FIRE
Foundation for Individual Rights and Expression

April 6, 2023

Lynn Mahoney, Ph.D.
Office of the President
San Francisco State University
1600 Holloway Avenue
San Francisco, California 94132

URGENT

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

Dear President Mahoney:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,[1] is concerned by a report that San Francisco State University is investigating history professor Maziar Behrooz following a student complaint that he showed a drawing of the Islamic prophet Muhammad in a class session about the history of the Islamic world between 500 and 1700.[2] Behrooz is reportedly required to meet with administrators early this month.[3]

As a public institution bound by the First Amendment,[4] SFSU's actions and decisions—including the pursuit of disciplinary sanctions[5]—must not violate faculty expressive freedoms, including academic freedom to determine whether and how to introduce or approach material that may be challenging, upsetting, or even deeply offensive to some students. As such, SFSU

[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] Emma Pettit, *Power Shift: The student-professor dynamic has changed. That makes faculty members nervous*, CHRON. OF HIGHER EDUC. (Apr. 5, 2023), https://www.chronicle.com/article/power-shift.

[3] *Id.* The recitation of facts here reflects our understanding of the pertinent facts based on public information. We appreciate that you may have additional information to offer and invite you to share it with us.

[4] *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).

[5] *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

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cannot take adverse action against faculty, including initiating an investigation, with the implication of potential punishment, for exercising the pedagogical autonomy to display instructionally relevant material in the classroom, regardless of whether that material offends any students.

An instructor's right to navigate difficult material—like whether to display a historical painting even though some Muslims believe Muhammad "should not be pictured in any way"[6]—falls well within the First Amendment's protection of academic freedom and our nation's broader commitment to it. In warning against "laws that cast a pall of orthodoxy over the classroom," the Supreme Court has called academic freedom "a special concern to the First Amendment" and a principle "of transcendent value to all of us and not merely to the teachers concerned."[7]

Academic freedom necessitates that faculty members receive substantial breathing room to determine how to approach subjects and materials relevant to their courses, rather than allowing administrators, students, legislators, or outside authorities to unduly influence those decisions. Pedagogically relevant material may include words, concepts, subjects, or discussions that some, many, or even most students find upsetting or uncomfortable, including displaying materials that may offend those who practice a certain religion. Faculty must be free of institutional restraints in attempting to confront and examine complex issues, as was Behrooz in teaching Islamic history.

Courts have expressly held that matter widely perceived as offensive is protected by academic freedom when used in pedagogically-relevant manner on a college campus. In *Hardy v. Jefferson Community College*, for example, the U.S. Court of Appeals for the Sixth Circuit unequivocally rejected as "totally unpersuasive" the argument "that teachers have no First Amendment rights when teaching, or that [authorities] can censor teacher speech without restriction."[8] Hardy, a white adjunct instructor of "Introduction to Interpersonal Communication," as part of his lecture to students on "language and social constructivism," discussed how "language is used to marginalize minorities and other oppressed groups in society."[9] Students, solicited by the instructor for examples, suggested "lady," "girl," "faggot," "nigger," and "bitch."[10] The instructor's use of those words as "illustrations of highly offensive, powerful language" was "clearly" relevant to exploring the "social and political impact of certain words," and was not "gratuitously used . . . in an abusive manner."[11] Holding the First Amendment protected the speech, the court explained that expression, "however repugnant,"

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[6] *Have pictures of Muhammad always been forbidden?*, BBC (Jan. 15, 2015), https://www.bbc.com/news/magazine-30814555.

[7] *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). Although Hamline is not bound by the First Amendment, students and faculty will reasonably interpret the university's commitment to freedom of expression and academic freedom to be in line with the First Amendment's protections.

[8] 260 F.3d 671, 680 (6th Cir. 2001).

[9] *Id.* at 674.

[10] *Id.* at 675.

[11] *Id.* at 675, 679.

if "germane to the classroom subject matter," is speech on "matters of overwhelming public concern—race, gender, and power conflicts in our society."[12]

To this end, displaying an image of Muhammad may similarly deeply offend some. But as it was pedagogically relevant to the course at issue, the First Amendment's protection of academic freedom precludes punishing it.

Additionally, the instructor's display of the image does not constitute discriminatory harassment. For conduct (including expression) to constitute actionable harassment, it must be (1) unwelcome, (2) discriminatory on the basis of a protected status like race or gender, *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."[13] The image was shown only once and in a pedagogically relevant context in a history course—neither targeted at any individual nor used to criticize or discriminate against Muslims or their ideology. Additionally, SFSU cannot construe the instructor's pedagogical choice as sufficient to deprive a reasonable person of the university's educational opportunities or benefits, as this would mean any subjectively offensive teaching of pedagogically relevant material could meet an unconstitutionally low bar to constitute harassment.

To be clear, even if SFSU does not ultimately formally punish Behrooz, an investigation into constitutionally-protected speech can itself violate the First Amendment, even if that investigation concludes in favor of the speaker. 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 from future First Amendment activities[.]"[14] Investigations into protected expression can meet this standard.[15]

For example, the Second Circuit found a cognizable First Amendment harm when a public university investigated 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 "conduct unbecoming of a member of the faculty."[16] SFSU's investigation into Behrooz also carries the implicit threat of discipline, and the resulting chilling effect constitutes a cognizable First Amendment harm.[17] SFSU's progressive discipline guidelines include significant sanctions,[18] ranging from mandatory participation in educational programming to suspension or dismissal, each of which is sufficient to meet the ordinary firmness test[19] and send the message that such speech may be punished in the future.

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[12] *Id.* at 679.

[13] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 683 (1999).

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

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

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

[17] *Id*. at 89–90.

[18] *P206 Progressive Discipline Guidelines*, S.F. STATE UNIV. (rev. Mar 2004), https://hr.sfsu.edu/p206-progressive-discipline-guidelines.

[19] *Speech First, Inc. v. Fenves*, No. 19-50529, 2020 U.S. App. LEXIS 34087, at *28–30 (5th Cir. Oct. 28, 2020).

The breathing room afforded classroom discussion depends increasingly on institutions' in-practice commitment to uphold academic freedom, and to zealously guard against signaling that particular discussions, language, or materials may risk punishment. Accordingly, FIRE calls on SFSU to immediately cancel its meeting with Behrooz, end its investigation, and reaffirm its commitment to academic freedom. We request a substantive response to this letter no later than the close of business on Thursday, April 13, 2023.

Sincerely,

Sabrina Conza
Program Officer, Campus Rights Advocacy

Cc: Office of Equity Programs & Compliance