August 18, 2021

Philip Oldham
Office of the President
Tennessee Tech University
1 William L. Jones Drive
Campus Box 5007
Cookeville, Tennessee 38505-0001

Sent via U.S. Mail and Electronic Mail (poldham@tntech.edu)

Dear President Oldham:

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 Tennessee Technological University's punishment of two professors for posting political flyers harshly criticizing a faculty member who serves as an elected county commissioner for Putnam County, in which Tennessee Tech is situated. While the content of the flyers is decidedly uncivil, Tennessee Tech's imposition of sanctions violates the First Amendment, which bars the university from punishing protected expression. The sanctions likewise violate state law that bars universities from "shield[ing] individuals"—let alone elected officials—"from free speech" and that prohibits "concerns about civility and mutual respect" from foreclosing expression that may be "offensive, unwise, immoral, [or] disagreeable" to other students or faculty.[1]

I. Tennessee Tech Punishes Professors for Posting Political Flyers

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. To these ends, please find enclosed executed privacy waivers authorizing you to share information about this matter.

The Putnam County School Board meeting on February 4 featured a discussion on whether it should rename its mascot, the "Algood Redskins,"[2] mirroring a broader national conversation

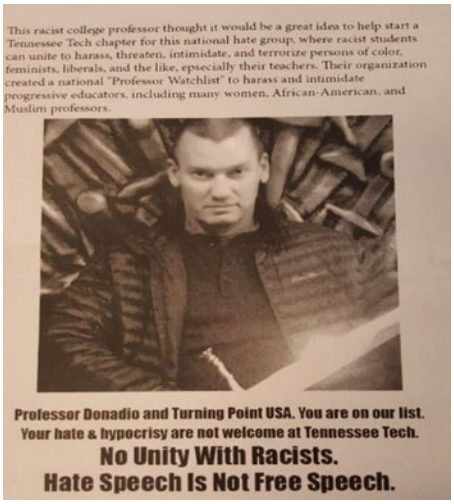
[1] TENN. CODE ANN. § 49-7-2405(3),(6).
[2] Jackie DelPilar, *Despite petition calling for its removal, Putnam Co. school will keep mascot: 'It's awful'*, FOX 17, Feb. 8, 2021, https://fox17.com/news/local/putnam-co-school-will-keep-its-mascot-despite-petition-calling-for-removal-its-awful.

about the renaming of sports teams and their mascots. The renaming effort—led by Julia Gruber, who is also employed as a professor in Tennessee Tech's Department of Foreign Languages—garnered significant public support, including some 3,000 signatures on a petition in support of the effort.[3]

At the meeting, Gruber recognized Andrew Donadio—an elected county commissioner, who also serves as an assistant nursing professor at Tennessee Tech.[4] When the effort to rename the mascot was rejected by the school board, Donadio "stood up, shouted a loud whoop, and clapped excessively," according to Gruber.[5]

After the meeting, Gruber spoke with senior instructor of English Andrew Smith about their disappointment with Donadio's opposition to their efforts, as well as his work as an advisor for the university's Turning Point USA student chapter, which Gruber and Smith perceived to be a hateful and racist political group.[6]

In response, the next day, Smith created a flyer depicting an image he created of Donadio sitting on the "Iron Throne" from HBO's *Game of Thrones* holding a sword. The flyer included text criticizing Donadio and Turning Point USA, pointedly citing TPUSA's "Professor Watchlist" (a website to "expose and document college professors who discriminate against conservative students and advance leftist propaganda")[7] and retorting that they "are on our list." Smith and Gruber distributed the flyer, pictured below, around campus at Tennessee Tech over the next few days:



[3] *Id.*
[4] Colleen Flaherty, *A Flier, and So Much More*, INSIDE HIGHER ED, Apr. 20, 2021, https://www.insidehighered.com/news/2021/04/20/tennessee-tech-professors-face-discipline-calling-colleague-racist.
[5] Nicole Fallert, *Professors Go After Colleague in Flyer for Advising Turning Point USA, Face Ethics Probe*, NEWSWEEK, Apr. 22, 2021, https://www.newsweek.com/professors-go-after-colleague-flyer-advising-turning-point-usa-face-ethics-probe-1585766.
[6] *Id.*
[7] TURNING POINT USA, *Professor Watchlist*, https://professorwatchlist.org (last visited Aug. 3, 2021).

Donadio filed an incident report with the University Police, complaining that the flyer's authors "attacked my integrity in a very public setting," that they "went after my honor," and that they "went after my ability to do my job," as "I've got minority students."[8] Donadio added that he was "an elected official" who "can take the heat," but that he perceived the flyers as an "attack on my students," referring to members of TPUSA, who "are students that could potentially have these people as instructors."[9] Upon receiving Donadio's complaint, University Police and Tennessee Tech administrators seized the flyers.

On February 24, Compliance Officer and Interim Associate Vice President of Communications Greg Holt informed Gruber and Smith that the Office of Human Resources would investigate a complaint by Donadio over their flyer.[10]

On April 14, Holt sent an Investigative Memorandum to Vice President for Planning and Finance Claire Stinson. The memo recommended an adverse finding against Gruber and Smith, citing a portion of Tennessee Tech Policy 600, which requires that employees, when "carrying out" the university's "educational, research, and public service" functions "are expected to conduct themselves fairly, honestly, in good faith, and in accordance with the highest ethical and professional standards and to comply with applicable laws, regulations, contractual obligations, and Tennessee Tech policies."[11] The cited portions of Policy 600 also require that employees "act in a manner that will enhance the name, service, and general impression of Tennessee Tech and the State of Tennessee."[12]

The memo found that Gruber and Smith violated Policy 600 based on these facts:

> Respondent B created the flyer and provided a copy to Respondent A. Respondent A distributed the flyers in Bell Hall where they would be seen by Complainant's students and colleagues. Respondent B affixed a flyer to a bulletin board in an area of the RUC frequented by students. The content of the flyer was intended to harass, intimidate, and threaten not only Complainant but other faculty, staff, and students whose views and opinions were contrary to those held by Respondents.[13]

That same day, Stinson informed Holt that she agreed with his recommendation and asked him to "refer this matter to the Provost for appropriate disciplinary actions."[14] On May 13, Gruber and Smith received substantially identical disciplinary letters from Provost and Vice President of Academic Affairs Lori Mann Bruce stating, in relevant part:

---

[8] Investigative Memorandum from Holt to Stinson (Apr. 14, 2021) ("Investigative Memorandum") (on file with author).
[9] *Id.*
[10] Letter from Holt to Gruber (Feb. 24, 2021) (on file with author).
[11] *Id.*; TENN. TECH. UNIV., POLICY NO. 600, Code of Conduct (approved June 15, 2017), https://tntech.policytech.com/dotNet/documents/?docid=831&public=true ("Policy 600").
[12] Investigative Memorandum, *supra* note 8, at 5.
[13] *Id.*
[14] Letter from Stinson to Holt (Apr. 14, 2021) (on file with author).

> I concur that your actions were intended to harass, intimidate, and threaten a small group of individuals. These include a specific employee whose name and photo were included on the flier and a small group of students participating in a student club specifically named on the flier. . . . Actions taken by you in this matter constitute a capricious disregard of accepted standards of professional conduct.[15]

Bruce imposed a range of sanctions on Gruber and Smith, including ineligibility for salary increases for one year, ineligibility for certain faculty assignments, mandatory sensitivity training, prohibitions against participation in study abroad trips or as advisors to student organizations, and mandatory meetings with administrators each semester "to reinforce with you the importance of not bringing personal grievances into the workplace," and "periodic visits" during their classes "to ensure that you are not bringing personal grievances into the classroom . . . ."[16]

The university denied the professors' June 17 appeal on July 6.[17]

II. The First Amendment and State Law Bar Tennessee Tech from Punishing Gruber and Smith for Distributing Political Flyers

The First Amendment and Tennessee state law bar Tennessee Tech from imposing discipline based on protected expression. Because Gruber and Smith spoke as private citizens—speech that Policy 600 does not purport to reach—and spoke on matters of public concern, their speech is protected by the First Amendment. Tennessee Tech's interest in civility between faculty members from different colleges is not sufficient to override the rights of private citizens to criticize an elected official. Even if it were, Tennessee state law expressly waived that interest and prohibits university efforts to shield students and faculty from speech they might find offensive or uncivil.

A. The First Amendment and Tennessee Law Protect Speech at Public Universities.

It has long been settled law that the First Amendment is binding on public universities like Tennessee Tech.[18] Accordingly, the decisions and actions of a public university—including the pursuit of disciplinary sanctions,[19] recognition and funding of student organizations,[20]

---

[15] Letter from Bruce to Gruber (May 13, 2021) (on file with author).
[16] *Id.*
[17] Appeal Memo. from Jennifer Taylor, Vice Pres. for Research, Tenn. Tech. Univ., to Gruber (July 6, 2021) (on file with author).
[18] *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).
[19] *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).
[20] *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000).

interactions with student journalists,[21] conduct of police officers,[22] and maintenance of policies implicating student and faculty expression[23]—must conform to First Amendment.

The professors' flyer may have offended some or even most who read it. However, whether speech is protected by the First Amendment is "a legal, not moral, analysis."[24] The Supreme Court has repeatedly, consistently, and clearly held that expression may not be restricted on the basis that others find it to be offensive. This core First Amendment principle is why the authorities cannot outlaw burning the American flag,[25] punish the wearing of a jacket emblazoned with the words "Fuck the Draft,"[26] penalize cartoons depicting a pastor losing his virginity to his mother in an outhouse,[27] or disperse civil rights marchers out of fear that "muttering" and "grumbling" white onlookers might resort to violence.[28]

This principle applies with particular strength to universities, dedicated to open debate and discussion. Take, for example, a student newspaper's front-page uses of a vulgar headline ("Motherfucker Acquitted") and a "political cartoon . . . depicting policemen raping the Statue of Liberty and the Goddess of Justice."[29] These words and images—published at the height of the Vietnam War—were no doubt deeply offensive to many at a time of deep polarization and unrest. So, too, were "offensive and sophomoric" skits depicting women and minorities in derogatory stereotypes,[30] "racially-charged emails" to a college listserv,[31] and student organizations that the public viewed as "shocking and offensive."[32] 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.'"[33]

The professors' satirical depiction of a public figure and a campus group does not remove their flyer from the First Amendment's protection for vitriolic parody. For more than 75 years, the Supreme Court has held: "One of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation."[34] This includes the right to create and express even the most caustic, outlandishly offensive parody. The professors' criticism of Donadio and a political campus group is demonstrably expression

---

[21] *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).
[22] *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011).
[23] *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).
[24] *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 821 (S.D. Iowa 2019).
[25] *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").
[26] *Cohen v. California*, 403 U.S. 15, 25 (1971).
[27] *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).
[28] *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).
[29] *Papish*, 410 U.S. at 667–68.
[30] *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 388–392 (4th Cir. 1993).
[31] *Rodriguez v. Maricopa Cnty. Comm. Coll. Dist.*, 605 F.3d 703, 705 (9th Cir. 2009) (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").
[32] *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 661 (1st Cir. 1974).
[33] *Papish*, 410 U.S. at 670.
[34] *Baumgartner v. United States*, 322 U.S. 665, 673–74 (1944).

on public issues, which the Court has explained "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."[35] Accordingly, the professors' flyers are political speech meriting the highest level of protection under the First Amendment and may not be punished by government actors such as Tennessee Tech.

B. Gruber and Smith Spoke as Private Citizens on Matters of Public Concern.

Public employees, like Gruber and Smith, may not face discipline or retaliation for constitutionally protected expression unless the government employer demonstrates that the expression hindered "the effective and efficient fulfillment of its responsibilities to the public."[36] As long as an employee is speaking as a citizen about matters of public concern, "they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively."[37] Disapproval of the speech at issue is insufficient grounds for punishment.[38]

The United States Court of Appeals for the Sixth Circuit—the decisions of which are fully binding on Tennessee Tech—conducts a two-pronged analysis to determine whether the First Amendment protects a public university professor's expression as a private citizen. First, courts analyze whether the professor was "disciplined for speech that was directed toward an issue of public concern."[39] Then, courts determine whether the professor's interest in his speech "outweighed the College's interest in regulating his speech."[40]

i. Gruber and Smith spoke as private citizens.

As a threshold matter, by creating and distributing the flyers, Gruber and Smith spoke as private citizens and not in their official capacity as employees of Tennessee Tech.

The "critical question" in determining whether the speech was that of an employee or private citizen is "whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."[41] Universities do not ordinarily employ their faculty to post political flyers. Even assuming others knew that Tennessee Tech employs the professors, the mere knowledge of a speaker's employment does not render their speech pursuant to their official duties.[42]

---

[35] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).
[36] *Connick v. Myers*, 461 U.S. 138, 150 (1983).
[37] *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).
[38] *Rankin v. McPherson*, 483 U.S. 378, 384 (1987) ("Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.").
[39] *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 678 (6th Cir. 2001).
[40] *Id.* (citing *Pickering, v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).
[41] *Lane v. Franks*, 573 U.S. 228, 240 (2014); *Higbee v. E. Michigan Univ.*, 399 F. Supp. 3d 694, 702 (E.D. Mich. 2019), *case dismissed*, No. 19-1751, 2019 WL 5079254 (6th Cir. Aug. 7, 2019) ("Using 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.").
[42] *See, e.g.*, *Pickering*, 391 U.S. at 576–78 (appendix reproducing teacher's letter to a local newspaper criticizing his employer, explaining that he teaches at the high school).

Policy 600 appears to be in accord, claiming as its domain the university's "educational, research, and public service missions[.]"[43] If, instead, the university reads that policy to extend to its employees when they speak as private citizens, it is facially unconstitutional because it grants administrators unfettered discretion to penalize any speech that does not "enhance the name . . . and general impression of Tennessee Tech and the State of Tennessee" or promote "respect for all[.]"[44] This broad scope would be fatal to Policy 600's constitutional viability when subject to strict scrutiny under the First Amendment. Further, its lack of objectively ascertainable boundaries—applying to any speech subjectively deemed insufficiently respectful or embarrassing to the university or the state—does not give faculty fair notice of what speech is or is not prohibited, failing the "first essential of due process."[45]

ii. Gruber and Smith spoke on matters of public concern.

The Supreme Court has declared that "[s]peech 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[.]"[46] That others find a statement to be of an "inappropriate or controversial character . . . is irrelevant to the question of whether it deals with a matter of public concern."[47] The question of "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement."[48] Here, the content, form, and context of the flyers demonstrate that the professors' statements address matters of public concern.

First, the content of the professors' flyers consists of allegations of racism and hypocrisy against a local government official and a political campus group—all of which are undoubtedly issues of public concern. This criticism is far beyond "matters only of personal interest,"[49] and "relate[s] to matters of overwhelming public concern—race, gender, and power conflicts in our society."[50] Even allegations of sexual or racial harassment, and "expressions of opinion, even distasteful ones, do not become matters of personal interest simply because they are phrased in the first person or reflect a personal desire."[51]

Second, the form of the statements—flyers distributed around campus—also weighs in favor of finding that they involve a matter of public concern. The distribution of misconduct allegations and criticism to a public audience, such as that of a state university campus, "cuts in favor of deeming the speech as addressing a matter of public concern" because, like social

---

[43] Policy 600 at III(E)(1).
[44] Policy 600 at III(E)(2).
[45] *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972) (laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," lest a "vague law impermissibly" be subject to "ad hoc and subjective" application).
[46] *Snyder v. Phelps*, 562 U.S. 443, 453 (2011*); Hardy*, 260 F.3d at 678 (quoting *Connick*, 461 U.S. at 142).
[47] *Rankin*, 483 U.S. at 387 (expression of hope that President Ronald Reagan might be assassinated was protected against retaliation).
[48] *Hardy*, 260 F.3d at 678 *(*quoting *Connick*, 461 U.S. at 147–48).
[49] *Bonnell v. Lorenzo*, 241 F.3d 800, 812 (6th Cir. 2001).
[50] *Hardy*, 260 F.3d at 679.
[51] *Marquardt v. Carlton*, 971 F.3d 546, 550 (6th Cir. 2020); *Bonnell*, 241 F.3d at 812 ("[I]t is well-settled that allegations of sexual harassment, like allegations of racial harassment, are matters of public concern.").

media posts, the flyers were intended to "share messages and opinions with a wide audience."[52]

The context of the flyers also indicates that Gruber and Smith spoke on matters of public concern. The flyers address several "newsworthy topic[s]," relate to "matter[s] of political, social, or other concern to the community" that "generated intense public debate and quickly became a matter of public discussion,"[53] demonstrating that they were distributed against a background of debate on matters of public concern.

iii. Tennessee Tech cannot demonstrate sufficient disruption to overcome the professors' interest in commenting on matters of public concern.

A public employer may regulate a private citizen's speech on matters of public concern only where the government's interest "in promoting the efficiency of the public services it performs through its employees" outweighs "the interests of the [employee], as a citizen, in commenting upon matters of public concern."[54] To meet that high bar, the public employer must demonstrate that the speech "impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise."[55] Importantly, "a stronger showing" of disruption "may be necessary if the employee's speech more substantially involved matters of public concern."[56]

While public institutions of higher education understandably prefer civility, "the desire to maintain a sedate academic environment does not justify limitations on [faculty members'] freedom to express [themselves] on political issues in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms."[57] This is because higher education is committed to unfettered debate where "conflict is not unknown" in light of the "inherent autonomy of tenured professors and the academic freedom they enjoy,"[58] and where "dissent is expected and, accordingly, so is at least some disharmony."[59] Controversy and the sharp exchange of views is a function, not a disruption, of universities and colleges. Even in the context of high schools, where administrators have a freer hand to regulate speech, the mere fact that expression "caused discussion *outside* of the classrooms," but not "interference with work" or "disorder," is insufficient to override First Amendment rights.[60] The "mere desire to avoid the

---

[52] *Marquardt*, 971 F.3d at 551 (finding that the expression in the form of Facebook posts visible only to the public employee's Facebook friends demonstrates that the posts addressed a matter of public concern).
[53] *Id.* at 552 (internal citations omitted); *see, e.g.*, Audrey Conklin, *Tennessee professor rejects 'racist' label in flyers distributed by colleagues*, Fox News (updated Apr. 25, 2021), https://www.foxnews.com/us/tennessee-professor-rejects-racist-label-in-flyers-distributed-by-colleagues.
[54] *Pickering*, 391 U.S. at 568.
[55] *Rankin*, 483 U.S. at 388.
[56] *Connick*, 461 U.S. at 150; *Whitney v. City of Milan*, 677 F.3d 292, 298 (6th Cir. 2012).
[57] Rodriguez, 605 F.3d at 709 (cleaned up).
[58] *Hulen v. Yates*, 322 F.3d 1229, 1239 (10th Cir. 2003).
[59] *Higbee*, 399 F. Supp. 3d at 704.
[60] *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 514 (1969) (emphasis added).

discomfort and unpleasantness that always accompany an unpopular viewpoint" is equally insufficient.[61]

Tennessee Tech cannot demonstrate actual disruption sufficient to justify sanctions here for four reasons.

First, given that Gruber and Smith teach at another college altogether, and do not share an academic department with Donadio, the possibility that their distribution of flyers would inhibit collegiality sufficient to disrupt university operations is speculative at best. In the Sixth Circuit, such "speculative concerns of workplace disharmony are insufficient to overcome" an individual's "interest in speaking as a private citizen on a matter of public concern,"[62] and merely offensive expression is not alone sufficiently disruptive to outweigh a professor's interest in commenting on public issues.[63]

Second, Donadio himself dismissed the possibility that the flyers would lead to disruptive disharmony with Gruber and Smith, arguing that he was "an elected official" who "can take the heat."[64] As a result, the university's interest in civility is unsupported either by Donadio or his relationship with Gruber and Smith.

Third, the possibility that student members of TPUSA might be offended by faculty criticism of their group is not a basis to shield the organization or its members from criticism. The possibility that the speech will be disruptive to university operations due to student offense is speculative at best, particularly given that the university's report does not assert any allegations of disruption. Even if Tennessee Tech sought to mischaracterize offensive speech as material disruption, the fact that faculty members express negative views about a student group's political activity cannot justify broad limits on faculty speech, as the "discomfort and unpleasantness that always accompany" abrasive expression would not amount to disruption even in the high school context.[65] Such a standard would leave TPUSA's members free to compile blacklists of faculty while gagging faculty from sharply criticizing that political speech.

Finally, Tennessee Tech cannot claim disruption by mischaracterizing the flyers as true threats or harassment, as the flyers do not rise to these narrow categories of unprotected speech. The flyers do not on their face or in context indicate that the professors intend to engage in any form of violence, nor do they invite any from third parties. The phrase "You are on our list. Your hate and hypocrisy are not welcome at Tennessee Tech" is most reasonably understood as expressing disagreement with Donadio's and TPUSA's views, not as a call for any violence or unlawful activity.[66] Additionally, the flyers amount to nothing more than

---

[61] *Pred v. Bd. of Pub. Instruction*, 415 F.2d 851, 858 (5th Cir. 1969).
[62] Whitney, 677 F.3d at 298 (indefinite gag order on public employee was an unjustified restraint on First Amendment rights when there was no showing that the employee's expression caused workplace disruption).
[63] *Hardy*, 260 F.3d at 681 ("[t]here is no indication that the lecture undermined Hardy's working relationship within his department, interfered with his duties, or impaired discipline. . . .").
[64] Investigative Memorandum, *supra* note 8, at 2.
[65] *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021) (quoting *Tinker*, 393 U.S. at 509).
[66] Even if the flyers are interpreted as advocating the necessity of force to remove Donadio and TPUSA from Tennessee Tech, they would still fall within the First Amendment's longstanding protection for political speech that references the propriety of, but does not threaten or incite, unlawful violence. *E.g.*, *NAACP v.*

subjectively offensive speech serving the legitimate purpose of debate on public issues, and fall far short of Tennessee Tech's standard for harassment.[67] As such, the flyers remain protected by the First Amendment.

iv. State law bars concern for "civility and mutual respect" from forming a basis for limiting speech that students or faculty may find offensive.

Even assuming that the university's interest in punishing incivility as severe disruption was supportable in this context, Tennessee state law bars considerations of civility and mutual respect from forming the basis for disciplinary action.

Our Supreme Court has explained that the First Amendment reflected a choice "[a]s a Nation" to "protect even hurtful speech on public issues to ensure that we do not stifle public debate."[68] Tennessee's legislature has deliberately made this same choice in the context of its public institutions of higher education. Recognizing that notions of civility can serve as a pretext to limiting speech, Tennessee state law bars its public universities from using "concerns about civility and mutual respect" as a justification for limiting expression, "however offensive, unwise, immoral, indecent, disagreeable, conservative, liberal, traditional, radical, or wrong-headed" that speech may be to "students or faculty."[69]

As a result, even if the First Amendment permitted concerns for civility to override faculty members' expressive rights, Tennessee's legislature has statutorily waived those concerns, and Tennessee Tech has adopted that public policy as its own.[70]

III. Conclusion

FIRE calls on Tennessee Tech to adhere to its constitutional obligations by rescinding its punishment of Gruber and Smith over their flyers. We request receipt of a response to this letter no later than the close of business on September 1, 2021.

Sincerely,

Claiborne Hardware Co., 458 U.S. 886, 926–27 (1982) (explaining how courts approach "with extreme care" claims that "highly charged political rhetoric lying at the core of the First Amendment" amounts to unlawful threats or incitement); *Wooley v. Maynard*, 430 U.S. 705, 722 (1977) (describing the license plate and state motto of New Hampshire, suggesting that residents "live free or die" in defense of liberty); *Watts v. United States*, 394 U.S. 705, 708 (1969) (man's statement, after being drafted to serve in the Vietnam War—"If they ever make me carry a rifle the first man I want to get in my sights is L. B. J."—was rhetorical hyperbole protected by the First Amendment, not a true threat to kill the president).

[67] TENN. TECH. UNIV., POLICY NO. 141, Code of Conduct (rev. Aug. 14, 2020), https://tntech.policytech.com/dotNet/documents/?docid=1250&public=true. That Tennessee Tech declined to charge Gruber and Smith under its policies regarding threats or harassment further undermines its classification of their flyers as unprotected expression.

[68] *Snyder*, 562 U.S. at 448.

[69] TENN. CODE ANN. § 49-7-2405(a)(6).

[70] TENN. TECH. UNIV., POLICY NO. 007 § IV (F) (effective Jan. 1, 2018), *available at* https://bit.ly/2VMNef4.

Zachary Greenberg
Senior Program Officer, Individual Rights Defense Program

Cc: Troy Perdue, University Counsel
Lori Mann Bruce, Provost and Vice President for Academic Affairs

Encl.

Authorization and Waiver for Release of Personal Information

I, Julia K. Gruber, do hereby authorize Tennessee Tech University (the "Institution") to release to the Foundation for Individual Rights in Education ("FIRE") any and all information concerning my employment, status, or relationship with the Institution. This authorization and waiver extends to the release of any personnel files, investigative records, disciplinary history, or other records that would otherwise be protected by privacy rights of any source, including those arising from contract, statute, or regulation. I also authorize the Institution to engage FIRE and its staff members in a full discussion of all information pertaining to my employment and performance, and, in so doing, to disclose to FIRE all relevant information and documentation.

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights in Education, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

If the Institution is located in the State of California, I request access to and a copy of all documents defined as my "personnel records" under Cal. Ed. Code § 87031 or Cal. Lab. Code § 1198.5, including without limitation: (1) a complete copy of any files kept in my name in any and all Institution or District offices; (2) any emails, notes, memoranda, video, audio, or other material maintained by any school employee in which I am personally identifiable; and (3) any and all phone, medical or other records in which I am personally identifiable.

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights in Education, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

I also hereby consent that FIRE may disclose information obtained as a result of this authorization and waiver, but only the information that I authorize.

DocuSigned by:
[redacted]

8/17/2021

Date

Authorization and Waiver for Release of Personal Information

I, Andrew W. Smith, do hereby authorize Tennessee Tech University (the "Institution") to release to the Foundation for Individual Rights in Education ("FIRE") any and all information concerning my employment, status, or relationship with the Institution. This authorization and waiver extends to the release of any personnel files, investigative records, disciplinary history, or other records that would otherwise be protected by privacy rights of any source, including those arising from contract, statute, or regulation. I also authorize the Institution to engage FIRE and its staff members in a full discussion of all information pertaining to my employment and performance, and, in so doing, to disclose to FIRE all relevant information and documentation.

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights in Education, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

If the Institution is located in the State of California, I request access to and a copy of all documents defined as my "personnel records" under Cal. Ed. Code § 87031 or Cal. Lab. Code § 1198.5, including without limitation: (1) a complete copy of any files kept in my name in any and all Institution or District offices; (2) any emails, notes, memoranda, video, audio, or other material maintained by any school employee in which I am personally identifiable; and (3) any and all phone, medical or other records in which I am personally identifiable.

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights in Education, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

I also hereby consent that FIRE may disclose information obtained as a result of this authorization and waiver, but only the information that I authorize.

DocuSigned by:
[redacted]

8/12/2021

Date