FIRE
Foundation for Individual Rights and Expression

March 18, 2024

Johnathan Holloway, President
Rutgers, The State University of New Jersey
7 College Avenue, 2nd Floor
New Brunswick, New Jersey 08901

William E. Best, Chair of the Board of Governors
c/o Kimberlee M. Pastva, Secretary of the University
Rutgers, The State University of New Jersey
7 College Avenue Winants Hall, Room 112
New Brunswick, New Jersey 08901

Sent via U.S. Mail and Electronic Mail (president@rutgers.edu and secretary@og.rutgers.edu)

Dear President Holloway and Chairperson Best:

FIRE[1] calls on Rutgers University to maintain its firm commitment to the First Amendment in the face of pressure from U.S. legislators to censor faculty and speakers at the Center for Security, Race, and Rights (the "Center").

We urge Rutgers to do so given the February 6 letter to you from ten members of the Senate Committee on the Judiciary providing examples of speech by faculty and guest speakers at the Center and questioning its funding and operation.[2] The examples included pro-Palestinian statements by a faculty affiliate and a fellow at the Center shortly after the October 7 killings of Israelis by Hamas; a "Jewish caricature" shared by another faculty affiliate of the Center;[3] the director's ongoing sharing of what the letter describes as "anti-Semitic propaganda" on social

[1] As you know, 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] Letter from Sen. Lindsey Graham et al., to Johnathan Holloway, President, and William Best, Board of Governors Chair (Feb. 6, 2024), https://www.judiciary.senate.gov/imo/media/doc/sjc_republicans_to_rutgers_020624.pdf. Please note that the recitation here reflects our understanding of the pertinent facts, based on public information. We appreciate that you may have additional information and invite you to share it with us.

[3] As described in the letter, the fellow "retweeted a Jewish caricature of a man with locks and traditional dress proclaiming "Mom, look! I is chosen! I can now kill, rape, smuggle organs & steal the land of Palestinians. Yay! #Ashke-Nazi." *Id.* at n.20.

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media; and an invited speaker previously convicted of providing material support to a terrorist organization.

FIRE is concerned that the extraordinary pressure such a letter seeks to exert could lead Rutgers to act hastily and in ways that chill speech of the Center, its faculty, and its invited speakers. While we have no reason to believe your commitment to the First Amendment has changed, we hope re-articulating those obligations may provide additional support.

I. The First Amendment protects speech, even hateful speech.

It is well-established that the First Amendment does not make a categorical exception for hateful expression, and equally well-established that it constrains public universities in penalizing faculty expression. The speech identified in the February 6 letter doubtlessly may offend many who read it—yet whether the First Amendment protects any particular speech is "a legal, not moral, analysis."[4]

The Supreme Court has repeatedly, consistently, and clearly held government actors may not restrict expression based on others finding it offensive. This core First Amendment principle is why the authorities cannot outlaw burning the American flag,[5] punish wearing a jacket emblazoned with "Fuck the Draft,"[6] penalize a parody ad depicting a pastor losing his virginity to his mother in an outhouse,[7] or disperse civil rights marchers out of fear "muttering" or "grumbling" white onlookers might resort to violence.[8] In holding that the First Amendment protects protesters holding insulting signs outside soldiers' funerals, the Court reiterated this fundamental principle, remarking that: "As a Nation we have chosen … to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[9]

This applies with particular strength to universities, which by design are dedicated to open debate and discussion. Take, for example, a student newspaper's front-page "political cartoon … depicting policemen raping the Statue of Liberty and the Goddess of Justice" and its use of the vulgar headline "Motherfucker Acquitted."[10] 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. But "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.'"[11] While certain hateful speech may lack protection because it falls into other

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

[5] *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").

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

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

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

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

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

[11] *Id.*

exceptions to the First Amendment, the Supreme Court has repeatedly held there is no categorical exception for expression others view as hateful.[12]

The February 6 letter cannot change that analysis. The First Amendment denies government officials—whether lawmakers in Washington or administrators on campus—the power to limit speech based on whether some, many, or most find it offensive.[13] This is because "government officials cannot make principled distinctions" between what speech is sufficiently innocuous or too offensive to be permitted.[14]

II. Faculty speech is entitled to constitutional protection.

Rutgers also may not restrict Center faculty's speech related to scholarship or teaching. While the Supreme Court in *Garcetti v. Ceballos* upheld the power of non-academic government employers to regulate employees' speech when it comes as part of their employment duties, the court reserved the question of "whether the analysis … would apply in the same manner to a case involving speech related to scholarship or teaching."[15] As Justice Souter's dissent stressed, *Garcetti* thus should not be read to "imperil First Amendment protection of academic freedom in public colleges and universities," which encompasses "the teaching of a public university professor."[16]

Thereafter, the U.S. Court of Appeals for the Fourth Circuit put it even more plainly, holding *Garcetti* does "not apply in the academic context of a public university" to the "work of a public university faculty member," including "scholarship or teaching."[17] Doing so would "place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment," a result inconsistent with *Garcetti*'s intent.[18] Other courts have reached the same conclusion.[19]

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[12] *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 393 (1992) (invalidating 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."). *Accord Matal v. Tam*, 528 U.S. 218, 246 (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").

[13] *Johnson*, 491 U.S. at 414 (holding that government actors "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

[14] *Cohen*, 403 U.S. at 25.

[15] 547 U.S. 410, 421, 425 (2006).

[16] *Id.* at 438 (Souter, J., dissenting).

[17] *Adams v. Trs. of the Univ. of N.C. Wilmington*, 640 F.3d 550, 562–64 (4th Cir. 2011).

[18] *Id.*

[19] *See, e.g.*, *Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014) (expression "related to scholarship or teaching" falls outside *Garcetti* and is protected by academic freedom); *Buchanan v. Alexander*, 919 F.3d 847, 853 (5th Cir. 2019) (applying the *Pickering-Connick* balancing to public university professor's in-class speech); *Van Heerden v. Bd. of Supervisors of La. State Univ.*, 2011 U.S. Dist. LEXIS 121414, at *19–20 (M.D. La. Oct. 20, 2011) (sharing "concern that wholesale application of the *Garcetti* analysis . . . could lead to a whittling-away of academics' ability to delve into issues or express opinions that are unpopular, uncomfortable or unorthodox"); *Sheldon v. Dhillon*, 2009 U.S. Dist. LEXIS 110275, at *14 (N.D. Cal. Nov. 25, 2009) (terminated

Accordingly, faculty speech, "however repugnant," that is "germane to the classroom subject matter" remains "protected by the First Amendment."[20] The Center's focus on security and race would bring the questioned speech well within its focus. Rutgers must therefore avoid actions that "would chill or silence a person of ordinary firmness from future First Amendment activities[.]"[21]

III. Conclusion

The speech exemplars in the February 6 letter are clearly protected. That does not shield the Center's speakers from every consequence from their expression—including criticism by students, faculty, the broader community, or Senate committee members. But that criticism is the *alternative* to censorship, not its justification.[22]

We request Rutgers share its response to the February 6 letter with us and affirm its intent to continue its laudable commitment to the First Amendment in future correspondence with the Committee.

Sincerely,

Adam Goldstein
Vice President of Strategic Initiatives

Cc: John J. Hoffman, Senior Vice President and General Counsel

community college instructor's lecture on heredity and homosexuality was protected by the First Amendment if it was "within the parameters of the approved curriculum and within academic norms" and the punishment "not reasonably related to legitimate pedagogical concerns.").

[20] *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 683 (6th Cir. 2001).

[21] *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999). Investigations into protected expression may meet this standard, even if no punishment follows. *See, e.g.*, *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000). For example, a public university launched an investigation into a tenured faculty member's offensive writings on race and intelligence, announcing an *ad hoc* committee to review whether the professor's expression—which the university's leadership said "ha[d] no place at" the college—constituted "conduct unbecoming of a member of the faculty." *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992). The investigation itself implicitly threatened discipline, and the resulting chilling effect constituted cognizable First Amendment harm. *Id.* at 89–90.

[22] *Whitney v. California*, 274 U.S. 357, 377 (1927) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by process of education, the remedy to be applied is more speech, not enforced silence.").