



December 7, 2017

Denise M. Trauth
Office of the President
Texas State University
601 University Drive
San Marcos, Texas 78666

URGENT

Sent via U.S. Mail and Electronic Mail (president@txstate.edu)

Dear President Trauth:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

Founded in 1974, the Student Press Law Center is the nation's only legal assistance agency devoted exclusively to supporting, defending and educating high school and college journalists about the rights and responsibilities embodied in the First Amendment and supporting the student news media in covering important issues free from censorship. The Student Press Law Center is a non-partisan, nonprofit organization.

The National Coalition Against Censorship (NCAC), founded in 1974, is an alliance of over 50 national nonprofit organizations, including literary, artistic, religious, educational, professional, labor, and civil liberties groups dedicated to promoting the right to free speech.

FIRE, SPLC, and NCAC are concerned about the threat to freedom of speech and of the press at Texas State University (TSU) posed by threats against an independent student newspaper's funding and an imposed review of its editorial process following the publication of a controversial editorial. These threats violate the First Amendment rights that TSU is legally and morally bound to uphold and must be repudiated immediately.

I. FACTS

The following is our understanding of the facts; please inform us if you believe we are in error.

On November 28, 2017, independent student newspaper *The University Star* published an editorial by opinion columnist Rudy Martinez titled “Your DNA is an abomination.” Martinez’s editorial argued that race—including “whiteness”—is a social construct used to oppress non-white populations. The editorial expressed a desire to end “whiteness” and concluded: “Until then, remember this: I hate you because you shouldn’t exist. You are both the dominant apparatus on the planet and the void in which all other cultures, upon meeting you, die.”¹

Martinez’s editorial sparked controversy and outrage across campus and online. On November 29, *The University Star* issued an apology to those offended by the article. The same day, you issued a statement² condemning the article as “abhorrent” and racist, stating, in relevant part:

I am deeply troubled by the racist opinion column that was published in the November 28, 2017, issue of the *University Star* titled “Your DNA is an abomination.” The column’s central theme was abhorrent and is contrary to the core values of inclusion and unity that our Bobcat students, faculty, and staff hold dear. As president of a university that celebrates its inclusive culture, I detest racism in any manifestation.

While I appreciate that the *Star* is a forum for students to freely express their opinions, I expect student editors to exercise good judgment in determining the content that they print.

Also on November 29, TSU Student Government President Connor Clegg issued a press release³ condemning Martinez’s opinion piece and demanding the resignations of Martinez, the Editor-in-Chief, and the Opinions Editor of *The University Star*. Clegg’s press release threatened that if the resignations were not voluntarily forthcoming, he would call for “an emergency meeting of the Student Service Fee Committee to reevaluate the paper’s funding and call for a full divestment of student fees from the Star.” A Change.org petition⁴ calling for the de-funding of the newspaper has received more than 1,600 signatures at the time of this letter’s writing.

¹ An image of Martinez’s editorial, since removed from *The University Star*’s website, can be found at <https://goo.gl/njzeqW>.

² Texas State University, FACEBOOK (Nov. 29, 3:41 PM), <https://www.facebook.com/txstateu/posts/10159524835485567>.

³ Texas State University – Student Government, FACEBOOK (Nov. 29, 8:23 PM), <https://www.facebook.com/txstStudentGovernment/photos/a.531954136899576.1073741826.345341165560875/1592679464160366>.

⁴ Defund the Racist University Star, CHANGE.ORG (Dec. 1, 2017), <https://www.change.org/p/bobcat-liberty-council-defund-the-racist-star>.

Last week, TSU Assistant Vice President of Communications Matt Flores informed *Inside Higher Ed* that the university is “looking further” into the editorial’s publication.⁵ TSU Director of the School of Journalism and Mass Communications Judy Oskam announced that she has formed a committee to examine *The University Star*’s editorial review process and provide recommendations.⁶

On November 30, *The University Star* fired Rudy Martinez. Although Clegg cited a “productive” meeting with the *Star*’s Editor-in-Chief following Martinez’s termination,⁷ Clegg subsequently stated that “[s]tudents deserve transparency and accountability with their fee dollars” and “[i]f we can’t get that, we need to look at funding options” because “[t]here should be no line item for racism in the Texas State budget.”⁸

II. ANALYSIS

It is well-settled law that the First Amendment applies with full force on public college campuses. *See, e.g., Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) (“With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities.”); *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973) (“[T]he 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.’”); *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 and quotation marks omitted); *see also DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) (on public university campuses, “free speech is of critical importance because it is the lifeblood of academic freedom”).

A. Hateful and offensive speech is protected by the First Amendment

The First Amendment does not exist to protect only non-controversial expression. It exists precisely to protect speech that some, many, or even all members of a community may find controversial or offensive. The Supreme Court has explicitly held, in rulings spanning decades, that speech cannot be restricted simply because it offends listeners. *See, e.g., Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (noting that free speech “may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger.

⁵ Jeremy Bauer-Wolf, *Column Starts a Culture War*, INSIDE HIGHER ED, Dec. 1, 2017, <https://www.insidehighered.com/news/2017/12/01/texas-state-president-blasts-racist-student-column>.

⁶ Texas State University, FACEBOOK (Dec. 1, 4:14 PM), <https://www.facebook.com/txstateu/posts/10159533053720567>.

⁷ Connor Clegg, FACEBOOK (Dec. 1, 5:49 PM), <https://www.facebook.com/connor.clegg.3/posts/10208160334486353>.

⁸ Connor Clegg, FACEBOOK (Dec. 2, 10:44 AM), <https://www.facebook.com/connor.clegg.3/posts/10208164385467625>.

Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.”). *See also Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

Accordingly, decades of legal precedent make clear that the First Amendment protects even speech that some, many, or all find hateful. *See, e.g., 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”). The Supreme Court reiterated this fundamental principle in *Snyder v. Phelps*, 562 U.S. 443, 461 (2011), proclaiming:

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. . . . [W]e cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.

Earlier this year, the Court again reaffirmed this principle in *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017), holding unanimously that the perception that expression is “hateful” or that it “demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground” is not a sufficient basis on which to remove speech from the protection of the First Amendment.

Misguided or offensive as some may have found Martinez’s editorial, it does not lose constitutional protection simply because some, or even most, consider it hateful.

B. De-funding *The University Star* due to its content would violate the First Amendment

Clegg seeks to de-fund *The University Star* because “[t]here is no reason for over 39,000 students to be forced to invest their student fees towards this brand of journalism.”⁹ But this reasoning is sharply at odds with decades of legal precedent governing the distribution of mandatory student fees. First Amendment jurisprudence prohibiting student governments from denying funding on the basis of viewpoints expressed by a student newspaper or organization is well-established. If Clegg proceeds with his stated goals, he will open the student government, Texas State University, and himself to the prospect of litigation. This is a fight that Clegg, his student government, and the university will lose.

⁹ Texas State University – Student Government, FACEBOOK (Nov. 29, 8:23 PM), <https://www.facebook.com/txstStudentGovernment/photos/a.531954136899576.1073741826.345341165560875/1592679464160366>.

The Supreme Court has ruled that the forum for expressive activity created by the collection and distribution of mandatory student activity fees in the public university setting requires access to be granted on a content- and viewpoint-neutral basis. *See Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 233 (2000) (“When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others.”); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 836 (1995) (“For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation’s intellectual life, its college and university campuses.”).

In *Rosenberger* and *Southworth*, the Court held that when a public university decides to use student fees to fund a multiplicity of independent student groups, as TSU has done here, each student group retains its status as a private party expressing its personal viewpoint. Unlike an “official” university publication, student newspapers like *The University Star* are independent organizations whose speech is fully protected by the First Amendment, a fact recognized by Oskam in her December 1 statement. Accordingly, the university and its agents cannot censor or punish such publications on the basis of content, even those which receive student fees, any more than the government can censor *The New York Times*. *The University Star*’s funds cannot be withdrawn or diminished simply because students or TSU’s Student Service Fee Committee may not find its content to their liking.

C. TSU’s investigation and formation of a review committee chill protected expression

TSU is free to criticize, as you have done, its students’ speech and the choice to publish the opinion piece. However, in announcing that the university is investigating the editorial, and creating a review committee to examine *The University Star*’s editorial review process, TSU has cast an unacceptable chill on student expression. This conduct threatens to cause substantial harm to the First Amendment rights of students at TSU, even if these investigations ultimately result in no formal consequences.

The First Amendment prohibits government actions taken in retaliation for constitutionally protected expression which would “chill a person of ordinary firmness from continuing to engage in that activity.” *Keenan v. Tejada*, 290 F.3d 252, 258 (5th Cir. 2002) (“The First Amendment prohibits not only direct limits on individual speech but also adverse governmental action against an individual in retaliation for the exercise of protected speech activities.”) *See also Black Farmers & Agriculturists Ass’n v. Hood*, 2014 U.S. Dist. LEXIS 30583 at *31–32 (S.D. Miss. 2014) (citing with approval a Fourth Circuit holding that a government official unconstitutionally chills speech when it responds to protected expression with “a threat, coercion, or intimidation intimating that punishment, sanction, or adverse regulatory action will imminently follow”) (citing *Suarez Corp. Industries v. McGraw*, 202 F.3d 676 (4th Cir. 2000)). In determining whether government action would have this impermissible effect, courts will “consider[] the status of the speaker and retaliator, the relationship between them, and the nature of the alleged

retaliatory acts.” *Reitz v. City of Abilene*, 2017 U.S. Dist. LEXIS 110673 at *62 (N.D. Tex. 2017).

Accordingly, investigations into protected speech may themselves be an act that violates the First Amendment. In *Sweezy v. New Hampshire*, 354 U.S. 234, 245–48 (1957), the Supreme Court noted that government investigations “are capable of encroaching upon the constitutional liberties of individuals” and have an “inhibiting effect in the flow of democratic expression.” Similarly, the Court later observed that when issued by a public institution like TSU, “the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation” might violate the First Amendment. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).

Several appellate courts have similarly held that government investigations into protected expression violate the First Amendment. *See White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) (holding that a government investigation into clearly protected expression chilled speech and therefore violated the First Amendment); *Levin v. Harleston*, 966 F.2d 85 (2d Cir. 1992) (upholding a trial court’s finding that a university president’s creation of a committee to investigate protected speech by a professor unconstitutionally chilled protected expression because it implied the possibility of disciplinary action); *Rakovich v. Wade*, 850 F.2d 1180, 1189 (7th Cir. 1988) (“an investigation conducted in retaliation for comments protected by the first amendment could be actionable . . .”).

The chilling effect in this case has already become clear. Faced with threats against its funding, a university investigation, and an imposed review committee, *The University Star* has fired Martinez for writing an editorial which the paper itself approved for publication. It is entirely predictable that, in light of your administration’s suggestion that *The University Star* has engaged in some kind of misconduct, the staff will be hesitant to publish any future articles that have the potential to be controversial. This is an unacceptable result at a public university legally bound to uphold the First Amendment, and a great disservice to your students, our nation’s future journalists.

III. CONCLUSION

Rudy Martinez’s editorial in *The University Star* is unquestionably protected by the First Amendment. So, too, was the decision by the *Star* to publish that opinion piece. While students, the public, and the university are free to criticize Martinez and the *Star*, Texas State University must ensure that the newspaper suffers no further investigation or formal consequences as a result of its publication, including mandatory alterations to its editorial practices or a loss of its funding. FIRE, SPLC, and NCAC ask that you immediately assure *The University Star* that its funding faces no risk, clarify to the university community that no student organization will face investigation or de-funding for engaging in protected expression, publicly renounce any formal investigation of *The University Star*, and ensure that any recommendations produced by Oskam’s committee be advisory rather than imposed.

We are committed to using all of the resources at our disposal to see this matter through to a just conclusion.

Each day that these threats go unaddressed, *The University Star* and all other TSU students remain unsure of what constitutionally protected expression may spur retaliation by their university. Accordingly, we request a response to this letter by no later than December 8, 2017.

Sincerely,



Ari Z. Cohn, Esq.
Director, Individual Rights Defense Program



Hadar Harris
Executive Director, Student Press Law Center



Christopher Finan
Executive Director, National Coalition Against Censorship

cc:

Dr. Margarita M. Arellano, Associate Vice President and Dean of Students

Dr. Joanne Smith, Vice President, Student Affairs

Charmaine Mazzantini, Associate General Counsel

Connor Clegg, President, Student Government

Morgan Rigsby, President, Student Organization Council