

November 12, 2024

Dr. Richard C. Benson  
Office of the President  
The University of Texas at Dallas  
800 West Campbell Road  
Richardson, Texas 75080-3021

**URGENT**

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

Dear President Benson:

FIRE's<sup>1</sup> Student Press Freedom Initiative (SPFI) and the Student Press Law Center (SPLC)<sup>2</sup> are concerned about the state of free expression, including freedom of the press, at the University of Texas at Dallas (UTD) following administrative interference in operational decisions of the independent student paper *The Mercury*. The Student Media Operating Board's (SMOB) removal of *The Mercury*'s editor-in-chief raises serious procedural issues, appearing even more suspect considering UTD's disregard for student expression on campus earlier this year.<sup>3</sup> UTD cannot continue to ignore its constitutional obligations. It must come to an agreement with the former editors of *The Mercury* and allow a free, independent press on campus.

Students at *The Mercury* report that the paper's relationship with UTD administrators has deteriorated in the wake of their coverage of student encampments and resulting arrests last spring.<sup>4</sup> *Mercury* staff state that since May, UTD administrators have demoted the paper's

---

<sup>1</sup> FIRE is a nonpartisan nonprofit dedicated to defending freedom of speech and of the press on and off campus. You can learn more about our recently expanded mission and activities at [thefire.org](https://www.thefire.org). FIRE's Student Press Freedom Initiative (SPFI) defends free press on campus by advocating for the rights of student journalists at colleges and universities across the country.

<sup>2</sup> The Student Press Law Center ("SPLC") is a non-profit, non-partisan organization which, since 1974, has been the nation's only legal assistance agency devoted to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment. SPLC provides free legal information and educational material for student journalists, and its legal staff jointly authors the widely used media-law reference textbook, *Law of the Student Press*.

<sup>3</sup> Graham Piro, *FIRE to UT Dallas: Restore free speech rocks to campus*, FIRE (Jan. 16, 2024), <https://www.thefire.org/news/fire-ut-dallas-restore-free-speech-rocks-campus>.

<sup>4</sup> Maria Shaikh et al., *Editorial: Reinstate Gregorio as EIC now*, MERCURY (Sept. 17, 2024), <https://utdmercury.com/editorial-reinstate-gregorio-as-eic-now/>. The following recitation of facts is our understanding of the situation. We appreciate you may have additional information to offer and invite you to share it with us.

advisor after unflattering coverage about UTD’s response to encampments, stolen copies of the paper from newsstands, and interfered with other operational decisions.<sup>5</sup>

On September 11, Director of Student Media Lydia Lum sent a memo to the voting members of the SMOB — a group comprised of students, faculty, and administrators — calling for the removal of then-editor-in-chief Gregorio Olivares Gutierrez.<sup>6</sup> In the memo, Lum stated a vote on Gutierrez’s removal would be held in two days and alleged Gutierrez violated SMOB bylaws by holding an additional form of student employment, exceeding anticipated printing costs on two issues, and “bypassing advisor involvement.”<sup>7</sup> On September 12, the day before the vote, Lum notified the three non-voting, *ex officio* SMOB members representing other UTD student media organizations that the board would meet the following day to discuss a “highly unusual business matter” and they “won’t need to attend.”<sup>8</sup> Lum did not provide further context on the reason for the meeting and ignored an *ex officio* member’s subsequent request for the virtual meeting link.<sup>9</sup>

On September 13, the SMOB voted 3-1 to remove Gutierrez as editor-in-chief.<sup>10</sup> Three of the seven voting SMOB members were absent from the vote, and none of the three *ex officio* members from other UTD student media were present.<sup>11</sup> After the vote, Lum informed Gutierrez that if he chose to appeal, Senior Director of Marketing and Student Media Jenni Huffenberger would decide his status as editor-in-chief, disregarding the bylaws’ mandate that the SMOB consider appeals first and turn to Huffenberger only in the event it cannot reach a decision.<sup>12</sup>

Gutierrez disputes allegations that he violated SMOB bylaws and filed an appeal on September 17 requesting a review of the removal process.<sup>13</sup> In a series of September 17 emails, Lum dismissed SMOB members’ calls to reconvene to hear Gutierrez’s appeal and to appoint an additional *ex officio* member from a local newspaper, despite SMOB bylaws supporting these requests.<sup>14</sup> On September 26, Huffenberger informed Gutierrez that — without input from the SMOB — she had denied his appeal, and he would not be reinstated.<sup>15</sup> *Mercury* staff and editors have been on strike in support of Gutierrez since September 14, and the future of the paper

---

<sup>5</sup> *Id.*

<sup>6</sup> Maria Shaikh et al., *Mercury EIC fired by UTD*, MERCURY (Sept. 16, 2024), <https://utdmercury.com/mercury-eic-fired-by-utd/>.

<sup>7</sup> *Id.*

<sup>8</sup> Maria Shaikh, *Former EIC appeals termination to Student Media Operating Board*, MERCURY (Sept. 17, 2024), <https://utdmercury.com/former-eic-appeals-termination-to-student-media-operating-board/>.

<sup>9</sup> *Id.*

<sup>10</sup> Shaikh et al., *Mercury EIC fired by UTD*, *supra* note 5.

<sup>11</sup> *Id.*

<sup>12</sup> Maria Shaikh, *Student Affairs prohibits SMOB from hearing former EIC’s appeal, violating bylaws*, MERCURY (Sept. 17, 2024), <https://utdmercury.com/office-of-student-affairs-attempts-to-circumvent-smob-in-appeal-process/>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Student Journalists at UTD (@retrograde\_news), INSTAGRAM (Sept. 27, 2024) [https://www.instagram.com/p/DAbiHQrvyH\\_/](https://www.instagram.com/p/DAbiHQrvyH_/) [https://perma.cc/6RYA-BBKR].

remains uncertain as UTD has ignored their demands to reinstate Gutierrez and update SMOB procedures for editor appointment and dismissal.<sup>16</sup> Gutierrez and other *Mercury* staff have since started a new student publication, *The Retrograde*, independent from administrative oversight, in the event editorial independence is not restored to *The Mercury*.<sup>17</sup>

### **I. UTD Violated the First Amendment Rights of its Students in Apparent Response to Critical Coverage**

UTD’s removal of Gutierrez and the denial of his appeal are antithetical to basic conceptions of a free student press and incongruous with the public university’s binding legal obligations to uphold Gutierrez’s and other students’ First Amendment rights.<sup>18</sup> The decisions and actions of a public university — including interactions with student journalists<sup>19</sup> and the pursuit of disciplinary sanctions<sup>20</sup> — must be consistent with the First Amendment.

It is well established that public institutions of higher education “may not constitutionally take adverse action against a student newspaper ... because it disapproves of the content of the paper.”<sup>21</sup> As helpfully explained by the United States Court of Appeals for the Fifth Circuit, the decisions of which are binding upon UTD, “once a University recognizes a student activity which has elements of free expression, it can censor that expression only if it acts consistent with First Amendment constitutional guarantees.”<sup>22</sup> That is, a university may regulate editorial decisions of student publications *only if* their content would lead to significant “violent disruption” of the educational environment.<sup>23</sup>

No such disruption occurred here, and instead, it appears UTD has retaliated against the paper’s coverage of encampments by ousting its editor-in-chief. To effect this retaliation, UTD manipulated participation in the SMOB meeting and ignored the Student Media Bylaws,<sup>24</sup> refusing to allow Gutierrez’s by-right appeal to the SMOB. While UTD may disagree with *The*

---

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *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).

<sup>19</sup> *Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995).

<sup>20</sup> *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

<sup>21</sup> *Husain v. Springer*, 494 F.3d 108, 124 (2d Cir. 2007); *Stanley*, 719 F.2d at 282; *see also Rosenberger*, 515 U.S. at 829–30.

<sup>22</sup> *Bazaar v. Fortune*, 476 F.2d 570, 574 (5th Cir. 1973).

<sup>23</sup> *Id.* at 580.

<sup>24</sup> *Student Media Bylaws, Operating Policies, Review and Appeal*, UNIV. OF TEX. AT DALLAS, 18–19, <https://studentmedia.utdallas.edu/docs/StudentMediaBylaws-010518.pdf> [<https://perma.cc/XY7S-2QQA>]. These bylaws represent the official guidelines for administering student media. *Id.*

*Mercury's* content, such as when it places the university in an unflattering light, retaliating against the students for their editorial choices violates the First Amendment.<sup>25</sup>

Lum's accusations against Gutierrez cannot justify a campaign to erode the paper's editorial independence by ignoring existing bylaws to eject its editor-in-chief. Lum's influence on the initial vote by calling such an important SMOB meeting on short notice with limited turnout from voting members and preventing *ex officio* student media members from attending reeks of an attack on the paper's editorial independence. Further, UTD had no jurisdiction to flagrantly disregard both the SMOB bylaws and members' requests to adhere to them by designating Huffenberger as the sole decisionmaker on the merits of Gutierrez's appeal. UTD failed to follow even its *most basic* obligation to follow the policies and procedures its own administrators established.

Beyond due process violations that reveal an animus toward the press freedoms of *The Mercury*, this situation demonstrates why the SMOB's current authority structure must be reformed to comply with UTD's First Amendment obligations. Decisions regarding student media leadership, discipline, and policies must be the sole province of the student editors, as they fall within the exercise of editorial independence—an expressive right that UTD must respect by virtue of the First Amendment.<sup>26</sup> The core values of the First Amendment and the freedom of press it embraces are diminished—not served—by a system that gives university officials any role in processes by which their watchdogs—student journalists—may be removed from their positions. Freedom of speech “does not leave us at the mercy of *noblesse oblige*,” and an unconstitutional grant of authority cannot be left in place merely because its holders “promised to use it responsibly.”<sup>27</sup>

The SMOB's oversight authority over *The Mercury* and other UTD student media directly invites the kind of impermissible content control prohibited by the First Amendment. *The Mercury* is a student-run medium endowed with expressive rights. Accordingly, UTD is not permitted to make decisions about the publication's content. We remind you that leaving decisions concerning student media policy, operations, and leadership to the students also insulates the university from liability for claims brought against the paper.<sup>28</sup>

---

<sup>25</sup> See, e.g., *Schiff v. Williams*, 519 F.2d 247, 260–61 (5th Cir. 1975) (dismissing editors due to alleged inaccuracies in a student newspaper violates the First Amendment); *Stanley*, 719 F.2d at 282 (“[a] public university may not constitutionally take adverse action against a student newspaper ... because it disapproves of the content of the paper”); *Joyner v. Whiting*, 477 F.2d 456, 462 (4th Cir. 1973) (“[i]t may well be that a college need not establish a campus newspaper ... But if a college has a student newspaper, its publication cannot be suppressed because college officials dislike editorial comment”); *Trujillo v. Love*, 322 F. Supp. 1266, 1271 (D.Colo. 1971) (“Having established a particular forum for expression, officials may not then place limitations upon the use of that forum which interfere with protected speech”); *Antonelli v. Hammond*, 308 F. Supp. 1329, 1337 (D. Mass. 1970) (freezing a university newspaper's funding because administrators deemed its content “garbage” was a violation of student journalists' First Amendment rights).

<sup>26</sup> *Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 255–258 (1974) (quoting, in part, *Pittsburgh Press Co. v. Hum. Rel. Comm'n*, 413 U.S. 376, 391 (1973) (to “reaffirm unequivocally the protection afforded to editorial judgment” under the First Amendment, which protects “the exercise of editorial control and judgement”).

<sup>27</sup> *United States v. Stevens*, 559 U.S. 460, 480 (2010).

<sup>28</sup> See *Lewis v. St. Cloud State Univ.*, 693 N.W.2d 466, 472–73 (Minn. Ct. App. 2005) (a policy establishing a student newspaper's editorial independence insulated the university from vicarious liability for defamation); *Milliner v. Turner*, 436 So.2d 1300 (La. App. 1983); see also *Miss. Gay All. v. Godelock*, 536 F.2d 1073, 1074–75

Yet these decisions are exactly what UTD, through the SMOB, is charged to carry out. That administrators violated SMOB procedures does not change the fact that the SMOB retains the power to hire and discipline editors at *The Mercury*—publication leaders who determine the content of the newspaper.<sup>29</sup> By harboring the power to choose who makes such content decisions, the SMOB ultimately holds the power to influence decisions about the paper’s content, if through no other means than considering what content goals an editorial candidate may have and favoring individuals whose goals mirror those of the university. This risk is made clear here, where UTD removed Gutierrez against the backdrop of UTD’s apparent dissatisfaction with the paper’s content. To the extent Gutierrez violated the student media bylaws, the matter represents an internal dispute, the resolution of which must be left to the editorial board of *The Mercury* and its established procedures rather than the impromptu whims of UTD administrators.

The SMOB’s role in hiring and disciplining student media leaders also creates an impermissible chilling effect on the content of student media. Chilling effects on their own infringe upon students’ expressive rights, as the First Amendment is violated not only where formal punishment is meted out, but where “an official’s act would chill or silence a person of ordinary firmness from future” expressive activities.<sup>30</sup>

The SMOB’s policies and practices not only threaten the opportunity for retaliation by administrators but also introduce an apparent conflict of interest. Vesting administrators—who are naturally the subjects of student journalists—with the authority to determine who will lead, how they will lead, and if they will be stripped of their leadership roles puts them in the position to retaliate, consciously or not, against student journalists after critical coverage, as has seemingly occurred here. Here, this fear of retaliation has resulted in a chilling effect, with *Mercury* staff electing to strike and leave *The Mercury*, forgoing office space and university funding to form a new publication altogether to avoid future retribution for their editorial decisions. The university’s constructive dismantling of the structures on which *The Mercury* depended will surely make journalists think twice about their coverage going forward for fear they will face similar inappropriate interference.

## **II. UTD Must Reinstate Gutierrez and Must Revise the Student Media Bylaws**

It is the responsibility of journalists, including student journalists, to serve as “surrogates for the public,” keeping a watchful eye on the operations of government.<sup>31</sup> Both SMOB procedures and the added due process concerns raised by Lum’s deviation from established procedures when removing Gutierrez have undermined these ideals of free expression by empowering the UTD administration to police the content of student media

UTD must rectify this situation by reaching an agreement with former editors of *The Mercury*, amending SMOB bylaws to eliminate any direct or indirect authority the SMOB has over

---

(5th Cir. 1976) (where state institutions do not regulate student newspapers, those publications do not act on behalf of the university).

<sup>29</sup> *Student Media Bylaws*, *supra* note 23 at 6.

<sup>30</sup> *Mendocino Env’t. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

<sup>31</sup> *Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 (1980).

student media content and operations, and ensuring student media have the right to select their own leadership in the future. Should UTD find itself unable to repair its relationship with *The Mercury*, it must grant Gutierrez and other staff the compensation to which they are entitled for their work on the paper this semester until now.

We request a substantive response to this letter no later than the close of business on Tuesday, November 29, 2024, confirming UTD will comply with our demands.

Sincerely,



Dominic Coletti  
Program Officer  
FIRE's Student Press Freedom Initiative



Jonathan Gaston-Falk  
Staff Attorney  
Student Press Law Center

Cc: Jenni Hufferberger, Senior Director, Marketing and Student Media  
Lydia Lum, Director of Student Media