FIRE
Foundation for Individual Rights and Expression

July 21, 2023

William F. Tate IV
Office of the President
Louisiana State University
3810 Lakeshore Drive
Baton Rouge, Louisiana 70808

URGENT

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

Dear President Tate:

FIRE[1] is concerned by LSU's public statement that it will withdraw from graduate student Marcus Venable future opportunities to assistant-teach in the wake of a voicemail he left for state Senator Mike Fesi strongly objecting to his recent vote against gender-affirming care for minors.[2] While the message may have seemed vituperative or deeply offensive to some, it does not fall into any category of speech unprotected by the First Amendment, which bars LSU from investigating or punishing Venable for his protest voiced to a public official. We urge LSU to publicly recommit to basing hiring decisions on only viewpoint-neutral criteria so as to meet the university's binding legal obligations to respect students' expressive rights.

The statement by LSU regarding Venable has its roots in a July 18 speech by Fesi during a Louisiana State Legislature session in support of a ban on gender-affirming healthcare for minors, after which Venable left Fesi an anonymous voicemail expressing his displeasure with the senator's views. This included calling the senator a "fat fucking piece of shit," saying "I can't wait to read your name in the fucking obituary," and promising to "make a goddamn martini made from the tears of butthurt conservatives when we put your fucking ass in the ground." Fesi reported the voicemail to the Terrebonne Parish Sheriff's Office, which forwarded the case the Louisiana State Police.

Yesterday, LSU issued a public statement claiming that it "foster[s] open and respectful dialog" as a university, pursuant to which:

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[1] As you may recall from past correspondence, the Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit defending freedom of expression and other individual rights on America's college campuses. You can learn more about our recently expanded mission and activities at thefire.org.

[2] The recitation of facts here reflects our understanding of pertinent facts based on publicly available information. We appreciate that you may have additional information to offer and invite you to share it with us.

> Like everyone, graduate students with teaching assignments have the right to express their opinions, but this profanity-filled, threatening call crossed the line. This does not exhibit the character we expect of someone given the privilege of teaching as part of their graduate assistantship. The student will be allowed to continue their studies but will not be extended the opportunity to teach in the future.[3]

Should LSU follow through on this denial of opportunities to Venable, it would violate his First Amendment rights. It has long been settled law that the First Amendment binds public universities like LSU[4] such that its actions and decisions, including the pursuit of disciplinary sanctions against students and faculty,[5] must comply with constitutional standards. While Venable's voicemail may have offended Fesi (or others who heard it), whether speech is protected by the First Amendment is "a legal, not moral, analysis,"[6] such that the Supreme Court has repeatedly, consistently, and clearly held that expression may not be restricted on the basis that others find it to be offensive[7] or even hateful.

In ruling, for example, 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."[8] This principle applies with particular strength to universities, dedicated to open debate and discussion, and as to which the Supreme Court has held "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.'"[9]

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[3] Piper Hutchinson, *LSU fires graduate assistant who left vulgar voicemail for state senator*, LA. ILLUMINATOR, July 20, 2023, https://lailluminator.com/briefs/lsu-fires-graduate-assistant-who-left-vulgar-voicemail-for-state-senator/.

[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).

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

[7] *See e.g.*, *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"); *Cohen v. California*, 403 U.S. 15, 25 (1971) (publicly wearing a jacket emblazoned with the words "Fuck the Draft," is First Amendment-protected activity).

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

[9] *Id.*

Nor does Venable's voicemail fall into any of the "historic and traditional categories"[10] of unprotected speech, such as, perhaps viewed by some as most relevant here, "true threats," which encompass only those statements through which a "speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group."[11]As the Supreme Court confirmed just weeks ago, punishment for true threats by a government actor requires that the speaker consciously disregard a substantial risk that their speech would place another in fear of serious physical harm.[12] Notably for present purposes, the court also explained that this does not include rhetorical hyperbole,[13] nor does it reach the endorsement of violence generally,[14] or the assertion of the "moral propriety or even moral necessity for a resort to force or violence."[15]

Here, Venable's vitriol looking forward to Senator Fesi's demise, including even his statement that "we'll put your fucking ass in the ground," is in context clear political hyperbole. While it may express desire to see Fesi out of office it cannot be fairly read as a promise to commit actual violence against him. Accordingly, the speech merits "robust protection under the First Amendment."[16]

These principles, of course, do not shield a speaker from every consequence from his expression—including criticism by students, faculty, or the broader community. Criticism is a form of "more speech," the remedy to offensive expression that the First Amendment prefers to censorship.[17] However, the First Amendment limits the *types* of consequences that may be imposed, and who may impose them. As a government actor, LSU is limited in that regard.

Public officials must expect to receive harsh criticism for their views, particularly on hot-button issues. When those public officials are genuinely uncertain as to whether they have received a true threat, law enforcement officials might review the allegedly threatening speech. But a properly trained law enforcement official should be able to quickly determine, as here, when there is no such threat. In this case, publicly identifying Venable was arguably unnecessary, and continuing to investigate even where he has committed no crime is improper.

In any case, LSU cannot punish Venable for his protected political speech. It accordingly must promptly correct its errors and the public record, especially if it wishes to avoid the continued chilling of strident political advocacy on its campus.

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[10] *United States v. Stevens*, 559 U.S. 460, 468–69 (2010) quoting, in part, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991).

[11] *Virginia v. Black*, 538 U.S. 343, 359 (2003).

[12] See *Counterman v. Colorado*, 143 S. Ct. 2106 (2023).

[13] *Id.* At 2114.

[14] *Watts v. United States*, 394 U.S. 705, 708 (1969) (man's statement, after being drafted to serve in the Vietnam War—"If they ever make me carry a rifle the first man I want to get in my sights is L. B. J."—was rhetorical hyperbole protected by the First Amendment, not a true threat to kill the president).

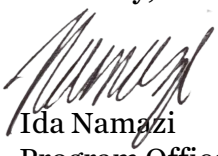
[15] *Noto v. United States*, 367 U.S. 290, 297–98 (1961).

[16] *Citizens United v. Fed. Election Comm'n,* 130 S. Ct. 876, 980 (2010) (Thomas, J. concurring).

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

Given the urgent nature of this matter, we request a substantive response to this letter no later than the close of business on July 28 confirming LSU will provide Venable future employment on a viewpoint-neutral basis and will not pursue any further investigation or disciplinary sanction against him in this matter.

Sincerely,



Ida Namazi
Program Officer, Campus Rights Advocacy

cc: Carlton (Trey) Jones, III, Deputy General Counsel
Cpt. Aaron Marcelle, Louisiana State Police
Sheriff Timothy Soignet, Terrebonne Parish Sheriff's Office