FIRE
Foundation for Individual Rights and Expression

January 16, 2023

Michael A. Fitts
Office of the President
Tulane University
6823 St. Charles Avenue
New Orleans, Louisiana 70118

URGENT

Sent via U.S. Mail and Electronic Mail (maf@tulane.edu)

Dear President Fitts:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,[1] is concerned by Tulane University's investigation of student Sarah Ma for writing an opinion piece expressing support for rapper Ye (formerly known as Kanye West). While some may consider Ma's article deeply offensive, it is clearly protected by Tulane's strong commitment to freedom of expression. Therefore, Tulane must immediately end its investigation without punishing Ma.

On January 11, the *College Dissident* published an opinion article by Ma titled "Ye Did Nothing Wrong."[2] In the piece, Ma argues that rapper West, who legally changed his name to Ye in 2021, was right to wear a jacket reading "White Lives Matter" and had reason to say he was going to go "death con 3 On JEWISH PEOPLE[.]" [3] She also argued Ye was following the 10 Commandments by saying he loves Hitler.[4] Throughout the piece, Ma expresses her opinion

[1] For more than 20 years, FIRE has defended freedom of expression, conscience, and religion, and other individual rights on America's college campuses. You can learn more about our recently expanded mission and activities at thefire.org.

[2] Sarah Ma, *Ye Did Nothing Wrong*, COLLEGE DISSIDENT (Jan. 11, 2023), https://collegedissident.com/ye-wrong. This 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.

[3] *Id.*

[4] *Id.*

about various reasons that Ye was, as Ma writes, "canceled." On January 12, Tulane announced that the "Office of Student Conduct is reviewing this matter."[5]

While Tulane is a private school not bound by the First Amendment to protect students' expressive rights, it has independently "committed to an environment in which a variety of ideas can be freely expressed and critically examined."[6] Tulane also makes clear its harassment policy cannot be used to curb these rights and, instead, "shall be applied in a manner that protects academic freedom and freedom of expression," including but not limited to "expression of ideas, however controversial, in the classroom setting, academic environment, university-recognized activities, or on the campus."[7] These policies represent a contractual commitment on the part of Tulane to respect the expressive freedoms of its students, including Ma.[8]

Tulane has not made publicly clear the basis under which it is investigating. But Tulane may not justify disciplining Ma on the basis that her article amounts to harassment, which "must include something beyond mere expression of views, words, symbols or thoughts that some person finds offensive."[9] In *Davis v. Monroe County Board of Education*, the Supreme Court set forth a strict definition of student-on-student (or peer) harassment.[10] In order for student conduct, including expression, to constitute actionable harassment, it must be (1) unwelcome, (2) discriminatory on the basis of gender or another protected status, and (3) "so severe, pervasive, and objectively offensive that it can be said to deprive the victim[] of access to the educational opportunities or benefits provided by the school."[11]

Here, even if Ma's article was objectively offensive and discriminatory on the basis of a protected status, there is no credible argument it has deprived any students of access to educational opportunities or benefits. The article expresses certain viewpoints—that Ye had reason to want to go "death con 3" on Jewish people and that Ye should not have been

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[5] Email from Erica Woodley, Assoc. Vice President & Dean of Students, Student Resources and Support Services, Tulane Univ., to Tulane Students (Jan. 12, 2023, 8:17 PM), *available at* https://collegedissident.com/tulane-ye.

[6] *Demonstration Guidelines*, TULANE UNIV., https://campusservices.tulane.edu/content/demonstration-guidelines (last visited Jan. 15, 2023).

[7] *Equal Opportunity/Anti-Discrimination Policies*, TULANE UNIV., https://r6phtc.sph.tulane.edu/wp-content/uploads/2020/02/EO-Policy.-July-2017.pdf (last visited Jan. 15, 2023).

[8] *Guidry v. Our Lady of the Lake Nurse Anesthesia Program Through Our Lady of the Lake Coll.*, 170 So. 3d 209, 213-14 (La. Ct. App. 2015) ("It is generally held across the jurisdictions of the United States that the basic legal relation between a student and a private university or college is contractual in nature. The terms of the contract are rarely delineated; however, it is generally accepted that the catalogs, bulletins, circulars, and regulations of the university made available to the student become part of the contract. A contract between a private institution and a student confers duties upon both parties, which cannot be arbitrarily disregarded and may be judicially enforced.").

[9] U.S. Dep't of Educ., Dear Colleague Letter from Gerald A. Reynolds, Assistant Sec'y for Civil Rights (July 28, 2003), https://www2.ed.gov/about/offices/list/ocr/firstamend.html.

[10] 526 U.S. 629 (1999). Again, while Tulane is a private institution, it has made clear affirmative commitments to protect students' right to freedom of expression. Students may reasonably expect the "freedom of expression" Tulane protects to fall in line with the First Amendment's protections.

[11] *Id.* at 650.

"canceled"—but it does not reference any student at Tulane, nor does it target any student. Additionally, Tulane policy makes clear that "the perceived offensiveness of a single verbal or written expression, standing alone," cannot be sufficient to constitute hostile environment harassment.[12]

Tulane has a responsibility to protect students from conduct that meets the requirements for actionable discrimination or harassment, but subjectively offensive speech, without more, will not meet this high legal standard. As a normative matter, the principle of freedom of speech does not exist to protect only or even primarily non-controversial or unobjectionable expression. Rather, it exists precisely to protect speech that some or even most members of a community may find objectionable.

The Supreme Court has repeatedly, consistently, and clearly held that expression may not be restricted on the basis that others take offense at it.[13] This core principle of expressive freedom is why the authorities cannot outlaw burning the American flag,[14] punish wearing a jacket emblazoned with "Fuck the Draft,"[15] penalize cartoons depicting a pastor losing his virginity to his mother in an outhouse,[16] or disperse civil rights marchers out of fear that "muttering" and "grumbling" white onlookers might resort to violence.[17] In ruling that the First Amendment protects protesters holding insulting signs outside of soldiers' funerals, the Court reiterated this fundamental principle, remarking that "[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[18] So too has Tulane chosen to protect even objectionable speech by promising to respect students' freedom of expression.

Notably, even if Tulane finds in Ma's favor, its investigation itself violates its expressive rights promises. The question is not whether formal punishment is meted out, but whether the institution's actions in response "would chill or silence a person of ordinary firmness[.]"[19] Investigations into protected expression may meet this standard.[20] For example, a public university launched an investigation into a tenured faculty member's offensive writings on race and intelligence, announcing an *ad hoc* committee to review whether the professor's expression—which the university's leadership said "ha[d] no place at" the college—constituted

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[12] TULANE UNIV., CODE OF STUDENT CONDUCT, https://tulane.app.box.com/s/4lvkm3dqkuxxct56f403nnnpgkrz44ww [https://perma.cc/3UWT-NR63]

[13] *See People v. Dietze*, 75 N.Y.2d 47, 52 (N.Y. 1989) (striking down, on First Amendment grounds, a penal law proscribing the "use of 'abusive' language with the intent to 'harass' or 'annoy' another person") (internal citations omitted); *see also Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973); *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 661 (1st Cir. 1974).

[14] *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").

[15] *Cohen v. California*, 403 U.S. 15, 25 (1971).

[16] *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988).

[17] *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

[18] *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).

[19] *Mendocino Envtl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

[20] *See, e.g.*, *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000).

"conduct unbecoming of a member of the faculty."[21] In this case, the United States Court of Appeals for the Second Circuit determined that an investigation itself constituted an implicit threat of discipline, and the resulting chilling effect constituted a cognizable First Amendment harm.[22]

Here, the student code of conduct includes significant sanctions—ranging from a written reprimand to suspension or expulsion,[23] each of which is sufficient to chill protected expression,[24] as an investigation sends the message that speech similar to Ma's may be punished in the future. A quick, preliminary review of Ma's speech is all that is necessary to confirm it is protected, obviating the need for any investigation (or reason to even notify the student that the inquiry and summary disposition of the complaint occurred).

While Ma's speech is clearly protected by Tulane's promises of free expression, this principle does not shield her from every consequence arising from her expression—including criticism by students, the broader community, or even the university itself. Criticism is a form of "more speech," the preferred alternative to censorship.[25] But because Tulane has made strong promises to respect students' expressive rights, it cannot subject Ma to institutional punishment for simply exercising that right.

Given the urgent nature of this matter, we request a substantive response to this letter no later than the close of business on Monday, January 23, 2022, confirming that Tulane has ended its investigation and will not pursue disciplinary sanctions in this matter.

Sincerely,

Sabrina Conza
Program Officer, Campus Rights Advocacy

Cc: Erica Woodley, Associate Vice President & Dean of Students, Student Resources and Support Services

[21] *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992).

[22] *Id.* at 89–90.

[23] TULANE UNIV., *supra* note 12.

[24] *Speech First, Inc. v. Fenves*, No. 19-50529, 2020 U.S. App. LEXIS 34087, at *28–30 (5th Cir. Oct. 28, 2020). *See also Hines v. Gomez*, 108 F.3d 265, 269 (9th Cir. 1997) ("The injury asserted is the retaliatory accusation's chilling effect on [plaintiff's] First Amendment rights . . . . [F]ailure to demonstrate a more substantial injury does not nullify [plaintiff's] retaliation claim.").

[25] *Whitney v. California*, 274 U.S. 357, 377 (1927).