



February 3, 2022

President Eli Capilouto
Office of the President
101 Main Building
University of Kentucky
Lexington, Kentucky 40506-0032

URGENT

Sent via Electronic Mail (pres@uky.edu)

Dear President Capilouto:

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 about the threat to freedom of expression at the University of Kentucky presented by a vow from the university, delivered via its Twitter account, to investigate student participants in an abortion-related campus protest.

In a video¹ that circulated on Twitter and TikTok yesterday, a group of women who appear to be UK students are shown in an open, public area of campus reacting to a man with a pro-life sign that depicts an aborted fetus. The women stand in front of the sign and do a roughly choreographed dance that lasts about five seconds. One of the students then turns to the man and says, "Sorry. No uterus, no opinion." She momentarily extends her middle finger and walks away, before turning back a final time to add: "Actually, I promise I'd kill my baby if I got pregnant." Another woman chimes in: "I literally would! Are you kidding me? No uterus, no opinion." At one point, another student with the group appears to shout to the protester: "Sorry! First Amendment, man."

While the students knew their counter-protest was legally protected expression, it appears that UK did not. Just over an hour later, after learning of the video and the criticism it engendered from pro-life groups on social media, UK's Twitter account responded:

¹ Libs of TikTok (@libsoktiktok) TWITTER (Feb. 2, 2022, 12:08 PM), <https://twitter.com/libsoftiktok/status/1488937299463180288>.

We are aware of the video involving students displaying mocking behavior toward another individual on our campus. The incident is being investigated. (1/2)²

At the University of Kentucky, we value mutual respect and civility, even in situations involving strong differences of opinion. This behavior is not in line with our values. (2/2)³

As you know, UK is legally bound to respect students' expressive rights under the First Amendment, Kentucky state law, and UK's own numerous and laudable commitments to free expression. Accordingly, UK must immediately cease any investigation into these students' protected expression and clarify to the student body that they will not be punished for engaging in lawful, peaceful protest on your campus.

It has long been settled law that the First Amendment is binding on public colleges like UK.⁴ The Kentucky General Assembly has also passed legislation specifically protecting students' First Amendment rights on campus, including a provision that provides in relevant part:

(2) Consistent with its obligations to respect the rights secured by the Constitutions of the United States and the Commonwealth of Kentucky, a governing board of a public postsecondary education institution shall adopt policies to ensure that:

(a) The institution protects the fundamental and constitutional right of all students and faculty to freedom of expression;

(b) The institution grants students and faculty the broadest possible latitude to speak, write, listen, challenge, learn, and discuss any issue;

(c) The institution commits to maintaining a marketplace of ideas where the free exchange of ideas is not suppressed because an idea put forth is considered by some or even most of the members of the institution's community to be offensive, unwise, disagreeable, conservative, liberal, traditional, or radical;

(d) Students and faculty do not substantially obstruct or otherwise substantially interfere with the freedom of others to express views they reject so that a lively and fearless freedom of debate and deliberation is promoted and protected;

² University of Kentucky. (@universityofky), TWITTER (Feb. 2, 2022, 1:46 PM), <https://twitter.com/universityofky/status/1488962047979126786>.

³ University of Kentucky. (@universityofky), TWITTER (Feb. 2, 2022, 1:46 PM), <https://twitter.com/universityofky/status/1488962049757442052>.

⁴ *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).

[...]

(j) The generally accessible, open, outdoor areas of the campus be maintained as traditional public forums for students and faculty to express their views . . . ;

(k) There shall be no restrictions on the time, place, and manner of student speech that occurs in the outdoor areas of campus or is protected by the First Amendment of the United States Constitution, except for restrictions that are:

1. Reasonable;
2. Justified without reference to the content of the regulated speech;
3. Narrowly tailored to serve a compelling governmental interest; and
4. Limited to provide ample alternative options for the communication of the information;⁵

UK has also committed itself to upholding these principles in its written policies. University policy expressly guarantees students “the right to engage in discussion, to exchange thought and opinion, to speak, write, or print freely on any subject, and to join associations in accordance with the guarantees of federal or state Constitutions.”⁶ The policy also holds that “[f]reedom of expression includes the right to picket or demonstrate for a cause,” and makes clear that “[s]tudents shall not be disciplined for speech protected by the First Amendment to the U.S. Constitution.”⁷

The students’ expressive conduct here is wholly protected by the First Amendment, does not constitute unlawful fighting words or harassment, and cannot be investigated or restricted on the basis that some may find it offensive. The First Amendment protects the display of the middle finger.⁸ (Indeed, the display of the middle finger is so plainly

⁵ KY. REV. STAT. ANN. § 164.348(2) (2019)

⁶ *Code of Student Conduct*, UNIV. OF KY. (last visited Feb. 3, 2022), <https://www.uky.edu/studentconduct/right-free-expression>.

⁷ *Id.*

⁸ The Supreme Court has “long recognized that its protection does not end at the spoken or written word.” *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (holding that burning the American flag is expressive conduct protected by the First Amendment). “Nonverbal conduct constitutes speech if it is intended to convey a particularized message and the likelihood is great that the message will be understood by those who view it, regardless of whether it is actually understood in a particular instance in such a way.” *Burnham*, 119 F.3d at 674. Displaying the middle finger is expressive, with “a long, if not illustrious, history dating back to ancient Greece.” *O’Brien v. Borowski*, 461 Mass. 415, 428–29 (2012). “[T]he middle finger gesture serves as a nonverbal expression of anger, rage, frustration, disdain, protest, defiance, contempt, or even excitement at finding a perfect pair of shoes.” Ira P. Robbins, *Digitus Impudicus: The Middle Finger and the Law*, 41 U.C. DAVIS L. REV. 1403, 1407–08 (2008).

protected by the First Amendment that officials who penalize such expressive activity have been held personally liable for violating clearly established constitutional rights.⁹)

UK's investigation is inconsistent with decades of case law holding that government actors, including public universities like the University of Kentucky, cannot censor speech simply because it is offensive or vulgar to some.¹⁰

Regardless of whether UK's investigation matures into formal charges or sanctions against the students, the mere maintenance of an investigation into constitutionally protected speech can itself violate the First Amendment. When "an official's act would chill or silence a person of ordinary firmness from future First Amendment activities," that act violates the First Amendment.¹¹ Likewise, federal appellate courts have held that government investigations into protected expression violate the First Amendment.¹² This includes investigations by university officials.¹³

Finally, note that even critics of the students' expression have recognized it is plainly protected. Mark Harrington, president of the pro-life group Created Equal told local media today that he does not want UK to investigate the student protesters.

"Free speech is a cornerstone of our republic, and we oppose universities investigating students for their free expression," he told WTVQ. "[T]he university can play a role in teaching students to have respectful dialogue with those they disagree with."¹⁴

FIRE joins the voices on both sides of this protest, calling on UK to quickly reaffirm its laudable commitment to students' expressive rights. It must publicly rescind its promise to investigate these students for their peaceful demonstration.

⁹ See, e.g., *Brown v. Wilson*, No. 1:12-CV-1122, 2015 U.S. Dist. LEXIS 88871, at *12-14 (W.D. Tex. July 9, 2015) (qualified immunity denied where the plaintiff "firmly gave . . . the middle finger, the bird, whatever you want to call it").

¹⁰ See *Texas v. Johnson*, 491 U.S. at 414 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973) (Expression, "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.'").

¹¹ *Mendocino Env't Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).


¹² See *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) (holding that a government investigation into clearly protected expression chilled speech and therefore violated the First Amendment).

¹³ See, e.g., *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992) (implicit threat of discipline by university administrator in initiating formal investigation into faculty member's writings).

¹⁴ Erica Bivens, *UPDATE: Anti-Abortion Organization releases statement on UK investigation into students mocking pro-life display*, WTVQ, Feb. 3, 2022, <https://www.wtvq.com/update-anti-abortion-organization-releases-statement-on-uk-investigation-into-students-mocking-pro-life-display/>

Given the urgent nature of this matter, we request receipt of a response to this letter by the close of business tomorrow, Friday, February 4, 2022.

Sincerely,

A handwritten signature in black ink, appearing to read 'Alex Morey', with a stylized flourish at the end.

Alex Morey
Program Officer, Individual Rights Defense Program

Cc: Trisha Clement Montgomery, Dean of Students