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May 11, 2004

Mike Davis
Chair, Judicial Council
Associated Students of University of California
209 Eshelman Hall
Berkeley, California 94720

VIA U.S. MAIL & EMAIL

Dear Mr. Davis:

This letter is to notify you that we are seeking immediate injunctive relief from the United States District Court for the Northern District of California to ensure that all the votes cast by students in the recent ASUC election at UC Berkeley are counted and to stop the Judicial Council's threat to disqualify the Defend Affirmative Action Party (DAAP).

We represent Yvette Felarca and the Berkeley chapter of DAAP in this matter.

The actions of the ASUC Judicial Council threaten to disenfranchise potentially thousands of students by substituting the decision of the Judicial Council for the votes cast by the student electorate. The Council's actions constitute a profound violation of Constitutional norms.

As the United States Supreme Court has repeatedly held, students have the right to free speech and the right to associate together in order to further that speech. See, e.g., *Healy v James*, 408 US 169 (1972). As the Court has also held, the right to run for office—and to vote for the candidates of one's choice—is a fundamental democratic right that may only be abridged by the most compelling state interest. See, e.g., *Storer v Brown*, 415 US 724 (1974).

Less than three years ago, the United States District Court for the Central District of California applied these principles to elections for office in the Associated Students of the University of California at Irvine. The court issued an injunction directing the reinstatement of a Senator who was denied his rightful seat because of an unconstitutional election rule. See *Welker v Cicerone*, 174 F Supp 2d 1055 (2001). As the Court held, any restriction of a candidate's right to run for student office had to be justified by a compelling state interest and could only be accomplished by means that were narrowly tailored to protect that interest. *Id.*

Paul LaFata, whose political opposition to DAAP is well-known, has asked the Council to violate all of these fundamental rights. The court's proceedings so far indicate a willingness and intention, at Paul LaFata's request, to violate rights enumerated in the US Constitution, the Civil Rights Act of 1866, and basic democratic norms.

Mr. LaFata asks the Judicial Council to disqualify the entire slate of Defend Affirmative Action Party candidates and to disenfranchise DAAP voters because, well after the election itself had taken place, a DAAP supporter who was a spectator at the hearing on Mr. LaFata's charges against another UCB student party, CalSERVE, supposedly displayed facial expressions that expressed "surprise and disbelief" to the Council and witnesses. Critical, surprised, and/or disbelieving facial expressions are constitutionally protected expression. See *Essen v Mellon*, 747 F Supp 692 (SD Fla 1990)(ruling unconstitutional a "Decorum Rule" that forbade making facial expressions that manifest approval or disapproval during witness testimony or at any other time).

In the formal Judicial Council hearing on Mr. LaFata's charges on Sunday, May 2, and in subsequent email communications sent to Ms. Yvette Felarca on May 5, 2004, the Judicial Council has clearly threatened to transform frivolous, factually dubious, legally unsupportable and unconstitutional allegations against a DAAP supporter who was a spectator at a hearing concerning another party into grounds for disqualifying a candidate or an entire slate—and thus disenfranchise a sizable section of the electorate. This shows that the Judicial Council does not understand the most basic principles of the First Amendment rights of Free Speech and Association.

The claim by Mr. LaFata that a leaflet distributed by DAAP urging students to attend an earlier hearing concerning another party is evidence of wrongdoing on our clients' part ("badgering the Judicial Council and Mr. LaFata") ought to have set off First Amendment alarm bells in the head of every person involved. Instead, the court accepted the leaflet as "evidence" for Mr. LaFata's unconstitutional line of argument.

Similarly, the claim that the DAAP spectator "badgered" a witness by attempting to talk with this individual about the facts of a case is on its face an attempt to restrict speech, and so is the claim that DAAP supporters attempted to "badger" the tribunal by asking to appeal the decision excluding the spectator from the earlier hearing.

Already, the Council's ex parte issuance of a gag order violates sixty years of Supreme Court precedent protecting the parties' right to comment upon and the public's right to know about on-going judicial proceedings. See *Bridges v State of California*, 314 US 252 (1941). Moreover, the Council's decision to hold a hearing on charges as transparently unlawful as those filed by Mr. LaFata—and the resulting delay in counting the votes—causes injury to the fundamental rights of all students. But Mr. LaFata is asking the Council to take a further step in breach of the law by disqualifying thousands of votes and numerous candidates based on his "charges."

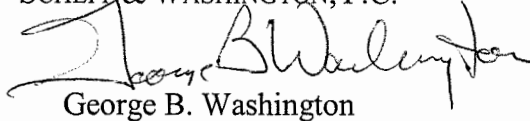
All of this would be comical except that it involves denying students some of the most basic democratic rights of all—the right to speak, associate and vote for the candidates of their own choice.

If the Council or Councilors are represented by an attorney or attorneys, we urge you to share this letter with counsel. Together with our California counsel, Meera Deo, we are currently drafting a complaint for filing against the Judicial Council and its individual members.

We will request a temporary restraining order to stop the Judicial Council action on the case against DAAP. We will request injunctive relief to ensure that all the votes cast by students be counted without further delay. Finally, you should be aware that we will be requesting an award of all attorneys' fees incurred pursuant to the federal statutes providing for mandatory awards in cases of this kind.

Please contact us or have your attorney contact us immediately.

Sincerely,
SCHEFFE & WASHINGTON, P.C.



George B. Washington

GW/lf

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