**Expert Witness Testimony of Zach Greenberg**

Dear Hearing Panel,

Thank you for allowing me to submit this testimony. I'm Zach Greenberg, a First Amendment attorney at the Foundation for Individual Rights in Education, also known as FIRE. I testify as an expert witness on Syracuse University's free speech policies and how they related to the Code of Student Conduct provisions the accused students are charged under.

My expertise concerning university speech policies comes from my employment with FIRE, 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. At FIRE, we've analyzed thousands of university speech policies at hundreds of schools, including those of Syracuse University. As a Justice Robert H. Jackson Legal fellow at FIRE, I have thoroughly researched and analyzed Syracuse University's speech policies, and I have written about them numerous times through my legal scholarship and public advocacy, all of which can be found at thefire.org.

Additionally, I'm a proud 2016 graduate of the Syracuse University College of Law, during which time I served on the Working Group for Free Speech, a committee tasked by Chancellor Kent Syverud with analyzing and providing recommendations for revising Syracuse University's free speech policies, including the some of the policies these students are accused of violating. I'm also an attorney in good standing with the New York State Bar and the First Amendment Lawyers Association.

Based on my experience with Working Group for Free Speech and as a free speech attorney with FIRE. I believe I am qualified to testify on Syracuse University's free speech policies and how they related to the charges against the accused students.

## I. ANALYSIS

The disciplinary action against the members of Theta Tau is at odds with the principles of freedom of expression to which Syracuse University has bound itself and must be rescinded immediately.

### A. Syracuse promises students freedom of expression

While Syracuse University is a private institution and thus not legally bound by the First Amendment, it is both morally and contractually bound to honor the explicit, repeated, and unequivocal promises of freedom of expression it has made to its students.

For example, Syracuse University's Campus Disruption Policy properly asserts that the university "is committed to the principle that freedom of discussion is essential to the search for truth."[1] Syracuse's declaration of "Student Rights and Responsibilities" similarly notes:

[1] *Campus Disruption Policy*, SYRACUSE UNIV. (Aug. 20, 2010), https://policies.syr.edu/policies/free-speech/campus-disruption-policy.

> Students have the right to express themselves freely on any subject provided they do so in a manner that does not violate the Code of Student Conduct.[2]

Similarly, Syracuse's Anti-Harassment Policy provides:

> Syracuse University is committed to maintaining an environment that fosters tolerance, sensitivity, understanding and respect while protecting the free speech rights of the members of its community.
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> [. . .]
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> The University is also committed to protecting academic freedom and the freedom of speech by members of its community. This policy is not intended, and may not be applied, to abridge the free speech or other civil rights of any individual or group on campus. However, harassing speech or conduct that effectively prevents equal access to University programs or otherwise violates federal or state law, or University policy, is prohibited. [3]

### B. Freedom of speech protects offensive and unpopular satire

Satire is unquestionably protected by the First Amendment. In *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the Supreme Court ruled that the First Amendment protects even the most blatantly ridiculing, outlandishly offensive parody. In that instance, the First Amendment protected a mock advertisement purporting to interview the Reverend Jerry Falwell, who described losing his virginity to his own mother in an outhouse.

Satire, of course, may be offensive and is often *intended* to offend. Freedom of speech does not exist to protect only non-controversial expression; it exists precisely to protect speech that some or even most members of a community may find controversial or offensive. The Supreme Court has explicitly held, in rulings spanning decades, that speech cannot be restricted simply because it offends people. *See, e.g.*, *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 freedom to offend some listeners is the same freedom to move or excite others. As the Supreme Court observed in *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), 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."

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[2] *Statement of Student Rights and Responsibilities*, SYRACUSE UNIV. (OCT. 2005), https://policies.syr.edu/policies/academic-rules-student-responsibilities-and-services/statement-of-student-rights-and-responsibilities.

[3] *Anti-Harassment Policy*, SYRACUSE UNIV. (Dec. 13, 2016), https://policies.syr.edu/policies/free-speech/anti-harassment-policy.

Accordingly, decades of legal precedent make clear that the First Amendment protects even the most hateful of speech. *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down an ordinance that prohibited placing on any property symbols that "arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender"). The Supreme Court reiterated this fundamental principle in *Snyder v. Phelps*, 562 U.S. 443, 461 (2011), proclaiming:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. . . . [W]e cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.

Last year, the Court once again reaffirmed this vital principle in *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017), holding unanimously that the perception that expression is "hateful" or that it "demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground" is not a sufficient basis on which to remove speech from the protection of the First Amendment.

### C. The disciplinary charges against Theta Tau members violate Syracuse's commitment to freedom of expression

Distasteful and offensive as many found the satirical skits portrayed in the videos, such private expression is undoubtedly protected by any reasonable understanding of freedom of speech. We will discuss each charge in turn.

#### i. <u>The Theta Tau skits did not cause or threaten physical harm</u>

The Theta Tau members' voluntary participation in satirical skits clearly did not cause any person any physical harm, so we presume that Syracuse alleges that the skits constituted a threat of physical harm. Such an allegation is legally and factually unfounded.

The Supreme Court has defined "true threats," which are not protected by the First Amendment, as "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." *Virginia v. Black*, 538 U.S. 343, 359 (2003). The Court has further elaborated that speech may lose protection as "intimidation"—a form of "true threat"—when "a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id.* at 360.

The Theta Tau expression falls far short of this exacting standard. The performance of a satirical skit cannot reasonably be construed as a serious expression of an intent to engage in any behavior whatsoever. The entire purpose of satire is to draw attention to the perceived failings or vices of its target; it is an exercise in exposure and ridicule, not a plan of action. Syracuse's implication that this skit constitutes a threat of violence ignores the legal definition of a true threat and defies common sense.

ii. The Theta Tau skits did not constitute harassment of any kind

Syracuse has also charged the members of Theta Tau with harassment under three separate policies: the general harassment provision of the Code of Student Conduct, the university's Anti-Harassment Policy, and its Sexual Harassment, Abuse, and Assault Prevention policy.

a. General harassment

Syracuse's Code of Student Conduct defines the offense of harassment as follows:

> Harassment, whether physical, verbal or electronic, oral, written or video, which is beyond the bounds of protected free speech, directed at a specific individual(s), easily construed as "fighting words," and likely to cause an immediate breach of the peace.[4]

This definition of harassment tracks the New York Court of Appeals' holding that, "at the least, any proscription of pure speech must be sharply limited to words which, by their utterance alone, inflict injury or tend naturally to evoke immediate violence or other breach of the peace." *People v. Dietze*, 75 N.Y.2d 47, 52 (N.Y. 1989) (striking down, on First Amendment grounds, a penal law proscribing the "use of 'abusive' language with the intent to 'harass' or 'annoy' another person") (internal citations omitted).

To the extent that the fighting words exception to the First Amendment remains valid law (a matter of considerable doubt[5]), it has been severely curtailed by the courts such that it applies only to an exceedingly narrow category of speech: face-to-face communications directed at a specific individual that would obviously provoke an immediate violent reaction.

The expression in question took place at a private fraternity event, the express purpose of which was the performance of skits lampooning fraternity members. As part of an intentionally comedic dialogue among friends, it is highly unlikely that the skits would have provoked any immediate violent reaction or caused any unlawful disturbance. Indeed, the response to the skits was, as shown in the videos, raucous laughter—as would be expected from those who chose to attend the event knowing full well what it entailed. Accordingly, Syracuse's allegation of harassment under the Code of Student Conduct must fail.

b. Discriminatory harassment

Syracuse also alleges that the charged Theta Tau members engaged in discriminatory harassment against protected classes, including sexual harassment. The skits performed at Theta Tau do not, however, meet either the legal standard for discriminatory harassment, nor Syracuse's own policy definitions.

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[4] *Code of Student Conduct*, SYRACUSE UNIV. (Feb. 2017), https://policies.syr.edu/policies/academic-rules-student-responsibilities-and-services/code-of-student-conduct.

[5] *See* Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 510–11 (1990) ("For the foregoing reasons, Supreme Court Justices and constitutional scholars persuasively maintain that *Chaplinsky*'s fighting words doctrine is no longer good law.").

The Supreme Court established the definition of student-on-student (or peer) harassment in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). In order for student conduct (including expression) to constitute actionable harassment, it must be (1) unwelcome, (2) discriminatory on the basis of gender or another protected status, and (3) "so severe, pervasive, and objectively offensive that it can be said to deprive the victim[] of access to the educational opportunities or benefits provided by the school." *Id.* at 650. By definition, this includes only extreme and typically repetitive behavior—conduct so serious that it would prevent a reasonable person from receiving his or her education.

In a July 28, 2003, "Dear Colleague" letter sent to all college and university presidents, Assistant Secretary Gerald A. Reynolds of the Office for Civil Rights (OCR) of the U.S. Department of Education made clear that harassment "must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive."[6] On April 29, 2014, Assistant Secretary Catherine E. Lhamon issued guidance again clarifying that "the laws and regulations [OCR] enforces protect students from prohibited discrimination and do not restrict the exercise of any expressive activities or speech protected under the U.S. Constitution," and stating that "when a school works to prevent and redress discrimination, it must respect the free-speech rights of students, faculty, and other speakers."[7]

Again, the forum in which the speech occurred precludes a finding that the charged students engaged in discriminatory harassment, whether based on sex or another protected classification.

Put simply, the skits seen in the videos were the *raison d'être* of the filmed event, and therefore were not "unwelcome" to the audience, none of whom—to FIRE's knowledge—have filed any complaint, let alone alleged that the speech interfered with their education. Because this speech was in fact *welcomed* by the audience, it cannot constitute harassment under the terms of both the Anti-Harassment Policy or the Sexual Harassment, Abuse, and Assault Prevention policy.

Syracuse's Anti-Harassment Policy defines prohibited harassment as

> unwelcome conduct or speech directed at an individual or group of individuals, based on a Protected Category, which is so severe or pervasive that it unreasonably interferes with an individual's work performance, terms of employment, educational program participation, or it creates an intimidating, hostile, or offensive environment for study, work, or social living. To qualify as Harassment under this policy, **the speech or conduct must be both viewed by the listener(s) as Harassment**, and be objectively severe or pervasive enough that a reasonable person would agree that the speech or conduct constitutes Harassment.[8] [Emphasis added.]

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[6] U.S. Dep't of Educ., Dear Colleague Letter from Gerald A. Reynolds, Assistant Sec'y for Civil Rights (July 28, 2003), https://www2.ed.gov/about/offices/list/ocr/firstamend.html.
[7] U.S. Dep't of Educ., Questions and Answers on Title IX and Sexual Violence 43–44 (Apr. 29, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.
[8] *Anti-Harassment Policy*, SYRACUSE UNIV. (Dec. 13, 2016), https://policies.syr.edu/policies/free-speech/anti-harassment-policy.

Syracuse's Policy on Sexual Harassment, Abuse, and Assault Prevention defines sexual harassment as

> unwelcome behavior of a sexual nature that relates to the gender or sexual identity of an individual and that has the purpose or effect of creating an intimidating, offensive or hostile environment for study, work, or social living.

Again, no member of the audience appears to have claimed that they suffered any unreasonable interference with their education, nor that a hostile environment has been created. Those audience members, as well as fraternity members who were unable to attend, were the only individuals to whom the skits were directed. Because no member of the audience viewed the skits as harassment, as required by the policy, Syracuse's charge of violating the Anti-Harassment Policy is without merit. Similarly, because the private audience to whom the speech was directed apparently had no objection to the expression, it did not violate the Sexual Harassment, Abuse, and Assault Prevention policy.

Syracuse may not rest its harassment charges on the fact that the videos were ultimately leaked and seen by the broader university community and the general public. The skits were intended solely for a private audience that expected and understood the nature of the satire. Syracuse may not hold the charged students responsible for creating a hostile environment simply because others learned of their private expression. Otherwise, every private conversation would be subject to harassment charges simply because one party informed others about the views espoused during the conversation. Such a result is untenable and would unacceptably hinder freedom of expression at Syracuse.

But even if the skits *were* to be legitimately assessed with respect to their effect on the entire university community, they would still not constitute discriminatory harassment. The skits were an isolated incident, performed in private, and obviously—to their intended audience—satirical in nature. That outsiders learned of the skits from a third party over whom the charged students had no control, and without critical context, cannot be the basis for imposing liability. Further, there simply is no credible argument that knowledge of such an event was sufficient in severity and pervasiveness to curtail any student's ability to access Syracuse's educational opportunities and benefits. Indeed, this is precisely the mere "expression of views, words, symbols or thoughts that some person finds offensive" that OCR has expressly stated is *not*, without more, sufficient to constitute discriminatory harassment.[9]

If the knowledge that others expressed offensive views in private was sufficient to constitute discriminatory harassment, freedom of expression on most campuses nationwide would be swallowed by the exception. For example, LGBT activists might find vociferous opposition to same-sex marriage offensive and hateful. Would Syracuse discipline any student publicly exposed for strongly advocating for "traditional marriage?" Would the university punish a student whose private support for the Black Lives Matter movement became public if others

[9]Dear Colleague Letter from Gerald A. Reynolds, Assistant Sec'y for Civil Rights, *supra* note 25.

subjectively found such beliefs hateful? Again, to allow such a result would be a wholesale abandonment of both freedom of expression and reason.

iii. Syracuse may not punish the charged students for "threaten[ing] the mental health" of others

As explained above, none of the expression at hand threatened the physical health or safety of another human being. Accordingly, we presume that Syracuse alleges that the charged students threatened the mental health of others.

Applying this policy to private speech that others found offensive would entirely gut Syracuse's promises of free speech. As previously noted, regardless of ideology, many deeply-held political and social views are simultaneously abhorrent and distressing to others. If the crux of this policy is whether a listener subjectively felt mental or emotional distress, there is apparently little of consequence that can be discussed at Syracuse. The use of section 3 of the Code of Student Conduct to discipline otherwise protected speech based on wholly subjective criteria is unacceptable given Syracuse's stated commitment to expressive rights.

iv. Syracuse has inappropriately charged individual chapter members with violation of a collective expectation

The charged students also stand accused of violating a provision of the Office of Fraternity and Sorority Affairs policy, which provides:

> No chapter will tolerate or condone any form of sexually abusive behavior from their chapter members or guests. This includes any behavior that is physical, mental, or emotional. Actions that are sexually demeaning will not be tolerated and dealt with according to the University's standard sanctions for sexual assault. This includes but is not limited to: rape, sexual assault, gang rape, or verbal harassment.[10]

As a threshold matter, this policy provision is inapplicable to the charged students. This provision appears in the "Community expectations" section of the policy, which contains several provisions applying to fraternity and sorority chapters as a collective entity. Notably, the community expectations do not expressly provide for individual liability, whereas other provisions—such as the event management guidelines—do.[11] To charge these students for an alleged violation that, by definition, can only be committed by the entire chapter is profoundly unjust.

Moreover, the satirical context of the skits makes eminently clear that they were not, in fact, "sexually abusive." Syracuse's misapplication of this policy means that a sorority that put on a

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[10] *Event Management Guidelines and Community Expectations* at 9, SYRACUSE UNIV. OFFICE OF FRATERNITY AND SORORITY AFFAIRS (2016), http://fasa.syr.edu/_documents/CommunityExpectations2016.pdf.

[11] *Id.* at 7 ("The following sanctions/suspensions will apply to individuals or chapters who fail to comply with the policies above").

production that satirized misogyny via faux-chauvinism might similarly run afoul of this prohibition. We are doubtful that this is the result Syracuse intends.

For the reasons explained throughout this letter, the Theta Tau skits are entitled to full protection under Syracuse's guarantees of freedom of expression. Syracuse's attempt to discipline otherwise protected speech under a general, chapter-wide expectation subject to immensely broad and subjective interpretation reflects poorly on Syracuse's commitment to the promises it has made, and indicates a desire to punitively make an example of these students.

Indeed, Syracuse's reaction to this controversy has been underscored by the apparent desire to avoid negative publicity by offering those offended a sacrificial lamb—to wit, the charged students. The university has barred these students from campus merely for engaging in private expression, despite the absence of evidence that they pose any kind of threat to the university community. It has attempted to expedite the disciplinary process immediately before the final exam period and has delayed in providing academic accommodations to the accused. And it has informed a faculty member that he is not qualified to teach at Syracuse because he dared criticize the university's response to the controversy. The inescapable impression is that Syracuse is more concerned with its public reputation than it is with keeping its promises and treating its students fairly.

In bringing spurious and unduly punitive charges against these students, and clumsily rushing to conclude the disciplinary process, you have abdicated your role as educators. At best, you have assumed the role of policing the tastefulness of private student expression. At worst, you have assumed the role of an arbitrary despot who rules by whim.

## II. CONCLUSION

FIRE is aware that you are under pressure, from within the university community and without, to react swiftly and harshly to expression perceived—devoid of context—as hateful and bigoted. But such pressure does not relieve Syracuse University of its obligation of fidelity to facts, reason, fundamental fairness, and the promises it has made to its students. The charges discussed above are entirely incompatible with the expressive rights that Syracuse University promises to its students and must be immediately dismissed.

Any questions or concerns about this testimony should be directed to zach.greenberg@thefire.org or 215-717-3473.

Thank you.

Respectfully,
Zach

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(Sent via email to Eric Nestor on May 11, 2018)