



May 17, 2019

Michael E. Engh, S.J.
Office of the President
Santa Clara University
500 El Camino Real
Santa Clara, California 95053

URGENT

Sent via Express Mail and Electronic Mail (president@scu.edu)

Dear President Engh:

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 about the state of freedom of speech and freedom of association at Santa Clara University (SCU) following the Associated Student Government's (ASG's) rejection of prospective student group Young Americans for Freedom (YAF) on the basis of the group's political stances. This viewpoint-based rejection of YAF is antithetical to the free speech promises SCU makes to its students. In the event that the ASG again refuses recognition this coming Thursday, SCU must ensure that the organization is recognized and afforded all benefits and privileges attendant with that recognition.

I. The ASG's Denial of Recognition to YAF

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us.

Young Americans for Freedom is a conservative organization founded by, among others, William F. Buckley Jr.¹ The student chapters are now affiliated with another conservative organization, the Young America's Foundation.

In early March, students at SCU sought to form a YAF chapter at their university, making a formal request to the ASG for recognition as a registered student organization. On April 11, the leaders of the chapter presented to the ASG, explaining that the group met all qualifications set by ASG for recognition.²

On April 25, the ASG discussed YAF's request for recognition. During the meeting, members of the ASG criticized YAF's similarity to other political student groups, potential membership overlap with other conservative student groups, perceived harmfulness of YAF's advocacy for free speech, and the general viability of political campus groups. For example, the minutes of the meeting portray ASG members complaining of the possibility of a "surplus of conservative clubs" that would lead to overlapping or diluted membership in existing conservative clubs, criticizing a lack of "transparency on party and ideology," arguing that the members were "misleading on what they were standing for," and questioning whether "students would feel unsafe" because of the group's ideology.³ Others pointed out that there are "differences between [YAF and] TPUSA," another conservative student group with a chapter at SCU, and that these organizations are not synonymous with the Republican Party.⁴

The minutes do not reflect any assertion that the YAF chapter does not meet all of the requirements to be recognized. However, upon taking a vote, the ASG denied YAF's request.

On May 8, YAF appealed the denial to the ASG Student Court. The following day, the Student Court issued a ruling holding that the ASG's denial of recognition was improper, on the grounds that several Student Senators were misinformed about the relationship between YAF and Turning Point

¹ Grant Strobl, *Meet the conservatives on campus*, DETROIT NEWS, May 18, 2016, <https://www.detroitnews.com/story/opinion/2016/05/18/meet-conservatives-campus/84576694>.

² These requirements are as follows:

Have at least 2 undergraduate students serve as club officers, particularly president and treasurer

Have at least 15 self-selecting members, which may include club officers

Have all club officers be undergraduate students

Have a majority of members be undergraduate students

SANTA CLARA UNIV., REGISTER A NEW RSO: REGISTRATION REQUIREMENTS, *available at*

<https://www.scu.edu/csi/organizations/rso/register/>.

³ ASSOC'D STUDENT GOV'T SANTA CLARA UNIV., *Senate Minutes 4.25.19*, May 1, 2019, <https://www.asgscu.com/single-post/2019/05/01/Senate-Meeting-Minutes-4>.

⁴ *Id.*

USA.⁵ The court ordered the ASG to give YAF another opportunity to present to the ASG, and to conduct another vote on YAF's recognition.⁶ A vote is scheduled for May 23.

On May 15, YAF submitted a petition for administrative intervention to Vice Provost Jeanne Rosenberger, asking SCU's administration to overturn the denial of recognition on the grounds that the vote violated the group's free speech rights.

II. ASG's Viewpoint-based Rejection of YAF's Recognition Violates SCU's Explicit Promises of Free Speech

A. *SCU promises its students freedom of expression.*

While SCU is a private university and thus not legally bound by the First Amendment, it is both morally and contractually bound to honor the explicit, repeated, and unequivocal promises of freedom of expression it has made to its students.

For example, SCU's mission and goals statement, set forth in part in its student handbook, provides that SCU is "dedicated to" developing "a community wherein freedom of inquiry and freedom of expression enjoy the highest priorities." Accordingly, the university pledges to "acknowledge, affirm, and defend the right of every member of the campus community to freedom of expression [and] freedom of association. . . ."⁷

SCU's "Student Events, Activities, and Organizations" policy makes similar commitments, elaborating on these principles:⁸

We are best served by an educational experience enriched by exposure to differing, and, indeed, to antithetical, opinion. Debating of "uncomfortable" ideas or points of view ought not to be shunned just because it is uncomfortable, for it may stimulate us to think and to think seriously. Thoughtful dialogue in search of truth leads to critical thinking, informed learning, and an honest exchange of facts, beliefs, and points of view. The belief system allowed to go untested is likely to be found weakest in the face of argumentative challenge.

[...]

⁵ *In the Case of the Young Americans for Freedom appeal of the Student Senate RSO vote*, SANTA CLARA UNIVERSITY ASSOCIATED STUDENT GOVERNMENT STUDENT COURT (May 8-9, 2019) (on file with author).

⁶ *Id.*

⁷ SANTA CLARA UNIV., STUDENT HANDBOOK 2018-19 p. 58 (2018), available at <https://www.scu.edu/osl/student-handbook/>.

⁸ *Id.* at 57.

Because as a university we remain irrevocably committed to intellectual discourse, we acknowledge, affirm, and defend the right of every member of the campus community to freedom of expression, freedom of association, and freedom of exercise of faith in accordance with the University’s stated mission and goals.

Additionally, SCU’s “Statement of Community Values” claims that “hampering [the] community’s right to the communication of ideas and ideals just because they don’t represent [one’s own]” is inconsistent with university members’ commitment to “valu[ing] diversity and learn[ing] from diverse people, ideas, and situations.”⁹

Having made students this explicit promise of freedom of expression, SCU has a legal and moral obligation to honor it.

For over forty years, California courts have made clear that “[t]he basic legal relation between a student and a private university or college is contractual in nature.” *Zumbrun v. Univ. of S. Cal.*, 25 Cal. App. 3d 1, 10 (1972). “The catalogues, bulletins, circulars, and regulations of the [educational] institution made available to the matriculant [student] become a part of the contract.” *Id.*; see also *Tecza v. Univ. of S.F.*, 532 F. App’x 667, 668–69 (9th Cir. 2013) (university student disability services handbook was a binding contract between students and the school); *Esquer v. Educ. Mgmt. Corp.*, 292 F. Supp. 3d 1005 (S.D. Cal. 2017) (arbitration provision in university enrollment agreement was a contract). The provisions of SCU Student Handbook guaranteeing students free speech rights form a binding contract between the university and its students.

B. ASG’s rejection of YAF was viewpoint discrimination, in violation of the university’s promises of freedom of expression.

ASG’s viewpoint-based rejection of YAF’s application for recognition is at odds with SCU’s stated commitments to foster debate of “uncomfortable” ideas and protect students’ rights to speak and associate freely.

Decades of First Amendment jurisprudence and the common recognition of the First Amendment’s requirement of viewpoint neutrality inform students’ reasonable expectations of a private institution that promises them freedom of expression. Under the First Amendment, burdens on expression on the basis of a speaker’s viewpoint are closely scrutinized and rarely upheld. When authorities target “not subject matter but particular views taken by speakers on a subject, the violation” of expressive rights “is all the more blatant.” *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). “Viewpoint discrimination is thus an egregious form” of censorship, and authorities “must abstain from regulating speech when the

⁹ *Id.* at 11.

specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Id.*

These principles apply in the context of student governments that exercise the institutional authority to grant or deny recognition or distribute student fees to student organizations. Courts low and high have repeatedly and consistently held that universities must grant expressive student organizations recognition and access to student fees on a viewpoint-neutral basis. *See, e.g., Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 233 (2000) (“When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others.”). The same must hold true at a private institution that, like SCU, is committed to freedom of expression. Although ASG is not legally bound by the First Amendment, it fundamentally abandons SCU’s institutional commitments to free speech and freedom of association and undermines First Amendment principles when it acts to stifle speech that it does not like.¹⁰

The ASG’s evaluation of YAF’s application for recognition reflects considerable viewpoint-discrimination. First, ASG members weighed the particular viewpoints of YAF against other conservative organizations, deciding that one should be recognized and the other should not. Not only does this evaluation take into consideration the views of the groups, it does so on an indefensible basis. While politically- or ideologically-oriented organizations may agree on a number of topics, or could be compared to other groups, few (if any) such organizations perfectly mirror another’s views.

Second, some ASG members expressed concern about the particular views of the proposed organization. The principle of freedom of speech does not exist to protect only non-controversial expression; it exists precisely to protect speech that some members of a community may find controversial or offensive. The Supreme Court of the United States stated in *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), that 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.” The Court has explicitly held, in rulings spanning decades, that speech cannot be restricted simply because it may be controversial. *See Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973) (“[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”) Again, although SCU is a private institution and not bound by

¹⁰ According to the minutes of a March 7 ASG meeting, SCU Interim General Counsel Bridget Colbert explained to the student senators that they could not penalize student groups for their expression. *Senate Minutes 3.7.19*, Assoc’d STUDENT GOV’T SANTA CLARA UNIVERSITY, Mar. 13, 2019, <https://www.asgscu.com/single-post/2019/03/13/Senate-Meeting-Minutes-3719-Week-9>.

the First Amendment, it makes extensive promises of free expression to its students—promises it must honor.

By refusing to grant YAF recognition because some members of the campus community are opposed to its real or perceived stances, ASG is hindering free and open dialogue on campus, to the great detriment of SCU students' education. Allowing and encouraging open—and sometimes controversial—debate is not always an easy endeavor, but, as SCU notes, “[t]he belief system allowed to go untested is likely to be found weakest in the face of argumentative challenge.”¹¹ Put simply, it is not the place of ASG to dictate to students what their organizations should advocate for.

Further, if ASG were to vote on every student group application on the basis of student opposition to its beliefs, or any perceived redundancies with other political campus organizations, SCU would likely see the number of its registered student organizations dwindle. Surely ASG and SCU understand that any recognized group on campus that takes a religious or political stance could be considered offensive or unwelcome to those who disagree with that group's beliefs. Some organizations currently recognized by SCU—College Republicans, College Democrats, Students for Justice in Palestine, GREEN Club, and HeForShe, to name just a few—would likely face opposition by someone on campus, but that does not lessen the contributions they may make to campus life.¹²

C. *If ASG again rejects YAF, SCU must exercise its authority to overturn the decision.*

FIRE understands that ASG must listen to and address the voices of its campus community, including those who object to YAF's recognition, but that does not mean it must violate the principles to which SCU has committed itself. Students who oppose YAF are not without means to express that opposition, and ASG should seek to encourage them to use their own voices rather than hampering YAF's members' ability to use theirs.

However, if ASG again rejects YAF on viewpoint-discriminatory grounds, or advances an unjustifiable, viewpoint-neutral basis as a pretext to viewpoint discrimination, SCU must intervene. SCU's "Student Organizations" policy grants the university the right to review ASG's decisions and intervene when necessary:

¹¹ STUDENT HANDBOOK, *supra* note 6, at 58.

¹² In an effort to show that ASG's opposition to YAF's request for recognition was ideologically motivated, YAFs created a chart detailing the many campus groups with similar mission statements that were granted recognition by ASG. SANTA CLARA UNIVERSITY YOUNG AMERICANS FOR FREEDOM CHAPTER, *APPROVED SANTA CLARA UNIVERSITY REGISTERED STUDENT ORGANIZATIONS AND CHARTERED STUDENT ORGANIZATIONS WITH SIGNIFICANT OVERLAP*, (May 5, 2019), https://s3.amazonaws.com/files.formstack.com/uploads/1675731/57533603/503165774/57533603_rsos_with_overlap.pdf.

The University administration reserves the right to review such decisions, offer guidance on them, and even intervene when necessary if the educational values and mission of the University appear to be undermined. Santa Clara University seeks to encourage the exercise of responsible freedom, however, student representatives should be allowed the greatest possible discretion in making these judgments.¹³

Indeed, SCU has exercised this very authority to reverse the ASG's rejection of a chapter of Turning Point USA on viewpoint-discriminatory grounds just two years ago.¹⁴ In keeping with its commitment to freedom of expression, it must do so again should the ASG persist in refusing recognition on indefensible grounds.

III. Conclusion

If YAF's rejection is allowed to stand, the laudable ideals SCU has consistently claimed to value will be tarnished. To honor the commitments it has made to open debate, freedom of speech, and freedom of association, SCU must intervene should YAF's application for recognition be denied on viewpoint-discriminatory grounds, and reaffirm that SCU stands by the promises it makes to students.

Due to the upcoming May 23 ASG vote on YAF's recognition, we request a response to this letter no later than close of business May 24.

Respectfully,



Zach Greenberg
Program Officer, Individual Rights Defense Program

cc:
Lisa Kloppenberg, Interim Provost Elect

¹³ *STUDENT HANDBOOK*, *supra* note 6, at 63.

¹⁴ Eric Kurhi, *Santa Clara University reverses student vote, OKs conservative group*, MERCURY NEWS, Mar. 5, 2017, <https://www.mercurynews.com/2017/03/05/santa-clara-university-reverses-student-vote-oks-conservative-group>; see also Press Release, *Santa Clara University protects student free speech with one hand, censors with the other*, FOUND. FOR INDIV. RIGHTS IN EDUC., Mar. 7, 2017, <https://www.thefire.org/santa-clara-university-protects-student-free-speech-with-one-hand-censors-with-the-other>.

Sam Pérez, ASG President
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