

FIRE

Foundation for Individual
Rights and Expression

May 23, 2023

Kathy Schwaig
Office of the President
Kennesaw State University
585 Cobb Avenue NW
Kennesaw, Georgia 30144

Sent via U.S. Mail and Electronic Mail (kschwaig@kennesaw.edu)

Dear President Schwaig:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is concerned by Kennesaw State's decision to investigate Professor David Bray for his personal LinkedIn posts. While these social media posts may have offended some who read them, as they do not fall into a category of speech unprotected by the First Amendment, KSU cannot legitimately—or constitutionally—investigate or punish Bray for his expression.

This matter arises out of the extent to which Bray frequently posts on his personal LinkedIn account to discuss politics, higher education, and diversity, equity, and inclusion policies.² On March 17, an anonymous complainant reported Bray to KSU's Compliance and Ethics Reporting Hotline.³ The complaint alleged Bray was "going on unhinged racist rants on LinkedIn," and opined that he was "[c]learly suffering from mental illness and too unstable to be teaching classes."⁴

On March 30, Assistant Vice President for Academic Affairs LaJuan Simpson-Wilkey notified Bray of the complaint and asked to discuss it with him.⁵ They spoke over the phone the same

¹ For more than 20 years, FIRE has defended 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 David Bray, LINKEDIN, <https://www.linkedin.com/in/david-e-bray-ph-d-599598254> [<https://perma.cc/96CB-LKYT>].

³ LaJuan Simpson-Wilkey, *Confidential Investigation Report* (April 19, 2023) (on file with the author). The recitation here 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.

⁴ *Id.*

⁵ *Id.*

day, and Simpson-Wilkey informed Bray of the allegations and acknowledged that his posts were protected speech.⁶ Despite this, Simpson-Wilkey *continued* to investigate Bray by reviewing student evaluations to assess his conduct in the classroom.⁷ She ultimately recommended closing the complaint and notified Bray of that decision on April 20.⁸

Records pertaining to the investigation of Bray obtained by a public records request confirm that KSU administrators acknowledged internally—on multiple occasions—that Bray’s posts were protected by the First Amendment, both the day the complaint arrived and before notifying Bray.⁹ Despite this acknowledgement, administrators moved forward with investigating and contacting Bray, stating the investigation should focus not only on the complained-of LinkedIn posts, but on whether students have complained about Bray’s classroom behavior.¹⁰ Administrators determined there were no concerns about Bray’s classroom conduct after reviewing his students’ course evaluations.¹¹

This is problematic, as it is well-established the First Amendment constrains public universities from penalizing faculty’s protected expression,¹² and equally well-established that it does not make exceptions for expression perceived as offensive. Whether speech is protected by the First Amendment is “a legal, not moral, analysis.”¹³ As several administrators acknowledged, Bray’s posts are clearly protected and do not fall into any category of expression unprotected by the First Amendment—such as true threats, obscenity, or harassment. The “bedrock principle underlying” freedom of expression is that speech may not be limited “simply because society finds the idea itself offensive or disagreeable[.]”¹⁴ It is this counter-majoritarian principle that protects “insulting, and even outrageous, speech in order to provide adequate breathing space” for public debate,¹⁵ recognizing that those with authority

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*; Email from LaJuan Simpson-Wilkey, Assistant Vice President for Academic Affairs, to David Bray (Apr. 20, 2023, 11:29 AM) (on file with author).

⁹ Email from Joelle Vernon, Senior Auditor, Investigations, to Nwakaego Walker, Karen McDonnell, Ronald Briggs, Lori Lowder (Mar. 17, 2023, 5:26 PM) (on file with author); *see also* Email from Nwakaego Nkumeh Walker, Vice President and Chief Legal Affairs Officer, Division of Legal Affairs, to Vernon, McDonnell, Aaron Howell, Briggs, Lowder (Mar. 20, 2023, 10:57 AM) (on file with author) (“After a close review of the posts and the complaint, I believe the posts have First Amendment protection. His posts do not appear to target a specific student and he is free to post views regarding USG policies and procedures.”).

¹⁰ Email from Nwakaego Nkumeh Walker, Vice President and Chief Legal Affairs Officer, Division of Legal Affairs, to Vernon, McDonnell, Howell, Briggs, Lowder (Mar. 20, 2023, 10:57 AM) (on file with author).

¹¹ Simpson-Wilkey, *supra* note 3.

¹² *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).

¹³ *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 821 (S.D. Iowa 2019).

¹⁴ *Snyder v. Phelps*, 562 U.S. 443, 458 (2011), citing *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

¹⁵ *Boos v. Barry*, 485 U.S. 312, 322 (1988) (cleaned up).

“cannot make principled distinctions” between what speech is sufficiently offensive to suppress.¹⁶

And investigation of constitutionally protected speech can itself violate the First Amendment, even if the investigation concludes in favor of the speaker. The question is not whether formal punishment follows, but whether the institution’s actions “would chill or silence a person of ordinary firmness from future First Amendment activities[.]”¹⁷

Investigations into protected expression may meet this standard.¹⁸ For example, a public university launched an investigation into a tenured faculty member’s offensive writings on race and intelligence 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.”¹⁹ This investigation itself constituted an implicit threat of discipline, and the resulting chilling effect constituted cognizable First Amendment harm.²⁰

Even though KSU administrators immediately acknowledged Bray’s speech was protected, they moved forward with an investigation and contacted him, ostensibly because his extramural speech and views could somehow indicate he may have behaved improperly in the classroom. And although administrators eventually closed the complaint against Bray without further discipline, the meeting with a high-level administrator to discuss the allegations and the weeks-long investigation that followed are sufficiently chilling to meet the ordinary firmness test.²¹

This university action sends the message that Bray or other faculty may be punished in the future for their speech—including speech your leadership understands is clearly protected.

If KSU wants to both maintain a Compliance and Ethics Reporting Hotline and comply with its First Amendment obligations, it must undertake a facial review of any complaints and first determine whether the conduct alleged constitutes protected expression. In such cases, KSU can resolve the complaint without notifying or involving the accused faculty.

Of course, faculty expression is not shielded from every consequence—including criticism by students, other faculty, the broader community, or the university itself. Criticism is a form of “more speech,” the preferred remedy to objectionable expression. But KSU may not wield institutional authority to force compliance with any particular view or sensitivity.

¹⁶ *Cohen v. California*, 403 U.S. 15, 25 (1971).

¹⁷ *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

¹⁸ See, e.g., *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000).

¹⁹ *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992).

²⁰ *Id.* at 89–90.

²¹ *Speech First, Inc. v. Fenves*, 979 F.3d 319, 338 (5th Cir. 2020).

We request a substantive response to this letter no later than the close of business on Tuesday, June 6, 2023, confirming that KSU will uphold its expressive obligations and reconsider how it involves faculty accused of exercising their expressive rights.

Sincerely,

A handwritten signature in cursive script that reads "Anne Marie Tamburro".

Anne Marie Tamburro
Program Officer, Campus Rights Advocacy

Cc: Dr. LaJuan Simpson-Wilkey, Assistant Vice President for Academic Affairs

Encl.

Authorization and Waiver for Release of Personal Information

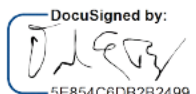
I, David E. Bray, do hereby authorize
Kennesaw State University (the "Institution") to release
to the Foundation for Individual Rights and Expression ("FIRE") any and all
information concerning my employment, status, or relationship with the Institution.
This authorization and waiver extends to the release of any personnel files,
investigative records, disciplinary history, or other records that would otherwise be
protected by privacy rights of any source, including those arising from contract, statute,
or regulation. I also authorize the Institution to engage FIRE and its staff members in a
full discussion of all information pertaining to my employment and performance, and,
in so doing, to disclose to FIRE all relevant information and documentation.

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.

If the Institution is located in the State of California, I request access to and a copy of
all documents defined as my "personnel records" under Cal. Ed. Code § 87031 or Cal.
Lab. Code § 1198.5, including without limitation: (1) a complete copy of any files kept
in my name in any and all Institution or District offices; (2) any emails, notes,
memoranda, video, audio, or other material maintained by any school employee in
which I am personally identifiable; and (3) any and all phone, medical or other records
in which I am personally identifiable.

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:

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Signature

5/17/2023

Date