

California Advisory Committee
to the
U.S. Commission on Civil Rights

Free Speech on
California Public University and College Campuses Briefing
Thursday, April 29, 2010

REPORTED BY: JOANNA KOSTAPAPAS

CSR NO. 13242



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1 California Advisory Committee
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3 U.S. Commission on Civil Rights
4 SUB-COMMITTEE MEMBERS
5

6 MANUAL KLAUSNER (Los Angeles)

7 VELMA MONTOYA, Chair (Hollywood)

8 MARC DOLLINGER (San Rafael)

9 JOE HICKS (Los Angeles)

10 JOHN DODD (Tustin)

11 MATTHEW ROSENTHAL (Studio City)

12 KAREN LUGO (Riverside)

13 GAIL HERIOT (SAN DIEGO)

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18 PETER MINARIK, Regional Director

19 ANGELICA TREVINO, Staff Assistant
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PANELISTS

DAVID BLAIR-LOY, Legal Director

GREG LUKIANOFF, President

ROBERT MEISTER, Chair, Council of UC Faculty Associations

ANNE NEAL, American Council of Trustees and Alumni

ADA MELOY, General Counsel, American Council on Education

ROBIN TOMA, Executive Director, Los Angeles County Human

Relations Commission

GALE BAKER, General Counsel, California State University

JONATHAN LEE, Staff Counsel, California Community

Colleges

CHRISTOPHER PATTI, Principal Counsel, University of

California

1 MR. KLAUSNER: Good morning. Ladies and
2 gentlemen, if you can kind of take your seats. And we're
3 about to get started here. This meeting of the
4 California Advisory Committee to the US Commission on
5 Civil Rights will now come to order. Today is Thursday
6 April 29th, 2010. The time is 10:00 a.m. Pacific
7 Standard time.

8 I am Manuel Klausner, Chairman of the Education
9 Subcommittee of the California Advisory Committee to the
10 West Commission on Civil Rights. And other members of
11 the California Advisory Committee who are present today
12 are: To my right, the Chairman of the State Advisory
13 Committee Velma Montoya; to my left, John Dodd, who is a
14 member of our subcommittee; to my right here, we have
15 Marc Dollinger, who gets the long distance award. He
16 flew in from San Francisco. Maybe Gail Heriot is a
17 contender. To the far right is Gail Heriot. Also is --
18 Gail is also a member of our California Advisory
19 Committee and the US Commission on Civil Rights. We
20 welcome Gail. Maybe you get the long distance award if
21 you came from Washington.

22 MRS. HERIOT: No. I came in second.

23 MR. KLAUSNER: And then Joe Hicks in between.
24 And Joe is also a member of our California State Advisory
25 Committee.

1 So we welcome everybody here from our -- the
2 public, who is attending, and the press as well as our
3 panelists, good morning. Mark Rosenthal has just
4 arrived. And he is a member -- Matthew Rosenthal,
5 forgive me, is another member of our State Advisory
6 Committee. So we're ready to roll. Our first panel this
7 morning, I will introduce shortly. But I'd like to make
8 a few preliminary comments.

9 First of all, I'd like to mention that the
10 United States Commission Civil Rights is an independent
11 agency of the United States government. It was
12 established by Congress in 1957, and it was directed to
13 do several things: To investigate complaints alleging
14 the citizens or being deprived of their right to vote by
15 reason of their race, color, religion, sex, age,
16 handicap, or national origin.

17 No. 2, to study and collect information
18 concerning legal developments constituting discrimination
19 or a denial of equal protection of the laws under the
20 constitution because of race, color, religion, sex, age,
21 handicap, or national origin.

22 Three, to appraise national -- federal laws and
23 policies with respect to discrimination or denial of
24 equal protection of the laws because of race, color,
25 religion, sex, age, handicap, or national origin.

1 And four, to service a national clearing house
2 for information about discrimination. As part of the
3 United States Commission of Civil Rights, State Advisory
4 Committees are established in each state and the District
5 of Columbia in accordance with the enabling legislation
6 of the Commission and the Federal Advisory Committee Act.

7 The State Advisory Commissions have three
8 functions: One, to examine civil rights issues in their
9 states under the jurisdiction of the commission; two, to
10 advise the commission on matters in their states
11 pertaining to the -- to discrimination or a denial of
12 equal protection of the laws under the constitution
13 because of race, color, religion, sex, age, handicap, or
14 national origin; and three, to aid the commission in its
15 role as a national clearing house for information about
16 discrimination.

17 The purpose of today's meeting is to obtain
18 information about the speech policies on public college
19 and university campuses in California. We are very
20 appreciative to those persons who have taken their time
21 out of their busy schedules to make their views known to
22 the committee. We have a very full agenda today, and
23 time limits will be strictly followed. Each presenter
24 will make an opening statement of no more than 15 minutes
25 with the remaining time allotted to the panel available

1 to committee members for questions. The deliberations of
2 this committee will be conducted in a civil manner.

3 Through -- though opinions on the subject
4 before us may be controversial, the defamation of any
5 person, institution, or organization will not be
6 tolerated. And any person, organization, or institution
7 who feels they have to defame has the right to make a
8 response, and that response will be included in the
9 record of these proceedings. This meeting is open to the
10 public. A record of these proceedings are being
11 transcribed. Records generated from this meeting may be
12 inspected and reproduced at the western regional office
13 as they become available. The only -- those persons
14 invited to make presentations will be allowed to speak at
15 this meeting today. Members of the public are entitled
16 to submit written comments regarding speech policies on
17 public college and university campuses in California.
18 Such comments will be made a part of the record.

19 To be included as part of the record of these
20 proceedings, such public comments must be received in the
21 western regional office by May 20th, 2010. The -- there
22 is a written form I'll mention in a minute. But the
23 mailing address is the western regional office of the US
24 Commission on Civil Rights. The address is 300 North Los
25 Angeles Street, Suite 2010, Los Angeles, California

1 90012. Persons wishing to e-mail their comments may do
2 so to Atrevino@usccr.gov. Instructions for submitting --
3 you don't need to get that all down. Instructions for
4 submitting written comments are also available at the
5 back of this meeting room or can be obtained by calling
6 the western regional office. The number is 213-894-3437.
7 And for those that would prefer to make an audio
8 recording, in effect a voice recording, of your comments
9 that are written comments that will be available as well.
10 So I welcome, again, each of you here. We have some
11 important business in front of us.

12 Our witnesses on the first panel are going to
13 be David Blair-Loy, who is the legal director of the
14 ACLU. And Greg Lukianoff, who is the President of FIRE,
15 the Foundation for Individual Rights and Education. And
16 we start off, as we do, giving the protocol that we
17 adhere to in these federal hearings. We start off and
18 conduct all our panels in the alphabetical order of our
19 witnesses. So we start first with David Blair-Loy.
20 Welcome to our reading, and thank you for giving us your
21 time.

22 MR. BLAIR-LOY: Thank you very much. I've
23 actually conferred with my copanelist, and we've agreed
24 that I would -- we've agree that he can go first.
25 Because he has a well-thought-out presentation that I

1 actually plan to go on and follow up on --

2 MR. KLAUSNER: All right. The chair finds that
3 as long as the witnesses consent, we are happy to comply.
4 And we appreciate your confirmative advances if it makes
5 sense to you both.

6 MR. LUKIANOFF: Sure. Well, thank you, David.
7 And thank you everybody. And thank you for having me.
8 I'm here to talk about something that I've been working
9 on pretty much my entire career for the last ten years.
10 And something that, frankly, would have been a surprise
11 for me before I worked for FIRE. Now, I -- you should
12 know I'm a constitutionally specialized 1st Amendment
13 attorney. I have been practicing law for about ten years
14 now. One of the things I have found -- well, first, as a
15 legal director, but now as president of FIRE is there is
16 a serious problem with overbroad harassment codes on
17 college campuses.

18 Now, first, I'm going to lay out the problem
19 for free speech in general. There -- this is a national
20 problem. And despite the feat stretching back to 1989,
21 the court's harassment codes are still there that go far
22 beyond the law and restrict an awful lot of protective
23 speech. And abuse of these codes is rampant. Most
24 current codes do not reflect Title 9 or 7 at -- we have a
25 constitutional lawyer who actually evaluates codes all

1 across the country. And we have found that 71 percent of
2 nearly 400 top colleges remain -- maintain what we would
3 call "red light codes."

4 Just to briefly explain what that means, that
5 means substantially violating the 1st Amendment norms.
6 While they exist in many forms, the most common form of
7 speech code are overbroad harassment codes, and we're not
8 alone in recognizing this. In 2003, the Office of Civil
9 Rights, so the Department of Education, specifically
10 wrote virtually every college in the country about this
11 problem. Writing -- some colleges and universities have
12 interpreted OCRS prohibition of harassment as
13 encompassing all offensive speech regarding sex,
14 disability, race, or other classifications. Harassment,
15 however, to be prohibitive -- to be permitted by the
16 statutes with an OCRS jurisdiction must include something
17 beyond the mere expression of views, words, symbols, or
18 thoughts that some person finds offensive. This was sent
19 to virtually every college in the country. And it seems,
20 to me, to have been almost completely ignored. The
21 actual standard for us, because I want to be very clear,
22 neither I nor FIRE have any problem.

23 Actually, I'm -- we believe that harassment,
24 actual harassment, should actually be pursued. But there
25 is a standard set by the Supreme Court on what

1 peer-on-peer harassment should mean. It was set in a
2 case called Davis v. Monroe County Board of Education
3 which was 5/26, US 6/29 in 1999. True harassment means
4 much more than merely offensive or rude speech. And
5 there is no -- contrary to prior belief, there is no
6 1st Amendment exception to -- for harassment.

7 Actually, it is just that harassment is
8 considered not to be speech because it is a pattern of
9 behavior that is: One, unwelcome; two, discriminatory;
10 three, on the basis of protected status such as race or
11 gender; four, directed and individual; and five, this is
12 a direct quote, "so severe, pervasive, and objectively
13 offensive that it undermines and attracts from the
14 victim's educational experience that the victimized
15 students are effectively denied equal access to
16 instructions -- institutions of resources and
17 opportunities. Now, that standard is -- balances
18 perfectly well interest in preventing racial and sexual
19 harassment with the interest in free speech. But those
20 limitations are placed there in order to make sure that
21 harassment doesn't become the exception that swallowed
22 the rule.

23 Now, let's take a look at some bad examples
24 within the state of California. CSU Monterey Bay
25 catalogues policy on sexual harassment and sexual assault

1 on nontolerance states that examples of harassment
2 include ascending inappropriate jokes or comments in
3 print or by e-mail and derogatory cartoons, drawings,
4 posters, or inappropriate gestures. San Francisco State
5 University Sexual Harassment Policy and Procedure
6 provides that sexual harassment is one person's
7 distortion of a university relationship by unwelcome
8 conduct which empathizes another person's sexuality.

9 UC Santa Cruz policy states that examples of
10 sexual harassment and discrimination include sexual
11 jokes, comments or innuendos and sex-based cartoons or
12 visuals that ridicule or denigrate a person. Now, I
13 don't think you have to be a constitutional lawyer to
14 know that that is laughably unconstitutional. Now -- and
15 I can go on. We have additional examples. But this is
16 something that a lot of people don't know is that since
17 the beginning of the Speech Code Movement in the 1980s,
18 harassment codes are the same thing as speech codes.

19 At this point there have been 19 successful
20 challenges to speech codes from 1989 onwards. Every
21 single one of them has included a challenge to an
22 overbroad harassment code. 19, again. Now, people might
23 be asking themselves: Why harassment? Why does this
24 seem to be the weapon of choice? Now, to be fair, from
25 the beginning there were advocates of using harassment

1 codes to basically stand in for what would be European
2 hate speech codes, more or less. But they survived, in
3 part, because people are so unwilling to question
4 harassment codes. They think that by being against
5 overbroad harassment codes that people are naturally for,
6 I suppose, harassment.

7 Now, all any -- all we are arguing is that
8 there is a standard that actually exists in law and that
9 should be followed. But most importantly, though, there
10 is one way in which harassment codes are not exceptional
11 in any way as being abused to stop free speech. History
12 shows that pretty much any exception that allows people
13 to punish opinions they dislike will be turned on speech
14 with remarkable speed. This happens time and time again
15 while there is unlimited decency or patriotism or in this
16 case prevention of harassment. And they do get accused.

17 Let's be very clear about this. This is not a
18 theoretical problem. And I'll just give some brief,
19 quick examples that are pretty mindblowing. At Indiana
20 University for New University in Indianapolis, this was
21 in late 2007, a student was actually found guilty of
22 racial harassment without a hearing for publicly reading
23 a book. The book was called Notre Dame versus the Klan.
24 He was found guilty of racial harassment because someone
25 found the picture of the Klansmen on the cover offensive.

1 Interestingly enough, the book actually celebrates the
2 defeat of the Klan in the 1924 street fight. But,
3 nonetheless, it took the combined efforts of the ACLU and
4 FIRE to get the university to back down.

5 Meanwhile, Tufts University students were found
6 guilty of racial harassment for an ad that involved true
7 statements about Islamic extremism including quotes from
8 the Koran. They were found guilty of racial harassment.
9 Tufts refuses to overturn this finding to this day. At
10 Brandeis University a professor was found guilty, also,
11 of racial harassment, also, without a hearing for
12 explaining what the term "wetback" means in his Latin
13 American studies class, a lot of people actually don't
14 know where it comes from, and then criticizing it. He
15 used the term to explore and criticized the term.

16 At San Francisco State University, closer to
17 home, students were initially investigated for harassment
18 for peaceful rallying, which they stepped on Hamas and
19 Hezbollah flags, a designated terrorist organization. So
20 what are the long-term effects of overbroad speech codes
21 on campus, in this case harassment codes? There is the
22 chilling fact. People are afraid to open their mouths if
23 they have reason to believe that they will be punished
24 for it. This, to me, contributes to breaking down the
25 sophistication regime. If you want to have an effective

1 university, you have to be free. You have to be truly
2 free to argue any point of view on the spectrum and then,
3 of course, defend them.

4 If you know -- if you think that there is any
5 chance whatsoever that you can be punished for making an
6 unpopular argument, nobody is going to (Court reporter
7 unable to hear.). Then there is the miseducation aspect
8 to it. That you are teaching students, essentially, bad
9 lessons about how to live in a free society. And,
10 actually, you are teaching them the wrong -- the wrong
11 things about the law. The 1st Amendment, again -- and I
12 think that we have 19 challenges at this point. These
13 codes do not hold up.

14 And -- but I believe if you were to ask a lot
15 of students today: What is unprotected harassment? They
16 would essentially list a large number of political points
17 of view that they would considered to be harassment. And
18 then there is -- which goes into my whole idea of
19 unlearning liberty. That universities are supposed to be
20 places where people are learning how to live in a
21 democracy. And I believe that they are learning bad
22 lessons, again, through both the actual codes as the
23 written and the examples of how they are used. So
24 quickly laying out the problem of overbroad harassment
25 codes for California, obviously all of the above -- but,

1 also, it encourages departments to draft binding codes
2 which have no relationship to federal or state free
3 speech protections.

4 California, as you know, has very strong free
5 speech protections in addition to (Court reporter unable
6 to hear.). The CSU system and the community college
7 system -- school have not changed their policies yet,
8 which leaves them right for litigation. When these codes
9 get litigated, the school loses. These, again, are not
10 close calls. Now, what this means legally long term when
11 a university -- when universities and institutions flout
12 the law and actually are passing codes that are in this
13 case -- in some cases laughably unconstitutional
14 consistently over the course of decades. Those employees
15 and institutions start to lose claims of qualified
16 immunity.

17 Qualified immunity only protects people who
18 reasonably believe they are acting under (Court reporter
19 unable to hear.) of law. But if they actually know, and
20 more -- or at least should have known -- and FIRE has
21 actually given the certified mail letters explaining to
22 schools all across the state of California that their
23 codes are unconstitutional. If they have actual notice
24 that their codes are unconstitutional, they should not
25 actually enjoy the protections of qualified immunity.

1 But, also, for those of us who care about preventing
2 racial and sexual harassment, these incidents and these
3 kind of codes frankly trivialize real harassment. When
4 you have people getting in trouble for reading a book and
5 codes that ban merely cartoons, then we have really
6 strayed quite foreign, and it discredits the entire
7 system. And, again, if you follow the actual law, you
8 have something that does actually prevent racial and
9 sexual harassment. So the solution, in my opinion, is
10 that -- and FIRE's opinion, is that the current interim
11 policy adopted by Chancellor Eudolph (Phonetic) is
12 agreed -- what we would call a green light policy as
13 opposed to a red light policy.

14 MRS. MONTOYA: Could you explain that?

15 MR. LUKIANOFF: Oh, explain green light as
16 opposed to red light?

17 MRS. MONTOYA: No. President Eudolph's policy.
18 Please explain.

19 MR. LUKIANOFF: It very much graces the Davis
20 Campaign that I laid out before.

21 MRS. MONTOYA: Well, tell them the date. They
22 don't know that background.

23 MR. LUKIANOFF: Okay.

24 MRS. MONTOYA: Please repeat it.

25 MR. LUKIANOFF: I would have -- could I --

1 could I present that? I don't actually have the Eudolph
2 policy (Court reporter unable to hear.).

3 MRS. MONTOYA: Here is my question. To
4 elaborate on how President Eudolph, in October, issued a
5 directive to meet the Davis standard. But on five
6 campuses you found on March 19th, this year --

7 MR. LUKIANOFF: Right.

8 MRS. MONTOYA: -- and they are still not in
9 effect.

10 MR. LUKIANOFF: Right.

11 MRS. MONTOYA: Could you explain that?

12 MR. LUKIANOFF: Yeah. Chancellor Eudolph, back
13 in October, actually recommended a policy shift that
14 implemented an interim harassment policy that very much
15 matches the Davis standard. But on five different
16 campuses we've actually seen that universities have
17 simply not adopted it. Now, if all campuses in
18 California were to adopt that, the benefits aren't just
19 that you have a constitutional policy but that actually
20 insulates universities better for litigation. And there
21 have been at least, I think, at this point three or four
22 lawsuits against schools in California, all of which the
23 schools in California have lost.

24 So it is in California's interest to actually
25 adopt what Eudolph said, not just as the interim policy,

1 but as the -- as a permanent policy. But there is one
2 thing that you do have to be aware of, that is the -- you
3 should adopt the Eudolph policy but no more or no less
4 than the Eudolph policy. Because a lot of these really
5 bad policies, in some cases they come from other
6 departments drafting their own versions of harassment
7 codes. And they sometimes apply really overbroad,
8 incredibly unconstitutional standards. But, also,
9 sometimes they add to an existing legal standard.

10 They add examples, a list of examples, that
11 touch on clearly protected speech. So getting -- so
12 basically the idea would be to have no more or no less
13 than the Davis standard to be extremely important.
14 Because in some cases you have a lot of universities that
15 have in one part of their policy a code that would be
16 constitutional. And then in another part of that very
17 same policy, have a list of examples or have another
18 definition of harassment that is going to lose in court.

19 So it is important to know that part of the
20 problem is that unless you make it clear that our -- this
21 is our sole harassment policy, and there is no more or
22 less than, I -- we think that the same kind of lawsuits
23 are going to occur. The same type of abuses are going to
24 occur, and the same kind of miseducation is going to
25 occur.

1 MR. KLAUSNER: Are we concluded then,
2 Mr. Lukianoff?

3 MR. LUKIANOFF: Yes.

4 MR. KLAUSNER: Okay. Thank you. You are well
5 within your time. And now if we could have our next
6 witness, Mr. Blair-Loy.

7 MR. ROSENTHAL: When do we get to ask
8 questions?

9 MR. KLAUSNER: Well, I was going to wait until
10 after each of the presentations are --

11 MR. ROSENTHAL: Okay.

12 MR. BLAIR-LOY: Thank you very much. And thank
13 you very much for the invitation. I'm delighted to speak
14 to the committee. I very much concur with Greg's
15 analysis of the applicable law. I think he is absolutely
16 right as a matter of 1st Amendment law and also as a
17 matter of California State law. California Education
18 Code, section 66301, guarantees college and university
19 students the same rights to freedom of speech on campus
20 that they would have off campus; thereby, incorporating
21 essentially 1st Amendment law. To the extent (Court
22 reporter unable to hear.) it might be a different
23 standard that would apply to college campuses. Certainly
24 in California, at least, that does not apply because of
25 the Education Code. In any event, I think, the

1 1st Amendment clearly does apply to public universities.

2 And I would concur with Greg's analysis of
3 1st Amendment law and the 1st Amendment problems with
4 overbroad speech codes. I also concur completely that
5 appropriate and narrowly tailored prohibitions on
6 harassment are not only valid but necessary to protect
7 equal educational opportunity. But they have to be
8 carefully drafted to comply with the appropriate legal
9 standards that Greg has very clearly laid out. I want to
10 emphasize a few other points. As warn out in my recent
11 interactions with the University of California San Diego
12 campus, I've provided copies of correspondents that I've
13 had with the university, which involved recent events at
14 the university, involving allegations of race of speech
15 and the response of the administration and student
16 government, which was in my view, in some cases not only
17 inadequate but positively illegal. And unfortunately the
18 situation has resolved itself.

19 But the -- and, you know, briefly what happens
20 when there's not a chance to review that correspondences
21 in response to some of the incidents of allegedly racive
22 speech in the form of an off-campus party and any
23 comments made over -- by student media. The student
24 government president unilaterally froze all funding to
25 all student media organizations on the campus. And we

1 both, FIRE and ACLU, corresponded with the university
2 (Court reporter unable to hear.) correspondence in your
3 records, I encourage you to read it.

4 It was a complete violation of the
5 1st Amendment. Not only -- it would have been bad enough
6 to silence or censor the allegedly offending speakers,
7 but the student government president went much farther
8 and unilaterally froze funding to all student media and
9 shutdown that forum for about two weeks. Unfortunately,
10 before litigation became necessary, the student
11 government as a whole rescinded that action and
12 reinstated the funding.

13 The lesson that I took from all that and that I
14 tried to convey in the letters that I wrote to the
15 university and also in an amicus brief that I filed in a
16 different case that presented similar issues, it's
17 also -- it provides the committee is that freedom of
18 speech is not only not inconsistent with equal
19 educational opportunity. It is an essential component of
20 equal educational opportunity for everyone on a college
21 or university campus. Free speech is an essential part
22 of academic inquiry. Without freedom of speech a college
23 or university cannot function properly and cannot serve
24 its highest mission to teach and explore all ideas and
25 all points of view.

1 Historically, freedom of speech is also
2 essential and has been essential and continues to be
3 essential to the struggle for civil rights and equal
4 opportunity. The civil rights movement could not have
5 existed. The movement for equal opportunity could not
6 exist without the guarantee of freedom of speech against
7 government censorship, against university censorship.
8 Within the last -- during the civil rights movement, the
9 various person and the various components of that
10 movement were -- well, the government did -- portions of
11 government at the state and local level and -- did their
12 utmost to stop the civil rights movement through
13 censorship. It wasn't just dogs in the street. It
14 wasn't just fire hoses in the streets of Birmingham, the
15 state of Alabama, the state of Mississippi. College
16 campuses all over the south and all over the country did
17 everything within their power to stifle and censor the
18 speech of civil rights activists. And it was because of
19 the 1st Amendment and the valiant efforts of civil rights
20 lawyers and the civil liberties lawyers defending the
21 free speech rights of civil rights activists that the
22 movement was able to continue and prevail. And I think
23 that is true just as much true today on college
24 university campuses.

25 And the problem not -- as Greg pointed out, one

1 of the problems with speech codes is that they inevitably
2 backfire on the very minorities that they purport to
3 protect. You know, the university of Michigan had a
4 speech code at one point. And some of the first
5 complaints filed under that code were by white students
6 against black students for allegedly -- speech that was
7 allegedly offensive to whites. I filed an amicus -- to
8 give you another example, I filed an amicus brief in a
9 case out of Poway High School in San Diego County
10 defending the free speech rights of a student to wear a
11 T-shirt that says, "Homosexuality is shameful. We should
12 not embrace what God has condemn." Now, I could not
13 disagree more with that point of view.

14 But we at the ACLU defended his right to say it
15 because if the school has the right to prohibit that
16 speech, then they have the right to prohibit speech that
17 says, "God is dead" or, you know, "I don't believe in a
18 God that says homosexuality is shameful." If Poway High
19 School can censor that student's message, then another
20 high school down the road or in another state or in
21 another county can turn around and censor the speech of
22 LGBT students who want to form a gay/straight alliance
23 who say that, "Silence equals death" and say that,
24 "Fundamentalism is bigotry." Fundamentalism is hatred.
25 Because if Poway High School can censor speech that is

1 supposedly offensive to LGBT students, what's to stop
2 another school from censoring speech that is offensive to
3 conservative Christian students?

4 So we defend the free-speech rights for all the
5 students, whatever the point of view, as long as they
6 don't cross the line into prohibitive harassment under
7 the Davis standard. This is consistent with our
8 position -- with what our position has always been, which
9 is that the response to bad speech is more speech, not to
10 censor speech, but to engage in more speech. Not only do
11 overbroad speech codes chill speech as a practical
12 matter, they don't solve the problem of unequal
13 educational opportunity. They don't solve the problem of
14 harassment.

15 Censorship only drives the speech underground.
16 It only drives the ideas underground. It also gives the
17 mistake an appearance that the institution -- the
18 administration is actually doing something to prohibit
19 harassment when, in fact, all it is doing is censoring
20 the speech. Harassment, unequal opportunity, racism,
21 they don't derive from the words themselves. The words
22 are nearly the manifestation of deeply held beliefs,
23 deeply held biases, people who hold prejudices that are a
24 part of an individual's culture, if you will, that
25 person's individual culture. The way to change culture

1 is to teach, to advocate, to persuade, to cultivate a new
2 culture. There is nothing to say that a university or a
3 college or a school cannot engage in its own advocacy
4 through its own power of government speech.

5 It can teach respect for diversity, it can
6 cultivate tolerance, it can cultivate respect. Fostered
7 by persuasion and example rather than dictate. That is
8 what freedom of speech is about. Not only does
9 censorship, you know, not solve the problem, it actually
10 backfires in another way in that it tends to promote the
11 censored message. We saw this in the Poway case. The
12 student at Poway High School wore his T-shirt that says,
13 "Homosexuality is shameful." If the principal and the
14 administration simply ignored it, he probably would have
15 given up and stopped wearing it, or (Court reporter
16 unable to hear.) I'm sure a lot of students that laughed
17 him off and said, "There goes that guy again."

18 But because the principal said, "No. You can't
19 wear that shirt," he became a free-speech martyr. His
20 story was spread all over the media. It was front page
21 in the Tribune and all of the Internet. And his message
22 got much more distribution than it would have had if the
23 administration had simply said, "Oh, there he goes
24 again." There are many, many things that universities
25 and colleges can do and in the ACLU's view should do: To

1 promote respect, to promote diversity, and to promote
2 equal education opportunity. Censorship of protected
3 speech was not one of them. Thank you.

4 MR. KLAUSNER: Thank you very much. We have
5 time now for questions. I'd also like the record to show
6 that one of our other members of the subcommittee has
7 arrived. Karen Lugo is here from Orange County, on the
8 left.

9 So as far as our panelists are concerned, does
10 anybody have questions they'd like to ask?

11 MR. DOLLINGER: Good morning. Thank you both.
12 My goal this opening session has been education. That is
13 to learn the legal constructs of the various codes and
14 where they are. In that point I'm a little concerned
15 that both of you see eye to eye. So if I could ask: If
16 you had opposing counsel here to give the opposite legal
17 interpretation of the points that you made, what would
18 they say?

19 MR. LUKIANOFF: I mean, you have to understand
20 there has never been a successful litigation defending
21 these codes. So while people a lot of times look for the
22 other side of the argument, these things have never been
23 upheld in the court. So I haven't -- I would be -- I'd
24 have a hard time fashioning a good argument because this
25 is directly in opposition to supreme court standards.

1 MR. ROSENTHAL: There has never been a defense
2 in any of these cases that you have brought forth?

3 MR. LUKIANOFF: Not one that I think is worth
4 repeating. I mean, they have all failed.

5 MR. BLAIR-LOY: All right. Let me just be
6 clear. I mean, when I say -- when we say -- when I say
7 "speech code," I mean a code that prohibits
8 constitutionally protected speech. Now, as Greg said,
9 the Supreme Court has been very clear as to what can be
10 prohibitive, what kind of harassment can be prohibited.
11 And I believe, you know, Greg has the standard with this.
12 I don't think -- it's -- you know, conduct, it is
13 unwelcome, objectively severe, and pervasive. I don't
14 have the precise language in front of me, but that is
15 supreme court law.

16 MR. LUKIANOFF: Yeah.

17 MR. BLAIR-LOY: And if a standard -- if a
18 school or university adopts that language, and it -- and
19 applies it consistently and appropriately, that will be
20 constitutionally valid and, in my view, constitutionally
21 appropriate to balance the 1st Amendment right to freedom
22 of speech and the 14th Amendment right to equal
23 protection. These rights do not need to conflict and
24 should not conflict. And I don't know -- if you were to
25 ask -- I mean, you can -- I know that you'll have a

1 university counsel as part of your session today, but, I
2 mean, you can ask them. I mean, most university counsel
3 will tell you that this is -- I think, and I've spoken of
4 it, this is the law and understanding.

5 MR. LUKIANOFF: Yeah. And it's interesting
6 because the times that I have actually spoken with
7 university counsels from California, because I do
8 actually give a lot of lectures, they've been pretty much
9 agreed.

10 MRS. MONTROYA: But how can they have agreed
11 when you are telling us that between 1999 and 2009, there
12 were overbroad harassment codes at the University of
13 California?

14 MR. LUKIANOFF: It is a mystery to me how these
15 codes have been able to survive so long. And I do think
16 that it's a combination of ideology, bureaucracy,
17 liability, and people just not knowing that they're there
18 in the first place. So that's really FIRE's job, to
19 educate people on the fact that they are there. Because
20 the main thing we run into is just denial. And a lot of
21 the maneuvers actually (Court reporter unable to hear.)
22 courts involved trying to fight outstanding. And then
23 really more procedural techniques for -- to get the case
24 dismissed, which also haven't worked, frankly.

25 MR. BLAIR-LOY: As a (Court reporter unable to

1 hear.) I'll just add briefly. First of all, not every
2 administrator who drafts a code consults with counsel.

3 MR. LUKIANOFF: Yes. That's a big part of the
4 problem.

5 MR. BLAIR-LOY: If they did consult with
6 counsel before drafting something, you know, competent
7 counsel would tell them that, you know, an overbroad code
8 is not legal, is not going to survive legal challenge.
9 As Greg said, you know, sometimes they were drafted
10 without benefit of counsel, and then just (Court reporter
11 unable to hear.) bureaucratic inertia.

12 MR. LUKIANOFF: Yeah.

13 MR. BLAIR-LOY: And then other times people
14 just don't do what their lawyers tell them to do.

15 MRS. MONTOYA: Let me just tell you that I
16 looked up those five campuses --

17 MR. LUKIANOFF: Yup.

18 MRS. MONTOYA: -- that still have the
19 nonEudolph directive overbroad harassment codes. And a
20 number of them are overseen by the top education counsel
21 in the University of California.

22 MR. LUKIANOFF: Right. Right.

23 MR. KLAUSNER: Let me just call on
24 Matt Rosenthal for a question, and then after that will
25 be Gail Heriot and Joe Hicks.

1 MR. ROSENTHAL: I actually have a few
2 questions.

3 MR. KLAUSNER: Well, maybe we'll rotate around.

4 MR. ROSENTHAL: Okay. Thank you very much for
5 being here. You gentleman have, you know, talked very
6 much about policy. But what proof do you have that there
7 are actually civil rights violations in the state of
8 California? For example, Mr. Lukianoff, you talked about
9 Indiana University, Tufts --

10 MR. LUKIANOFF: Yes.

11 MR. ROSENTHAL: Brandeis. And I'm --

12 MR. LUKIANOFF: And San Francisco State
13 University.

14 MR. ROSENTHAL: Okay. San Francisco State.

15 MR. LUKIANOFF: Yeah.

16 MR. ROSENTHAL: But I want you to -- the
17 purpose of this committee is really to tackle actual
18 violations and not to discuss policy.

19 MR. LUKIANOFF: Uh-huh.

20 MR. ROSENTHAL: But to know that people with
21 actual civil rights are directly being violated.

22 MR. LUKIANOFF: Yes.

23 MR. ROSENTHAL: So I want you, please --

24 MR. LUKIANOFF: Yeah.

25 MR. ROSENTHAL: Just a minute. I want to be

1 very clear for you to answer my question. I want you to
2 detail the evidence --

3 MR. LUKIANOFF: Uh-huh.

4 MR. ROSENTHAL: -- of the actual violations
5 that are occurring within this state. I want you to give
6 me a list of what you know.

7 MR. LUKIANOFF: Well, the policies themselves
8 are actually violations. And this is something that a
9 lot of people don't seem to understand. That when you
10 pass a policy that actually tells people that they have
11 far fewer speech rights than they do, that is considered
12 to be a very serious violation of the rights of
13 Americans.

14 MR. ROSENTHAL: Nobody made -- but you talked
15 about, sir, that there are certain effects such as people
16 are afraid to open their mouth. How do you know? How do
17 you know people are actually afraid to open their mouths
18 within the state of California? I want you to give me
19 the evidence that you not just -- this is a policy. And
20 I think this is going to be -- I interpret the result of
21 this policy, but I want -- I don't want your
22 interpretations. I want the facts where people are --
23 prove to me that these policies have resulted in people
24 being afraid to open their mouths on campuses.

25 MR. LUKIANOFF: Well, first of all, the idea of

1 the chilling effect isn't something you want. But
2 essentially the reason why overbroad codes are considered
3 to be unconstitutional is, and this is repeated over and
4 over and over again in the law. Is it assumed? True.
5 That when codes are frequently wildly overbroad, that
6 people are going to be afraid to open their mouths.
7 That's just established. Now, when it comes to actual
8 examples of abuses from Californians, then sure. There
9 have been a number of them at San Francisco State
10 University. That was the example that I used earlier.

11 This was a case where students were protesting
12 what they thought was an overly pro-Palestinian, not
13 particularly pro-Israel stance on campus. And they made
14 (Court reporter unable to hear.) of Hamas and Hezbollah
15 flags and (Court reporter unable to hear.) designated
16 (Court reporter unable to hear.) and stepped on them.
17 Now, they were brought up on charges. And it took the
18 university, you know, a couple of months, I think,
19 actually to come up with which rationale they were going
20 to punish them under. The first one that they played
21 with was harassment. They eventually settled on
22 civility, being -- and this was all (Court reporter
23 unable to hear.) acquired writing and actually saying,
24 "Well, this is" -- "if you can burn an American flag
25 under Texas v. Johnson, you can certainly step on Hamas

1 and Hezbollah flags." There is no question about that.
2 But the university went ahead with these things, and it
3 took a -- it took quite a while.

4 MR. ROSENTHAL: Okay. So that's one.

5 MR. LUKIANOFF: So -- and eventually this
6 resulted in a system -- a court finding that the -- of
7 the civility code for the entire California State
8 University system was unconstitutional. So that's one.
9 At Cal Poly University a student put up a poster for a
10 speech by a black conservative. The title of the book
11 was: It is Okay to Leave the Plantation. And he was
12 brought up on charges at Cal Poly. This case is well
13 documented also by FIRE, but also in the documentary
14 (Court reporter unable to hear.). And they also played
15 with harassment in this case. The rationality they
16 settled on was disruption, saying that students felt
17 internally disrupted on campus by seeing this poster and,
18 therefore, subjected the student to an eight-hour
19 hearing.

20 There is also a case at UCLA where students
21 were trying -- who were actually (Court reporter unable
22 to hear.), and were trying to actually invite someone to
23 take the other side of the argument. And they charged
24 the students something like a -- they were trying to
25 charge the students a particularly expensive -- I think

1 it was something like a \$5,000 security fee in order to
2 have those students on campus. Those students -- now,
3 that, again, is a gross violation of the establish --
4 established in the supreme court law. I mean, we have an
5 entire case base devoted to cases that we have had in
6 California over the years, and I can definitely produce
7 additional examples.

8 But, again, if you have codes that actually say
9 that the substantial portion of freedom of speech is
10 punishable, people will be afraid to open their mouths.
11 Okay. Also UC San Diego, which we just discussed, or
12 Southwestern University, where they actually limited free
13 speech to a lone-free-speech patio, a code that they have
14 yet to overturn.

15 MR. ROSENTHAL: UC San Diego --

16 MR. KLAUSNER: Hold on. Let me just say
17 because we have limited time and other people have to ask
18 questions -- but I would also like to ask if I could hear
19 just briefly from Mr. Blair-Loy, if you want to augment
20 that. And then I would like to invite both of you (Court
21 reporter unable to hear.) particularly useful for the
22 purpose of our briefing here today, if you could
23 supplement your comments today with examples of certain
24 kinds of things that you have in your files and also
25 what's available.

1 MR. BLAIR-LOY: And I'll be glad to do that.
2 Just to emphasize, I am legal director for ACLU of
3 San Diego and Imperial County, so my territory is only
4 San Diego and Imperial County. That is the area that I'm
5 most familiar with. I would certainly be glad to talk to
6 my colleagues at the separate affiliates of ACLU of
7 northern California and southern California for their --
8 any experience they have with these issues. Obviously
9 FIRE covers nationwide and statewide issues. But I did
10 place in the record examples of my correspondence with
11 UCSD. This is a very recent example where there were two
12 problems. One, the university made a lot of noise about
13 investigating students for an off-campus party, so called
14 the --

15 MR. KLAUSNER: This is the matter that you
16 referred to earlier?

17 MR. BLAIR-LOY: Yes.

18 MR. KLAUSNER: (Court reporter unable to
19 hear.).

20 MR. BLAIR-LOY: Absolutely. I just want to say
21 briefly, you know, whether it's UCSD or San Francisco
22 State. The process of investigation is itself a
23 punishment. Anyone who has ever been investigated or
24 prosecuted, even if ultimately acquitted or not suspended
25 or not disciplined, that process itself is the

1 punishment. And that sends a message (Court reporter
2 unable to hear.) other student out there. So the
3 cause -- the price that we pay we may never know. We may
4 never know what people don't say. We only know who
5 actually got disciplined.

6 MR. ROSENTHAL: That's not the purpose.

7 MR. KLAUSNER: All right. So let me go now to
8 (Court reporter unable to hear.). You're next and then
9 Mr. Hicks.

10 MRS. HERIOT: Do I need the microphone or --

11 MR. KLAUSNER: Yeah.

12 MR. HICKS: It doesn't reach that far.

13 MRS. HERIOT: I'm loud anyway. Mr. Blair, you
14 mentioned the Poway school, and I am curious.

15 Is there a line to be drawn between what
16 universities can do and what school systems can do? And
17 I'm particularly interested on -- not so much on the
18 harassment side, because, I think, with the Davis case we
19 have got a president there. It's quite clear. But on
20 the civility side, can the Poway schools ban T-shirts
21 with obscene language or not very nice language, or can
22 they, in fact, ban all T-shirts that say anything?

23 MR. BLAIR-LOY: There is a case the US Supreme
24 Court called Frasier --

25 MR. LUKIANOFF: Yeah. Frasier.

1 MR. BLAIR-LOY: -- which arose out of a high
2 school in which the Supreme Court upheld the authority of
3 a public high school to censor speech that is vulgar or
4 lewd but is not legally obscene. You know, speech that
5 could not be censored outside of the high school or
6 primary school context. So I doubt that would properly
7 apply to the university whereby definition (Court
8 reporter unable to hear.) prohibited adults over
9 eighteen; therefore, legally adults.

10 MRS. HERIOT: What year was that?

11 MR. BLAIR-LOY: What year was Frasier decided?

12 MRS. HERIOT: Yes.

13 MR. BLAIR-LOY: 1986, '87. This is the
14 mid 80s. I don't know how far exactly. But that's
15 pretty settled to Supreme Court law that primary and
16 secondary schools have greater power to censor certain
17 forms of speech than do colleges or universities. So,
18 for example, a vulgar or lewd speech. So, for example,
19 there's the classic case of Cohen versus California. But
20 pardoned on a (Court reporter unable to hear.) for the
21 case, the Supreme Court (Court reporter unable to hear.),
22 which is California, upheld a man's right to wear a
23 T-shirt that said, "Fuck the draft" in a state
24 courthouse. However, under Frasier a high school student
25 could not wear that same shirt to school not because of

1 the content of his message, but because of the manner of
2 his expresser.

3 MRS. HERIOT: Thank you.

4 MR. KLAUSNER: Mr. Hicks?

5 MR. HICKS: Yeah. A couple of very quick
6 questions. One, you mentioned a European hate-speech
7 code, and I'd like you to explain what European standard
8 seem to be across -- in many of those countries.

9 MR. LUKIANOFF: Yeah. It's definitely a mixed
10 bag. In many countries of Europe they have explicit bans
11 on things that can be conceived as hateful. And -- but,
12 you know, they are different per jurisdiction per country
13 or so. And, you know, I attend actual international
14 hate-speech conferences about these, and we get to see
15 how they work out and practice. America has what, I
16 think, is a much more generally multicultural idea that
17 actually everybody gets a chance to speak. And I think
18 that ultimately that's one of the -- that is actually
19 something that America can export to other countries is
20 the idea that freedom of speech is actually signed in a
21 generally robust and diverse society.

22 MR. HICKS: But my large concern is, one, I
23 think Mr. Trevino (Phonetic) mentioned if, in fact, a
24 number (Court reporter unable to hear.) seem to be
25 avoiding the states --

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MR. LUKIANOFF: Right.

MR. HICKS: -- standard and its code --

MR. LUKIANOFF: Yes.

MR. HICKS: -- then there must be some political impetus on these campuses to maintain that.

MR. LUKIANOFF: Yes.

MR. HICKS: If that is so, and I know you that you can certainly comment on that, what do you think needs to happen to impact these campuses that are avoiding the law in some cases --

MR. LUKIANOFF: Right.

MR. HICKS: -- by just ignoring the fact that you've got unconstitutional codes in place?

MR. LUKIANOFF: Well, the truth is why some of these codes stay in place is general, a mixed bag. And I usually come down to four different reasons. One of those, you know, again, it's -- I consider it's ideology, bureaucracy, liability, and ignorance. And part of the ignorance is that people, in some cases students, that afford -- the right people don't know that these codes are in place in the first place. But the liability factor has offended people actually understand the least. And this is the thing that's been -- you know, in addition to knowing (Court reporter unable to hear.). So it's the most interesting thing that contributes to this

1 cause is risk management, fear of liability.

2 There is what I consider to be sort of a
3 popular myth within the university lawyers that if you
4 get sued for discrimination or harassment, you can
5 actually -- one of the -- something you can offer as an
6 affirmative defense is that you actually have to put in
7 place a very rough speech code. And that -- and if it
8 violates the 1st Amendment, fine. It just has to look
9 like you're aggressively going after this problem. Now,
10 the unfortunate thing that's (Court reporter unable to
11 hear.) -- and, again, this is -- in some cases I don't
12 blame the risk management industry for giving this
13 advice.

14 First of all, I do. But what's been happening
15 is there has been an increase in litigation, particularly
16 by the Alliance Defense Fund, but also by the ACLU that
17 has been demonstrated that there is also a cost to
18 passing these codes. So it is kind of unfortunate in
19 that it seems to be some -- there is some level of beyond
20 ideology of just universities thinking, "Oh, well. These
21 will keep us safer if we're sued for discrimination or
22 harassment." That unfortunately what's having to happen
23 is that universities are getting sued with greater
24 frequencies. So the balancing act actually sits more in
25 favor of actually protecting free speech than having what

1 was on harassment codes.

2 Now, the perfect solution to this is just
3 follow what the Supreme Court said. It perfectly deals
4 with actual sexual, racial harassment, and it prevents --
5 it insulates universities from free-speech lawsuits.

6 MR. KLAUSNER: We'll take one more question,
7 and then we'll go into our scheduled break.

8 MR. ROSENTHAL: I do have another question.

9 MR. KLAUSNER: All right. I'll just --
10 we'll -- all right. What I'll do, I'll let anyone else
11 on the subcommittee go ahead and ask a question. Ask
12 one. Given the limited time, we'll (Court reporter
13 unable to hear.). I'm grateful for your information and
14 that you volunteered.

15 MR. DOLLINGER: I asked a question already,
16 though.

17 MR. KLAUSNER: Okay. So Mark, we'll pass it on
18 to you and then John Dodd.

19 MR. DODD: I just have a question on
20 implementing these things. You say they bring these
21 young people up on charges. What do they do? First of
22 all, what are the different processes that are employed?
23 You said sometimes some -- you know, a student leader or
24 bureaucrat makes a --

25 MR. LUKIANOFF: Yes.

1 MR. DODD: -- makes a decision about himself,
2 so maybe you could explain some of these processes. And
3 then, two, what are the penalties? You know, do they
4 just get a discard letter, or do they get dinged on their
5 record, or do they get suspended, or what happens to them
6 for violating these codes?

7 MR. LUKIANOFF: It is honestly a really mixed
8 bag. In some cases, like the case I talked about,
9 Indiana, this was an affirmative action officer who sent
10 a letter saying, "You have been found guilty without a
11 hearing of violation of the harassment code." Meanwhile,
12 at San Francisco State University they did actually
13 follow their policy and actually go through a student
14 judiciary. So in a lot of cases, the student judiciary,
15 sometimes it's actually just an administrator declaring
16 someone guilty. Punishment can be, for a student group,
17 anywhere from disbanding to probation. But, again, as we
18 said, the idea that you can be hauled up, you know, in
19 front of a committee to evaluate what you said when it is
20 clearly protected is also considered to be a
21 1st Amendment (Court reporter unable to hear.).

22 MR. DODD: (Court reporter unable to hear.) as
23 part of the group, I consider it to be funded. But the
24 individual, what do they do to them?

25 MR. BLAIR-LOY: Well, it can -- I mean,

1 violations of these codes are treated as violations of
2 the student code conduct, and that typically includes
3 penalties, anything from a verbal reprimand all the way
4 up to suspension or expulsion. These kinds of codes
5 typically invest enormous discretion in the university to
6 meet how -- what are the terms of the appropriate
7 punishment. And that's fine in sort of the normal run of
8 the mill, you know, academic integrity issues which are
9 plagiarism or stealing or what have you. But when it
10 comes to speech, the more discretion (Court reporter
11 unable to hear.) vast in the decision maker to decide, A,
12 what the standard is and, B, what the punishment will be,
13 the greater chilling effect.

14 And we saw this in a UCSD case recently in
15 response to this off-campus party, this so called Compton
16 Cookout. I mean, university administration in the press,
17 in the media, in it's own public statements was rattling
18 a very sharp sabre talking about potential suspension,
19 potential expulsion of people for, you know, an
20 off-campus party that was in questionably and extremely
21 poor taste, and very offensive to many people. It was in
22 no way, shape, or form unprotected speech.

23 MR. DODD: So -- but the lesser punishments
24 would have effects for employment. I suppose if you
25 apply to a job when you get out and if you've been

1 academically disciplined or if you get into graduate
2 school, and you have to report that or even --

3 MR. BLAIR-LOY: Yeah. Absolutely. Yeah.

4 MR. DODD: And sitting on -- I was on a
5 committee of bar examiners, and for those lawyers you
6 have to fill out this long questionnaire and report
7 everything. So that would be a reportable offense to the
8 committee of bar examiners.

9 MR. LUKIANOFF: Potentially, yes. And
10 absolutely. And, I mean, before these things would have
11 to be underlined. If you have on your transcript that
12 you've been found guilty of racial harassment, that is
13 not good.

14 MR. KLAUSNER: Our time has come to conclude
15 this first panel. I want to thank both of you. You are
16 very knowledgeable. You know your area. You perceive
17 civility and cadence in your presentation. So I do
18 invite you, again, to augment your presentations if you
19 want to give further examples in response to (Court
20 reporter unable to hear.).

21 MR. LUKIANOFF: Sure. Absolutely.

22 MRS. MONTROYA: Can I take a picture really
23 quick?

24 MR. KLAUSNER: We have a semiphotographer.

25 (Court reporter unable to hear.).

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MRS. MONTOYA: Smile.

MR. LUKIANOFF: I can actually blur out my face.

MRS. MONTOYA: Okay. Is that okay?

MR. KLAUSNER: I think that will do. This is for posterity. We have a special rate, which we will discuss with you separately. Thank you again. We'll take a recess now. Our next panel begins at 11:00 a.m. (Whereupon, there was a short break in the proceedings.)

MR. KLAUSNER: Ladies and gentlemen, we're about to resume here. And if there's somebody out in the hallway, maybe we can go and give them notice. We're about to resume our hearing. And if the next witnesses want to take your places at the table here, we'll be getting under way shortly here.

And for the record, let me welcome our two next panelists. We have Robert MISTER, who is the chair of the counsel of the University of California Faculty Associations, and Anne Neal, who is the president of the America Consulate of Trustees and Alumni.

And as I indicated, and of course with protocol, we proceed in alphabetical order, which means that Mr. Meister is first on deck.

MR. MEISTER: Thank you very much. And thank you for inviting me. I want to make one main point.

1 That since the regents of the University of California
2 acted on November 18th to raise tuition, the University
3 of California is applying the principle of vicarious
4 liability that comes from court law to all student
5 protests directed against the regents. That is to say it
6 is applying the principle of vicarious liability to
7 protest directed against itself. University of
8 California, since November 18th, now tells all
9 participants or potential participants in any student
10 protests or demonstration that they can be held jointly
11 and severally liable for a violation occurring at any
12 subsequent time committed by any other person even if
13 they are not present at that time.

14 In other words, the University of California
15 now treats political protests and demonstrations using
16 the same legal and disciplinary techniques it applies to
17 fraternity parties. When you have a fraternity party at
18 a university, it is at least arguably the case that you
19 want to develop disciplinary rules that encourages
20 students to chill or perhaps to avoid going to a party
21 that might turn wild or rowdy. There are due-process
22 issues. I don't want to go into them here.

23 The problem is that the central meaning of the
24 1st Amendment, as you all probably know better than I, is
25 that you cannot apply tort doctrines such as vicarious

1 liability to protected speech and to the rules
2 establishing public order, time, place, or manner of
3 activities, some elements of which involve protected
4 speech. And it is certainly the case with respect to
5 student protests at the University of California against
6 the policies of the University of California that at
7 least some of what is being done falls squarely under the
8 category of protected speech and cannot be punished using
9 a doctrine of vicarious liability in which everyone is
10 held responsible for what anyone does either at the time
11 or subsequently.

12 In other words, the form of regulation of
13 protected speech must take direct account of its special
14 status and must make specific exceptions -- specific
15 exemptions to the use of doctrines that are simply not
16 intended to deter or to chill various kinds of conduct
17 that are disfavored and particularly, in the case of
18 political protests, that are being punished by the
19 university and that are directed against the university
20 itself.

21 Now, further point is that the universities
22 disciplinary proceedings are now in a way that they never
23 were so clearly before, directly targeted at concerta
24 action. That is the point of the vicarious joint and
25 several liability doctrine. Students are being told that

1 it is permissible under the rules as they are written to
2 disregard the 1st Amendment aspect of their activity by
3 holding them vicariously liable for the actions of
4 others. But they are also told that, that theory would
5 not apply if they identified the others who performed the
6 acts in question.

7 In other words, the doctrine of vicarious
8 liability is basically being used to break up student
9 organizations and prevent them from acting in concerta by
10 telling students that the only way out of the application
11 of the doctrine -- the only way out is to rat and snitch.
12 Now, my understanding of the constitution is different
13 than that. It is based on the cases that you heard
14 discussed earlier from the 1960s based on the cases
15 involving the civil rights movement; wherefore, example,
16 literary laws were held unconstitutional because they did
17 not distinguish between loitering and leafleting, and,
18 thus, demonstrations could not be prohibited on the basis
19 of loitering laws or enjoying the required post bond for
20 the clean up because they make a mess. One of the things
21 we learned in the 1960s is -- at the cost of having the
22 1st Amendment is that it may sometimes include the right
23 to make a mess.

24 Students who do not participate in
25 demonstrations are told that if there is a mess at any

1 point thereafter, and they are identifiably present at
2 the demonstration, they can be held not merely jointly
3 liable for the mess but severally liable for the mess
4 unless, of course, they are willing to rat on the person
5 who made the mess. Now, I would never have thought at
6 the University of California that the disciplinary rules,
7 the conduct rules that apply to students could be applied
8 in this way. I would have thought that the rules, while
9 they don't explicitly distinguish between protected and
10 unprotected conduct, while they don't explicitly
11 distinguish between a fraternity party and a political
12 demonstration, would apply to make that distinction.
13 That is to say that the obvious defense, full
14 exculpation, would be that, as far as I'm concerned, I
15 was engaging in a protected speech.

16 This is not the case. How do I know that it is
17 not the case? Because just this Monday I accompanied a
18 student, one of my very own good students to a hearing in
19 which she was for the first time being shown the evidence
20 against her. Evidence against her which arises from a
21 four-day occupation of (Court reporter unable to hear.)
22 Hall, which happens to be the chancellor's office, where
23 the chancellor happened to be the object of the protest,
24 consists of one shot, distilled shot, taken from a
25 security camera, which my student stands in the public

1 area in front of the reception desk with both hands on a
2 bullhorn and her mouth open.

3 Now, there is no soundtrack on this security
4 camera, so I can't be absolutely sure she was engaging in
5 protected speech. But prima facie, it sure looks --
6 looks like that. There is no other evidence against her
7 than being in the public's face during normal business
8 hours in front of a public building, in a public
9 university of which she is a member in excellent
10 standing. Indeed, she is an outstanding student. But
11 that has nothing to do with her 1st Amendment rights. No
12 other evidence against her, and she has been presented
13 with a pro rata share of \$38,000 in damages, 14,000 of
14 which is simply for cleanup, for removing trash, for
15 loiter, and some of which is for vandalism that everyone
16 knows occurs three nights later.

17 The students who are being charged a pro rata
18 share of these damages are students who identified
19 themselves by engaging in public acts. My student,
20 standing in front of the building, holding a bullhorn
21 with her mouth open, I don't know exactly what she said.
22 Other students who wrote about the protest for the
23 newspaper or for other campus media and several of the
24 students who participated during negotiations which
25 occurred after my student was photographed and could be

1 construed to have meant that the students at least were
2 in the building permissibly and legally -- in other
3 words, this looks a lot like the kind of protected
4 activity that should be an exception to the application
5 of the vicarious liability doctrine that would apply
6 outside the 1st Amendment area, and that should limit the
7 ability of the university to recover the full extent of
8 damages in the same way that NAACP versus Claiborne
9 Hardware says that even though a constitutionally
10 protected boycott may result in damages of a sort that
11 could have been illegal, your ability to recover is based
12 upon the idea that the constitution actually blocks
13 causal chain reasoning insofar as well.

14 Essentially, the idea is speech may be a spark,
15 but the 1st Amendment means that a speaker could not be
16 committed or convicted of arson on the basis of speech
17 alone. In other words, illegal activity that follows
18 from protected activity cannot be consequentially
19 punished. Now, I want to conclude simply by saying that
20 the 1st Amendment, if it means anything at all, certainly
21 blocks vicarious liability. It blocks causal chain
22 reasoning of a sort that is common, otherwise, in tort
23 law. And I would have thought after the University of
24 California went through the entire free-speech period
25 that the University of California would actually have

1 free speech. It is not the case, however, that the
2 free-speech movement brought us free speech in the same
3 degree that the civil rights movement brought us civil
4 rights.

5 The result of the free-speech movement was that
6 faculty and students were fired and dismissed for
7 activities that were political. Faculty tenure was
8 subject to good cause. And all of the faculty dismissal
9 cases would be the question, essentially, of whether, for
10 example, missing your class because you were on strike
11 was the same as missing your class because you were on
12 vacation. The academic senate did not insist on
13 protecting academic-freedom speech. It adopted a faculty
14 code of conduct that simply listed an exhaustive set of
15 good causes for which someone could be disciplined or
16 dismissed.

17 The student code of conduct is similar. It
18 does not distinguish between protected constitutional
19 activities and regulateable activities. It does not
20 distinguish between fraternity party and a political
21 protest. And so the University of California becoming
22 once again a laboratory for free speech. I will ask my
23 friends in the American Civil Liberties Union to seek a
24 temporary restraining order against the application of
25 the entire student discipline code to the student

1 protests on the grounds that it is unconstitutionally
2 overbroad and void on its face. And I would like for
3 you, the Civil Rights Commission, to consider the same
4 question: Is it necessary for university discipline
5 codes for both faculty and for students to explicitly
6 distinguish between protected and unprotected forms of
7 expression insofar as they are, as apply, having a
8 substantial effect in deterring or chilling 1st Amendment
9 protected activities? Thank you.

10 MR. KLAUSNER: Thanks, Mr. MISTER. You have a
11 couple minutes remaining yet. And we will have questions
12 afterwards. But I do want to make the observation for
13 you and other speakers here that will be on other panels.
14 And that is that our purview is limited to the types of
15 discrimination involving free speech that comes under the
16 protected categories that I indicated at the outset of
17 the meeting. Unless there is some aspect of
18 discrimination that's either based on race, color,
19 religion, sex, age, handicap, or national origin, then it
20 is really not within our purview. So if you, when you
21 indicated in your comments that you use a picture of your
22 student with a bullhorn, didn't know what she was saying,
23 from our standpoint known what she is saying. And if
24 there was discrimination against her based on her
25 advocacy of a particular point of view for gay rights or

1 for woman's rights or something that comes within our
2 purview, that will be very useful for us as we are
3 gathering information for our briefing and as we prepare
4 our report.

5 MR. MEISTER: I would be happy to ask her what
6 she said.

7 MR. KLAUSNER: And also the circumstances then
8 to see if she has any reason to think that the reason she
9 is being disciplined is because of the content of her
10 speech and not just the fact that she is speaking the
11 specific content and what it was. Okay. Thanks. Thank
12 you very much. Now, our second speaker on the panel is
13 Anne Neal.

14 MRS. NEAL: Good morning. And thank you to the
15 committee for inviting me to be here today. I am
16 President of the American Consulate of Trustees and
17 Alumni. And I'm most pleased to share some thoughts
18 about free speech on campus, a critically important issue
19 both here on California's public campuses as well and
20 across the country. By way of background, the American
21 Consulate of Trustees and Alumni, which was founded
22 in 1995, we are an independent nonprofit representing
23 thousands of parents, taxpayers, alumni, and trustees
24 from across the country, including California, who
25 believe in a quality education at an affordable price.

1 We adhere to the three A's: Academic freedom, academic
2 excellence, and accountability in higher education. And
3 we believe that a critical part of a quality education is
4 a campus atmosphere that fosters open debate, vibrant
5 dialogue, multiple view points, and the free exchange of
6 ideas. Sadly, the free exchange of ideas is in many ways
7 an endangered species on our college campuses.

8 And as we are discussing today and have already
9 heard this morning, many institutions around the country,
10 including those here in California, have put in place
11 policies called speech codes, harassment codes,
12 student-conduct codes, and free-speech zones that are
13 really nothing more than wrongful restrictions of free
14 speech protected by the 1st Amendment. (Court reporter
15 unable to hear.) FIRE, the ACLU, and others in condemning
16 speech codes which go far beyond the law and restrict
17 much protected speech. Far from encouraging the free
18 exchange of ideas, these kinds of codes do just the
19 opposite, putting certain areas of discussion off limits
20 in the vague fear that they will do (Court reporter
21 unable to hear.). Now, all members of the community
22 should be concerned, as I will outline in the next few
23 minutes. Trustees or regents have a special obligation
24 as fiduciaries. 1st Amendment is fully protected on
25 campus; and to resist those forces, that would revere

1 sensitivity more than the 1st Amendment and free
2 expression protection. In doing so, they can join other
3 boards across the country standing up for free
4 expression.

5 First, let me start with a little history. In
6 founding the University of Virginia, Thomas Jefferson
7 articulated, well, the issue we address today. The
8 essence of the university experience, he said, should be,
9 and I quote, "Based on the unlimitable freedom of the
10 human mind, to follow truth wherever it may lead and to
11 tolerate any error so long as reason is left free to
12 combat it."

13 Stated another way, the university should be a
14 place where diverse views can be expressed freely even if
15 they are offensive. "The answer to offensive speech, the
16 answer to error," as Jefferson put it, "is more speech."
17 This foundational principal is reflected in the mission
18 statements in California's public universities. The
19 University of California outlines that central pervasive
20 mission of discovery and advancing knowledge in
21 California State University's mission statement outlines
22 CSU's obligation to, and I quote, "Encourage free
23 scholarly inquiry and protect the university as a forum
24 for the discussion and critical examination of ideas,
25 findings, and conclusions."

1 Now, in recent years there has been a growing
2 view that only one insults harassment, disrespect, and
3 vulgarity are banned on universities as people engage in
4 truly substantive arguments. As this thinking goes, we
5 should not offend, we should not make people
6 uncomfortable, we need to get along first. And it has
7 immense appeal. But as we have already heard this
8 morning, those who look favorably towards speech and
9 harassment codes miss an important point. Rather than
10 encouraging speech, ones which are overly restrictive,
11 create a chilling atmosphere effectively empowering the
12 institution to silence students and faculty on the
13 grounds that a person or even a group has been offended.

14 Faced with speech codes or harassment policies,
15 whatever the name or whatever the guise that are overly
16 broad, students and faculty will hold back from
17 expressing controversial opinions and making forceful
18 arguments. When they are worried, they might face
19 administrative or disciplinary repercussions to
20 constitutionally protected speech. But as Jefferson told
21 us, "The purpose of education is not to induce correct
22 opinion or impose orthodoxy and suppress decent." No one
23 has a right not to be offended. Rather, it is to search
24 for wisdom and to liberate the mind, to be sure
25 solidarity, civility, and mutual respect are important

1 values. But in an institution of higher learning, they
2 are not the defining values. On this very point, there
3 is an inspiring guidance from an academic committee
4 (Court reporter unable to hear.) at Yale to address these
5 issues in the 1970s.

6 After several prominent speakers, including
7 General William (Court reporter unable to hear.) and
8 Secretary of State, William Rogers, felt compelled to
9 cancel their plans to speak. President (Court reporter
10 unable to hear.) established a committee shared by noted
11 historians (Court reporter unable to hear.) to address
12 the free exchange of ideas on campus. And I quote from
13 the committees report, "Without sacrificing the
14 universities central purpose, it cannot make its primary
15 and dominant value the fostering of friendship,
16 solidarity, harmony, civility, or mutual respect to be
17 sure," said the committee. These are important values.
18 Other institutions may properly assign them the highest
19 and not merely a subordinate priority. Through the good
20 university we'll seek and may in some significant measure
21 attain these ends.

22 But we'll never let these values, as important
23 as they are, override its central purpose, to value the
24 freedom of expression precisely because it provides a
25 forum for the new, the provocative, disturbing, and the

1 unorthodox. Free speech is a barrier to tyranny of
2 authoritarian or even a majority opinion as to the
3 rightness or wrongness of particular doctrines or
4 thoughts. Now, given these important values, whose
5 responsibility is it then to ensure the robust exchange
6 of ideas and to identify and eliminate campus speech
7 codes which unduly restrict that exchange of ideas? The
8 faculty? The administration? Well, yes. But the fact
9 is often these folks tend not to. After all, they are
10 often the ones writing the speech codes, implementing
11 them, and enforcing them.

12 We must then look to the group that has both the
13 legal obligation and the necessary independence to ensure
14 that campus free speech is really free, mainly the
15 trustees. Trustees have a critically important role to
16 play in ensuring free exchange of ideas. And powered by
17 charter, by statute, and here in the State of California,
18 even by the constitution and independent actors
19 answerable to the people of the state, parents, and the
20 taxpayers in their role as fiduciaries, academic and
21 financial health of their institutions. They are
22 obligated to uphold their institution's mission to
23 promote the free exchange of ideas. And, most surely, in
24 the context of public institutions, they are bound to
25 support and uphold the 1st Amendment. And as appointees

1 with relatively long terms, the trustees are given the
2 independence needed to stand up for constitutional
3 protection even if freedom of speech makes some squirm or
4 some groups on campus aggressively want to continue
5 restricted codes.

6 As outlined by former Wisconsin (Court reporter
7 unable to hear.) Phyllis Crutch (Phonetic), the ideal
8 board takes into account the respect of their students,
9 faculty, parents, and administrators, elected officials,
10 and others, (Court reporter unable to hear.) to none of
11 them with mind full of mission and special purposes of
12 the university and the trust that it holds. Now, I'm
13 happy to report that governing boards across the country
14 are rising to the occasion. And there is guidance a
15 plenty for boards which wish to follow suit. For
16 example, last year my organization issued a report
17 entitled "Protecting the Free Exchange of Ideas; How
18 Trustees Can Advance Intellectual Diversity on Campus."
19 In it, we highlighted ten best practices gleaned from
20 exemplary efforts by institutions around the country to
21 give meaning and definition to the concepts of academic
22 freedom and intellectual pluralism. Counsel on
23 education, in its 2005 State (Court reporter unable to
24 hear.), academic rights and responsibilities. Among the
25 best practices we sight is the elimination of speech

1 codes and other policies that wrongly restrict freedom of
2 expression.

3 There, we showcase how trustees at Dartmouth
4 College's major force in repealing the problems with
5 speech code and ensuring that Dartmouth (Court reporter
6 unable to hear.) adhere to a state of commitment with
7 free exchange of ideas. We also show how, at Northern
8 Kentucky University, trustees there showed real
9 leadership by adopting the free expression policy that
10 clarified student rights regarding freedom of speech
11 through demonstration. A new policy eliminated much
12 criticized and unconstitutional free speech (Court
13 reporter unable to hear.) on campus and instituted a rule
14 allowing students to distribute fliers and posters
15 regardless of subject matter.

16 More recently the president and board of the
17 college of William and Mary lead the way in eliminating
18 policies that restricted free speech in order to protect
19 certain groups from offense. These are excellent
20 examples (Court reporter unable to hear.). Trustees can
21 and should use their (Court reporter unable to hear.) in
22 defense of the 1st Amendment. They should demand the
23 review of an end to institutional policies, whether they
24 are called speech codes or harassment codes or
25 free-speech zones, but unduly restrict the free exchange

1 of ideas protected by the Constitution. And they should
2 follow some of the suggestions that Greg made this
3 morning. And (Court reporter unable to hear.)
4 administrators are already undertaking these reviews.
5 Boards should support them and encourage those efforts by
6 putting their voice behind them. In the past many boards
7 have been lead to believe that adoption of sensitivity
8 codes would avoid liability on its face, that they should
9 think again.

10 Litigation against speech codes including
11 harassment codes, as Greg told us this morning, is
12 "successful and costly." As Robert O'neil notes in his
13 recent book: Academic Freedom in the Wired World. Every
14 speech code, every challenge in court that has been found
15 unconstitutional, a fact that "underscores" as he puts
16 it, how unwise and ill-fated this quest for campus
17 civility and (Court reporter unable to hear.) has been.
18 Just this month the Federal District Court in California
19 seriously rebutted the Los Angeles Community College
20 District for its unrelenting and still unsuccessful
21 effort to defend its sexual harassment policy.

22 Given the extreme budget crisis facing the state
23 in this public institutions, why would any reasonable
24 regent or trustee fight costly legal battles defending
25 speech codes similar to ones that have already been

1 struck down? Why would any reasonable regent or trustee
2 really risk damaging these institutions reputation when
3 it is found not to obey the law? And why, moreover,
4 would any reasonable regent or trustee potentially lose
5 qualified immunity and risk personal liability through
6 continued violation of clearly established statutory and
7 constitutional rights as, again, Greg outlined this
8 morning? Surely there are far better uses of very
9 limited taxpayer and personal funds. Trustees might
10 rightly be tempted to expend dollars on litigation if
11 these sensitivity codes and harassment codes worked.

12 But as O'neil again points out, and I quote,
13 "Apart from the constitutional flaws, speech codes have
14 never been shown to be at all effective in mitigating
15 racist, sexist, homophobic, or anti-Semitic attitudes on
16 campus." And may, in fact, sometimes have been
17 counterproductive simply by driving such hateful views
18 underground while magnifying the animus of those who hold
19 them. The return to the precious words of the (Court
20 reporter unable to hear.) committee, if the priority
21 assigned to free expression that in nature of the
22 universities is to be maintained in practice, clearly the
23 responsibility for maintaining that priority rests with
24 its members by voluntarily taking up membership in the
25 university and thereby asserting (Court reporter unable

1 to hear.) to its right and privileges.

2 Members also acknowledge the existence of
3 certain obligations upon themselves and their fellows.
4 Above all, every member of the university has an
5 obligation to permit free expression in the university.
6 No member has the right to prevent such expression.
7 Every official of the university, moreover, has a special
8 obligation to foster free expression and to ensure that
9 it is not obstructed. I think this cautionary note,
10 sounded years ago, could not be more timely irrelevant
11 and (Court reporter unable to hear.)

12 MR. KLAUSNER: Okay. Thank you, Mrs. Neal. And
13 now I'd like to ask, now, for questions. Let's start
14 with the -- any questions from our education subcommittee
15 or including the elected official member of (Court
16 reporter unable to hear.)?

17 MRS. MONTOYA: (Court reporter unable to hear.)
18 Bob, explain Manny's concern?

19 MR. MEISTER: I can address it directly. I
20 wasn't aware that you had this implementation. But let
21 me just say what the students were told when they entered
22 the public area of the chancellor's office building.
23 They were told by the chancellor and by university
24 officials, "Your protest is legitimate, but it should be
25 directed against Sacramento and not against us." Mark

1 Eudolph said the same thing systemwide. In other words,
2 what UC was saying to the students is that they had a
3 right to repress the protest because it was directed
4 against them, even though the protest was clearly,
5 clearly 1st Amendment activity as they, themselves,
6 conceded. I don't know, because there wasn't a
7 soundtrack, what the student said. I heard other
8 student's speeches, and those student speeches said we
9 have at least as much a complaint against the regents as
10 we do against Sacramento. And we are protested directly
11 against the regents action last week. So, in that sense,
12 UC admitted that the speech that was engaged in was
13 protected 1st Amendment activity and simply exercised his
14 right to repress that speech because the protest was
15 against them. In other words, they were applying to
16 their rules to call an activity that was protesting
17 against them "unlawful."

18 And then using a procedure that does not allow
19 the student as a defense to say our activity was lawful,
20 and these rules should not be applied or not be applied
21 in the same way that they would be applied to a clearly
22 unlawful activity. It is solely because of the target of
23 the speech. It is solely because the university
24 administration and the regents were the target of the
25 speech that the students were suppressed. The students

1 were told, "Go to Sacramento."

2 MR. KLAUSNER: Any further questions? We'll
3 hear from Mark Dollinger.

4 MR. DOLLINGER: Actually, I have a question to
5 follow up on our chair's question. And that's -- I
6 guess, the best way to ask this is in the form of a
7 scenario. Let's assume there is a particular campus
8 group exercising its 1st Amendment free-speech rights.
9 We'll take the more extreme group, Ku Klux Klan. For
10 example, just to make it dramatic in the exercise of
11 their 1st Amendment rights, there should be a member of
12 any of the designated groups, which Manny articulated,
13 who, as a result of that protected speech, no longer
14 consider that California public university to be a safe
15 place for them and then stop coming because the
16 reputation in this particular university is a home of
17 racism or whatever else it can be.

18 What would your position be on how this
19 committee should respond to that sort of scenario?

20 MR. MEISTER: Well, it is quite clear that one
21 legitimate purpose of time, place, and manner regulation
22 is the protection of other constitutional rights; for
23 example, the principle outside the educational context.
24 The principle of "no vicarious liability" into the
25 Catholic bishop can't be prosecuted if, as a consequence

1 of sermon, someone bombs an abortion clinic. That
2 doesn't mean that woman don't have a constitutional right
3 to an abortion, and it doesn't mean that there are
4 14th Amendment rights that can justify legitimate
5 regulations of antiabortion groups. It is simply that
6 these regulations must be based on constitutional grounds
7 rather than on the kinds of unrestricted public interest
8 and public order that would apply outside the
9 constitutional realm.

10 It is certainly the case that students attending
11 the public university, minority students have
12 constitutional rights of a sort that can be implemented
13 by various antiharassment laws. Those laws must balance
14 and must take explicit account of the 1st Amendment
15 rights of speakers as well as the 14th Amendment rights
16 of all students. There needs to be a rights-based
17 decision, and not simply -- and the same way -- in the
18 same way that the demonstrations that have leaflets can
19 be legitimately regulated. They simply need to be
20 regulated in different ways and with much more latitude
21 as to timing and so on and so forth than street parties.
22 It is a rights-based argument. It is not an argument
23 that it suggested 1st Amendment rights trump all other
24 rights.

25 MR. DODD: I have a question for Mrs. Neal.

1 MR. KLAUSNER: Go ahead.

2 MR. DODD: Is the report that your organization
3 did, is that available on the Web site, or could you make
4 it?

5 MRS. NEAL: Yes. It is.

6 MR. DODD: Or could you maybe submit it as part
7 of the public comment?

8 MR. NEAL: I'd be happy to submit it. It is
9 also available on my Web site.

10 MR. DODD: And then my question is: Do you have
11 your group of trustees and alumni? And sometimes it
12 would seem to me that some of the alumni groups might
13 have a little more clout because their students might --
14 their children might be in these universities that are
15 subject to these or the beneficiaries of these if they
16 are advocates of it. I was wondering if, in your
17 experience of the alumni groups -- an alumni portion of
18 your group, are they involved with the administration of
19 the universities at all in addressing any of these
20 issues?

21 MRS. NEAL: In the example I gave of the College
22 of William and Mary, in that particular instance, a group
23 of alums have been very outspoken and ensuring
24 free-speech rights on the campus. And we have them
25 articulating that to the administration as well as to the

1 board of trustees, so that is certainly one example.

2 MR. ROSENTHAL: I have a question.

3 MR. KLAUSNER: Go ahead.

4 MR. ROSENTHAL: Thank you very much. Both of
5 you have discussed the importance of focusing on 1st
6 amendment protected activity, which really followed the
7 constitution in terms of free speech. Obviously, I think
8 everybody here knows that harassment is focused usually
9 against an individual or specific individuals and not,
10 you know, about general groups. You, in a group, can't
11 sue because somebody you know published something that
12 (Court reporter unable to hear.) racial epithet. Nobody
13 as an individual is necessarily targeted. So my question
14 for you is: Following 1st Amendment protected
15 activities, does that mean -- in your opinion, does that
16 mean professors should be allowed to stand up in front of
17 their classrooms and use racial epithets, anti-Semitism,
18 invectives, whatever it may be, as long as routinely --
19 as long as they are not necessarily targeting one or two
20 particular individuals in their classrooms, but just go
21 and pepper their lectures with whatever types of, you
22 know, epithets, racial anti-Semitic gender harassments,
23 (Court reporter unable to hear.). What are your
24 opinions? Should professors be allowed to do that
25 considering they are, technically, protected under

1 1st Amendment?

2 MR. MEISTER: Well, I am a professor. I am
3 subject both to professional code of conduct in my
4 treatment of students, and I'm expected. And it would be
5 unprofessional of me not to treat students equally and
6 with respect. I also have what I regarded very strong
7 1st Amendment rights to use language in ways that may
8 provoke and disturb students. And I don't believe that
9 my academic freedom is limited to making students
10 comfortable. Now, the serious question that you are
11 raising is whether there is an overlap between things
12 that I might do that might make people intellectually
13 uncomfortable and things that I might do that might cross
14 the line in terms of my professional ethics as someone
15 who -- as a professor, I teach for the sake of my
16 students.

17 And to the extent that I am deliberately doing
18 something that is harmful to my students, with the intent
19 of harming them rather than doing something with the
20 consequence of provoking and disturbing them, I think
21 that I am probably more in the realm of a professional
22 ethics violation than I am in the realm of free speech.
23 But I would say -- I would say that the fact that a
24 student might be disturbed by something that I might say
25 in a provocative way, and I teach political theology in

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1 ways that have never elicited protest, but that might,
2 because I take a very provocative position.

3 I do believe I have the academic and
4 intellectual freedom to do, for example, provocative
5 readings of people's sacred texts, and that it is not a
6 violation of my professional ethics to do that if I am
7 doing it for the sake of students. And I ask the
8 professor to benefit them even if it happens to disturb
9 and provoke them.

10 MR. ROSENTHAL: You didn't answer my question.
11 Sir, I just asked you: Do you think it is okay for
12 professors to be allowed -- without any repercussions
13 policywise from the public university or college, for
14 professors to be allowed to use racial epithets,
15 anti-Semitic pajoritives or whatever? You know, pepper
16 their lectures routinely with this type of speech as long
17 as they are not targeting any particular individual. If
18 they are expressing -- and it is not necessarily to teach
19 a specific lesson, but they are just voicing their
20 opinions about blacks in general or about Jews in general
21 or about woman, should they be allowed without
22 repercussions to do that?

23 MR. MEISTER: I answered. Your question is
24 that, that would be unprofessional conduct. On the other
25 hand, I could imagine I lecture using the same words and

1 the same content to make a provocative and valid
2 intellectual point. So the question is whether this is
3 like that. And I wouldn't make it a content-based
4 description. I would make it an ethics-based description
5 and say that it would be unethical for a professor to
6 behave in a way that is deliberately offensive to
7 students. And it has that effect.

8 MR. KLAUSNER: Thank you. Mrs. Montoya?

9 MRS. MONTOYA: I have a question for Anne Neal.

10 Do you see any particular difficulties for
11 public trustees to address free-speech issues as opposed
12 to private trustees? Do you see any friends? Because
13 from what I'm hearing, your group deals -- covers both.

14 MRS. NEAL: The American Consulate of Trustees
15 normally does deal with both private and public trustees.
16 But I think particularly with public trustees who are
17 definitely bound by the 1st Amendment as they oversee
18 their institutions that there can be very little question
19 that, that is a part and parcel of their obligation to
20 uphold the 1st Amendment, which applies to institutions.
21 In most private institutions, they may subscribe to the
22 1st Amendment, or they will say that they will uphold
23 adherence to the 1st Amendment, that they may not be
24 bound by it; whereas, public institutions are. So I
25 think that, if anything, there is less latitude for

1 trustees in this area and the public institutions than in
2 the private.

3 MRS. MONTOYA: Thank you.

4 MR. KLAUSNER: Mr. Hicks?

5 MR. HICKS: Yes. Mrs. Neal, to the extent that
6 you are aware of it, in terms of college and campus
7 university and college campuses here in California, I
8 would like to talk -- I would like you to talk today
9 about your view of the culture that exists on these
10 campuses. You spoke earlier about Jefferson in the
11 notion that there is no constitutional right not to be
12 offended. Do you think that would be viewed as
13 politically incorrect for people to have that view that
14 it is my right not to be offended by people on campus or
15 by the professor or by other students around them?

16 MRS. NEAL: I think there are many who construe
17 that they have no right to be offended. And I think that
18 is one of the underlying problems that we have on college
19 campuses across the country. And that, I think, we need
20 to continue to emphasize that a system of free speech
21 really cannot be sustained if individuals and if groups
22 don't learn to deal with offenses constructively and to
23 respond with counter arguments rather than silence or
24 demanding censorship. So I think that really gets at the
25 fundamental issue for administrators, faculty, students,

1 and trustees. That rather than being fearful of offense,
2 we should take that as an opportunity for a teaching
3 moment to really get back to what it is the 1st Amendment
4 is all about, that our constitution gives us as citizens.
5 And I think we're seeing in too many cases, too many
6 students who do not understand the fundamentals of the
7 Constitution and, therefore, aren't upholding that
8 protection.

9 MR. ROSENTHAL: Can I ask one more question?

10 MR. KLAUSNER: Sure.

11 MR. ROSENTHAL: Thank you. I'd like, Mrs. Neal,
12 for you to follow up on what you just said. So would it
13 be true then, according to your opinion, that people
14 should have the right to express themselves, to whatever
15 extent it may be, you know, in focusing on, you know,
16 groups or whatever, and even if that winds up resulting
17 in minority students on that campus feeling that they are
18 grossly intimidated to express themselves. I'm not sure
19 if I'm articulating myself very well, but my point is
20 that without -- do you feel that without any policy on --
21 such policies on university or college campuses, if a
22 group or majority -- an ethnic or racial majority of
23 students are expressing themselves in such a way that it
24 intimidates other students, minority students, from
25 expressing themselves? Is that okay? Is that okay,

1 nevertheless? Is that an okay byproduct?

2 MRS. NEAL: I think the distinction we're
3 dealing with here, and heard a little bit this morning,
4 is when you are talking about active behavior and
5 physical intimidation versus simply restricting someone's
6 thinking about things or holding particular views or
7 having ideas with which one may disagree certainly in a
8 free society and on a college campus that supports the
9 robust exchange of ideas. I think we do have to be open
10 to having -- to allowing viewpoints with which we may
11 disagree and simply be prepared to disagree with them
12 with more speech. I think, if you are getting into
13 intimidation or physical acts, that you are stepping into
14 a different determination.

15 MR. KLAUSNER: Karen, go ahead.

16 MRS. LUGO: I was just curious about the role of
17 the trustee and whether -- and maybe it's a different
18 answer for public or private, but how are they trained?
19 What is presented to them as far as this role? How aware
20 are they of what potential role they have in monitoring
21 and/or, you know, supporting speech?

22 MRS. NEAL: Well, you have raised a very
23 interesting question. The one reason that the American
24 Consulate of Trustees and Alumni exists is, quite
25 frankly, to serve as a resource for college and

1 university trustees so that they can understand their
2 legal and fiduciary obligations. I think we all
3 understand that colleges and universities are unique
4 places. That they have very special protocols and
5 special practices, concepts of academic (Court reporter
6 unable to hear.) shared governance. These are often not
7 understood by lay trustees. And one of the goals of the
8 American Consulate of Trustees and Alumni is to assist
9 trustees and understanding those protocols so that they
10 can properly exercise their role as fiduciaries.

11 MR. KLAUSNER: All right. Well, we have come to
12 the point where we are going to conclude. And I want to
13 thank both of you for coming here this morning and taking
14 time out of your schedules and providing a lot of good
15 information for us. I encourage you, if you want to
16 supplement or augment your comments for our records, if
17 you, afterwards, within our time frame. May 30th, I
18 believe, is our deadline. We want to submit anything
19 particularly pertaining to acts of speech where there is
20 potential infringement or intimidation involving minority
21 rights on California campuses, public universities, or
22 colleges. Thank you both very, very much for attending.
23 And you are most welcome to stay on for the rest of the
24 afternoon, if you would like.

25 ///

1 (Whereupon, there was a break for lunch in the
2 proceedings.)

3 MR. KLAUSNER: I'm going to call our
4 proceedings, afternoon session, to order. We have two
5 panels this afternoon. And I welcome all of you back.
6 And for those of you who weren't here this morning, I
7 welcome you as well; and want to indicate that as we
8 proceed here today, one of our guidelines is civility.
9 And I was very pleased with our morning performances.
10 And I look forward to another interesting and informative
11 afternoon with our panelists that we have. We have two
12 panelists this afternoon. Panel 3, one of our speakers
13 has not yet arrived, Robin Toma, from the Los Angeles
14 County Human Relations Commission.

15 But we're not going to wait for him, and we
16 will proceed with Ada Meloy, who is general consulate of
17 the American Consulate on Education. And then our
18 Panel 4, I want to announce, also, in advance. In terms
19 of our schedule, we are going to have representatives of
20 the California State University, the California community
21 colleges, and the University of California. And we're
22 scheduled to go from 2:30 to 3:15. But we felt because
23 the three panelists in that group, we're going to expand
24 the time a bit. And instead of adjourning at 3:15, we'll
25 expect to go to 4:00. That will allow time for

1 additional questions and answers that if you people have
2 more questions (Court reporter unable to hear.) community
3 members here.

4 So I would like to ask now Mrs. Meloy, if you
5 could proceed on your comments. And then it may be just
6 you or it may be Robin Toma, who has addressed our group
7 before. We hope that he will show up.

8 MRS. MELOY: Okay.

9 MR. KLAUSNER: Thanks very much.

10 MRS. MELOY: Well, thank you very much for
11 inviting us. I'm very privileged and happy to be here.
12 I don't know if you are familiar with the American
13 Counsel on Education. I'll briefly describe that for
14 you. We sometimes say that we are the unifying voice for
15 higher education in your nation's capital, which means
16 that we are recognized as the main and most comprehensive
17 lobbying group on issues of higher education in
18 Washington. We also have various programs for research
19 and publication about higher education. We own and run
20 the GED exam for the nation. And we have a large grant
21 from the Department of State, USA ID to help develop
22 higher education in the developing world.

23 We have members over 1600 colleges and
24 universities of all types from community colleges up
25 through the major research universities. So we are the

1 most comprehensive association dealing with higher
2 education issues. I should also say that in contrast to
3 some of our speakers this morning, I am not a
4 constitutional law expert. What I am is a long time
5 higher education lawyer who worked on a campus, not in
6 California for many years, but for joining the American
7 Counsel on Education three years ago. So I will present
8 my remarks and be happy to respond to questions to the
9 best of my ability.

10 The scope and limits of the 1st Amendment
11 protection are recurrent subject of legal analysis. Just
12 last week the Supreme Court struck down a federal law
13 that criminalized the sale and possession of dogfight
14 videos and certain other depictions of animal cruelty,
15 holding that these representations of animal cruelty were
16 not protected by the 1st Amendment. Excuse me. Were
17 protected by the 1st Amendment, were not categorically
18 unprotected by the 1st Amendment. And, of course, the
19 actual acts that were being shown on these videos are
20 illegal in all the states and the District of Columbia.
21 But because of the strength of the 1st Amendment, the
22 statute for bidding depictions had to be restriction.

23 And as colleges and universities contemplate
24 their own speech policies and how best to fulfill their
25 educational missions, they must keep the broad

1 protections of the 1st Amendment in mind, as well as the
2 exceptions that are legally supportable. The American
3 Counsel on Education issued a statement on academic
4 rights and responsibilities in 2005, which was endorsed
5 by 26 additional educational organizations, including all
6 of the major representatives of higher education. That
7 statement asserts that intellectual pluralism and
8 academic freedom are fundamental tenants of american
9 higher education. And this was referred to by the prior
10 speaker Mrs. Neal also. This particular statement that
11 we put out in 2005, it sets forth the following
12 principles: Diversity of institutions, each with its own
13 mission and purpose, the importance of intellectual
14 pluralism, and the free exchange of ideas.

15 Students and faculty should never be
16 disadvantaged on the basis of their political opinions.
17 The validity of ideas, theories, arguments, and views
18 should be measured against intellectual standards of
19 relevant academic and professional disciplines determined
20 by reference to standards of the academic profession as
21 established by each institution's community of scholars.
22 Government's recognition and respect for the independence
23 of colleges and universities is essential for academic
24 and intellectual excellence. Protecting academic freedom
25 is important not only for student speech, which we've

1 heard the most about today, but also for faculty and
2 employees.

3 Traditionally at public institutions,
4 1st Amendment protection for employees has only been
5 limited to speech on topics of public concern, including
6 matters that are fairly considered as relating to any
7 matter of political, social, or other concern to the
8 community. Mere expression by a professor or other
9 employee of a state college or university of unpopular,
10 controversial, or offensive view points on a matter of
11 public concern could not be a basis for the institution
12 to prohibit or punish the speech. With the 2006 Supreme
13 Court decision in Garcetti versus Ceballos, many in the
14 higher education community are concerned about the
15 erosion of 1st Amendment protections for public college
16 employees.

17 The court held that when public employees make
18 statements pursuant to their official duties, the
19 employees are not speaking as citizens for 1st Amendment
20 purposes, and the constitution does not insulate their
21 communications from employer discipline. Though if such
22 a public statement not made as part of official job
23 duties involves a matter of public concern, it may be
24 protected. Still, subsequent federal cases have relied
25 on Garcetti in upholding faculty employment decisions

1 based on speech related to job function. Faculty rights
2 with respect to academic freedom are explicitly protected
3 at nearly all public and private colleges and
4 universities.

5 Academic freedom is not absolute though. A
6 faculty member does have the right to express
7 controversial or even offensive use as long as done so
8 appropriately. Well, most speech, including symbolic
9 speech such as the wearing of a T-shirt or an arm band,
10 an artistic expression is protected by the 1st Amendment.
11 Freedom of speech is not absolute under all circumstances
12 and in all forum. The Supreme Court has recognized
13 certain categorical exceptions where speech may be
14 prohibited as it is not protected by the constitution.
15 Types of unprotected speech include: Advocacy of illegal
16 action, fighting words, true threats, defamation, and
17 obscenity. Time, place, and manner restrictions can be
18 permissible in public fora, designated fora, and
19 nonpublic fora as long as done in a content natural way
20 and providing other avenues for communication.

21 There is a distinction between speech and
22 conduct, and we heard that mentioned this morning.
23 Prohibiting harassment must be done in such a way as to
24 allow expression of any view, words, symbol, or thought
25 even if a listener finds it offensive. Institutions must

1 take measures to prevent discrimination and note the
2 distinction between expressing a view and discriminatory
3 conduct. However, one must recognize the difficulties
4 that speech may be used as evidence in discrimination
5 cases poses for an institution. Despite the complexities
6 in 1st Amendment jurisprudence, colleges and universities
7 are generally very successful in their implementation of
8 speech policies. They are aware -- we are aware of only
9 three cases reported in the last three years concerning
10 California public college and university speech policies.

11 In two of those instances, the speech was
12 accompanied by inappropriate conduct and lawsuits ensued.
13 They are often provoked by extreme behavior. And the
14 third involved a time, place, and manner restriction.
15 Institutions of higher education in California and
16 elsewhere are struggling to walk the line between
17 protection of free speech and maintenance of a vibrant
18 and welcoming learning environment. And they are getting
19 it right most of the time. Faculty, administrators, and
20 other employees at colleges and universities are the
21 experts in dealing with student, faculty, and staff
22 issues on campus.

23 They should be given deference with respect to
24 educational decision making, including the freedom to
25 formulate and enforce an appropriate policy concerning

1 free speech for the particular college or university. I
2 would be happy to try to respond to questions or any
3 other comments.

4 MR. KLAUSNER: Okay. Thank you very much for
5 your comments. And let me see who is on tab here. So
6 we'll start with you.

7 MR. DOLLINGER: Good afternoon. Thank you. I
8 don't know if you were here this morning.

9 MRS. MELOY: Yes.

10 MR. DOLLINGER: But your comments reflected
11 well, I think, on our morning presentation. I was most
12 interested in the list you gave where free speech could
13 be abridged. And you sort of listed a number:
14 Harassment, time, place, and manner. My specific
15 question has to do with time, place, and manner. And
16 what I thought I heard this morning, that free-speech
17 zones themselves were problematic, and that the
18 university had to change those. And do you offer any
19 perspective on that?

20 And then the second had to do with how one
21 defines each of those words. Because I would imagine
22 that in the California State University systems, that
23 would be the question at hand. And I think that would be
24 something that this committee would be interested in
25 trying to figure out.

1 MRS. MELOY: Right. I'm happy to try to
2 express as best I can the answers to your questions. I
3 believe that time, place, and manner restrictions can be
4 valid. But they cannot be overly restrictive, and they
5 cannot be based on the content of the speech, the actual
6 words that you are saying. In other words, I believe
7 that it is certainly appropriate for a college to say
8 that you can't stand up and give a speech in the library,
9 but that there can be other areas where it is appropriate
10 for you to express your opinions and exercise your
11 free-speech rights. So I think there can be some time,
12 place, and manner restrictions.

13 Similarly, you couldn't go around shouting in
14 the dormitory in the middle of the night, that kind of
15 thing. So there can be restrictions. But I think to
16 have a very limited small free speech is what is
17 forbidden is my understanding. As far as the definitions
18 of the terms of what it is that is -- that you can
19 restrict -- in other words, what is not protected by the
20 1st Amendment. As I say, I'm not a constitutional
21 expert. But I know that in higher education
22 institutions, this is something that is looked at and
23 considered when they do make any kind of policy about
24 what is or is not permissible, which might impinge on
25 speech. I think that what we heard this morning about

1 the Davis case was kind of deceptively simple.

2 In other words, to really figure out what it is
3 that is permissible speech and not permissible speech
4 when you are getting into certain areas that are very
5 sensitive and difficult is not as simple as I think it
6 sounded this morning. This is something that college and
7 university administrators and faculty, because many of
8 the policies, of course, come up through what we call
9 shared governance, and faculty as (Court reporter unable
10 to hear.) on board before it can really become a policy,
11 get very involved in trying to draw the lines that can be
12 drawn about what is or is not a permissible way to
13 restrict what ends up being speech.

14 MR. DOLLINGER: Thank you.

15 MR. KLAUSNER: Mr. Dodd is next, and afterwards
16 is Mr. Hicks.

17 MR. DODD: All right. My question sort of
18 builds on what you just said. I mean, in your remarks
19 you talked about how the faculty and the administration
20 should be given deference basically because they are on
21 the front lines of enforcing these. But then the -- you
22 know, and then they are the ones through various
23 committees formulate these policies. But if the policies
24 themselves are directly contrary to US Supreme Court
25 precedent, how much deference should they have? And

1 No. 2, if the mechanism, some of the complaints we heard
2 about this morning dealt with the mechanism as much as
3 the policy. You know, no hearing, no notice, no
4 administrative making decisions. How much deference
5 should they really be given?

6 MRS. MELOY: Right. Well, I would not say that
7 anyone should truly have deference to violate something
8 that is the law of the land, whether it be the state of
9 California or the federal laws, including what has been
10 articulated by the Supreme Court. But in actually
11 crafting these policies, it isn't always as simple as it
12 appears. But certainly, and I would not support any
13 policy that was in violation of the actual law. As far
14 as the procedures, yes, we did hear this morning of
15 apparent incidents where somebody was disciplined without
16 a hearing.

17 What I can say about that is that would be an
18 aberration. And usually something like that would only
19 happen in a -- what was at least perceived by someone to
20 be a true emergency, and there would be a hearing very
21 promptly following on that. In other words, there are
22 times when a student has to be suspended without a
23 hearing because of the emergency of the situation.

24 But --

25 MR. DODD: (Court reporter unable to hear.) for

1 something for what they said in the past is emergency?

2 MRS. MELOY: Well, that doesn't sound like an
3 emergency to me. No, it doesn't. So I don't know the
4 exact facts of that. And I understand that there are
5 people who are very vigorously out there trying to
6 support these principles, and that's what you were
7 hearing this morning. But I also feel that overall, as I
8 did say in my remarks, that I think that most of the
9 colleges and universities are trying to do the right
10 thing, and sometimes they aren't perfect.

11 MR. DODD: I think there seems to be some
12 tension between what well-meaning people believe is the
13 right thing --

14 MRS. MELOY: Uh-huh.

15 MR. DODD: -- and what is legal. Would you
16 agree with that?

17 MRS. MELOY: I would agree with that. There
18 can be that tension.

19 MR. KLAUSNER: I don't see any other further
20 questions. I do, actually. But --

21 MR. HICKS: No. I don't anymore. I think my
22 question was just asked, so I'm fine.

23 MR. KLAUSNER: Why don't we take these -- but I
24 believe Robin Toma is on his way. And so we'll keep
25 going. At this point we're going to (Court reporter

1 unable to hear.)). So we will go forward here with
2 Mr. Rosenthal and then Mrs. Lugo.

3 MR. ROSENTHAL: Thank you, Ms. Meloy for being
4 here. Two quick questions for you, if you please. You
5 had mentioned that as far as you know, there are only
6 three cases that have come to your attention in regard to
7 people complaining about the policies restricting speech
8 on campus?

9 MRS. MELOY: In California --

10 MR. ROSENTHAL: In California?

11 MRS. MELOY: -- in the last three years.

12 MR. ROSENTHAL: Okay. So would you -- in your
13 opinion, are the policies restricting certain types of
14 speech on university and college campuses, are these
15 being translated into widespread civil rights abuse
16 across the State of California?

17 MRS. MELOY: No.

18 MR. ROSENTHAL: Thank you. And my second
19 question for you is: You had mentioned that you would
20 not uphold a policy-restricting speech that is in
21 violation of the law; correct?

22 MRS. MELOY: Correct.

23 MR. ROSENTHAL: Out in the general public, a
24 person is free to hang a noose; correct?

25 MRS. MELOY: Yes.

1 MR. ROSENTHAL: Would you, therefore, say that
2 it is okay for students if they are -- as long as they
3 are not targeting any particular individual, that it
4 would be okay policy or legitimate for a student or
5 professor to hang nooses all around a university campus?

6 MRS. MELOY: I would say that would be very
7 provocative. Whether it would be strictly protected
8 under the 1st Amendment, I would not be able to say
9 definitively. I know it would cause -- it would
10 undoubtedly cause distress among members of the
11 community, the university community and certainly should
12 be dealt with in appropriate ways. And whether those
13 ways can beyond the expression of others in the community
14 as to how they thought this was offensive or whether
15 actions beyond those expressions of the contrary are
16 legal, it is something I wouldn't want to say. I
17 don't -- I'm not able to say at this time. I haven't
18 researched that.

19 MR. KLAUSNER: Okay.

20 MRS. LUGO: Okay.

21 MR. KLAUSNER: I guess we will -- why don't
22 we then end this.

23 MR. ROSENTHAL: Thank you, Mrs. Meloy.

24 MR. KLAUSNER: Thank you very much for your
25 testimony. And now we welcome our second panelist,

1 Robin Toma, who is the Executive Director of the
2 Los Angeles County Human Relations Commission. I might
3 ask as you go into your remarks, to the extent you are
4 able -- I know you are based here in LA County -- to the
5 extent that you are able to focus in particular on
6 free-speech issues that involve acts of discrimination
7 within the purview of our commission, and our committees
8 work for the US Commission on Civil Rights deals with
9 minority rights or sex or any other types of harassments,
10 that sort of thing.

11 MR. TOMA: Good afternoon. My name is
12 Robin Toma. I'm the Executive Director of the
13 Los Angeles County Human Relations Commission. And I'm
14 here today because the Human Relations Commission's
15 mission is to foster harmonious and equitable (Court
16 reporter unable to hear.) relations and engage in
17 nonviolent (Court reporter unable to hear.) resolution.
18 I promote and inform an inclusive multicultural society.
19 Colleges and universities are critical to our mission.
20 Therefore, many students, the last formal educational
21 experience before they launch their full-time work
22 careers. As such, they are in place to help them
23 recognize, exercise, and assert in a balanced and common
24 sense fashion their fundamental rights and
25 responsibilities.

1 The Human Relations Commission is one of the
2 oldest and largest of its kind, having its origins
3 in 1944. And in order to serve the county of more
4 residents than any other in the country, we focus on
5 strategic priorities. First, we empower youth with the
6 knowledge and skills that we change (Court reporter
7 unable to hear.) to include in group relations. Second,
8 we ensure the safety of groups in LA County who are
9 vulnerable because of their actual perceived race,
10 ethnicity, ancestry, and national origin, gender, gender
11 identity, sexual (Court reporter unable to hear.),
12 language, religious beliefs, disability, homeless status,
13 or any other protected or arbitrary characteristics.

14 We are working hard to reduce prejudice in
15 crimes against persons who are homeless. And we believe
16 that we need to strengthen the commission's role on
17 racializing and violent prevention and community
18 engagement.

19 I'm going to start by just making three points
20 today. The 1st Amendment right to free speech is a
21 critically important one in our society. One which I
22 spent considerable time in the past when I was an
23 actively litigating lawyer bringing cases to protect. I
24 also believe the 1st Amendment right is not absolute.
25 That speech can lead to harmful consequences. The

1 proverbial prank, yelling "fire" in a crowded theater, or
2 the modern day version saying "bomb" or "gun" on an
3 airplane or verbal threat to kill someone. That leads me
4 to my second point. The 1st Amendment must be balanced
5 with the right to equal protection in pursuing the
6 fundamental right to education.

7 Conduct such as shouting racial ethnic epithets
8 or derogatory names at a student or staff on campus does
9 not protect the right or allow them or ensure the rights
10 to pursue education without having to endure hostility
11 and ridicule or other forms of prejudice and bigotry
12 because of their race, ethnicity, national origin, or any
13 other protective characteristics. I assume that everyone
14 is in agreement on that point. The question then becomes
15 my third point, which how do college and university
16 leaders balance those two equally important rights and
17 values they represent? I believe that the balance is
18 different for campuses than for larger society.

19 Because we need to recognize and protect that,
20 there is a public interest in ensuring that the campuses
21 are safe places to learn. One of the things that we have
22 done at the commission is to focus on high schools,
23 because we know that studies tell us that students do
24 better in places where they feel included and protected
25 as opposed to harassed or targeted. Research supports

1 that where students experience biased related harassments
2 in harassment incidents, they report depression in higher
3 numbers, are absent in school more often, have lower
4 grades, et cetera. We need to promote ways of engaging
5 discussion of different points of views in respectful
6 ways that do not demean others.

7 That means in some cases where speech or
8 expressive activity that is derogatory of another, a
9 school administration needs to take action to deter and
10 publicly respond to such activity, to send a clear
11 message that this is not acceptable behavior on campus.
12 On the other hand, a speech that's expressing
13 controversial ideas, even those that are seen as racist
14 or bigotive, that should be challenged with more speech,
15 not suppression. There are many resources available with
16 college administrators that which will allow for
17 free-academic debate, but ensure a nonhostile environment
18 (Court reporter unable to hear.) protected by our civil
19 rights laws on campus. And we certainly would help any
20 college or university seeking such assistance.

21 I thought I would keep it brief and allow an
22 opportunity for questions. I have brought copies of our
23 annual hate-crime report, which tells us that, of course,
24 in those cases where people engage in extreme behavior,
25 and they commit a crime that's premised on somebody's

1 protected status, that they are going to be dealt with by
2 law enforcement. And those reports come into this
3 collection of all the crimes that are reported in any
4 given calendar year from the 46 different police agencies
5 in LA County. And that tells us, unfortunately, that
6 despite gangs that we've made and hate crimes, that, that
7 extreme behavior still exists in the community.

8 Of course we know that the larger context is
9 that there are many incidents that do not rise to the
10 level of the crime that occur in our community incidents,
11 prejudice, like bigotry and bias, which are not reported.
12 And really the truth is that they're -- some agent
13 reported that the vast number, there is no reason to
14 report them because there is really nothing that is done
15 with them outside of protected environments. So, for
16 example, even within -- you know, in the workplace, if
17 that occurs, yes. That's dealt with. If it occurs
18 within a school environment, that should be reported as
19 well. But when you step out of that, those sorts of
20 incidents are -- if not a crime, do not arise to a level
21 where there is any institutional framework to actually
22 collect and address those issues. So I believe that
23 while we're making many gangs on many fronts in terms of
24 better human relations, we still have great challenges.
25 And what happens on university campuses and college

1 campuses, apparently based on what the media is
2 reporting, is that there are still issues that need to be
3 dealt with. So I'll end there. And thank you for the
4 invitation. And thank you, Mrs. Meloy.

5 MR. KLAUSNER: Thank you, Mr. Toma. So now
6 questions from our group leader. And for those of you
7 who deferred questions for Mrs. Meloy, you can ask those
8 at the same time. So if you would like to raise your
9 hands or go forward.

10 MR. ROSENTHAL: I do.

11 MR. KLAUSNER: Go ahead.

12 MR. ROSENTHAL: Thank you, Mr. Toma. I
13 appreciate that. A couple questions for you. You
14 mentioned that the 1st Amendment should be balanced with
15 the right to pursue -- equal pursuit of education. So in
16 your opinion, are there -- could there be incidents where
17 students in large groups, maybe even a mob, could
18 exercise their freedom of speech in a way that not
19 necessarily directed at a particular individual or couple
20 of individuals, but directed at a racial or an ethnic
21 group in a way that, that speech could result in
22 intimidation or a hostile learning environment for the
23 members of the group that are being targeted by the
24 speech?

25 MR. TOMA: I think that on a college campus,

1 there is no question that oftentimes students, the
2 distribution of student groups in terms of the cultural
3 ethnic background, may be different in every situation.
4 And where you have campuses where, for example, there are
5 very few members of a certain group, that tends to create
6 a situation where if there is an act, for example, a
7 large march that was proposing the segregation of that
8 group from the rest of society, for example, that
9 certainly would send a message that -- and if there was
10 no response by any other voice or on campus, I think that
11 would send a message and setup as a part of the kind of
12 environment that would not make a student feel very
13 welcome or protected in that environment.

14 I think it really depends on a lot of factors
15 as to what the administration does to address that kind
16 of activity. If it was a mob, as you say, that might be
17 even same things, that would encourage people to take
18 direct action and to, you know, physically try to eject
19 people from campus who they believe don't belong, that
20 obviously creates a situation that the administration
21 should intervene to try to prevent that kind of
22 insightment to violence. On the other hand, if it's a
23 mere expression of ideas, well, not mere, a very strong
24 expression of ideas and their beliefs, and it is done in
25 a way that is basically stating a position without any

1 targeting of any individual, it may be protected.

2 It depends what else is going on at that time
3 in response to the administration and other elements and
4 activities on campus. But I think that for many students
5 in many universities where they feel isolated because
6 they may be one of the few in their own race or ethnicity
7 or national origin or religion, a whole variety of
8 factors, you know, there has to be that factored into the
9 kind of atmosphere that's being created on campus and in
10 a role of administration on that.

11 MR. ROSENTHAL: So in your opinion, freedom of
12 speech could be manipulated or used in a way that is
13 actually -- results in violation of other civil rights.

14 MR. TOMA: Well, there's no question that the
15 Supreme Court has recognized in numerous cases that the
16 right of free speech is not absolute. That when it poses
17 a danger to other individuals, when it interferes with
18 the exercise of their other fundamental rights, that it
19 is -- needs to be balanced. And what happens on school
20 campuses has certainly been part of the analysis of the
21 court. And I think that makes sense.

22 MR. ROSENTHAL: Okay. And then, just quickly,
23 this is going to be my last question. Are you aware of
24 any incidents in which -- on school campuses where you
25 have gotten complaints by minority students or their

1 parents or their families, whatever, where they did not
2 want to continue their education on that campus because
3 of racial or ethnic or a variety of social tensions
4 occurring, and where they felt that they were, you know,
5 being victimized by, you know, various types of tensions
6 that were perpetuated by speech?

7 MR. TOMA: I would have to review our records.
8 Because I don't -- I'm not sure that I know the answer to
9 that. I do know that we have received such complaints
10 regarding high school campuses. In many situations in
11 which high school students have left a campus or brought
12 legal action because of feeling harassed or subjected to
13 a hostile environment on campus, I know that there are
14 many campuses in the Southern California area. And I
15 don't recall all of the complaints that have been, you
16 know, come to our attention so --

17 MR. ROSENTHAL: But on high school campuses you
18 know about that?

19 MR. TOMA: Absolutely. Yes.

20 MR. ROSENTHAL: Okay. Thank you.

21 MR. KLAUSNER: Karen?

22 MRS. LUGO: I'm curious about specifics. So
23 maybe what I'm looking for are examples. The word
24 "harassment" or "insightment," all of these things are so
25 subjective. And you refer to case law by -- when

1 speeches proscribed legally, as far as I know of Supreme
2 Court law, it is a matter of something that rises to the
3 level of physical violence, where -- and that has been
4 given more and more latitude as in recent cases. So --
5 and I'm thinking Brandon Berg. You know, the -- where it
6 used to be a matter of clear and present danger, but
7 that's no longer a thing.

8 So -- I'm curious, first, as far as existing
9 campus policies that you might feel are practically
10 working, what is a good example for us to consider of a
11 campus policy -- a working campus policy that -- you
12 know, where there is an actual written code that students
13 can go to, to know what is expected of them and to know
14 at what point their speech is protected, or they may
15 cross the line, and they may have a challenge coming.
16 That would be my first question.

17 And then I'm just kind of curious, too, as to
18 where -- as far as how you draw the line between -- once
19 you get to a point where something is considered
20 harassment, and I know you referred to not suppressing
21 speech; but on the other hand, you talk about being
22 sensitive to, you know, the fact that on campus there
23 should be a built-in sensitivity to racial minorities
24 and victimization. I -- where is that line? Where are
25 you drawing that line?

1 MR. TOMA: I'll give you an example from,
2 actually, my days at UCLA Law School where at one point,
3 somebody wrote a racial epithet on one of the meeting
4 boards, the bulletin boards that announces (Court
5 reporter unable to hear.) as one of the minority student
6 groups. And that was considered to be something that
7 violated the policy. It was vandalism with the intent
8 to, obviously, denigrate the given racial group. And
9 so --

10 MRS. LUGO: That was the campus determination?

11 MR. TOMA: That was the law school
12 determination.

13 MRS. LUGO: Could you specify what the incident
14 was a little better? I'm not following you.

15 MR. TOMA: It was -- somebody wrote the "N"
16 word on the Black Law Student Association bulletin board,
17 as I recall. And the law school administration responded
18 by making a clear statement that, that was not acceptable
19 conduct. That the student who was, you know, identified,
20 if they were identify, would have been dealt with. I
21 don't know that they ever found anyone that wrote it.
22 That's hard. And that's the case with vandalism in
23 broader society. Also, vandalism occurs that we never
24 have suspects for or no one is ever caught because
25 someone writes -- you know, no one is looking, and no one

1 admits to it.

2 But that is the kind of thing that there had
3 been no response. If it had been left up on the board
4 for a period of time or say it was in a place that
5 students could remove it, it would send a very clear
6 message that this really isn't that important to the
7 administration, and they'll take their time in dealing
8 with some vandalism. I think that the quick response to
9 it, and the message being sent sends a different message.
10 And it tells the university community that, that kind of
11 behavior and that kind of speech is not protected here
12 just as if there was a discussion, and it descended into
13 one person shouting racial epithets at another. And that
14 would be something that I think is not the kind of
15 environment that actually encourages engagement,
16 intellectual engagement and learning, but rather
17 facilitates perhaps violence or leads up to violence. So
18 I think that's the kind of approach that many
19 universities have taken. And I think that it makes
20 sense.

21 There are other situations in which there is
22 behavior that may be more on the side of mocking or, you
23 know, denigrating a given holiday; and I think in those
24 cases, sometimes the, you know, the actions might be one
25 of you can't take action to, you know, punish a given

1 student; but you can say we are not going to continue to
2 support, you know, by giving public funds to that
3 organizations activities. Those are the same issues that
4 the Federal Government deals with when it deals with
5 speech activities as well.

6 And I think that it is an appropriate policy
7 for college and university administrators to make sure
8 that they have a response when those things occurred in
9 one way or another or at least encourage that there be --
10 if it is protected speech, that there be a response
11 funding administration, if it is something that they
12 don't feel is one -- in line with their view

13 MR. KLAUSNER: Mr. Hicks?

14 MR. HICKS: Yeah. Mr. Toma, you said that you
15 think from these campuses, can't restrict speech in some
16 way or codes of some kind, harassment codes and others
17 makes sense. We heard this morning that 19 had been
18 challenged in court and then found unconstitutional.
19 (Court reporter unable to hear.) this morning that many
20 around the country would not pass that kind of scrutiny
21 if you looked at the guidelines that the US Supreme Court
22 has laid down. Have you looked at some of these? And do
23 you think that -- you say it makes sense, but do they
24 make sense in a legal sense? Would they pass
25 constitutional scrutiny if you looked at speech codes or

1 harassment codes in many of these campuses?

2 MR. TOMA: Well, when I made that statement, I
3 certainly wasn't saying that I read or examined every
4 single harassment code that exists out there. And I'm
5 sure that there are universities that have written them
6 in a way that is overbroad and vague so that (Court
7 reporter unable to hear.) successful constitutional
8 challenges. 19 out of all the -- in this country is not
9 a large number percentagewise. But certainly not to say
10 that there wouldn't be codes that are you know overbroad
11 and not ought to be challenged. On the other hand, to
12 say that all codes of conduct are -- that address
13 harassment through speech can't be upheld I think would
14 be incorrect as well.

15 MR. HICKS: But the constitutions lays down
16 guides. So there is a guideline that the constitution
17 says and makes sense in terms of what harassment is. You
18 know what I'm saying? Many of those, if looked at,
19 you've heard certainly. Testimony would not pass that
20 constitutionally mustered if placed under that kind of
21 scrutiny. I think there is a general agreement that some
22 of this does make sense or try to protect students from
23 harassment.

24 MR. TOMA: Yeah. Within general terms, you
25 know, I don't have a particular policy in front of me.

1 So I don't know, you know, what we're talking about. But
2 I'm certain, as you say, that there are codes of conduct
3 that would not pass constitutional muster. There are
4 other ones that would. And I think that the colleges and
5 universities had a responsibility to carefully construct
6 such codes so that they do respect 1st Amendment rights,
7 but at the same time do not allow an environment on
8 campus that is going to be hostile and allow harassing
9 behavior by students on campus or anyone on campus of any
10 student or staff based on their unprotected
11 characteristics.

12 MR. KLAUSNER: So could I ask Mrs. Meloy if you
13 have any comments to add or augment at all?

14 MRS. MELOY: No. I think that is correct.
15 There are, I think, over 4,000 higher education
16 institutions in this country. And to say that 19 have
17 been found invalid, it's important, but is not indicative
18 of an overarching problem. And I think that, again,
19 policies can be written in different ways and also
20 enforced in different ways. And that, that is something
21 that is not a simple matter on a campus when you are
22 dealing with highly charged emotional issues and trying
23 to maintain an environment that is welcoming to all sorts
24 of people and protecting all of those who have the legal
25 protections that agencies like my colleague here are

1 supporting.

2 MR. KLAUSNER: And Mrs. Montoya?

3 MRS. MONTOYA: Mrs. Meloy, you said that a
4 2005ACE issued a policy --

5 MRS. MELOY: Yes.

6 MRS. MONTOYA: -- on intellectual (Court
7 reporter unable to hear.) and academic freedom along with
8 other groups.

9 Could you name some of the other groups so we
10 can --

11 MRS. MELOY: Oh, certainly.

12 MRS. MONTOYA: Thank you.

13 MRS. MELOY: And I do have some copies of it.
14 I didn't realize how many people would be on the panel,
15 but I do have some copies of it. The American
16 Association Community Colleges, The American Association
17 of State Colleges and Universities, The American
18 Association of University Professors, American Dental
19 Education Association, American Political Science
20 Association, The Association of American Colleges and
21 Universities, Association of American Law Schools,
22 Association of American Universities, Association of
23 Catholic Colleges and Universities, Association of the
24 Governing Boards of Universities and Colleges,
25 Associations of Higher Education Facility Officers,

1 Association of Jesuit Colleges and Universities, The
2 College Board, College Student Educators International,
3 College and University Professional Association for Human
4 Resources, The Counsel for Advancement, Supportive
5 Education, Counsel for Christian Colleges and
6 Universities, Counsel for Higher Education Association,
7 Counsel for Opportunity and Education, The Counsel of
8 Graduate Schools, The Counsel of Independent Colleges,
9 National Association of Independent Colleges and
10 Universities, National Association of State Universities
11 and Land Grant Colleges, The National Association of
12 Student Personnel Administrators, and The University
13 Continuing Education Association.

14 MRS. MONTOYA: Thank you.

15 MR. KLAUSNER: Mr. Rosenthal?

16 MR. ROSENTHAL: This question is for both
17 Mr. Toma and Mrs. Meloy, please. My question is pretty
18 simple. And that is, Mr. Toma, although you are
19 Executive Director of the Los Angeles County Commission
20 on Human Relations, you are -- have been associated with
21 California Association of Human Relations Organization,
22 so you do have an idea of issues regarding human
23 relations throughout the state and not just within the
24 County of Los Angeles; is that correct?

25 MR. TOMA: Yes. That's correct. I'm actually

1 on the Board of Directors of the California Association
2 of Human Relations Organization and the President of the
3 Board.

4 MR. ROSENTHAL: Okay. So my question for the
5 two of you are: Do you -- either of you have any
6 evidence of testimony by students who are complaining
7 that these policies are violating their civil rights?
8 I'm just curious. Because the -- us dealing with this
9 issue is coming from the bottom up; or if it is coming
10 from the top down, and I don't know.

11 Do you both understand what I mean by that?

12 MRS. MELOY: I think so.

13 MR. TOMA: I am not aware of any complaint that
14 has come to California Association of Human Relations
15 Organization or any of its members from students alleging
16 what you have said.

17 MR. ROSENTHAL: That these speech codes are
18 violating their civil rights?

19 MR. TOMA: Right.

20 MR. ROSENTHAL: They are not complaining?

21 MR. TOMA: Yeah. I don't doubt that there
22 are -- there is someone out there that might say that,
23 but they haven't come to us.

24 MRS. MELOY: Certainly the challenges that have
25 been brought in the 19 cases that we heard about this

1 morning, I'm sure some of those were probably brought by
2 students. But I have not observed, and I don't know
3 everything. But I do, every day, read all of the higher
4 end news and publications. I haven't observed any ground
5 swell of students objecting to speech policies on
6 universities.

7 MR. ROSENTHAL: So then would you -- sorry.
8 This is a follow-up. Would you both feel it is safe to
9 say that although these policies are in effect, that the
10 students do not feel necessarily negatively affected by
11 the application of these policies for the most part?

12 MRS. MELOY: Well, I would say -- as I say, I
13 don't see any ground swell against them by students or
14 student groups. But there is certainly a certain
15 potential for a chilling effect that we heard about this
16 morning. I wouldn't deny that, that could be the case
17 from time to time. But it has not come to our attention
18 that this is a significant problem right now.

19 MR. ROSENTHAL: Okay.

20 MR. KLAUSNER: And Mr. Hicks?

21 MR. HICKS: Yeah. I'm not sure. At the county
22 level you get -- or even maybe at the level of the state
23 Human Relations Organization. But I'm wondering, and
24 maybe both of you could comment on this? There hasn't
25 been an ongoing allegation that there have been a chilled

1 atmosphere on many of California campuses in terms of
2 intellectual and academic freedom. And, I guess, I'm
3 going to ask both of you: Where do you think those come
4 from? We've heard allegations it is a top-down problem,
5 but it certainly is quite prevalent. So I would like you
6 to say where do you think those arguments come from that
7 students feel? In some cases staff professors and others
8 feel. They don't have the freedom to say clearly how
9 they would like to do. They don't have the freedom to
10 teach the kind of things or make the kind of points they
11 would like to make in classes. Students feel that they
12 raise certain kind of points. Challenging their
13 professor, they'll suffer for that.

14 Do you think there is any basis for that, or is
15 it just coming from advocacy organizations?

16 MRS. MELOY: Well, I would say that, I think,
17 the voices that are heard most strongly do come from
18 certain advocacy organizations. I don't mean to belittle
19 the fact that these feelings exist in various
20 circumstances and on certain campuses and certain people
21 and certain times, but I haven't, in my watching of
22 higher education issues, noted that it is a matter of a
23 ground swell of a problem.

24 MR. TOMA: I guess my response to that would be
25 that I think that part of that would come from the fact

1 that, I think, in the normal course of human interaction
2 and intense emotional debate, that when you have a
3 university campus or any college campus -- and I think as
4 a society we have come to a place where we are saying as
5 a society that we don't want to see any individual
6 feeling excluded or second classed because of their race,
7 their ethnicity, or any other protected characteristic.

8 So knowing that's being the dominant culture
9 that when there is, you know, debate on campus, and very
10 emotional debate -- as we know from brain science, it
11 doesn't have to be that emotional for the rational part
12 of our brains to click off and our emotional sides to
13 light up. And in that context I can see people feeling
14 skiddish about stepping into the fray and being in the
15 minority and having to endure the expression of
16 opposition and hostility from those in the majority in
17 many circumstances. So I think that is a part of the
18 natural reluctance that people have to say things. For
19 example, a professor who might be professing, you know,
20 that -- the genetic inferiority of a given group to speak
21 out openly about that.

22 I know there is a professor, for example,
23 within Cal State Long Beach who is a tenured professor
24 who has such views. And I think that's less of a code of
25 conduct, but more of -- just simply would be the sense

1 that they would be widespread. Not just disapproval, but
2 concern in, you know, perhaps, a loss of standing in the
3 eyes of other members of the community, if someone like
4 that would be regularly saying their views to the world
5 and to the campus. So I think that's a large -- you
6 know, a large part of what operates.

7 I think that there can be in a given campus
8 that -- where you have, say, a student code of conduct
9 that is overbroad and is enforced in an overbroad way
10 that could have a chilling effect. But whether that
11 exists throughout most of the campuses, that I have not
12 seen evidence of.

13 MR. KLAUSNER: Yeah. I would like to say we
14 are running, actually, over the time for this panel. We
15 have a bit of time for a designated break before next
16 panel begins. So I want to thank both of you for your
17 informant testimony. You can't leave here without your
18 picture being shot. Unless you choose a (Court reporter
19 unable to hear.), in which case you can do it.

20 MRS. MONTOYA: For the record.

21 MR. KLAUSNER: Okay. Thank you both very much.
22 And I invite you also if you want to augment any of your
23 comments, if something comes to mind before May 30th,
24 which would be the cutoff date for additional
25 submissions. If there is anything that comes to your

1 attention or you can come up with by way of specific
2 references to California-based acts of discrimination
3 based on various minority statuses that are within our
4 purview, we would be delighted if you want to augment
5 your testimony. But I thank you both very, very much for
6 participating this morning.

7 MRS. MONTOYA: Also, if Mrs. Meloy wants to
8 itemize those three things that she referred to.

9 MR. KLAUSNER: Yeah. Sure. That would be in
10 depicting. You know, I mean, for the record afterwards.

11 MRS. MONTOYA: Yeah. For the record later.

12 MR. KLAUSNER: Yeah. That would allow for the
13 break. We have a few minutes, still, interval.

14 MRS. MONTOYA: Okay.

15 MR. KLAUSNER: So we'll resume approximately
16 2:30 for our third concluding panel. And as I mentioned
17 earlier, for those of you that weren't here, that we'll
18 kind of carry that panel over further to allow additional
19 time for Q and A. And we'll go, perhaps, as late as
20 4 o'clock. Thank you very much.

21 (Whereupon, there was a break in the proceeding.)

22 MR. KLAUSNER: So I'd like to mention that we
23 are just about to go back on record. If anybody is in
24 earshot in the lobby, you can enter late. We'll start
25 shortly. It is just after 2:30 p.m. And I see that we

1 are being memorialized here, but Karen, if you want to
2 join us here.

3 MRS. MONTOYA: Thank you.

4 MR. KLAUSNER: All right. Let us commence with
5 our record here for our final and fourth panel of the
6 day. We have three representatives from the various
7 universities and colleges in California. Our order of
8 presentation is going to be slightly varying from our
9 protocol to deal with traveled schedules. Our three
10 panelists in order of presentation will be:

11 Jonathan Lee, who is staff consult of the California
12 community colleges. Jonathan's presentation will be
13 followed by Gale Baker, who is general consult of the
14 California State Universities, and Christopher Patti, who
15 is the principal consult at the University of California
16 is in the third slot here. We'll have ample time, as
17 indicated, for Q and A because we'll go as late as
18 4 o'clock if the questions don't run out by then. So
19 with that, if we could proceed, first of all, with
20 Mr. Lee. And we look forward to all of your
21 presentations.

22 MR. LEE: Thank you very much. My name is
23 Jonathan Lee. I'm staff consult at the Chancellor's
24 Office of California community colleges. What I wanted
25 to talk to you today about is kind of the unique role

1 that the chancellor's office has within the system and
2 how it differs greatly from Cal State University and
3 University of California. And so you can know what our
4 role would be or what role there really isn't in regards
5 to this particular situation.

6 For California community colleges, to give you
7 a little background, we are the largest higher education
8 system in the nation with over 72 districts and 112
9 colleges. We represent over 2.9 million students. Our
10 general purpose is basic skills training, work force
11 training, transfer to other four-year universities, and
12 in some cases personal enrichment. The chancellor's
13 office itself was established in 1967. And it operates
14 with the State Chancellor and is guided by the Board of
15 Governors, which we currently have 17. The Board of
16 Governors selects our Chancellor, which is currently
17 Jack Scott, which many of you may know. And a lot of the
18 policy decisions are made through consultation counsel
19 from the shared governance, which I mentioned before.

20 The general mission envision of the
21 chancellor's office is to empower the community colleges
22 through leadership, advocacy, and support. And also to
23 foster access, success, and lifelong learning for all
24 students while simultaneously advancing the state's
25 interest in a skilled workforce in an educated citizenry.

1 And in general, our office is responsible for allocating
2 state funding to the colleges in the districts. Now, the
3 chancellor's office itself is -- compared to this huge
4 population is very, very small. We are a state agency
5 centered in Sacramento, California with only 160
6 employees. We have ten different divisions ranging from
7 the executive office to academic affairs to the legal
8 division.

9 The legal division itself is made up of
10 currently only two attorneys, me and the general counsel.
11 So if you get a perspective, you know some -- some -- the
12 other higher education institutions will have three
13 attorneys per campus, and we have two for the entire
14 system. Among the part of governance is the local
15 governing boards at the colleges. Education Code 70902
16 says among other things, these local governing boards
17 manage and control district property; they establish
18 procedures to ensure faculty, staff, and students the
19 opportunity to express their opinions on the campus
20 level; and to establish roles and regulations governing
21 student conduct. And these are done at the local level,
22 not at the state level. And as mentioned earlier today,
23 there -- we have Education Code 66301, which talks about
24 freedom of speech, and I'd also point to Education
25 Code 76120, which specifically talks about what role our

1 office plays in that area.

2 For 66301, it states neither the regents of the
3 University of California, the trustees of the State of
4 California, the governing board of the community college
5 district, nor any mention of any campus of those
6 institutions shall make or enforce a rule subjecting a
7 student to disciplinary action solely on the basis of
8 conduct that is speech or other communication. Curiously
9 omitted from that is our office, because we're talking
10 about local governing boards, not the chancellor's
11 office.

12 And Education Code 76120 specifically points
13 out that the governing board of a community college
14 district shall adopt rules and regulations relating to
15 the exercise of free expression by students upon the
16 premises of each community college maintained by the
17 district, which shall include reasonable provisions for
18 the time, place, and manner of conducting such
19 activities. So, unfortunately, while I would like to
20 help this commission provide answers provided in
21 community colleges. It is a confusion made throughout
22 the state level of what our office can do.

23 We are a small agency which administers the
24 funding and some different conditioning throughout the
25 state. But in regards to free speech and those

1 particular important issues, our office does not weigh
2 in, and our office does not have that individual
3 jurisdiction over that, which is one issue. In fact, if
4 you wanted information about those particular cases, each
5 of the local districts or even colleges may have their
6 own counsel, which would specialize in those particular
7 areas. And they are the best ones to ask. But we wanted
8 to at least address so it would be on the record to know
9 where our office stands on these issues and what role we
10 play, which is unfortunately very little. So --

11 MRS. MONTOYA: So how many community colleges
12 in Los Angeles -- whom should we have invited?

13 MR. LEE: Well, I mean, that's -- it just
14 depends on who you wanted to talk to because -- you know,
15 like there was a mentioning of a Los Angeles Community
16 College District case. They have their own general
17 counsel. You could have invited them, but they would
18 have only been able to talk about their specific
19 policies. But each district could have their own
20 variation of apologies. And, you know, you can imagine
21 how difficult it would be to monitor all 112 colleges
22 different plans and try to establish that.

23 MR. KLAUSNER: So we -- let me just say, for
24 the record that, Lee, given your (Court reporter unable
25 to hear.) schedule and flight schedule, so we'll take

1 questions now for Mr. Lee and then proceed with the other
2 panelists.

3 MR. LEE: Thank you.

4 MR. DOLLINGER: So given that your office has
5 little or nothing to do with this, does your office ever
6 receive any information on this issue? Is it aware from
7 the statewide level at the community colleges what may or
8 may not be happening? Is there any buzz or anything that
9 you could tell us?

10 MR. LEE: Well, there is no official -- I mean,
11 it is not something done through the office. If I find
12 out something, it is personal reading it myself, doing my
13 own personal research. But nothing in official capacity
14 to the office. So I couldn't state that my office has
15 this stance or this belief because it wouldn't have the
16 stance or belief on it.

17 MR. DOLLINGER: Thank you.

18 MR. KLAUSNER: Mrs. Heriot?

19 MRS. HERIOT: If the committee were to try to
20 collect all of the policies for all of the very many
21 community colleges, would your office be the right office
22 to go through?

23 MR. LEE: It's -- our office wouldn't
24 necessarily -- our office would try to help facilitate
25 the process.

1 MRS. HERIOT: That's really what I'm asking.

2 Could you help us facilitate that?

3 MR. LEE: We can say -- we can make a call out
4 and say, you know, we've been asked to collect the
5 policies. But as far as current policies, we do not
6 collect them currently. So we don't have them stored in
7 our facility.

8 MRS. HERIOT: But you can help us collect them
9 if we needed to?

10 MR. LEE: I mean, there's not -- I mean, of
11 course we would help you in any way we could within our
12 boundaries.

13 MR. KLAUSNER: Mr. Dodd, you are next.

14 MR. DODD: Well, that was half my question.
15 But we're mainly a volunteer, very small office staff,
16 and you have more staff than we do. I mean, so one of us
17 doesn't have to sit there and generate an e-mail list of
18 everybody, who have that currently available. And
19 then -- but the other thing is, I think, in your litany
20 of things that you do, do at the beginning, there was
21 advice in there somewhere, what is the extent -- what is
22 the scope of your advice to the local districts?

23 MR. LEE: Well, our advice doesn't center
24 around those specific factors of the law. Because there
25 is a whole set of regulations that affect community

1 colleges, such as the type of course work that can be
2 taught. But when we look at student discipline, student
3 conduct, things that happen on a specific level that
4 happens on each individual campus -- I mean, when you
5 look at campuses that range as far from (Court reporter
6 unable to hear.) County to Los Angeles to Los Rios, you
7 know, each of those campuses have completely different
8 affairs that deal with on a student conduct level. But
9 if we were going to talk about what qualifies as a
10 transfer degree, you know, what qualifies as a degree
11 that gets you towards a career in technical education
12 credit, that's something our office would abide by. But
13 not necessarily should this student's grade be changed?
14 That is not something we would ever deal with.

15 MR. DODD: Could you advise them to remember
16 that there is such a thing as Government Code 66301?

17 MR. LEE: Well, I mean, the education code -- I
18 mean, they have attorneys as well. I mean, we often will
19 have them deferred to their own attorneys before we give
20 advice at our level, because we are such a small office
21 compared to other ones. Unless it is specifically in the
22 Title 5 regulations that we are governing, we don't give
23 just general advice on any random issue.

24 MR. DODD: Okay. Thank you.

25 MR. KLAUSNER: Mr. Hicks?

1 MR. HICKS: How many campuses did you say there
2 were again?

3 MR. LEE: There are 112.

4 MR. HICKS: Just to -- do you find that
5 problematic that you guys at -- can centralize policy in
6 something as important as student conduct? Would you
7 prefer it -- maybe what I'm asking you, would you prefer
8 it to be more centralized? Because I imagine there is
9 people making decisions at local campus levels that you
10 can't always keep track of. Isn't that just a little bit
11 cumbersome?

12 MR. LEE: I mean, it's a frustrating process
13 because we've been put in this situation before where,
14 you know, a legislator would say why can't your office do
15 something to inflict this policy? Or we'll have students
16 who will come from an individual campus and say, "We have
17 this complain, and we want you to solve it because we
18 don't know who to go to." And it is such a convoluted
19 process sometimes because they have to go through their
20 local board, their local process in a lot of cases.

21 So in a way of making it simpler, I'm sure it
22 is frustrating. But, practically, it is very difficult
23 for one small office to implement a policy over every
24 campus when it comes to individuals with conduct issues
25 in particular. I mean, that's just practically not

1 possibly unless the state wants to, you know, grow our
2 office, which it hasn't happened. You know, we worked up
3 by ten percent of last year -- I mean, the last budget
4 policy. We are not -- I mean, we're (Court reporter
5 unable to hear.) agency. We're general fund, and so we
6 don't have discretion to grow without the states
7 approval.

8 MR. HICKS: Okay.

9 MR. KLAUSNER: Well, I think at this point we
10 can go on.

11 MRS. MONTOYA: Can I just --

12 MR. KLAUSNER: Oh, yeah. Lee --

13 MR. LEE: I can stay up to part of there.

14 MR. KLAUSNER: Okay.

15 MRS. MONTOYA: Before you leave -- did it go
16 there? There we go. Thank you so much.

17 MR. KLAUSNER: Maybe -- certainly, as far as
18 today is concerned. But maybe -- you know, I gather
19 there may be very few attorneys that have responsibility
20 for one and a half million students or clients under
21 their purview. So I think that we understand if you have
22 to catch a plane and get back to work. But thanks very
23 much, Mr. Lee.

24 And now we'll turn to the California State
25 University system with Mrs. Baker.

1 MRS. BAKER: Thank you. And thank you for
2 inviting us. I, first, wanted to clarify that I noticed
3 on the agenda and in your introductions I was identified
4 as the general counsel. I am not the general counsel,
5 that would be Christine Halwick (Phonetic). I am one of
6 the attorneys in our office of general counsel for the
7 system.

8 MR. KLAUSNER: Oh, I see.

9 MRS. BAKER: I also --

10 MR. KLAUSNER: The office of general counsel?

11 MRS. BAKER: Yes. I also wanted to clarify
12 that I, too, am not a constitutional scholar or
13 1st Amendment expert, but I will do my best to answer any
14 questions you may have.

15 I, first, wanted to say that I think probably
16 all of us, but I'll just speak for the CSU. And we
17 agreed, generally, with the statements that were made by
18 both the FIRE and ACLU representatives this morning on
19 the applicable legal standards on when -- regarding
20 harassment and speech codes. But, I think, as Mrs. Meloy
21 indicated, it is often not so simple. It is definitely
22 in the details. It is also often quite difficult to
23 ascertain exactly when something has crossed the line,
24 such that the students who's the victim, so to speak, of
25 the speech and conduct is when you can legitimately say

1 that they are being deprived of equal access or
2 opportunities.

3 So I think that may be one thing to keep in
4 mind that it just is not always so easy when you look at
5 all the facts of a particular case, to figure out exactly
6 where that line is or to guess where a court will say
7 that line is. I also wanted to say as much as we value
8 free speech, we also very much value and consider it
9 critical to have a very open and welcome environment for
10 all our students. And I think, you know, it is very
11 difficult when two rights are clashing, the right to free
12 speech and the right to be free from harassment and
13 discrimination. And that's where we have our stickiest
14 situations and our problem situations that often -- or
15 sometimes lead to a lawsuit, and we have to deal with
16 them.

17 Just generally, I think, we at the CSU are
18 fortunate to not have had the kind of hate-speech
19 incidents that have been occurring at some of the other
20 California campuses recently. And I think in large part
21 that may be a function of the fact that we are a very
22 diverse -- we have a very diverse student body. And I
23 think that does make a difference. Someone, I forget who
24 exactly, mentioned earlier, maybe Mr. Toma, that -- I do
25 believe that if there is a critical mass, so to speak, of

1 a particular group on a campus, it does help them feel
2 welcome and inclusive and not so vulnerable to hate
3 speech that may be coming from other student groups on
4 the campus.

5 But each having said that, we are an extremely
6 large institution. We have 23 campuses statewide. We
7 have over 430,000 students. So we obviously have had
8 some incidents. One of the more recent was at our Cal
9 Poly San Luis Obispo campus a few years ago, when some
10 students placed a noose near a confederate flag and a
11 racist sign. And there was a lot of outrage as you might
12 imagine. A lot of outrage, you know, expressed by not
13 only campus administration but the campus community.
14 There was a lot of people pushing for student discipline
15 against the students. We had a legitimate concern to
16 think that to impose discipline, it may have implicated
17 their 1st Amendment rights, their free-speech rights.
18 They were not ultimately disciplined. However, I think
19 they were quite surprised at the ground swell of outrage
20 that was expressed by their fellow students and by the
21 administration and were very apologetic for their
22 actions.

23 But I understand that one of the outbursts of
24 that was in January 2010 it became illegal in the state
25 of California to place a noose on a college campus. That

1 is now -- that joins existing prohibitions on swastikas
2 and burning crosses. So that, that would now be
3 recognized as a hate crime. So if that were to happen
4 again on one of our campuses, I -- depending on the
5 circumstances, of course. But generally speaking, don't
6 think that we would need to be concerned that to impose
7 discipline (Court reporter unable to hear.) violate their
8 free-speech rights. On a systemwide basis, we have
9 somewhat of a similar -- it is appropriate that I'm
10 sitting in the middle.

11 Because we're somewhat like the community
12 colleges and we're somewhat like the UC, we are different
13 in a number of respects. We do have 23 campuses. We
14 have a system wide office that exercises a little bit
15 more control than I understand the system wide community
16 colleges office exercises. But we don't have the kind of
17 attorney resources the UC has, so we are stretched a
18 little more thin. But even in terms of policies that
19 could be considered free-speech type policies, we do have
20 the system wide guidance and policies that are found in
21 Title 5 of the California Code of Regulations. Those are
22 regulations that have been issued by our board of
23 trustees. But -- and those generally involve the use of
24 campus grounds and buildings like, you know, handbills
25 and leafleting, rallies and events, and those types of

1 things.

2 But it is left to each of the individual
3 campuses to issue their own time, place, and manner
4 regulations, for example. So each of our 23 campuses do
5 have their own, for lack of a better term, "free-speech
6 policies" that apply only at that particular campus. We
7 also have a system wide student conduct code which
8 differentiates us a little bit from the community
9 colleges, I think. And as part of -- and this would be
10 the code that if any CSU student is to be disciplined, it
11 would be in accordance with the system wide student
12 conduct code, which is also found in Title 5.

13 Some of the grounds upon which a student could
14 be disciplined, that are speech related include
15 willfully, materially, and substantially disrupting or
16 obstructing campus activity or the free flow of
17 pedestrian or other traffic; substantially and materially
18 disrupting the normal campus operations; substantially
19 and materially infringing upon the rights of members of
20 the campus community; disorderly, lewd, indecent; or
21 student behavior and conduct that threatens or endangers
22 the health or safety of the members of the campus
23 community.

24 And the student conduct code also makes clear
25 that no student may be disciplined by any behavior

1 protected by the 1st Amendment. Some of those
2 descriptions are broad. Again, I think this is where you
3 get into the rabbi was discussing earlier. I don't know
4 that it is possible to draft a student conduct code or
5 free speech policy that is so detailed that it covers
6 every possible contingency. They are to some degree
7 necessarily slightly broad. But we do have a legal
8 obligation to make our policies specific enough to give
9 advanced notice to our students and other members of the
10 campus community as to what will be tolerated and what
11 won't be tolerated. But there's always going to be
12 matters of interpretation and trying to fit those
13 prohibitions to a particular set of facts, which is where
14 we sometimes get into trouble. We have had occasion over
15 the years to revise that student conduct code, sometimes
16 in response to a lawsuit or having some external
17 organization like FIRE bring something to our attention.
18 We did revise the code of conduct several years ago to
19 clarify that it was not enough to disrupt a campus
20 function.

21 It had to be a material and substantial
22 disruption for someone to be disciplined in accordance
23 with court decisions on the subject. We also -- and this
24 case was referenced several times this morning, the
25 San Francisco State College Republicans case, which

1 involved some students from the Campus College
2 Republicans Club, complaining that their 1st Amendment
3 rights were violated when they were investigated for
4 having stepped on the Hamas and Hezbollah flags as part
5 of an antiterrorism rally.

6 That's not my campus, so I don't know the
7 details. My understanding is they were not disciplined,
8 but they were investigated because a complaint had been
9 filed. And we're obligated to investigate those kinds
10 of -- a complaint of harassment or discrimination, which
11 I believe is what happened there. But in the course of
12 that investigation, I think the campus did give some kind
13 of indication to the students that they may have violated
14 the code of civility in our students conduct code. And
15 when the students went to court with the request for a
16 temporary restraining order, my understanding is the
17 court agreed and expressed some concern about the
18 civility language that was in our student conduct code at
19 that time.

20 I think that the campus administration may have
21 misunderstood the student conduct code. It was never our
22 intent that somebody could be disciplined for a lack of
23 civility. But we did, after that case, amend the code to
24 make it very clear that while we -- and we still have a
25 section that talks about our expectations of civility.

1 But we have made it very clear that a violation of
2 civility is not a ground for student discipline. It is
3 an expectation and hope for the campus community. We
4 have received -- some of our campuses have received
5 letters in the past, from FIRE and other external
6 agencies, bringing to their attention perceived problems
7 with various policies on the campus.

8 I understand that some campuses -- but all of
9 the campuses that received those took another look at
10 their policies. I believe some have been revised in
11 response to those letters. And, you know, we actually
12 value that kind of external input because this is a very
13 complicated area of law. And it is often difficult to
14 get the word out from our office, from our legal office,
15 to all of the folks on our campuses who are involved in
16 whatever way dealing with students and problems that
17 arise. There is turnover on the campuses. People don't
18 always understand what the rules are. So when we do get
19 letters, it comes to our attention that there may be a
20 problem. And I think we do a good job of trying to
21 respond to those and fix problems when we see them.

22 MR. KLAUSNER: Thank you. We're going to go
23 straight, now, to Mr. Patti's presentation and take
24 questions for Mr. Patti afterwards, as well as
25 Mrs. Baker.

1 MR. PATTI: Thank you. I appreciate the
2 opportunity to discuss the universities (Court reporter
3 unable to hear.) free-speech policies with the committee.
4 I would like to talk briefly about those values and the
5 legal requirements that have shaped the universities
6 policies. And then I'll talk a little bit about the
7 policies themselves. Let me begin by discussing two
8 values that I think are essential at the University of
9 California and probably all of the institutions of higher
10 education.

11 First is the value of freedom and expression.
12 The business of the university is the creation,
13 exploration, testing and dissemination of ideas. Success
14 in that business requires an environment in which ideas
15 can be freely and vigorously debated and conventional
16 wisdom challenged. The campuses of the University of
17 California are home to intense and often fractious debate
18 over issues of science, social problems, law, politics,
19 international affairs, religion, literature, the arts,
20 and much more.

21 Within those categories a huge range of points
22 of view are expressed. This diversity of expression
23 extends beyond scholarship in the classroom, the campus
24 community as well. Students are engaged in a dizzying
25 variety of activities, clubs, and groups dedicated to

1 expressing all matter of viewpoints on religious,
2 political, social, and other issues. The university
3 allows students to engage in peaceful and lawful protest,
4 including protest of the actions of the university
5 administration. And protest, they do. Now, there have
6 been institutes, some recent and well publicized, in
7 which protest has crossed the line from legitimate speech
8 and illegality and even violence.

9 Students and others on campus have the same
10 responsibility as citizens everywhere to obey the laws.
11 And the university may, of course, take appropriate
12 action to protect property and safety, to maintain order,
13 and to ensure that university operations are not
14 materially disrupted. Protest does not give a license to
15 violate the law. It is true that universities have
16 sometimes been the target of criticism by free speech
17 advocates. I think, in part, this is because recognition
18 of the importance of free expression at the university by
19 society and by universities themselves has caused the bar
20 to be set very high, appropriately so.

21 And so while it is legitimate for critics to
22 point out those instances in which universities fall
23 short of the high standards being set for themselves, it
24 is also important to recognize that there are few, if
25 any, public institutions in which freedom of expression

1 was more vigorously practiced than in our nation's
2 universities. A stroll down Berkeley's (Court reporter
3 unable to hear.) plaza on any given day when classes are
4 in session will show you that. And I think a walk around
5 most of our campuses would.

6 A second essential value of the university is
7 inclusiveness, diversity, and equality of opportunity.
8 As a publicly-funded university in a large diverse state,
9 the University of California must remain accessible and
10 open to Californians from all backgrounds. Like freedom
11 of expression, diversity, and equality are essential
12 conditions for the university to successfully pursue this
13 mission in scholarship and education. With a broad
14 diversity in backgrounds including social, racial, and
15 economic diversity, contributes to a multiplicity of
16 experiences, outlooks, and ideas that create a richer,
17 scholarly, and educational environment. Now, for the
18 most part, these two values: freedom of expression on
19 the one hand and inclusiveness and diversity on the other
20 are complimentary and not competing goals.

21 Freedom of expression allows every group to
22 express its ideas and to engage in associations and
23 activities that provide mutual support. Group-free
24 expression, minority groups are able to make their
25 concerns and beliefs known and become a welcomed part of

1 the vibrant university and community. Similarly, an
2 inclusive and diverse community can support the ideals of
3 free expression by broadening the conversation and
4 providing new ideas and new points of view.

5 Unfortunately, there have also been circumstances in
6 which these values have come into tension with each
7 other.

8 There have been instances including recent well
9 publicized incidents at the University of California in
10 which some abused their rights to free expression. In
11 these cases speech had been used to degrade, marginalize,
12 threaten, or harass minority individuals or communities
13 on the basis of their race or sex. These are the actions
14 of a very few and have been condemned by the majority of
15 our students, our faculty, and our administration.
16 Nevertheless, such actions have a severe and far reaching
17 negative impact. They send a false message that minority
18 communities are unwelcomed or even unsafe. They
19 undermine the university's efforts and inclusiveness.
20 And they disrupt and distract from our educational
21 mission.

22 These values of the university are associated
23 with corresponding legal obligations that are sometimes
24 also intentional. On the one hand, public universities
25 as government entities are subject to the requirements of

1 the 1st Amendment, which limit the degree to which public
2 universities can discipline students for their speech.
3 On the other hand, universities are also subject to the
4 requirements of federal antidiscrimination law, including
5 Title 9 of the Education Act amendments of 1972, Titles 7
6 and -- 6 and 7 of the Civil Rights Act, which impose a
7 duty on universities to respond to discriminatory
8 harassment committed by students against other students.
9 Universities have faced significant challenges in their
10 efforts to comply simultaneously with the sometimes
11 competing legal obligations.

12 In the case of Davis versus Monroe County Board
13 of Education, which was discussed extensively this
14 morning. In 1999 the United States Supreme Court held
15 that schools violated their obligations under Title 9 by
16 showing deliberate indifference to student-on-student
17 sexual harassment. Similarly, the US Department of
18 Education's Office of Civil Rights has issued regulatory
19 guidance, stating that, "The existence of a racially
20 hostile environment that is created, encouraged,
21 accepted, tolerated, or left uncorrected on campus can
22 constitute a violation of Title 6 by the institution."
23 In order to comply with these requirements, colleges and
24 universities must be able to establish rules and
25 procedures that authorize action against students who

1 engage in unlawful discrimination and harassment.

2 The challenge that universities have faced is
3 that courts have, as we heard previously, repeatedly
4 struck down public university antiharassment policies
5 finding that they violate student's free-speech rights.
6 These issues have generally arisen in the context either
7 of discrimination against educational institutions or
8 free-speech claims. But courts have seldom dealt in a
9 single case with both issues. And, therefore, as a
10 result, courts have not given explicit guidance on how
11 universities must comply with these potentially duly
12 mandates. They haven't clearly reconciled them in a
13 single case. And, here, I have to disagree with the
14 suggestion that the answer to how you reconcile these two
15 mandates is clear or cut and dry.

16 In fact, some courts have gone so far to
17 suggest it is not possible for the university to comply
18 both with the 1st Amendment and antidiscrimination law
19 simultaneously. For example, in a much discussed 2008
20 case, De Jon versus Temple University, the US Court of
21 Appeals for the third circuit invalidated the sexual
22 harassment policy that prohibited speech that "has the
23 purpose or effect if unreasonably interfering with an
24 individual's work, educational performance or status or
25 the purpose of creating and intimidating hostile or

1 offensive environment," which sounds a lot like the
2 guidance that I just quoted from the US Department of
3 Education.

4 The Court rejected the university's argument
5 that the provisions were needed to meet the school's
6 obligation to correct the discriminatory hostile
7 environment. The court stated that, "We have found no
8 categorical rule that divests harassing speech as defined
9 by federal antidiscrimination statutes of 1st Amendment
10 protection." In other words, the court seems to be
11 saying that even speech that's unlawful under the
12 antidiscrimination laws may be constitutionally
13 protected. If so, it's hard to see how public
14 universities can lawfully meet their antidiscrimination
15 obligations. So having described the University of
16 California's values and legal challenges, allow me to
17 talk a little bit about what the university has done to
18 try to advance its values and to comply with its legal
19 obligations. Before I do, I should say a word about the
20 university's organizational structure.

21 As you know, the University of California is
22 comprised of ten separate campuses. Those campuses, in
23 turn, have numerous offices and organizations within
24 them. The president of the university and the office of
25 the president is responsible for administration and

1 oversight of the entire system. And ultimate authority
2 over policy rests with the Board of Regents. Policies
3 may be adopted at any of these levels by the regents, the
4 office of the president, the campus, or units within
5 campuses. Regents and office of president policies take
6 precedence over local campus or unit policies. Although,
7 sometimes when there is a change in system-wide policy,
8 it may take a short while for campus policies to conform
9 or for statements of policy in campus or local materials
10 and Web sites to catch up. Here, I'm going to be
11 focusing mostly on system-wide policies adopted by the
12 office of the president, which are the primary (Court
13 reporter unable to hear.) in this area. I'd like to
14 highlight several aspects of those system-wide policies.

15 First, the UC policy contains many strong
16 affirmations of protections for the free-speech rights of
17 students, faculty, and visitors to the university. For
18 example, the universities policy on speech and advocacy
19 states that, "The university is committed to assuring
20 that all persons may exercise the constitutionally
21 protected rights of free expression, speech, assembly,
22 and worship." The university's policy on academic
23 freedom states that, "The university is committed to
24 upholding and preserving principles of academic freedom,
25 which include freedom of inquiry and research, freedom of

1 teaching, and freedom of expression and publication."

2 The university's regulations governing the
3 conduct of -- on campus of individuals not affiliated
4 with university, state that, "These regulations may not
5 be utilized to impinge upon the lawful exercise of
6 constitutionally protected rights of freedom of speech or
7 assembly." Those same policies provide that when
8 nonaffiliates are required to obtain approval to hold
9 events on campus, for example, criteria for approval
10 "shall be content neutral and specified in advance."

11 The university policies support student speech
12 activity by making financial support from student-fee
13 revenues available to student organizations. The
14 procedure and criteria for distribution of those funds
15 "must be viewpoint neutral in their nature. That is they
16 must be based on considerations, which would not include
17 approval or disapproval of the viewpoint of the student
18 organizations." On the other side of the equation, the
19 university has recently reviewed and revised its
20 antiharassment policies to bring more in the line with
21 emerging judicial authority.

22 Last year my office conducted a review of the
23 university's student conduct harassment policies. We
24 determine that the existing policy had a number of
25 problems. The prior policy contained to different

1 harassment standards. One for sexual harassment and
2 another more broadly applicable to harassment based on
3 race, national origin, sex, and other factors. Because
4 both policies prohibited harassment on the basis of sex,
5 there was inconsistency even as to the definition of
6 student sexual harassment. And, finally, the definitions
7 of harassment in those policies was quite close to the
8 ones struck down in a number of recent cases, including
9 the De Jon case that I talked about previously.

10 My office recommended that the policies be
11 modified. But because the policy revision process in the
12 university required extensive consultation throughout the
13 institution that takes a considerable amount of time, we
14 recommended that an interim policy be adopted until full
15 review could be completed. On October 9th, 2009,
16 President Eudolph accepted this recommendation and
17 implemented a new interim harassment policy. The interim
18 policy establishes a single definition of prohibited
19 harassment based on sex, race, national origin, or other
20 protected classifications. The definition of harassment
21 is modeled closely on the definition of unlawful
22 student-on-student harassment set forth by the US Supreme
23 Court in the Davis case.

24 Specifically, the policy defines prohibited
25 harassment as conduct that is so severe and/or pervasive

1 and objectively offensive and that so substantially
2 impairs a person's access to university programs or
3 activities, that the person could defectively deny equal
4 access to the universities resources and opportunities on
5 the basis of his or her race, color, national origin, or
6 ethnic origin, alienage, sex, religion, age, sexual
7 orientation, gender identity, marital status, veteran's
8 status, physical or mental disability are perceived
9 membership in any of these classifications. In this way,
10 the university hopes to retain the tools necessary to
11 respond to acts of discriminatory harassment while
12 minimizing the vulnerability of this harassment policy,
13 the constitutional challenge under the 1st Amendment.

14 The universities currently review options for a
15 permanent antiharassment policy, although it's expected
16 that the permanent policy will follow the basic approach.
17 Also, in light of recent racial incidents, the university
18 is exploring the possibility of (Court reporter unable to
19 hear.) relating to threatening conduct to make sure it
20 has the maximum authority allowed under the 1st Amendment
21 to respond to such circumstances.

22 Again, I want to thank the committee for the
23 opportunity to describe UC speech policies. And I'm
24 happy to respond to any questions.

25 MR. KLAUSNER: Well, thank you, Mr. Patti.

1 Thank you all for your excellent presentations. I'm glad
2 we have ample time for questions and following up. So
3 who is --

4 MR. ROSENTHAL: Excuse me. Is the other
5 gentleman coming back, or did he --

6 MRS. MONTOYA: No. He had to leave.

7 MR. KLAUSNER: He had to leave. He had to go.

8 MR. ROSENTHAL: Oh, he did. Okay.

9 MR. KLAUSNER: So is there anybody that wants
10 to go (Court reporter unable to hear.).

11 MR. DODD: You are the chair.

12 MR. KLAUSNER: Is that what you want? Go ahead
13 and begin.

14 MRS. MONTOYA: You spoke about examples that
15 effect minorities with respect to the (Court reporter
16 unable to hear.). In some cases the inclusiveness, the
17 diversity, the equality of opportunity. Aren't there
18 also -- I mean, would you acknowledge -- or are there
19 examples that affect, I guess, what we call majorities on
20 the UC campuses like Anglo-Americans, Asian-Americans,
21 other examples of problems that matter. You only -- my
22 point is that with respect to inclusiveness, diversity,
23 and equality of opportunity, you seem to speak as if
24 these problems only affect minorities. I guess that
25 would be African-Americans, Latinos.

1 MR. PATTI: Well, I think it's conceivable that
2 they can effect everyone. The incidents that have
3 occurred recently, happen to have been targeted --

4 MRS. MONTOYA: Mainly African-American at
5 San Diego.

6 MR. PATTI: -- at small minority groups. And I
7 think those groups are the ones who tend to be most
8 vulnerable to these sorts of actions because they are
9 small. As a previous speaker indicated, there may not be
10 a critical mass of some of these groups on campus. And
11 so there is the potential that these kinds of incidents
12 can make them feel that they are not welcome there.
13 Whereas, if you are one of, you know, thousands and
14 thousands of students of your type. I think that's a
15 little bit more difficult.

16 MRS. MONTOYA: Yeah. I don't even see those as
17 free speech. I see them as beyond free-speech incidents,
18 but that's just me. Let's see. I also wanted to know,
19 how do you explain that you have five campuses that still
20 have not implemented President Eudolph's interim
21 harassment policy that he accepted on October 9th, at
22 least, by -- I think it was March 19th that FIRE found
23 that they had not been implemented.

24 MR. PATTI: Well, in fact, the president's
25 policy has been implemented throughout the system. It is

1 the law of the land for the University of California.

2 MRS. MONTOYA: Yeah. But not for particular
3 campuses.

4 MR. PATTI: But for some -- and for all those
5 campuses. But in some cases I think it is correct, and
6 it has been brought to our attention recently that the
7 Web sites that set out policies on those campuses have
8 not caught up with what the system-wide policy is. And
9 so we have asked campuses to conduct reviews to make sure
10 that they bring their statements of policy in compliance
11 with what the actual policy is. But the policy that
12 governs is the policy that is (Court reporter unable to
13 hear.).

14 MRS. MONTOYA: You know I'm not a lawyer. But
15 it seems to me, when I read the record, that UC was
16 sitting on the wrong policy from 1999 until 2009. Could
17 you explain?

18 MR. PATTI: Yeah. Let me --

19 MRS. MONTOYA: Please.

20 MR. PATTI: Let me just be clear about what the
21 court said in 1999. The court in 1999 did not say what
22 is and what is not constitutional. The court, in 1999,
23 said if universities are deliberately indifferent to this
24 conduct, they may be liable for discrimination --
25 violations of discrimination law under Title 9. The

1 court wasn't actually dealing with what the
2 constitutional standard is. I think what we have come to
3 sort of conclude over time, seeing the way courts have
4 responded in the meantime, is that our best chance at
5 maintaining a constitutionally defensible policy is to
6 hue as closely as we can to what the court in 1999 said
7 is the standard under discrimination law.

8 Hopefully the courts won't say you are required
9 to do one thing under discrimination law that you are
10 prohibited from doing under the constitution. But as I
11 said in my statement, the courts haven't really
12 reconciled these two things. And I don't think it is
13 entirely clear cut that the solution we've taken is the
14 only possible one. But it's the one that we've
15 recommended that we think is probably the safest. And
16 that's the direction that the university decided to go.

17 MRS. MONTOYA: I guess my question is:
18 shouldn't you have made the review earlier than 2009?

19 MR. PATTI: Well, I'm not actually sure that
20 there was reason to because the case law has been
21 evolving somewhat in this area. The policy we had before
22 this one was not a policy that, I think, was clearly
23 unconstitutional. And, in fact, we discussed it with
24 ACLU at the time we adopted it. And so the -- I believe
25 that the standards have been changing a bit. And,

1 therefore, it has caused us to have to review things on
2 an ongoing basis. I think where we are right now is
3 probably the safest place to be. But I don't think we're
4 going to know until a court, maybe the Supreme Court,
5 takes both of these strands of the law, discrimination
6 law and the constitution in the same case, and says,
7 "Here is how we're going to reconcile these guys. Go out
8 and write your policy accordingly."

9 And another problem that we have sometimes is
10 we get some fairly general pronouncements in the cases
11 about what the standards are. But those don't
12 necessarily translate into the words of the policy. I
13 mean, you know, one of the problems with the Davis test
14 is it gives you some language that we have now put into
15 policy. What exactly does that mean? How hard or
16 difficult is it going to be to apply that in individual
17 cases to actual facts (Court reporter unable to hear.).

18 MRS. MONTOYA: Thank you.

19 MR. KLAUSNER: Mr. Dodd?

20 MR. DODD: I have a few. But I can come back.
21 This is a mechanical question for Mrs. Baker. So the
22 Code of Conduct is in Title 5?

23 MRS. BAKER: Right.

24 MR. DODD: Now, can the individual campuses
25 augment, amend, write, and use notes, or is that it?

1 MRS. BAKER: That's it.

2 MR. DODD: That's it. So if they have
3 something different, you're not supposed to (Court
4 reporter unable to hear.)?

5 MRS. BAKER: Correct.

6 MR. DODD: Okay. And then I was wondering, as
7 far as the San Francisco State case that was brought up,
8 you said they were obligated to have (Court reporter
9 unable to hear.). Are you obligated to investigate every
10 point in the case that somebody says my feelings were
11 hurt because of XYZ, or is there some kind of demur
12 proceeding to use a legal analogy? You know, that this
13 complaint really doesn't meet -- well, now you have a new
14 policy for the UCs. This complaint does not even meet
15 this test. We are not going to go further. Or do you --
16 is there some regulations that everything that is
17 complained must be investigated? And I give it to both
18 of you guys.

19 MRS. BAKER: I don't know if there is an easy
20 answer to that. If a complaint comes in that is clearly
21 on its face, even if you accepted everything they said is
22 true, it doesn't even meet (Court reporter unable to
23 hear.) of a possible violation of a policy or the law,
24 then there is not going to be an investigation. But
25 usually it is not so clear. It doesn't have to be a

1 full-blown investigation. Lots of times, maybe if you
2 accepted everything as true, it could possibly be a
3 violation. So the level of the investigation may be much
4 more informal and quick than if it looks like there is
5 some substance here, and it is complicated. It may be a
6 much longer and involved investigation. But, you know,
7 we have an obligation to take seriously complaints of
8 discrimination and harassment. So if it does meet that
9 first initial review, that there could possibly have been
10 a violation of policy or law here where we could just
11 say, you know, this doesn't even merit any kind of
12 investigation. We do need to look into it.

13 MR. DODD: Well, and then if something is
14 investigated, does that go into the student's file?

15 MRS. BAKER: No.

16 MR. DODD: Only if he asks?

17 MRS. BAKER: Well, when you say their file -- I
18 mean, nothing -- it doesn't go in their official
19 educational file.

20 MR. DODD: There's no disciplinary records that
21 attains them to these actions?

22 MRS. BAKER: Right. No.

23 MR. PATTI: The only thing that I would do
24 that -- is that the sort of demure -- the equivalent to
25 the demure in the student conduct situation, the decision

1 whether or not to bring charges.

2 MRS. BAKER: Right.

3 MR. PATTI: So investigations can take
4 different forms and can be more or less intense depending
5 on the issue. But, ultimately, if the institution
6 decides not to bring charges, that's -- the demur has
7 been sustained.

8 MR. BAKER: Right.

9 MR. DODD: Well, I mean, if you have, you know,
10 the Jewish student group saying the Palestinians are
11 chanting yes to Israel and that offended my racial and
12 ethnic sensibilities, and the Palestinian group was
13 saying, "The Republicans stomped on the flag, and that
14 insulted me." I mean, it seems to me that that's one
15 that you just say, "Go away. Get out of my office."
16 This is a 1st Amendment question. And -- but that --
17 that's not what's happening, what we're hearing.

18 MR. PATTI: Well, I'm not sure that isn't
19 what's happening. I mean, I think -- I think in some of
20 these cases, student conduct officials will take a look
21 at what the facts are and then make a decision not to
22 bring charges. I mean, we haven't had a lot of examples
23 of charges brought that I'm aware of for pure speech
24 activities of the kind you have described.

25 MR. DODD: Okay. Thank you.

1 MR. KLAUSNER: We'll go to Mrs. Heriot and then
2 Mr. Hicks.

3 MRS. HERIOT: I just want to get back to the
4 demur here. We've had incidents on my campus. And I
5 work on a private campus where we've had investigations
6 for things I would have thought would want to demur
7 standards, but didn't. They were, nevertheless,
8 investigated quite extensively. And so -- well, what is
9 the demur standard for Cal State? What -- in my case I
10 remember a case where one of my colleagues had used the
11 word "colored" to refer to an African-American. Because
12 the case that she was teaching from, which was from the
13 1910s, had used that term "colored."

14 And an investigation, I guess, was conducted
15 into her class as to whether or not she acted
16 inappropriately by using the word "colored." She had
17 actually used it because: A, the case had used it; B, a
18 student had then used the term. And she just sort of
19 automatically responded to it that way. And there was a
20 big hullabaloo on our campus. Is it the Davis standard
21 that is (Court reporter unable to hear.) of demur?

22 MRS. BAKER: No. It wouldn't be that standard.
23 You know, an investigation -- the way you should conduct
24 an investigation is you have no preconceived notion of
25 the truth or falsity of the allegations.

1 MRS. HERIOT: There's still legal standard.

2 Legal standard has to be something.

3 MRS. BAKER: Right.

4 MRS. HERIOT: And you assume the truth about
5 the allegation, and then you say, "Well, does this fit
6 what?" What's this -- what's the rule that you are
7 trying to --

8 MRS. BAKER: But I think the problem is that
9 lots of times you don't have all the facts. You don't
10 have enough facts to make that initial determination.
11 And that is the very point of the investigation is to get
12 those facts. But I don't know the particulars of that
13 situation.

14 MRS. HERIOT: Can you give me some examples?

15 MRS. BAKER: If a student came in and said, you
16 know, "One of my professors makes statements that are
17 very demeaning to woman, and I feel very offended." You
18 know, we would -- hopefully what would happen on the
19 campus is they would ask for particulars and details.
20 They would go talk to other students in the class to see
21 if they can -- they concur, if they can add anything. If
22 there is any meat or potential meat on the bone, go and
23 talk to the professor. Have you made these kind of
24 statements? In what context? Was it part of the
25 legitimate pedagogical mission of your discussion? That

1 would be the investigation, to find out the facts and the
2 context. To determine -- to even make the determination:
3 Is there a possible violation of the policy?

4 MRS. HERIOT: But see. This is actually the
5 crucial step. If the worry here is that there is some
6 chilling effect to speech codes, hate codes, harassment
7 codes, whatever we want to call them, it is occurring at
8 that level. And so the real law isn't what is written in
9 the code. The real law is at what point do the lawyers
10 start calling people, calling fellow students, asking
11 people what really happened here. At what point does the
12 hullabaloo start? Not at what point does the -- does an
13 actual charge come across.

14 MRS. BAKER: I think there is --

15 MRS. HERIOT: So isn't this where things are
16 really important? Isn't this where Davis -- if Davis is
17 the standard, and you can see that it was. So if it is
18 not the standard being implemented, I think you've waived
19 qualified immunity at this point. So what is that
20 standard that causes not the expulsion of a student or
21 the discipline of a faculty member, but what starts the
22 talk around campus? "Hey, they are investigating this.
23 They asked me this." What starts that?

24 MRS. BAKER: I think it is the same with any
25 kind of complaint of substance. If an employee were to

1 allege that I didn't get that promotion because I'm a
2 particular ethnicity or race, and it looked like there
3 was any possibility that, that was true.

4 MRS. HERIOT: Any possibility?

5 MRS. BAKER: Yes.

6 MRS. HERIOT: Any possibility?

7 MRS. BAKER: We would have to look into it.

8 MRS. HERIOT: Any possibility?

9 MRS. BAKER: Yes.

10 MRS. HERIOT: One in 1,000 chance?

11 MRS. BAKER: Yes.

12 MRS. HERIOT: One in 10,000 chance?

13 MRS. BAKER: How do we determine that? We need
14 to gather the facts to determine whether there is any
15 legitimacy to the claim.

16 MRS. HERIOT: Either because it is not going to
17 (Court reporter unable to hear.), but more for the fact
18 I'm a white woman. You are not going to investigate that
19 one, are you?

20 MRS. BAKER: If you came in and filed a
21 complaint and you could put some --

22 MRS. HERIOT: No matter what?

23 MRS. BAKER: A little bit of meat off of it.
24 You're trying to stump me.

25 MRS. HERIOT: How much meat? That's not my

1 question. How much meat do you need?

2 MRS. BAKER: I'm not going to be able to draw a
3 black-and-white line.

4 MRS. HERIOT: But that's the trouble. I mean,
5 I completely sympathize with you that you can't draw a
6 black-and-white line.

7 MRS. BAKER: Yes. But this is not something --

8 MRS. HERIOT: But like there's standards here.
9 You could say, "Davis, here's the standard, and it's kind
10 of this wide. There is this gray area here we're not
11 really quite sure." But then that is the standard.
12 Because you have a legal standard there, not a standard
13 over here. One over here. We might have a gap here. We
14 might not know exactly how, you know, a particular case
15 ought to be disposed of. But we know, "Here is a legal
16 standard, not here." But up until now all I need is like
17 a 1 in 10,000 chance that maybe there is something to
18 what I'm saying?

19 MRS. BAKER: In your example of being an
20 employee and coming in and making a complaint that some
21 action was taken or not taken on the basis of your race
22 or ethnicity, we would look into it.

23 MRS. HERIOT: But that just means you're
24 allowing that issue to trump the chilling issue. You
25 know, whenever there is any kind of reason to believe, no

1 matter what, you know, it is possible that there is
2 something going on here. That, that trumps the
3 alternative issue. The issue we're supposed to be
4 balancing here is 1st Amendment issues and the ability to
5 talk and feel free and not think, "Oh, my gosh. If I
6 think "colored person," then there is going to be an
7 investigation."

8 MRS. BAKER: Well, Chris, have any thoughts?

9 MR. PATTI: Well, I would just -- I would just
10 say this. I mean, I think the general standard ought to
11 be similar to what it is in the court of law, which is
12 that if someone makes allegations that if true would meet
13 the legal standard, then you have to start looking into
14 it. So I'm not sure what else we can do.

15 MR. KLAUSNER: Okay. Why don't we go on to
16 Mr. Hicks. I'll make a comment, and then go on to
17 Mrs. Montoya.

18 MR. HICKS: Yeah. I -- what troubles me about
19 all this is the fantalizing of people, both students in
20 some cases -- you know, employees on those campuses
21 that -- the standard almost seems to be if somebody
22 claims that feelings were hurt at any level, no matter
23 how ridiculous it may be, then what you offered was
24 certainly ridiculous, he can have a certain weight in the
25 political climate we've allowed to generate on these

1 campuses. That's my real trouble, a bunch of it. But I
2 have a question about UC San Diego in terms of -- because
3 that's been the latest, you know, big deal issue that
4 garnered the headlines for quite a while.

5 Some would argue, and I'd like to hear how you
6 think from the UC perspective that it dealt with.
7 Because some argue there was an overreaction to what took
8 place outside of what may have been, that he (Court
9 reporter unable to hear.) hanging a noose. Nobody seems
10 to know who that -- really did it, even though somebody
11 confessed from around the corner kind of way. But
12 what -- what's -- did anything change in terms of policy?
13 Did -- from your office, in a policy way, did you react
14 any way that moved to change things in terms of policy
15 statements regarding what was generated out of
16 UC San Diego?

17 MR. PATTI: Well, actually, we haven't altered
18 any policies as a response to what happened at
19 UC San Diego. We are examining our policies to see
20 whether or not, for example, acts that are -- fall within
21 the Supreme Courts truth threat jurisprudence, which
22 allows people to be punished for actually engaging in
23 threats of physical violence whether that can be included
24 in a more clear way in our policies. But we haven't made
25 any specific changes in policy as a result.

1 MR. KLAUSNER: I would like to pose a question
2 to both of you. And that is: The role each of your
3 offices play in keeping abreast of current case law,
4 current complaints within, say, the Lopez decision
5 against LA Community College Education District in the
6 court in 2009 that dealt with the appropriate kinds of
7 defenses that could be raised to speech codes or
8 policies. And what you do, then, to the extent you keep
9 abreast of acting the clearing house or disseminating
10 information to the various campuses that you are dealing
11 with. And if we could start with Mr. Medic (Phonetic).

12 MR. PATTI: Yeah. We do quite a bit of that.
13 I mean, we do keep -- we do review relevant cases like
14 that, that are relevant to higher education. And, in
15 fact, there was that. That case was one of the reasons
16 we decided to take another look at our own policies. We
17 had this case in the third circuit and very similar
18 ruling, here, more locally. And that really was one of
19 the things that lead us to sort of take a look and see
20 who do we think we need to adjust things now? So yes, we
21 are fairly active in that sort of thing.

22 MR. KLAUSNER: And just before Mrs. Baker
23 comments, Mrs. Baker mentioned during her testimony, her
24 presentation, that sometimes you are triggered into
25 action by letters or complaints received from -- such as

1 FIRE. And I was just wondering what role -- you know,
2 groups such as FIRE (Court reporter unable to hear.). So
3 you play -- bringing things to your attention for
4 prompt -- you take action.

5 MR. PATTI: Sure. I mean, you know, we
6 appreciate those kinds of communications, and we often
7 respond to them. And sometimes, for example, there will
8 be something happening at some level, somewhere on the
9 campus that we're unaware of that we become aware of when
10 we get a letter from FIRE or the ACLU or something else
11 or someone else. And in many cases we respond to them.
12 I have to say we don't always agree with them on the law,
13 but, you know, there are times when certainly we do. And
14 I think we try to respond and clear those situations up.

15 MRS. KLAUSNER: And Mrs. Baker.

16 MRS. BAKER: I have a somewhat similar answer.
17 We do have 23 campuses, as I mentioned. They all have
18 their own policies that need to be in accord with
19 systemwide policy, but are generally much more expensive,
20 so it's hard to keep up with them all. But when new
21 cases come out, we do try to stay abreast with them. We
22 often -- all of the attorneys meet on a regular basis
23 with an agenda. We regularly discuss new cases of
24 interest or import. So that is one way of getting the
25 word out to the individual attorneys who represent all of

1 the campuses, that they may need to take another look at
2 their campus policy to see if they have any problems.

3 MR. KLAUSNER: And then Mrs. Montoya and then
4 Mr. Rosenthal.

5 MRS. MONTOYA: I would be delighted if there
6 was a Chris and Patti on every UC campus. My concern is
7 similar to Mrs. Heriot's with the process procedure of
8 implementation. I know of cases where the dean of
9 students or the assistant dean for judicial affairs has
10 confronted the student and said, "You are guilty of this.
11 I can create a panel" -- you know, "panel group," or --
12 "so you may as well quit school, dismiss as a regent." I
13 had to request a hearing for a student recently. I know
14 of a case where a majority student criticized a minority
15 student at a graduate seminar, and -- which the minority
16 student complained. And the majority student still
17 doesn't have his life back together.

18 And I mention this and discussed it with a
19 former member of the academic Senate. And she said --
20 she is also in law and society, and she said, "Oh, he
21 just offended the wrong student. This was two years
22 ago." And that's not the law. You know that. I know
23 that's not the law. But that was the attitude of someone
24 on the faculty, and the faculty acted. So what I'm
25 saying is that I don't think your procedures are getting

1 down to the campuses -- the correct procedures are
2 getting down to the campuses. That's my experience.

3 MR. PATTI: And let me say that I, you know,
4 can't -- we try hard to get the message out. And I can't
5 say that 100 percent of cases, you know, things always
6 work perfectly. I think in the great majority of them,
7 they do. But, you know, it requires legal resources.
8 And we don't always hear about every single case in our
9 office, but we try to respond to them.

10 MRS. HERIOT: Can I add a little bit? Could
11 you elaborate a little more on exactly what you do to get
12 the word out to the UCs?

13 MR. PATTI: Sure. I mean, we have -- first of
14 all, we regularly inform student judicial affairs
15 officers of what the policies actually are.

16 MRS. HERIOT: With a letter? How is the
17 communication then?

18 MR. PATTI: Well, they do training. And most
19 of this is done at the campus level and not -- most of
20 the campuses have their own attorneys on the campus who
21 are responsible for this sort of thing.

22 MRS. HERIOT: And do training programs?

23 MR. PATTI: Yes. And work closely with student
24 judicial affairs people. So an effort is made there to
25 do that. But, you know, as I say, it is a big system.

1 Legal resources are small. So there are times when
2 people won't necessarily act in a way that is -- that's
3 absolutely according to our policies. Now, I think most
4 often those get straightened out over time. And I don't
5 think it happens all that frequently in the first place.

6 MRS. HERIOT: Does Cal State have similar
7 training programs?

8 MRS. BAKER: We do. Student judicial officers
9 meet on a regular basis. We have an attorney in my
10 office to -- is the kind of -- we call it "resource
11 attorney for student discipline" who regularly meets with
12 them and does training and that sort of thing. So in
13 addition to discussing new cases with attorneys for all
14 of the campuses, that's another way that we get the word
15 out to the people on the ground.

16 MR. KLAUSNER: Mr. Rosenthal.

17 MR. ROSENTHAL: Thank you both for being here.
18 I have a few questions for both of you, please. A
19 question for both of you, actually, if you can, answer
20 is: How many complaints have you each gotten from UC and
21 Cal State systems from students and/or professors
22 complaining about their -- how these policies are
23 restricting their freedom of speech?

24 MRS. BAKER: I could not give a number for the
25 system as a whole because I wouldn't be aware of all

1 those complaints. Like I said, we have 23 campuses. I
2 would have to pull each individual attorney in my office
3 to see what they have heard about from their campuses. I
4 personally have been with the system for 15 years, and I
5 don't think I have ever heard from any of my campuses
6 that there has been such a complaint.

7 MR. ROSENTHAL: So you are saying you don't --
8 you can't recall -- to the best of your knowledge, this
9 isn't -- you are not getting, you know, mass complaints
10 throughout the system --

11 MRS. BAKER: No.

12 MR. ROSENTHAL: -- that students and faculty
13 are having their freedom of speech violated by these
14 campuses?

15 MR. KLAUSNER: Reasonably, you can't (Court
16 reporter unable to hear.).

17 MR. ROSENTHAL: Cal State.

18 MRS. BAKER: Correct. Once I have been
19 assigned to a --

20 MR. KLAUSNER: Which ones would you --

21 MRS. BAKER: Currently, Cal State Northridge.
22 I was campus counsel at Cal State Long Beach for a long
23 time, the (Court reporter unable to hear.) south Bay,
24 east Bay, Cal State Chico.

25 MR. ROSENTHAL: What about you, Mr. Patti?

1 MR. PATTI: Well, I'm trying to think. I
2 recall one instance from UC San Diego about ten years
3 ago. And then there was also a letter that we received
4 from the academic freedom committee at the University --
5 at UCLA last year, which was one of the things that lead
6 us to the review of policies. Those are the two that
7 I -- that come to my mind. But I'm not sure that I would
8 necessarily be a clearing house for every complaint that
9 came along.

10 MRS. MONTOYA: Well, would they come to you?
11 You are not in charge of that area.

12 MR. PATTI: Well, I'm -- I -- they -- if it got
13 to the -- I mostly do litigation. So if it got to a
14 lawsuit, I would learn about them. So there haven't been
15 a lot of lawsuits. I mean, that I can think of one.

16 MRS. MONTOYA: Okay.

17 MR. PATTI: There may have been complaints that
18 were local. And as I say, this faculty group raised
19 concerns about the harassment policy (Court reporter
20 unable to hear.).

21 MRS. MONTOYA: Was that for students or for
22 faculty?

23 MR. PATTI: It was the student harassment
24 policy.

25 MRS. MONTOYA: Okay.

1 MR. KLAUSNER: Let me ask -- if I could, we can
2 come back to Mr. Rosenthal. This morning when we had the
3 panel with FIRE and ACLU, they indicated that there was
4 really no significant point of departure, a different
5 perspective on what the applicable guidelines or
6 principles were under the governing case law. And I'm
7 curious -- realizing that a lot of complaints come to
8 your attention that are incidents that area raised with
9 your complaints, that there may be disputed factual
10 issues. I'm curious if there's anything that comes to
11 mind for either of you, whether you have any different
12 perspective in general or specifically on the applicable
13 guidelines that you can envision via FIRE or the ACLU.

14 MR. PATTI: Yeah. I actually think my
15 perspective is a little bit different. I think the place
16 I end up is the same place that FIRE and the ACLU ended
17 up. But I don't think it is so clear or has been so
18 clear for a long time. That those are the guidelines
19 that are required. And, you know, you can go into sort
20 of the history of how many of these antiharassment
21 policies were developed. But a lot of them were based
22 upon the antiharassment law that applies in the --

23 MR. KLAUSNER: In the workplace?

24 MR. PATTI: Pardon?

25 MR. KLAUSNER: In the workplace?

1 MR. PATTI: In the workplace. That's right.
2 And they've sort of evolved from there. And what the
3 courts have kind of been telling us is "No. Those rules
4 that apply in the workplace don't really apply, in
5 general, on the campus." And we've sort of been learning
6 that through a series of cases. And so where we've ended
7 up is "Okay. Fine." The Supreme Court told us what we
8 could be liable for under the discrimination laws in
9 Davis. So maybe if we just stick to that, we will be
10 okay. And so that's sort of where we are now. And I
11 think that's also where FIRE and the ACLU is. But for us
12 it has been a little bit more of a journey than a
13 clear-cut answer.

14 MR. KLAUSNER: Okay. And what about
15 Mrs. Baker?

16 MRS. BAKER: And I would have to, again, say
17 I'm not really as much of a scholar as Mr. Patti in the
18 area, so -- but that's my general understanding. I mean,
19 I think we're in fundamental agreement on the standards.
20 I don't think it is so clear. And I think it is often
21 very difficult to apply those standards to a particular
22 circumstance.

23 MR. ROSENTHAL: May I finish?

24 MR. KLAUSNER: Yes.

25 MR. ROSENTHAL: Okay.

1 MR. KLAUSNER: And then John will go.

2 MR. ROSENTHAL: Thank you. Okay. So just to
3 be clear, the two of you, you know, clearly representing
4 your systems have been asked to come and testify as
5 authoritative sources about this issue on the UC and
6 Cal State campuses. Therefore, again, you know, just to
7 be clear, according to each of your individual knowledge,
8 this is not, you know, problems with these policies
9 translating into actual free-speech limitations. In
10 fact, this is not a widespread problem on either of your
11 campuses, to the best of your knowledge; is that correct?

12 MR. PATTI: It is not something that there have
13 been widespread complaints about. That's -- I would
14 agree with that.

15 MR. ROSENTHAL: Thank you.

16 MRS. BAKER: Correct. And there have certainly
17 been instances that -- I mentioned this earlier in my
18 presentation where we've gone back and changed things in
19 response to --

20 MR. ROSENTHAL: Right. Thank you. And so
21 that's another thing I wanted to follow up. So it seems
22 to me that each of your systems are actively working on
23 this issue as it continues to evolve. That you are not
24 merely passive actors about this, but you are really
25 working as diligently. You know, both the UC and Cal

1 State systems are working diligently to reconcile the
2 issues about freedom of speech and antiharassment.

3 Does -- is that correct?

4 MR. PATTI: We feel we are. Yes.

5 MR. ROSENTHAL: So do you feel that there is a
6 need for the US commission on civil rights to intervene,
7 or do you feel you are quite capable of, you know,
8 dealing with these issues as they arise?

9 MRS. BAKER: I think --

10 MR. KLAUSNER: Before you answer the question,
11 in terms of intervening of the purview of the commission,
12 which doesn't have its own force and ability and is quite
13 limited, so you mean within the scope of its study and
14 investigation?

15 MR. ROSENTHAL: Yes.

16 MRS. BAKER: I think to sum up, we are firmly
17 committed to acting within the law. I know I speak on
18 the systemwide basis for the chancellor and the board of
19 trustees and everyone. Firmly committing free-speech
20 rights as we are committed to antidiscrimination and
21 harassment rights that we do try to stay abreast of the
22 law and to get that word out to the campuses. We're not
23 perfect. People make mistakes. There is turnover. New
24 administrators come in. They don't really understand the
25 nuances. When it has come to our attention, we do our

1 best to educate them and to revise the policy, if
2 necessary, and to rectify the mistake. But I have not,
3 in my 15 years with the system, heard anything that
4 suggests to me that this is an overwhelming problem or
5 that there is a lot of problems out there in the
6 application. You know, certainly it comes up that we're
7 a huge institution. But I think with our firm commitment
8 that we try to keep abreast of things and (Court reporter
9 unable to hear.).

10 MR. ROSENTHAL: Great. So when the -- the
11 problems that you are aware of, are they mostly by
12 advocacy groups that are not, you know, student groups or
13 from the students and faculty, people directly on campus?

14 MRS. BAKER: I think that I would be most
15 likely to hear about something if it's coming from an
16 outside advocacy group because that's brought in at the
17 systemwide level. I think that my colleagues on the
18 various campuses deal with issues as they arise, and it
19 never comes to my attention. It doesn't get a lot of
20 press, or there is no lawsuit. It's just that somebody
21 is facing potential discipline, or there has been an
22 incident, and the campus is calling and asking for advice
23 and guidance, and they may be somewhat misguided on what
24 they can do and what they can't do. And we talk to them
25 and give them our advice, and counsel and the problem

1 gets dealt with. So it doesn't always come to my level.
2 I would be more likely to know of an issue if it did come
3 in to FIRE or the ACLU.

4 MR. ROSENTHAL: And you, Chris?

5 MR. PATTI: Yeah. I would say that most of the
6 attention on this issue has come from advocacy groups
7 with the exception of the UCLA faculty group they have
8 mentioned before. I think that's fine. We are perfectly
9 happy to hear from those groups. And I think we have
10 sort of, you know, in part, responded to those
11 suggestions. And then I think we're basically where they
12 are now with regard to what these sort of competing
13 policies should provide, so --

14 MR. ROSENTHAL: Okay. And then -- thank you.
15 And then my last question is --

16 MR. KLAUSNER: Why don't we go to Karen and
17 come back to you.

18 MRS. LUGO: I think mine is pretty
19 straightforward and quick. As far as the constitutional
20 rights, recognized fundamental rights, there is the right
21 to speech and expression and assembly. But I think I
22 heard you refer to a right to be free of harassment. I
23 wish my children had known about that one. But it is not
24 to -- and then I hear a classification of all of this
25 kind of being lumped as values. But constitutionally and

1 legally there are standards that are recognized when it
2 comes to fundamental rights like speech. And nothing in
3 that category, which is very open to subjectivity,
4 administrative discretion, when you are talking about
5 someone else interpreting, "I have been harassed. I have
6 a freedom not to be; therefore, you are the," you know,
7 "object of my harassment. I will complain about that."
8 Are students -- when all of this is presented to them, do
9 they -- are they -- do they understand that they are
10 accountable equally for these standards as far as, "Yes.
11 You have free speech, but the person next to you has the
12 same freedom to be free from harassment"?

13 MRS. BAKER: I think that is an ongoing
14 educational challenge. And one of the things with
15 college campuses, universities, it is a constant
16 challenge. And, I mean, I think if someone mentioned
17 earlier a lot of people, students, as well as others feel
18 that any offensive -- any comment that's offensive to
19 them, there's some rights that have been -- one of their
20 rights has been violated, that is something that needs to
21 be met with educational as well. It can be very
22 complicated, but I certainly think there is many students
23 who don't under -- have that fundamental understanding.

24 But, you know, I hope that part of our mission,
25 what we are trying to do, even in the area of student

1 discipline, the focus is on education rather than
2 anything punitive. So even if it rose to that level, it
3 is a question of education rather than discipline.

4 MR. KLAUSNER: Mr. Patti, do you have any
5 comments to make?

6 MR. PATTI: No. I agree.

7 MR. KLAUSNER: Mr. Rosenthal?

8 MR. ROSENTHAL: Yes. Thank you. Just a
9 question. Would you say it's -- there is a possibility
10 that these antiharassment policies are, in fact,
11 safeguarding free speech and expression for minority
12 students so that minority students can go -- so that they
13 can express themselves as an equal footing as the
14 majority of students without having to worry about being
15 intimidated, shouted down, or whatever so that they may
16 not be able to express themselves specifically because
17 they are a minority?

18 MRS. BAKER: Well, I'm sure they benefit from
19 it just like anyone else does. I mean, like I said, it
20 is our goal, and it's a critical goal to make everyone
21 feel as welcome to our campuses as possible. So our free
22 speech policies, just like our antiharassments and
23 discrimination policies, work for everyone's benefit, not
24 just a particular group, majority, or (Court reporter
25 unable to hear.) group.

1 MR. ROSENTHAL: Thank you.

2 MRS. MONTOYA: Mr. Patti, what educational
3 programs do you offer? Given that I had a former head of
4 the academic senate say, "It is fine now. It just
5 depends on" -- "he offended the wrong guy."

6 MR. PATTI: Well, you're asking what
7 educational programs we offer to the faculty?

8 MRS. MONTOYA: No. For the campus. Yeah. No.
9 I'm very serious. I don't think it is funny because it
10 is a faculty that initiates the call to the judicial
11 officers. It is not funny. That's part of the
12 procedure. You should know that.

13 MR. PATTI: I know. Well --

14 MRS. MONTOYA: So my question is: How do you
15 get the word out on what the law should be?

16 MR. PATTI: Well, we -- I speak to academic
17 groups of the academic senate, which is the official
18 faculty legislative organization at the University of
19 California, frequently on these issues. And there's a
20 lot of work that they do, too, around academic freedom
21 and speech issues. And these are issues that are
22 discussed pretty much continually at the University of
23 California. And, you know, there will, I'm sure, always
24 be people who will not get or understand any message that
25 we attempt to get out there. But I think that as a

1 general matter, the faculty have been as strongly
2 protective of free-speech rights at the university than
3 anyone has. And there may be exceptions to that.

4 MRS. MONTOYA: No. That's not any experience.
5 I wish it were.

6 MR. DODD: The beginning panel was very proud
7 of their claim that 19 or 20 of these cases that actually
8 went through the judgment deal or whatever. And they
9 went through every single one of them.

10 Have you ever won a case through the court
11 system defending a policy that was being attacked by one
12 of these?

13 MR. PATTI: Well, no one has ever challenged
14 one of our policies.

15 MR. DODD: One of your --

16 MR. PATTI: Right.

17 MR. DODD: Are you aware of any of the other
18 cases from other jurisdictions that the education
19 institution has succeeded in defending the policy?

20 MR. PATTI: No. I think it is accurate that in
21 most of these cases, the policies have been overturned.
22 And I don't know whether the number is 19 or not. I have
23 read a lot of these cases.

24 MR. DODD: Like 5 or 15 or whatever?

25 MR. PATTI: Yeah. It -- there -- you know, 19

1 sounds about the right number to me. But one thing I do
2 want to say, it would not be accurate to think of all
3 these cases as addressing all the same issues. Some of
4 the policies in these cases were very off, very far off
5 in one direction and others were not. And so these
6 policies really, really -- or these cases really have
7 addressed policies that are very, very different. And I
8 would say some of the more recent cases have suggested
9 that policies that a lot of people assumed were probably
10 okay, may not be. So there has been a movement in the
11 law, in my opinion.

12 MR. DODD: And as far as the number of actual
13 complaints, one of the principles in the 1st Amendment
14 law is the chilling effect on speech and student's
15 thought process. Would you agree that -- you know,
16 students are there to get out. They are there to get a
17 degree, generally. We have some people that want to be
18 an activist as a job. But they really want to succeed
19 and get a degree and get out. And they may just be going
20 along to get along. And we'll just assume, not complain
21 about something even though they believe there was a
22 fundamental flaw in it. We believe there may be students
23 out there in that box.

24 MR. PATTI: There are all kinds of different
25 students. And I'm sure there are some students who just

1 keep their head down and do their work. But my
2 experience is there are a lot of students who are willing
3 to complain about almost anything. And as I -- you know,
4 as I indicated, there are thousands of different student
5 groups at the University of California dedicated to all
6 different kinds of expression, all different points of
7 view. And so it has not really been my experience that
8 there has been any sort of suppression in any general way
9 of speech of the University of California.

10 MR. DODD: Maybe I needed to be more clear. As
11 opposed to just complaining, there's a difference between
12 being a complainer and being that test case that will be
13 out there and is going to intentionally do something to
14 violate a policy that they believe is not constitutional
15 and risk academic discipline. There may be a lot of
16 people that would just assume to that, but they don't
17 want to risk academic discipline.

18 MR. PATTI: Well, they don't have to violate it
19 to challenge it. You can challenge a policy like that
20 even if you're not (Court reporter unable to hear.). In
21 most of these cases -- many of these cases are of that
22 type.

23 MR. DODD: But a lot of them -- well, a lot of
24 them may be -- like you were saying the letter from FIRE
25 that's going through the ACLU going through Web sites

1 around the nation, screening policies and writing letters
2 to people. And you have an XYZ problem, and then you
3 might take action to rectify it.

4 MR. PATTI: Correct.

5 MR. KLAUSNER: I'd like to ask -- you had some
6 testimony earlier today about an incident at University
7 of California, Santa Cruz that dealt with what we were
8 told was the new approach taken to enforcing problems,
9 you know, dealing with incidents, speech incidents on
10 campuses that involve the administration invoking the
11 doctrine of vicarious liability and joint and several
12 liability to pose the own risk charge against students
13 for clean-up fees after demonstration if they were merely
14 involved unless they were -- would, perhaps, identify
15 others who were involved and exculpated. And I just want
16 to ask if this is something that has come to your
17 attention and if you are familiar with it, if you can
18 maybe elaborate.

19 MR. PATTI: Well, I don't know the details of
20 the particular case, but it is my understanding on this
21 is that a number of students engaged in an illegal
22 building occupation. It wasn't their speech activity
23 that is being -- they are facing discipline for. It is
24 trespass. And the the position that the campus has taken
25 is that if you engage in illegal activity, you are going

1 to be jointly and severally liable for the costs of that.
2 Now, the fact that students may also have been engaging
3 in protected 1st Amendment activity doesn't protect them
4 from -- you know, doesn't insulate them from punishment
5 for illegal activity that they are engaged in. Holding
6 the bull horn doesn't mean you are allowed to trespass or
7 burn down a building. That's my understanding of the
8 situation, but I'm not familiar with the facts of the
9 case.

10 MR. KLAUSNER: Are you aware if there is any --
11 been a change in policy with regard recently or --

12 MR. PATTI: I don't -- I -- I'm not aware that
13 it's a change in policy. My understanding is that in
14 particular cases, it is the position that the
15 administration has taken on it. That it's been -- I
16 don't think there's been any policy enacted with respect
17 to it. But, again, I don't want to suggest that I'm more
18 familiar with the facts than I am.

19 MRS. MONTOYA: I have a question.

20 MR. KLAUSNER: Okay.

21 MRS. MONTOYA: Mr. Patti, what on average do
22 you think it costs for a student to challenge illegal
23 dismissal at the University of California?

24 MR. PATTI: For a student to challenge illegal
25 dismissal?

1 MRS. MONTOYA: Yes. Wouldn't it be like
2 \$50,000 because you have to go through all channels to
3 hire a good lawyer?

4 MR. PATTI: I honestly couldn't say. I mean,
5 most of these cases -- well, first of all, I mean, you
6 know, if you get to the point where there has been a
7 dismiss that is illegal, there's a lot of process that's
8 been gone through before then. And usually --

9 MRS. MONTOYA: Not necessarily.

10 MR. PATTI: Well, the student has -- have
11 availability of a lot procedures that they can -- before
12 they get to it.

13 MRS. MONTOYA: Don't count on it. Some of
14 these procedures can be awfully blunt at the campus
15 level.

16 MR. PATTI: So -- so in any event, if they --
17 if -- there's a court procedure called a "writ of
18 mandate," which is fairly quick, that can be -- that the
19 student can take advantage of in cases where they
20 actually want to challenge in court their disciplinary
21 action. But I -- you know, I can't say how much that
22 might cost. If they get a pro bono lawyer like the ACLU,
23 nothing.

24 MRS. MONTOYA: It's very hard to get a pro bono
25 lawyer. One of your colleagues said 10,000 just to look

1 over a case, just to read it.

2 MR. KLAUSNER: Mrs. Heriot?

3 MRS. HERIOT: Yeah. I just want to make sure I
4 understand the Cal State system. You are saying there is
5 an umbrella policy, essentially, that all schools have to
6 abide by?

7 MRS. BAKER: For the student conduct code?

8 MRS. HERIOT: Yes. And then they might have
9 individual policies below that?

10 MRS. BAKER: Not for the student conduct code,
11 for speech codes. Things that could be construed as
12 speech codes. There are systemwide regulations that
13 apply to all the campuses. But then each campus has its
14 own time, place, and manner regulations. What I would
15 call the campus' free-speech policy.

16 MRS. HERIOT: Well, could we have those
17 collected through your office? Do you have copies of all
18 of those?

19 MRS. BAKER: I do not.

20 MRS. HERIOT: Would that be something you could
21 get for us?

22 MRS. BAKER: I could never get that for you.

23 MRS. HERIOT: Okay. Thank you.

24 MRS. BAKER: I think part of the reason -- I'm
25 not being facetious, but --

1 MRS. HERIOT: I know.

2 MRS. BAKER: It is not necessary always one
3 policy that, you know, the campus doesn't necessarily
4 have one policy that contains all of the kinds of
5 policies that you might be concerned about. Probably all
6 of the time, place, and manner regulations are in one
7 place, although I couldn't even swear to that. But there
8 may be provisions or policies that govern what we think
9 of as free-speech activities that contained parts here
10 and parts there, so it may not be so simple.

11 MRS. HERIOT: Our policy -- (Court reporter
12 unable to hear.), that's our staff for this sort of
13 thing. And he has 50 states that's he works with.

14 MRS. BAKER: Right.

15 MR. KLAUSNER: Well, let me thank everybody on
16 behalf of the state advisory committee, on behalf of the
17 commission, and on behalf of the staff of the commission.
18 I want to sincerely thank Mrs. Baker, Mr. Patti, and
19 everybody else who has come here today with your time and
20 give us such good information and very useful
21 information. I mentioned earlier there is an opportunity
22 for those that are interested in making comments. We
23 have a cut off date of May 30th. The procedures and the
24 details of how to go about that are available at the desk
25 outside as you leave. I appreciate all of you coming.

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We appreciate the good work of our court reporter here, so we can get a good, clean transcript. And we look forward to having a briefing that will be issued within the next several months dealing with today's proceeding. You will have a chance to take a look at that. And we are hoping this will be a useful contribution to the discussion of the debate. Thank you again.

MRS. BAKER: Thank you.

MR. PATTI: Thank you.

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CERTIFICATE

OF

CERTIFIED SHORTHAND REPORTER

* * * *

The undersigned Certified Shorthand Reporter of the State of California does hereby certify:

That the foregoing Deposition was taken before me at the time and place therein set forth, at which time the Witness was duly sworn by me.

That the testimony of the Witness and all objections made at the time of the Deposition were recorded stenographically by me and were thereafter transcribed, said transcript being a true and correct copy of the proceedings thereof.

In witness whereof, I have subscribed my name, this date: July 19, 2010.

Joanna K Kostapapas
Joanna K. Kostapapas, CSR No. 13242

