FIRE
Foundation for Individual Rights in Education

June 30, 2020

Eric I. Bruntmyer
President's Office
Hardin-Simmons University
2200 Hickory
Abilene, Texas 79698

URGENT

Sent via Electronic Mail (eric.bruntmyer@hsutx.edu)

Dear President Bruntmyer:

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 Hardin-Simmons University's (HSU's) investigation of and disciplinary action against student Ashleigh Brock for statements made in videos posted to TikTok and Instagram Live. While Brock's comments about issues of race are deeply offensive to many, they are nonetheless protected by the right to free expression, which HSU has publicly committed to uphold.

I. Brock "No Longer Enrolled" at HSU Following Investigation into TikTok and Instagram Videos

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 23, 2020, Twitter users shared screenshots of videos originally posted by HSU student Ashleigh Brock.[1] One video depicts Brock acting calmly with the captions, "People when a BLACK person kills another BLACK person," and "People when a BLACK person kills

[1] TONYSNOW❄ (@ZoMorgan24), TWITTER (June 23, 2020, 8:29 PM), https://twitter.com/ZoMorgan24/status/1275586928218378241; Johnny Morales (@JMo_Money33), TWITTER (June 23, 2020, 11:03 PM), https://twitter.com/JMo_Money33/status/1275625642424500224.

a WHITE person," but acting angrily with the caption, "People when a WHITE person kills a BLACK person."[2] In the second video, Brock discusses statistics on race and homicide, concluding with a remark that "all lives matter."[3]

After becoming aware of these videos, HSU tweeted:

> HSU became aware late this evening of a deeply disappointing and unacceptable social media post by one of our students. The message shared by this student is not reflective of the Christian values of our institution. We are actively investigating and taking decisive action.[4]

While the results of this investigation are not entirely clear, on June 26, HSU tweeted a video of yourself announcing that Brock is "no longer enrolled" at HSU.[5]

II. Investigating and Disciplining Brock for the Speech at Issue Is Inconsistent with HSU's Commitment to Expressive Freedom

Hardin-Simmons University is a private institution, and the First Amendment does not compel it to grant students freedom of expression. Nevertheless, HSU has made clear public commitments promising its students freedom of expression. We think you will agree that when an institution makes a commitment, it should keep that promise. However, by investigating and disciplining a student for protected expression, HSU departs from its commitment to freedom of expression.

A. HSU Makes Institutional Guarantees to Protect Free Expression.

HSU makes clear commitments to uphold students' freedom of expression. Specifically, in its student handbook, HSU affirms:

> Students and student organizations are free to examine and discuss all questions of interest to them and to express opinions publicly and privately. They will be free to support causes by orderly means which do not disrupt the regular and essential operation of the university and do not violate the values and standards of behavior articulated in the disciplinary code.[6]

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[2] TONYSNOW❄, *supra* n. 1.
[3] Johnny Morales, *supra* n. 1.
[4] Hardin-Simmons University (@HSUTX), TWITTER (June 23, 2020, 11:49 PM), https://twitter.com/HSUTX/status/1275637050323226630.
[5] Hardin-Simmons University (@HSUTX), TWITTER (June 26, 2020, 5:44 PM), https://twitter.com/HSUTX/status/1276632425146331137.
[6] STUDENT HANDBOOK, https://www.hsutx.edu/wp-content/uploads/2020/01/2019-20-Student-Handbook-1.10.20.pdf (last visited June 29, 2020).

Regarding off-campus speech, HSU further specifies:

> College and university students are both citizens and members of the academic community. As citizens of the United States, students will enjoy the same freedom of speech, peaceful assembly, and right of petition that other citizens enjoy; and, as members of the academic community, they are subject to the obligations that accrue to them by virtue of this membership.[7]

These 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.[8] This relationship requires a private institution to adhere to its commitments to the freedom of expression and academic freedom of its students and faculty.[9]

Thus, while HSU is a private university not required to abide by the First Amendment, its own substantially similar promises of free expression reasonably lead HSU students to expect free speech rights commensurate with those protected by the First Amendment at public institutions, especially in regard to their off-campus expression. It is well-established that the First Amendment, and the concept of free expression generally, does not include a categorical exception for hateful expression. Thus, while Brock's comments on her TikTok and Instagram Live videos may be deeply offensive to others, HSU must rescind any action taken against Brock because her statements do not fall into any exception to free expression.

B. The First Amendment Makes No Exception for Hateful Expression.

Brock's videos are doubtlessly offensive to many who view them. However, whether speech is protected is an analytical, "not moral, analysis."[10]

i. Freedom of expression protects offensive expression.

The Supreme Court has 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 principle, upon which First Amendment jurisprudence is built, is why the authorities cannot ban the burning of the American flag,[11] prohibit the wearing of a jacket emblazoned with the words

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[7] *Id.*

[8] *Villarreal v. Art Institute of Houston*, 20 S.W.3d 792, 797 (Tex. App. 2000) (citing Texas cases finding contractual relationship between institution and student).

[9] *See, e.g., Awad v. Fordham Univ.*, 117 N.Y.S.3d 800 (Sup. Ct. 2019) (private university's refusal to recognize a chapter of Students for Justice in Palestine was contrary to the university's mission statement guaranteeing freedom of inquiry); *McAdams v. Marquette Univ.*, 2018 WI 88 (2018) (a private university breached its contract with a professor over a personal blog post because, by virtue of its adoption of the 1940 AAUP Statement of Principles on Academic Freedom and Tenure, the post was "a contractually-disqualified basis for discipline").

[10] *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 821 (S.D. Iowa 2019).

[11] *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").

"Fuck the Draft,"[12] penalize cartoons depicting a pastor losing his virginity to his mother in an outhouse,[13] or disperse civil rights marchers out of fear that "muttering" and "grumbling" white onlookers might lead to violence.[14] 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."[15]

This principle applies with particular strength to 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."[16] 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.'"[17]

This is because "officials cannot make principled distinctions" between offensive speech and speech deemed sufficiently inoffensive to remain protected.[18] The same may be said about staff and administrators at private colleges and universities, whose institutional interests may not always align with the interests of the student or faculty member engaging in controversial, dissenting, or offensive expression.

HSU's own policy recognizes the importance of establishing a marketplace of ideas on campus by affirming its value for "open dialogue and the free exchange of ideas," consistent with the university's educational mission.[19] 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."[20]

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[12] *Cohen v. California*, 403 U.S. 15, 25 (1971).
[13] *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).
[14] *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).
[15] *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).
[16] *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).
[17] *Id.*
[18] *Cohen v. California*, 403 U.S. 15, 25 (1971) ("Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.").
[19] STUDENT HANDBOOK, *supra* n. 6.
[20] *Cohen*, 403 U.S. at 24–25.

ii. There is no 'hate speech' exception to protected expression.

While some examples of hateful expression may not be protected speech because they fall into other exceptions to protected expression—such as "true threats" or "fighting words"—the Supreme Court has repeatedly held that there is no exception simply for expression others view as hateful.[21] 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."[22]

This principle does not waver in the context of public universities, whether the speech is a "heated exchange of views" on race[23] or a "sophomoric and offensive" skit depicting women and minorities in derogatory stereotypes.[24] In the context of private universities that promise to uphold freedom of expression, such as HSU, this principle should similarly hold true.

If a university could punish expression it deems to be hateful, it would imperil a broad range of political speech and academic inquiry, and such an exception would unquestionably be used against those it would be intended to protect. Such has been the case in the past. 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.[25]

iii. The speech at issue does not amount to unprotected 'fighting words' or 'true threats.'

The speech at issue does not fall into any of the "historic and traditional categories" of unprotected speech, such as obscenity, defamation, incitement, and fighting words.[26] Of these "well-defined and narrowly limited classes of speech,"[27] the category most relevant to this

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[21] *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down 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").

[22] *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017).

[23] *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").

[24] *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 388–92 (4th Cir. 1993).

[25] "[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).

[26] *United States v. Stevens*, 559 U.S. 460, 468–69 (2010) (quoting, in part, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991).)

[27] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942).

matter is "fighting words." However, because the speech at issue here does not amount to fighting words, it remains protected under the First Amendment, and should therefore remain protected under HSU's free expression policy.

The "fighting words" exception applies to language that is "likely to provoke the average person to retaliation, and thereby cause a breach of the peace."[28] That "very limited" exception has been continually narrowed by the Supreme Court, and the "small class" of fighting words is now limited to speech amounting to a "direct personal insult or an invitation to exchange fisticuffs."[29] Because the exception is limited to face-to-face encounters, it is unlikely that online speech will qualify as fighting words, as the medium renders the requisite "exchange [of] fisticuffs" highly unlikely. In this instance, neither video has been reported to have led to a violent interaction.[30]

C. HSU's Principles on Free Speech Create No Exception for Hateful Expression.

In addition to students' reasonable expectations that a commitment to freedom of expression is analogous to the First Amendment's protection of freedom of expression, the plain language of HSU's own policies provide that "[s]tudents . . . are free to examine and discuss all questions of interest to them and to express opinions publicly and privately."[31] Per its policy, HSU limits this freedom only by prohibiting speech that "disrupt[s] the regular and essential operation of the university" or "violate[s] the values and standards of behavior" otherwise outlined in its handbook.

In determining how students will reasonably understand its own free expression policies, HSU should look to the historic categories of unprotected expression as carefully defined by courts nationwide. As discussed, Brock's comments in this matter do not meet the definition of any unprotected category of expression, and therefore would constitute protected speech under the First Amendment. Brock's speech should therefore also be protected by a common sense reading of HSU's own policy, and HSU should rescind any action taken against her in response to her speech.

D. Investigations Into Protected Speech Chill Free Expression.

Based on the fact that Brock is "no longer enrolled" at HSU, it appears likely that disciplinary action led to her dismissal from the university. Brock's expulsion for protected expression

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[28] *Id.*

[29] *Sandul v. Larion*, 119 F.3d 1250, 1255 (6th Cir. 1997) (quoting, in part, *Texas v. Johnson*, 491 U.S. 397, 409 (1989)).

[30] Nor does the speech at issue amount to an unprotected true threat, 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). Here, the speech does not on its fact or in context indicate that Brock intended to engage in any form of violence. While the First Amendment does not protect racially-offensive expression made with the intent to intimidate or threaten physical violence against another person, the use of such expression *without more* remains protected speech. *Id.* at 347–48.

[31] STUDENT HANDBOOK, *supra* n. 6.

would constitute a departure from HSU's commitments to free speech and a betrayal of its legal obligations to uphold its contractual promises. It is clear that—at minimum—HSU launched an investigation into Brock's speech. An investigation alone may betray a commitment to free expression, even if no formal punishment is ultimately imposed.

In the First Amendment context, when "an official's act would chill or silence a person of ordinary firmness from future First Amendment activities," that chilling effect violates the First Amendment.[32] The Supreme Court has 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."[33] Similarly, the Court later observed that when issued by a public institution, "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" might itself violate the First Amendment.[34] This same logic holds true at a private university that purports to support free expression.

Accordingly, like formal disciplinary sanctions, investigations into protected expression also chill speech and violate free expression.[35] 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."[36] The United States Court of Appeals for the Second Circuit upheld the district court's finding that the investigation itself constituted an implicit threat of discipline and that the resulting chilling effect constituted a cognizable First Amendment harm.[37]

Because the speech here is protected, both under the First Amendment and HSU's own policies, HSU may not investigate it. That the speech is protected does not shield the speaker from every consequence from her 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.[38] However, a commitment to freedom of expression limits the types of consequences that may be imposed and who may impose them.

III. Conclusion

Because the maintenance of an investigation represents an ongoing threat to expressive rights, we request receipt of a response to this letter no later than the close of business on

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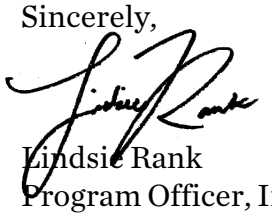
[32] *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).
[33] *Sweezy v. New Hampshire*, 354 U.S. 234, 245–48 (1957).
[34] *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).
[35] *See, e.g., White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000).
[36] *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992).
[37] *Id.* at 89–90.
[38] *Whitney v. California*, 274 U.S. 357, 377 (1927).

Tuesday, July 7, 2020, confirming that HSU will rescind any disciplinary actions taken against Brock and discontinue its investigation her TikTok and Instagram Live videos.

Sincerely,



Lindsie Rank
Program Officer, Individual Rights Defense Program