



March 13, 2024

Lawrence Schovanec
Office of the President
Texas Tech University
115 Administration Building, Box 42005
Lubbock, Texas 79409-2005

URGENT

Sent via U.S. Mail Next-Day Delivery and Electronic Mail (pres.webmaster@ttu.edu)

Dear President Schovanec:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is deeply concerned by Texas Tech University's suspension of Assistant Professor Jairo Fúnez-Flores for his social media commentary on the Israeli-Palestinian conflict that TTU has labeled "antithetical" to its values while announcing an investigation into whether he made similar comments in class. As public university faculty do not forfeit core First Amendment rights to comment as private citizens on matters of public concern simply by virtue of their employment, TTU's actions violate its binding obligations under the First Amendment.² TTU must end its suspension and investigation of Fúnez-Flores and restore him to the classroom immediately.

¹ 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 *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)).

Our concerns arise out of TTU's reaction to a February 22 *Texas Scorecard* article detailing several of Fúnez-Flores's posts on X,³ which included commentary about the Super Bowl,⁴ suffering in Gaza,⁵ and Palestinian resistance to Israeli military action.⁶ On March 4 you informed Fúnez-Flores TTU had placed him on "suspension with pay pending the results of an investigation ... by the TTU System Office of Equal Opportunity," citing TTU's asserted need to ensure students, faculty, and staff "remain in a safe working and learning environment that is free from discriminatory harassment of any kind, including antisemitic harassment."⁷ University officials have publicly called Fúnez-Flores's posts "antithetical" to TTU's values and claimed the university is investigating whether he made similar comments in the classroom or work environment.⁸

But TTU may not punish faculty members for constitutionally protected political speech, as the First Amendment provides them broad protections to speak as private citizens on matters of public concern,⁹ which there can be no doubt that the current Middle East conflict and subsequent debate about antisemitism on U.S. college campuses encompass.¹⁰ To assess whether the First Amendment protects a public employee's speech as a private citizen, courts balance the interests of the employee in speaking against that of the employer in promoting the

³ Kristen Stanciu, *Texas Tech Professor Publicly Exposes Antisemitism*, TEX. SCORECARD (Feb. 22, 2024), <https://texasscorecard.com/investigations/texas-tech-professor-publicly-expresses-antisemitism/>. The recitation here reflects our understanding of the pertinent facts. We appreciate that you may have additional information 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 "Fuck the Super Bowl, the US, Israel, and everyone who doesn't care about what's happening in Rafah." Jairo I Fúnez-Flores (@Jairo_I_Funez), X (Feb. 12, 2024, 12:17 AM), https://twitter.com/Jairo_I_Funez/status/1756910366246707558 [<https://perma.cc/9KL6-WKQV>].

⁵ "Fuck Israel & its supporters! Fuck those who remain silent! Fuck academia! Fuck colonial apologists. Fuck those who stop humanitarian aid! Fuck the liberal 'nuances'! Fuck Biden! Fuck everyone who says it's not a genocide! Fuck those who disregard the suffering of Palestinians!" Jairo I Fúnez-Flores (@Jairo_I_Funez), X (Jan. 30, 2024, 8:43 AM), https://twitter.com/Jairo_I_Funez/status/1752326549636878466 [<https://perma.cc/P8GR-NR4P>].

⁶ "PALESTINIANS HAVE THE RIGHT TO RESIST SETTLER COLONIAL GENOCIDE[.] PALESTINIANS HAVE THE RIGHT TO RESIST OCCUPATION & APARTHEID[.] PALESTINIANS HAVE THE RIGHT TO LIVE WITH DIGNITY IN THEIR OWN LAND[.]" Jairo I Fúnez-Flores (@Jairo_I_Funez), X (Oct. 11, 2023, 9:36 AM), https://twitter.com/Jairo_I_Funez/status/1712099862546637226 [<https://perma.cc/8BXV-JW2P>]. Fúnez-Flores also reposted a post on October 7 that stated Hamas's attacks in Israel were "not terrorism," but rather were acts "resisting dehumanization, ethnic cleansing and genocide[.]" Stanciu, *supra* note 4.

⁷ Letter from Lawrence Schovanec, president, to Jairo Fúnez-Flores, assistant professor (March 4, 2024) (on file with author).

⁸ Kate McGee, *Texas Tech suspends professor over Israel-Hamas War comments*, TEX. TRIBUNE (March 4, 2024), <https://www.texastribune.org/2024/03/04/texas-tech-university-professor-israel-hamas/>.

⁹ *Connick v. Myers*, 461 U.S. 142, 150 (1983). Speech "deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community[.]" *Snyder v. Phelps*, 562 U.S. 443, 453 (2011).

¹⁰ See, e.g., Anna Betts, *A Timeline of How the Israel-Hamas War Has Roiled College Campuses*, N.Y. TIMES (Dec. 12, 2023), <https://www.nytimes.com/2023/12/12/us/campus-unrest-israel-gaza-antisemitism.html> (detailing "the tensions on campuses, including dueling protests, calls for the ouster of school leaders and threats from angry donors and alumni to pull funding[.]").

efficiency of the public service it provides without disruption.¹¹ And, notably, as held by the U.S. Court of Appeals for the Fifth Circuit, whose decision bind TTU, when expression “more substantially involves matters of public concern,” the state must make “a stronger showing of disruption,”¹² which TTU has failed to do. To the contrary, Fúnez-Flores’s X account does not reference his TTU employment, making it highly unlikely those viewing his posts would understand them to be anything more than *personal* political viewpoints.

And regarding those posts, the mere fact that some may have taken offense is alone insufficient to remove Fúnez-Flores’s speech from the First Amendment’s protection, because others finding a statement of “inappropriate or controversial character ... is irrelevant to ... whether it deals with a matter of public concern.”¹³ Rather, political speech, including that on global conflicts, even if others view it as antisemitic, receives the highest level of First Amendment protection. As the Supreme Court has said: “Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect free discussion of governmental affairs.”¹⁴ Criticizing military actions is undoubtedly “core political speech” at the very heart of any conception of free expression, where First Amendment protection is “at its zenith.”¹⁵ As the Court has made clear: “As a Nation we have chosen ... to protect even hurtful speech on public issues to ensure we do not stifle public debate.”¹⁶

Even with TTU’s obligation to address discriminatory harassment, which its March 4 communication suggests is where its interests lie here, it must avoid punishing protected speech, which means using the legal definition set out by the Supreme Court in *Davis v. Monroe County Board of Education*. The *Davis* Court held that for conduct (including expression) to constitute actionable harassment, it must be (1) unwelcome, (2) discriminatory on the basis of gender or another protected status, and (3) “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.”¹⁷ Here, as none of Fúnez-Flores’s posts targeted specific students (or faculty) on campus, and cannot be reasonably said to be depriving any student from receiving his or her education, his protected extramural speech cannot justify an investigation into his in-class speech.

¹¹ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

¹² *Gonzales v. Benavides*, 774 F.2d 1295, 1302 (5th Cir. 1984) (citing *Connick*, 461 U.S. at 150 (1983)).

¹³ *Rankin v. McPherson*, 483 U.S. 378, 384 (1987) (expression of hope that President Ronald Reagan might be assassinated was protected against relation).

¹⁴ *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

¹⁵ *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 186-87 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414 (1988)).

¹⁶ *Snyder*, 562 U.S. at 448, 461.

¹⁷ 526 U.S. 629 (1998). In a July 28, 2003 “Dear Colleague” letter sent to college and university presidents nationwide, the Office for Civil Rights of the U.S. Department of Education further made clear punishable harassment “must include something beyond the mere expression of views, symbols, or thoughts that some person finds offensive.” U.S. Dep’t of Educ., Dear Colleague Letter from Gerald A. Reynolds, Assistant Sec’y for Civil Rights (July 28, 2003), <https://www2.ed.gov/about/offices/list/ocr/firstamend.html>.

Finally, before suspending Fúnez-Flores, TTU failed to give him proper notice of the charges—including an explanation of how his speech violated specific university policies—and an adequate opportunity to respond to them, raising due process concerns. Notice of charges is an “elementary and fundamental requirement of due process,”¹⁸ as is the opportunity “to be heard at a meaningful time and in a meaningful manner.”¹⁹ By removing Fúnez-Flores from the classroom before determining whether he has violated any university policies, TTU has disciplined him before giving him a chance to fully and substantively respond to any charges against him.

Of course, Fúnez-Flores is not shielded from every consequence of his expression—including criticism by students, faculty, and/or the broader community, forms of the “more speech” remedy to objectionable expression that the First Amendment prefers to censorship.²⁰ But the First Amendment limits the *types* of consequences that may be imposed, and *who* may impose them—and surely bars state actors from punishing protected political expression.

We urge TTU to immediately end its suspension and investigation of Fúnez-Flores and restore him to the classroom. Due to the university’s ongoing violation of Fúnez-Flores’s First Amendment rights, we request a response no later than close of business on March 20.

Sincerely,



Graham Piro
Program Officer, Campus Rights Advocacy

Encl.

¹⁸ *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

¹⁹ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

²⁰ *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

Authorization and Waiver for Release of Personal Information

I, Jairo Fúnez-Flores, do hereby authorize Texas Tech 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:
Jairo Fúnez-Flores
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Signature

3/13/2024

Date