FIRE
Foundation for Individual Rights and Expression

December 8, 2023

Randy Boyd
Office of the President
University of Tennessee
505 Summer Place
UT Tower #1288
Knoxville, Tennessee 37902

Sent via U.S. Mail and Electronic Mail (utpresident@tennessee.edu)

Dear President Boyd:

FIRE[1] is concerned by the University of Tennessee's recent public statement that it reprimanded an unnamed professor for in-class comments UT characterizes as meeting the International Holocaust Remembrance Alliance's (IHRA) definition of anti-Semitism.[2] FIRE appreciates that UT is one of the few institutions in the country whose policies earn FIRE's "green light" rating, but we are constrained to remind UT that even institutional actions falling short of formal discipline—such as admonishment or investigation—can chill its faculty from speaking on sensitive topics. We accordingly urge UT to recommit to its constitutional obligation to uphold faculty free expression and academic freedom rights.[3]

[1] As you may recall from previous correspondence, the Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending freedom of speech. You can learn more about our recently expanded mission and activities at thefire.org.

[2] Vinay Simlot, *UT leaders said they addressed antisemitic comments from professor*, WBIR 10 NEWS (Nov. 1, 2023, 7:11 PM EDT), https://www.wbir.com/article/news/local/ut-addressed-instructors-anti-semitic-comment/51-6cb60c8e-6ad3-4fa0-aabe-b41f8dc6d4e9. In its statement, UT said, "The professor fell short of how instructors should present complex and painful issues in a classroom" such that it addressed the comments directly with the professor, while claiming federal law prevented publicly discussing specific details of the case. *Id.* Note that the recitation here reflects our understanding of the pertinent facts based on UT's statement and public reporting. We appreciate, however, that you may have additional information to offer, and if so, we invite you to share it with us.

[3] It has long been settled that the First Amendment binds public colleges like UT. *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).

510 Walnut Street, Suite 1250 Philadelphia, PA 19106
phone: 215-717-3473 Fax: 215-717-3440
thefire.org

As a public university, UT is bound by the First Amendment, such that its actions and decisions—including the pursuit of disciplinary sanctions[4] and maintenance of policies implicating faculty expression[5]—must satisfy constitutional standards. As the Supreme Court has explained, academic freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[6] Academic freedom necessitates substantial breathing room for faculty to decide 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, or even most, students find upsetting or uncomfortable.

To be sure, UT may be obligated to investigate instances of discrimination, harassment, or threats on campus. But UT's reliance on the IHRA's definition of anti-Semitism as the standard for determining what faculty speech is punishable is misguided. According to Kenneth Stern, the primary author of the definition, it "was intended for data collectors writing reports about anti-Semitism in Europe. It was never supposed to curtail speech on campus."[7] Stern opposed legislation requiring use of the definition because, among other things, it would chill campus speech.[8]

The IHRA defines anti-Semitism as "a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of anti-Semitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities."[9] The IHRA also provides a list of examples, which include "[m]aking mendacious, dehumanizing, demonizing, or stereotypical allegations about Jews;" "[d]enying the fact, scope, mechanisms ... or intentionality of ... the Holocaust;" "[c]laiming that the existence of a State of Israel is a racist endeavor;" "[a]pplying double standards by requiring of [Israel] behavior not expected or demanded of any other democratic nation;" "[d]rawing comparisons of contemporary Israeli policy to that of the Nazis."[10] As such, the IHRA definition is so broad that it sweeps in a substantial amount of speech protected by the First Amendment and academic freedom.[11] Unless accompanied by expression that falls within one of the recognized, narrowly defined categories of unprotected speech, such as

---

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

[5] *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

[6] *Keyishian v. Bd. of Regents*, 385 U.S. 589, 602–04 (1967).

[7] Kenneth S. Stern, Opinion, *Will Campus Criticism of Israel Violate Federal Law?*, N.Y. TIMES (Dec. 12, 2016), https://www.nytimes.com/2016/12/12/opinion/will-campus-criticism-of-israel-violate-federal-law.html.

[8] *Id.*

[9] *What is antisemitism?*, International Holocaust Remembrance Alliance, adopted May 26, 2016, https://www.holocaustremembrance.com/resources/working-definitions-charters/working-definition-antisemitism.

[10] *Id.*

[11] Will Creeley, *State Department's Anti-Semitism Definition Would Likely Violate First Amendment on Public Campuses*, FIRE, May 22, 2015, https://www.thefire.org/news/state-departments-anti-semitism-definition-would-likely-violate-first-amendment-public.

incitement,[12] true threats,[13] or discriminatory harassment,[14] the speech described in these examples is largely protected by the First Amendment. Taking just a couple of examples, criticizing Israel by comparing it to the Nazis or referring to it as a racist settler colonial state may or may not be anti-Semitic, but it is protected speech that government actors—including those at a public university—may not restrict.

This is because, as the Supreme Court has explained, expression may not be restricted on the basis that implicates ethnicity or religion in ways others may deem as hateful.[15] "As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[16] The Department of Education's Office for Civil Rights has been clear that antisemitic expression on campus, "even when personally offensive and hurtful," does not always constitute actionable harassment.[17] The mere fact that a professor's comments may meet the IHRA's definition of anti-Semitism accordingly does not remove them from the protection of the First Amendment.

UT's public announcement of a reprimand based on classroom speech using the IHRA's broad definition of anti-Semitism is likely to unconstitutionally chill faculty speech. In making that assessment, the question is not whether formal punishment is meted out, but whether an institution's actions in response to speech "would chill or silence a person of ordinary firmness from future First Amendment activities."[18] A reprimand may meet this standard because it implicitly threatens future discipline and faculty may self-censor accordingly.[19]

---

[12] *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (incitement is speech advocating violence that is both intended and likely to produce imminent lawless action by others).

[13] *Counterman v. Colorado*, 600 U.S. 66, 74 (2023) ("True threats are 'serious expression[s]' conveying that a speaker means to 'commit an act of unlawful violence.'") (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)).

[14] *Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629, 650 (1999) (punishable harassment is unwelcome, discriminatory on the basis of gender or another protected status, and "so severe, pervasive, and objectively offensive that it can be said to deprive the victim[] of access to the educational opportunities of benefits provided by the school").

[15] *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (refusing to establish a limitation on speech viewed as "hateful" or demeaning "on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground"); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down an ordinance that prohibited placing on any property symbols that "arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender").

[16] *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011); *see also 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").

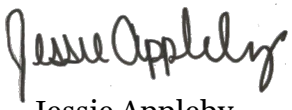
[17] Larry Gordon, *Feds dismiss Jewish students' complaint against UC Berkeley*, LA Times (Aug. 27, 2013, 12 AM), https://www.latimes.com/local/lanow/la-xpm-2013-aug-27-la-me-ln-jewish-uc-20130827-story.html. Anti-semitic speech must be "so severe, pervasive, and objectively offensive that it can be said to deprive the victim[] of access to the educational opportunities or benefits provided by the school" to rise to the level of unprotected, actionable harassment. *Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629, 650 (1999).

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

[19] *See, e.g.*, *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992) (threat of discipline implicit in college president's creation of ad hoc committee to study whether professor's extramural speech could be considered

We therefore urge UT to reassure its faculty immediately that they do not face investigation or discipline for their protected speech simply because it may meet the standard for anti-Semitism articulated by IHRA, and we request a substantive response to this letter no later than close of business December 22, 2023, confirming that UT will honor its legal obligation to protect faculty's free expression and academic freedom on campus in that regard.

Sincerely,



Jessie Appleby
Program Officer, Campus Rights Advocacy

Cc: C. Ryan Stinnett, General Counsel

misconduct "was sufficient to create a judicially cognizable chilling effect on [the professor's] First Amendment rights"); *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000).