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BY FIRST CLASS U.S. MAIL, FACSIMILE TO (805) 965-0151 and EMAIL

September 28, 2010

Susan C. Ehrlich, Vice-President
Santa Barbara Community College District
Human Resources and Legal Affairs
721 Cliff Drive
Santa Barbara, CA 93109
Email: Ehrlich@sbcc.edu

Re: District Illegal Speech Policies

Dear Vice-President Ehrlich:

Our office represents the Santa Barbara Instructors Association (SBIA). We write in response to the District's recent attempts to unlawfully restrict the free speech rights of faculty through its ad-hoc, recently adopted "Election Guidelines" and by unlawfully limiting faculty speech on campus to purported "free speech" areas. This effort similarly violates the speech rights of classified employees and other staff, students, and the public. This violation is a serious matter.

Preliminarily let me emphatically state that on the evening of the Thursday, September 30, candidates forum, we fully expect faculty and members of the public to set up a table, distribute literature and campaign in support of candidates for the upcoming Board election, on campus, outside the forum venue. Such handbilling is "pure speech," entitled to the highest constitutional protection. This distribution will be outside the so-called "free speech area" recently announced by the District's in-house lawyer, *but well within the public forum which exists in the open areas of the College, and hence is entirely protected by the California and U.S. Constitutions.*

As we explain in detail below, any attempt by the District to interfere in this speech on Friday will constitute a serious violation of the California and Federal law, subjecting the District to a lawsuit for damages and other relief.

Several community college district's learned that the courts will not tolerate interference in speech on campus, including Peralta, San Francisco, Citrus, South Orange, and Yuba. Damages and legal fees in some of these cases exceeded $100,000, and includes in San Francisco, where the District "only" violated the free speech rights of one individual and one

organization.

I have used throughout the term "free speech areas," although at this point we have learned of only one such area created on the campus, confining "free speech" to the City College's "Friendship Plaza." This single "free speech area" is located away and out-of-sight from the District's MacDougall Administration Center, where the District's Board meets and where the District is holding its September 30 candidates forum for electoral candidates for its Board of Trustees. It is astounding that on a campus of 74 contiguous acres, the sole "area" known to be created seemingly amounts to less than 1% of the campus space. As we explain, almost the entire open space of the campus is a "public forum," where free speech is, by law, protected.

Finally, it is difficult to ignore that the timing of the announced "Guidelines" in relation to the upcoming candidates forum, might be considered by some to be an impermissible use of District funds and services in violation of Education Code section 7054, in an attempt to restrict lawful speech.

Background

Several years ago the District adopted, after considerable discussion and consultation or negotiations, policies governing free expression on campus. Those policies, discussed below, do not allow the suppression of free speech.

Then, on September 21, 2010, the SBIA sent an email over the District's listserv, "Groupwise," containing information regarding the upcoming candidate forum for September 30, and the Union's endorsements for the SBCC Board of Trustees. The District, without the consent of any faculty, and in violation of the speech rights of all faculty and in violation its own Administrative Procedure 3720.6 for the inspection and monitoring of electronic communications, the District entered faculty in-boxes and destroyed all unread copies of the Union's email.

Immediately thereafter, on September 21, 2010, and in response to the Union's endorsement of challenger-candidates to the District's Board of Trustees, the District distributed a new, *ad-hoc* speech policy that illegally restricts employees' and students' rights to engage in protected speech and political advocacy. The District's speech policy, euphemistically entitled "Election Guidelines for Employees and Students of SBCC," violates the rights of faculty to assemble; speak freely in Public Forums throughout the District; wear political clothing, buttons and other paraphernalia; and, finally, to use District email and "Groupwise" listservs for political activity.

The Union vehemently objects to the District's new and unilaterally crafted "Election

Susan C. Ehrlich, Vice-President
Santa Barbara Community College District
Human Resources and Legal Affairs
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Guidelines and its heavy-handed attempt to suppress and censor the political speech of faculty. As explained below, the District's various attempts to suppress faculty speech are without any legal justification, and conflict with this Board's sworn duty to uphold the Constitutional rights of faculty, staff, students and the public.

I. The District's Recent, Ad-hoc Policies in its "Election Guidelines" violate Free Speech Rights of Faculty and Students

The District's new speech policy violates the free speech rights of faculty and students in by prohibiting political and other types of speech in violation of the California and Federal Constitutions, throughout the Santa Barbara City College campus and within the District email and listserv.

Furthermore, to the extent that the District is constitutionally allowed to adopt policies to regulate any faculty speech, it must negotiate any such policies with the SBIA, the exclusive representative of District faculty. The District's recently distributed "Election Guidelines" were not negotiated, and are inconsistent with the existing, negotiated District policies.

1. The District cannot restrict political advocacy to so-called "free speech areas" or "free speech zones."

The Santa Barbara City College campus is, and always has been, a *public forum* under California and Federal law, where freedom of speech is protected from restriction by important constitutional doctrines such as strict scrutiny of any proposed or asserted limitations or restraints.

The District, in its hastily drawn, *ad-hoc* "Election Guidelines," improperly asserts that "there are free speech areas on the credit campus and non-credit campuses" and "designated areas where materials of a limited size can be posted." This vague policy attempts to *re-characterize* the District's City College and non-credit campuses as *non-public* forums, by prohibiting free speech on campus in all but limited (and currently undefined) limited areas. By law a *limited* public forum, such as a "free speech zone," is actually a part of a *non-public forum*. In such zones freedom of speech is limited, and the government may restrict both the speakers and the content of the speech. Such zones are in reality more of an effort aimed at restricting freedom of speech than allowing it, and have been found unconstitutional in cases decided across the country in the last few years. In a "free speech area" or "zone" the rights of students, faculty, staff and the public would be seriously curtailed, as we explain below.

In its misguided effort to re-characterize the colleges' campuses as *non-public forums*,

the administration is attempting to restrict faculty, students and staff *to lesser rights than are enjoyed by customers at a shopping mall*, and about the same level of rights enjoyed by visitors to military bases, fishing piers, or VA hospitals. (See, e.g., *Fashion Valley Mall LLC v. NLRB* (2007) 42 Cal. 4th 850, 857-858 [affirming that shopping malls are public forums under California law], and cases cited below at page 3.[1]

The District cannot re-characterize the public forum nature of its campuses, whether by attempting to artificially construct "free speech areas" or by any other means. The law is clear that a public college cannot convert a *public forum* into a *non-public* or *limited public forum*, and thereby eliminate the traditional and proper expressive nature of a college's public forum. .

The District recently violated the rights of certain faculty members by illegally requiring them to "relocate" their political advocacy in support of challenger candidates to the District's Board of Trustees to a so-called "free speech zone." The District's promulgation of its "Election Guidelines" continues this violation of faculty rights on an even wider scale. Accordingly, the SBIA demands that the District immediately withdraw this aspect of its "Election Guidelines" and any other policy purporting to limit faculty, student or public speech to "free speech areas," as such a policy contravenes the free speech protections of the California and U.S. Constitutions

A. The Public Forum Under California Law

California law holds that the test of whether property constitutes a *public forum* is whether the use of the area as a "public forum" interferes with its primary use. *In re Hoffman* (1967) 67 Cal. 2d 845, 851.[2] This test is much broader than that applied by Federal courts. In the *Pruneyard Shopping Center* case, the California Supreme Court explicitly recognized that the state Constitution "grants broader rights to free expression than does the First Amendment" to the Federal Constitution. 23 Cal. 3d at 910. The Court underscored that it had first

[1] *Fashion Valley* reaffirmed the principles of *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899 (1980)

[2] In *Hoffman*, the issue was the right of protesters opposed to the Vietnam War to distribute literature to departing troops at the Union Station in Los Angeles. The City attempted to restrict distribution on grounds that while "streets, sidewalks, and parks" have from "time immemorial" held "in trust" for freedom of expression, a railway station was different, and that speech activities could be regulated as "unauthorized uses." *Id*. at 849. The Court concluded that this distribution did not interfere in the use of the station as a transportation terminal. Id. at *851*.

recognized a private shopping mall as a public forum in *1946*. The recognition that a college or university is a forum for public debate extends back much further - consider Socrates at the Lyceum in ancient Greece (although his dissent in 399 B.C. was also subjected to a rather unwarranted and startling attack). In California, this recognition was renewed during the Free Speech Movement at UC Berkeley in 1964.

The primary uses of a shopping malls' open spaces are fairly evident to most consumers - such malls have replaced our town squares. A college's open spaces are even more evident. The City College campus, like every California publicly-funded college or university, includes innumerable pathways, sidewalks, hallways, plazas, quadrangles and knolls, patios and fountains, public streets (such as Loma Alta Drive and Castillo Street), student unions and open areas where freedom of expression has always been practiced. Indeed, a public college is *supposed to be a bastion of freedom of expression*, the quintessential public forum. In these college forums the faculty, classified staff, students and the public have been historically permitted to handbill, solicit funds, distribute literature, proselytize, protest, debate, urge support or opposition to candidates or policies large or small, express themselves artistically and exercise their rights of free expression. SBIA, faculty and students have availed themselves to these rights over the years, over the course of SBCC's 101 year history.

The exercise of these expressive and associative rights on the college campus in no way interferes with the primary educational use of the premises. Rather, spirited debate, dissent and protest actually enhances it by exposing the college population to the free exchange of ideas in the search for truth. In this District, such use has never disrupted the District's educational mission nor posed a "clear and present danger" of disruption.

These generous open spaces, and other areas, were intended not merely for pedestrian or other traffic, but offer the opportunity for adults in a college setting, faculty, students, staff, and the public, to engage each other in discussion, debate, protest and other types of free speech and association. The Supreme Court has recognized the high importance given to free expression on a college campus,

> "... **the university is a traditional sphere of free expression** so fundamental to the function of our society [that] the Government's ability to control speech within that sphere ... is restricted by the vagueness and overbreadth doctrines of the First Amendment." *Rust v. Sullivan*, 500 US 173, 200 (1992), quoting from *Keyishian v. Board of Regents*, 385 U.S. 589, 605-606. Emphasis added.

Because a public forum historically exists within California's colleges and universities, freedom of expression and association are fully protected from arbitrary limitation or exclusion by the trustees of that public property. Simply put, the District cannot eliminate the

Constitutionally protected, historic public forum aspects of its campuses *by re-characterizing them as non-public forums*. Such an action squarely conflicts with California law and Federal law, which recognizes that a college campus bears all the attributes of a public forum.

Unlike public K-12 schools, VA hospitals, fishing piers or military bases which are either limited or non-public forums,[3] the *default standard for a California community college is that the campus is historically and by tradition a public forum*.

This is consistent, but more expansive, than Federal forum analysis, that holds public streets, public sidewalks, public squares and parks, public grounds, and other public rights-of-way to be "quintessential" public fora. *Frisby v. Schultz* (1988) 487 U.S. 474, 481. As mentioned above, California's more expansive approach to public forums, however, is not limited to traditional forums such as streets, sidewalks and parks, or to sites dedicated for communicative activities. Rather, the California test is whether the communicative activity is "basically incompatible" with the normal activity of a particular place at a particular time. *In re Hoffman* (1967) 67 Cal. 2d 845. It is important to recognize that California enjoys the power to interpret its own Constitution, and it interprets the free expression provision of the California Constitution more broadly than Federal courts interpret the First Amendment.[4,5]

B. Santa Barbara City College is a Public Forum

It is inescapable that the Santa Barbara City College is a public forum. The College was established in 1909, and the entire grounds of the campus bear the attributes of a park-like public forum, with expansive lawns, gardens and other open areas, surrounded and interspersed with

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[3] See *Barr v. Lafon*, 528 F. 3d 554, 576 (6th Cir. 2008), contrasting a public school - a limited public forum for K-12 age children - with a forum for adults; *Preminger v. Secretary of Veterans Affairs*, 517 F. 2d 1299, 1313 (9th Cir. 2008), holding that VA Hospital is a non-public forum; and *Greer v. Spock*, 424 U.S. 828 (1976), holding that a military base is a non-public forum; *New England Regional Council v. Kinton*, 284 F. 3d 9 (1st Cir. 2002), holding a fishing pier to be a non-public forum.

[4] *Pruneyard Shopping Center*, *supra.*

[5] In states which do not have California's constitutionally-based, special protection of free expression, some Federal courts have concluded that universities or colleges were designated *public* forums. See, e.g., *Bowman v. White*, 444 F. 2d 967, 977-978 (8th Cir. 2006), holding that the University of Arkansas was an "unlimited designated public forum," despite having many characteristics of a traditional public forum. *Id.* at 979. However, the court definitively rejected the University's assertion that it was a non-public forum. *Id.*

public streets and sidewalks, again quintessential public fora.

According to the District's account of the history of the college, the college moved to its current location in 1959, and is situated on a 74-acre bluff. There are dozens of pedestrian walkways on the campus, the campus is divided by a public road, Loma Alta Drive, and includes courtyards and plazas, as well as an expansive West Campus lawn.

The purpose of the campus also has been that of a public forum, as students, faculty, classified staff, and the public are free to come and go on the walkways, quadrangles, plazas, and similar areas of the campus. Between buildings, there are several areas for students and faculty to meet and speak, to exchange ideas, to debate events of the day, to distribute literature, to protest, to petition, to raise money, and to engage in the myriad of expressive activities available. That these activities have existed for the life of the institution prove they are no threat to the educational purpose of the colleges; rather, they are consistent with it.

The campus, in light of both its purpose and physical characteristics, is indisputably a public forum.

C. Legal Distinctions Among Public Forums, Non-Public Forums and Limited or Designated Public Forums

The District's "creation" of a minuscule "free speech" area is an attempt to transform the City College campus from a public forum to a limited public forum, which is illegal under both Federal and California forum analysis.

Federal "forum analysis" divides public property into public forums, non-public forums, and limited or designated public forums. *Hopper v. City of Pasco*, 241 F. 3d 267, 274 (9th Cir. 2001). In Federal constitutional analysis, the scope of free expression, and the allowed level of governmental regulation, turns on which forum is involved.

In a *public forum*, Federal law holds that the government may limit free speech and impose content-based exclusions only upon a showing that its regulation is narrowly drawn to achieve a compelling governmental interest.[6] Limitations are subject to "strict" judicial scrutiny. A "traditional" public forum is a place which, by long tradition or historical practice, is devoted

[6] See *United States v. Stevens*, 533 F. 3d 218, 232 (3d Cir. 2008). A "content-based" regulation, that is one which regulates the content of a message, is presumed unconstitutional in a public forum. *Id*.

to debate or association.[7]

In a *non-public forum*, the least free speech rights exist. The government may entirely exclude, at its discretion, speakers on the basis of subject matter, so long as distinctions are viewpoint neutral and reasonably drawn in light of the purpose served. *Cornelius v. NAACP Legal Defense and Ed. Fund*, 473 U.S. 788, 799-800 (1985). Hence, at Southwestern College in 2009, the college declared it was a non-public forum and decided it was thus empowered to arrest and ban from the campus three professors who wanted to protest outside the limited "free speech zones." (Again, the resulting storm of protest over this has seemingly led to a "reassessment" of this illegal action. Visit www.thefire.org for the full story.)

A "*limited public forum*," such as the District proposes for the specific, limited free speech zones at its colleges, has been a place where speech is actually limited under Federal law to certain groups or certain topics, and is space which can only be "carved out" of a non-public forum.[8] Thus, in a "limited public forum," the government is able to restrict the topics of allowed speech, and the speakers, but only in a place which would otherwise be a non-public forum. Accordingly, in no circumstances is the District free to change or limit the status of its already *public forum*, and its attempt to do so for a historical public forum is startling and utterly unwarranted.

It is undeniable that the adoption of such "free speech zones" will discourage students, faculty, staff and the community from exercising their free speech rights on the college campus, for by doing so they risk sanction. While the policy is surely to be declared illegal if litigation is necessary (see discussion herein about, e.g., City of Salt Lake, City College of San Francisco, the University of Nevada at Reno, Citrus College, and other entities), the adoption of the Policy would itself be an illegal act, and prior restraint on speech.

D. Efforts by Colleges to Characterize Themselves as Non-Public Forums Have Been Defeated

It is refreshing that the few colleges which have inadvisably sought to declare themselves non-public or limited public forums have had to withdraw such designations for conflicting with California and Federal law. The *City College of San Francisco* was recently enjoined, and then admitted its campus is a public forum, when it sought to restrict hand-billing by Jews for Jesus,

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[7] *Perry Education Association v. Perry Local Educators Assn*, 460 U.S. 37, 45 (1983)

[8] *DiLoretto v. Downey Unified School District*, 196 F. 3d 958, 964 (9th Cir. 1999), cert den. 529 U.S. 1067 (2000).

Inc. on the college's main campus.[9] The University of Nevada at Reno's ill-advised effort to create a non-public forum, and confine speech to four *limited public forums* was stopped by the intervention of FIRE, the Foundation for Individual Rights in Education.[10] West Virginia University abandoned its "free speech zones" after FIRE's challenge, and declared the entire campus is a free speech zone.[11] *Citrus Community College's* failed attempt in 2003 to declare the college a non-public forum led to suit by the ACLU, and the forced rescission of its free speech policy.[12]

SBIA is dismayed that this radical policy has been suddenly "adopted" and published without any debate or discussion, and in conflict with the rights afforded by law. The District's administration has lost sight of this self-evident aphorism: that this is the United States of America, where freedoms of expression and association are bedrock values of Constitutional proportions. Freedoms of speech and association are enshrined at the forefront of the Bill of Rights and in the first Article of the California Constitution, and are at the *core* of most of our other freedoms. In attempting to limit political speech to limited, quarantined areas, the administration is unlawfully attempting to corral free expression.

E. The District's "Election Guidelines" and Use of "Free Speech" Areas Chills Free Expression and is an Illegal Prior Restraint

The District's "Guidelines" weakly assert that the District "encourages and protects free speech on our campus;" yet, in the same policy, it attempts to limit this expression to a severely limited area on campus, hiding and diluting the power of faculty and student's to exercise free expression, including the right for both groups to distribute printed material or petitions, or other campaign literature, on the upcoming trustee election, or other matters..

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[9] See *Jews for Jesus, Inc. v. San Francisco Community College District*, 2009 WL 86703 (N.D. Cal. 2009) Although this decision has not yet been published in the Federal Reporter, it is instructive for its reasoning, and cannot be ignored. A copy of this decision and court settlement document is enclosed with this letter for your convenience.

[10] In 2006, efforts by FIRE resulted in the University rescinding its non-public forum/free speech zone policy, and adopting a new policy designating the entire campus, except for the interior of campus buildings, as a public forum. See http://www.thefire.org/article/7118.html

[11] See http://www.thefire.org/index.php/case/30.html

[12] Citrus rescinded its "non-public forum"/free speech zone policy in 2003 after the ACLU sued in the U.S. District Court, paying the attorney fees of the students who sued. See http://www.thefire.org/public/pdfs/4704_2818.pdf

By adopting a policy that, except for limited areas, severely restricts freedom of speech, the District makes non-speech the default status of the City College campus. When the University of Arkansas attempted to restrict proselytizing Christians from its campus by declaring it was a non-public forum, the Court which struck down this restriction cogently explained the dangers of the non-public forum, warning that "[t]he government can most freely restrict speech in a nonpublic forum." *Bowman v. White*, 444 F. 3d 967, 976, 978 (8th Cir. 2008) The Court recognized that the convoluted restrictions the University attempted to then impose on speech amounted to a prior-restraint on free expression.

The District's "Election Guidelines" severely restricts expression on campus As such, the inevitable restrictions which will result are a prior restraint on speech. In a non-public forum, prior restraints are generally permitted. But *not* in a public forum.[13]

A prior restraint on speech has no place in an institution of higher education which is legally committed to robust and free debate. Indeed, one can imagine that a "free speech zone," hidden far away from the governing body of the District, such as the District presumes to create, would fit well within George Orwell's frightening view of a state-controlled society in his masterwork *1984*. This District should be better than that.

The Supreme Court has repeatedly recognized that free speech is essential on college campuses:

> "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straight-jacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding, otherwise our civilization would stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)

> "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." *Widmar v. Vincent*, 454 U.S. 263, 268-269 (1981)

Despite these bedrock principles, the District proposes an untenable policy which conflicts with the Supreme Court's recognition that the campus of a public university "possesses

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[13] See *New England Regional Council of Carpenters v. Kinton*, 284 F. 3d 9, 23 holding that an outright ban on leafleting, a prior restraint, was justified in a non-public forum.

many of the characteristics of a public forum." *Widmar*, 454 U.S. at 267, n. 5. The District cannot simply assert that the vast majority of the City College campus is a non-public forum, and that speech is conscribed to a limited area, when longstanding precedent dictates otherwise.

It is beyond question that the open spaces of the campus are by history and tradition, public forums. Furthermore, statutes have designated many places within the colleges and even public schools, as public forums. The Civic Center Act, Education Code section 58130, *et seq.* allows public use of various auditoriums or common areas of school and college districts. The Educational Employment Relations Act (also called the Rodda Act) allows unions free use of college space for public meetings. Gov. Code section 3543.1.[14] And school board meetings are, by designation, public forums, where the public may listen to and address the board.[15] Moreover, the California Constitution allows teachers to circulate petitions on public school campuses absent a showing of a clear and present threat to order in the schools. *American Federation of Teachers v. Los Angeles Unified School District* (1969) 71 Cal. 3d 551.

Given this, the prior restraints which result from restrictions in the campus' public forum are inescapably illegal.

F. The District, as a Public, State-Supported Educational Institution, has a Mandatory Obligation to Protect Freedom of Speech.

The very purpose of the Bill of Rights was to protect First Amendment freedoms from limitation by local officials. As the Supreme Court explained in *West Virginia State Board of Education v. Barnette* (1942) 319 U.S. 624, 638, the Founding Fathers determined to protect such freedoms from the "vicissitudes of political controversy, to place them beyond the reach of majorities and officials." In *Hague v. CIO*, 307 U.S. 496 (1939), the Court held that the government has an affirmative duty to preserve public forums – not destroy them as the District's "Election Guidelines" do.

In *Hague*, the Supreme Court held that the government did not enjoy the same discretion

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[14] See *Desert Community College District*, PERB Dec. No. 1921, 21 PERC 137 (2007) [union entitled to hold meeting on campus in classroom to determine endorsements for school board election.]

[15] See *Madison Joint School District, No. 8 v. Wisconsin Employment Relations Comm.*, 429 U.S. 167, 174, n. 6 (1976), holding that statute requiring open meetings made school board meetings public forums. Thus, the California George Brown Act, Cal. Gov. Code section 54950, *et seq.*, creates a similar designated public forum in meetings of this Board's trustees.

as a private property owner in regulating speech on public property. 307 U.S. at 514-516. The court imposed on the government the requirement that it accord the widest possible latitude to speech within "public forums," which are places where the government must guarantee not just the right, but the meaningful opportunity, to express themselves. Thus, under this doctrine, the government serves as the guarantor of individuals' free speech rights,

While the "Election Guidelines" laughably give lip service to "protecting" and "encouraging" speech, the District's attempt to restrict speech to a single "free speech area" is a noxious repudiation of its duties.

G. Strict Scrutiny Applies to Governmental Restrictions on Public Forums, and the District Fails to Offer Any Justification, Let Alone a Compelling One, for its "Election Guidelines"

In attempting to re-characterize the colleges open-space public forums as non-public forums, the District is severely restricting the exercise of free expression and association within the college. The change from a public forum to a non-public forum would be a stunning change, since different free speech rights obtain in a public forum versus a non-public, or even a designated public forum.

The public forum doctrine "derives from the most basic mythological image of free speech: an agitated but eloquent speaker standing on a soap box ... railing against injustices committed by the government, whose agents are powerless to keep the audience from hearing the speakers's damning word ..."[16]

Government restrictions on speech within a public forum *are subject to the most stringent scrutiny such that no speech restrictions will be upheld unless they serve compelling state interests and are the least restrictive means of restricting speech*.

The extent to which the government may limit or exclude speech and assembly from a forum depends upon whether its justification satisfies the requisite standard of constitutional scrutiny for the forum. *Perry* 460 U.S. 37, at 45-46. The government "has the burden of showing there is evidence supporting its proffered justification." *Kuba v. A-1 Agricultural Association*, 387 F. 3d 850, 859 (9th Cir. 2004) The court held that the government failed to carry its burden of supporting a speech restriction where it was unable to offer objective data to explain the need for the restriction: "Using a speech restrictive blanket with little or no factual

[16] "Reopening the Public Forum-From Sidewalks to Cyberspace," Steven G. Gey, 58 Ohio St. L.J. 1535, 1538 (1998)

justification flies in the face of preserving one of our most cherished rights." *Id*.

Here the District has offered **no justification whatsoever** for its purported transformation of its public open-space forum into a non-public forum. There have been no exercises of free speech or association which have allegedly prompted this change, and the District's likely unstated reason for its "Guidelines," to protect incumbent Board members from opposition, is completely contrary to speech in a free society, and not a legitimate restriction on speech.

Limiting access to one or more "speech areas" which are not contiguous to or fail to include forums and areas where people engage in communicative activities, such as a walkway our entryway outside of a building where board meetings are taking place, constitutes an invalid time, place and manner restriction. Even if the District's "free speech areas" were permissible under "time, place and manner" restrictions, which they are not, any such limitations must allow ample alternatives for communication. *Gonzalez v. Superior Court*, 180 Cal. App. 3d 1116 , 1125; *United States v. Grace*, 461 U.S. 171, 177 (1983); *Burbridge v. Sampson*, 74 F. Supp. 2d 940, 951. Confining speech to a single area, far from the upcoming candidates forum, means there is no way for supporters or opponents of candidates or issues to effectively interact with visitors to the forum. Thus, the District's "Guidelines" and "free speech areas" again effectively prevents speech in violation of the Federal and California Constitutions.

H. The "Conversion" of a Public Forum to a Non-Public Forum is Not Allowed by Law

Under a Federal constitutional analysis, traditional public fora are defined by the objective characteristic of a property, and hence renaming them is ineffective to deprive a traditional or historic public forum of its status, when the objective characteristics remain unchanged.[17] A designated public forum is created by "purposeful governmental action, ... , **by intentionally opening a nontraditional public forum for public discourse.**" *Perry*, 460 U.S. at 45, emphasis added.

Here the District is not opening a "nontraditional" forum for discourse, it is *closing* a public forum and purporting to convert an unspecified portion of it into a yet-undefined limited public forum.

Rather than preserve its public fora, as the law requires, the District actually proposes to do away with it. Yet a traditional public forum, as viewed from a Federal perspective, such as

[17] *Perry Education Association v. Perry Local Educators Assn*, 460 U.S. 37, 45 (1983)

the City College campus, must be preserved for assembly and communication. Given these principles, the conclusion is inescapable: the District cannot eliminate its public forum character by adopting this proposed policy.

There exists no legal right to by policy "declare" that a traditional public forum is now a "limited" public forum, saddled with the limitations that entails. Not long ago, Salt Lake City and the Mormon Church ran squarely into the Constitution by attempting to convert a formerly public forum street into a non-public forum mall, by selling it to the Mormon Church. Under the terms of the sale, the street and the mall plaza continued in existence, and the city maintained a public easement. But the Church owned the property, and a term of sale was the easement should not be interpreted to "create or constitute a public forum, limited or otherwise." The terms also said the easement was not intended to allow picketing, distribution of literature, soliciting, demonstrating, or a host of other expressive activities. The Church then posted signs forbidding such activities, and groups now foreclosed from use of the fora such as the First Unitarian Church, then filed suit.

The Court had no difficulty holding that the declaration in the contract for the easement could not insulate the property from being considered a public forum:

> "The easement's history, as well as the other contemporary characteristics of the easement discussed above, support the conclusion that the easement is a public forum. The objective nature and purpose of the easement and its similarity to other public sidewalks indicate it is essentially indistinguishable from other traditional public fora. We reach this conclusion **in spite of the City's express intent not to create a public forum**, because **the City's declaration is at odds with the objective characteristics of the property** and the City's express purpose of providing a pedestrian throughway. Accordingly, we hold that the easement is a public forum. *First Unitarian Church of Salt Lake City v. Salt Lake City*, 308 F. 3d 1114, 1131 (10^{0h} Cir. 2002). Emphasis added.

A primary thesis of the City and the Mormon Church was that because the mall was no longer governmental property, the forum could be closed. The court rejected this, recognizing that either governmental ownership or governmental regulation was sufficient to find a public forum. 308 F. 3d at 1122, relying on, inter alia, *United States v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 129 [apply forum analysis to privately owned mailboxes controlled by the government]; *Marsh v. Alabama*, 326 U.S. 501, 505 (1946) [title to property not determinative to public speech rights on property]; *Venetian Casino v. Local Joint Executive Board*, 257 F. 3d 937, 945, n. 6 [sidewalks need not be government owned to constitute public fora]. As the court explained, government ownership is not required for a public forum to exist. *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788, 800-801 (1985).

The ultimate argument of the City and Mormon Church was that the city's intention to not create a public forum controlled the outcome. The Court soundly rejected this proposition:

> "The government cannot simply declare the First Amendment status of property regardless of its nature and public use. See *Forbes*, 523 U.S. at 678 ... ('traditional public fora are open for expressive activity regardless of the government intent.") *Grace*, 461 U.S. at 180 ... (the government's own *ipse dixit* does not determine the First Amendment status of property ..." *First Unitarian Church, supra.*, 308 F. 3d at 1125, emphasis added."

Finally,

> "If the objective, physical characteristics of the property at issue, and the actual public access and uses that have been permitted by the government indicate that the expressive activity would be appropriate and compatible with those uses, the property is a public forum. The most important considerations in this analysis are whether the property shares physical similarities with the more traditional public forums, whether the government has permitted or acquiesced in broad public access to the property, and whether expressive activity would tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated the property." *International Society for Krishna Consciousness v. Lee (ISKCON)*, 505 U.S. 672 (1992), majority opinion of J. Kennedy at 698-699.

Here, the physical characteristics establish the District is attempting to curtail a public forum, in areas where unfettered speech has traditionally been exercised. Moreover, under California's more lenient test, treating the college as a public forum does not interfere in its intended use, it enhances it. Where but at California's colleges should the public, students, faculty and staff be free to exercise their rights of free speech on all matters of discussion.

We do not contend that every part of the campus is a public forum. Classrooms, when class is in session, would ordinarily not be a public forums, although speech is permitted in them, and discussions of matters of public concern may be protected. Even when a college or university campus differs in significant ways from traditional public forums such as parks, a campus still possesses many of the characteristics of a public forum. Hence a policy that confines free speech to limited areas, purporting to make the rest of the campus a non-public forum, is clearly proscribed by law.

The District is seemingly unaware that a few other colleges, including some in California, have also attempted to transform their public forums into non-public or limited public forums, and that in every instance this action was enjoined, declared unconstitutional, or

withdrawn when the school was confronted with demands or litigation from the ACLU, FIRE,[18] or another group. Besides the colleges cited above, note that in *Roberts v. Haragan (Texas Tech University)* 346 F. Supp. 2d 853 (N.D. Texas 2004) the court struck down Texas Tech's "designated forum area" policy as unconstitutional. While the court agreed that the entire campus was not a public forum, it found that the campus included areas which were characteristic public forums, including sidewalks, park-like areas, streets and other common areas. The court wrote that these areas "comprise the irreducible public forums on the campus." *Id*. at 861. It rejected the proposition that the University's ownership of the campus property allowed it carte blanche power to limit the public forum:

> "The mere fact that the University owns all the land within its boundaries does nothing to change the equation. First Amendment protections and the requisite forum analysis apply to all government-owned property; and nowhere is it more vital, nor should it be pursued with more vigilance, than on a *863 public university campus where government ownership is all-pervasive. The University's interest in an orderly administration of its campus and facilities in order to implement its educational mission does not trump the interest of its students, for whom the University is a community, in having adequate opportunities and venues available for free expression. Indeed, those who govern and administer the University, above all, should most clearly recognize the peculiar importance of the University as a "marketplace of ideas" and should insist that their policies and regulations make adequate provision to that end." *Id*. at 861-862.

The right of free expression means much more in the United States than it does in most corners of the world, or in those tin-plate dictatorships where such rights are entirely non-existent. Yet here we are, more than 200 years after this nation was founded, confronting a College administration which is responsible for overseeing public resources, and holding public forums in trust for the people, which has the gall assert that it may confine all free expression on campus to one single area.

In *Keyishian v. Regents*, the court stated that "[t]he nation's future depends on leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritarian selection." 385 U.S. at 603. The District must take this principle to heart, and protect, not hinder, the free speech rights of faculty and students.

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[18] FIRE is the Foundation for Individual Rights in Education, a group composed of leaders in the fields of civil rights and civil liberties from across the political and ideological spectrum, which is committed to protection freedoms of speech, religion, academic freedom, due process and liberty across America's college campuses. (Go to: www.thefire.org)

2. The District cannot prohibit faculty from wearing political clothing, buttons or other paraphernalia in or outside of the classroom.

It has been common within American colleges and universities, almost from "time immemorial," for teachers to passively express their views on ideological and political matters by various means. Such expression commonly takes the form of clothing or ornamentation (t-shirts, jewelry, book-bags, backpacks, rings, American flag pins, pink ribbons, yellow bows, etc., each of which carries a distinctive messages), and occasionally *buttons*, beards, hair, and even tattoos. Buttons have been worn to express political beliefs since the first American button was conceived in 1789 - a vest with the visage of George Washington on its buttons.[19] During the suffragette campaign in the early 20th century, college teachers sympathetic to women voting wore distinctively colored jewelry. Such expression of ideological or political views is an accepted *passiv*e form of speech

While courts have held that wearing buttons may be restricted in instructional settings in K-12 public schools, since impressionable younger students might confuse the message of the teacher with the message of the government (school), there are no such legal restrictions for colleges and universities. (Even in a K-12 school, some passive expression is allowed, such as black armbands to protest a war.) Indeed, the modern American college or university, is a veritable "marketplace" of ideas, where faculty routinely express their views as noted above. And adult students are expected to be confronted by teachers who have opinions, thus stimulating learning opportunities and discussion.

In one of the more noteworthy recent cases, *Burnham v. Ianni*, 119 F. 3d 668 (8th Cir. 1997), two faculty members displaying of their interest in weaponry was held to be protected speech. So whether a faculty member is passively indicating his or her views of 2nd Amendment rights, the death penalty, the war in Iraq, affirmative action, immigration, or a local election, the result should be the same - passive faculty expression is protected. There is simply no legitimate justification for suddenly proclaiming a K-12 rule in a California community college.

Within SBCC, there have been *no* rules attempting to prohibit such passive expression since the college was founded. And there is little question that administrators, faculty, classified staff, and students, have without restriction, worn clothing, jewelry, and buttons, for decades. Union buttons, and buttons concerning labor issues, have been common throughout the California colleges.

The "Guideline" which prohibits buttons is unconstitutional.

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[19] *Collecting Political Americana*, Edmund B. Sullivan, Crown Publications, New York 1980

3. The District cannot prohibit political speech on its "Groupwise" listserv or on its email system

The District's email system and "Groupwise" listserv is a designated public forum, which the District, through its lawfully negotiated and enacted Board policies, has opened to faculty use for all free expression. To now attempt to abrogate this use, on the eve of an important election for faculty, students and others within the community, is an illegal restriction on speech.

A. The Right to Engage in Political Activity is Protected by the California and Federal Constitutions.

First, colleges are not a cloistered, apolitical zone. As noted above, they are the quintessential marketplace of ideas. The right to inform the public about political issues is protected as part of the right to freedom of speech and freedom of assembly. *Pittsburg Unified School District v. California School Employees Assn*. (1985) 166 Cal. App. 3d 875. And merely because political protests or activities occur on through the medium of a college email system does not mean the comments made or positions taken are endorsed or sponsored by the school. *Widmar v. Vincent*, 454 U.S. 263, 274, n. 14. (An open forum in a public university does not confer any imprimatur of state approval on ... the goals of the Students for a Democratic Society, the Young Socialist Alliance, or any other group eligible to use its facilities.")

Applying these principles, the courts have even forbidden public schools (which have a younger, more impressionable student body, *Widmar, supra*, at 274, n. 14) from restricting faculty political activities in non-instructional settings. See, e.g., *L.A. Teachers Union, Local 1021, AFT v. Los Angeles City Board of Education*, 71 Cal.2d 551 (1969). In *L.A. Teachers Union*, a union circulated a petition on school grounds concerning a statewide ballot proposition dealing with financing of public education. The district ordered the faculty to cease distribution, arguing the issue was "controversial," and involved political issues which created "discord" within the school environment. The Supreme Court held that the district's restrictions violated the faculty's freedom of speech rights. It explained that the schools had "no valid interest" in restricting or prohibiting speech in non-instructional areas, because the "free expression of ideas concerning controversial matters is essential to our system of government." *Id*. at 558-559.

Here, the District has no valid interest in prohibiting political activities, such as distributing political and social opinions though the District's email system; and furthermore, to do would violate the speech clauses in the California and Federal Constitutions.

Under the above standards, it is entirely proper for District employees to handbill, give political speeches, to post advocacy materials such as fliers on physical bulletin boards or tables; and most importantly, to express political ideas and viewpoints, and to distribute political materials through the District's virtual bulletin board, its listserv system.

B. The District Cannot Regulate Speech Based on Content or Viewpoint in a Designated Public Forum

The District has unlawfully prohibited faculty speech on its email system through its new "Election Guidelines," and by its recent action in **removing** an email sent from SBIA endorsing certain challenger-candidates from the very inboxes of faculty.[20]

The law is settled that a public college "may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector and Visitors of the University of Virginia* (1995) 515 U.S. 819, 828. In *Rosenberger*, the United States Supreme Court held that the university violated the Constitution by attempting to restrict religious certain viewpoints from its school newspaper. The Court held that discrimination against speech because of its message is presumptively discriminatory. *Id* at 828.

As the Court explained in *Rosenberger*, once a public college has opened a forum, even a limited forum, it may not exclude speech where the exclusion is not "reasonable in light of the purpose served by the forum [citations], nor may it discriminate against speech on the basis of its viewpoint [citations]." *Id*. at 829. Here, the District violates this principle by prohibiting faculty speech through its email system based both based on its content (whether it is political or "not political" speech) and based on the viewpoint of the speaker (whether the political speech supports a cause championed by the District, such as Measure V, or certain Board members, or whether it does not).

Like for the District's Groupwise listerv and email system, the forum in *Rosenberger* was more "metaphysical" than spatial, but the Court had little difficulty in determining that the University had violated the Constitution with its effort at restricting religious speech of one type. In doing so it relied on its decision in *Lamb's Chapel v. Center Moriches Union Free School District* (1994) 508 U.S. 384. There, a public school district allowed the use of its premises by a wide variety of social, civic and recreational groups, but refused access to groups with religious

[20] An earlier, recent email sent to all faculty by a group endorsing *incumbent* Board members was not similarly removed. The District's after-the-fact justification for this disparate treatment was spuriously based on "where the email originated," a completely unavailing and arbitrary explanation.

purposes. Finding that the District had allowed use of its facilities by all sorts of groups with views about child rearing and family issues, it held that it could not then refuse to allow groups with viewpoints reflecting religious views of similar issues. When the University sought to justify its position that it was merely forbidding an entire class of viewpoints, the Court ruled "Our understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas." 508 U.S. at 831. Here, the District has no justification for discriminating against faculty emails and listserv postings based on political content or political viewpoint, as political speech of all viewpoints is allowed by District policy.

C. The District's Board Policies on "Electronic Communications" Affirm that its Listserv and Email are Public Forums

It is beyond dispute that the District, through its Board Policy on electronic communications, has opened its email and listerv to all types of protected speech, and in doing so created a public forum or designated public forum.

In or around 2002, the District, Union and Academic Senate consulted and negotiated over a revised computer usage policy. Through these negotiations, a new District policy on computer usage was adopted, Board Policy (PB) 3720, "Electronic Communications Policies and Procedures." BP 3720 states that the District shall "establish procedures that provide guidelines to students, administrators, faculty and staff for the appropriate use of information technologies, and pursuant to that direction, the Board adopted Administrative Procedures (AP) 3720.1-3720.7, its "Electronic Communication Procedures."

This policy and these procedures expressly protect the right of faculty to use the District's information technologies – including its email and listserv – for political speech, and nowhere in its policy or procedures does it limit such speech.

AP 3720.1, "Introduction," broadly encourages the use of the District's email and listserv, stating that the District "Encourages the use of electronic communications to share information and knowledge in support of the District's mission of education, student support, and public service *and* to conduct the District's business."

The Introduction expressly states that:

> "while some electronic communication resources may be dedicated to specific research, teaching or administrative tasks that would limit their use, **freedom of expression must, in general, be protected**. The District does not limit access to information due to its content when it meets the standards of legality and District policies. Consequently, **the**

> **District's policy of freedom of expression applies to electronic communications**"[21] (Emphasis added.)

AP 3720 also states that "this policy shall be interpreted in a manner consistent with other District Policies, and State and Federal laws," and cites "Appendix B" for a list of such policies. "Appendix B" expressly incorporates the District's Board policies on "Academic Freedom," "Right to Privacy" and "Freedom of Expression," all set forth in BP 4030 (former BP 2520).

Board Policy 4030, (former BP 2520) **which the District expressly affirms is applicable to its Electronic Communications policy** protects faculty speech, including political speech.

This policy, "Academic Freedom," states:

> "Freedom of expression is a legal right protected by the Constitution of the United Sates. Members of the faculty of the Santa Barbara City College are entitled to freedom of expression, provided such expression does not impede or prevent responsible performance of job requirements or interfere with the mission and goals of SBCC."

And:

> "Freedom of expression and academic freedom should be limited **in no greater degree in electronic format than in printed or oral communication**, unless and to the degree that unique conditions of new media warrant different treatment. While expression in cyberspace is obviously different in important ways from print or oral expression – for example, in the far greater speed of the communication, and in the capacity to convey messages to far wider audiences – such factors **do not appear to justify alteration or dilution of basic principles of academic freedom and free inquiry within the academic community**."

Furthermore, the Introduction of AP 3720, "Electronic Communications," states that:

> "In general the District cannot and does not with to be the arbiter of the contents of electronic communications. Neither can the District always protect users from receiving

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[21]AP 3720 also states that "this policy shall be interpreted in a manner consistent with other District Policies, and State and Federal laws," and cites "Appendix B" for a list of such policies. "Appendix B" expressly includes the District's Board policies on "Academic Freedom," "Right to Privacy" and "Freedom of Expression," all set forth in BP 2520.

> electronic communications they might find offensive."

Elsewhere in AP 3720, the procedure makes clear that personal use of the District's electronic communications is allowed, provided it does not interfere with the District's operations or the employee's employment obligations, or burden the District with incremental costs. (AP 3720.42) Political emails sent over the listserv or email by faculty in no way interfere with the District's operations, not cause it to incur additional costs, nor (went sent by an employee during his or her free time) interfere with an employee's employment obligations.

The District does restrict certain types of communications, but these notably omit political advocacy communications. (AP 3720.47.) The District's procedures expressly affirm protection of the freedom of expression, and have no prohibition whatsoever on political advocacy, even though other uses of the system are expressly prohibited (such as use of the system for individual commercial purposes).

The District's "Electronic Communications," make it perfectly clear the District's policy is to allow protected speech through its email and listserv, and to honor freedom of expression in this policy. Unless the District is asserting that the Union's endorsements of challenger-candidates to the Board of Trustees "interferes with the mission and goals of SBCC," (BP 4030) the Union's use of the District listserv and email, and a table outside of the District's administration building, to send its endorsements is entirely consistent with the District's policies on Academic Freedom and Freedom of Expression; and, by express reference, its "Electronic Communications" policy.

D. The SBIA has the Right to Use the District's Email

In addition to individual faculty members' right to use the District's email and listserv, the SBIA has an independent right to use these District resources. Article 4.1 of the SBIA/SBCC collective bargaining agreement states:

> "The Association shall have the right of access to areas in which employees work, the right to use institutional telephones (at no cost to the District), bulletin boards, mailboxes, **electronic mail services**, and institutional facilities provided that such use or access shall not interfere with nor interrupt normal District operations, including classroom activities." (Emphasis added.)

By removing the Union's email containing its Board of Trustees endorsements from faculty email inboxes, the District violated the parties' collective bargaining agreement, as the Union has the unequivocal right to utilize the District's email for any of its political endorsements as it sees fit.

E. The Listserv is a Bulletin Board

Finally, the listserv is a virtual bulletin board, hosted by the District, for faculty and employee viewpoints to be exchanged, on every imaginable issue. As such, all viewpoints have been welcome to be posted, debated, chastised, acclaimed, and made available to the college community. There is no question that the listserv is understood to reflect the personal viewpoints of the participants, not the college. For instance, recently the Supreme Court reaffirmed this in *Rumsfeld v. Forum for Academic and Institutional Rights*, 547U.S.47, 126 S. Ct. 1297 (2006). There the Court held that the schools were not speaking when they allow military recruiters on campus, or when those recruiters announce their presence to students and faculty with literature and signs. Noting that the Court has recognized that even high school students can recognize when a school sponsors speech and merely *hosts* it, "surely students have not lost that ability by the time they get to law school." *Id*. at 65. Moreover, the Communications Decency Act of 1996 (47 U.S.C. § 230 *et seq*) states no provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information provider.

Additionally, the listserv is not "equipment" or a "service" within the meaning of Education Code section 7054; and, accordingly, no statutory justification exists for the District to prohibit its use for political advocacy.

F. Education Code section 7054 does not Prohibit the Use of the District's Email for Political Advocacy

In removing the SBIA's email from faculty email inboxes for containing political materials, and in promulgating "Election Guidelines" which purports to limit faculty members' right to use the District's email for political advocacy, the District appears to be wrongly relying on Education Code section 7054.

In its "Election Guidelines," the District incorrectly asserts that "attempting to explain a candidate's position or offering facts to support or refute a candidate's position constitutes advocacy and the use of public resources to disseminate such a message is impermissible," and that "faculty cannot use district resources to advocate for the pass or defeat of ballot measures or candidates." By making such broad claims in its policy, however, the District exaggerates and misstates the law.[22]

[22] The District also misstates its own Board Policies, which also limit the use of District resources specifically to "funds, services, supplies, or equipment." BP 2716 states that

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September 28, 2010

Neither the Education Code or any other statute categorically prohibits the use of District "resources" for political speech. The only prohibition for *some types* of District resources is found within Education Code section 7054, which states:

> "No school district or community college district **funds, services, supplies, or equipment** shall be used for the purpose of urging the support or defeat of any ballot measure or candidate." (Emphasis added.)

This section, however, only narrowly applies to "funds, services, supplies and equipment," and does not broadly prohibit the use of District *resources* for political advocacy. The District's prohibition on the use of District resources is overbroad.

This interpretation of section 7054 was affirmed by the California Supreme Court in its recent decision in *San Leandro Teachers Ass'n v. Governing Bd. of San Leandro Unified School Dist*. (2009) 46 Cal.4th 822, 835. In *San Leandro*, the Court determined that the use of internal school mailboxes for political advocacy implicates, but does not necessarily violate, section 7054, since the mailboxes at issue in that case are "equipment" under that section.

The Court warned, however, that its decision was narrowly decided, and that other school property was not properly considered equipment under that section:

> "We agree with the Court of Appeal that, **unlike school furniture**, for example, which **may be incidentally used for a host of different purposes**, the term 'equipment' is plausibly applied to fixtures dedicated to a specific use." *Id.* (Emphasis added.)

The Court in *San Leandro* closed by noting of the importance of political speech, holding that:

> "Again, we emphasize **the narrow reach of our holding**. Political speech is 'at the core of what the First Amendment is designed to protect.' (*Morse v. Frederick* (2007) 551 U.S. 393.) Neither the First Amendment nor the free speech clause of the California Constitution, nor, as discussed, California statutory law, countenances undue restriction on the political speech of teachers or their unions." *Id*. at 845 (Emphasis added.)

Based on the Court's decision in *San Leandro*, it is clear that an email system, with its myriad of uses and lack of characteristics of a fixture in now way implicates or violates section 7054. The District's email listserv is not similar to the use of a tangible piece of equipment,

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"Members of the Board shall not use District funds, services, supplies or equipment to urge the passage or defeat of any ballot measure or candidate, including, but not limited to, any candidate for election to the governing board."

such as faculty mailboxes. The use of the email system (both receiving *and* sending emails) results in no strain on or wear on that system, and is distinguishable from physically present, faculty mailboxes.

The system is a virtual bulletin board, in which faculty and employees post their ideas for all to see who wish to read them. Like a cork bulletin board, where a viewer can turn away, or a table, where a viewer can simply keep walking past, the putative viewer of a posting on a listserv or in an email inbox has a simple solution to dealing with a postings or emails that are not relevant to him or her - the viewer can simply hit the "delete" key. No one is forced to read any posting, and the District specifically acknowledged its "Electronic Communications" procedures that it is not in the business of "protecting users from receiving electronic communications they might find offensive."

The District has no justification whatsoever for its new "Guidelines" purporting to prohibit political advocacy through its email and listserv, nor for its decision and action in removing the Union's contractually allowed email from faculty email inboxes.

II. SBIA Demands that the District Cease Violating Faculty Free Speech Rights

Due to the above-mentioned violations, the SBIA demands that the District retract and stop enforcing its "Election Guidelines" in their entirety. The Union further demands that the District immediately cease violating the free speech rights of faculty and students by enforcing limitations on speech which purport to limit it to "free speech" areas on campus – especially those that the District strategically sequestered far from the District's administration building, where much of the important business of the District is conducted.

Finally, the SBIA demands that the District adhere to its legally negotiated and adopted BP 3270, "Electronic Communications Policies and Procedures," especially that policy's protection of unfettered faculty use of the District email system for political speech. If the District continues to violate the Constitutional rights of its members, the SBIA will take legal action as it deems necessary.

The suspicious timing of the District's announcement of new guidelines will assuredly cause some to speculate that the administration is attempting to affect the outcome of the upcoming Board of Trustees election. While SBIA is not speculating, and hopes this is not the case, we can hardly ignore that an investigation of the District would be expensive and distracting.

Given the overwhelming legal authority in support of free speech, we ask that the College act immediately to rescind the unlawful Guidelines and assure faculty and others that it

will not act to restrict free expression outside the forum this Thursday. Please notify our office no later than 10:00 a.m. on Thursday of this assurance.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me.

Very Truly Yours,

Robert J. Bezemek
David Conway
SBIA Legal Counsel

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September 28, 2010

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