FIRE
Foundation for Individual Rights in Education

July 10, 2020

Interim President Gary Locke
Office of the President
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Bellevue, Washington 98007-6406

Sent via Electronic Mail (gary.locke@bellevuecollege.edu)

Dear Governor Locke:

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 by an email sent by Gilbert Villalpando, Bellevue College's Interim Vice President of Diversity, Equity, and Inclusion, to the campus community on June 2, 2020, reading, in pertinent part:

> When talking about the recent protests or discussing anything about the Black community, I hopes [*sic*] that you will reflect on your prejudices and biases within your word choice. . . . Do not perpetuate hate by repeating racist statements.
>
> Do not repeat any racist statement as those listed above or ask questions related to the statements above.[1]

The statements Villalpando indicates should neither be repeated or questioned include "[r]iots make a person's message invalid and peaceful protests is [*sic*] how you win people over," "[b]lack people were violently protesting," and "[w]hen the looting starts the shooting starts."[2]

Even if intended as merely aspirational, the express directive of the email—sent by a senior administrator at Bellevue—may lead students and faculty to question whether discussing

[1] E-mail from Gilbert Villalpando, Interim Vice President of Diversity, Equity, and Inclusion, Bellevue Coll. (June 2, 2020, 6:54 PM PDT) (on file with author).
[2] *Id.*

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these questions or viewpoints may yield disciplinary consequences. The First Amendment protects the rights of students and faculty to discuss these viewpoints, whether they share them or not. The chilling effect occasioned by the email's recklessly ambiguous directive is unacceptable at a public institution of higher education, particularly one that has so recently seen its administrators engage in naked censorship.

I. The First Amendment, Binding on Public Universities, Protects Offensive Expression

It has long been settled law that the First Amendment is binding on public colleges like Bellevue.[3] Accordingly, the decisions and actions of a public university—including the pursuit of disciplinary sanctions,[4] recognition and funding of student organizations,[5] interactions with student journalists,[6] conduct of its police officers,[7] and maintenance of policies implicating student and faculty expression[8]—must be consistent with the First Amendment.

The principles enshrined in the First Amendment do not protect only speech that is uncontroversial or inoffensive. To the contrary, the First Amendment exists precisely to protect speech that some or even most members of a community may find controversial or deeply 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. This core First Amendment principle is why the authorities cannot prohibit the burning of the American flag.[9] In ruling that the First Amendment did not allow the government to punish signs outside of fallen 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."[10]

This principle applies with particular strength to public universities. 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."[11] These images were no

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[3] *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).
[4] *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).
[5] *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000).
[6] *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).
[7] *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011).
[8] *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).
[9] *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag was protected by the First Amendment, the "bedrock principle underlying" it being that government actors "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").
[10] *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).
[11] *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

doubt deeply offensive at a time of profound 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.'"[12] Expressive rights, in short, may not be curtailed on the basis that others find the expression offensive or outrageous.

This is because "governmental officials cannot make principled distinctions" between what speech is sufficiently inoffensive and what speech is too offensive.[13] As the Supreme Court aptly observed in *Cohen v. California*, although "the immediate consequence of . . . freedom [of speech] 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."[14]

Accordingly, while Bellevue is free to encourage its campus community to "consider how your black family members, black neighbors, black classmates, black friends, black instructors and black mentors are doing at this time,"[15] the First Amendment forbids it from drawing a line between speech it views as acceptable and statements it prohibits because they have been deemed racist by university administrators. The line separating the speech that may be lawfully punished is already drawn by the First Amendment.

II. The First Amendment Makes No Categorical Exception for "Hate Speech" or "Racist Statements"

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"[16]—the Supreme Court has repeatedly held that expression does not lose First Amendment protection solely because some, or even many, deem it to be hateful.[17] 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."[18]

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[12] *Id.*
[13] *Cohen v. California*, 403 U.S. 15, 25 (1971).
[14] *Id.* at 24–25.
[15] E-mail from Villalpando, *supra* note 1.
[16] So-called "fighting words" are those "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942). The "small class" of words within this narrow exception is now limited to speech amounting to a "direct personal insult or an invitation to exchange fisticuffs." *Sandul v. Larion*, 119 F.3d 1250, 1255 (6th Cir. 1997) (quoting, in part, *Texas v. Johnson*, 491 U.S. 397, 409 (1989)). 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).
[17] *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").
[18] *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017).

This principle does not apply with any less force on the campuses or in the classrooms of public universities.[19] If words, images, or other expression viewed as "hateful" were unprotected, it would have an impermissible chilling effect on faculty members' rights of academic freedom to choose how to present and discuss America's history of—and ongoing struggle with—racism and discrimination. Indeed, we regularly defend faculty members whose repetition of racial epithets in a pedagogically-relevant context is called into question by university administrators or criticized by students.[20] While some exercise their own free speech rights by questioning the wisdom of protected speech, academic freedom provides faculty the right to determine how best to confront America's painful legacy. This right is shielded by the First Amendment,[21] which—as the Supreme Court explained in overturning legal barriers to faculty members with "seditious" views—is of "special concern to the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[22]

In addition to putting faculty members' academic freedom at risk, if the state could punish expression it deems to be hateful, a broad range of political speech by faculty and students alike would be imperiled, and such power would unquestionably be used against those a "hate speech" exception would be intended to protect. For example, when the University of Michigan briefly enacted a prohibition against hate speech—a measure struck down by a federal court[23]—it was almost universally used to punish students of color who offended white students.[24] Indeed, a century-old Connecticut law banning *commercial advertisements* with hateful language is now used by police officers to criminally charge people who verbally insult

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[19] *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, 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.").

[20] *See, e.g.*, Press Release, Found. for Individual Rights in Educ., VICTORY: Professor exonerated for quoting iconic black writer at The New School (Aug. 16, 2019), https://www.thefire.org/victory-professor-exonerated-for-quoting-iconic-black-writer-at-the-new-school (professor cleared of harassment charges for quoting James Baldwin during a classroom discussion).

[21] *See, e.g.*, *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 674 (6th Cir. 2001) (denying qualified immunity to administrators who fired a Caucasian adjunct instructor for leading a "classroom discussion examining the impact of such oppressive and disparaging words as 'nigger' and 'bitch.'" (cleaned up)).

[22] *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

[23] *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 869 (E.D. Mich. 1989).

[24] "[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)).

police, including white officers.[25] And Donald Trump views the phrase "Black Lives Matter" to be a "symbol of hate."[26]

In our own work defending faculty and students' expressive rights, we have seen an alarming increase in efforts to punish the speech of students and faculty of color, as well as their allies, when it is critical of systemic racism. For example, we've witnessed a student successfully raise community pressure to investigate an adjunct lecturer who criticized racism and warned that some white people "may have to die for Black communities to be made whole in this struggle to advance to freedom," such as Heather Heyer, murdered in Charlottesville, Virginia by a white supremacist.[27] We have also seen similar pressure on universities to investigate or punish faculty who criticized gentrification,[28] called on others not to help those in power "who practice bigotry,"[29] or lampooned the white nationalist theory that miscegenation amounts to "white genocide."[30]

This pressure on critics of racist ideology and expression is not limited to faculty members. We have also seen a student newspaper at a public university lose its student funding after a student group, complaining of "fake news," mounted a campaign to encourage students to vote against renewing the newspaper's funding.[31] Not coincidentally, the campaign began after the newspaper published an article revealing that a member of the student group had crafted flyers nearly identical to those of American Vanguard, a white supremacist group.[32]

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[25] Adam Steinbaugh, *UConn: We can't stop the unconstitutional process our police started*, FOUND FOR INDIV. RIGHTS IN EDUC., Nov. 1, 2019, https://www.thefire.org/uconn-we-cant-stop-the-unconstitutional-process-our-police-started.
[26] Donald J. Trump (@realdonaldtrump), TWITTER (July 1, 2018, 9:48 AM), https://twitter.com/realDonaldTrump/status/1278324680311681024.
[27] Adam Steinbaugh, *FIRE warns University of Georgia and state attorney general to end speech-chilling investigation into TA's protected expression*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., Jan. 25, 2019, https://www.thefire.org/fire-warns-university-of-georgia-and-state-attorney-general-to-end-speech-chilling-investigation-into-tas-protected-expression.
[28] Press Release, Found. for Individual Rights in Educ., VICTORY: Rutgers reverses finding against professor who posted about resigning from the white race on Facebook (Nov. 15, 2018), https://www.thefire.org/victory-rutgers-reverses-punishment-of-professor-who-posted-about-resigning-from-the-white-race-on-facebook.
[29] Adam Steinbaugh, *Trinity College professor's 'let them fucking die' posts are protected speech; continued investigation unwarranted*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., July 7, 2017, https://www.thefire.org/trinity-college-professors-let-them-fucking-die-posts-are-protected-speech-continued-investigation-unwarranted.
[30] Adam Steinbaugh, *Russia-linked Twitter account helped Drexel professor's 'White Genocide' tweet go viral, prompting university investigation*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., Oct. 20, 2017, https://www.thefire.org/russia-linked-twitter-account-helped-drexel-professors-white-genocide-tweet-go-viral-prompting-university-investigation.
[31] Press Release, Found. for Individual Rights in Educ., FIRE analysis: Rutgers violated the Constitution by defunding student newspaper (June 3, 2019), https://www.thefire.org/fire-analysis-rutgers-violated-the-constitution-by-defunding-student-newspaper.
[32] Kira Herzog & Chloe Dopico, *Rutgers Conservative Union flyer mimics one created by white supremacy group*, DAILY TARGUM, Mar. 1, 2017, https://www.dailytargum.com/article/2017/03/rutgers-conservative-union-flyer-mimics-one-created-by-national-white-supremacy-group.

You might object that Bellevue's leaders would not act in the same manner as administrators in some of these examples, recent history notwithstanding.[33] But the First Amendment "does not leave us at the mercy of the *noblesse oblige*," and an unconstitutional grant of authority cannot be left in place merely because its holders "promised to use it responsibly."[34] To permit a public college or university to promulgate or enforce a blanket moratorium on specific phrases due to an administrator's determination that they are racist not only violates the First Amendment, it opens the door to broader censorship of certain phrases in response to changing societal circumstances. You cannot anticipate now the pressure that other groups, donors, or legislators will bring to bear against speech they view as hateful or contrary to the university's values, nor can you be sure that your successor or other administrators will use such authority wisely.

III. Banning Specific Phrases Constitutes an Impermissible Prior Restraint on Speech

This blanket moratorium on certain phrases also violates the First Amendment because it serves as a content-based prior restraint on speech. Prior restraints are "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). The risk prior restraints present to freedom of expression is so great that the "chief purpose" in adopting the First Amendment was to prevent their use. *Near v. Minnesota*, 283 U.S. 697, 713 (1931). A prior restraint's incompatibility with expressive rights is not diminished in the educational context—even in high schools, where administrators have a freer hand in regulating student expression. *See, e.g.*, *Burch v. Barker*, 861 F.2d 1149, 1155–57 (9th Cir. 1988) (striking down mandatory prior review of student newspaper at a high school).

This mandate that people "not repeat" or "ask questions related to" certain phrases—including phrases pertinent to arguably one of the most pressing social issues of our time—based on an administrator's determination that they are "racist statements" is a prior restraint on expression based on the content of these statements. This is evident from Villalpando's characterization of the statements as racist, with an explanation of how each statement is racist included in the email. Determination by an administrator that a certain phrase is unacceptable before it is even uttered is an unconstitutional prior restraint on speech.

IV. Conclusion

The First Amendment does not shield a speaker from every consequence of their expression, but it does limit the *types* of consequences that may be imposed and who may impose them. It does not inhibit a speaker from public criticism responding to their expression—including

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[33] Adam Steinbaugh, *Why did a Bellevue College administrator censor an art installation memorializing Japanese-American internment camps? Public records suggest a motive.*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., May 19, 2020, https://www.thefire.org/why-did-a-bellevue-college-administrator-censor-an-art-installation-memorializing-japanese-american-internment-camps-public-records-suggest-a-motive.

[34] *United States v. Stevens*, 559 U.S. 460, 480 (2010).

criticism by you, faculty members, students, or the broader community. That is a form of "more speech," the remedy the First Amendment prefers to censorship.[35]

Villalpando's assertion that this list of particular phrases should not be repeated or even questioned raises renewed concerns about Bellevue's regard for the fundamental First Amendment rights of its students and faculty, and it will have an unconstitutional chilling effect on protected expression. The ability to ask and confront difficult questions is how those questions are answered, and forms the fundamental basis for the function of an institution of higher education.

In times of great social and political upheaval, our governmental and educational institutions face substantial pressure to foreclose on expression protected by the First Amendment. This, however, is when institutions must be most vigilant in refusing to do so. Penalizing protected expression is not a cure for the underlying challenges faced by society, and abandoning a robust defense of freedom of expression will inure to the detriment of rights across political, social, and ideological spectrums.

We respectfully request receipt of a response to this letter no later than the close of business on Thursday, July 23, 2020.

Sincerely,

Katlyn A. Patton

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

Cc: Dr. Gilbert Villalpando, Interim Vice President of Diversity, Equity, and Inclusion

[35] *Whitney v. California*, 274 U.S. 357, 377 (1927). That response, however, must be an expression of viewpoint that would not have a "chilling effect" on a person of reasonable firmness. *See Holloman v. Harland*, 370 F.3d 1252, 1268-69 (verbal reprimand of student refusing to say pledge "cannot help but have a tremendous chilling effect") *and Smith v. Novato Unified Sch. Dist.*, 59 Cal. Rptr. 3d 508 (Ct. App. 2007) (secondary school violated speech rights of student by sending home letter stating that offensive editorial should not have been published).