



# FIRE

Foundation for Individual  
Rights and Expression

January 31, 2023

Stuart R. Bell  
Office of the President  
University of Alabama  
Box 870100  
Tuscaloosa, Alabama 35487

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

Dear President Bell:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,<sup>1</sup> is concerned by the University of Alabama's statement that certain views cannot be expressed on campus because they violate UA's "Capstone Creed." Public universities like UA cannot ban speech others may find offensive to uphold "conventions of decency."<sup>2</sup>

On January 26, UA was notified of chalk on its sidewalks reading "#YeIsRight Friday 1/27" and "America First." The messages were reportedly part of an announcement that activist Dalton Clodfelter was coming to campus.<sup>3</sup> The same day, UA announced it was removing the chalk and investigating. It also condemned the messages for violating the university's "Capstone Creed, our campus culture and our core values."<sup>4</sup>

While UA has the right to remove the messages for violating its Grounds Use Policies relating to chalking,<sup>5</sup> UA did not invoke that policy when announcing its investigation. Instead, administrators said the *content* of the messages was problematic.

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<sup>1</sup> 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](https://thefire.org).

<sup>2</sup> *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

<sup>3</sup> The recitation of facts here reflects our understanding of the pertinent facts based on public reports. We appreciate that you may have additional information to offer and invite you to share it with us.

<sup>4</sup> The Univ. of Alabama (@UofAlabama), TWITTER (Jan. 26, 2023), <https://twitter.com/UofAlabama/status/1618666118906023937>.

<sup>5</sup> The chalk messages appear to have been written on the sidewalks of Shelby Lawn, which the Grounds Use Policy prohibits. "Chalking is prohibited on The University of Alabama Student Center Plaza, Lawn and Crimson Promenade. Chalking is only permitted on natural gray concrete sidewalks and streets that are

UA may criticize the messages, but it must comply with its First Amendment obligations, including by allowing subjectively offensive expression, so long as it does not violate reasonable time, place, and manner restrictions. Whether speech is protected by the First Amendment is “a legal, not moral, analysis.”<sup>6</sup>

It is well-established that the First Amendment does not make an exception for hateful expression, and equally well-established that it constrains public universities in penalizing student expression. While some examples of hateful expression may not be protected speech because they fall into other exceptions to the First Amendment (a true threat, for example), the Supreme Court has repeatedly held there is no categorical exception for expression others view as hateful.<sup>7</sup> The Court recently affirmed this principle by refusing to establish a limitation on speech viewed as “hateful” or demeaning “on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground.”<sup>8</sup>

This principle does not waver in the context of public universities, whether the speech is a “heated exchange of views” on race<sup>9</sup> or a “sophomoric and offensive” skit depicting women and minorities in derogatory stereotypes.<sup>10</sup> If authorities could punish expression deemed hateful, it would imperil a broad range of political speech and academic inquiry, and such an exception would undoubtedly be used against those it intended to protect. For example, when the University of Michigan briefly enacted an unconstitutional prohibition against hate speech, it was used almost universally to punish students of color who offended white students.<sup>11</sup>

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subject to being washed by the rain. No chalking can occur on sidewalks or building entrances that are covered by a shelter of any type. Chalking is not permitted on any type of brick or concrete pavers. Chalking is not allowed on walls, doors, windows, trees or any vertical surfaces. The type of chalk used must be washable.” Time, place, and manners restrictions, like the aforementioned policy, must be applied in content-neutral manner and may not target specific viewpoints. *Grounds Use Policies*, UNIV. OF ALA., <https://uastudentcenter.sa.ua.edu/advertising-and-promotion/grounds-use-policies> [<https://perma.cc/S77H-J6NH>].

<sup>6</sup> *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 821 (S.D. Iowa 2019).

<sup>7</sup> See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down an ordinance that prohibited placing on any property symbols that “arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender”).

<sup>8</sup> *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017).

<sup>9</sup> See, e.g., *Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 705 (9th Cir. 2009) (faculty member’s use of system-wide listserv to send “racially-charged emails” was not unlawful harassment, as the First Amendment “embraces such a heated exchange of views,” especially when they “concern sensitive topics like race, where the risk of conflict and insult is high”).

<sup>10</sup> *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 388–92 (4th Cir. 1993).

<sup>11</sup> “[M]ore than twenty cases were brought by whites accusing blacks of racist speech; the only two instances in which the rule was invoked to sanction racist speech involved punishment of speech by a black student and by a white student sympathetic to the rights of black students, respectively; and the only student who was subjected to a full-fledged disciplinary hearing was a black student charged with homophobic and sexist expression.” Thomas A. Schweitzer, *Hate Speech on Campus and the First Amendment: Can They Be Reconciled?*, 27 CONN. L. REV. 493, 514 (1995) (citing Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 DUKE L.J. 484, 557–58 (1990)); see also *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 869 (E.D. Mich. 1989) (striking down the university’s speech code as unconstitutional).

FIRE does not object to UA's reasonable removal of messages that violate viewpoint-neutral and neutrally-applied policies regulating chalking on campus. But UA must make clear to students that they will not be punished for subjectively offensive expression.

UA's statement implies it can and will investigate and/or punish messages deemed to violate UA's "core values." As to the former, the harm caused by investigations alone is not *de minimis*—investigations into protected expression frequently constitute implicit threat of discipline, and the resulting chilling effect can constitute cognizable First Amendment harm.<sup>12</sup> The implication that students could be investigated for similar messages would very likely "chill or silence a person of ordinary firmness from future First Amendment activities."<sup>13</sup> If UA can investigate chalking that "#YeIsRight" could it investigate a student for tweeting the same message or saying it in class?

FIRE urges UA to confirm to students that it cannot and will not investigate or punish similar subjectively offensive speech in the future. Again, UA may criticize views the university disagrees with. Criticism is a form of "more speech," the remedy to offensive expression that the First Amendment prefers to censorship.<sup>14</sup> However, the First Amendment limits the *types* of consequences that may be imposed and who may impose them. At a public institution, administrators cannot use state power to censor controversial views.

Given the urgent nature of this matter, we request a substantive response to this letter no later than the close of business on Monday, February 13, 2023, making clear that students may express themselves even if others are offended.

Sincerely,



Sabrina Conza  
Program Officer, Campus Rights Advocacy

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<sup>12</sup> *Levin v. Harleston*, 966 F.2d 85, 89–90 (2d Cir. 1992).

<sup>13</sup> *Mendocino Env'tl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

<sup>14</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927).