ACLJ
American Center for Law & Justice

December 2, 2015

VIA U.S. MAIL & ELECTRONIC MAIL

Chancellor Gene Block
University of California Los Angeles
Chancellor's Office
[redacted]

Dear Chancellor Block,

The undersigned national legal organizations—the American Center for Law and Justice ("ACLJ"), Stand With Us, The Lawfare Project, and the Zionist Organization of America ("ZOA")—have become aware of the recent disagreement on the UCLA campus over the adoption by the UCLA Graduate Student Association ("GSA") Cabinet of a resolution (which, if adopted by the GSA Forum would become binding GSA policy) whereby the GSA, as a body, would "abstain from taking any stances or engaging in any discussion in regards to Israel-Palestine Politics" (the "Resolution"). The purpose of this letter is to provide the administration, and the GSA, with a legal analysis regarding the constitutionality of the Resolution based on the facts that have been provided to us, some of which appear to have been omitted from a recent letter to the administration from several other legal organizations.

By way of introduction, the ACLJ, the main signatory to this letter, is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech and religion.[1] As a non-profit organization dedicated to protecting constitutional liberties—especially the rights to free speech and religious expression—by engaging legal, legislative, and cultural issues through advocacy, education, and litigation, the

[1] *See, e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (unanimously holding that a monument erected and maintained by the government on its own property constitutes government speech and does not create a right for private individuals to demand that the government erect other monuments); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors enjoy the protection of the First Amendment); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987) (unanimously striking down a public airport's ban on First Amendment activities).

ACLJ has had years of experience negotiating the lines between rights and wrongs. We, as well as the other signatory organizations, firmly believe that in both public and private institutions, the freedom of speech, even offensive speech, should be cherished and respected as part of what makes our democracy so great. We do not believe in stifling freedoms, but we do believe in following the law and making sure that freedoms are not abused, and that rights do not turn into weapons used to politicize legitimate behavior. While some may argue that in practice these are difficult lines to draw, we firmly disagree.

FACTUAL BACKGROUND

As we understand it, a member of the UCLA student organization Diversity Caucus recently made a funding request, directly to the UCLA Graduate Students Association ("GSA") President, Milan Chatterjee, for a diversity event scheduled to take place on campus in early November. According to its Constitution, the GSA "is part of the unincorporated association known as the Associated Students of UCLA but the GSA possesses its own rights to adopt its own rules and procedures, to set its terms of membership, and further to establish such relationships with the University of California, Los Angeles, as shall be beneficial to the interests of graduate students."[2] The Associated Students, in turn, "are official units of the University exercising authorities concerning student affairs by delegations from The Regents, the President, and the Chancellors."[3] The GSA Cabinet is the committee that "oversee[s] the daily operations of the GSA."[4] Generally, the Cabinet member holding the position of "Director of Discretionary Funding" oversees "the distribution and use of SFAC/GSA funds to qualified graduate student groups in order to support programming for graduate student events."[5] Requests for discretionary funds are required to be submitted on the appropriate forms and must comply with GSA funding procedures, requirements, and guidelines.[6]

The Diversity Caucus, however, specifically did *not* avail itself of this process.[7] Instead, it was clear from the early communications that GSA was being asked, and agreed, to provide funding from its own budget as a form of *sponsorship* of the diversity event. In communications regarding the funding, Mr. Chatterjee explained that the GSA leadership (*i.e.*, the GSA Cabinet members) had adopted a "zero engagement/endorsement policy towards Divest from Israel or any related movement/organization" because "GSA—as an organization—doesn't want to sponsor/engage in this cause."

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[2] UCLA Graduate Students Association, Constitution of the Graduate Students Association, Art. I, Sec. A(2), available at http://www.gsa.asucla.ucla.edu/organization/governing-documents/constitution.

[3] University of California, Regents Policy 3301: Policy on Associated Students, available at http://regents.universityofcalifornia.edu/governance/policies/3301.html.

[4] UCLA Graduate Students Association, Codes of the Graduate Students Association, Section 4.1.1, available at http://www.gsa.asucla.ucla.edu/sites/default/files/Code_4_Cabinet.pdf.

[5] *Id.*, Sec. 4.1.4.1.

[6] *Id.*

[7] *See, e.g.*, Letter from ACLU, Center for Constitutional Rights and Palestine Legal to UCLA Chancellor Gene Block (Nov. 18, 2015), available at https://ccrjustice.org/home/blog/2015/11/18/ucla-must-cease-discrimination-against-advocates-palestinian-human-rights (acknowledging that "[t]he GSA maintains a 'Discretionary Fund' with a formal application process, written eligibility guidelines, and a stated purpose to support 'educational and cultural events held primarily for graduate students that take place on the UCLA campus,'" but that "it was the understanding of the Diversity Caucus that the group did ***not*** apply to the Discretionary Fund because the requested $2000 exceeded the maximum grant available") (emphasis added).

Additional communications between Mr. Chatterjee and the Diversity Caucus representative included Mr. Chatterjee's clarification of the Cabinet's funding stipulation, as follows: "The GSA Cabinet has adopted the following resolution: Under this resolution, the UCLA Graduate Student Association--as a governing body--will abstain from taking any stances or engaging in any discussion in regards to Israel-Palestine Politics." Mr. Chatterjee further explained that the GSA Cabinet "does not want to co-program with Divest from Israel, as we believe we'll be sponsoring a position that will alienate a substantial portion of our constituents. As I clarified to you over the phone, we also don't want to co-program with any counter-organization to Divest from Israel, because that will alienate a significant portion of students, as well. GSA wants to remain neutral in Israel-Palestine politics, as described above."

On November 18, 2015, the ACLU of Southern California, along with the Center for Constitutional Rights and Palestine Legal, issued a letter to the UCLA administration taking issue with the constitutionality of the Cabinet's funding stipulation.[8] The clarifying statements contained in the foregoing communications, however, while crucial for both a proper factual understanding of the situation and an accurate legal analysis of the Cabinet's Resolution, are absent from the ACLU Letter.

LEGAL ANALYSIS

While "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys,"[9] the United States Supreme Court has clarified that, constitutionally speaking, there is a "crucial difference between government speech . . . and private speech."[10] Thus, "it is well established that the government can make content-based distinctions when it subsidizes speech.[11] As the Court has consistently held, "[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity."[12]

The GSA Cabinet Resolution is clear in its purpose: preventing the GSA, as a government body, from becoming embroiled in a controversial political issue through a decision to abstain from engaging on either side of the debate. As GSA President Chatterjee explained, the Cabinet believes this neutral position is appropriate to avoid alienating any component of the graduate student population, which undoubtedly represents varying views on this topic. Such a position is in full compliance with the instruction of the Supreme Court that "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other."[13] Indeed, although the GSA could constitutionally choose to craft and

[8] *Id.*
[9] *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995).
[10] *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990).
[11] *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188-189 (2007) (citing *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 548-550 (1983)).
[12] *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980).
[13] *Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

convey its own message on this issue, here, the GSA Resolution constitutes a choice *not* to take *any* position at all, instead remaining entirely neutral. Consequently, there is simply no basis to argue that the Resolution subjects any particular viewpoint to disparate or discriminating treatment.

The facts that the ACLU letter left out—demonstrating that this was not a typical funding request but an ask for special treatment—are *crucial* to the constitutional analysis. The facts set forth in the ACLU letter make it sound as if one group was singled out for disparate treatment on the basis of its viewpoint, and was not given the "same student fee funding available to other students."[14] Incredibly, however, earlier in the very same letter, there is an admission that, "the group did not apply to the Discretionary Fund [*i.e.*, the funds generally available to student groups] because the requested $2000 exceeded the maximum grant available."[15] It is absolutely clear that if the group in question had been seeking funding through the normal channels (*i.e.*, through the Discretionary Fund process), they would have received it, like every other organization receiving such funds, without this stipulation attached. It was only because the Diversity Caucus specifically chose to operate outside of the normal procedures and to ask for special treatment, treatment that would require the GSA to make the choice to affirmatively "speak" through sponsorship, that the stipulation based on the Resolution was applied. Addressing this very issue, the Supreme Court has explained, "The First Amendment shields [a student group] against state prohibition of the organization's expressive activity, however exclusionary that activity may be. But [the student group] enjoys no constitutional right to state subvention of [such expression]."[16] As the Court has repeatedly held, "when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position."[17] The GSA's decision to remain neutral *by not speaking* on the issue of Israel-Palestine politics, including the choice to not provide sponsorship funding to either side, is both reasonable and axiomatically viewpoint neutral.

In short, the law is clear that the GSA may, without running afoul of the First Amendment, choose not to speak on the issue of Israel-Palestine politics or to use government funds to subsidize speech on that topic. Making such a decision about its own speech, however, in no way restricts or otherwise interferes with the private speech of any student organization, instead leaving all such groups free to engage the issue from any viewpoint they desire. As a quintessential form of government speech, the Resolution creates no constitutional crisis at all.

Sincerely,

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AMERICAN CENTER FOR LAW AND JUSTICE

Yael Mazar
Director of Legal Affairs
StandWithUs

[14] *Id.*
[15] *Id.*
[16] *Christian Legal Soc. Chapter of the Univ. of California v. Martinez*, 561 U.S. 661, 669 (2010).
[17] *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015). *See also Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217 (2000); *Rust v. Sullivan*, 500 U.S. 173 (1991); *Keller v. State Bar of California*, 496 U.S. 1 (1990).

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