



September 14, 2018

Wanda Austin
Interim President
USC Office of the President
Los Angeles, California 90089-0012

Sent via U.S. Mail and Electronic Mail (president@usc.edu)

URGENT

Dear Interim President Austin:

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 and freedom of the press at the University of Southern California as a result of USC's directive prohibiting student journalists from taking notes during a listening session open to members of the student body. Restrictions on student journalists' ability to report on student criticism of the university in a public forum is inconsistent with the university's commitments to freedom of expression and to transparency, and cannot be justified by a professed interest in open criticism.

I. Statement of Facts

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. However, if the facts here are substantially accurate, USC has betrayed its published commitment to freedom of expression.

On August 7, 2018, USC President C. L. Max Nikias tendered his resignation to the university's Board of Trustees.¹ The formal resignation followed multiple, widely-reported controversies,

¹ Tomás Mier & Allen Pham, *'Our light has dimmed recently': Nikias steps down, Board appoints interim president*, DAILY TROJAN, Aug. 7, 2018, <https://dailytrojan.com/2018/08/07/our-light-has-dimmed-recently-nikias-steps-down-board-appoints-interim-president>.

including allegations that the university quietly ended its relationship with a gynecologist who had been the subject of numerous complaints.²

In an August 28 letter to the USC community, Rick J. Caruso, Chair of the USC Board of Trustees, announced the launch of a “USC Presidential Search website through which [students] can provide input” on the search for a new president “by utilizing a confidential online survey.”³ The letter also announced that USC would hold “in-person forums,” referred to as “listening sessions,” where students can “share [their] views and recommendations” with members of the search committee and the professional search firms retained to assist in the search.⁴ On the official website dedicated to the presidential search, these “listening sessions” are characterized by the university as “public forums.”⁵

On September 13, USC held a listening session in Town and Gown, a large ballroom on USC’s campus capable of accommodating upwards of one thousand people.⁶ Although characterized as “listening sessions,” the September 13 event included substantive remarks by Caruso concerning the process and progress of the presidential search.⁷

When student journalists associated with the *Daily Trojan* and *Annenberg Media* appeared at the venue, one or more USC officials initially refused to permit their entry. The journalists were subsequently told that, as reported by the *Daily Trojan*, they “could not take down notes

² Harriet Ryan, *et al.*, *A USC doctor was accused of bad behavior with young women for years. The university let him continue treating students*, L.A. TIMES, May 16, 2018, <http://www.latimes.com/local/california/la-me-usc-doctor-misconduct-complaints-20180515-story.html>.

³ Message from Board of Trustees Chairman Rick J. Caruso, Aug. 28, 2018, <https://boardoftrustees.usc.edu/message-from-board-of-trustees-chairman-rick-j-caruso-august-28-2018>.

⁴ *Id.*

⁵ UNIV. OF S. CAL., *Presidential Search*, <https://presidentiaalsearch.usc.edu> (last visited Sept. 13, 2018). USC’s presidential search has not been free from controversy. Among other things, USC’s undergraduate and graduate governments have criticized the university for not including student representatives on the 23-member search committee. *See, e.g.*, Statement by Graduate Student Government and Undergraduate Student Government, *Importance of Student Participation in the Presidential Search Process*, Sept. 13, 2018, available at <http://tiny.cc/7oikyy>; *see also* Malika Mohan & Terry Nguyen, *Student leaders voice hopes for new president*, DAILY TROJAN, Sept. 13, 2018, <http://dailytrojan.com/2018/09/13/student-leaders-voice-hopes-for-new-president> (quoting student disappointed in lack of conversation about “why ... there isn’t a student representative on the committee”).

⁶ Town & Gown, USC Hospitality, https://hospitality.usc.edu/dining_locations/town-gown (last visited Sept. 14, 2018). In advance of the session, USC encouraged students to RSVP, as there was a possibility that space would be limited. *Presidential Search*, *supra* note 5.

⁷ Aozora Ito, *Board holds first listening session*, DAILY TROJAN, Sept. 13, 2018, <http://dailytrojan.com/2018/09/13/board-holds-first-listening-session>.

or quotes despite the session being a public forum.”⁸ These restrictions do not appear to have been announced in advance, nor has it been reported that similar restrictions were placed on USC students who are not journalists.

The *Trojan* Editorial Board described their reporter’s experience:⁹

A *Daily Trojan* reporter entered Town and Gown for a general listening session meant to gather community input on the University’s next leader, they were instructed by a University spokesperson to not take notes or write down quotes for an article. The spokesperson explained that our reporter was welcome to attend as a student – but not as a journalist. They then instructed the *Daily Trojan* to join other media outlets, including the *Los Angeles Times*, to instead interview students following the event.

[...]

Furthermore, after the *Daily Trojan* tweeted news of the media ban, the same USC representative asked our reporter to delete the tweet.

Annenberg Media recounted a similar experience, reporting via Twitter that its “reporters were initially told by USC that no press would be allowed at today’s presidential search listening session, a public forum promoting transparency in the presidential search process” but “were later allowed to sit in on the meeting but couldn’t record it.”¹⁰

⁸ *Id.* See also, Laurie Maemura, *Students, faculty express transparency concerns at first presidential search forum*, ANNENBERG MEDIA, Sept. 13, 2018, <http://www.uscannenbergmedia.com/2018/09/13/students-faculty-express-transparency-concerns-at-first-presidential-search-forum> (reporting that Annenberg Media was denied access to the forum).

⁹ *EDITORIAL BOARD: We will not allow USC to censor student voices*, DAILY TROJAN, Sept. 13, 2018, <http://dailytrojan.com/2018/09/13/editorial-board-we-will-not-allow-usc-to-censor-student-voices>.

¹⁰ USC Annenberg Media (@AnnenbergMedia), TWITTER (Sept. 13, 2018, 6:49 PM), <https://twitter.com/AnnenbergMedia/status/1040417259674468352>.

In a prepared statement provided to the *Daily Trojan*, USC defended its directive, citing concerns that student views would be “reported on”:¹¹

These listening sessions are an important part of gathering honest feedback from members of the university community in an effort to guide our presidential search process.

Those contributors need to feel comfortable sharing their perspectives freely, which is much easier to do in a session that is not being recorded or reported on.

In a statement you provided to the *Daily Trojan*, you defended the restriction:¹²

The committee has opened up multiple avenues for hearing and receiving input, with the objective of reaching out to as many members of the university community as possible.

Listening sessions like the one we held today, which included students, faculty and staff, give us a very strong sense of the diverse set of viewpoints that we need to consider as the search for a permanent president moves ahead.

There are two additional listening sessions scheduled for this coming Monday, September 17, and on the Tuesday of the following week, in the same venue.¹³ It is unclear whether student journalists will be able to take notes and perform other basic journalistic functions at these sessions.

II. USC’s Restrictions on Student Journalists Is Inconsistent with the University’s Commitment to Freedom of Expression

Student journalists possess broad rights of inquiry and expression, and well-established principles attendant with these rights encompass a right to access, record, and publish what they observe as members of USC’s student body. By imposing restrictions on members of the student press seeking to observe events open to fellow members of the student body, USC’s

¹¹ Daily Trojan (@DailyTrojan), TWITTER (Sept. 13, 2018, 2:10 PM), <https://twitter.com/dailytrojan/status/1040346894478635009>.

¹² Daily Trojan (@DailyTrojan), TWITTER (Sept. 13, 2018, 2:10 PM), <https://twitter.com/dailytrojan/status/1040346891832066049>.

¹³ USC Annenberg Media (@AnnenbergMedia), TWITTER (Sept. 13, 2018, 6:49 PM), <https://twitter.com/AnnenbergMedia/status/1040417278905339906>.

administration has engaged in control of its facilities as a means of censoring student expression. This is a power the university has expressly prohibited itself from exercising, and its exercise here is not justified by the asserted interest in facilitating open discussion. Any attempt to enforce this rule breaches not only that commitment, but California law.

A. USC’s “Longstanding” Commitment to Freedom of Expression and “Paramount” Commitment to Transparency

As a private institution, USC is not compelled by the First Amendment to extend freedom of expression, including freedom of the press, to its students. It is, however, morally and legally bound to adhere to the promises it does make, including its promises to respect students’ expressive rights.

As you know, USC publishes what it describes as “longstanding policies” dedicating itself to “protecting the free speech rights and academic freedom of faculty and students.”¹⁴ This statement pledges that students “shall be free to examine and discuss all questions of interest” to them, and commits USC itself to “preserving First Amendment rights” specifically in the context of “resolving problems which arise in the dynamics of life in a university community.”¹⁵ So, too, has the university publicly dedicated itself to “rebuild[ing] our culture to reflect an environment” in which “transparency” is of “paramount importance.”¹⁶

In service of these laudable commitments, USC’s Student Handbook provides a “Statement of Student Rights and Responsibilities” extending rights of inquiry, expression, and press to its students.¹⁷ These policies explicitly pledge that “student publications” have the right to “maintain their integrity as vehicles for free inquiry and free expression,” provide that the “student press shall be free of censorship,” and extend to student editors the right “to develop their own editorial policies and patterns of news coverage.”¹⁸

¹⁴ Univ. of S. Cal., *USC Policy on Free Speech*, <https://www.provost.usc.edu/usc-policy-free-speech> (last visited Sept. 14, 2018).

¹⁵ *Id.*

¹⁶ Letter from Rick Caruso, Chairman, Subcommittee of the Executive Committee, USC Board of Trustees, May 25, 2018, *available at* <https://news.usc.edu/143779/usc-board-of-trustees-executive-committee-and-c-l-max-nikias-announce-transition-in-leadership>.

¹⁷ UNIV. OF S. CAL., SCAMPUS: THE USC STUDENT HANDBOOK 2018-19, 7-16, *available at* <https://policy.usc.edu/files/2018/07/SCampus-2018-19.pdf> (“Statement of Student Rights and Responsibilities”). USC also provides that students whose rights to inquiry or expression are abridged “may present the issue to the Office of the Vice President for Student Affairs.” Vice President Carry is copied on this letter.

¹⁸ Statement of Student Rights and Responsibilities, Art. III(c)(i).

Finally, and of particular importance here, USC’s policies expressly oblige the university’s administration to avoid exercising “[c]ontrol of campus facilities . . . as a device of censorship.”¹⁹

B. The Right to Record Public Events Is Well-Established for Journalists and Non-Journalists Alike

For decades, the United States Court of Appeals for the Ninth Circuit has consistently held that the First Amendment extends—to journalists and non-journalists alike—a right to film matters of public interest. *See, e.g., Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (discussing a “First Amendment right to film matters of public interest”). Other circuits are in accord. For example, the Seventh Circuit has pronounced that recording *and* note-taking are both rights necessarily protected by principles of freedom of expression:

The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected . . . [B]anning photography or note-taking at a public event would raise serious First Amendment concerns; a law of that sort would obviously affect the right to publish the resulting photograph or disseminate a report derived from the notes.

Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583, 595–96 (7th Cir. 2012).

Even assuming USC had the right to prohibit student journalists from making audio or video recordings of a public event, that right certainly does not extend to a prohibition on taking *notes* of their observations. As USC is powerless—by operation of both its own policies and California law, as discussed below—to prohibit students from *publishing* their observations, its prohibition on note-taking and recording serve only to frustrate reporters’ ability to accurately report statements.

¹⁹ Statement of Student Rights and Responsibilities, Art. III(d)(ii).

C. USC’s Denial of Access Is a Prohibited “Device of Censorship,” and Unsupported by a Vague and Illusory Interest in Facilitating Student Expression

By shuttering student journalists’ access to “public forums,” or by permitting their entry upon condition that they not take notes concerning their observations, USC has exercised precisely the “control” of its “facilities” prohibited by its own policies.²⁰

The Supreme Court of the United States has addressed the exclusion of the press from public proceedings, observing that journalists play a role in facilitating government transparency by allowing for informed public discussion of government affairs.²¹ For example, in the context of a statute mandating that the public be barred from sexual assault criminal trials in order to encourage minor victims to come forward to testify, the Supreme Court applied a strict scrutiny test. *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 606–7 (1982). Under that test, denial of access to the proceedings could be justified only if the denial was “necessitated” by a “compelling” interest, and was “narrowly tailored to serve that interest.” *Id.* The Court found that the prohibition failed to advance the government’s interest in an effective manner: The goal was to keep the victim’s testimony and identity secret, but the press still had the ability to learn of and report on the testimony, including through interviewing court personnel “or any other possible source that could provide an account[.]” *Id.* at 609–10.

USC’s prohibitions suffer from similar defects, and the university’s interest in facilitating public discussion is not well-served by restrictions imposed on student journalists.

First, USC has established multiple channels for students to share their views with USC’s administration privately. For example, USC provides an email address, botchair@usc.edu, through which USC solicits “your perspective on the future of the university and the search for a new president,” allowing students, faculty, or members of the general public to contact the university outside of a public forum.²² If email is insufficient, USC also provides an online form (and a second email address) to share perspectives with the presidential search committee, expressly allowing submitters to decline to identify themselves.²³

²⁰ Statement of Student Rights and Responsibilities, Art. III(d)(ii).

²¹ While the Supreme Court applied the First Amendment, its decisions are a useful indicator of the parameters of how freedom of expression is understood and applied in the United States.

²² Message from Board of Trustees Chairman Rick J. Caruso, Aug. 7, 2018, <https://boardoftrustees.usc.edu/message-from-board-of-trustees-chairman-rick-j-caruso-august-7-2018>.

²³ UNIV. OF S. CAL., *President Survey*, <https://www.research.net/r/USCPresident> (last visited Sept. 13, 2018).

Second, and similarly, USC may encourage some semblance of anonymity by allowing students to decline to give their names when speaking publicly, an opportunity afforded to students attending the September 13 listening session.²⁴

Third, unlike the journalists in *Globe*, the journalists here are physically present during the discussions. Because they have rights under both California law and USC policy to publish their observations, the university is unable to guarantee to anyone that their statements in a public setting will remain confidential.

Whatever purported interest USC intends to serve by restricting student journalists, it results in a disservice to the broader USC community and undermines the university's commitment to transparency. Student journalists play a critical role in communicating events and concerns to members of the broader community, including those who may be unable to attend events like these. Imposing restrictions on student journalists' access to campus facilities will inure to the detriment of the university community as a whole.

D. California Law Bars USC from Prohibiting Its Students From Reporting Their Observations

If, as suggested by your statement to the *Daily Trojan* that USC seeks to ensure that its listening sessions are “not being recorded or reported on,”²⁵ USC seeks to bar student journalists not only from recording a public discussion, but from publishing their observations, USC would breach California law.

California Educational Code Sec. 94367 extends to students at private colleges rights of freedom of expression corollary to those established by both the First Amendment and California's state constitution. The statute specifically provides that private institutions, like USC, shall not “make *or* enforce any rule” that would result in discipline to any student who exercised rights that would be protected against government regulation by the First Amendment or Article I, Section 2 of the California constitution.²⁶

Accordingly, any attempt to enforce a rule prohibiting student journalists from recording public events or from publishing their observations would violate not only USC's policies committing it to its students' freedom of expression, but California law. Furthermore, there is a lawful interest in attending a newsworthy event held open to the public.²⁷ Singling out

²⁴ Ito, *supra* note 7 (citing “[a]nother speaker, who did not introduce himself”).

²⁵ *Daily Trojan*, *supra* note 11.

²⁶ CAL. EDUC. CODE § 94367 (emphasis added).

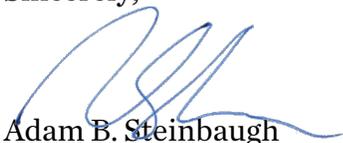
²⁷ See generally, e.g., *Savage v. Pacific Gas and Electric Co.*, 21 Cal.App.4th 434 (1st Dist. 1993) (First Amendment, made applicable by state law, prohibits a “state-protected monopoly” from blacklisting critical reporter); *Borreca*

journalists to prohibit them from attending such an event could violate Section 94367 if there is a real or implied threat of disciplinary action for noncompliance.

III. Conclusion

We call on USC to return to its public commitment to freedom of expression by publicly assuring that its student journalists will not be prohibited from recording or reporting on public events, and that USC do so before Monday's listening session.

Sincerely,



Adam B. Steinbaugh
Director, Individual Rights Defense Program

Cc:

Dennis Cornell, Chief of Staff (dcornell@president.usc.edu)
Ainsley Carry, Vice President for Student Affairs (acarry@usc.edu)
Allen Pham, Editor-in-Chief, Daily Trojan
Charlotte Pruett, Executive Editor, USC Annenberg Media Center

v. Fasi, 369 F. Supp. 906 (D. Haw. Hawaii 1974) (First Amendment prohibits banning reporter from press conferences); *Southwestern Newspapers Corp. v. Curtis*, 584 S.W.2d 362 (Tex. Civ. App. 1979) (First Amendment prohibits banning reporter from asking questions without an appointment); *U.S. v. Peters*, 754 F.2d 753 (7th Cir. 1985) (First Amendment prohibits judge from barring reporter from exhibits as a sanction for undefined "misconduct"); *Times-Picayune Publishing Corp v. Lee*, Case No. 88-1325, 15 MLR 1713 (E.D. La. 1988) (First Amendment prohibits barring reporter from press conferences).