



May 1, 2020

President Kathleen Murray
Office of the President
Whitman College
345 Boyer Avenue
Walla Walla, Washington 99362

Sent via Electronic Mail (kmurray@whitman.edu)

Dear President Murray:

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.

We are concerned for the state of freedom of expression at Whitman College after the college instituted a policy of prior review over a student community listserv in response to offensive messages posted on an unrelated Instagram account. Practicing prior review of students' communications is inconsistent with Whitman's commitment to free expression, and doing so in response to messages it finds offensive only heightens the inconsistency. Whitman must rectify this misstep by returning the community listserv to its previous, uncensored status.

I. Whitman Announces Censorship of Listserv After Controversy Regarding Instagram 'Confessions' Account

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us. However, if the facts here are substantially accurate, Whitman's restriction of discussion on its student listserv is contrary to its published commitment to freedom of expression.

Whitman maintains multiple listservs, or email lists, including: announcements@lists.whitman.edu ("Announcements List"), students@lists.whitman.edu ("Students List"), and community@lists.whitman.edu ("Community List").¹ Whitman

¹ *Whitman Email List Moderation*, WHITMAN COLL. TECH. SERVS., April 15, 2020, <https://kb.whitman.edu/display/public/KB/Whitman+Email+List+Moderation>.

describes its Community List as “open to all faculty, staff and students” to share information that is not directly related to Whitman, but that students and other community members may find helpful.² The Students List is “open to faculty, staff, student employees posting as part of their work, and Whitman-affiliated student group leaders,” and is intended for sharing of information related to Whitman-affiliated departments and groups, such as campus events.³ Until early April, both the Students List and the Community List were open to posting by all students, without moderation.⁴

In early April, the anonymously-operated whitmanconfessional2 Instagram account posted a series of “confessions” purportedly submitted by other, anonymous students, including a “[p]etition to change the name of Coronavirus to Kung Flu.” Others were able to comment on the posts, including a comment arguing that choosing not to date “colored people” is a matter of personal preference. These posts and comments sparked criticism from other members of the Whitman community.

One such student sent screenshots of some of these posts and comments, as well as a call for Whitman to “properly address this behavior” and “hold students accountable for the racist things they post,” to you, other administrators, and some student clubs via email on the evening of April 7.⁵ Her email also revealed the identity behind the whitmanconfessional2 account by including reference to the personal Instagram handle of the administrator.⁶ Just a few minutes after this email was sent, another student introduced the controversy to the Students List by forwarding the email to the list, saying, “Read this. Every bit of it. I don’t wanna hear ‘I didn’t know’ when we ask why you don’t support us.”⁷ Hours after the email was forwarded to the Students List, the whitmanconfessional2 administrator responded by sending an email to you, other administrators, and the Students List sharing his own experience, and emphasizing that he is not racist.⁸

Thomas Witherspoon, Vice President for Diversity and Inclusion, wrote to all students the following afternoon—on April 8—to inform them that, due to the whitmanconfessional2 Instagram account and the ensuing controversy, Whitman would begin a practice of prior review and moderation of emails on the Students List, Community List, and Announcements List.⁹ Witherspoon’s email also indicated that Whitman had “taken the necessary steps to

² *Id.*

³ *Id.*

⁴ E-mail from Thomas Witherspoon, Vice President for Diversity and Inclusion, Whitman College, to all students, April 8, 2020, 5:50 PM (on file with author).

⁵ E-mail to Students List, April 7, 2020, 8:54 PM (on file with author). The email was originally sent to Kazi Joshua, Associate Dean for Intercultural Affairs and Chief Diversity Officer; Marvin Viney, Director of Security; Shampa Biswas, Politics Department Chair; Thomas Witherspoon, Vice President for Diversity and Inclusion; Club LatinX; Womxn of Color Voices; Black Student Union; Mocha; and the Whitman African Students Association.

⁶ *Id.*

⁷ *Id.*

⁸ E-mail to Students List, April 7, 2020, 10:50 PM (on file with author).

⁹ E-mail from Thomas Witherspoon, *supra* note 4.

report the page(s)” to Instagram and would continue to “be vigilant about disbanding anything that is not in alignment with who we are as a community,” presumably by continuing to monitor students’ online activity on third-party websites and applications such as Instagram.¹⁰

The new moderation regulations limit the number of times event and program organizers may post to the lists, specify that the lists “are not platforms for personal viewpoints,” and warn that “[p]osts that demean individuals and/or groups” are not allowed.¹¹

Whitman suspended on-campus classes due to the COVID-19 pandemic on March 13.¹² While residence halls remain open for students who need them, Whitman has encouraged students to leave campus entirely.¹³ With many away from Walla Walla and from Whitman’s campus, the Community List and Students List are among students’ primary means of continuing to communicate with the campus community during these uncertain times.

II. Prior Review of Student Communications Is Inconsistent with Whitman’s Commitment to Freedom of Expression

Whitman is a private institution, and the First Amendment does not compel it to grant students freedom of expression. Nevertheless, Whitman has made clear, public commitments promising its students freedom of expression. Those commitments are betrayed by a policy of prior review and restraint of student expression, particularly when the policy is in response to controversial speech.

A. Whitman promises freedom of expression to its students.

Whitman has made a clear commitment to maintaining the right to freedom of expression for its students in its statement on Student Rights and Responsibilities:

Every student has a right to conditions that are conducive to learning and favorable to the pursuit of higher education. These rights include freedom of speech, expression, and association . . .¹⁴

Whitman’s commitment to freedom of expression is also a condition of its accreditation. Whitman is accredited by the Northwest Commission on Colleges and Universities, which

¹⁰ *Id.*

¹¹ *Whitman Email List Moderation*, *supra* note 1.

¹² *Whitman moves to online learning after spring break*, WHITMAN COLL., March 12, 2020, <https://www.whitman.edu/health-center/coronavirus-information/march-12-whitman-moves-to-online-learning-after-spring-break>.

¹³ *Updated expectations for students moving forward*, WHITMAN COLL., March 14, 2020, <https://www.whitman.edu/health-center/coronavirus-information/march-14-updated-expectations-for-students-moving-forward>.

¹⁴ *Student Rights and Responsibilities*, WHITMAN COLL., <https://www.whitman.edu/dean-of-students/student-handbook/student-rights-and-responsibilities> (last visited April 28, 2020).

requires that college “constituencies are free to examine thought, reason, and perspectives of truth.”¹⁵ This is a laudable commitment to defend, rather than abrogate, the freedom of expression of members of the student body and faculty.

Having made these commitments, Whitman must adhere to them. Whitman’s commitments represent not only a moral obligation, but a legal duty on the part of the university, which has a contractual relationship with its students. *Doe v. Gonzaga Univ.*, 24 P.3d 390 (Wash. 2001), *rev’d on other grounds*, 536 U.S. 273 (2002). This relationship requires a private institution to adhere to its commitments to the freedom of expression. *See, e.g., Awad v. Fordham University*, 2019 NY Slip Op 51418(U) (Sup. Ct. 2019) (holding private university’s refusal to recognize pro-Palestinian group was contrary to the university’s mission statement guaranteeing freedom of inquiry).

B. Subjecting student expression to prior review is a betrayal of Whitman’s commitments to free expression, which it is morally bound to uphold.

Given Whitman’s explicit promises of free expression, students may reasonably expect to enjoy free speech rights commensurate with those advanced by the First Amendment. Therefore, courts’ interpretations of the First Amendment provide a useful baseline for understanding what students would reasonably expect from an institution that holds itself out as protecting free expression, as Whitman does.

i. Prior review and prior restraint are egregious forms of censorship that do not comport with ideals of free expression.

The Ninth Circuit (whose decisions are binding in the state of Washington) has held that prior review of student expression violates the First Amendment. *Burch v. Barker*, 861 F.2d 1149, 1159 (9th Cir. 1988); *see also Lovell v. Griffin*, 303 U.S. 444, 451 (1938) (striking down an ordinance requiring city manager review of literature before distribution).

Rulings on prior restraints are also instructive, as prior review is often the first step toward a prior restraint. Prior restraints are “the most serious and least tolerable infringement” of free speech. *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). Courts, including the Supreme Court of the United States, have long held that prior restraints are permissible only in the most severe circumstances, such as in the event of a demonstrated threat to national security.¹⁶ Having committed to free expression, it is patently unreasonable for Whitman to also subject its students to prior review in one of their last remaining forums for campus-wide communication during the COVID-19 pandemic: email lists. This is especially true when the new policy of prior review occurs in response to speech posted on another of the remaining forums for student communication: social media.

¹⁵ NW. COMM’N ON COLLS. AND UNIVS., NWCCU 2020 STANDARDS, <https://www.nwccu.org/accreditation/standards-policies/standards> (last visited Apr. 29, 2020).

¹⁶ *See New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931).

ii. Principles of free expression dictate that open forums may not be restricted based on expression of controversial viewpoints.

While a college need not create a forum for open student expression, such as the Community List and the Students List, it is also true that where such a forum has been established, authorities should not “exclude speech where its distinction is not reasonable in light of the purpose of the forum[.]” *Rosenberger*, 515 U.S. at 829 (internal citation and quotation omitted). An institution of higher education also must not, in line with the principles of free expression, partially close a forum to certain types of speech in response to disagreement with speech historically shared on the forum. *Koala v. Khosla*, 931 F.3d 887, 906 (9th Cir. 2019).

Here, the Community List serves the purpose of “sharing information that is not Whitman-affiliated but may be of interest to the greater Whitman community.”¹⁷ This purpose is not served by the exclusion of student viewpoints, even if those viewpoints may at times cause offense to others. Further, the creation of these restrictions in response to the controversial posts and comments on the Instagram account demonstrates a viewpoint animus that is antithetical to Whitman’s commitment to maintaining a campus of open inquiry.

iii. The offensive nature of the Instagram account and ensuing controversy do not justify censorship.

While the racially-charged posts and comments on the Instagram account may be offensive and controversial to many in the Whitman community, the principle of freedom of speech does not exist to protect only non-controversial expression. Rather, 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 others, on or off campus. *See, e.g., 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.’”) The Court reiterated this fundamental principle in *Snyder v. Phelps*, 562 U.S. 443, 461 (2011), proclaiming that “[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate.” In *Cohen v. California*, the Court aptly observed that although many would see as “the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance,” that people will encounter offensive expression is “in truth [a] necessary side effect[] of the broader enduring values which the process of open debate permits us to achieve.” 403 U.S. 15, 24–25 (1971).

¹⁷ *Whitman Email List Moderation*, *supra* note 1.

These principles hold true when applied to email distribution lists like those maintained by Whitman, and the need for open discourse helps to shield colleges from liability urged by those aggrieved by speech they find offensive. The Ninth Circuit explained these principles at length in rejecting a lawsuit that sought to hold a college liable for failing to shut down a listserv that a faculty member used to send “racially-charged emails” to every employee in the district. *Rodriguez v. Maricopa County Community College District*, 605 F.3d 703, 705 (9th Cir. 2009). The court explained:

Indeed, precisely because Kehowski’s ideas fall outside the mainstream, his words sparked intense debate: Colleagues emailed responses, and Kehowski replied; some voiced opinions in the editorial pages of the local paper; the administration issued a press release; and, in the best tradition of higher learning, students protested. The Constitution embraces such a heated exchange of views, even (perhaps especially) when they concern sensitive topics like race, where the risk of conflict and insult is high. Without the right to stand against society’s most strongly-held convictions, the marketplace of ideas would decline into a boutique of the banal, as the urge to censor is greatest where debate is most disquieting and orthodoxy most entrenched. The right to provoke, offend and shock lies at the core of the First Amendment. This is particularly so on college campuses. Intellectual advancement has traditionally progressed through discord and dissent, as a diversity of views ensures that ideas survive because they are correct, not because they are popular. Colleges and universities--sheltered from the currents of popular opinion by tradition, geography, tenure and monetary endowments--have historically fostered that exchange. . . . [T]he desire to maintain a sedate academic environment does not justify limitations on a teacher’s freedom to express himself on political issues in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms.

Id. at 708–709 (cleaned up).

The conversation that took place on the lists following the controversy over posts on Instagram demonstrates this process. Unhappy with the speech they encountered on the Instagram account, concerned students took to the listserv with *more speech*, meant in part to persuade the Whitman community that Whitman students need additional race education. The whitmanconfessional2 administrator followed up with *even more speech*, defending himself by asserting that he does not consider himself racist and discussing his experience as a Jewish man. These messages, while certainly controversial and probably offensive to some, sparked discussion within the Whitman community about how the campus handles questions

of race and equity—conversations that remain important as Whitman adapts to the challenges of the current global health situation.

III. **Whitman Must Not Stifle Students' Virtual Conversations as They Adjust to Learning from Home**

As COVID-19 has drastically changed education at Whitman, and colleges and universities across the country, virtual communication methods such as email lists and social media have become a vital means for students to remain connected. By responding to speech on one of those forums by instituting prior review on another, Whitman closes a vehicle for open discourse just as the need for open channels of communication is at its peak. This is a disappointing departure from Whitman's own stated commitments to free expression.

We call on Whitman to restore its fidelity to its commitment to freedom of expression by immediately rescinding its email list moderation policies, by clarifying to students that it will not practice prior review of listserv messages, and by abstaining from monitoring off-campus communication on third-party applications.

We request receipt of a response to this letter no later than the close of business on May 15. If you need additional time to respond in light of strains created by the COVID-19 crisis, please don't hesitate to let us know when you expect to be able to respond.

Sincerely,



Lindsay Rank

Program Officer, Individual Rights Defense Program

Cc: Thomas Witherspoon, Vice President for Diversity and Inclusion
Kazi Joshua, Associate Dean for Intercultural Affairs and Chief Diversity Officer