FIRE
Foundation for Individual Rights and Expression

August 14, 2023

Richard C. Benson
The University of Texas at Dallas
Office of the President
800 West Campbell Road
Richardson, Texas 75080-3021

URGENT

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

Dear President Benson:

FIRE,[1] a nonpartisan nonprofit dedicated to defending freedom of speech, is deeply concerned by the University of Texas at Dallas' apparent belief that it can apply its Student Code of Conduct to speech that the university acknowledges is constitutionally protected against punishment by government actors, as expressed in its recent correspondence to graduate student Cody Hatfield regarding interjections he directed to parking enforcement officers. The university's finding Hatfield responsible for speech-based Code of Conduct violations, placing him on a student success plan, and imposing a two-year deferred suspension are clear violations of his expressive rights. These actions indicate that UT Dallas' administrators either grossly misunderstand their First Amendment obligations or are actively flouting them. Either way, we urge the university to reverse its decision to punish Hatfield for engaging in clearly protected speech.

Our concern arises out of an April 11 interaction between Hatfield and a group of four parking enforcement officers who ticketed him for illegal parking in a lot on campus.[2] Hatfield, returning to his car, shouted that the officers should "fuck off and get a real job," and called

[1] As you may recall from prior correspondence, the Foundation for Individual Rights and Expression defends 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] This recitation reflects our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us. To these ends, please find enclosed an executed privacy waiver authorizing you to share information about this matter.

them "fucking parasites."[3] He then drove off while extending his middle finger at the officers.[4] Video evidence indicated that the encounter lasted approximately 40 seconds.[5]

After two of the officers filed reports with UT Dallas' parking office,[6] Hatfield attended two disciplinary hearings on April 25 and May 11 involving the matter. The ensuing Statement of Findings found him responsible for violating the student code of conduct by "[e]ngaging in disorderly, lewd, indecent, inappropriate, loud, or obscene conduct or behavior that interferes with the orderly functioning of the University or interferes with an individual's pursuit of an education."[7] Based on these findings, UT Dallas imposed a two-year deferred suspension and placed Hatfield on a student success plan.[8]

Hatfield appealed the decision, but on August 1, Vice President of Student Affairs Gene Fitch denied his appeal. The denial letter informed Hatfield that the consequence of the deferred suspension is that any "violation during this probationary period will result in your immediate suspension."[9] Fitch also wrote that it did not matter that Hatfield's speech is constitutionally protected:[10]

> In your appeal letter, you raise a variety of concerns, although you ultimately argue that your actions in Lot T were protected by state and federal law. This represents a conflation of law and university policy, which are not one and the same. To the contrary, law and university policy must be applied independently in many circumstances, and the Student Code of Conduct is clear in this regard, stating, "The conduct process is an administrative process and meant to be educational in nature." Further, the Student Code of Conduct is guided by the principle that students will engage in "ethical decision making and personal integrity," not merely adherence to the law. **Although one could argue that your conduct might have amounted to Constitutionally protected speech and therefore is not subject to penalty under law, that does not mean it did not violate the Student Code of Conduct and therefore is subject to administrative processes and sanctions.**

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[3] Statement of Findings, University Discipline Committee, UNIV. OF TEX. AT DALL. (May 22, 2023) (on file with author).

[4] Student Conduct Hearing, Cody Hatfield, Exhibit C, UNIV. OF TEX. AT DALL., (May 11, 2023) (on file with author).

[5] *Id.* at Exhibit E.

[6] *Id.* at Exhibits B and C.

[7] Statement of Findings, *supra* note 3.

[8] *Id.*

[9] Response to appeal, from Dr. Gene Fitch, Jr., Vice President for Student Affairs to Cody Hatfield, student (Aug. 1, 2023) (on file with author).

[10] *Id.* (emphasis added).

The letter gave Hatfield until August 18 to make an appointment to create an approved student success plan.

The claim in Vice President Fitch's letter that UT Dallas may punish Hatfield's expression even if it is protected by the First Amendment reflects a profound misunderstanding of the university's constitutional obligations and limitations. UT Dallas is a public university, and thus a state institution.[11] The First Amendment, applicable to the states and their political subdivisions through the Fourteenth Amendment,[12] including their public universities such as UT Dallas,[13] substantially restrains their authority over "Constitutionally protected speech" (to use Vice President Fitch's terminology).

It has long been settled law that the actions of public universities like UT Dallas, including maintenance of policies implicating student expression, cannot regulate beyond what the First Amendment allows.[14] As the Supreme Court explained, "the 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.'"[15] UT Dallas's "administrative processes and sanctions" do not, contrary to the suggestion in Vice President Fitch's letter, supersede the United States Constitution and—this is critical—cannot serve as a tool to punish students for expression the First Amendment protects.[16] The well-settled law is clearly to the contrary of Vice President Fitch's analysis.

We hope you will excuse any unintended pedantry in the foregoing, but it appears UT Dallas has lost sight of these basic points, commensurate with which it must rethink its approach to Mr. Hatfield. It cannot, for example, punish him for speech if it is simply "disorderly," "lewd," "indecent," "inappropriate," or "loud," even if, as such, those to whom it is directed or who hear it take offense.[17]

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[11] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 506 (1969) ("First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.").

[12] *Healy v. James,* 408 U.S. 169, 180 (1972) ("[S]tate colleges and universities are not enclaves immune from the sweep of the First Amendment.").

[13] *Id.*

[14] *Id.*

[15] *Id.* (internal citation omitted).

[16] A federal court in UT Dallas' proverbial backyard (whose decisions are binding on it) just this week drove home the peril of maintaining policies that have been declared in violation of federal civil rights protections, when it imposed substantial sanctions on an airline in a Title VII case. *See Carter v. Transp. Workers Union of Am., Local 556*, --- F. Supp. 3d ---, 2023 WL 5021787 (N.D. Tex. Aug. 7, 2023).

[17] Statement of Findings, *supra* note 3. While it is well-established that "obscene" speech may be proscribed, it is equally clear that such speech is not at issue here. *See, e.g.*, *Miller v. California*, 413 U.S. 15, 24 (1973) (obscenity that may constitutionally be proscribed is limited to patently offensive depictions of sexual conduct that the average person applying contemporary community standards would find appeals to a

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. This core First Amendment principle is why the authorities cannot outlaw burning the American flag,[18] punish the wearing of a jacket emblazoned with the words "Fuck the Draft,"[19] penalize a parody ad depicting a pastor losing his virginity to his mother in an outhouse,[20] or disperse civil rights marchers out of fear that "muttering" and "grumbling" white onlookers might resort to violence.[21]

This principle applies with particular strength to universities, dedicated to open debate and discussion. 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").[22] These words and images—published 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,[23] "racially-charged emails" to a college listserv,[24] and student organizations viewed as "shocking and offensive."[25]All of these cases reinforce that "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.'"[26]

The university's conduct here is a particularly stark illustration of a "reckless or callous indifference to the federally protected rights of others."[27] We note in this regard that a public university administrator who violates clearly established law will not retain qualified immunity and can be held personally responsible for monetary damages for violating First

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prurient interest in sex, and which objectively lacks serious literary, artistic, political or scientific value); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 235 (2002) (under *Miller*, to meet obscenity test, the government must prove that expression taken as a whole: "[1] appeals to the prurient interest [in sex], [2] is patently offensive in light of community standards, and [3] lacks serious literary, artistic, political or scientific value") (internal quotation marks omitted).

[18] *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").

[19] *Cohen v. California*, 403 U.S. 15, 25 (1971).

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

[21] *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

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

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

[24] *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.").

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

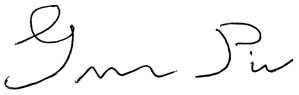
[26] *Papish*, 410 U.S. at 667–68 (1973).

[27] *Smith v. Wade*, 461 U.S. 30, 56 (1983) (establishing standard for punitive damages in constitutional cases, as applied in, *e.g.*, *Ostrander v. Kosteck*, 2017 WL 4414263, at *10 (W.D. Tex. Oct. 4, 2017)).

Amendment rights.[28] We write to you privately today to give UT Dallas a chance to remedy this situation.

Given the urgent nature of this matter, we request a substantive response to this letter no later than the close of business on Friday, August 18 confirming that UT Dallas will rescind the sanctions it has imposed on Mr. Hatfield.

Sincerely,



Graham Piro
Program Officer, Campus Rights Advocacy

Cc: Dr. Gene Fitch, Jr., Vice President for Student Affairs
Tim Shaw, University Attorney

Encl.

[28] *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Gerlich v. Leath*, 861 F.3d 697, 709 (8th Cir. 2017) (upholding denial of qualified immunity to defendants—public university administrators—because plaintiffs' First Amendment right was clearly established).

Authorization and Waiver for Release of Personal Information

I, Cody Hatfield, born on 01/08/1994, do hereby authorize The University of Texas at Dallas (the "Institution") to release to the Foundation for Individual Rights and Expression ("FIRE") any and all information concerning my current status, disciplinary records, or other student records maintained by the Institution, including records which are otherwise protected from disclosure under the Family Educational Rights and Privacy Act of 1974. I further authorize the Institution to engage FIRE's staff members in a full discussion of all matters pertaining to my status as a student, disciplinary records, records maintained by the Institution, or my relationship with the Institution, and, in so doing, to fully disclose all relevant information. The purpose of this waiver is to provide information concerning a dispute in which I am involved.

I have reached or passed 18 years of age or I am attending an institution of postsecondary education.

In waiving such protections, I am complying with the instructions to specify the records that may be disclosed, state the purpose of the disclosure, and identify the party or class of parties to whom disclosure may be made, as provided by 34 CFR 99.30(b)(3) under the authority of 20 U.S.C. § 1232g(b)(2)(A).

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights and Expression, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

I also hereby consent that FIRE may disclose information obtained as a result of this authorization and waiver, but only the information that I authorize.

DocuSigned by:
Cody Hatfield
217A027AE2B8449...

Student's Signature

8/11/2023

Date