



# FIRE

Foundation for Individual  
Rights and Expression

March 9, 2023

Shari McMahan  
Office of the President  
Eastern Washington University  
214 Showalter Hall  
Cheney, Washington 99004

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

Dear President McMahan:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,<sup>1</sup> is concerned by Eastern Washington University's decision to block Twitter users who post tweets critical of EWU, and by the university's apparent misunderstanding of its First Amendment obligations. When a public institution like EWU opens an online forum for commentary, the exclusion of disfavored views or speakers from those spaces violates the First Amendment.

## **I. EWU Blocks, Then Unblocks, Professor From its Official Twitter Account**

On January 31, *The Spokesman-Review* reported that EWU history professor Larry Cebula had been blocked by the official EWU Twitter account, @EWUEagles, for nearly a year after posting tweets critical of the university.<sup>2</sup>

EWU officials admitted to blocking Cebula in the spring of 2022 after he posted tweets the school considered "defamatory."<sup>3</sup> As an example, EWU Director of Communications & Media Relations David Meany pointed to a May 2022 tweet:

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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> Emry Dinman, *Eastern Washington University professor questions university's move to block him after critical tweets*, THE SPOKESMAN-REVIEW (Jan. 31, 2023), <https://www.spokesman.com/stories/2023/jan/31/eastern-washington-university-professor-questions->. Our understanding of the pertinent facts is derived from public reporting. We appreciate that you may have additional information to offer and invite you to share it with us.

<sup>3</sup> *See id.*

For those following along at home, #EWU is still a dumpster fire, caused by the admin gutting every campus office to find even more money for the football team. Campus offices at half-staff, impossible to order equipment or hire student workers or get support for essential tasks.<sup>4</sup>

Meany claimed that Cebula’s “tweet was inaccurate and could harm EWU’s reputation and enrollment” and that “it was the language used, not what he was tweeting about that led us to block him.”<sup>5</sup> Meany said the school stands by its actions and that “EWU will continue to follow its social media policy.”<sup>6</sup>

EWU’s social media policy states that:

EWU reserves the right to monitor all content posted to its social media sites and may remove any content including, but not limited to, content that it deems discriminatory; harassing; threatening; obscene; defamatory, slanderous, false, or misleading; a violation of copyright or privacy laws, a violation of Washington State Ethics or privacy laws, or otherwise injurious or illegal.<sup>7</sup>

## **II. EWU’s Blocking of Cebula and Others on Social Media Violates the First Amendment**

EWU’s actions in response to Cebula’s online speech violate the First Amendment, under which the university has no authority to censor disfavored expression in the online public forums it creates, no matter how “inaccurate” or potentially harmful to its reputation the university considers that expression.

### ***A. Blocking Cebula from the @EWUEagles Account Amounts to Unconstitutional Viewpoint Discrimination***

It has long been settled law that the First Amendment is binding on the decisions and actions of public institutions of higher education like EWU,<sup>8</sup> including those not only bearing on speech within physical forums, but also expression in interactive, online forums. Specifically, “social media is entitled to the same First Amendment protections as other forms of media.”<sup>9</sup>

<sup>4</sup> Dr. Larry Cebula (@LarryCebula), TWITTER (May 22, 2022, 4:38 AM), <https://twitter.com/larrycebula/status/1528294117884698625> [<https://perma.cc/392W-33UB>].

<sup>5</sup> Dinman, *supra* note 2. Meany also claimed that Cebula had posted another tweet about EWU football players, but no such tweet appears on Cebula’s Twitter feed.

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

<sup>7</sup> *Policy 203-04: Social Media*, EAST. WASHINGTON UNIV. (May 19, 2011), <https://inside.ewu.edu/policies/knowledge-base/ewu-203-04-social-media> [<https://perma.cc/5GNT-KHRM>].

<sup>8</sup> *Healy v. James*, 408 U.S. 169, 180 (1972).

<sup>9</sup> *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019), vacated as moot sub nom. *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220 (2021).

As the Supreme Court has observed, “in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views,” but the answer today is clear: “It is cyberspace . . . and social media in particular.”<sup>10</sup>

As the United States Court of Appeals for the Ninth Circuit—the decisions of which are binding on EWU—has held, government actors’ social media pages are public forums governed by First Amendment protections.<sup>11</sup> Accordingly, any restrictions on access to or content on these interactive spaces must be “narrowly drawn to achieve a compelling state interest,” and viewpoint discrimination is impermissible, even if there are other avenues for users to express themselves.<sup>12</sup>

The @EWUEagles Twitter account is an official account of a government entity. The username invokes the university’s name and mascot, the account bio exhorts users to “[f]ollow us for events, announcements and connections to other EWU twitter [sic] channels,” and the account is actively used to communicate with members of the EWU community and convey information about happenings at the school. Further, as Meany’s comments to the media indicate, the account is operated by university staff. Consequently, the account’s administration must comply with the First Amendment.

### ***B. EWU’s Social Media Policy is Unconstitutional***

The categories of prohibited speech enumerated in EWU’s social media policy include expression protected by the First Amendment, sweeping well beyond the narrow categories of unprotected speech. The First Amendment “generally prevents government from proscribing speech . . . or even expressive conduct,”<sup>13</sup> unless it falls within certain well-defined categories,

<sup>10</sup> *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

<sup>11</sup> *Garnier v. O’Connor-Ratcliff*, 41 F.4th 1158, 1177–78 (9th Cir. 2022); *see also, e.g., Windom v. Harshbarger*, 396 F. Supp. 3d 675 (N.D.W. Va. 2019) (First Amendment challenge survives motion to dismiss where constituent blocked from legislator’s “politician” Facebook page); *One Wis. Now v. Kremer*, 354 F. Supp. 3d 940 (W.D. Wis. 2019) (granting summary judgment to nonprofit entity blocked on Twitter by state assembly members); *Leuthy v. LePage*, No. 17-cv-00296, 2018 U.S. Dist. LEXIS 146894, \*36–43 (D. Me. Aug. 29, 2018) (governor’s Facebook page was limited public forum); *Dingwell v. Cossette*, 327 F. Supp. 3d 462 (D. Conn. 2018) (applying *Knight* in holding critic blocked from police Facebook page sufficiently alleged his First Amendment rights were violated).

<sup>12</sup> *Knight*, 928 F.3d at 238–39; *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 575 (S.D.N.Y. May 23, 2018) (upheld on appeal by the Second Circuit, *see id.*) (quoting, in part, *Int’l Soc’y for Krishna Consciousness, Inc., v. Lee*, 505 U.S. 672, 678–79 (1992)); *see also Davison v. Randall*, 912 F.3d 666, 682 n.3, 686–88 (4th Cir. 2019) (“interactive component” of county political figure’s Facebook page, “in which the public can post comments, reply to posts” and “like” comments and posts was a public forum, and politician unconstitutionally blocked her constituent because of his views); *Lewis v. Jones*, 440 F. Supp. 3d 1123 (E.D. Cal. 2020) (issuing preliminary injunction ordering sheriff to unblock critics from Facebook page, noting evidence of viewpoint discrimination where sheriff deleted critical posts by Black Lives Matter (BLM) member and blocked her after she commented on a post in which the sheriff expressly criticized her and BLM); *Price v. City of New York*, No. 15-cv-5871, 2018 U.S. Dist. LEXIS 105815, \*25–46 (S.D.N.Y. June 25, 2018) (where NYPD precinct blocked Twitter user, whether the forum was a “public, designated, or nonpublic forum” was immaterial, as “viewpoint discrimination that results in the intentional, targeted expulsion of individuals . . . is unlawful in *any* forum,” including nonpublic forums) (emphasis in original).

<sup>13</sup> *R.A. V. v. St. Paul*, 505 U.S. 377, 382 (1992).

such as obscenity, defamation, fraud, and incitement.<sup>14</sup> Outside of the narrow universe of categorically unprotected expression, “[c]ontent-based regulations are presumptively invalid.”<sup>15</sup> EWU’s policy threatens protected speech—including social and political commentary that lies at the core of the First Amendment—that an administrator could subjectively deem “discriminatory,” “harassment,” “false or misleading,” or “injurious.”<sup>16</sup>

Under EWU’s policy, student and faculty online expression may be burdened simply because it is offensive to administrators or others. As a result, the policy permits censorship of speech even if it consists of views on important political and social issues, such as governmental administration and the allocation of public resources. This result is at odds with the Supreme Court’s recognition that “speech concerning public affairs is more than self-expression; it is the essence of self-government,” reflecting “our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”<sup>17</sup>

Further, the EWU policy’s lack of specificity regarding what speech could be considered “discriminatory” or “injurious” leaves ambiguity and does not provide faculty and students with a “reasonable opportunity to know what is prohibited, so that [they] may act accordingly.”<sup>18</sup> This leaves unbridled discretion in the hands of EWU administrators to determine what speech is or is not permitted, based on inscrutable criteria such as “the language used” in particular messages. Granting government officials such broad discretion “opens the way to arbitrary suppression of particular points of view,” in violation of the First Amendment.<sup>19</sup> The application of the policy to suppress Cebula’s speech, consisting of pointed criticism of a public university’s management of its resources, demonstrates the ease with which the policy reaches protected expression.

EWU’s social media policy does not provide a constitutional basis for the censorship of student or faculty expression in online public forums created by the university. By blocking Cebula—and, presumably, other students and faculty—pursuant to an arbitrary social media policy, EWU violated the First Amendment. The continued enforcement of this policy unconstitutionally chills the expressive rights of the entire EWU community and must immediately cease.

### **III. Conclusion**

By virtue of their status as government entities, public universities necessarily open themselves up to criticism—even strident criticism—from faculty, students, politicians, and the general public. Administrators may respond to criticism with counterspeech or choose to

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<sup>14</sup> See *United States v. Stevens*, 559 U.S. 460, 468–69 (2010).

<sup>15</sup> *R.A. V.*, 505 U.S. at 382.

<sup>16</sup> Policy 203-04, *supra* note 7.

<sup>17</sup> *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (internal quotations omitted).

<sup>18</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

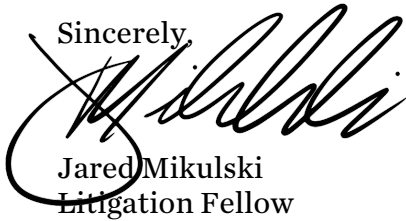
<sup>19</sup> *Crowder v. Hous. Auth. of Atlanta*, 990 F.2d 586, 591 (11th Cir. 1993); see also *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009) (en banc).

ignore it, but they may not, consistent with the First Amendment, wield the power of censorship to silence their critics.

FIRE calls on EWU to immediately unblock all social media users it has previously blocked under its unconstitutional social media policy, affirm that it will no longer misuse its policies to censor critics, and revise its social media policy to comply with its legal obligations under the First Amendment. FIRE would be happy to work with you on this revision.

We request receipt of a response to this letter no later than the close of business on March 24, 2023.

Sincerely,

A handwritten signature in black ink, appearing to read "Jared Mikulski", is written over the word "Sincerely,". The signature is fluid and cursive, with a large loop at the end.

Jared Mikulski  
Litigation Fellow

Cc: Jay J. Manning, Chair, Board of Trustees of Eastern Washington University  
Barb Richey, Vice President & Executive Director of University Advancement  
David Meany, Director of Communications & Media Relations