



# FIRE

Foundation for Individual  
Rights and Expression

September 15, 2022

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

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

Dear President Oldham:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech, expression, and conscience, and other individual rights on campus, is concerned by Tennessee Technological University's punishment of student groups for hosting a drag show. While the event may have been offensive to some, it does not fall into any category of speech unprotected by the First Amendment, which bars Tennessee Tech from investigating or punishing protected expression. FIRE calls on Tennessee Tech to end its investigation of the student sponsors of the drag show, reinstate their canceled events, and promise to uphold students' First Amendment right to host expressive events.

**I. Tennessee Tech Investigates Student Groups, Cancels Their Events, Over Drag Show**

On August 20, 2022, Tennessee Tech's Backdoor Playhouse held a drag show titled "DRAG at the Backdoor."<sup>1</sup> Upper Cumberland Pride, a local LGBTQ+ rights advocacy organization, and two university-recognized student groups, Lambda Gay-Straight Alliance and Tech Players, hosted the show.<sup>2</sup> On September 7, a short video of spliced clips of the show began circulating

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<sup>1</sup> 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.

<sup>2</sup> Lambda Gay Straight Alliance seeks to "provide a network of support, safety, and unity for LGBTQ students on Tennessee Tech's campus," and Tech Players seek to "stimulate interest in dramatic activities, to provide a cultural advantage of a student oriented drama society." TENNESSEE TECH, *Student Organization List*, <https://www.tnitech.edu/engagement/orgs/list.php> [<https://perma.cc/VYV2-W9DE>].

on Twitter.<sup>3</sup> The video showed a dancer changing outfits and dancing to a music medley in front of an audience of adults and minors.<sup>4</sup> The video prompted condemnation online.

On September 8, your office released a statement explaining that you were “disturbed and dismayed about” the event, which you said does not “represent Tech’s values.”<sup>5</sup> Your office stated that student group “programming should not include obscene, lewd or explicit activities,” and “all public events scheduled on campus by these sponsoring organizations are cancelled pending a review.”<sup>6</sup> Your office added that this “investigation focuses on the inappropriate involvement of minors and a review of our policies and procedures.”<sup>7</sup>

## **II. The First Amendment Bars Tennessee Tech from Punishing Student Groups for Hosting Subjectively Offensive Events**

The First Amendment protects students’ right to host expressive events, even those university administrators or some members of society at large may find offensive. Accordingly, Tennessee Tech, as a public institution bound by the First Amendment, may not investigate or punish student groups for their expressive events.<sup>8</sup>

Drag shows, or a student group’s sponsorship of them, constitute expressive conduct. The freedom of expression enshrined in the First Amendment “does not end at the spoken or written word.”<sup>9</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.<sup>10</sup> 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>11</sup> Conduct is also considered expressive when it falls within a traditionally protected genre—such as art, theater, and dancing—even if it does not convey a “narrow, succinctly articulable

<sup>3</sup> @LandonStarbuck, TWITTER (Sept. 7, 2022), <https://twitter.com/LandonStarbuck/status/1567530842875957251> [<https://perma.cc/9EQR-DG46>].

<sup>4</sup> *Id.*

<sup>5</sup> Tennessee Tech Office of the President, *Statement on Backdoor Playhouse video* (Sept. 8, 2022), <https://www.tntech.edu/president/notices/statement.php> [<https://perma.cc/8AMB-KLEB>].

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *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). Additionally, state law requires Tennessee educational institutions to “be committed to giving students the broadest possible latitude to speak, write, listen, challenge, learn, and discuss any issue,” and uphold “the free exchange of ideas[.]” which may not “be suppressed because the ideas put forth are thought by some or even by most members of the institution’s community to be offensive, unwise, immoral, indecent, disagreeable, conservative, liberal, traditional, radical, or wrong-headed.” TENN. CODE ANN. § 49-7-2405(3), (6). Accordingly, Tennessee Tech is foreclosed from using “concerns about civility and mutual respect . . . as a justification for closing off the discussion of ideas, however offensive, unwise, immoral, indecent, [or] disagreeable.” *Id.*

<sup>9</sup> *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

<sup>10</sup> *Id.* at 404, 406.

<sup>11</sup> *Id.*

message.”<sup>12</sup> This is what protects the act of saluting or refusing to salute a flag,<sup>13</sup> wearing black armbands to protest war,<sup>14</sup> raising a “seditious” red flag,<sup>15</sup> burning an American flag,<sup>16</sup> picketing or leafletting,<sup>17</sup> and participating in a sit-in.<sup>18</sup>

Freedom of expression, likewise, protects student groups’ right to host expressive events. In *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*, the United States Court of Appeals for the Fourth Circuit overturned on First Amendment grounds a university’s sanctions on a fraternity for conducting an “ugly woman contest” with “racist and sexist” overtones.<sup>19</sup> The court held that the fraternity members who dressed in drag as “ugly” women and performed a skit intended to convey a message—both through their mode of dress and by performing in a theatrical skit—and were, therefore, protected by the First Amendment.<sup>20</sup> The court found that “some forms of entertainment are so inherently expressive as to fall within” the scope of freedom of expression “regardless of their quality,” as “[e]ven crude street skits come within the First Amendment’s reach.”<sup>21</sup>

The holding of *Iota Xi Chapter* reflects the First Amendment’s longstanding protection for expressive events some people nonetheless find offensive, such as live nude dancing,<sup>22</sup> certain musical or theatrical productions,<sup>23</sup> blackface performances,<sup>24</sup> and broadcast radio and motion pictures with potentially divisive content,<sup>25</sup> regardless of their informative or entertainment value.<sup>26</sup> Thus, like the fraternity in *Iota Xi Chapter*, Tennessee Tech’s student groups have the expressive right to host events you personally feel are “obscene, lewd or explicit.”<sup>27</sup>

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<sup>12</sup> *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 569 (1995).

<sup>13</sup> *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 633–34 (1943).

<sup>14</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969).

<sup>15</sup> *Stromberg v. California*, 283 U.S. 359, 369 (1931).

<sup>16</sup> *Johnson*, 491 U.S. at 414.

<sup>17</sup> *United States v. Grace*, 461 U.S. 171, 176 (1983).

<sup>18</sup> *Brown v. Louisiana*, 383 U.S. 131, 383 (1966).

<sup>19</sup> 993 F.2d 386, 389–90, 392 (4th Cir. 1993).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 389–90; see also *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973) (“[T]he 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.’”).

<sup>22</sup> *Barnes v. Glen Theatre*, 111 S. Ct. 2456, 2460 (1991).

<sup>23</sup> *Se. Promotions v. Conrad*, 420 U.S. 546, 557–58 (1975).

<sup>24</sup> *Berger v. Battaglia*, 779 F.2d 992, 999 (4th Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986).

<sup>25</sup> *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981).

<sup>26</sup> *Winters v. New York*, 333 U.S. 507, 510 (1948) (holding offensive magazine enjoyed First Amendment protection because “[t]he line between the informing and the entertaining is too elusive for the protection of that basic right. . . . What is one man’s amusement, teaches another’s doctrine.”); see also *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (“Giving offense is a viewpoint.”).

<sup>27</sup> *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (holding the First Amendment protects a parody advertisement depicting a pastor losing his virginity to his mother in an outhouse); *Cohen v. California*, 403 U.S. 15, 25 (1971) (holding the First Amendment protects the wearing of a jacket emblazoned with the words “Fuck the Draft” because “while the particular four-letter word being litigated here is perhaps more

By canceling Lambda Gay Straight Alliance’s and Tech Players’ upcoming events for hosting DRAG at the Backdoor, Tennessee Tech punishes these student groups because, according to your office, the event offended some at the university. This punishment—handed down weeks after the event and only after a video emerged online—is an unconstitutional response to subjectively offensive expression, which remains fully protected by the First Amendment. While the university’s investigation is purportedly focused on the “inappropriate involvement of minors and a review of our policies and procedures,” neither the presence of minors at the event nor any Tennessee Tech policy removes the groups’ expression from the First Amendment’s protection.

Additionally, by canceling these groups’ “public events scheduled on campus . . . pending a review,” Tennessee Tech engages in an unconstitutional prior restraint by preventing the groups from hosting expressive events before such expression can occur. Prior restraints are “the most serious and least tolerable infringement” of free speech, and are permissible only in the most severe circumstances, such as in the event of a demonstrated threat to national security.<sup>28</sup> Even if Tennessee Tech’s review of the groups’ events was permissible, any restraint on speech before it can occur must be resolved in a “prompt” manner that seeks to “minimize the deterrent effect” of an erroneous determination.<sup>29</sup> Tennessee Tech’s open-ended “review” of the groups and censorship of their events creates a profound chilling effect, wholly failing to comport with the First Amendment.

### **III. Conclusion**

The speech here is clearly protected. This principle does not shield the groups from every consequence of their 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.<sup>30</sup> However, the First Amendment limits the *types* of consequences that may be imposed and who may impose them. This investigation and cancelation of groups’ events serve no purpose but to unlawfully chill students’ expressive rights, and must end immediately.

We respectfully request receipt of a response to this letter no later than the close of business on September 22, 2022, confirming that Tennessee Tech has ended its investigation of Lambda Gay Straight Alliance and Tech Players, reinstated their events, and publicly promised to uphold students’ First Amendment right to host expressive events.

Sincerely,

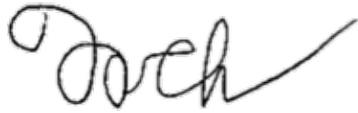
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distasteful than most others of its genre, it is nevertheless often true that one man’s vulgarity is another’s lyric”).

<sup>28</sup> *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976); *N. Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971).

<sup>29</sup> *Freedman v. Maryland*, 380 U.S. 51, 59 (1965) (striking down film licensing scheme because it “fails to provide adequate safeguards against undue inhibition of protected expression, and this renders the . . . requirement of prior submission of films to the Board an invalid previous restraint.”).

<sup>30</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927).

A handwritten signature in black ink, appearing to read "Zach". The signature is fluid and cursive, with a long, sweeping tail that extends to the right.

Zachary Greenberg  
Senior Program Officer, Student Organizations, Campus Rights Advocacy

Cc: Troy Perdue, University Counsel  
Katherine Williams, Dean of Students