



FIRE

Foundation for Individual
Rights and Expression

October 28, 2022

Pradeep K. Khosla
Office of the Chancellor
University of California, San Diego
9500 Gilman Drive # 0005
La Jolla, California 92093-0005

URGENT

Sent via U.S. Mail and Electronic Mail (chancellor@ucsd.edu)

Dear Chancellor Khosla:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is concerned by the University of California, San Diego's (UCSD's) removal of Professor Robert Ternansky from teaching his assigned courses for the remainder of the fall quarter after he made fleeting comments about members of the Latino and Chicano communities that some on campus found offensive. Whatever else they may represent to objectors, Ternansky's comments constitute speech wholly protected by the First Amendment, which binds UCSD as a public institution and prohibits the university from taking institutional action against him.

I. UCSD Removes Ternansky from Teaching His Assigned Courses After Remarks Referencing Latino and Chicano Communities

On October 14,² a UCSD student posted to Instagram an in-class recording of organic chemistry professor Robert Ternansky making comments that some found offensive or insensitive to the Latino and Chicano communities.³ In the video, Ternansky shouts to custodial workers down a hallway, "Sí, sí, señor. Ándale, ándale! Arriba, arriba!" and then asks his class, "How do you say

¹ For more than 20 years, FIRE has defended freedom of expression, conscience, and religion, and other individual rights on America's college campuses. You can learn more about our recently expanded mission and activities at thefire.org.

² This recitation of facts reflects our understanding of the pertinent facts, based on publicly available information. We appreciate that you may have additional information to offer and invite you to share it with us.

³ Sparky Mitra, *BREAKING: Organic Chemistry Lecturer Caught Saying Racist Remarks Against Latino Community*, GUARDIAN (Oct. 14, 2022), <https://ucsdguardian.org/2022/10/14/breaking-organic-chemistry-lecturer-caught-saying-racist-remarks-against-latino-community>.

‘quiet’ in Mexican? Cállate?”⁴ This prompts a quick discussion about Ternansky’s limited knowledge of Spanish, and ends with Ternansky saying (in reference to the custodial workers), “Someone tell me if they start running in here with weapons.”⁵

Students and faculty criticized Ternansky for his comments and called for UCSD’s administration to act.⁶ Some demanded that it suspend Ternansky, while others insisted he be terminated.⁷ That same day, Ternansky published a statement on his Canvas page acknowledging his “inappropriate comments in lecture,” apologizing for his behavior, and promising a more formal apology and an in-person apology during the next lecture.⁸

On October 17, UCSD Assistant Director of University Communications Erika Johnson told *The Triton* that “The university is aware of the situation and is taking the appropriate steps to engage [Ternansky] about his comments, which do not reflect our community values of inclusivity and respect.”⁹ By the next day, UCSD had removed Ternansky from teaching his courses for the current fall quarter.¹⁰ In a statement announcing his effective suspension, Dean of UCSD’s Physical Sciences Division Steven Boggs said the incident “serves as a painful reminder of how offhand comments and ‘jokes’ can expose biases and stereotypes which are antithetical to our ongoing efforts to create an inclusive and respectful environment for everyone,” adding that Ternansky’s removal “was to ensure a ‘productive learning environment for all.’”¹¹

II. The First Amendment Bars UCSD from Removing or Investigating Ternansky for his Fleeting Comments

It has long been settled law that the First Amendment binds public universities like UCSD,¹² such that its decisions and actions—including the pursuit of disciplinary sanctions,¹³ and maintenance of policies implicating student and faculty expression¹⁴—must comply with the First Amendment. It is also well-established that the First Amendment does not make a categorical exception for expression that causes offense.¹⁵ As Ternansky’s speech at issue does

⁴ Liam Winstead, *Organic Chemistry Professor Faces Criticism After Making Racist Comments During Lecture*, THE TRITON (Oct. 17, 2022), <https://triton.news/2022/10/organic-chemistry-professor-faces-criticism-after-making-racist-comments-during-lecture/>.

⁵ *Id.*

⁶ Mitra, *supra* note 3.

⁷ *Id.*

⁸ *Id.*

⁹ Winstead, *supra* note 4.

¹⁰ Colleen Flaherty, *‘Did I Insult Them?’*, INSIDE HIGHER ED (Oct. 19, 2022), <https://www.insidehighered.com/news/2022/10/19/uc-san-diego-suspends-instructor-racist-comments>.

¹¹ *Id.*

¹² *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”) (internal citation omitted).

¹³ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

¹⁴ *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

¹⁵ *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703 (9th Cir. 2010) (“[T]he government may not silence speech because the ideas it promotes are thought to be offensive.”).

not fall into any category of unprotected speech, UCSD’s “engagement” with him about his comments, and its subsequent adverse employment action against him, were inappropriate insofar as the university cannot punish him for constitutionally protected speech.

A. The First Amendment Protects Subjectively Offensive Expression.

While people on and off UCSD’s campus were offended by Ternansky’s comments, whether the First Amendment protects any particular expression is “a legal, not moral, analysis.”¹⁶ The Supreme Court, to that effect, has repeatedly, consistently, and clearly held that government actors may not restrict expression based on others taking offense.

This core First Amendment principle is why the authorities cannot outlaw burning the American flag,¹⁷ punish the wearing of a jacket emblazoned with the words “Fuck the Draft,”¹⁸ penalize a parody ad depicting a pastor losing his virginity to his mother in an outhouse,¹⁹ or disperse civil rights marchers out of fear that “muttering” and “grumbling” white onlookers might lead to violence.²⁰ And, in ruling that the First Amendment protects protesters holding insulting signs outside of soldiers’ funerals, the Court reiterated this fundamental principle, remarking that “[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”²¹

This principle applies with particular strength to universities, dedicated to open debate and discussion. Take, for example, a student newspaper’s use of a vulgar headline (“Motherfucker Acquitted”) and a “political cartoon . . . depicting policemen raping the Statue of Liberty and the Goddess of Justice.”²² These words and images—published at the height of the Vietnam War—were no doubt deeply offensive to many at a time of deep polarization and unrest. So, too, were “offensive and sophomoric” skits depicting women and minorities in derogatory stereotypes,²³ “racially-charged emails” sent to a college listserv,²⁴ and student organizations that the public viewed as “shocking and offensive.”²⁵ Yet, “the 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.’”²⁶ UCSD may acknowledge that Ternansky’s speech could be viewed as offensive, and may publicly condemn or challenge the speech, but it may not punish Ternansky for exercising his right to free expression.

¹⁶ *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 821 (S.D. Iowa 2019).

¹⁷ *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag was protected by the First Amendment, the “bedrock principle underlying” the holding being that government actors “may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”).

¹⁸ *Cohen v. California*, 403 U.S. 15, 25 (1971).

¹⁹ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

²⁰ *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

²¹ *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).

²² *Papish*, 410 U.S. at 667–68.

²³ *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 388–392 (4th Cir. 1993)

²⁴ *Rodriquez*, 605 F.3d at 703 (the First Amendment “embraces such a heated exchange of views,” especially when they “concern sensitive topics like race, where the risk of conflict and insult is high.”)

²⁵ *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 661 (1st Cir. 1974).

²⁶ *Papish*, 410 U.S. at 667–68.

B. Ternansky's Comments Do Not Constitute Actionable Harassment

UCSD's removal of Ternansky also cannot legitimately rest on a finding that his comments constituted harassment. Such a finding would be improper because fleeting comments do not constitute actionable harassment under federal law²⁷ or university policy.²⁸ In *Davis v. Monroe County Board of Education*, the Supreme Court set forth a strict definition of harassment in the educational context.²⁹ For conduct (including expression) to constitute actionable harassment, it must be (1) unwelcome, (2) discriminatory on the basis of gender or another protected status, and (3) "so severe, pervasive, and objectively offensive that it can be said to deprive the victim[] of access to the educational opportunities or benefits provided by the school."³⁰ In a July 28, 2003, "Dear Colleague" letter sent to college and university presidents nationwide, the Office for Civil Rights (OCR) of the U.S. Department of Education made clear that harassment "must include something beyond the mere expression of views, symbols, or thoughts that some person finds offensive."³¹ UCSD similarly defines harassment as:

unwelcome conduct that is so severe and/or pervasive, and objectively offensive, and that so substantially impairs a person's access to university programs or activities, that the person is effectively denied equal access to the university's resources and opportunities and is motivated on the basis of an individual's race, color, national origin, religion, sex³²

Ternansky's comments do not meet either of these stringent standards, and therefore cannot form the basis for punishment. Even if some of the comments could be said to meet the "objectively offensive" prong, the comments were only made on a single occasion and would not meet the required "pervasive[ness]" component. Similarly, Ternansky's comments are not "severe," as they were not directed at a particular person; rather, the comments were arguably a joke directed to his class. Finally, UCSD cannot construe the comments—a one-time instance—as sufficiently serious as to deprive a reasonable person of the university's educational opportunities or benefits.

C. Adverse Employment Action Arising from Protected Expression Violates the First Amendment

The First Amendment bars any "adverse government action against an individual in retaliation for the exercise of protected speech activities" which "would chill a person of ordinary firmness

²⁷ See *Davis v. Monroe Cnty. Bd. Of Educ.*, 526 U.S. 629, 651 (1999).

²⁸ *General University Policy Regarding Academic Appointees: The Faculty Code of Conduct*, UNIV. CAL. SAN DIEGO (revised Sept. 23, 2020), https://www.ucop.edu/academic-personnel-programs/_files/apm/apm-015.pdf [<http://perma.cc/4T7M-VAGV>]; *University Policies on Nondiscrimination, Sexual Harassment, and Sexual Violence*, UNIV. CAL. SAN DIEGO, <https://catalog.ucsd.edu/about/policies/policies-on-shpp/index.html> [<https://perma.cc/37DB-JGZB>].

²⁹ 526 U.S. 629.

³⁰ *Id.* at 650.

³¹ U.S. Dep't of Educ., Dear Colleague Letter from Gerald A. Reynolds, Assistant Sec'y for Civil Rights (July 28, 2003), <https://www2.ed.gov/about/offices/list/ocr/firstamend.html>.

³² *University Policies on Nondiscrimination, Sexual Harassment, and Sexual Violence*, UNIV. CAL. SAN DIEGO, <https://catalog.ucsd.edu/about/policies/policies-on-shpp/index.html> [<https://perma.cc/37DB-JGZB>].

from continuing to engage in that activity.”³³ UCSD’s removal of Ternansky from teaching will certainly chill faculty members from exercising their well-established rights to academic freedom and free speech, amid concerns that UCSD will punish them if some find their protected commentary subjectively offensive.

Under the unlawful standard applied to Ternansky, no professor has reasonable notice as to what lectures, examples, materials, or fleeting comments could lead to coercive disciplinary measures, including removal. Nor can a professor know what examples or comments will be subjectively offensive to individuals in the campus community from a broad range of backgrounds, experiences, and beliefs. To avoid serious consequences, a professor is likely to self-censor, potentially diminishing the overall quality of a UCSD education. The chilling effect created by removing Ternansky from teaching is unacceptable at an institution legally bound to protect professors’ First Amendment rights.

III. Conclusion

Ternansky’s comments were undoubtedly offensive to some members of the campus community, but the First Amendment protects his speech from punishment by government actors like UCSD. Critically, this principle does not shield him from every consequence arising from his expression—including criticism by students, faculty, the broader community, or the university itself. Criticism is a form of “more speech,” the remedy to offensive expression that the First Amendment prefers to censorship.³⁴ However, the First Amendment strictly limits the types of consequences that may be imposed and who may impose them.

Given the urgent nature of this matter, we request a substantive response to this letter no later than the close of business on Friday, November 11, 2022, confirming UCSD will immediately reinstate Ternansky to his teaching position and not punish faculty in the future for protected speech.

Sincerely,



Haley Gluhanich
Program Officer, Campus Rights Advocacy

Cc: Daniel Park, Chief Campus Counsel, University of California, San Diego
Elizabeth H. Simmons, Executive Vice Chancellor for Academic Affairs, University of California, San Diego

³³ *Keenan v. Tejada*, 290 F.3d 252, 258 (5th Cir. 2002).

³⁴ *Whitney v. California*, 274 U.S. 357, 377 (1927).