



February 26, 2024

Donna Gooden Payne
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University of Rochester
263 Wallis Hall
Rochester, New York 14627-0040

Sent via U.S. Mail and Electronic Mail (Donna.Payne@rochester.edu)

Dear Ms. Payne:

FIRE appreciates your January 31 response to our December 15 letter detailing our concerns about the state of free expression at the University of Rochester. Thank you for clarifying that we were mistaken that the university prohibited students' use of the chant, "From the river to the sea, Palestine must be free," and that, rather, it prohibited chants of "From New York to Gaza, globalize the Intifada." But that neither changes the analysis nor, accordingly, alleviates our concerns, as neither statement, standing alone, falls into any category of unprotected speech. Rochester's ban therefore still violates its First Amendment obligation to respect expressive freedom.

You claimed that "From New York to Gaza, globalize the Intifada" is "a call for immediate, violent actions in New York, including ... Rochester," and that the university's administration believes the chant is a call to violence that "so clearly seeks imminent action that it is not protected by principles of free speech."¹ That is incorrect. While Rochester may intend "to minimize the potential for violence,"² it cannot not use that intention, or the extent to which it misapplies the requisite legal standard, as license to censor protected political expression.

Under relevant First Amendment jurisprudence, speech qualifies as unprotected incitement only if it "specifically advocates[s] for listeners to take unlawful action," is "directed to inciting or producing imminent lawless action," and is "likely to incite or produce such action."³ More

¹ Letter from Donna Gooden Payne, Vice President and General Counsel, to Graham Piro, Program Officer, Jan. 31, 2024 (on file with author).

² *Id.*

³ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

generalized calls for violence do not meet this exacting standard and thus remain protected,⁴ as the First Amendment’s robust protection of political speech—vital in times of intense disagreement—encompasses rhetorical hyperbole and conceptual endorsements of violence.⁵ Political discourse has, in fact, long been steeped in imagery of violence.⁶

Because rhetoric tinged with violent themes often intersects with charged political expression, and “language of the political arena ... is often vituperative, abusive, and inexact,” the values of the First Amendment require an exacting standard before a statement constitutes unprotected “incitement.”⁷ Even accepting for argument’s sake that “From New York to Gaza, globalize the Intifada” genuinely calls for violence, as an assertion of the “moral propriety or even moral necessity for a resort to force or violence,” it remains protected speech.⁸

We also appreciate your substantive response to our concerns about opportunities for spontaneous expression on campus. Rochester certainly has a significant interest in ensuring on-campus protests do not substantively disrupt campus operations. Accordingly, it can establish reasonable time, place, and manner restrictions on expressive activity, but those restrictions must be viewpoint-neutral and content-neutral, narrowly tailored to serve a significant government interest, and leave ample alternative channels for communication—and perhaps most importantly, must not be enforced selectively.⁹

We continue to urge you, however, to allow for spontaneous expression and reserve punishment for “material and substantial interference” with institutional events or operations.¹⁰ To protect both free speech and campus safety, the university should address

⁴ See, e.g., *Nwanguama v. Trump*, 903 F.2d 604, 609-10 (6th Cir. 2018) (former President Trump’s repeated “get ‘em out of here” complaints about protesters to a campaign rally crowd was not specific advocacy of violence even if understood as encouraging it); see also *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (speech “not directed any person or group” that advocates action “at some indefinite future time,” is “not sufficient” to remove that speech from the First Amendment’s embrace.).

⁵ *Watts v. United States*, 394 U.S. 705, 708 (1969).

⁶ See, e.g., Letter from Thomas Jefferson to William Stephens Smith (Nov. 13, 1787) available at <https://founders.archives.gov/documents/Jefferson/01-12-02-0348> [<https://perma.cc/T96C-TZ2W>] (“The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is [its] natural manure.”).

⁷ *Watts*, 394 U.S. at 708; see also *Burnham v. Ianni*, 119 F.3d 668, 671 (8th Cir. 1997) (a state university violated the First Amendment by removing photographs depicting its professors bearing weapons related to their academic interests).

⁸ See *Noto v. United States*, 367 U.S. 290, 297-98 (1961). Moreover, there is extensive scholarly debate over the nature of calls for “Intifada,” as some scholars view the phrase as calls for nonviolent resistance while others view it as a call for violence. See, e.g., Ellen Cole et al., *Refugee Women and Their Mental Health*, 42 (1 Ed. 1992) (the word “Intifada” “was chosen to convey the notion of aggressive nonviolent resistance[.]”) (internal citations omitted); David Hazony, *The War Against the Jews*, SAPIR (Oct. 2023–Jan. 2024), <https://sapijournal.org/war-in-israel/2023/11/the-war-against-the-jews/> (chants of “Globalize the Intifada” mean the war is “not only against Israel—it is against global Jewry.”).

⁹ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); see also *Healy v. James*, 408 U.S. 169, 192-93 (1972).

¹⁰ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). In the university context, the protections *Tinker* established set the floor for student expressive rights—not the ceiling.

protests that substantially disrupt campus operations while allowing minimally disruptive expression even if some find it offensive. This reflects the First Amendment’s robust protections for uncivil, offensive, hateful, and even outrage-provoking speech.¹¹

We would be happy to offer further assistance—free of charge—in reforming Rochester’s policies to ensure they align with the university’s robust and commendable promises to uphold free expression on campus. We look forward to continuing this dialogue and request a further substantive response to this letter no later than close of business on Monday, March 11.

Sincerely,



Graham Piro
Program Officer, Campus Rights Advocacy

Cc: Dave Figlio, Provost
Sarah C. Mangelsdorf, President

¹¹ As we noted in our first letter, in ruling that the First Amendment protects protesters holding insulting signs outside of soldiers’ funerals, the Supreme Court remarked 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.” *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).