



February 21, 2019

Kevin Ballinger
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Orange Coast College
2701 Fairview Road
Costa Mesa, California 92626

Sent via U.S. Mail and Electronic Mail (kballinger@occ.cccd.edu)

Dear Interim President Ballinger:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

FIRE is concerned for the state of freedom of expression at Orange Coast College (OCC) in light of administrators' directive that a recognized student organization remove a banner because it displayed a "facsimile" of a firearm, reportedly citing a district policy concerning weapons. The terms of that policy do not reach displays of mere images, and the policy's application abridged the students' well-established First Amendment rights.

I. Statement of Facts

The following is our understanding of the pertinent facts, which is based on public reports. We appreciate that you may have additional information to offer and invite you to share it with us. However, if the facts here are substantially accurate, any directive requiring the removal of the display violated the students' well-established First Amendment rights.

On February 12, 2019, OCC's Inter-Club Council held its Spring 2019 Pirate Involvement Fest, an event held each semester at which "potential or active" student organizations are

permitted to reserve a table to recruit prospective members.¹ Organizations display banners of their own choice at their tables.²

During the tabling, members of a recognized student organization, the Young Americans for Freedom Club (YAF), displayed a banner bearing the words “DON’T TREAD ON ME,”³ two silhouettes of a rifle, and the words “2nd AMENDMENT SINCE 1789.” This is a photo of the banner:⁴



According to a public report, two university officials “approached the students during the recruitment fair and demanded that [the banner] be taken down,” as the image was a “facsimile of a firearm” prohibited by a district policy, AP 3530, entitled “WEAPONS PROHIBITED ON DISTRICT PROPERTY.”⁵

¹ ORANGE COAST COLL., STUDENT CLUB & ORGANIZATION HANDBOOK 58 (Aug. 25, 2018), http://www.orangecoastcollege.edu/student_life/associated_students/clubs/Documents/2018-2019%20ASOCC%20Club%20Handbook%20-%20Publish%20Date%2008.25.2018.pdf; ORANGE COAST COLL., *ASOCC and Student Clubs & Organizations Calendar: Pirate Involvement Fest: Formally Club Rush/Student Service Fair*, http://www.orangecoastcollege.edu/student_life/associated_students/Pages/Student-Calendar.aspx#/?i=4 (last visited Feb. 18, 2019).

² Associated Students of Orange Coast College, FACEBOOK (Feb. 13, 2018, 1:57 PM), <https://www.facebook.com/associatedstudentsoforangecoastcollege/posts/2589893841025498>.

³ The banner derives its words (“Don’t Tread On Me”) from the Gadsden Flag, named for a “Revolutionary War colonel who gave it to the commander-in-chief of the Continental Navy before the Navy’s first-ever mission in 1775.” *United Veterans Mem. & Patriotic Ass’n v. City of New Rochelle*, 72 F. Supp. 3d 468, 471 (S.D.N.Y. 2014); see also *Texas v. Johnson*, 491 U.S. 397, 422 (1989) (Rehnquist, J., dissenting, describing the flag as one of “many colonial and regimental flags” used by the colonies).

⁴ Beth Baumann, *EXCLUSIVE: College Bars Young Americans for Freedom Chapter From Displaying a Pro-2A Flag*, TOWNHALL, (Feb. 15, 2019), <https://townhall.com/tipsheet/bethbaumann/2019/02/15/college-bars-young-americas-foundation-chapter-from-displaying-a-pro2a-flag-n2541568>.

⁵ Coast Comm. Coll. Dist. Admin. Proc. 3530 (“AP 3530”), available at https://www.cccd.edu/boardoftrustees/BoardPolicies/Documents/General_Institution/AP_3530_Weapons_Prohibited_on_Campus.pdf.

II. The YAF Chapter’s Display of the Banner Was Protected by the First Amendment

A. *The First Amendment, California’s Constitution, and the California Education Code broadly protect students’ First Amendment rights.*

It has long been settled law that the First Amendment is binding on public colleges like OCC. *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); *see also DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) (on public campuses, “free speech is of critical importance because it is the lifeblood of academic freedom”).

OCC students’ expressive rights are also protected by the California Constitution and California law. California’s constitutional guarantee of expressive freedom is “more definitive and inclusive than the First Amendment[.]” *Wilson v. Superior Court (Watson)* (1975) 13 Cal. 3d 652, 658. California’s legislature has also enacted broad measures barring administrators of public institutions of higher education, including community colleges, from attempting to “make *or enforce* a rule subjecting a student to disciplinary sanction solely on the basis of conduct that is speech or other communication that, when engaged in outside a campus of those institutions, is protected” by the First Amendment and the California Constitution. Educ. Code, § 66301, subd. (a) (emphasis added).

B. *AP 3530 does not authorize the regulation of displays of images.*

The policy reportedly invoked by OCC’s administrators does not reach the display of images of firearms, but instead regulates the *possession* of dangerous objects.

The policy provides, in pertinent part, and with emphasis added:

Firearms, knives, explosives or other dangerous objects, **including**, but not limited to any facsimile of a firearm, knife, or explosive, are prohibited on District property. . . .⁶

On its face, the policy’s broadest reach is limited to “dangerous objects.” For a “facsimile” of a dangerous object to fall within the scope of the policy, that facsimile would have to amount to a “dangerous object.” It is difficult to conceive of any image that could reasonably be described as dangerous, nor is there any reasonable argument that a depiction of a gun is itself dangerous.

⁶ AP 3530.

The balance of the policy supports the conclusion that the policy was intended to regulate the possession of weapons, not expression. Both of the penal statutes referenced by the policy pertain to possession of weapons, not expressive displays. Cal. Pen. Code §§ 626.9, 626.10 subd. (b). Neither of the statutes, nor the policy itself, references the mere image of a weapon.

Rather, regulations such as AP 3530 are intended to prohibit the use of imitations of weapons to frighten others. For example, someone who plants an object that resembles, but is not, a bomb could be convicted for use of a “facsimile of a weapon of mass destruction,” but not for planting a bomb. *See, e.g., People v. Turnage*, 55 Cal. 4th 62, 67 (planting a “facsimile” of a bomb that “lacked explosive content”). Given the obvious intent of these regulations, we are unsurprised that we are unable to find any case in which statutes concerning “facsimiles” of weapons have been applied to ban mere images of a weapon. *See, e.g., Cal. Pen. Code* §§ 148.1 subd. (d) (“facsimile bomb”); 11418.1 (“facsimile of a weapon of mass destruction”).

C. Displays of images of firearms are protected political expression.

The First Amendment protects displays of flags and banners, including those whose display offends others, whether that offense arises from the content of the flag or the manner of its exhibition. For example, nearly a century ago, the Supreme Court of the United States struck down as an “unwarranted limitation on the right of free speech” a California statute barring display of any “red flag” or “banner” as a “symbol or emblem of opposition to organized government.” *Stromberg v. California*, 283 U.S. 359, 361–64 (1931). More recently, the Court held that burning the American flag was expressive conduct protected by the First Amendment, even if the provocative display offends others. *Texas v. Johnson*, 491 U.S. 397, 403–410 (1989).

Political discourse has long been steeped in themes of violence. Perhaps most famously, Thomas Jefferson—a principal author of what ultimately became the First Amendment⁷—predicted that revolution and violence would be necessary to preserve liberty, writing: “The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is [its] natural manure.”⁸ Our Constitution likewise grants considerable deference to language that invokes themes of violence in a political context. *See Watts v. United States*, 394 U.S. 705, 708 (1969) (“The language of the political arena . . . is often vituperative, abusive, and inexact.”). Courts approach “with extreme care” claims that “highly charged political rhetoric” is unprotected by the First Amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926–27 (1982).

Violent imagery is likewise protected expression. *See, e.g., Brown v. Entm’t Merchs. Ass’n.*, 564 U.S. 786, 795–805 (2011) (striking down California’s regulation of violent video games as “the

⁷ *Everson v. Bd. of Educ.*, 330 U.S. 1, 11 (1947).

⁸ Letter from Thomas Jefferson to William Stephens Smith, Nov. 13, 1787, *available at* <https://founders.archives.gov/documents/Jefferson/01-12-02-0348>. *See also, e.g.,* the license plate and state motto of New Hampshire, suggesting that residents “live free or die” in defense of liberty. *Wooley v. Maynard*, 430 U.S. 705, 722 (1977).

latest episode in a long series of failed attempts to censor violent entertainment for minors,” and observing that “the *books* we give children to read . . . contain no shortage of gore.” (emphasis in original). For example, the United States Court of Appeals for the Ninth Circuit has held as protected speech a professor’s writings, published in a campus newspaper, which were imbued with themes of violence concerning the institution’s leadership. *Bauer v. Sampson*, 261 F.3d 775, 780–85 (9th Cir. 2001). More to the point, the Eighth Circuit held as protected expression students’ display, on a public campus, of an exhibit featuring photographs of professors bearing various weapons. *Burnham v. Ianni*, 119 F.3d 668, 670–76 (8th Cir. 1997).

OCC may not interpret its policies in such a way as to ban protected expression. OCC’s apparent interpretation of its policies would allow it to regulate both speech in favor of an expansive reading of the Second Amendment and expression in favor of a narrow reading.⁹ Regulations that “restrict or burden the exercise of First Amendment rights must be narrowly drawn,” and a “pronouncement by the government that prohibits, burdens, or restricts appreciably more protected activity than is necessary to achieve a competing and compelling public interest cannot survive constitutional attack.” *Coll. Republicans v. Reed*, 523 F.Supp.2d 1005, 1012–13 (N.D.C.A. 2007). This restriction, if read to target pure expression, would not be narrowly tailored to an interest in public safety because it would reach, as here, the display of images in a nonthreatening manner. While true threats are not protected by the First Amendment, such a display does not amount to a true threat because no “reasonable observer” would view it as a “serious expression[] of an intent to cause harm.” *Fogel v. Collins*, 531 F.3d 824, 832 (9th Cir. 2008).

Political debate about the role of firearms in the United States will inevitably utilize depictions of weapons, whether by Second Amendment proponents or students who stage walkouts in protest of gun violence.¹⁰ The principle of freedom of speech does not exist to protect only non-controversial expression; it exists precisely to protect speech that some or even most members of a community may find controversial or offensive. As the Supreme Court observed in *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), speech “may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.”

⁹ For example, in one Florida case, an activist in favor of gun control sent “photographs showing injuries from gunshot wounds” to “a public figure who advocates gun rights,” telling her she “should see a few photos of handiwork of the assault rifles you support.” *Hammer v. Sorensen*, No. 4:18-cv-329, 2018 U.S. Dist. LEXIS 196425 at *2 (N.D.F.L. Nov. 17, 2018). While uncivil, the photographs were “germane to the policy debate,” and tolerating “incivility . . . is a price a nation pays for freedom.” *Id.* at *2–3.

¹⁰ One such walkout took place at OCC, with the support of the institution. Open letter from Dennis Harkins, President of Orange Coast College, Mar. 15, 2018, <http://www.orangecoastcollege.edu/news/Lists/Posts/Post.aspx?ID=21345>.

III. Conclusion

OCC must ascertain whether its staff or administrators directed students to remove the “Don’t Tread On Me” banner. If so, OCC violated its students’ First Amendment rights and must take steps to assure its students that their rights will not be infringed in the future. Be advised that a public college administrator who violates clearly established law will not retain qualified immunity and can be held personally responsible for monetary damages for violating First Amendment rights under 42 U.S.C. § 1983. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

We request receipt of a response to this letter no later than the close of business on March 7, 2019.

Sincerely,



Adam Steinbaugh
Director, Individual Rights Defense Program

Cc:

Young Americans for Freedom Club