



## Foundation for Individual Rights in Education

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July 1, 2009

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*Sent by U.S. Mail and Facsimile (707-527-4938)*

Alan Charles Kors  
CO-FOUNDER AND  
CHAIRMAN EMERITUS

Dear President Agrella:

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As you can see from the list of our Directors and Board of Advisors, FIRE unites civil rights and civil liberties leaders, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, due process, freedom of association, religious liberty and, as in this case, freedom of speech on America's college campuses. Our website, [www.thefire.org](http://www.thefire.org), will give you a greater sense of our identity and activities.

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FIRE is concerned about the threat to freedom of expression posed by Santa Rosa Junior College's (SRJC's) overbroad and unconstitutional decision to ban members of the SRJC community from using the letters "SRJC" in Internet domain names or e-mail addresses. In short, this restriction is broader than what the California Education Code restricts, and it is broader than the United States Constitution and California Constitution permit. We urge you to lift the ban and clarify that unambiguously private, noncommercial use of SRJC's name both is and must be permitted among SRJC students and faculty members.

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This is our understanding of the facts; please inform us if you believe we are in error. On May 5, 2009, Vice President of Academic Affairs/Assistant Superintendent Mary Kay Rudolph e-mailed faculty members and others a notice under the subject heading, "Student Violations of Education Code section 72000(b)(4)." The notice claimed that any "use of 'Santa Rosa Junior College' or any abbreviation of the college name" is illegal and that SRJC was willing to resort to legal action against all such uses. The notice read, in its entirety:

Dear Faculty Colleagues:

It has come to our attention that several hundred students have been using a reference to Santa Rosa Junior College in their personal E-mail address and/or domain name. **The use of "Santa Rosa Junior College" or any**

**abbreviation of the college name is protected by Education Code 72000(b)(4). Computing Services will be contacting any student violators individually and requesting that they immediately cease using Santa Rosa Junior College or SRJC in their domain name or e-mail addresses. Students will be notified that failure to comply could result in legal action. [Emphasis added.]**

The specifics of Education Code section 72000(b)(4) follows [sic]:

72000.

(4) The name “Sonoma County Junior College District”, “Santa Rosa Junior College” and the names of community colleges maintained by the district are the property of the district. No person shall, without permission of the board, use these names, or any abbreviation of them, or any name of which these words are a part in any of the following ways:

(A) To designate any business, social, political, religious, or other organization, including, but not limited to, any corporation, firm, partnership, association, group, activity or enterprise.

(B) To imply, indicate or otherwise suggest that any organization, or any product or service of the organization is connected or affiliated with, or is endorsed, favored or supported by, or is opposed by one or more California community colleges, the Board of Governors of the California Community Colleges, or the office of the Chancellor of the California Community Colleges.

(C) To display, advertise, or announce these names publicly at or in connection with any meeting, assembly, or demonstration, or any propaganda, advertising or promotional activity of any kind which has for its purpose or any part of its purpose the support, endorsement, advancement, opposition or defeat of any strike, lockout, or boycott of any political, religious, sociological, or economic movement, activity or program.

(D) The provisions of this section shall not preclude the use of the name “Santa Rosa Junior College” or “Sonoma County Junior College District” by any person or organization otherwise subject to this section using the name immediately prior to the effective date of this section, so long as the name is not used in additional, different ways.

(E) Nothing in this section shall interfere with or restrict the right of any person to make a true and accurate statement in the course of stating his or her experience or qualifications for any academic, governmental, business, or professional credit or enrollment, or in connection with any academic, governmental, professional or other employment whatsoever.

Please help us get this word out to your students.

Thank you!

Mary Kay

Later that day, Professor J. Davis Mannino publicly asked Rudolph to provide examples of misuse of SRJC's name. Rudolph responded to the same list ("DL.STAFF.FAC.ALL") that evening, stating that e-mail addresses such as "mksrjc@yahoo.com" and "santarosajuniorcollege2@yahoo.com" are "illegal."

According to an article on the morning of May 8 in *The Press Democrat*, Kenneth L. Fiori, Director of Computing Services, had "created the policy" described by Rudolph. In the article, Fiori reiterated that the college might "pursue legal action against anyone who does not comply" with cease-and-desist orders commanding alleged offenders to stop using the "SRJC" acronym in personal e-mail addresses. According to a *Press Democrat* article on the evening of May 8, you approved the cease-and-desist letter. It states:

The use of Santa Rosa Junior College or any abbreviation of the college name is protected by Education Code 72000(b)(4). In order to avoid any future legal action we are requesting that you remove any reference to Santa Rosa Junior College in your E-mail address and/or domain name and cease to use it now and in the future.

The ban announced by Rudolph extends beyond students and appears to be enforced broadly and without any investigation beyond the mere use of the letters "SRJC." For instance, at 8:19 p.m. on May 5, Professor Roger Mercer reported to the DF.STAFF.FAC.ALL list that he had received a warning notice from Fiori earlier that day because his personal e-mail address contained the letters "SRJC." Mercer also reported that he only uses that e-mail address "for the college to communicate with me," so he notified Fiori that day "to let him know that I don't regard such use as a violation." In addition, on May 8, a blogger named Lauren Weinstein reported that faculty member Sean Kirkpatrick also received a warning notice. Kirkpatrick reported that the threat led him to close down his domain at SRJC.US, which he had maintained for about five years.

According to the May 8 evening *Press Democrat* article, you yourself reiterated that SRJC "would continue efforts to remove the SRJC name from private e-mail addresses." The article reported that about 100 alleged violators had received warning letters from SRJC. You did not retract the letters threatening legal action, implying that the threats of legal action were not followed up only because such threats, for the past 19 years, always successfully intimidated people into compliance.

We trust that you understand that the First Amendment's guarantee of freedom of expression fully extends to public colleges like SRJC. See, e.g., *Keyishian v. Board of Regents*, 385 U.S. 589, 605–06 (1967) ("[W]e have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment"); *Healy v. James*, 408 U.S. 169, 180 (1972) (citation omitted) ("[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”); *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) (“With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities”). As a public institution, SRJC is both legally and morally bound by these and other decisions of the United States Supreme Court.

By misinterpreting the restrictions of the California Education Code, SRJC has unconstitutionally restricted the freedom of expression of members of the SRJC community. SRJC may reasonably restrict the use of its name when a reasonable person might mistake the private expression at issue as institutional expression. Further, SRJC may reasonably restrict the commercial use of its name. SRJC may not, however, categorically ban individual e-mail addresses and domain names simply because they use the name of the school or the district. Even if the California Education Code did include such a ban, which it does not, such a ban would be unconstitutionally overbroad. Indeed, the ban as promulgated by Rudolph prohibits expression that is protected by the First Amendment to the United States Constitution.

Moreover, SRJC may not forbid someone from using the name or initials of SRJC either to criticize the university or to identify a domain name, website, or e-mail address that is critical of the university. In the case of *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161 (C.D. Cal. 1998), a federal court ruled that Bally Total Fitness (Bally) could not stop a man from operating a website called “Bally Sucks,” which included a modified Bally logo on the front page and used the term “ballysucks” in the URL of the website. In that case, Bally, like SRJC, argued (among other things) that allowing a critic to use its mark was likely to cause confusion among those who were searching for its official website. The court found against Bally, ruling that there was no likelihood of consumer confusion and that “[a]pplying Bally’s argument would extend trademark protection to eclipse First Amendment rights. The courts ... have rejected this approach by holding that trademark rights may be limited by First Amendment concerns.” 29 F. Supp. 2d at 1166, *citing L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26 (1st Cir. 1987), *cert denied*, 483 U.S. 1013 (1987).

Courts have also determined that so-called “cybergripping” websites, which are generally dedicated to harsh criticism of a business and which often use the business’s marks, are usually considered constitutionally protected speech. In *Taubman Co. v. Webfeats*, 319 F.3d 770, 775 (6th Cir. 2003), the court determined that “any expression embodying the use of a mark not ‘in connection with the sale ... or advertising of any goods or services,’ and not likely to cause confusion, is ... necessarily protected by the First Amendment.” In that case, the defendant had established not one but *five* different websites, such as *taubmansucks.com* and *willowbendmallssucks.com*, that criticized plaintiff Taubman and his business “The Shops at Willow Bend” with the purpose of hurting his business and reputation. *Id.* at 772.

The vast majority of possible domain names, websites, and e-mail addresses that might use the letters “srjc” or “SRJC” have no commercial purpose and do not tend to confuse or mislead readers into believing that they are officially sanctioned by SRJC. In particular, California Education Code section 72000(b)(4) does not ban the noncommercial use of the letters SRJC (or related expression) by private individuals in ways that do not suggest affiliation with SRJC or in ways that do not confuse a reasonable person into mistakenly imagining such an affiliation.

Again, it is acceptable, as you state in the May 8 article, to prevent people from “mak[ing] it look like the college is endorsing a product or issue,” but it is not acceptable to summarily ban the letters “SRJC” in order to keep the college from being “misrepresented.” That is, SRJC may prohibit people from falsely representing themselves as SRJC officials or using SRJC’s name to imply commercial or political endorsement, but placing prior restraint on e-mail addresses and domain names in order to keep people from making merely controversial, unpopular, unwanted, or merely unremarkable assertions about the college is unconstitutional.

SRJC may not threaten legal action against protected expression, nor may it seek to silence protected expression by declaring that it is illegal. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963) (holding that “threat of invoking legal sanctions” from state actor may constitute “informal censorship” and thus require injunctive relief). As a state actor, SRJC may not censor by instilling fear in those who seek to engage in protected speech. *Laird v. Tatum*, 408 U.S. 1, 11 (1972) (holding that indirect prohibition on protected speech may give rise to constitutional challenge due to resulting chilling effect on speech).

Furthermore, the overbroad ban on expression in this case is a form of unconstitutional prior restraint, chilling and preventing expression that might otherwise have come to pass were it not for this ban. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (“[a]ny prior restraint on expression comes to this Court with a ‘heavy presumption’ against its constitutional validity”).

In addition, the ban on protected expression in the Code is facially unconstitutional in itself. For example, naming an organization “Santa Rosa Junior College Should Change Its Policies Today!” (banned under section A) or “Santa Rosa Junior College Has Opposed Our Organization!” (banned under section B) is core political speech protected by the First Amendment and thus may not be banned. Facebook.com online organizations, for instance, frequently use such language, and such names may not be banned.

Still worse, section C even prohibits “announc[ing]” the name of SRJC at public meetings and prohibits display of the name of SRJC in “any kind” of “propaganda” regarding “any political, religious, sociological, or economic movement, activity or program.” To ban the mere mention or display of SRJC’s name in such political contexts is a severe violation of the First Amendment, banning precisely the kind of political speech at the heart of the First Amendment’s protection.

Please know that while you are not responsible for the existence of the California Education Code, you and other agents of SRJC *may not* enforce it unconstitutionally. While FIRE does not directly engage in litigation, we believe you should be aware that any public university policy prohibiting constitutionally protected expression is an unlawful deprivation of constitutional rights under 42 U.S.C.S. § 1983 for which university administrators can be sued in their individual capacities. State officials and employees are offered only *qualified* immunity “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Davis v. Scherer*, 468 U.S. 183 (1984). This means that administrators may be held personally liable for continuing to maintain unconstitutional speech codes in violation of students’ First Amendment rights. Having been warned about

unconstitutional provisions and uses of the Code, in the future you might not be able to claim qualified immunity from personal legal liability for the kinds of First Amendment violations described in this letter.

Finally, I should note that in 2005, after the University of California–Santa Barbara similarly tried to force the independently hosted website “www.thedarksideofucsb.com” to remove the letters “ucsb” from its website URL—alleging that the website owner was “guilty of a misdemeanor” for using the letters—FIRE successfully intervened to protect the owner’s rights.

We urge you to lift the ban and to clarify the First Amendment rights of members of the SRJC community by announcing that unambiguously private, noncommercial use of SRJC’s name both is and must be permitted among SRJC students and faculty members. FIRE hopes to resolve this situation amicably and swiftly; we are, however, prepared to use all of our resources to see this situation through to a just and moral conclusion. We request a response to this letter by July 17, 2009.

Sincerely,



Adam Kissel

Director, Individual Rights Defense Program

cc:

Mary Kay Rudolph, Vice President of Academic Affairs, SRJC

Kenneth L. Fiori, Director, Computing Services, SRJC

Ricardo D. Navarrette, Vice President of Student Services, SRJC

Kay L. Albiani, President, Board of Governors, California Community Colleges

Diane Woodruff, Chancellor, California Community Colleges