

September 5, 2024
Via e-mail

Patricia A. Pérez, Associate Vice President, Faculty Affairs
patricia.perez@csulb.edu

RE: CSULB's Attempt to Enforce Unconstitutional Amplified Sound Policy

Dear Associate Vice President Pérez,

I write on behalf of Professors Sabrina Alimahomed-Wilson and Jake Alimahomed-Wilson because you sent them a notice warning them that they had violated the University's amplified sound policy – a policy that very likely violates the First Amendment and Liberty of Speech Clause of the California Constitution.¹ Accordingly, I urge you to cease enforcing this policy and excise it from the University's Time, Place, and Manner free speech regulations. I am also concerned by the possibility that the University may have sent the warning to the Alimahomed-Wilsons because of disapproval with their political positions, or with the fact that they have been outspoken in defense of Palestinian rights in the past, in violation of their free speech rights.

A. The University's Amplified Sound Policy is Unconstitutional On Its Face.

In public spaces that have traditionally been held open for public speech activities, including open plazas and sidewalks, free speech protections “reach their zenith.” *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009). This includes public areas of public universities. See *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 44–46 (1983) (once a university opens a space for use by the public, “it is bound by the same standards as apply in a traditional public forum”); *Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (“the campus of a public university ... possesses many of the characteristics of a public forum”). Regulation of speech in a traditional public forum “is subject to the highest scrutiny.” *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). A public university may impose content-neutral regulations on the time, place, and manner of speech, but such regulations must be

¹ While your email warning only provides a general reference to the University's “TPM Policy,” linking to the University's “Campus Rules & Regulations” page, <https://www.csulb.edu/student-affairs/campus-rules-and-regulations>, it appears that you intended to indicate that all of the faculty members who received this warning were in violation of “Regulation III: Amplification Policies,” located at <https://www.csulb.edu/student-affairs/campus-rules-and-regulations/regulation-iii>.

EXECUTIVE DIRECTOR Hector O. Villagra

CHAIR Michele Goodwin **VICE CHAIRS** Rob Hennig and Stacy Horth-Neubert

CHAIRS EMERITI Marla Stone Shari Leinwand Stephen Rohde Danny Goldberg Allan K. Jonas* Burt Lancaster* Irving Lichtenstein, MD* Jarl Mohn Laurie Ostrow* Stanley K. Sheinbaum*

*deceased

narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. *See Ward v. Rock Against Racism*, 491 U.S. 781, 799, 802 (1989).

The First Amendment and the Liberty of Speech Clause of the California Constitution protect the right to protest and use amplified sound as essential elements of political speech. *Saia v. State of New York*, 334 U.S. 558, 561 (1948) (“Loud speakers are today indispensable instruments of effective public speech”); *see also Cuiello v. City of Vallejo*, 944 F.3d 816, (9th Cir. 2019) (“The United States Constitution and California Constitution protect bullhorns, and other sound-amplifying devices, as ‘indispensable instruments’ of public speech.”); *Jim Crockett Promotion, Inc. v. City of Charlotte*, 706 F.2d 486, 490-91 (4th Cir. 1983) ([T]he “right to amplified speech” is within the protection of the First Amendment). Speakers have a constitutional right to use amplified sound because “[t]he right to communicate inherently comprehends the right to communicate effectively.” *Reeves v. McConn*, 631 F.2d 377, 382 (5th Cir. 1980). Indeed, political speech in public spaces lies at the core of the First Amendment’s protections. *See Perry Educ. Ass’n*, 460 U.S. at 45.

The University’s amplification policy fails the narrow tailoring test in numerous ways.

First, it restricts “substantially more speech than necessary” to meet any possible significant university interest because it requires advance permission anytime someone wants to use their own sound amplification on university property. *Cuiello v. City of Vallejo*, 944 F.3d 816, 829 (9th Cir. 2019) (internal quotation marks omitted). There may be legitimate reasons for limiting the use of amplified sound in some circumstances, as in when amplification would pose a serious threat of disruption to university activities, but it is clearly impermissible to require advance permission for *any* use of amplification *anywhere* on campus. *See id.* (holding that a plaintiff was likely to succeed on the merits of their claim that an ordinance requiring a permit “for any use of a sound-amplifying device at *any* volume by *any* person at any location—without any specifications or limitations that may tailor the permit requirement to situations involving the most serious risk to public peace or traffic safety” “burden[s] more speech than necessary” in violation of the Liberty of Speech Clause) (original emphasis); *see also Dowd v. City of Los Angeles*, No. CV 09-06731 DDP, 2010 WL 11591900, at *6–8 (C.D. Cal. Oct. 21, 2010) (enjoining total ban on amplified sound on boardwalk except in limited number of spaces as not narrowly tailored).

The amplification policy also fails the narrow tailoring test because there is no justification for the volume limitation. The policy prohibits any use of noise louder than 85 decibels, but it does not provide any distance requirement for measuring this volume. Without any amplification at all, an ordinary human voice reaches approximately 70 decibels when measured at a distance of just one foot, while an unamplified shout at the same distance will measure 88 decibels, which is higher than the threshold allowed by the amplification policy.² Thus, despite its official title, the University’s “Amplification Policies” actually prohibit any form of protest or even conversation where people are engaged in loud discussion or chanting, even without amplification. It is difficult to imagine that the University intended such sweeping prohibitions when it enacted its “Amplification Policies” but intended, or not, they are not

² See The Engineering Toolbox: Required Voice Level at Distance, https://www.engineeringtoolbox.com/voice-level-d_938.html. Decibel levels decrease dramatically with distance, so, while a shout might be measured at 88 decibels if measured one foot away from the speaker, it would likely only reach 60 decibels if measured from 24 feet away. *Id.*

constitutional. See *United States v. Doe*, 968 F.2d 86, 90 (D.C. Cir. 1992) (federal regulation for national parks which prohibited the use of a “audio device” in a manner exceeding sixty decibels measured at fifty feet was not narrowly tailored because even a “loud conversation” would exceed the sixty-decibels at fifty-feet limit); see also, e.g., *Lilly v. City of Salida*, 192 F.Supp.2d 1191, 1194 (D.Col.2002) (declaring facially invalid “25 feet limitation on the audibility of sound measured from the property line” without a permit, which was “so limiting that it constitute[d] a complete ban on the use of amplified sound for any form of speech”); *Deegan v. City of Ithaca*, 444 F.3d 135, 143 (2d Cir. 2006) (holding invalid ban on “any noise that can be heard 25 feet away”). Unlike the University’s sound amplification policy, the policies that courts found unconstitutional in these cases at least had the virtue of including a term that measured distance for determining decibel levels. Without such a term, the prohibition’s sweep is virtually all-encompassing.

Finally, the amplification policy sweeps too broadly because there appears to be no justification for the highly restrictive time limitations. The policy is poorly written and unclear, but it appears to say that, even with advance permission, amplified sound will only be allowed in key public areas of campus, including the Southwest Terrace and South Plaza, for two hours at least for Monday through Wednesday.³ It is difficult to imagine how the University could justify preventing any use of amplified sound in an open plaza for 22 hours of a weekday – a period of time that surely includes hours where no classes are in session and there is no possibility of disrupting any university business. Without evidence that the “blanket prohibition on amplified sound” during the vast majority of these days is “narrowly tailored to a significant [university] interest” it cannot pass constitutional muster. *Ward v. Rock Against Racism*, 491 U.S. at 802.

The policy’s lack of clarity is a serious problem in its own right, because it makes it impossible for members of the University community to know when they might be in violation of the policy, or when they will be denied permission for amplified sound. A law that is so vague that it does not provide notice to the public of what conduct is prohibited violates the Due Process Clause of the Fourteenth Amendment. *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620-22 (1976); see also *Johnson v. United States*, 576 U.S. 591, 595 (2015) (a law is impermissibly vague if “it fails to give ordinary people fair notice of the conduct it punishes, or so [is] standardless that it invites arbitrary enforcement.”) The risk of arbitrary enforcement is especially pronounced because the policy provides no guidelines indicating when the required requests for advance permission will be granted or denied.

³ This is not much more than a guess: the time restrictions are completely incomprehensible. For the Southwest Terrace, South Plaza, and USU Pool, the policy says “Monday through Friday, 11 a.m. to 1 p.m., Thursday and Friday, 5 p.m. to 10 p.m., and Saturday, 8 a.m. to 10 p.m.” It is unclear if those are the hours that amplified sound is, or is *not*, allowed. Assuming this is intended to say that amplified sound is allowed (with advance permission) during these hours, it is unclear how to reconcile the reference to “Monday through Friday, 11 a.m. to 1 p.m.” with the reference to “Thursday and Friday, 5 p.m. to 10 p.m.” Does that mean that amplified sound (with advance permission) is allowed in these areas Monday through Friday from 11am-1pm, and that it is also allowed on Thursday and Friday only from 5pm-10pm? That is the only reasonable interpretation, but it is not stated explicitly, and members of the university community should not be forced to guess whether it’s the correct interpretation. Does the absence of any reference to Sunday mean that amplified sound is never allowed anywhere on campus on Sundays? Or that it is allowed all day on Sundays without restriction? That might make sense given that classes are unlikely to be held on Sundays, but, again, there is no way to know whether that is, in fact, the rule.

B. The Amplified Sound Policy May Not Be Enforced in a Manner that Discriminates Based on Viewpoint.

I am also concerned by troubling indications that the warning letters may have been sent in retaliation for speech that the university disagrees with or because the Alimahomed-Wilsons and the other faculty members who received warnings co-authored a recent article accusing the University of complicity in Palestinian genocide.⁴ My understanding is that, while many faculty members used amplified sound while participating in the teach-in that provides the ostensible basis for the warning emails, the only faculty members who received these warnings (the Alimahomed-Wilsons, Araceli Esparza, Steven Osuna, Azza Basarudin) were the co-authors of the article. I hope that this is mere coincidence, but the correlation is at least notable.

The inference of viewpoint discrimination or retaliation is bolstered by my understanding that faculty have regularly used amplified sound at union rallies without obtaining advance permission, and without receiving warnings of TPM violations later on. Inconsistent application of rules regulating speech can understandably support findings of unconstitutional viewpoint discrimination. *See, e.g., People for the Ethical Treatment of Animals, Inc. v. Los Angeles Cnty. Metro. Transportation Auth.*, 646 F. Supp. 3d 1201, 1213 (C.D. Cal. 2022), *appeal dismissed sub nom. People for Ethical Treatment of Animals, Inc. v. Los Angeles Cnty. Metro. Transportation Auth.*, No. 23-55115, 2023 WL 9511162 (9th Cir. Nov. 30, 2023) (“Even if a restriction is facially neutral, the uneven application of the policy may nevertheless constitute as-applied viewpoint discrimination”) (holding that there was a triable issue of material fact as to whether “inconsistent application” of a policy restricting advertising on a public transport system was evidence of “actual viewpoint discrimination” or “merely honest mistakes.”). Again, I hope that the apparent inconsistent application of the university’s amplification has been merely an honest mistake, but I am concerned that hope may not be justified.

CONCLUSION

The University’s “Amplification Policies” (Regulation III), are unconstitutional as written, and there is good reason to suspect that warnings received by the Alimahomed-Wilsons and Professors Esparaza, Osuna, and Basarudin may have been issued because of disagreement with the professors’ political speech. For both of these reasons, I ask that the University commit to refraining from enforcing Regulation III against the Alimahomed-Wilsons, the other faculty members it sent warning messages to, or anyone else. I also ask that the University remove Regulation III from its policies, at least until it can amend it so as to comport with constitutional requirements. Please inform me by September 20, 2024 whether you intend to cease enforcing Regulation III and amend or repeal it. I can be reached at jmarkovitz@aclusocal.org if you would like to discuss this matter.

⁴ The article, “Boeing University: How the California State University became complicit in Palestinian genocide,” was published in *Mondoweiss* on May 20, 2024, and can be found at <https://mondoweiss.net/2024/05/boeing-university-how-the-california-state-university-became-complicit-in-palestinian-genocide/>.

Sincerely,



Jonathan Markovitz
Free Expression and Access to Government Senior Staff Attorney

CC: Jane Conoley, President, California State University, Long Beach

Jane.Conoley@csulb.edu,

Karyn Scissum Gunn, Provost and Senior Vice President

Karyn.ScissumGunn@csulb.edu

Donna Nicol, Associate Dean for Personnel and Curriculum

Donna.Nicol@csulb.edu

Deborah Thien, Dean, College of Liberal Arts

Deborah.Thien@csulb.edu

Beka Langren, Senior Field Representative, California Faculty Association

blangen@calfac.org

Shawna McKeever, University Counsel

smckeever@calstate.edu