



FIRE

Foundation for Individual
Rights and Expression

December 15, 2023

Sarah C. Mangelsdorf
Office of the President
240 Wallis Hall
University of Rochester
Rochester, New York 14627

URGENT

Sent via U.S. Mail and Electronic Mail (ThePresidentsOffice@Rochester.edu)

Dear President Mangelsdorf:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is concerned by the University of Rochester's public denouncement of the campus chapter of Students for Justice in Palestine for chanting a political slogan in defiance of a university order. We are also concerned about modification of the university's campus protest policies to effectively eliminate opportunities for spontaneous expression.² We thus urge the university to abide by its strong free speech promises and refrain from punishing or restricting student speech that does not involve prohibited conduct or constitute, *e.g.*, actionable harassment, solely because others find the speech offensive.

Our concerns arise from a November 20 university announcement that it received "multiple reports" concerning "certain slogans shouted at past demonstrations" that were perceived as "violent and threatening,"³ which FIRE understands to include "From the river to the sea,

¹ For more than 20 years, FIRE has defended freedom of expression, conscience, and religion, and other individual rights on America's university campuses. You can learn more about our recently expanded mission and activities at thefire.org.

² The recitation here reflects our understanding of the pertinent facts, which is based on public information. We appreciate that you may have additional information to offer and invite you to share it with us.

³ *Update regarding on-campus protests*, UNIV. OF ROCH. (Nov. 20, 2023) <https://www.rochester.edu/president/update-regarding-on-campus-protests/> [<https://perma.cc/R2GM-E6HD>]. The statement also alleges students engaged in some potentially unprotected expression, such as blocking "the egress of University buildings[.]" This letter concerns only the "rhetoric" the university cites as "unacceptable."

Palestine will be free.”⁴ Before this announcement, the university had alerted SJP that “their use of one specific slogan is understood by many as a call for physically harming Jewish people, all over the world, because of their religious or cultural identity.”⁵ University leaders directed the organization not to use the phrase in a protest, but the protest leader “led the chant of this specific slogan over 30 times,” allegedly violating the Student Code of Conduct.⁶ The announcement also stated that the university must now “be notified of any protests, rallies, and demonstrations at least three full business days in advance of each event.”⁷

We understand the present moment is one of heightened political tension, and that there have been instances of true threats, discriminatory harassment, and vandalism, resulting in many students feeling unsafe on campus. This tense environment, however, cannot serve as a license to target and censor protected expression—including provocative political speech—based solely on others taking offense or finding the expression distasteful or hateful.

Rochester in fact makes commendable guarantees that it will uphold the speech rights of its community members by endorsing “free speech and peaceful protest” and vowing to “not restrict speech based on viewpoint or content.”⁸ Additionally the university rightfully notes that the “remedy to offensive speech is more speech—counter programming, peaceful protest, fierce intellectual debate—not enforced silence.”⁹ These promises represent not just a moral obligation on the part of Rochester, but a legal one.¹⁰

As an initial matter, any commitment to free speech, particularly one as unequivocal as Rochester’s, presupposes that some on campus may take offense to some expressed viewpoints, as the “bedrock principle underlying” free speech is that it is not subject to limitation “simply because society finds the idea itself offensive or disagreeable.”¹¹ This principle is especially important in higher education, where the exchange of views may sometimes be caustic, provocative, or inflammatory. The Supreme Court has held that “the

⁴ Alex Zapesochny, *A UR campus rally in support of Palestinians*, ROCHESTER BEACON (Nov. 20, 2023) <https://rochesterbeacon.com/2023/11/20/a-ur-campus-rally-in-support-of-palestinians/>.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Guidelines for Free Speech and Peaceful Protest*, UNIV. OF ROCHESTER, <https://www.rochester.edu/public-safety/about/policies/guidelines-free-speech/> [<https://perma.cc/87RC-JXQL>]. While the University of Rochester is a private educational institution and therefore not bound by the First Amendment, Rochester’s clear invocation of free speech principles means that First Amendment jurisprudence can provide a baseline for the expressive rights community members can expect to exercise.

⁹ *Id.*

¹⁰ New York courts have held violations of guarantees in a student handbook and on the university website can constitute a breach of contract. *See, e.g., Novio v. N.Y. Acad. of Art*, 317 F.Supp.3d 803 (S.D.N.Y. 2018) (to make out the contract claim, a student “must identify specific language” in the school’s materials that are promises by the school “to provide for certain specified services”). Moreover, the public policy of deference to educational decisions would not be appropriate when such deference would not implicate a special area of academic decision-making or be “necessary to [the institution’s] continued existence.” *Hassan v. Fordham*, 515 F.Supp.3d 77, 91 (S.D.N.Y. 2021), *citing Gertler v. Goodgold*, 107 A.D.2d 481 (NY App. Div. 1st Dept. 1985).

¹¹ *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

mere dissemination of ideas,” no matter how offensive to others” on campus “may not be shut off in the name alone of ‘conventions of decency.’”¹²

The slogan “from the river to the sea, Palestine will be free,” even if deeply offensive to many, generally remains protected political expression. “The public interest in having free and unhindered debate on matters of public importance” is “the core value” underlying First Amendment protection of free expression.¹³ Moreover, political speech, including speech on the Israeli-Palestinian conflict, merits the highest level of First Amendment protection, as “there is practically universal agreement that a major purpose of [the] Amendment was to protect the free discussion of government affairs.”¹⁴ Discussion of geopolitics is undoubtedly “core political speech” at the very heart of any conception of free expression, and is where First Amendment protection is “at its zenith.”¹⁵ And whether or not the slogan advocates genocide is a subject of live debate, as some advocates say the term simply refers to the mission of liberation from Israel, while others interpret it as a call for violence.¹⁶

Contexts exist in which that slogan, if directed at a specific student or group of students based on their identity, could rise to the level of discriminatory harassment. In *Davis v. Monroe County Board of Education*, the Supreme Court established the definition of student-on-student harassment as encompassing conduct (including speech) that must be (1) unwelcome, (2) discriminatory on the basis of gender or another protected status, and (3) “so severe, pervasive, and objectively offensive that it can be said to deprive the victim-student of access to the educational opportunities or benefits provided by the school.”¹⁷ But merely chanting the slogan at a political rally does not constitute expression unprotected by the university’s strong free speech promises.

Nor does chanting the slogan at a political rally amount to an unprotected true threat to commit violence, as Rochester seemed to imply by describing the chant as “threatening.”¹⁸ A “true threat” is a statement through which “the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals”¹⁹ and requires the speaker to consciously disregard a substantial risk that their speech would place another in fear of serious physical harm.²⁰ The exception does not include

¹² *Papish v. Board of Curators*, 410 U.S. 667, 667–68 (1973).

¹³ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 (1968); see also, e.g., *Connick v. Myers*, 461 U.S. at 145 (“[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”).

¹⁴ *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

¹⁵ *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 186–187 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414 (1988)).

¹⁶ See, e.g., Aaron Terr, Matthew Harwood, *Why (most) calls for genocide are protected speech*, FIRE (Dec. 8, 2023) <https://www.thefire.org/news/why-most-calls-genocide-are-protected-speech>.

¹⁷ 526 U.S. 629, 650 (1999).

¹⁸ *Update*, *supra* note 3.

¹⁹ *Virginia v. Black*, 538 U.S. 343, 359 (2003).

²⁰ See *Counterman v. Colorado*, 143 S. Ct. 2106, 2117–18 (2023).

rhetorical hyperbole, the conceptual endorsement of violence,²¹ or the assertion of the “moral propriety or even moral necessity for a resort to force or violence.”²² And the Department of Education’s Office for Civil Rights has made clear that unprotected expression “must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.”²³

Courts have also made clear that broad restrictions on spontaneous expression, like requiring students to notify the university three full business days before expressing themselves in open areas of campus, violate the First Amendment.²⁴ Rochester may impose certain reasonable time, place, and manner restrictions on student protests to ensure they do not substantially interfere with the proper functioning of the university. But it cannot stifle student speech by requiring three business days’ notice for *any* protest or gathering. Creating this requirement bars all spontaneous expression, including protest or counter-protest about current events. It also increases the likelihood that Rochester will restrict the right to protest on campus if others object to the content of the protest, an impermissible basis for restricting speech.²⁵ For example, events that have not gone through the official event procedure could be shut down because they draw significant attention, but others that have also not gone through the procedure but do not receive significant attention could proceed. The potential for such uneven enforcement is impermissible, and at any rate, policies requiring individuals to seek approval from officials before speaking are “offensive—not only to the values protected by the First Amendment, but to the very notion of a free society.”²⁶

We urge Rochester to be mindful of the guarantees it makes to its community members regarding their expressive rights, and to refrain from issuing directives to student groups to refrain from participating in protected speech.

²¹ *Watts v. United States*, 394 U.S. 705, 708 (1969) (holding 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 the First Amendment protected, not a true threat to kill the president).

²² *Noto v. United States*, 367 U.S. 290, 297–98 (1961).

²³ U.S. Dep’t of Educ., Dear Colleague Letter from Gerald A. Reynolds, Assistant Sec’y for Civil Rights (July 28, 2003), <https://www2.ed.gov/about/offices/list/ocr/firstamend.html> [<https://perma.cc/B46T-P75J>].

²⁴ See *Roberts v. Haragan*, 346 F. Supp. 2d 853, 870 (N.D. Tex. 2004) (holding Texas Tech’s rule that students must acquire a permit at least two days before engaging in expressive activity outside designated free speech areas “sweeps too broadly in imposing a burden on a substantial amount of expression that does not interfere with any significant interests of the University”); see also *Martin v. City of Struthers*, 319 U.S. 141, 146–47 (1939) (“Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations ... it must be fully preserved.”).

²⁵ Administrative procedures requiring a speaker to obtain a license or permit before speaking are highly disfavored under long-established law. See *N.Y. Times v. United States*, 403 U.S. 713, 714 (1971) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”).

²⁶ *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 165–66 (2002).

We request a substantive response to this letter no later than the close of business on Friday, December 29, confirming Rochester will not punish students for engaging in protected expression on campus, and will also continue to allow for spontaneous demonstrations.

Sincerely,

A handwritten signature in cursive script that reads "Graham Piro".

Graham Piro
Program Officer, Campus Rights Advocacy

Cc: David Figlio, Provost