



March 4, 2014

President Wayne D. Watson
Chicago State University
Cook Administration Building, 3rd Floor
9501 S. King Drive
Chicago, Illinois 60628

Sent via U.S. Mail and Facsimile (773-995-3849)

Dear President Watson,

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 from across the political and ideological spectrum on behalf of liberty, due process, legal equality, voluntary association, religious liberty, and freedom of speech on America's college campuses. Our website, thefire.org, will give you a greater sense of our identity and activities.

FIRE is deeply concerned by the threat to free speech presented by Chicago State University's (CSU's) egregious attempts to silence a blog published by several CSU faculty members. By insinuating that the contributing faculty members could face discipline for an alleged lack of "civility" in the blog, and by threatening legal action based on dubious intellectual property claims, CSU has demonstrated that it is willing to disregard its moral and legal obligation to uphold the First Amendment in order to stifle criticism and dissent. CSU must immediately end its unconstitutional campaign against dissent on campus, and assure the CSU community that speech critical of administrators and the university will receive the constitutional protection to which it is entitled and will not result in discipline or threats of legal action.

The following is our understanding of the facts; please inform us if you believe we are in error.

Since 2009, CSU Professor Phillip Beverly has published the *CSU Faculty Voice* blog (the "*Faculty Voice*") with seven other CSU faculty members.¹ The *Faculty Voice* is wholly non-commercial and serves as an outlet for the opinions of the contributing faculty members in

¹ Available at <http://csufacultyvoice.blogspot.com>.

their individual capacities. Articles appearing on the *Faculty Voice* often criticize alleged mismanagement by the CSU administration. The *Faculty Voice* website makes no claim that it is endorsed by, or speaks on behalf of, CSU in any official capacity.

In a letter dated November 11, 2013, CSU Vice President and General Counsel Patrick B. Cage demanded that Beverly “immediately disable [the] Chicago State University Faculty Voice Blog . . . no later than November 15, 2013 in order to avoid legal action.” Cage first argued that the *Faculty Voice* “violates [CSU’s] values and policies requiring civility and professionalism of all University faculty members.” The letter further alleged that the *Faculty Voice* infringes on CSU’s trademarks and trade names:

Your unauthorized use of CSU’s trade names and marks in association with your blog has caused, and will continue to cause, confusion. Specifically, your use of the mark falsely denotes association with CSU in that the comments and views posted on the Blog are not those of or endorsed by the University. Further, your use of the mark diminishes the University’s brand.

(As of the date of Cage’s letter, CSU did not in fact hold any registered trademarks. Three days later, on November 14, 2013, CSU filed three trademark registration applications.)

Prior to Cage’s letter, an image of hedges on CSU’s campus shaped to form the school’s initials appeared at the top of the *Faculty Voice* website, and the words “Chicago State University Faculty Voice” were superimposed on the picture. Subsequent to Cage’s November 11 letter, the superimposed words were altered, with “Chicago” appearing as crossed out and replaced by “Crony.” The slogan “Where we hire our friends” was added to the image as well.

Wesley Johnson, counsel for the contributors to the *Faculty Voice*, replied to Cage’s letter on November 27, 2013, rejecting CSU’s ultimatum and demanding that CSU cease its campaign against the site.

On January 3, 2014, the *Faculty Voice* received a letter from Donald Levine, external counsel retained to represent CSU in this matter. The January 3 letter contained new allegations that the *Faculty Voice* was designed to give the impression that it had been authorized or endorsed by the faculty as a whole. The letter also argued that the use of a picture of the CSU hedges violated CSU’s intellectual property rights by insinuating that the *Faculty Voice* was endorsed by the university, thus violating the Lanham Act. Levine contended that the alteration of “Chicago” to “Crony” is only evident upon a “closer second inspection.” The letter demanded that the *Faculty Voice* cease using CSU’s name, as well as any picture of CSU, on the website, and that it place a disclaimer written by counsel for CSU prominently on the page.

Levine’s January 3 letter is simply the latest affront in CSU’s brazen, shameful campaign to stifle constitutionally protected criticism and dissent on campus. CSU has put the speech

rights of its students and faculty in peril—an unacceptable result at a public institution of higher education.

It has long been settled that the First Amendment applies in full force on public university campuses. *See, e.g., Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) (“With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities.”); *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”) (internal citation and quotation marks omitted).

To be clear: CSU may not discipline or threaten to discipline faculty members for engaging in protected expression simply because the administration has deemed it “uncivil.” The principle of freedom of speech does not exist to protect only non-controversial speech; indeed, it exists precisely to protect speech that some members of a community may find controversial, offensive, or disrespectful. The U.S. Supreme Court has explicitly held, in rulings spanning decades, that speech cannot be restricted simply because it offends some, or even many, listeners. *See, e.g., Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (noting that free speech “may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.”). *See also Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973) (“[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”).

The reasoning of U.S. Magistrate Judge Wayne Brazil in *College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007), a case in which the court prohibited the California State University System from imposing a “civility” requirement on students, is particularly instructive on this point. Judge Brazil wrote:

[A] regulation that mandates civility easily could be understood as permitting only those forms of interaction that produce as little friction as possible, forms that are thoroughly lubricated by restraint, moderation, respect, social convention, and reason. The First Amendment difficulty with this kind of mandate should be obvious: the requirement “to be civil to one another” and the directive to eschew behaviors that are not consistent with “good citizenship” reasonably can be understood as prohibiting the kind of communication that it is necessary to use to convey the full emotional power with which a speaker embraces her ideas or the intensity and richness of the feelings that attach her to her cause. Similarly, mandating civility could deprive speakers of the tools they most need to connect emotionally with their audience, to move their audience to share their passion.

In sum, there is a substantial risk that the civility requirement will inhibit or deter use of the forms and means of communication that, to many speakers in circumstances of the greatest First Amendment sensitivity, will be the most valued and the most effective.

Id. at 1019. Not only can much expression that lacks “civility” be singularly effective in disseminating a particular message, some messages incorporate a measure of “incivility” or “disrespect” by their very nature. Where the message conveyed levies harsh criticism or accusations of deception or malfeasance, the target of such expression will naturally feel that they have been subjected to uncivil and disrespectful speech. The precedents cited here, and decades of similar holdings, have nevertheless made clear that the First Amendment protects such speech.

Moreover, the *Faculty Voice* is a classic example of the type of speech *most* deserving of the strongest First Amendment protection. Courts have consistently held that a core purpose of the First Amendment is to shield criticism of governmental bodies and public officials from official threat or retribution. *See Ariz. Free Enter. Club’s Freedom Fund PAC v. Bennett*, 131 S. Ct. 2806, 2828 (2011) (“[T]here is practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs.”) (internal citation and quotation marks omitted); *New York Times Co. v. Sullivan*, 376 U.S. 254, 296–97 (1964) (Black, J., concurring) (“[F]reedom to discuss public affairs and public officials is unquestionably, as the court today holds, the kind of speech the First Amendment was primarily designed to keep within the area of free discussion.”). As a public university funded by taxpayer dollars, the operations of CSU and the integrity of its administration are inescapably matters of significant importance to both the CSU community and the taxpaying public. Simply put, CSU may not—consistent with its obligations under the First Amendment—subject faculty members to any discipline or retaliation for engaging in this core protected speech, no matter how “uncivil” or disrespectful the administrators targeted by the *Faculty Voice* find it.

CSU’s spurious and meritless allegations of trademark violations likewise fail to justify the university’s demands. Rather, these unsupported allegations evince nothing other than a transparent attempt to stifle dissent and criticism of the administration. Foremost, only speech “use[d] in commerce” is subject to liability under the Lanham Act. 15 U.S.C. § 1125(a). The *Faculty Voice* is non-commercial, as it is simply a platform for disseminating the views of its contributors and does not offer anything for sale, much less a product that would compete with CSU.

Furthermore, CSU’s contention that the *Faculty Voice* would likely be confused with a university-sponsored or endorsed website strains credibility well past the breaking point. Even a cursory glance at the *Faculty Voice* reveals that it is a personal blog hosted by faculty members speaking in their personal capacities. The URL of the website is a subdomain of a popular free blog hosting service. Any reasonable visitor to the site would immediately understand that an officially sanctioned and endorsed faculty website would instead

appear as a part of CSU's own website and bear a ".edu" top-level domain suffix. Taken together with the *Faculty Voice's* use of a stock template blog design, it would be nearly impossible for a reasonable person to confuse the *Faculty Voice* with an officially sanctioned university website.

Nor can it reasonably be argued that the inclusion of the image of CSU's "iconic" hedges will create confusion as to whether the *Faculty Voice* is endorsed by the university. Not only does the presence of a solitary picture of a campus landmark on an otherwise obviously non-affiliated website fail to raise any risk of confusion, but the image also includes prominent text disparaging the university by alleging widespread cronyism. It defies logic to assume that visitors to the *Faculty Voice* website will believe the blog to be endorsed or approved by the university when it in fact openly mocks CSU.

Finally, CSU's demand that the *Faculty Voice* cease using the university's name, initials, or any picture of its campus is legally unsupported. Courts have long held that the First Amendment protects websites that criticize products or businesses, even when they incorporate the target's trademarked name or logo. For example, in *Bally Total Fitness Holding Corp v. Faber*, 29 F. Supp. 2d 1161 (C.D. Cal. 1998), a federal court ruled that Bally Total Fitness 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. The court found that there was no likelihood of consumer confusion, and noted that courts "have rejected this approach by holding that trademark rights may be limited by First Amendment concerns." *Id.* at 1166. Further, the United States Court of Appeals for the Sixth Circuit has held 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." *Taubman Co. v. Webfeats*, 319 F.3d 770, 775 (6th Cir. 2003). As the *Faculty Voice* is engaged solely in non-commercial speech that raises no reasonable likelihood of confusion, it is entitled to tell its readers that it is speaking about Chicago State University by using its name and images of its campus.

Our conclusion that CSU is asserting meritless pretextual claims against the *Faculty Voice* in order to stifle criticism is justified by the CSU administration's sordid history in similar matters. Indeed, CSU has exhibited a remarkable pattern of wantonly trampling on the rights of its students and faculty in order to silence dissent and ensure that the administration has complete control over any public narrative related to the university.

In 2011, CSU General Counsel Patrick Cage refused to release certain information pursuant to a Freedom of Information Act request because the *Chicago Tribune* reporter who filed the request had written "negative" articles about CSU in the past. Illinois Attorney General Lisa Madigan ruled against Cage, finding that he had improperly withheld public records. In 2012, CSU again attempted to exert control over how the university is portrayed by requiring faculty and staff to obtain approval for any media interviews, opinion pieces, newsletters, social media, or other communications regarding CSU. After swift public

backlash against such a ham-handed attempt at top-down censorship, CSU was forced to withdraw the policy.

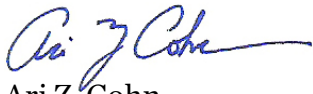
CSU has also recently suffered major losses in court as a result of its disregard for the rights of its campus community. Just two weeks ago, a jury awarded \$2.5 million to a former CSU attorney who faced retaliation for refusing to improperly withhold public records regarding your employment and for reporting questionable contracts to the Illinois Attorney General's office. And in August, CSU was ordered to pay over \$200,000 in court costs and attorneys' fees after being held liable for retaliating against the student newspaper and its faculty advisor in response to a series of articles critical of the university's administration.

It is remarkable that even after these public, embarrassing, and costly defeats, Chicago State University continues to disregard the basic constitutional rights that it is bound by law to uphold. As a Chicagoland native and resident for more than 28 years, it is particularly distressing for me to witness CSU engaging in an obviously unconstitutional endeavor to silence the free exchange of ideas and political dissent, to the great detriment of not only the CSU community, but also the reputation of the City of Chicago.

Please spare CSU the embarrassment and cost of yet another loss in its repeated and ill-advised battles against the First Amendment. If you have not already done so, we urge you to immediately withdraw your unconstitutional demands to the *Faculty Voice* and to clarify to Chicago State University students and faculty that their First Amendment right to engage in dissent and criticism of the CSU administration will not be infringed upon in the future.

We ask for a response by March 18, 2014.

Sincerely,



Ari Z. Cohn

Program Officer, Legal and Public Advocacy

cc:

Patrick B. Cage, Vice President and General Counsel

Angela Henderson, Interim Provost and Senior Vice President for Academic Affairs

Donald B. Levine, Gonzalez Saggio & Harlan LLP