June 2, 2020

Brad L. Mortensen, PhD
Office of the President
Weber State University
1265 Village Drive, Dept. 408
Ogden, Utah 84408

***URGENT***

*Sent via Electronic Mail (bmortensen@weber.edu)*

Dear President Mortensen:

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.

FIRE is concerned by the investigation initiated by Weber State University (WSU) into a member of its faculty, Professor Scott Senjo, over tweets critical of protesters and elected officials. While many may find Senjo's statements—some of which appear to endorse the use of violence—angering or offensive, his extramural political speech is protected by the First Amendment, falling short of the exceptions for unprotected "true threats" or incitement.

In times of grave turmoil, it is critical that freedom of speech be protected, not diminished. Because Senjo's speech is protected by the First Amendment, there is no offense for WSU to investigate.

## I. Senjo's Tweets Lead to Public Anger and an Investigation by WSU

Our understanding of the pertinent facts follows. We appreciate that you may have additional information to offer and invite you to share it with us.

Scott Senjo is a professor at WSU, where he is currently teaching online courses, including Criminal Law and the Courts, Research Methods in Criminal Justice, and Contemporary Legal Issues.

Senjo maintains a personal Twitter account to share his personal political views, identifying himself as a professor.[1] The account does not identify his affiliation with WSU.[2]

On May 31, 2020, a reporter with the Wall Street Journal, Tyler Blint-Welsh, was beaten by officers of the New York City Police Department while covering protests over the homicide of George Floyd. Blint-Welsh tweeted that NYPD officers had hit him repeatedly in the face even though he was "backing away as request[ed], with my hands up" and even though his "NYPD-issued press badge was clearly visible."[3] Senjo responded to Blint-Welsh's tweet: "Excellent. If I was the cop, you wouldn't be able to tweet."[4] Senjo's tweet received over 1,500 responses, almost universally opposed, before it was deleted by Twitter. Members of the public, angered by Senjo's tweet, located other tweets they found offensive, including references to Rep. Ilhan Omar, remarks about the NYPD's use of violence against protesters, and a comment about showing "rioters & looters" how firearms work.[5]

On June 1, as public criticism mounted and reports surfaced that community members would hold a demonstration calling for Senjo's termination,[6] WSU responded with a public statement condemning Senjo's "abhorrent" tweets as "hurtful and inconsistent with the values of Weber State University and our work to create an inclusive and welcoming environment."[7] The statement urged that the university "does not condone violence or threats of violence under any circumstance." It concluded:

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[1] Scott Senjo (@ProfSenjo), TWITTER (last visited June 1, 2020), https://twitter.com/ProfSenjo.

[2] Although the account is reportedly "linked to his Weber State email address" and his cell phone number, this information is not publicly available. Courtney Tanner, *Weber State professor under investigation for tweets threatening those involved in police protests*, SALT LAKE TRIB., June 1, 2020, https://www.sltrib.com/news/education/2020/06/01/weber-state-professor.

[3] Tyler Blint-Welsh (@tylergabriel_), TWITTER (May 31, 2020, 10:51 PM), https://twitter.com/tylergabriel_/status/1267287516345925632.

[4] Scott Senjo (@ProfSenjo), TWITTER (May 31, 2020, 11:24 PM), https://twitter.com/ProfSenjo/status/1267295867544862720.

[5] Scott Senjo (@ProfSenjo), TWITTER (May 29, 2020, 11:48 PM), https://twitter.com/ProfSenjo/status/1266577128822198272 ( "America-haters like" the Somalia-born Rep. Ilhan Omar "would be back in Somalia" if Senjo were "in charge"); Scott Senjo (@ProfSenjo), TWITTER (May 30, 2020, 10:40 PM), https://twitter.com/ProfSenjo/status/1266922582457999360 (responding to a video of an NYPD officer driving into a crowd of protesters, "That's not how I would have driven the car into the crowd"). In a since-deleted tweet responding to a video depicting residents of a Seattle suburb "protecting their neighborhoods from rioters & looters" by brandishing a firearm, Senjo remarked: "Come by my neighborhood. I won't just display firearms, I'll show you how they work." Jordan Verdadeiro, *Weber State University responds to criminal justice professor sharing violence and threats on Twitter*, ABC4, June 1, 2020, https://www.abc4.com/news/top-stories/weber-state-university-responds-to-alleged-criminal-justice-professor-sharing-violence-and-threats-on-twitter; *see* Digital Forests (@DigitalForests), TWITTER (May 31, 2020, 10:09 PM), https://twitter.com/DigitalForests/status/1267277113524133888 (video of Seattle residents).

[6] Brittany Johnson (@BJohnsonTV), TWITTER (June 1, 2020, 4:29 PM), https://twitter.com/BJohnsonTV/status/1267553822399848448.

[7] WEBER STATE UNIV., *Statement Regarding Professor Tweets*, June 1, 2020, https://www.weber.edu/WSUToday/060120_ProfessorTweets.html.

> Weber State is taking the matter very seriously and will investigate to determine what other measures may be appropriate to ensure the safety and well-being of all members of our campus community. This matter in its complete context will be reviewed further by the university to make sure all perspectives are equally and fairly represented.

The statement was widely interpreted as opening an investigation, and WSU declined to say whether Senjo would be placed on leave or clarify the scope of the review.[8]

## II. Senjo's Tweets are Protected by the First Amendment

The First Amendment broadly protects government employees, particularly faculty members at a public university, when they speak as private citizens on matters of public concern. Senjo's tweets, however offensive to other members of the community, do not amount to true threats, which are not protected by the First Amendment. Accordingly, WSU's investigation into clearly protected expression is itself a violation of the First Amendment.

### *A. The First Amendment Bars WSU from Punishing a Faculty Member for Speech on Matters of Public Concern*

It has long been settled law that the First Amendment is binding on public colleges like WSU. *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).

Employees of government institutions like WSU do not "relinquish First Amendment rights to comment on matters of public interest by virtue of government employment." *Connick v. Myers*, 461 U.S. 138, 140 (1983). Instead, faculty members retain a First Amendment right to speak as private citizens on matters of public concern. *Id.*; *Pickering v. Board of Education*, 391 U.S. 563 (1968).

#### i. Senjo spoke as a private citizen, not a public employee.

Under the *Garcetti/Pickering* test, the first inquiry is whether the employee spoke "pursuant to [the] employee's official duties" or as a private citizen. *Singh v. Cordle*, 936 F.3d 1022, 1034 (10th Cir. 2019). In other words, the query focuses on whether the speech was that which the "employer itself has commissioned or created" (*Garcetti*, 547 U.S. at 413) or, alternatively, whether the speech was of "the type that the employee was paid to do." *Rohrbaugh v. University of Colorado Hospital Authority*, 596 F.3d 741, 747 (10th Cir. 2010).

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[8] *See, e.g.*, Tanner, *supra* note 2.

This remains true where the speaker's employer or chosen profession is identifiable, or even the subject of the speech itself. *Pickering v. Board of Education,* 391 U.S. 563, 576–78 (1968) (high school teacher's letter to the editor discussing his employment was speech as a private citizen); *see also, e.g.*, *Singh v. Cordle,* 936 F.3d 1022, 1036 n.1 (10th Cir. 2019) (expressing skepticism that a professor's binder of documents arguing in favor of the nonrenewal of his colleague's tenure was speech as a public employee). As one federal court recently observed, "[u]sing a public forum to comment on the University's response to recent racial incidents would not appear to be within a history professor's official duties." *Higbee v. Eastern Michigan University,* 399 F. Supp. 3d 694, 702 (E.D. Mich. 2019).

Senjo's tweets are inarguably not those of a public employee speaking on behalf of his employer, but those of a private citizen discussing his personal political viewpoints. While his Twitter account references the nature of his employment, it does not identify his employer or purport to speak on behalf of the university. It is exceedingly unlikely that the university is paying him to tweet and unlikelier still that a reasonable member of the public would believe his tweets to be speech on behalf of the institution.

**ii. Senjo's tweets addressed matters of profound public concern and remain protected, even if offensive to others.**

Because Senjo's tweets were made in his capacity as a private citizen, they remain protected if they addressed matters of public concern. "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community[.]" *Snyder v. Phelps,* 562 U.S. 443, 453 (2011). That others find the statements to be of an "inappropriate or controversial character . . . is irrelevant to the question of whether it deals with a matter of public concern." *Rankin v. McPherson,* 483 U.S. 378, 387 (1987) (expression of hope that President Ronald Reagan might be assassinated was protected against retaliation).

There can be no dispute that the current civil unrest, the sociopolitical disputes to which they relate, and the most recent homicide to renew tremors in these fault lines are matters of the utmost public concern. Indeed, the public's attention to an ongoing pandemic has been overcome by images of violence and unrest, including over one hundred assaults of journalists by police officers and protesters.[9] While others may certainly find Senjo's contributions to the spiraling public discourse to be inflammatory, offensive, or otherwise objectionable, the principle of freedom of expression does not exist to protect only non-controversial expression. The Supreme Court has repeatedly, consistently, and clearly held that expression may not be restricted merely because some or even many find it to be offensive or disrespectful. For example, in holding that burning the American flag was expression

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[9] *See, e.g.*, Laura Hazard Owen, *U.S. police have attacked journalists more than 110 times since May 28*, NIEMANLAB, June 1, 2020, https://www.niemanlab.org/2020/06/well-try-to-help-you-follow-the-police-attacks-on-journalists-across-the-country; Katelyn Burns, *Police targeted journalists covering the George Floyd protests*, VOX, May 31, 2020, https://www.vox.com/identities/2020/5/31/21276013/police-targeted-journalists-covering-george-floyd-protests.

protected by the First Amendment, the Supreme Court urged that "[i]f 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." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

This principle applies with particular strength with respect to public institutions of higher education. For example, the Supreme Court unanimously upheld as protected speech a student newspaper's front-page use of a vulgar headline ("Motherfucker Acquitted") and a "political cartoon . . . depicting policemen raping the Statue of Liberty and the Goddess of Justice." *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 667–68 (1973). These images were no doubt deeply offensive at a time of profound political polarization, yet "the 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.'" *Id.* Expressive rights, in short, may not be curtailed on the basis that others find them offensive or outrageous.

### *B. Senjo's Tweets Do Not Amount to Unprotected "True Threats" or Incitement*

Political discourse has long been steeped in themes of violence. Perhaps most famously, Thomas Jefferson—a principal author of what ultimately became the First Amendment[10]—predicted that revolution and violence would be necessary to preserve liberty, writing: "The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is [its] natural manure."[11] Because rhetoric tinged with violent themes often intersects with charged political expression, and the "language of the political arena . . . is often vituperative, abusive, and inexact," the First Amendment requires an exacting standard to be met before a statement constitutes an unprotected "true threat" or "incitement." *Watts v. United States*, 394 U.S. 705, 708 (1969). Accordingly, courts approach "with extreme care" claims that highly charged political rhetoric lying at the core of the First Amendment" falls into either category. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926–27 (1982).

#### i. Senjo's tweets are not "true threats."

A "true threat" is a statement through which "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 exception does not include speech which amounts to rhetorical hyperbole or the endorsement of violence. *Watts*, 394 U.S. at 708 (rejecting "political hyperbole" as a true threat; *Noto v. United States*, 367 U.S.

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[10] *Everson v. Bd. of Educ.*, 330 U.S. 1, 11 (1947).

[11] Letter from Thomas Jefferson to William Stephens Smith, Nov. 13, 1787, *available at* https://founders.archives.gov/documents/Jefferson/01-12-02-0348. *See also, e.g.,* the license plate and state motto of New Hampshire, suggesting that residents "live free or die" in defense of liberty. *Wooley v. Maynard*, 430 U.S. 705, 722 (1977).

290, 297–98 (1961) (the "abstract teaching" of the "moral propriety or even moral necessity for a resort to force or violence" was protected speech).

In *Watts*, for example, an investigator for the Army Counter Intelligence Corps heard the defendant remark:

> They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L. B. J. . . . They are not going to make me kill my black brothers.

*Watts*, 394 U.S. at 706. The Supreme Court held the speech remained protected by the First Amendment because it did not amount to a true threat. The Court acknowledged that the government "undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence." *Id.* at 707. However, the Court warned that "[w]hat is a threat must be distinguished from what is constitutionally protected speech," including "political hyperbole" like that "indulged" in by the speaker, because of the country's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 707–08. Thus, the defendant's "very crude offensive method of stating a political opposition to the President" did not amount to a true threat, and remained protected speech. *Id.* at 708.

None of Senjo's tweets qualify as true threats. For example, the tweet concerning the NYPD's assault of a Wall Street Journal reporter is hypothetical, referencing what Senjo would do if he were in the officer's boots. That tweet endorses the violence, but does not threaten it. Similarly, his tweet referencing a Seattle-area resident's brandishing of a firearm to deter would-be looters is couched as a hypothetical, that he would shoot a looter in his neighborhood. This tweet, not directed at any person in particular, amounts to no more than hyperbolic chest-thumping, not a sincere expression of an intent to undertake violence against any person in particular. If the *Watts* draftee's hyperbolic rhetoric about assassinating the President of the United States is protected, so too is charged political rhetoric endorsing violence against looters.

**ii. Senjo's tweets do not amount to unprotected incitement.**

Senjo's tweets also fall far short of the First Amendment's demanding standard for unprotected incitement. Speech is only "incitement" where it is "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). If it is "not directed to any person or group of persons" in particular, it cannot be said to be said to be directed at commanding or urging any person to take action. *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973).

Senjo's tweets, while steeped in themes of violence, cannot be said to be "directed to" calling for others to take unlawful action, much less likely to result in imminent unlawful action. Even if he could be said to be encouraging others to act violently, the "mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment." *Claiborne Hardware Co.*, 458 U.S. at 927 (emphasis in original).

### *C. Investigations into Protected Expression Violate the First Amendment*

We remind you that an investigation of constitutionally protected speech can itself violate the First Amendment. When "an official's act would chill or silence a person of ordinary firmness from future First Amendment activities," that act violates the First Amendment. *Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999). In *Sweezy v. New Hampshire*, 354 U.S. 234, 245–48 (1957), the Supreme Court noted that government investigations "are capable of encroaching upon the constitutional liberties of individuals" and have an "inhibiting effect in the flow of democratic expression." Similarly, the Court later observed that when issued by a public institution like WSU, "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" might violate the First Amendment. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).

Accordingly, several appellate courts have held that government investigations into protected expression violate the First Amendment.[12] In *Levin v. Harleston*, for example, a public university launched an investigation into a tenured faculty member's offensive writings on race and intelligence, announcing an *ad hoc* committee to review whether the professor's expression—which the university's leadership said "ha[d] no place at [the college]"—constituted "conduct unbecoming of a member of the faculty." 966 F.2d 85, 89 (2d Cir. 1992). The United States Court of Appeals for the Second Circuit upheld the district court's finding that the investigation constituted an implicit threat of discipline and that the resulting chilling effect constituted a cognizable First Amendment harm. *Id.* at 89–90.

Senjo's tweets are clearly protected expression. This principle does not shield Senjo from every consequence from his expression—including criticism by his colleagues, students, or the broader community, which is the remedy the First Amendment prefers to censorship: "more speech." *Whitney v. California*, 274 U.S. 357, 377 (1927). However, the First Amendment limits the *types* of consequences that may be imposed and who may impose them. While WSU purports to be undertaking an investigation in order to ensure that "all perspectives are equally and fairly represented," it is abundantly clear that the First Amendment constrains a university's administration from imposing or pursuing official actions that would chill freedom of expression.

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[12] *See, e.g.*, *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000).

## III. Conclusion

While Senjo's tweets may be—and, demonstrated by the clamorous response on social media, are—deeply offensive to other members of the community, they remain protected by the First Amendment. We call on WSU to immediately disclaim any suggestion that it will engage in an investigation into Senjo's protected expression.

Given the urgent nature of this matter, we request receipt of a response to this letter no later than the close of business on Thursday, June 4, 2020.

Sincerely,

Adam Steinbaugh
Director, Individual Rights Defense Program

Cc: Prof. Scott Senjo