



National
Coalition
Against
Censorship

December 8, 2016

President Daniel F. Mahony
Winthrop University
Office of the President
114 Tillman Hall
Rock Hill, South Carolina 29733

URGENT

Sent via U.S. Mail and Electronic Mail (president@winthrop.edu)

Dear President Mahony:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses. The National Coalition Against Censorship (NCAC), founded in 1974, is an alliance of over 50 national nonprofit organizations, including literary, artistic, religious, educational, professional, labor, and civil liberties groups dedicated to promoting the right to free speech.

FIRE and NCAC are concerned for the state of freedom of expression at Winthrop University due to the spurious charges and threats of expulsion or suspension levied against student Samantha Valdez over her alleged involvement in an art installation criticizing Winthrop's naming of Tillman Hall.

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

On the night of November 12 or the morning of November 13, 2016, figures—made of nylon stockings stuffed with dirt, spray-painted black, and shaped like bodies—were placed in the trees outside Winthrop's Tillman Hall, and a piece of paper that said "Tillman's Legacy" was taped over the sign outside the hall.¹ Tillman Hall has, for months, been at the center of

¹ For a photograph of the installation, see Caroline Fountain (@FountainFox46) TWITTER (Nov. 14, 2016 1:23 PM), https://twitter.com/FountainFox46/status/798229762246406144?ref_src=twsrc%5Etfw.

student protests due to its namesake, Benjamin Tillman,² governor of South Carolina from 1890-1894, during which time the state saw an increase in the number of lynchings of African Americans.³ According to the Winthrop University Police Department's Incident Report, the university discovered the installation at 4:47 PM on Sunday November 13.⁴

Association of Artists for Change—an unrecognized group made up in part by Winthrop students—claimed responsibility for the installation by way of a statement made to the media by Winthrop student, and self-identified Association of Artists for Change spokesperson Samantha Valdez. That statement reads, in full:⁵

Art challenges one to think, to provoke, even to disturb, in a constant search for truth. Arousing our emotions, expanding our sympathies in directions we may not anticipate and may not want. Tillman's Legacy is a work which aims to disrupt the aesthetic veil the building has, eliminating the ability to forget the eighteen men who were lynched during Benjamin Tillman's years in office. The beauty of the building tranquilizes the atrocity of the man. Tillman Hall should incite the same rage, sadness, and fear the artwork did. One should question, why this artwork is offensive and not the building itself? The building, named Tillman Hall in 1962, in response to the Civil Rights Movement, to incite fear toward prospective students of color. Following traditions of guerrilla-style tactics in creating Protest Art, the artwork appears without warning to ensure pure genuine emotion from the viewer. The strong imagery forces a disruption and makes the truth unavoidable. The work is intended to incorporate the willing and the unwilling into a dialogue about the building and its history.

This work came after the election. The climate made the fear of deportation, detainment and a repeat of history apparent. It coincides with frustration over Winthrop University's lack of momentum in changing the name and the disrespect toward the artwork depicting of a ship, which Winthrop promised to move to a more suitable location, but instead has hidden.

This work remembers the past, hoping to never repeat it. Though shocking, Tillman's Legacy has opened an aesthetic dialogue.

² Tea Franco, *March on Tillman's lasting impact*, THE JOHNSONIAN, (Dec. 2, 2016), <http://www.mytjnow.com/march-on-tillmans-lasting-impact/>.

³ *Benjamin Tillman*, CLEMSON UNIVERSITY, <http://www.clemson.edu/about/history/bios/ben-tillman.html> (last visited Dec. 6, 2016).

⁴ Teddy Kulmala, *Black figures found hanging from tree in vandalism at Winthrop's Tillman Hall*, THE HERALD, (Nov. 14, 2016), <http://www.heraldonline.com/news/local/crime/article114620828.html>.

⁵ *Winthrop Police investigate 'disturbing' display found outside Tillman Hall*, FOX 46 CHARLOTTE, (Nov. 14, 2016), <http://www.fox46charlotte.com/news/local-news/217395963-story>.

On Monday, November 14, you sent an email stating, in relevant part, your intention to punish those responsible for the display:⁶

Winthrop Campus Police are currently investigating a display found this Sunday by Tillman Hall. The display, consisting of a sign with the words “Tillman’s Legacy” and a number of abstract black spray-painted figures hanging from branches of a nearby tree, was immediately removed when reported to police.

While we do not know the intent of this display, these images are clearly hurtful and threatening and are contrary to the values of Winthrop University. Actions such as these are not, and will not be, acceptable on this campus. This incident will be fully investigated, and those responsible will be held accountable to the campus judicial system and South Carolina state law.

On November 15, you reiterated those statements in another email to the campus community:

Winthrop University Police and university administrators continue to investigate the incident that occurred on our campus this past weekend. I want to repeat that this act was deeply hurtful and threatening to our faculty, staff, students and their families, and that those responsible will be held accountable.

On November 21, Valdez received a letter from Assistant Dean of Students and Director of Student Conduct Anthony Davis informing her that she is alleged to have violated three provisions of the Student Conduct Code:

Item A. Actual or threatened disruption of classes, seminars, research projects, or functions or activities of the University. Behavior that disturbs the public order and peace and/or the living and learning environment of the residence halls, recreational facilities, student organizations or other learning environments is prohibited. Excessive and unreasonable requests and/or demands for university services and resources, to the extent that they limit or interfere with the ability of faculty/staff to meet other university needs and functions, are disruptive to the operations of the university.

Item E. Disorderly Conduct- Individual or group behavior which unnecessarily disturbs individuals or groups is prohibited. Such conduct includes, but is not limited to, unwelcome physical contact, hazing, and

⁶ *Id.*

boisterous or threatening conduct which is unreasonable for the area, time, or manner in which it occurs.

Item Z. Violation of the University's fundraising, solicitation, canvassing, assembly, and posting policies.

Davis' letter also alleges—based on Winthrop University PD's incident report and Valdez's November 13 statement on behalf of Association of Artists for Change— that:

The display your group created was in an area not designated for public display. In addition, the flyer you posted was not posted on an open-access bulletin board, nor cleared through the University.

[...]

By not following proper procedures for public displays, your actions unnecessarily disturbed numerous individual students and groups. Also, the area, time, or manner in which your display occurred was unreasonable.

Davis' letter warned Valdez that these violations could result in her suspension or expulsion from Winthrop. Valdez has scheduled a pre-hearing interview with Davis for December 9.

The disciplinary charges against Valdez alleging “disruption” and “disorderly conduct” threaten the First Amendment rights that Winthrop University is legally and morally bound to uphold, and must be rescinded immediately.

It has long been settled law that the First Amendment is binding on public universities such as Winthrop. *See 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 omitted).

Additionally, the Supreme Court has repeatedly held that speech may not be punished merely because those who witness it may be offended. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“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.”); *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.’”); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (“[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”); *see also Village of Skokie v. National Socialist Party of America*, 373 N.E.2d 21 (Ill. 1978) (holding that public “use of the swastika is a symbolic form of free speech entitled to first amendment protections”).

The Item A and Item E charges (hereafter the “disruption” and “disorderly conduct” charges, respectively) against Valdez are spurious, and the threats of expulsion or suspension are appallingly disproportionate to the conduct Valdez is alleged to have engaged in.

Disruption or Disturbance of the Public Order and Peace

As defined by the Student Conduct Code of Winthrop’s Student Handbook,⁷ this charge provides, in relevant part:

Behavior that disturbs the public order and peace and/or the living and learning environment of the residence halls, recreational facilities, student organizations or other learning environments is prohibited.

Valdez’s conduct in releasing a statement on behalf of this group does not meet these criteria. Regardless of whether Valdez herself participated in the physical placement of this exhibit, doing so would not violate this prohibition. The activities Valdez is alleged to have engaged in cannot reasonably be interpreted as disruptive in and of themselves.

Winthrop’s charge rests then upon the real or perceived negative reactions from the campus community members, some of whom the Winthrop administration believes felt threatened by the exhibit. However, these reactions cannot serve as the basis for a disruption charge consistent with Valdez’s First Amendment rights. Such grounds amount to punishment of protected expression on the basis that it may cause a negative reaction among the campus community.

That viewers of expression are offended cannot be the basis for its punishment. Such speech remains protected by the First Amendment. *Cohen v. California*, 403 U.S. 15 (1971) (reversing conviction of man wearing a jacket bearing the anti-draft slogan “Fuck the Draft” in a courthouse because the message was protected under First Amendment). If viewers find the Tillman Hall art installation upsetting, they are free to look away, just as the occupants of the Los Angeles Superior Court were free to avert their eyes from Paul Robert Cohen’s jacket and its colorful language. Likewise, the

⁷ *Student Conduct Code*, STUDENT HANDBOOK WINTHROP UNIVERSITY, <http://www.winthrop.edu/uploadedFiles/studentconduct/StudentHandbook.pdf> (last visited Dec. 4, 2016).

Supreme Court has observed that even speech intended to offend a crowd hostile to the speaker “cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.” *Forsyth County v. Nationalist Movement* (1992) 505 U.S. 123, 134–135. If expression which intentionally offends a hostile mob cannot be restricted on the basis of the audience’s reaction alone, then it surely follows that expression which might offend students cannot be restricted on that basis.

That some campus community members may react negatively to Association of Artists for Change’s installation is no justification for punishing Valdez. Cohen could no more be held accountable for the anger of those who viewed his jacket than Valdez could be held accountable for any “disruption” or disturbances of “public order and peace” that occur in response to the installation. If any disruptions truly did occur on Winthrop’s campus in reaction to the Tillman Hall art installation, Winthrop will set a dangerous and unconstitutional precedent by punishing the expression that inspired it.

Disorderly Conduct

The “disorderly conduct” charge is similarly unjustifiable. The “Student Conduct Code” of the Winthrop’s Student Handbook refers to disorderly conduct as an “[i]ndividual or group behavior which unnecessarily disturbs individuals or groups. . . . Such conduct includes, but is not limited to, unwelcome physical contact, hazing, and boisterous or threatening conduct which is unreasonable for the area, time, or manner in which it occurs.”⁸

Valdez’s alleged participation in the construction of the Tillman Hall installation can hardly be construed as “boisterous or threatening conduct.” Considering that Winthrop students are almost certainly aware of the controversy surrounding Tillman’s history and the uproar it has caused on campus,⁹ it can hardly be argued that, upon seeing the “Tillman’s Legacy” sign, the students would perceive the installation as anything other than commentary on the acts Association of Artists for Change associate with his name.

The artistic representation of lynching is controversial, and intentionally so. As the statement by the Association of Artists for Change memorialized, their installation sought to “eliminat[e] the ability to forget the eighteen men who were lynched during Benjamin Tillman’s years in office.” Confronting viewers with an unpleasant image or idea is not the same as threatening them with what those images or ideas convey or represent. Billie Holiday’s iconic song “Strange Fruit” is an apt example of this.

⁸ *Student Conduct Code*, STUDENT HANDBOOK WINTHROP UNIVERSITY, <http://www.winthrop.edu/uploadedFiles/studentconduct/StudentHandbook.pdf> (last visited Dec. 4, 2016).

⁹ A December 2, 2016 article in Winthrop University’s student newspaper *The Johnsonian* points out that “many discussions and protests have been held concerning the name and legacy of Tillman Hall” during the Fall 2016 semester. See Tea Franco, *March on Tillman’s lasting impact*, THE JOHNSONIAN, (Dec. 2, 2016), <http://www.mytjnow.com/march-on-tillmans-lasting-impact/>.

“Strange Fruit” offers an unflinching look at the haunting history of lynching in the American South, and was named “Song of the Century” by *Time* magazine in 1999 for doing so.¹⁰ Its lyrics:

Southern trees bear a strange fruit,
 Blood on the leaves and blood at the root,
 Black body swinging in the Southern breeze,
 Strange fruit hanging from the poplar trees.

Pastoral scene of the gallant South,
 The bulging eyes and the twisted mouth,
 Scent of magnolia sweet and fresh,
 And the sudden smell of burning flesh!

Here is a fruit for the crows to pluck,
 For the rain to gather, for the wind to suck,
 For the sun to rot, for a tree to drop,
 Here is a strange and bitter crop.

As with Holiday’s “Strange Fruit,” Association of Artists for Change’s installation is clearly a commentary on racism and lynching, not a declaration of intent to engage in it. This should become clear not only through the sign the Association of Artists for Change included in the installation, but also in the context of the long and well-known history of artists’ use of disturbing imagery to compel viewers to reckon with painful ideas. Parts of the campus community may have misinterpreted the work, but the way to remedy that is with more conversation about the meaning of the action, not penalizing the artists and thus chilling others from speaking up on important campus issues.

Finally, any insinuation that Association of Artists for Change’s installation constituted a “true threat” is unjustifiable. In *Virginia v. Black*, 538 U.S. 343, 359 (2003), the Supreme Court held that only “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals” fall outside the boundaries of First Amendment protection. Again, the installation of an art exhibit that criticizes South Carolina’s history of lynching does not meet this legal standard.

Disproportionate Punishment

In addition to the baseless “disruption” and “disorderly conduct” charges, Davis’ threat of potential expulsion or suspension merits discussion. The “Disciplinary Sanctions” section of Winthrop’s Student Code of Conduct¹¹ states:

¹⁰ Elizabeth Blair, *The Strange Story Of The Man Behind ‘Strange Fruit,’* NPR (Sept. 12, 2012), <http://www.npr.org/2012/09/05/158933012/the-strange-story-of-the-man-behind-strange-fruit>.

The severity of the sanctions imposed is intended to correspond with the severity or frequency of violation, as well as the student's willingness to recommit themselves or herself to good citizenship through behaviors that fall within the conduct regulations of the University.

It is preposterous to claim that a one-time, easily removed art installation that contained context for the disturbing imagery it conveyed is a conduct code violation so severe or frequent that expulsion or suspension is a just or appropriate response.

Conclusion

Lastly, your November 14 statement to the Winthrop community, in which you suggested that “these images [that] are clearly hurtful and threatening [...] are not, and will not be, acceptable on this campus” woefully misinforms Winthrop students’ about their free speech rights. Implicit in your email is the idea that artwork that community members may see as “harmful” is verboten on campus. To effectively ban “harmful” artwork from display due to institutional disapproval of its content is unconstitutional. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 401 (1992) (finding that a regulation may not “regulate use based on hostility—or favoritism—towards the underlying message expressed”). Yet Winthrop has conveyed to its students, faculty, and staff that it is willing to do precisely that—an unacceptable abdication of its duty to uphold its community members’ constitutional rights.

In addition to promptly revoking the baseless “disruption” and “disorderly conduct” charges against Valdez and informing her that she will not face suspension or expulsion for her alleged involvement in the Tillman Hall art installation, Winthrop University must clarify to its students that expression on a public campus cannot be punished or censored purely on the basis that some listeners perceive it as “harmful,” as was suggested in your November 14 statement.

We urge the university to treat this incident as a teachable moment, as an instance of how an artist’s intent may not always be immediately obvious and may require reflection rather than hastily-drawn conclusions; and to use the ensuing controversy to open a more active dialogue with students around the naming of historical buildings on campus at a time of exacerbated racial tensions.

FIRE is committed to using all of the resources at our disposal to see this matter through to a just conclusion. NCAC has vast experience with art controversies and will be pleased to advise Winthrop University further in handling controversies in a

¹¹ *Student Conduct Code*, STUDENT HANDBOOK WINTHROP UNIVERSITY, <http://www.winthrop.edu/uploadedFiles/studentconduct/StudentHandbook.pdf> (last visited Dec. 4, 2016).

productive manner, which respects both academic freedom and First Amendment principles. We appreciate your attention to these concerns.

We have enclosed a signed FERPA waiver from Samantha Valdez, permitting you to freely discuss her case with FIRE. Due to the urgency of this matter, we request a response no later than December 9, 2016.

Sincerely,



Sarah McLaughlin

Program Officer, Individual Rights Defense Program, FIRE



Svetlana Mintcheva, Ph.D.

Director of Programs, National Coalition Against Censorship

Encl.

cc:

Anthony Davis, Assistant Dean of Students and Director of Student Conduct