



# FIRE

Foundation for Individual  
Rights and Expression

September 23, 2022

Sim Gill  
District Attorney  
35 East 500 South  
Salt Lake City, Utah 84111

**URGENT**

*Sent via U.S. Mail and Electronic Mail (districtattorney@slco.org)*

Dear District Attorney Gill:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech and other individual rights, is deeply concerned by the campus police department's arrest of University of Utah undergraduate Meredith Miller over a flippant social media post saying if the Utes didn't win their next football game she would detonate the school's nuclear reactor.<sup>1</sup> Her arrest, under Utah Code § 76-5-107.3 ("Threat of terrorism"), contravenes the First Amendment and thus should not result in any criminal charge or university punishment.

During a press conference, University of Utah Police Department Acting Police Chief Jason Hinojosa characterized Miller's statement, made on social media app Yik Yak, as "sort of a veiled threat" with a "likelihood of about as close to zero as you can get" that it would or could be carried out due to the reactor's practically impenetrable security.<sup>2</sup> He also acknowledged the remark could be "meant as a joke . . . given the wording of the actual post."<sup>3</sup>

These facts—combined with Miller's own assertions that she was, indeed, joking—place her expression firmly within the First Amendment's protection. Miller's release from custody on

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<sup>1</sup> Pat Reavy, *Student arrested, accused of making nuclear threat unless Utes won*, KSL.COM (Sept. 21, 2022), <https://www.ksl.com/article/50480786/student-arrested-for-allegedly-making-nuclear-threat-unless-utes-won>.

<sup>2</sup> Antonio Planas, *University of Utah student arrested in alleged threat to detonate school's nuclear reactor if football team lost, officials say*, NBC NEWS (Sept. 22, 2022), <https://www.nbcnews.com/news/us-news/university-utah-student-arrested-alleged-threat-detonate-schools-nucle-rcna48993>.

<sup>3</sup> *Id.*

the very night she was arrested further suggests police do not believe Miller’s post constituted an actual threat of terrorism.<sup>4</sup> She should not have been arrested in the first place.

Public entities, including your office, the University of Utah, and its campus police are bound by the First Amendment to protect all lawful student expression.<sup>5</sup> While some categories of speech—such as true threats—fall outside the First Amendment’s protection, Miller’s Yik Yak post cannot amount to a true threat unprotected by the First Amendment, for several reasons.

First, mere hyperbole cannot suffice as a true threat, which as defined by the Supreme Court in *Virginia v. Black*, requires 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.”<sup>6</sup> For example, in 1969, the Supreme Court held in *Watts v. United States* that a draftee’s statement during an anti-war protest that if “they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” was political hyperbole, not an unprotected true threat.

Second, combined with *Black*’s “seriousness” standard, any true threat analysis should require the speaker to possess the *subjective* intent to threaten. As interpreted by (among others) the United States Court of Appeals for the Tenth Circuit, whose decisions are binding on University of Utah, *Watts* and *Black* require proof of a speaker’s subjective intent to make a threat.<sup>7</sup> Yet Miller’s statement fails that test because—as Chief Hinojosa acknowledged—she offered her statement in jest.

Even using an objective test applied by other federal circuits (though, again, Utah courts are bound by the Tenth Circuit), which evaluates whether a reasonable person would believe a speaker intended to threaten, Miller’s post would not qualify as a true threat. In fact, the surrounding circumstances strongly indicate the post was not a “serious” expression of an intent to commit violence—so much so that even Chief Hinojosa expressed reluctance in arresting Miller for the post. First, the post appeared on Yik Yak, a platform known for irreverent banter, and was consistent with that ethic, calling for an absurdly high gravity of harm (nuclear disaster) for a trivial reason (losing a football game). Second, an objective listener familiar with the campus would know the reactor is a device that simply cannot be “detonated”—and, in fact, is one with “energy levels . . . so low that students can actually stand

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<sup>4</sup> Analis Bailey, *University of Utah student arrested for allegedly making nuclear threat if football team lost USA*, TODAY SPORTS (Sept. 22, 2022), <https://sports.yahoo.com/university-utah-student-arrested-allegedly-172938937.html>.

<sup>5</sup> *Healy v. James*, 408 U.S. 169, 180 (1972) (applying the First Amendment to Central Connecticut State College, and holding that the “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.’”).

<sup>6</sup> *Virginia v. Black*, 538 U.S. 343, 359 (2003) (emphasis added).

<sup>7</sup> *United States v. Heineman*, 767 F.3d 970, 975 (10th Cir. 2014) (“[T]he First Amendment . . . require[s] the government to prove in any true-threat prosecution that the defendant intended the recipient to feel threatened.”).

close by while it operates.”<sup>8</sup> Third, a reasonable observer would equally know it is a device protected by near-impenetrable security whose breach is certainly beyond the capabilities of a lone 21-year-old undergraduate student. These circumstances confirm that Miller’s statement cannot objectively be construed as a serious expression of intent.

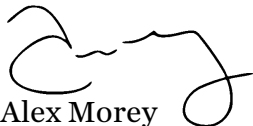
Chief of Police Hinojosa’s press statement that Utah’s “threat of terrorism” statute, under which Miller was arrested, “doesn’t distinguish between jokes or terroristic threats that are not attempted or not possible,” elides what the law actually requires.<sup>9</sup> While the statute ends with a caveat that it “is not a defense under this section that the actor did not attempt to carry out or was incapable of carrying out the threat,” it first requires—as a threshold issue, and to be consistent with the First Amendment—that the speaker act with intent to threaten.<sup>10</sup> A joke, by definition, is *unserious* and lacks the intentionality required by law to constitute a true threat.

Miller offered her post as a joke, and she subjectively had no intention of threatening anyone. Likewise, a reasonable person reading the post would understand her intent was not to threaten, but to joke about just how badly she wanted the Utes to win, by describing the outlandish lengths to which she would go to show her disappointment in a loss.

We appreciate that universities have, particularly in recent months, faced serious threats of violence intended to disrupt and intimidate students, faculty, and visitors. However, arresting Miller for what the public understands to be a remark in jest, diminishes the seriousness of true threats leveled against universities across the country, and places the state on a collision course with the First Amendment. We therefore call on the Salt Lake County District Attorney to decline to charge Miller for her protected speech.

Given the urgent nature of this matter, we request a substantive response to this letter no later than the close of business on Wednesday, September 28, 2022.

Sincerely,



Alex Morey  
Director, Campus Rights Advocacy

Cc: Taylor R. Randall, University of Utah President  
Jason Hinojosa, University of Utah Police Department Acting Chief of Police

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<sup>8</sup> John Hollenhorst, *University of Utah has own nuclear reactor tucked away*, DESERET NEWS (Mar. 16, 2011), <https://www.deseret.com/2011/3/16/20370414/university-of-utah-has-own-nuclear-reactor-tucked-away>. Leaving aside the First Amendment barriers to charging Miller, the reactor’s characteristics make it doubtful that Miller’s post would even satisfy Utah Code § 76-10-401(6)(a)’s definition of “weapon of mass destruction,” as it is not “designed”—or even able—“to release radiation or radioactivity at a level dangerous to human life,” and only has the power to “heat . . . water up from about 65 degrees up to maybe 80 degrees after operating for many hours.”

<sup>9</sup> University of Utah Communications, *University statement: Reactor detonation bomb threat* (Sept. 22, 2022), [<https://perma.cc/6Y5G-5JDY>].

<sup>10</sup> Utah Code § 76-5-107.3 [<https://perma.cc/D3MW-ELR8>].