



FIRE

Foundation for Individual
Rights and Expression

May 8, 2023

Cynthia Larive
Office of the Chancellor
Kerr Hall
University of California Santa Cruz
Santa Cruz, California 95064

URGENT

Sent via U.S. Mail and Electronic Mail (chancellor@ucsc.edu)

Dear Chancellor Larive:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is concerned by University of California Santa Cruz's announced investigation of students allegedly celebrating Adolf Hitler's birthday.² While this celebration was undoubtedly offensive to many on campus, it does not fall into any category of speech unprotected by the First Amendment, which bars UCSC from investigating or punishing protected expression. The university must accordingly drop its investigation and ensure it does not unduly curtail student speech in the future.

It has long been settled law that the First Amendment binds public universities like UCSC,³ such that its actions and decisions—including the pursuit of disciplinary sanctions—must comply with the First Amendment.⁴ While students celebrating Hitler's birthday doubtlessly

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 Email from Akirah Bradley-Armstrong, Vice Chancellor for Student Affairs and Success, Univ. of Cal. Santa Cruz, to UCSC community (Apr. 30, 2023), *available at* <https://news.ucsc.edu/2023/04/rejecting-hate.html> [<https://perma.cc/7MJZ-8SRR>]. Note that 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.

³ *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).

⁴ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

offended some, whether speech is protected by the First Amendment is “a legal, not moral, analysis.”⁵

The Supreme Court has repeatedly, consistently, and clearly held that government actors may not restrict expression on the basis that others find it to be offensive. This core First Amendment principle is why the authorities cannot outlaw burning the American flag,⁶ punish the wearing of a jacket emblazoned with the words “Fuck the Draft,”⁷ penalize a parody advertisement depicting a pastor losing his virginity to his mother in an outhouse,⁸ or disperse civil rights marchers out of fear that “muttering” and “grumbling” white onlookers might resort to violence.⁹ 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.”¹⁰

This principle was famously reiterated by the Illinois Supreme Court in *Skokie v. National Socialist Party*, when Nazis sought to march in a town with a large population of Holocaust survivors.¹¹ The court explained it is “firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”¹² It went on to hold that “as offensive to the principles of a free nation as the memories it recalls may be,” swastikas constitute “symbolic political speech intended to convey to the public the beliefs of those who display it.”¹³

The importance of free expression applies with particular strength to universities. Take, for example, a student newspaper’s front-page publication of a “political cartoon . . . depicting policemen raping the Statue of Liberty and the Goddess of Justice” and use of a vulgar headline (“Motherfucker Acquitted”).¹⁴ These words and images—at the height of the Vietnam War—were no doubt deeply offensive to many at a time of deep polarization and unrest. So, too, were “offensive and sophomoric” skits depicting women and minorities in derogatory stereotypes,¹⁵ “racially-charged emails” to a college listserv,¹⁶ and student organizations that the public

⁵ *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 821 (S.D. Iowa 2019).

⁶ *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”).

⁷ *Cohen v. California*, 403 U.S. 15, 25 (1971).

⁸ *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

⁹ *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

¹⁰ *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).

¹¹ 69 Ill. 2d 605, 615 (1978).

¹² *Id.* at 612.

¹³ *Id.* at 615.

¹⁴ *Papish* 410 U.S. at 667–68 (1973).

¹⁵ *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 388–392 (4th Cir. 1993)

¹⁶ *Rodriguez v. Maricopa Cnty. Comm. Coll. Dist.*, 605 F.3d 703, 705 (9th Cir. 2009) (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.”).

viewed as “shocking and offensive.”¹⁷ Yet, “the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”¹⁸

Importantly, even if concluded in favor of the students, an investigation of constitutionally protected expression can itself violate the First Amendment. 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[.]”¹⁹ Here, the university’s code of conduct includes significant sanctions—ranging from mandatory participation in educational programming or reflection papers to suspension or dismissal,²⁰ each of which suffices under the ordinary firmness test²¹—such that an investigation sends a message that UCSC may punish such speech in the future. Indeed, its investigation and statement that the event was “referred to student conduct for follow up *and adjudication*”²² will surely chill speech and thus cognizably harm First Amendment rights.²³

The students’ gathering here is clearly protected by the First Amendment. While that does not shield them from every consequence of their expression—including criticism by students, faculty, the broader community, or the university itself, which would constitute the “more speech” remedy to offensive expression the First Amendment prefers to censorship²⁴—it does limit the *types* of consequences that may be imposed, and who may impose them. And most notably, it takes university-imposed punishment, or the threat of it, off the table.

Given the urgent nature of this matter, we request a substantive response to this letter no later than the close of business on Monday, May 15, 2023, confirming that UCSC will drop its investigation and not pursue disciplinary sanctions in this matter.

Sincerely,



Sabrina Conza
Program Officer, Campus Rights Advocacy

Cc: Akirah Bradley-Armstrong, Vice Chancellor for Division of Student Affairs and Success
Garrett Naiman, Dean of Students

¹⁷ *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 661 (1st Cir. 1974).

¹⁸ *Papish*, 410 U.S. at 667–68.

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

²⁰ *Policy on Student Conduct and Community Agreements*, UNIV. OF CAL. SANTA CRUZ, <https://deanofstudents.ucsc.edu/student-conduct/student-handbook/100.004.pdf> [<https://perma.cc/ECH3-PS5F>].

²¹ *Speech First, Inc. v. Fenves*, 979 F.3d 319, 333 (5th Cir. Oct. 28, 2020).

²² Email from Bradley-Armstrong to UCSC community, *supra* note 2 (emphasis added).

²³ *See Levin v. Harleston*, 966 F.2d 85, 89–90 (2d Cir. 1992).

²⁴ *Whitney v. California*, 274 U.S. 357, 377 (1927).