October 31, 2017

Via Email & Fax

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Re: Procedures for Non-Departmental Users to Request Access to Campus Facilities (Interim)

Dear Vice Chancellor Greenwell,

On behalf of the American Civil Liberties Union Foundation of Northern California ("ACLU"), we write to offer comments[1] in response to UC Berkeley's draft policy regarding procedures for non-departmental users to request access to campus facilities ("draft policy").

For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures and communities to defend and preserve the individual rights and liberties that the Constitution and the law of the United States guarantee to everyone in the country. The ACLU advances equality through litigation and policy advocacy, including by challenging limits to the constitutional guarantees of free speech, peaceful assembly, and equal protection of the law.

Since its inception, the ACLU has staunchly supported and defended the First Amendment's protection of the free speech rights of all individuals. We applaud the University's reiteration that all criteria set forth in the proposed policy for assessing events must be applied in a viewpoint-neutral manner. The commitment to free speech is nowhere more important than on our public university campuses, where the free exchange of ideas fosters knowledge, individual growth, and tolerance for new and different ideas. We also appreciate that the University has a responsibility to its students and staff to keep the campus safe.

[1] Our comments merit deeper explanation than can be provided in the University's standardized feedback form, so we welcome the opportunity to provide comments through this letter.

As described below, the ACLU has several concerns about the draft policy, in particular because it imposes a number of administrative burdens—including an eight-week notice requirement—on student groups and other non-departmental users who wish to hold events on campus.

First, we are concerned with the several broadly-worded criteria for determining if an event qualifies as a "major event" and is thus subject to the draft policy's requirements. Specifically, the draft policy applies to events depending on—as decided within the discretion of campus officials—the "complexity" of the event, or whether the event is "likely to significantly affect campus safety and security," or "has a substantial likelihood of interfering with other campus functions or activities." Because these phrases alone are highly subject to interpretation, the draft policy does not give students and other non-departmental users sufficient guidance about whether their event will be deemed as "major" and thus whether the University will require eight weeks' notice and the other administrative burdens—which will have the effect of deterring the planning of some events.[2] It also may not give University officials themselves sufficient guidance as to when and how they apply.[3] As precision must be the touchstone of all free-speech regulations,[4] we urge you to provide additional guidance articulating the considerations campus officials will take into account in evaluating whether a proposed event meets one of those standards. This will both assist the implementation of the policy and safeguard free-speech rights under the proposed regulations.

Second, we are concerned that the draft policy applies to all events where the organizer expects over 200 persons to attend. Although there are some events with over 200 persons that might justify the eight weeks' notice and other administrative burdens, certainly, there are many that do not. Although the University has a substantial interest in ensuring campus safety, such a lengthy time restriction for all events over 200 persons unreasonably restricts free speech.[5]

Third, we are also concerned with the eight-week notice requirement itself. Advance notice requirements and the delay inherent in advance notice requirements tend to inhibit speech.[6] The harms of advance notice requirements are particularly pointed on university campuses that serve as public fora for the exchange of ideas. By requiring such a lengthy advance notice with no exceptions, the University prohibits immediate responses to immediate issues, limiting "the quantity of effective speech."[7]

Without providing students an exemption to the notice requirement to respond to current events, the hefty constraints on free speech under the draft policy greatly outweigh the security concerns of the University. Timing is of the essence in political discourse, and it is often necessary to have one's voice

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[2] *See N.A.A.C.P., W. Region v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984) (finding that "[t]he simple knowledge that one must inform the government of his desire to speak and must fill out appropriate forms and comply with applicable regulations discourages citizens from speaking freely").
[3] *See City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988).
[4] *See Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 438, 83 S. Ct. 328, 340, 9 L. Ed. 2d 405 (1963) (holding that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms").
[5] See *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1037-38 (9th Cir. 2009)
[6] *City of Richmond*, 743 F.2d at 1355.
[7] *Id.*

heard promptly, if it is to be considered at all.[8] A delay of even a day or two may be intolerable when applied to the critical political speech for which the element of timeliness may be important.[9] Absent an exception for students and other non-departmental users to organize and respond to breaking news, the advance notice requirement unreasonably restricts their speech rights.[10]

Additionally, students must plan around the often-demanding schedules of speakers who may not have the flexibility to organize a lecture two months in advance. In order to continue welcoming notable speakers to the Berkeley campus, the University should offer students recourse when a speaker's circumstances require some leniency.

However, care must be given when granting discretionary waivers to the eight-week notice requirement, as facially neutral policies may be applied in a discriminatory manner against disfavored viewpoints and speakers.[11] Clear standards must be articulated in the forthcoming policy to guide the granting of waivers for critical, timely speech responding to current events and for notable speakers with inflexible schedules.[12]

The ACLU is lastly concerned with the draft policy to the extent that it purports to allow the University to search all event attendees for "contraband, weapons, drugs, alcohol, and other illegal or prohibited materials." A search for weapons may be reasonable in light of the security concerns of the University and may be done in a non-intrusive manner—for example through the use of a metal detector and visual examination. Yet, a search for other illicit items, such as drugs, would require a more invasive search, and the existence of conspicuously posted signs nor attendance at an event does not establish an individual's consent to a search.[13] Without informed consent or probable cause for searching an

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[8] *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 163, 89 S.Ct. 935, 945, 22 L.Ed.2d 162 (1969) (Harlan, J., concurring).

[9] *Carroll v. Commissioners of Princess Anne,* 393 U.S. 175, 182, 89 S.Ct. 347, 352, 21 L.Ed.2d 325 (1968); *see also Long Beach Area Peace Network*, 574 F.3d at 1038 (invalidating 24-hour notice period as insufficiently narrowly tailored).

[10] *See Church of the Am. Knights of the Ku Klux Klan v. City of Gary,* 334 F.3d 676, 682 (7th Cir. 2003) (holding that "the length of the required period of advance notice is critical to its reasonableness…a very long period of advance notice with no exception for spontaneous demonstrations unreasonably limits free speech").

[11] *See Kaahumanu v. Hawaii,* 682 F.3d 789, 805–06 (9th Cir. 2012); *N.A.A.C.P., W. Region v. City of Richmond,* 743 F.2d at 1356 (reiterating the Supreme Court's acknowledgement of "the invidious effect of permitting facially neutral laws to discriminate against disfavored viewpoints and speakers").

[12] *See Long Beach Area Peace Network*, 574 F.3d at 1041-44.

[13] *See Sheehan v. San Francisco 49ers, Ltd*., 45 Cal. 4th 992, 1001, 201 P.3d 472, 479 (2009) (finding that a person's choice to attend an event does not mean that the individual consents to any security measures the promoters may choose to impose); *State v. Seglen,* 700 N.W.2d 702, 709 (N.D. 2005) (holding that signs "conspicuously posted" at a hockey arena's entry points warning persons entering arena that they were "subject to search" did not establish that the individual had consented to search); *see also Bourgeois v. Peters,* 387 F.3d 1303, 1324 (11th Cir. 2004) (holding that the government may not require protestors to surrender their Fourth Amendment rights in order to attend a political protest).

attendee, such a high degree of intrusion may violate the Fourth Amendment and the California constitutional right to privacy.[14]

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In conclusion, the ACLU supports the University's efforts to ensure the safety of large events on campus through clear, public, viewpoint-neutral measures. Nonetheless, our concerns that certain requirements are ambiguous or may curtail the First and Fourth Amendment rights of students and attendees merit further revision of the draft policy before its final adoption. Please contact Christine Sun at (415) 621-2493 (ext. 360) or csun@aclunc.org with any questions. Thank you for this opportunity to comment.

Sincerely,

Christine P. Sun
Legal and Policy Director
ACLU of Northern California

[14] *See United States v. Place*, 462 U.S. 696, 703, 103 S.Ct. 2637, 2642 (1983) (holding that a minimal intrusion on protected privacy interests is measured by balancing an individual's Fourth Amendment rights against governmental interests; however, a substantial intrusion on an individual's privacy interest must satisfy the probable cause requirement of the Fourth Amendment).