August 14, 2009

Chancellor Gene D. Block
Chancellor's Office
University of California, Los Angeles
Box 951405, 2147 Murphy Hall
Los Angeles, California 90095-1405

URGENT

Sent by U.S. Mail and Facsimile (310-206-6030)

Dear Chancellor Block:

As you can see from the list of our Directors and Board of Advisors, FIRE unites civil rights and civil liberties leaders, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, due process, freedom of association, religious liberty and, as in this case, freedom of speech on America's college campuses. Our website, www.thefire.org, will give you a greater sense of our identity and activities.

FIRE is concerned about the threat to freedom of expression posed by University of California, Los Angeles's (UCLA's) demand that a former student take down a non-commercial, personal website that includes the letters "ucla" in its domain name under the threat of legal action.

This is our understanding of the facts; please inform us if you believe we are in error. On or about July 12, 2009, former UCLA student Tom Wilde launched the website "ucla-weeding101.info." The website is entirely non-commercial and is expressly about personal matters, as the home page makes clear:

> On this website, I am offering documents on my expulsion from UCLA's Graduate School of Education. These documents will show how the university terminated me, and thereby help the public to understand how this public university operates in the public's name.

At present, the website also includes this disclaimer, in relevant part:

> Disclaimer: This site is not supported, endorsed, or authorized by UCLA or the University of California. The inclusion of "UCLA" in the domain name and site content is solely for the purposes of identifying this public university.

In a letter dated August 6, 2009, however, Patricia M. Jasper, UCLA Senior Campus Counsel, argued that Wilde's website and another domain name, "ucla-weeding101.com" (which appears never to have been used by Wilde) constitute "trademark infringement and dilution, and are illegal." Although the website is entirely non-commercial, Jasper further threatened that "[t]he commercial use of any of the names of the University of California" without the appropriate university permission "not only constitutes an illegal infringement of the trademark rights of The Regents [of the University of California], but is also a criminal offense under California Education Code, section 92000."

Jasper's letter demanded "in writing by fax" that Wilde confirm that he "will immediately cease the use of 'UCLA' or any other name belonging to The Regents in connection with your websites' activities, including, without limitation, promotion of products or services on such sites, no later than August 17, 2009." Jasper noted that the University would "take all necessary steps to protect its trademarks **and reputation.**" (Emphasis added.)

Jasper further demanded that Wilde disclaim any right to the domain names now and in the future and "immediately cancel the registrations and take down the web sites." Jasper added that the University "reserves its rights to pursue whatever additional remedies or claims it may have against you, including punitive damages."

As a public institution, UCLA is both legally and morally bound by the United States Constitution. *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179, 192 (1988) (holding that "[a] state university without question is a state actor.") We trust that you understand that the First Amendment's guarantee of freedom of expression fully extends to public universities like UCLA.

By misinterpreting the restrictions of the California Education Code in order to ban non-commercial mentions of UCLA's name such as in Wilde's website, and by threatening both criminal and civil action against him, UCLA has abused its power as a state entity and has unconstitutionally threatened his freedom of expression. UCLA may reasonably restrict the commercial use of its name and may reasonably intervene when there is legitimate confusion between an official UCLA website and a private website that speaks *about* UCLA. UCLA may not, however, categorically ban domain names containing the letters "ucla" or "UCLA" simply because they use an abbreviation of the name of the school—and certainly not in order to prevent attacks to the university's "reputation" by disgruntled former students. The vast majority of possible domain names, websites, and e-mail addresses that might use the letters "ucla" or "UCLA" have no commercial purpose and do not tend to confuse or mislead readers into believing that they are officially sanctioned or endorsed by UCLA.

In the case of *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161 (C.D. Cal. 1998), a federal court ruled that Bally Total Fitness (Bally) could not stop a man from operating a website called "Bally Sucks," which included a modified Bally logo on the front page and used the term "ballysucks" in the URL of the website. In that case, Bally, similarly to UCLA, argued (among other things) that allowing a critic to use its mark was likely to cause confusion among those who were searching for its official website. The court found against Bally, ruling that there was no likelihood of consumer confusion and that "[a]pplying Bally's argument would extend

trademark protection to eclipse First Amendment rights. The courts … have rejected this approach by holding that trademark rights may be limited by First Amendment concerns." 29 F. Supp. 2d at 1166, *citing L.L. Bean, Inc. v. Drake Publishers, Inc*., 811 F.2d 26 (1st Cir. 1987), *cert denied*, 483 U.S. 1013 (1987).

Courts have also determined that so-called "cybergriping" websites, which are generally dedicated to harsh criticism of a business and which often use the business's marks, are usually considered constitutionally protected speech. In *Taubman Co. v. Webfeats*, 319 F.3d 770, 775 (6th Cir. 2003), the court determined that "any expression embodying the use of a mark not 'in connection with the sale … or advertising of any goods or services,' and not likely to cause confusion, is … necessarily protected by the First Amendment." In that case, the defendant had established not one but *five* different websites, such as taubmansucks.com and willowbendmallsucks.com, that criticized plaintiff Taubman and his business "The Shops at Willow Bend" with the purpose of hurting his business and reputation. *Id.* at 772.

UCLA may not threaten legal action against protected expression, nor may it seek to silence protected expression by declaring that it is illegal. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963) (holding that "threat of invoking legal sanctions" from state actor may constitute "informal censorship" and thus require injunctive relief). As a state actor, UCLA may not censor by instilling fear in those who seek to engage in protected speech. *Laird v. Tatum*, 408 U.S. 1, 11 (1972) (holding that indirect prohibition on protected speech may give rise to constitutional challenge due to resulting chilling effect on speech).

Jasper's demands are also a form of unconstitutional prior restraint, chilling and preventing protected expression that might otherwise have come to pass were it not for this ban. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity").

In addition, several provisions in California Education Code section 92000, if interpreted as Jasper seems to interpret them, would be facially unconstitutional in themselves. I refer in particular to sections (a)(1) through (a)(3):

> 92000. (a) The name "University of California" is the property of the state. No person shall, without the permission of the Regents of the University of California, use this name, or any abbreviation of it or any name of which these

> strike, lockout, or boycott or of any political, religious, sociological, or economic movement, activity, or program.

For example, naming an organization "UCLA Should Change Its Policies Today!" (apparently banned under section 1) or "UCLA Has Opposed Our Organization!" (banned under section 2) is core political speech protected by the First Amendment and thus may not be banned. Facebook.com "groups," for instance, frequently use such language, and such names may not be banned.

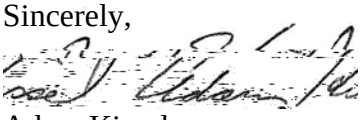
Worse, section 3 even prohibits "announc[ing]" the name of UCLA at public meetings and prohibits display of the name of UCLA in "any kind" of "propaganda" regarding "any political, religious, sociological, or economic movement, activity or program." To ban the mere mention or display of UCLA's name in such political contexts is a severe violation of the First Amendment, banning precisely the kind of political speech at the heart of the First Amendment's protection.

Please know that while you are not responsible for the existence of the California Education Code, you and other agents of UCLA *may not* enforce it unconstitutionally. While FIRE does not directly engage in litigation, we believe you should be aware that any public university policy prohibiting constitutionally protected expression is an unlawful deprivation of constitutional rights under 42 U.S.C. § 1983 for which university administrators can be sued in their individual capacities. State officials and employees are offered only *qualified* immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Davis v. Scherer*, 468 U.S. 183 (1984). This means that administrators may be held personally liable for actions that violate First Amendment rights. Having been warned about unconstitutional provisions and uses of the Code, in the future you might not be able to claim qualified immunity from personal legal liability for the kinds of First Amendment violations described in this letter.

Finally, I should note that in 2005, after the University of California–Santa Barbara similarly tried to force the independently hosted website "www.thedarksideofucsb.com" to remove the letters "ucsb" from its website URL—alleging that the website owner was "guilty of a misdemeanor" for using the letters—FIRE successfully intervened to protect the owner's rights.

We urge you to immediately withdraw UCLA's unconstitutional demands. FIRE hopes to resolve this situation amicably and swiftly; we are, however, prepared to use all of our resources to see this situation through to a just and moral conclusion. Since the stated deadline for Wilde's action is Monday, August 17, 2009, we request that you immediately notify Wilde of your response and that you also respond to FIRE by 5:00 p.m. Pacific Time on August 17, 2009.

Sincerely,



Adam Kissel
Director, Individual Rights Defense Program

cc:
Patricia M. Jasper, Senior Campus Counsel
Kevin S. Reed, Vice Chancellor-Legal Affairs and Associate General Counsel
Charles F. Robinson, General Counsel and Vice President for Legal Affairs
Cynthia Holmes, Director, UCLA Trademarks & Licensing