FIRE
Foundation for Individual Rights in Education

June 30, 2020

Richard B. Myers
Office of the President
Kansas State University
110 Anderson Hall
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Manhattan, Kansas 66506

Sent via Electronic Mail (rmyers65@k-state.edu)

Dear President Myers:

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 appreciates that Kansas State University (KSU) is one of the few institutions in the country whose policies earn a "green light" rating from FIRE. We write today in response to the university's statement that it is reviewing its "options" concerning KSU undergraduate Jaden McNeil's expression on social media. While McNeil's tweets may be deeply offensive to many, they do not fall into a category of speech unprotected by the First Amendment, which strictly limits public universities like KSU from punishing protected expression.

I. KSU Reviewing "University's Options" in Response to McNeil's Tweets

The following is our understanding of the pertinent facts, which is based on public information. We appreciate that you may have additional information to offer and invite you to share it with us.

On June 25, McNeil posted a tweet reading "Congratulations to George Floyd for being drug free for an entire month!"[1] McNeil also reportedly tweeted a follow-up stating, "People are

[1] Jaden McNeil (@McNeilJaden), TWITTER (June 25, 2020, 4:48 PM) (screenshot on file with author).

more upset about this tweet than they are about George Floyd robbing a pregnant woman at gunpoint. BTW he died from overdosing on fentanyl and meth."[2]

Others, angered by McNeil's tweets, began using Twitter to call on KSU to "do something"[3] and "[g]et this handled."[4] Several student-athletes posted a statement on their social media accounts in response to McNeil's tweets. That statement reads, in pertinent part:

> Due to the recent disparaging, insensitive, and unsettling comments made by a fellow student, we as a football team, after consultation with students from campus organizations as well as students from the general student body, feel it is best for us to stand with the students. We are demanding that Kansas State University put a policy in place that allows a student to be dismissed for displaying openly racist, threatening or disrespectful action toward a student or groups of students.[5]

These student-athletes indicated they will not to play, practice, or meet until KSU takes action.[6]

KSU responded with the following statement, attributed to you, on the university's official Twitter account:

> The insensitive comments posted by one K-State student hurts our entire community. These divisive statements do not represent for the values of our university. We condemn racism and bigotry in all its forms. We are launching an immediate review of the university's options. Black Lives Matter at Kansas State University and we will continue to fight for social justice.[7]

The university has not elaborated on what "options" it is considering.

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[2] Staff, *University athletes want student expelled for tweet about George Floyd's drug use*, THE COLLEGE FIX (June 27, 2020), https://www.thecollegefix.com/university-athletes-want-student-expelled-for-tweet-about-george-floyds-drug-use.
[3] Joshua Youngblood (@YB060), TWITTER (June 26, 2020, 1:27 AM), https://twitter.com/YB060/status/1276386672675041280.
[4] Walter Neil Jr. (@1WayWalt), Twitter (June 26, 2020, 2:16 AM), https://twitter.com/1WayWalt/status/1276398844205502464.
[5] *See, e.g.*, Joshua Youngblood (@YB060), TWITTER (June 27, 2020, 5:28 PM), https://twitter.com/YB060/status/1276990854452969473; Wykeen Gill Jr. (@W_GillJr), TWITTER (June 27, 2020, 5:40 PM), https://twitter.com/W_GillJr/status/1276993774783168513; Malik[4] (@Leekfor6), TWITTER (June 27, 2020, 5:27 PM), https://twitter.com/Leekfor6/status/1276990570980880392; Jonathan Alexander (@CatchaplayJ), TWITTER (June 27, 2020, 5:26 PM), https://twitter.com/CatchaplayJ/status/1276990343964221442?s=20.
[6] *Id.*
[7] K-State (@KState), TWITTER (June 26, 2020, 12:24 PM), https://twitter.com/KState/status/1276551914755362816.

II. The First Amendment Bars KSU from Punishing or Investigating McNeil for His Tweets

It is well-established that the First Amendment constrains public universities in penalizing student expression. While others may find McNeil's tweets outrageous, they do not fall into any exception to the First Amendment.

A. The First Amendment Binds KSU as a Public University

It has long been settled law that the First Amendment is binding on public colleges like KSU.[8] Accordingly, the decisions and actions of a public university—including the pursuit of disciplinary sanctions,[9] recognition and funding of student organizations,[10] interactions with student journalists,[11] conduct of police officers,[12] and maintenance of policies implicating student and faculty expression[13]—must be consistent with the First Amendment. KSU has publicly committed to uphold this obligation by adopting its Statement on Free Speech and Expression.[14]

Because the First Amendment binds public universities, efforts to punish students for protected expression are futile: courts will order the university not only to rescind the punishment, but also to pay the student's damages and attorneys' fees.[15] Nor can a public university take other actions that "would chill or silence a person of ordinary firmness from future First Amendment activities."[16] Thus, even where a university's response does not involve formal punishment, its response may still violate the First Amendment if it carries "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" by university officials.[17] As a federal appellate court explained today in ruling that the First Amendment protected a high school cheerleader who was suspended from her cheerleading team because of her "fuck cheer" Snapchat: "[W]hatever the school's preferred

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[8] *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).
[9] *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).
[10] *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000).
[11] *Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995).
[12] *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011).
[13] *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).
[14] *Statement on Free Speech and Expression*, KAN. STATE UNIV. (adopted Aug. 2017), https://www.k-state.edu/about/values/free-speech/ ("The University's fundamental commitment is to the principle that viewpoints may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed.").
[15] *See, e.g.*, *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973) (student unlawfully "expelled because of the disapproved *content* of the newspaper" she published); *Barnes v. Zaccari*, 669 F.3d 1295, 1307–1308 (11th Cir. 2012) ("emergency" suspension of student for protected speech was unconstitutional); *Marin v. Univ. of Puerto Rico*, 346 F. Sup. 470, 478 (D.P.R. 1972) (suspension of students).
[16] *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).
[17] *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).

mode of discipline, it implicates the First Amendment so long as it comes in response to the student's exercise of free speech rights."[18]

B. The First Amendment Makes No Exception for Offensive Expression

As evidenced by the vociferous response, many who saw McNeil's tweets found them offensive. However, whether speech is protected by the First Amendment is "a legal, not moral, analysis,"[19] and the law makes no exemption for speech on the basis that others find it disagreeable, offensive, or outrageous.

i. The First Amendment protects subjectively offensive 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. This core First Amendment principle is why the authorities cannot ban the burning of the American flag,[20] prohibit the wearing of a jacket emblazoned with the words "Fuck the Draft,"[21] penalize cartoons depicting a pastor losing his virginity to his mother in an outhouse,[22] or disperse civil rights marchers out of fear that "muttering" and "grumbling" white onlookers might lead to violence.[23] In ruling that the First Amendment protects protesters holding signs outside of soldiers' funerals (including signs that read "Thank God for Dead Soldiers," "Thank God for IEDs," and "Fags Doom Nations"), the Court reiterated this fundamental principle, remarking 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."[24]

This principle applies with particular strength to public universities, where students and faculty engage in debate and discussion about the issues of the day in pursuit of advanced knowledge and understanding. This dialogue may encompass speech that offends some, many, or even most. 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."[25] These images were no doubt deeply offensive to many at a time of political polarization and civil unrest, 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.'"[26]

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[18] *B.L. v. Mahanoy Area Sch. Dist.*, No. 19-1842 at *21 (3d Cir. June 30, 2020).
[19] *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 821 (S.D. Iowa 2019).
[20] *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag was protected by the First Amendment, the "bedrock principle underlying" the holding being that government actors "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").
[21] *Cohen v. California*, 403 U.S. 15, 25 (1971).
[22] *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).
[23] *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).
[24] *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).
[25] *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).
[26] *Id.*

This is because "governmental officials cannot make principled distinctions" between what speech is sufficiently inoffensive to remain protected.[27] As the Supreme Court aptly observed in *Cohen v. California*, although "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."[28]

Although McNeil's tweets are offensive to many—including the student-athletes who now call on KSU to change its policies to allow for the punishment of protected but offensive expression—he cannot be punished for them on the basis that others find them offensive.

ii. There is no First Amendment exception for "hate speech."

Some of those angered by McNeil's tweets have characterized them as "hateful rhetoric," and the university's response implied that his tweets represented "racism and bigotry."[29] This is also insufficient to remove speech from the First Amendment's protection.

While some examples of hateful expression may not be protected speech because they fall into other exceptions to the First Amendment—such as "true threats" or "fighting words"[30]—the Supreme Court has repeatedly held that there is no exception to the First Amendment for expression others view as hateful.[31] The Court recently and expressly reaffirmed this principle, refusing to establish a limitation on speech viewed as "hateful" or demeaning "on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground."[32]

This principle does not waver in the context of public universities, whether the speech is a "heated exchange of views" on race[33] or a "sophomoric and offensive" skit depicting women and minorities in derogatory stereotypes.[34] If the state could punish expression it deems to be hateful, it would imperil a broad range of political speech and academic inquiry, and such an

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[27] *Cohen v. California*, 403 U.S. 15, 25 (1971).
[28] *Id.* at 24–25.
[29] Dene Dryden, *Students react to 'hateful rhetoric' from America First Students president with petition, planned protest*, THE COLLEGIAN (June 26, 2020), https://www.kstatecollegian.com/2020/06/26/students-react-to-hateful-rhetoric-from-america-first-students-president-with-petition-planned-protest.
[30] McNeil's tweets do not amount to "fighting words," a narrow exception for "direct personal insult or an invitation to exchange fisticuffs," because neither tweet involves a direct personal insult, however outrageous others may have found them. *Sandul v. Larion*, 119 F.3d 1250, 1255 (6th Cir. 1997) (quoting, in part, *Texas v. Johnson*, 491 U.S. 397, 409 (1989)). Nor are they "true threats," which are limited to "serious expression[s] of an intent to commit an act of unlawful violence[.]" *Virginia v. Black*, 538 U.S. 343, 359 (2003).
[31] *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").
[32] *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017).
[33] *See, e.g., Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 705 (9th Cir. 2009) (faculty member's use of system-wide listserv to send "racially-charged emails" was not unlawful harassment, as the First Amendment "embraces such a heated exchange of views," especially when they "concern sensitive topics like race, where the risk of conflict and insult is high").
[34] *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 388–92 (4th Cir. 1993).

exception would unquestionably be used against those it would be intended to protect.[35] As you acknowledged in a public statement yesterday:

> Recent events highlight a fundamental tension in our society. On one hand, we are one of only a few countries that allow citizens the freedom to peacefully protest against their government. Because of that freedom, on the other hand, we sometimes have to hear thoughts or ideas that are not only abhorrent, but may cause people to fear for their personal safety.[36]

III. Conclusion

McNeil's tweets are unquestionably protected by the First Amendment. This principle does not shield him from every consequence of his expression—including criticism by students, faculty, the broader community, or the university itself. Criticism is a form of "more speech," the remedy to offensive expression that the First Amendment prefers to censorship.[37] However, the First Amendment limits the *types* of consequences that may be imposed and who may impose them. As a public university, KSU is one such actor.

Again, FIRE appreciates that KSU has made laudable commitments to its First Amendment obligations by adopting written policies that earn an overall green light rating. We are hopeful that you will adhere to those commitments and obligations here.

Sincerely,

Katlyn A. Patton

Katlyn A. Patton
Program Officer, Individual Rights Defense Program and Public Records

Cc: Thomas Aaron Lane, Vice President of Student Life
Maureen Anne Redeker, Acting General Counsel

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[35] For example, when the University of Michigan briefly enacted an unconstitutional prohibition against hate speech, it was almost universally used to punish students of color who offended white students. "[M]ore than twenty cases were brought by whites accusing blacks of racist speech; the only two instances in which the rule was invoked to sanction racist speech involved punishment of speech by a black student and by a white student sympathetic to the rights of black students, respectively; and the only student who was subjected to a full-fledged disciplinary hearing was a black student charged with homophobic and sexist expression." Thomas. A. Schweitzer, *Hate Speech on Campus and the First Amendment: Can They Be Reconciled?*, 27 CONN. L. REV. 493, 514 (1995) (citing Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 DUKE L.J. 484, 557–58 (1990)); *see also Doe v. Univ. of Mich.*, 721 F. Supp. 852, 869 (E.D. Mich. 1989) (striking down the university's speech code as unconstitutional).

[36] *A message from President Myers*, K-STATE TODAY SPECIAL ISSUE (June 29, 2020), https://www.k-state.edu/today/info/announcement/?id=66060.

[37] *Whitney v. California*, 274 U.S. 357, 377 (1927).