



January 28, 2021

Dr. Noelle E. Cockett
Office of the President
Utah State University
Old Mail Hill
Logan, Utah 84322

Sent via Electronic Mail (Noelle.Cockett@usu.edu)

Dear Dr. Cockett:

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.

FIRE is concerned about the state of freedom of expression at Utah State University (USU) in light of a report¹ that administrators blocked students on Twitter, citing the university's "social media policy." This censorship departs from USU's obligations as a public university bound by the First Amendment's guarantee of freedom of expression.

I. USU Blocks Students from Interacting with its Official Twitter Account

Our understanding of the facts is derived from public information reported by *The Utah Statesman*.² We appreciate that you may have additional information to offer and invite you to share it with us.

On Twitter, the #USUgripe hashtag collects the tweeted complaints of USU students and alumni about the university.³ On December 9, 2020, a student tweeted expressing annoyance that the university's library did not have a back door and including the #USUgripe hashtag.⁴ In

¹ Taylor Cripe & Sydney Dahle, *BLOCKED – USU's social media policies called into question*, UTAH STATESMAN, Jan. 25, 2021, <https://usustatesman.com/blocked-usus-social-media-policies-called-into-question>.

² *Id.*

³ Karcin Harris, *USU Gripe Night revived on Twitter for its semiannual event*, UTAH STATESMAN, Dec. 11, 2020, <https://usustatesman.com/usu-gripe-night-revived-on-twitter-for-its-semiannual-event>.

⁴ B (@billye_wilson), TWITTER (Dec. 9, 2020), https://twitter.com/billye_wilson/status/1336857614349553666.

response, the university's official Twitter account, @USUAggies, tweeted, "Philosophical question: What if the entrance IS a back door, and there simply is no front door."⁵

Zachary Grant Bess, then a USU student, responded to USU's tweet from his personal Twitter account:⁶

Doesn't change anything you bastards, just means you need to build a front door.

We need an entrance on all four sides.

The entrance facing the tsc could be easily converted, the loading dock could be dual purpose. Checkmate.

#gwaggies #usugripe

The USU Twitter account tweeted in response, "Keep it civil please, Grant."⁷ Bess responded:⁸

I literally paid you 4K plus fees to work as a free teacher, 300 miles away from campus doing student teaching this semester, during COVID-19.

I'm sure the PR guy can handle a swear.

According to Bess' next tweet⁹ and *The Statesman's* reporting,¹⁰ Bess was then blocked by USU staff from interacting with the official USU Twitter account. USU's public information officer, Emilie Wheeler, told *The Statesman* that USU urging Bess to "[k]eep it civil" acted as a warning before blocking him.¹¹ According to *The Statesman's* reporting, Bess is no longer blocked by USU's Twitter account.¹²

The Statesman's reporting also references other students' complaints that they were blocked by the USU Twitter account, including USU student Cameron Moellendorf, who said he

⁵ Utah State University (@USUAggies), TWITTER (Dec. 9, 2020), <https://twitter.com/USUAggies/status/1336877751567933444>.

⁶ Grant (@ZGrantBess), TWITTER (Dec. 9, 2020), <https://twitter.com/ZGrantBess/status/1336883496782983168>.

⁷ Utah State University (@USUAggies), TWITTER (Dec. 9, 2020), <https://twitter.com/USUAggies/status/1336884208388567040>.

⁸ Grant (@ZGrantBess), TWITTER (Dec. 9, 2020), <https://twitter.com/ZGrantBess/status/1336885634229649411>.

⁹ Grant (@ZGrantBess), TWITTER (Dec. 9, 2020), <https://twitter.com/ZGrantBess/status/1336891358926102530>.

¹⁰ Cripe & Dahle, *supra* note 1.

¹¹ *Id.*

¹² *Id.*

believes he was blocked by USU for disagreeing with its position that the university is welcoming to all, including the LGBTQ community.¹³

USU's Social Media Guidelines provide, in pertinent part:¹⁴

Utah State University welcomes and encourages your participation through our social media channels. Our goal is to provide a place to express and honor the diverse voices of our university. In order to achieve that end, we reserve the right to delete off-topic posts which may include spam, solicitations, comments irrelevant to USU operations, commercial comments, as well as comments that contain Private Sensitive Information (PSI) or Institutional Data, as defined by USU Policy. Any questions or concerns regarding this disclaimer, or about a specific post, should be directed to the USU Social Media Coordinator.

The “About” section of USU's Facebook page sets forth a variation of the university's Social Media Guidelines, adding new categories of prohibited speech:¹⁵

In order to achieve that end, we reserve the right to delete posts/comments and block accounts containing profanity, obscenity, personal attacks, electronic harassment, or privacy violations. Your posts should always be relevant to USU. Do not use this site to promote any other business, political candidate or other causes. Spam, irrelevant posts and solicitations will be deleted.

II. USU's Applied Social Media Policies Violate the First Amendment

USU's social media policy included on its Facebook “About” page does not provide a constitutional basis for the censorship of student or faculty expression in online public forums created by the university. By blocking Bess—and other students, according to *The Statesman*—pursuant to an arbitrary social media policy, USU violated the First Amendment. The continued maintenance of this policy unconstitutionally chills the expressive rights of all USU students, and USU must cease such unconstitutional enforcement of these policies.

¹³ *Id.*

¹⁴ Social Media Guidelines, UTAH STATE UNIV., UNIV. MARKETING AND COMM'NS (last visited Jan. 26, 2021), <http://www.usu.edu/umac/web-communications/social-media-guidelines.cfm#:~:text=In%20order%20to%20achieve%20that,as%20defined%20by%20USU%20Policy>.

¹⁵ Utah State Univ., *About*, FACEBOOK (last visited Jan. 26, 2021), <https://www.facebook.com/UtahState/about>.

A. *The First Amendment binds USU.*

It has long been settled law that the First Amendment is binding on public colleges like USU.¹⁶ Accordingly, the decisions and actions of a public university—including the pursuit of disciplinary sanctions,¹⁷ recognition and funding of student organizations,¹⁸ interactions with student journalists,¹⁹ conduct of police officers,²⁰ and maintenance of policies implicating student and faculty expression²¹—must be consistent with the First Amendment.

B. *The interactive components of USU’s social media accounts are public forums.*

The First Amendment does not apply only to speech within physical forums, but extends to expression in interactive, online forums. “[S]ocial media is entitled to the same First Amendment protections as other forms of media.”²² As the Supreme Court has observed, “in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views,” but the answer today is “clear”: “It is cyberspace . . . and social media in particular.”²³

This is particularly true for college students, who are more likely than preceding generations to embrace burgeoning tools of communication. And it is all the more so in the midst of a global pandemic which has forced students and faculty to evacuate campuses across the country, relegating much of their communication—social, academic, and otherwise—to digital forums. Accordingly, the confluence between higher education and social media, with their mutually-reinforcing interests in academic and expressive freedom, should be where speech protections are at their height.

In recent years, a wide range of courts across the country have held government actors’ social media sites to be public forums subject to First Amendment limitations.²⁴ These decisions

¹⁶ *Healy v. James*, 408 U.S. 169, 180 (1972).

¹⁷ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

¹⁸ *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000).

¹⁹ *Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995).

²⁰ *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011).

²¹ *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

²² *Knight First Amendment Inst. at Columbia Univ. v. Trump*, No. 18-1691-cv, 2019 U.S. App. LEXIS 20265, at *21 (2d Cir. July 9, 2019) (“*Knight*”).

²³ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

²⁴ *See, e.g., Windom v. Harshbarger*, No. 1:19-cv-24, 2019 U.S. Dist. LEXIS 95080, at *13–18 (N.D.W. Va. June 6, 2019) (First Amendment challenge survives motion to dismiss where constituent blocked from legislator’s “politician” Facebook page); *One Wisconsin Now v. Kremer*, 354 F. Supp. 3d 940 (W.D. Wis. Jan. 18, 2019) (legislators blocking critic on Twitter); *People for the Ethical Treatment of Animals, Inc. v. Young*, No. 4:18-cv-01547 (S.D. Tex. Sept. 10, 2018), ECF No. 31 (summary order denying motion to dismiss First Amendment claims premised on keyword-based content filters on public university’s Facebook page); *Leuthy v. LePage*, No. 17-cv-00296, 2018 U.S. Dist. LEXIS 146894, *36–43 (D. Me. Aug. 29, 2018) (governor’s Facebook page was limited public forum); *Dingwell v. Cossette*, No. 3:17-cv-01531, 2018 U.S. Dist. LEXIS 95832 (D. Conn. June 7, 2018) (critic

clearly establish that the interactive components of USU’s social media accounts are public forums.

The most prominent of these decisions was a challenge to then-President Donald Trump’s practice of blocking critics from his Twitter account.²⁵ There, the district court carefully applied the First Amendment’s forum doctrine to the “interactive space” following each of the president’s tweets.²⁶ That space was a designated public forum, as it was “generally accessible to the public at large” without limiting criteria, the account had been held out as a means of communication with Trump, and the space’s interactive design was compatible with expressive activity.²⁷ Because it was a designated public forum, restrictions on access or content were permissible only if “narrowly drawn to achieve a compelling state interest,” and viewpoint discrimination was impermissible.²⁸

The United States Court of Appeals for the Second Circuit agreed, holding that the account created a “metaphysical” public forum, barring its government operator from viewpoint-discriminatory acts that “burden” users’ speech, even if there are other avenues for those users to express themselves.²⁹

The Second Circuit is not alone. The United States Court of Appeals for the Fourth Circuit approvingly applied the reasoning of the *Knight* district court decision to a Facebook page created by a county political figure.³⁰ The court reasoned that “aspects of” a Facebook page “bear the hallmarks of a public forum,” as the comment section was compatible with expressive activity and had been opened by the official for public discourse.³¹ The “interactive component” of the Facebook page, consisting of the portion “in which the public can post comments, reply to posts” and “like” comments and posts was a public forum.³² The court declined to reach the issue of whether the Facebook page amounted to a “traditional public forum or designated or limited public forum,” which would bear on the level of scrutiny to be applied, as the politician’s act of blocking her constituent because of his views would be impermissible in any public forum.³³

blocked from police Facebook page).

²⁵ *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 549 (S.D.N.Y. May 23, 2018) (upheld on appeal by the Second Circuit in *Knight*).

²⁶ *Id.* at 566–77.

²⁷ *Id.* at 574–75.

²⁸ *Id.* at 575 (quoting, in part, *Int’l Soc’y for Krishna Consciousness, Inc., v. Lee*, 505 U.S. 672, 678–79 (1992)). *See also, Price v. City of New York*, No. 15-cv-5871, 2018 U.S. Dist. LEXIS 105815, *25–46 (June 25, 2018) (where NYPD precinct blocked Twitter user, whether the forum was a “public, designated, or nonpublic forum” was immaterial, as “viewpoint discrimination that results in the intentional, targeted expulsion of individuals . . . is unlawful in *any* forum,” including nonpublic forums).

²⁹ *Knight* at *21–28.

³⁰ *Davison v. Randall*, 912 F.3d 666, 682 n.3 (4th Cir. 2019).

³¹ *Id.* at 682.

³² *Id.* at 686–87.

³³ *Id.* at 687–88.

Just a few weeks ago, the United States District Court for the Southern District of California reaffirmed the right to free expression when a public official creates a designated public forum for constituent communication, as is the purpose of USU’s Twitter.³⁴

USU’s Twitter serves the same function as an elected official’s Twitter or Facebook page, and its administrators are similarly bound by the First Amendment. Students, alumni, and faculty alike use USU’s social media to learn about what is happening on campus and other pertinent information that USU may share through its social media. Blocking a student’s account inhibits their ability to access information about campus happenings and announcements, which is especially troublesome during a global pandemic, when students must be aware of and understand the university’s policies and issues of campus safety.

C. USU’s policies are unconstitutional and must be revised.

USU’s enumerated categories of prohibited speech include expression well within the protection of the First Amendment and decades of case law.

The First Amendment “generally prevents government from proscribing speech . . . or even expressive conduct,”³⁵ unless it falls within certain well-defined categories, such as obscenity, defamation, fraud, and incitement.³⁶ Outside of the narrow universe of categorically unprotected expression, “[c]ontent-based regulations are presumptively invalid.”³⁷ USU’s policy threatens protected speech—including social and political commentary that lies at the core of the First Amendment—that a student or administrator could subjectively deem “profanity,” a “personal attack,” or “electronic harassment.”³⁸

Under USU’s policy, students’ online expression may be burdened simply because it is offensive to administrators or others, even if it consists of views on important political and social issues such as affirmative action, religion, abortion, marijuana legalization, or other issues likely to result in sharp exchanges. This result is at odds with the Supreme Court’s recognition that “speech concerning public affairs is more than self-expression; it is the essence of self-government,” reflecting “our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”³⁹ The propensity of the policy to silence speech on important issues is further evidenced by Moellendorf’s allegation that he was blocked by USU for his opinion that USU is not welcoming to the LGBTQ community.⁴⁰

The lack of specificity regarding what speech could be considered a “personal attack” or “electronic harassment,” leaves ambiguity and does not provide students with a “reasonable

³⁴ *Garnier v. O’Connor-Ratcliff*, 2021 WL 129823 (S.D. Cal. Jan. 14, 2021).

³⁵ *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992).

³⁶ See *United States v. Stevens*, 559 U.S. 460, 468–69 (2010).

³⁷ *R.A.V.*, 505 U.S. at 382.

³⁸ *Supra* note 12.

³⁹ *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (internal quotations omitted).

⁴⁰ Cripe & Dahle, *supra* note 1.

opportunity to know what is prohibited, so that he may act accordingly.”⁴¹ This leaves unfettered discretion in USU administrators to determine what speech is or is not permitted. Granting government officials such broad discretion “opens the way to arbitrary suppression of particular points of view,” in violation of the First Amendment.⁴²

This unfettered discretion yields particularly troubling results when the object of a “personal attack” is an administrator or the university itself, providing administrators authority to censor their critics. Our constitutional commitment to freedom of expression obliges government officials to weather “vehement, caustic, and sometimes unpleasantly sharp attacks” in order to provide breathing room for public debate.⁴³ This conflict of interest is on acute display in USU’s response to Bess’ tweets chiding them as “bastards” over the location of a door and adding that he was “sure the PR guy” running the USU Twitter account “can handle a swear.”

III. USU Must Rescind its Operative Social Media Policy

USU’s maintenance of the policy promulgated on its Facebook page is plainly contrary to the First Amendment. In enforcing it against Bess and other students, USU violates core First Amendment principles and undermines USU students’ freedom of expression. That action demonstrates that USU’s policies can be—and have been—used in an unconstitutional manner.

Fortunately, USU may remedy this iteration of its policy by replacing it with the version already set forth on its own website, which—while imperfect—lacks the operative policy’s most troubling aspects, such as prohibitions on “profanity” or “personal attacks.” We would be pleased to work with USU on evaluating and revising its social media policies, or any other institutional policy or practice, for compliance with the First Amendment in order to better protect students’ rights to free expression, while meeting USU’s needs.

We request receipt of a response to this letter no later than the close of business on February 10, 2021.

Sincerely,



Sabrina Conza
Program Analyst, Individual Rights Defense Program

Cc: Mica McKinney, Vice President for Legal Affairs and General Counsel
Bill Plate, Vice President, Marketing and Communications

⁴¹ *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

⁴² *Crowder v. Hous. Auth. of Atlanta*, 990 F.2d 586, 591 (11th Cir. 1993).

⁴³ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).