



National
Coalition
Against
Censorship



February 24, 2021

Randy Boyd
Office of the President
The University of Tennessee System
800 Andy Holt Tower
1331 Circle Park
Knoxville, Tennessee 37996

Sent via Electronic Mail (utpresident@tennessee.edu)

Dear President Boyd:

The Foundation for Individual Rights in Education,¹ the National Coalition Against Censorship,² and PEN America³ write to share our concerns for the First Amendment rights of members of the East Tennessee State University (ETSU) men's basketball team. The university has faced mounting pressure from lawmakers and the general public to do what the First Amendment does not permit: restrict students' freedom of expression. We urge you to resist such demands and uphold the free speech imperatives that bind the actions of any public university.

I. ETSU Men's Basketball Players Take a Knee During the National Anthem

On February 15, 2021, the ETSU men's basketball team was photographed kneeling during the national anthem before a game against UT Chattanooga.⁴

¹ 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.

² 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.

³ PEN America is a nonprofit organization standing at the intersection of literature and human rights to protect open expression in the United States and worldwide.

⁴ Kaylyn Kluck, *'This kind of activity will not be tolerated': Local lawmakers react to ETSU players kneeling during anthem*, WJHL (Feb. 19, 2021), <https://www.wjhl.com/news/local/this-kind-of-activity-will-not-be-tolerated-local-lawmakers-react-to-etsu-players-kneeling-during-anthem>.

On February 17, ETSU coach Jason Shay discussed the players' protest, explaining:

That's good that [people are] discussing it because that's what that was supposed to do. It was a decision our team made prior to the season as a call to action against racial inequalities and injustices. [...] Our intentions by no means involve disrespecting our country's flag or the servicemen and women that put their lives on the line for our nation. [...] No one knows the sacrifice, the fear, the pain, the anxiety, the loss that they've experienced fighting for our country's freedom and rights. But many of us don't know the same sacrifice, fear, pain and loss the people of color have had to endure over 400 years. . . .⁵

The protest prompted vociferous condemnation.⁶ On February 22, lawmakers peppered a university attorney with questions about the protest,⁷ and twenty-seven members of the Tennessee Senate sent a letter to university leaders reading, in pertinent part:

While we recognize our student athletes may express their own views on a variety of issues in their personal time, we do not condone any form of protest that could be viewed as disrespectful to our nation or flag while they are representing our state universities. When they don the jersey of a Tennessee university, they step out of their personal roles and into the role of an ambassador for our state. We expect all those who walk onto the field of play representing our universities to also walk onto the field of play to show respect for our National Anthem.

To address this issue, we encourage each of you to adopt policies within your respective athletic departments to prohibit any such actions moving forward. We view this as a teachable moment in which administrators may listen to concerns from students but also exercise leadership in stating unequivocally what the National Anthem means to this nation and explain proper times, places, and manners for expressing protest.⁸

We write today to make clear that while this is a “teachable moment,” the lesson to be learned is the enduring power and necessity of the First Amendment’s protection of freedom of conscience and free expression, especially in the face of government pressure to conform.

⁵ Joe Avento, *Shay says Bucs' kneeling 'call to action,' not disrespectful*, JOHNSON CITY PRESS (Feb. 18, 2021), https://www.johnsoncitypress.com/sports/shay-says-bucs-kneeling-call-to-action-not-disrespectful/article_ae81574e-71f8-11eb-8b50-7bf47c13c6e.html.

⁶ See Kluck, *supra* note 4; Natalie Colarossi, *Tennessee Lawmakers Sound Warnings After University Basketball Team Kneels During Anthem*, NEWSWEEK (Feb. 20, 2021), <https://www.newsweek.com/tennessee-lawmakers-sound-warnings-after-university-basketball-team-kneels-during-anthem-1570769>.

⁷ Mackenzie Moore, *May student athletes kneel without repercussions? Tennessee lawmakers clash*, WJHL (Feb. 22, 2021), <https://www.wjhl.com/news/regional/tennessee/do-student-athletes-have-the-right-to-kneel-tennessee-lawmakers-clash>.

⁸ Letter from Lt. Gov. Randy McNally, et al., to Dr. Steven Angle, Chancellor, Univ. of Tenn. Chattanooga, et al., Feb. 22, 2021, *available at* <https://twitter.com/PaulBaileyforTN/status/1364285667077947396>.

II. The Players' Symbolic Protest is Protected by the First Amendment

The First Amendment limits how public universities may regulate students' speech,⁹ restricting the ability of university officials to restrain or penalize student-athletes' peaceful protest—including students who kneel during the national anthem.¹⁰

A. *The First Amendment and Tennessee Law Protect Student Expression.*

It has long been settled law that the First Amendment is binding on public universities like ETSU.¹¹ Accordingly, the decisions and actions of a public university must be consistent with the First Amendment.¹² In addition to these constitutional obligations, Tennessee's Campus Free Speech Protection Act¹³ protects the rights of "all students" to engage in "all forms of peaceful assembly" and "protests."¹⁴ This right is protected even when that expression is "thought by some or even by most" to be "offensive, unwise, immoral, indecent, disagreeable, conservative, liberal, traditional, radical, or wrong-headed."¹⁵

B. *The First Amendment Protects Expressive Conduct.*

The First Amendment protects not only spoken and written words, but also symbolic expression.¹⁶ It protects the act of saluting the American flag (or refusing to do so),¹⁷ burning the American flag,¹⁸ stepping on the flags of Hamas and Hezbollah to protest terrorism,¹⁹ wearing black armbands to protest war,²⁰ or raising a fist while others salute the flag.²¹

The team members' kneeling is symbolic expression "intended to convey a particularized message" which is likely to be "understood by those who viewed it."²² Even if others find that message or its context offensive, kneeling during the anthem is commonly understood to convey a message about police and race in the United States.²³

⁹ See *Healy v. James*, 408 U.S. 169, 180 (1972).

¹⁰ See, e.g., *V.A. v. San Pasqual Valley Unified Sch. Dist.*, No. 17-cv-02471-BAS-AGS, 2017 U.S. Dist. LEXIS 210400, at *10–18 (S.D. Cal. Dec. 21, 2017).

¹¹ *Healy*, 408 U.S. at 180.

¹² See, e.g., *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

¹³ Tenn. Code Ann. § 49-7-2401 *et seq.*

¹⁴ Tenn. Code Ann. §§ 49-7-2404(3), 49-7-2405(a)(3) (emphasis added).

¹⁵ Tenn. Code Ann. § 49-7-2405.

¹⁶ *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) (stating that a flag salute is a form of symbolic speech and recognizing that "[s]ymbolism is a primitive but effective way of communicating ideas").

¹⁷ *Id.* at 633–34.

¹⁸ *Texas v. Johnson*, 491 U.S. 397, 411–420 (1989).

¹⁹ *Coll. Republicans v. Reed*, 523 F. Supp. 2d 1005, 1007 (N.D. Cal. 2007).

²⁰ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969).

²¹ *Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004).

²² *Spence v. Washington*, 418 U.S. 405, 410–411 (1974).

²³ See Jeremy Bauer-Wolf, *Still Taking a Knee Against Racism*, INSIDE HIGHER ED (Feb. 19, 2019), <https://www.insidehighered.com/news/2019/02/19/college-students-are-still-taking-knee-against-racism>.

C. The First Amendment and Tennessee Law Bar Compelled Speech, Including Requiring Students to Stand for the National Anthem

Just as the First Amendment protects the right to speak or engage in expressive conduct, it also protects the corollary right to *refrain* from speaking.²⁴ The refusal to stand in symbolic reverence of our national symbols is a well-established right under the First Amendment, as our Supreme Court recognized even in the dark days of World War II that *requiring* students to stand for the flag is contrary to our national commitment to freedom of conscience.

As the Court explained:

[I]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.²⁵

In requiring that student-athletes stand for the anthem, the university would render the act of standing in reverence for the flag a “gesture barren of meaning.”²⁶ *Compelling* them to do so undermines the very purpose of our national commitment to freedom of expression: “To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous, instead of a compulsory routine, is to make an unflattering estimate of the appeal of our institutions to free minds.”²⁷

D. The ETSU Basketball Players’ Kneeling is Protected Expression

Student-athletes do not leave their First Amendment rights on the locker room floor. A player who scores a game-winning touchdown might visibly give thanks to their Creator or, as Heisman Trophy-winning quarterback Tim Tebow was known to do, kneel in prayer. Athletes, still in uniform, regularly give post-game interviews sharing their personal views or thoughts about the game.

Because the First Amendment and Tennessee law circumscribe the ability of public universities to limit student expression, the expressive rights of student-athletes may be limited only in certain circumstances. None of those circumstances is present here, as the speech neither disrupts university functions nor hinders the team’s athletic cohesion.

²⁴ See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (“[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”).

²⁵ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

²⁶ *Id.* at 633.

²⁷ *Id.* at 641.

i. The students' protest is not disruptive.

As a general matter, the ability of a university to limit student-athlete expression is narrow, and public institutions “may not penalize players for engaging in peaceful speech activity which does not create substantial disorder, materially disrupt class work, or invade the rights of others.”²⁸ To the extent a student-athlete must accept reasonable limits on expressive activity in order to maintain team functions or discipline, that concern is not present here. To the contrary, the team appeared to be united in its decision to kneel, and that decision was vocally supported by their coach.

ii. Student-athletes are not “ambassadors” of the State.

Student-athletes are not “ambassadors” of the State of Tennessee by virtue of playing for a public university’s sports team. Not all expression by an individual member of a team can reasonably be attributed to the university itself, and courts routinely reject the argument that educational institutions’ failure to *punish* speech may be perceived as endorsing it.²⁹

A federal court—not the first to rule that the First Amendment protects uniformed athletes’ criticism of race in America³⁰—recently applied these principles to determine that the First Amendment protected a high school student-athlete’s right to kneel during the anthem before his team’s games.³¹ The court recognized that “schools cannot force students into patriotic expression under the threat of retaliation.”³² Notably, the court found that the student’s kneeling was not school-sponsored speech:

By silently kneeling on the sideline, Plaintiff’s protest to racial injustice sends a personal message to the community that is akin to an individual student’s display of a button or an armband during school hours. The expression is easily interpreted as his own, rather than the school’s, much like Colin Kaepernick’s expression is interpreted as his own, and not imputed to the San Francisco 49ers. Moreover, Plaintiff’s kneeling in

²⁸ *Seamons v. Snow*, 206 F.3d 1021, 1030 (10th Cir. 2000).

²⁹ See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 841 (1995) (concern that a student organization’s expression might be “attributed to the University is not a plausible fear”); *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 64–65 (2006) (rejecting a law school’s limitation on military recruiters’ use of its resources on basis that the law school “could be viewed as sending the message that they see nothing wrong with the military’s policies”); *Gerlich v. Leath*, 861 F.3d 697, 713 (8th Cir. 2017) (prohibiting university from imposing viewpoint-based restrictions on student use of its trademarked name in club materials).

³⁰ For example, “Black athletes [criticizing the] alleged racial policies of the Mormon Church” were dismissed from the team after seeking to wear black “armbands in peaceable and symbolic demonstration” during a football game against Brigham Young University. *Williams v. Eaton*, 443 F.2d 422, 424 (10th Cir. 1971). Although a federal appellate court ruled in their favor, the action remained a scar on the reputation of the University of Wyoming, which apologized to the players still living half a century later. Leah Asmelash, *After 50 years, the University of Wyoming apologized for the dismissal of 14 black football players*, CNN (Sept. 16, 2019), <https://www.cnn.com/2019/09/16/us/university-of-wyoming-black-14-trnd/index.html>.

³¹ *V.A. v. San Pasqual Valley Unified Sch. Dist.*, No. 17-cv-02471-BAS-AGS, 2017 U.S. Dist. LEXIS 210400, at *10–18 (S.D. Cal. Dec. 21, 2017).

³² *Id.* at *11.

protest during the National Anthem expresses an opinion that is opposed to the school's decision to play the National Anthem with the expectation that students will stand.³³

Given the prominent, national discussion about the meaning of athletes' kneeling, the ETSU players' protest cannot reasonably be understood as speech *by* the university, but instead as an expression of the students' personal views. In that context, student-athletes' uniforms merely signify that they are on the team and do not turn them into university spokesmen, and the university's inability to punish them for their speech does not mean that the university has endorsed it. To the contrary, the university has ample means at its disposal to share its own views of the players' protest.

iii. Speech cannot be curtailed on the basis that it is “disrespectful to our nation or flag” or otherwise offensive.

The act of protesting during the anthem is subject to a wide range of interpretations.

Some view kneeling with teammates—as opposed to remaining on the benches—as a means of expressing political dissent while supporting teammates who choose to stand, as Colin Kaepernick did in response to criticism from a retired Army Green Beret.³⁴ Others have argued that kneeling is a traditional form of protest rooted in 1960s-era protests against segregationist churches, showing dissent from the congregants' practice while kneeling in respect for the sanctity of the church.³⁵ Meanwhile, critics of this form of protest do not view it as an expression of respect, but instead as a “disrespectful” gesture, one which is “not protesting racism in your country,” but instead “protesting your country” in disregard for “the sacrifice of courageous men and women who fought and died to preserve its promise for all Americans.”³⁶

Legislators may express their own views, as well, as the “way to preserve” the “special role” of national symbols “is not to punish those who feel differently about these matters,” but “to persuade them that they are wrong.”³⁷ But the First Amendment deprives government officials—whether lawmakers in state houses or administrators on campus—of the power to

³³ *Id.* at *15.

³⁴ Sam Farmer, *Must Reads: The ex-Green Beret who inspired Colin Kaepernick to kneel instead of sit during the anthem would like to clear a few things up*, L.A. TIMES (Sept. 17, 2018), <https://www.latimes.com/sports/nfl/la-sp-kaepernick-kneel-boyer-20180916-story.html>.

³⁵ Ansley L. Quiros, *Kneeling during the national anthem isn't disrespectful. It's a protest steeped in religion.*, WASH. POST (May 29, 2018), <https://www.washingtonpost.com/news/made-by-history/wp/2018/05/29/kneeling-during-the-national-anthem-isnt-disrespectful-its-a-protest-steeped-in-religion>.

³⁶ Marc A. Thiessen, *Opinion: Kneeling during the anthem isn't protesting against racism. It's protesting against America.*, WASH. POST (June 16, 2020), <https://www.washingtonpost.com/opinions/2020/06/16/kneeling-during-anthem-isnt-protesting-against-racism-its-protesting-against-america>.

³⁷ *Texas v. Johnson*, 491 U.S. 397, 419 (1989)

limit speech on the basis of whether some, many, or most find it offensive.³⁸ This is because “government officials cannot make principled distinctions” between what speech is sufficiently innocuous or too offensive to be permitted.³⁹

This principle applies with particular strength to our nation’s public universities, which are dedicated to open debate and discussion, as expression, “no matter how offensive to good taste,” at a public university “may not be shut off in the name alone of ‘conventions of decency.’”⁴⁰ Tennessee state law enshrines this longstanding judicial precedent, recognizing that while “concerns about civility and mutual respect” may be important, those concerns “shall never be used as a justification” to curtail expression.⁴¹ Accordingly, it is “not the proper role of an institution to attempt to shield individuals from free speech, including” expression they may find “offensive” or “radical.”⁴²

Symbols of national reverence are not secluded from criticism under the First Amendment. The state may not “foster its own view” of national symbols “by prohibiting expressive conduct relating to” them, nor may the government require that “a symbol be used to express only one view of that symbol or” what it represents.⁴³ In other words, the First Amendment does not permit state officials to restrict speech on the basis that it is perceived—or even intended—to show disrespect for a symbol of the United States.

³⁸ *Id.* at 414 (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”).

³⁹ *Cohen v. California*, 403 U.S. 15, 25 (1971).

⁴⁰ *Papish*, 410 U.S. at 667–68.

⁴¹ Tenn. Code Ann. §§ 49-7-2405(a)(5), (6).

⁴² *Id.*


⁴³ *Johnson*, 491 U.S. at 415–17.

III. Conclusion

Calls to punish or prohibit student-athlete expression because it is perceived as insufficiently patriotic are invitations to violate students' First Amendment rights. We call on you to provide a civic teaching moment to the public at large by explaining how—and why—the First Amendment does not permit the University of Tennessee to accede to those demands.

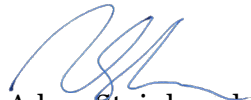
We request receipt of a response to this letter by Wednesday, March 3, 2021.

Sincerely,



Aaron Terr

Program Officer, Individual Rights Defense Program and Public Records
Foundation for Individual Rights in Education



Adam Steinbaugh

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Cc: Jason Shay, Men's Basketball Coach, East Tennessee State University
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