



November 11, 2021

Vincent E. Price  
Office of the President  
Duke University  
207 Allen Building  
Box 90001  
Durham, North Carolina 27708-0001

*Sent via U.S. and Electronic Mail (president@duke.edu)*

Dear President Price:

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 Duke University is one of the few institutions in the country whose policies earn a "green light" rating from FIRE. We are, however, concerned about reports that Duke's police department is investigating speech written on its "Free Expression Bridge," a forum Duke has designated for open student expression. We are likewise disappointed to learn that Duke has adopted a practice of unmasking anonymous speakers by installing surveillance cameras to monitor expression on the bridge.

The investigation into painted content and the use of surveillance cameras to monitor the bridge threaten the ability of students to exercise their right to engage in anonymous expression—however unpopular or offensive their protected speech may be to others—as guaranteed by Duke's commendable promises of free expression. We call on Duke to end its investigation into content painted on the bridge and to remove the surveillance cameras.

**I. Duke Investigates and Monitors Speech on Free Expression Bridge**

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.

Duke students and student groups “may express opinions” by painting on the Pettigrew Bridge and Free Expression tunnel.<sup>1</sup> Duke—to its credit—assures students that expression there will “not [be] restricted by content, except by legal standards.”<sup>2</sup> This tradition of painting the bridge, also known as the East Campus Bridge, has existed since at least 1967.<sup>3</sup>

On October 18, 2021, “homophobic” and “anti-Black” messages on the bridge were reported to Duke’s Office of Student Conduct.<sup>4</sup> The next day, Duke said the Office of Student Conduct was working with the university police department to identify those responsible, though it did not specify what the messages said.<sup>5</sup> The investigation by university police reportedly remains ongoing.<sup>6</sup>

It is also reported that the university has cameras surveilling the bridge, which were added after anti-Semitic language appeared on the bridge in 2018.<sup>7</sup>

## **II. Painting on the Free Expression Bridge Is Protected by Duke’s Commitments to Free Expression**

Investigating speech—however offensive—on Duke’s Free Expression Bridge contravenes not only the very purpose of allowing that expressive activity, but also the university’s free speech promises. The university’s decision to monitor the bridge with surveillance cameras impedes anonymous speech, which is protected expression.

### ***A. Duke’s commitments to free expression protect speech on the Free Expression Bridge.***

Although Duke is a private institution, and thus not bound by the First Amendment, the university makes commendable promises to free expression to its students, earning Duke FIRE’s highest “green light” rating.

Duke’s Pickets, Protests, and Demonstrations policy, for example, states that Duke “respects the right of all members of the academic community to explore and to discuss questions

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<sup>1</sup> Bridge Painting, Student Conduct & Community Standards, DUKE UNIV., <https://studentaffairs.duke.edu/conduct/z-policies/bridge-painting> (last visited Nov. 10, 2021).

<sup>2</sup> *Id.*

<sup>3</sup> *Painted East Campus Bridge, May 1967*, Duke Univ. Archives, FLICKR, <https://www.flickr.com/photos/dukeyearlook/11225933675> (Dec. 5, 2013).

<sup>4</sup> Nadia Bey, *East Campus bridge vandalized with homophobic, anti-Black graffiti*, CHRON. (Oct. 19, 2021, 3:25 PM), <https://www.dukechronicle.com/article/2021/10/duke-university-east-campus-bridge-vandalized-anti-black-racist-homophobic-graffiti>.

<sup>5</sup> *Id.*

<sup>6</sup> Rachel Lalgie, *Duke University investigates ‘homophobic’ graffiti left on ‘Free Expression’ bridge*, COLLEGE FIX (Nov. 4, 2021), <https://www.thecollegefix.com/duke-university-investigates-homophobic-graffiti-left-on-free-expression-bridge>.

<sup>7</sup> Bre Bradham, *In wake of swastika, Price promises a security camera at bridge, continued extra security at Freeman Center*, CHRON. (Nov. 19, 2018), <https://www.dukechronicle.com/article/2018/11/price-addresses-duke-community-after-swastika-says-security-camera-will-be-installed-at-bridge>.

which interest them, to express opinions publicly and privately, and to join together to demonstrate their concern by orderly means.”<sup>8</sup>

Additionally, Duke has a specific policy governing its free expression bridge, which states in pertinent part that:

The purpose of this policy is to ensure an aesthetically pleasing campus, protect university facilities, and allow for students to use the “Free Expression” bridge/tunnel without damaging neighboring property. Individuals and student groups may express opinions within this area that are not restricted by content, except by legal standards.<sup>9</sup>

Given Duke’s strong endorsement of expressive rights, especially on the Free Expression Bridge, students would reasonably expect to be able to speak freely without facing administrative efforts—much less those by law enforcement—to strip their anonymity or, as implied by invocation of the Office of Student Conduct, the possibility of formal institutional discipline.

***B. The Free Expression Bridge is a public forum protected by Duke’s commitments.***

Duke has designated the Free Expression Bridge as a public forum for student expression; thus, it must treat the bridge as such.

The Supreme Court of the United States “has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum.”<sup>10</sup> Even if the Free Expression Bridge itself is not a traditional public form, it is at minimum a designated public forum, which is one designated “for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.”<sup>11</sup>

For decades, Duke has held open the Free Expression Bridge for the purpose of student expression and has authorized students to “express opinions” that “are not restricted by content.”<sup>12</sup> The university has thus specifically designated the bridge for free expression without any rules or restrictions on student expressive use, indicating that Duke

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<sup>8</sup> Pickets, Protests and Demonstrations, Student Conduct & Community Standards, DUKE UNIV., <https://studentaffairs.duke.edu/conduct/z-policies/pickets-protests-and-demonstrations> (last visited Nov. 10, 2021).

<sup>9</sup> Bridge Painting, *supra* note 1.

<sup>10</sup> *Widmar v. Vincent*, 454 U.S. 263, 267 (1981). Although the First Amendment does not directly apply to Duke as a private institution, decades of First Amendment jurisprudence provide insight into the meaning of freedom of speech and what students reasonably expect when an institution of higher education commits to supporting and upholding that fundamental freedom.

<sup>11</sup> *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985). “[W]hen the Government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest.”

<sup>12</sup> Bridge Painting, *supra* note 1.

“intentionally . . . [via] policy and practice . . . designate[d] a place not traditionally open to assembly and debate as a public forum.”<sup>13</sup>

***C. Duke may not investigate or punish messages on the Free Expression Bridge merely because some may find them offensive.***

Although Duke may punish students for engaging in acts of vandalism, destruction of university property, and other violations of its student code of conduct, it may not seek to discipline students solely for painting, painting over, or removing offensive messages on the Free Expression Bridge.

**i. Painting and repainting the Free Expression Bridge is expression.**

Freedom of expression “does not end at the spoken or written word.”<sup>14</sup> To the contrary, conduct “intend[ed] to convey a particularized message” that is likely to “be understood by those who viewed it” is expressive conduct. And while authorities may enforce content-neutral regulations that may incidentally impact expressive conduct, they cannot restrict the expressive conduct “because it has expressive elements.”<sup>15</sup>

Conduct is also considered expressive when it falls within a traditionally protected genre—such as music, paintings, and parades—even if it does not convey a “narrow, succinctly articulable message.”<sup>16</sup> This is what protects the act of saluting or refusing to salute a flag,<sup>17</sup> wearing black armbands to protest war,<sup>18</sup> raising a “seditious” red flag,<sup>19</sup> burning an American flag,<sup>20</sup> picketing or leafletting,<sup>21</sup> and participating in a sit-in.<sup>22</sup>

The act of painting and repainting the Free Expression Bridge, even if it covers up or alters a prior message, is expression protected by the First Amendment and may not be stifled, as Duke’s expressive promises indicate.

**ii. Offensive expression is protected by Duke’s commitments to free expression.**

Although it is not publicly known exactly what was painted on the Free Expression Bridge, there are no public reports suggesting that what was painted met any of the “legal standards” that would render its “content” unprotected. Duke’s message to its community regarding the painting did not suggest the speech constituted an unprotected true threat or incitement, nor did any of the numerous reports by news outlets suggest as much. Although speech may be

<sup>13</sup> See *Cornelius v. NAACP*, 473 U.S. at 802.

<sup>14</sup> *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

<sup>15</sup> *Id.* at 404, 406.

<sup>16</sup> *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 569 (1995).

<sup>17</sup> *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 633–34 (1943).

<sup>18</sup> *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 505–06 (1969).

<sup>19</sup> *Stromberg v. California*, 283 U.S. 359, 369 (1931).

<sup>20</sup> *Johnson*, 491 U.S. at 414.

<sup>21</sup> *U.S. v. Grace*, 461 U.S. 171, 176 (1983).

<sup>22</sup> *Brown v. Louisiana*, 383 U.S. 131, 383 (1966).

offensive to some, or even most, speech that does not fall into one of the narrowly tailored categories that courts have deemed unprotected remains protected and cannot be punished.

Indeed, public reports about the display focus on its offensive nature. Offensiveness, however, is not among the “legal standards” that would authorize Duke to unmask and sanction its author. The principle of freedom of speech does not exist to protect only non-controversial expression; it exists precisely to protect speech that some members of a community may find controversial or offensive. Decades of legal precedent make clear that the First Amendment protects even intentionally insensitive speech.

For example, in *Snyder v. Phelps*, the Supreme Court held as protected expression picketers’ signs, which read “Thank God for dead soldiers” and were directed at the funeral of a fallen soldier, proclaiming:

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. . . . [W]e cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.<sup>23</sup>

The Court unanimously reaffirmed this vital principle in *Matal v. Tam*, holding that the perception that expression is “hateful” or “demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground” is not sufficient to remove it from the protection of the First Amendment.<sup>24</sup> Thus, speech that is “insensitive, offensive, and even bigoted” may nonetheless be protected expression.<sup>25</sup>

Because Duke has made such strong commitments to students’ expressive rights, the university may not labor to identify or sanction students for writing offensive messages on its Free Expression Bridge.

**iii. Installing surveillance cameras on a ‘space intended for free expression’ contravenes the university’s promises of free expression.**

Duke’s installation of surveillance cameras monitoring the Free Expression Bridge represents an immediate threat to students’ expressive rights. Freedom of expression protects not only the right to speak, but to do so anonymously.<sup>26</sup>

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<sup>23</sup> *Snyder v. Phelps*, 562 U.S. 443, 461 (2011).

<sup>24</sup> 137 S. Ct. 1744, 1764 (2017).

<sup>25</sup> *Goza v. Memphis Light, Gas & Water Div.*, No. 2:17-cv-2873, 2019 U.S. Dist. LEXIS 100057, at \*2 (W.D. Tenn. June 14, 2019).

<sup>26</sup> *Watchtower Bible & Tract Soc. of New York v. Village of Stratton*, 536 U.S. 150, 166–67 (2002) (striking down ordinance that, among other things, required canvassers to identify themselves to mayor’s office); *Justice for All v. Faulkner*, 410 F.3d 760, 764–65 (5th Cir. 2005) (striking down college policy requiring leaflets distributed on campus to identify their authors).

The Supreme Court has explained that anonymous speakers may have a variety of motivations for maintaining their anonymity:

[A]n author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible.<sup>27</sup>

Anonymous communication, the Court explained, “is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.”<sup>28</sup> Students may have any number of reasons to remain anonymous when they add their messages to the Free Expression Bridge. Some may fear retaliation by administrators if their message denounces university leaders, such as students who criticized their university's refusal to rename a building—named after a governor responsible for the Sand Creek Massacre—by painting “Fuck John Evans” and “THIS LAND IS COLONIZED” on their institution's rock.<sup>29</sup> Other students may be chilled from painting messages criticizing law enforcement or in support of the Black Lives Matter movement if they must do so in front of a security camera. Still others might fear repercussions from painting messages dissenting from movements popular among the student body, like the Black Lives Matter movement.

While the university undoubtedly has an interest in preventing damage to the Free Expression Bridge, surveillance is more likely to chill student expression in a forum explicitly dedicated to such than to prevent significant damage. Moreover, there do not appear to be any policies concerning who may review surveillance footage, how long the footage is kept, or the purposes for which footage may be used. That raises the distinct possibility that the footage will be used not to identify vandals, but to identify those who exercise their right to share expression unpopular with administrators or other students. And this risk is not idle. According to reports, Duke viewed surveillance footage of the bridge in 2020 in an attempt to identify those who painted anti-Semitic messages on the bridge.<sup>30</sup>

### **III. Duke Must Ensure Its Free Expression Bridge Remains an Outlet for Free Expression**

We understand that the messages on the Free Expression Bridge were offensive to some, but the remedy to offensive speech is more speech, not censorship. Students are permitted to paint over the messages and express their own opinions, which is preferable to an investigation of likely protected expression.

FIRE encourages Duke to ensure its Free Expression Bridge remains an outlet for free expression by ending its investigation into the anti-Black and homophobic language on the

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<sup>27</sup> *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341–42 (1995).

<sup>28</sup> *Id.* at 357.

<sup>29</sup> See David Gleisner, “*FUCK JOHN EVANS*”—*The background behind the Rock's weekend paint job*, N. BY NW (Oct. 31, 2019), <https://www.northbynorthwestern.com/john-evans-explained>.

<sup>30</sup> Lalgie, *supra* note 6.

bridge. We also ask that Duke remove its cameras and stop the practice of surveilling students who use the bridge as a means to express themselves anonymously.

We request receipt of a response to this letter no later than the close of business on Tuesday, November 30, 2021.

Sincerely,



Sabrina Conza  
Program Analyst, Individual Rights Defense Program

Cc: Jeanna McCullers, Senior Associate Dean of Students & Director, Office of Student  
Conduct and Community Standards  
Clay Adams, Vice Dean of Students