. Battaglia*, 779 F.2d 992, 999 (4th Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986).

Supreme Court set forth a definition of punishable harassment in the educational context.[17] For conduct (including expression) to constitute discriminatory harassment, it must be (1) unwelcome, (2) discriminatory on the basis of gender or another protected status, and (3) "so severe, pervasive, and objectively offensive that it can be said to deprive the victim[] of access to the educational opportunities or benefits provided by the school."[18]

It is not possible for these individuals' display of subjectively offensive costumes to meet this standard. Even if the costumes could be said to be "objectively offensive," there is no evidence that they wore the costumes on any other occasions than the one depicted in the photo, meaning that their actions cannot meet the required "pervasive[ness]" component. SDSU also cannot construe wearing the costumes in this one-time instance as conduct capable of depriving a reasonable person of the university's educational opportunities or benefits.

SDSU must immediately cease any investigation into the costumes. Such investigations alone into protected expression create an impermissible chill, even when an investigation concludes in the individuals' favor.[19] Because of the implicit threat of discipline and the implication that the expression at issue is not protected, these investigations have a censorial effect.[20] If SDSU felt compelled to reassure students it was aware of the costumes, it could have noted just that and done a private preliminary review of the situation to confirm the expression is protected and does not reach the *Davis* standard—and with that confirmation, proceed no further. That approach avoids the suggestion that the university will launch full-scale disciplinary investigations into protected expression.

Of course, this does not shield the individuals from every consequence of their expression—including criticism by students, faculty, or the broader community. Criticism is a form of "more speech," the remedy to offensive expression preferred to censorship.[21] Nor would SDSU be barred from offering resources to students who may have been offended or upset by the costumes. However, the First Amendment strictly limits government actors from censoring offensive speakers on a public university campus.

Given the urgent nature of this matter, we request a substantive response to this letter no later than close of business on November 14, 2024, confirming SDSU will end its investigation into the costumes, not pursue any punishment in this matter, and will refrain from announcing investigations into protected expression in the future.

Sincerely,

Haley Gluhanich
Senior Program Officer, Campus Rights Advocacy

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[17] *Davis v. Monroe County Bd. of Ed*, 526 U.S. 629 (1999).

[18] *Id.* at 650.

[19] *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

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

[21] *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).