ASUCI Judicial Board

Ashley Pham

v.

Fund the Clubs

Ruling

Dated: April 23, 2020

Abundis, C.J., delivered the majority opinion of the Board, in which Gerald Q., Naqvi K. and Bunda J. joined. Gandall, K., concurred. Anayat T., took no part in the consideration or decision of the case.

Chief Justice Abundis delivered the majority opinion of the Judicial Board,

In the submitted elections complaint, the petitioner sought to challenge campaigning actions taken by student Bryce Lindsey in support of the slate Fund the Clubs, for what the petitioner alleges were incidences of voter manipulation and the spread of misinformation. The Judicial Board first and foremost finds that even though both previous Election Codes restrict voter manipulation, as neither code is in effect, these provisions are not grounds to proscribe punishment. The Judicial Board reaffirms the holdings in *Dang v. Mendez* and finds that no punitive measures shall be taken against the Fund the Clubs slate.

I.

The Judicial Board firstly finds that there are no Election Codes currently binding the ASUCI elections. The prior version of the Election Code became non-binding and in effect, no-existent upon the entire revision of the code, done in Senate legislation R55-38. In creating a new binding authority, the prior election code lost the political will granted to it by the students of ASUCI as manifested by the actions of their representatives. In social contract terms, the previous Election Code no longer was consented to and so, regardless of the happenstance of the new iteration of the Election Code, could not be returned to, absent of another act of the Senate.

Setting aside the old Elections Code, the Elections Code empowered by the 2020 Elections Code Revision Act[1], is similarly non-binding for the current elections term, if only because *Knight v. Elections Commissioner*, published on April 17, 2020 overturned it on grounds of unconstitutionality.[2] Upon the striking of R55-38, elections became prescribed by the highest remaining authority, Robert's Rules of Order Newly Revised (RONR). Things holding all from the *Knight v. Elections Commissioner* case set the standard for which the petitioner's complaint shall be adjudicated. Given that there are no elections codes in effect other that RONR, the it is only upon prohibited behavior banned or regulated in RONR that could result in punitive action to be taken for the behavior alleged by the petitioner. The Judicial Board determines that there is no prohibition for the voter manipulation and/or spread of disinformation that was found by the Elections Commissioner, and so Mr. Lindsey's actions, even if they could be directly tied to the Fund the Clubs slate, are not found punishable by the Judicial Board.

[1] Senate Legislation R55-38 is the 2020 Elections Code Revision Act, which contain the new elections code approved by the Senate on Feb. 18, 2020.

[2] The requirements for candidates to run for elected office in the Elections Code contradicted the express and universal right of UCI students to run in elections. See *Knight v. Elections Commissioner*.

II.

The Judicial Board finds no reason to define what constitutes misinformation or voter intimidation as it is found in no authority and there are no arguments to enforce punitive actions. If in the future, these terms become part of the ASUCI Election code or are added in a governing document, these matters may return to the Board, but that is currently not in order.

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The Judicial Board rules as follows upon recommendation of the Elections Commissioner:

Fund the Clubs, the subject of the submitted Elections Complaint is not to be punished for the actions alleged in the petitioner's election complaint.

It is so ordered

Michelle Abundis
Chief Justice

Quincy Gerald
Vice Chief Justice

Kulsoom Naqvi
Associate Justice

Kimo Gandall
Associate Justice

Jeremy Bunda
Associate Justice

Justice Gandall, writing in concurrence.

In the case before the board, we focus on the technical aspects of the necessity of codified restrictions as to 'misleading' voters. That is, as Chief Justice Abundis wrote, a violation of the elections code was, "not grounds to proscribe punishment," as the Elections Code was deemed unconstitutional per our ruling in *Knight et al. v. Elections Commission*. *See also*: *Dang v. Mendez*. For this reason, the majority disregards any discussion as to either the merit or constitutionality of the charge, and opts instead to dismiss the case on face.

I concur that the case can indeed be dismissed on its face, as it is a fundamental maxim of the law that punishment cannot be applied without a codified violation: "Perhaps more important than jurisdiction is the philosophical notion that one may not be charged for that of which is not prohibited. The legal maxim, *nullum poena sine lege,* or 'no punishment without law,' is a fundamental premise to a society under the rule of law." *Wolfe v. Sparks*, at 2.

However, before the board are twelve similar cases, all of which prescribe a similar, but equally dangerous, precedent: the suppression of the natural right to free expression, guaranteed under Art. 3 §1(f) of the ASUCI Constitution. In *Wolfe v. Sparks*, even as I wrote the majority opinion, of which focused largely on technical issues, I was deeply troubled by the lack of commitment to the value of free speech emphasized by my fellow justices. It seems, for some, that the content of speech can be regulated, given the correct framework is applied. And in today's case, perhaps even more alarming, the Elections Commissioner testifies to the Board that it is conceivable that a future statute could prohibit 'misleading' content.

In the age of 'fake news' I understand the temptation to suppress unpopular, or even clearly untrue speech; however, as I explain, any attempt to regulate the content of a political message is not only unconstitutional, but a grave threat to the values of a free and just society. Such power, as Justice Jackson wrote so wisely in his concurrence in *Youngstown v. Sawyer,* "either has no beginning or it has no end." 343 U.S. 579 (1952).

I.

The ASUCI Constitution unequivocally guarantees that freedom of expression is protected: "Students have the right to freedom of investigation and expression." Constitution, Art. 3 §1(f). University policy, furthermore, not only acknowledges the protection given to the content of speech, but that such "acquires a special significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution's educational mission." Sec. 900-01: Free Speech at UCI Interim Policy. This policy, furthermore, has an

explicitly pedagogical intent relevant to our university setting: "universities exist to provide the conditions for hard thought and difficult debate so that individuals can develop the capacity for independent judgment. This cannot happen if universities attempt to shield people from ideas and opinions they might find unwelcome." Sec. 900-01 (A)(2). In short, UCI is designed as a setting where ideas are refuted, or accepted, entertained, or denied response, and most importantly: understood and not dogmatically rejected.

Perhaps the best parallel to my fear today lies in the founding of our own country. In 1798 the US Congress passed the *Alien and Sedition Acts*, which, in practice, prohibited "seditious writing, talk, and behavior," to ensure that "all Americans" were united on a single front to support the newly established nation.[3] The Federalists, very similar to petitioner today, argued that misleading information could constitute "voter manipulation" and thereby undermine basic democratic functions. The public response was an overwhelming: in what John Adams called the "'revolution of 1800,'" the Jeffersonian Republicans crushed the Federalists and elected Thomas Jefferson as President.[4] As equal to that, the founding public of our country understood that the core tenents not only promised liberty, but required it. The petitioner - amongst many others - would beg we do the opposite: that indeed, we uphold the constitutionality of a rule that openly violates the right to freedom of expression, under the arbitrary and universally applied rubber stamp of "voter manipulation."

Even if not parallel in our history, there is an extensive list of court opinions protecting free speech on campus. In *Rosenberger v. Rector*, a student requested the University of Virginia provide funding for a christian magazine. The university, however, argued that university policy prohibited funding for "a particular belief in or about a deity," and thus, rejected the request. The court, in contrast, held that if any speech was to be promoted, such promotion must be neutral - and not exclusionary - of any viewpoint: "The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." 515 U.S. 819 (1995). In short, regulation can never be made that is tailored to prohibit the content of the message. This concurrence, while not operating as an exhaustive

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[3] Douglas Bradburn, *A Clamor in the Public Mind: Opposition to the Alien and Sedition Acts*, 65 The William and Mary Quarterly 565 (2008).
[4] James Morton Smith, *The Sedition Law, Free Speech, and the American Political Process*, 9 The William and Mary Quarterly 497 (1952).

discussion on the application of free expression, uses the *Rector* precedent to reflect a universal truth: that no message may be regulated for the content of its speech.

II.

In application to today's case, petitioner argues to this board that the defendant's claim that, "the Dean of Engineering may not distribute funds due to the Covid-19 outbreak," suffices to be false because, "the Dean has not announced that engineering organizations will be defunded." Her fallacy, however, emerges as an appeal to ignorance, as the absence of evidence never proves that absence is evidence. Furthermore, even if this was not true, political statements are not peer reviewed academic papers: they require neither evidence nor substantiation, for the very reason that doing so would yield to selective information. Under this criteria, the 'enlightened elite,' behind their comfortable student-fee paid desks, would be allowed to pick and choose 'correct' ideas, and throw out candidates daring to challenge the status quo. And, as quickly as these ideals were codified and implemented, unpopular, and incidentally, conservative, speech would be prohibited. Before society could tip its hat to examine the results, erroneous articles would be published by equally outrageous political pundits in our student papers pressuring our elected officials to codify increasingly regressive policies: and before long, this mob would replace our constitutional republic as the new judge, jury, and executioner. Effectively, as Chancellor Gillman warns, this experiment into authoritarianism would be "catastrophic" and lend not only to dispelling untrue speech, but institute a panopticon of censorship regimes - a mechanism, he points out, that is often utilized by institutions embodying apartheid, slavery, and mass murder. Surely, this reality could not emerge here. But it would endanger, and ultimately doom, the telos of our society at UCI: education. As summarized by the Chancellor: "Higher education must, if anything, be a space in society for the generation of new knowledge on reflecting on wisdom. And you cannot be an institution dedicated to reflecting on the crust of conventional wisdom… unless you not only do you tolerate, but encourage people, to articulate points of view that challenge existing ways of thinking, even when those ways of thinking are considered destabilizing, maybe even uncivil, or dangerous." As such, "for higher education, there must be one anchoring idea, any idea must be expressible on a campus."[5]

Even if the petitioner finds this self-evident nightmare comforting, it offends the values of UCI. Sec. 900-01. It offends our constitutional principles. Constitution,

[5] Howard Gillman, (2017). *UCI Law Video: UCI Chancellor Howard Gillman and UCI Law Dean Erwin Chemerinsky on Free Speech on Campus.* https://www.law.uci.edu/news/videos/free-speech-on-campus-gillman-chemerinsky2016feb.html.

Art. 3 §1(f). It offends our country. *Rosenberger v. Rector* 515 U.S. 819 (1995); *see also*: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397 (1989). And worst yet, it offends nature, and nature's creator, God, to which such concomitant rights are guaranteed: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." US Declaration of Independence. *See also*: "The truth shall set you free." John 8:32.

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In perhaps one of the best written maxims, English author Evelyn Beatrice Hall, in summarizing Voltaire's beliefs, wrote the phrase: "I [may] disapprove of what you say, but I will defend to the death your right to say it."

Likewise, it is irrelevant to me if I agree with Mr. Lindsey, and is further irrelevant if Mr. Lindsey is correct or not. I am not worried about an offended individual, but the precedent that such an admission may set: that an 'enlightened elite' may be able to actively censor opposition, upon the unfalsible grounds of 'fake news' or 'voter manipulation.' In the future, the Board will need to more thoroughly examine and establish standards as to acceptable regulations of speech - such as profanity and that of which, by nature, is profane. This concurrence does not accomplish this. Instead, as I hope to have conveyed, this opinion represents an increasing concern that the values of free speech are often at odds with the ideas espoused by our students.

For this reason, I concur.