



August 12, 2021

Darryl Hamm  
General Counsel  
California State University  
Office of the Chancellor  
401 Golden Shore  
Long Beach, California 90802

**URGENT**

*Sent via Electronic Mail (dhamm@calstate.edu)*

Dear Mr. Hamm:

Thank you for The California State University System's past attention to concerns raised by FIRE<sup>1</sup> with respect to expression protected by the First Amendment. We write today out of concern for a new matter at Fresno State University in the hope you might ensure that the university abandons any investigation into protected political speech.

FIRE is concerned by Fresno State's announcement that its Dean of Students is conducting "further review" of tweets by the Fresno State College Republicans that criticized a veteran of the armed forces who does not attend the university. While these tweets may be offensive to others, including military veterans, or otherwise contrary to the university's values, they do not fall into any category of speech unprotected by the First Amendment. As a public university bound by the Constitution, Fresno State may exercise its own expressive rights in condemning speech it finds distasteful; however, it may not investigate or punish students' protected expression.

**I. Fresno College Republicans' Responses to Veteran's Video Go Viral**

The following is our understanding of the pertinent facts, which is based on public information. We appreciate that you may have additional information to offer and invite you to share it with us.

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<sup>1</sup> As you will recall from past correspondence, 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.

Early yesterday morning, the Fresno State College Republicans' Twitter account made several comments about a video that criticized people who do not wear masks amid the COVID-19 pandemic.<sup>2</sup> In the video posted to Twitter in February, Patrick Loller, a disabled veteran, said:

If you don't wear a mask, it's because you're a coward. And that's coming from me, a combat veteran. So, come at me bro. And I'm a paramedic, which doubles as being not a coward / knowing how stupid you are for not just wearing a mask. The fact that you equate putting a piece of cloth over your face to stop a deadly pandemic with weakness lets me know just how small you are as a person. You're terrified other people will think that you're weak, because you are. And ironically, by not just wearing a mask when you go out in public, you are broadcasting to the world exactly how much of a coward you actually are. It's amazing. Your fragile little ego is taking peoples' lives. Wow. I deeply hope my persona annoys you, because I'm a bigger man than you, and I'm not even a man.<sup>3</sup>

Loller served as an Army medic in Afghanistan and is an outspoken advocate for veterans who have suffered from Post-Traumatic Stress Disorder.

The Fresno State College Republicans' Twitter account quote-tweeted Loller's video and added the following commentary:

You're such a hero that you'll break down when I light fireworks next door.<sup>4</sup>

The group later offered its thoughts on the military generally, tweeting:

Maybe guys who are actually fighting in combat are brave and whatnot, but the vast majority of our military are glorified DMV employees. They work against what we as conservatives believe all the time with few exceptions.<sup>5</sup>

The tweets, since deleted,<sup>6</sup> have drawn condemnation from the public. Fresno State tweeted a statement yesterday criticizing the tweets as "deeply concerning and inconsistent with the University's core values," which include support for "our nation's military and its veterans."<sup>7</sup> In a subsequent tweet, Fresno State wrote that the "matter has been referred to the Dean of Students for further review."<sup>8</sup>

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<sup>2</sup> Bryant-Jon Anteola, *Fresno State College GOP makes fun of military vet over mask video. University responds*, FRESNO BEE (Aug. 11, 2021) <https://www.fresnobee.com/news/local/article253433844.html>.

<sup>3</sup> Patrick Loller (@PatrickLoller), TWITTER (Feb. 9, 2021, 4:39 PM), <https://twitter.com/PatrickLoller/status/1359270668609683461>.

<sup>4</sup> Anteola, *supra* note 2.

<sup>5</sup> *Id.*

<sup>6</sup> The College Republicans tweeted an apology overnight and suggested the objectionable posts were made by an unauthorized user. *See* Fresno State College Republicans (@FresnoStateCRs), TWITTER (Aug. 12, 2021, 2:02 AM), <https://twitter.com/FresnoStateCRs/status/1425714238518173699>.

<sup>7</sup> Fresno State University (@Fresno\_State), TWITTER (Aug. 11, 2021, 6:48 PM), [https://twitter.com/Fresno\\_State/status/1425605154875711490](https://twitter.com/Fresno_State/status/1425605154875711490).

<sup>8</sup> Fresno State University (@Fresno\_State), TWITTER (Aug. 11, 2021, 6:48 PM), [https://twitter.com/Fresno\\_State/status/1425605155974647808](https://twitter.com/Fresno_State/status/1425605155974647808).

## **II. Fresno State Cannot Investigate the College Republicans for its Protected Tweets**

The First Amendment bars Fresno State from punishing or investigating students for making use of their expressive rights.

It is well-established that the First Amendment does not make a categorical exception for offensive expression, and equally well-established that it constrains public universities in penalizing students' free speech.

### ***A. The First Amendment Applies to Fresno State as a Public University.***

It has long been settled law that the First Amendment is binding on public universities like Fresno State.<sup>9</sup> Accordingly, the decisions and actions of a public university—including the pursuit of disciplinary sanctions,<sup>10</sup> recognition and funding of student organizations,<sup>11</sup> interactions with student journalists,<sup>12</sup> conduct of police officers,<sup>13</sup> and maintenance of policies implicating student and faculty expression<sup>14</sup>—must be consistent with the First Amendment.

### ***B. The First Amendment protects subjectively offensive expression.***

The Fresno State College Republicans' tweets, criticizing a disabled veteran and the broader U.S. Armed Forces, may be offensive to many who read it. However, whether speech is protected by the First Amendment is “a legal, not moral, analysis.”<sup>15</sup>

The Supreme Court has repeatedly, consistently, and clearly held that expression may not be restricted on the basis that others find it to be offensive. This core First Amendment principle is why the authorities cannot outlaw burning the American flag,<sup>16</sup> punish the wearing of a jacket emblazoned with the words “Fuck the Draft,”<sup>17</sup> penalize cartoons depicting a pastor losing his virginity to his mother in an outhouse,<sup>18</sup> or disperse civil rights marchers out of fear that “muttering” and “grumbling” white onlookers might lead to violence.<sup>19</sup> Indeed, the Court has squarely held as protected speech insults directed at those who have served our country.

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<sup>9</sup> *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).

<sup>10</sup> *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

<sup>11</sup> *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000).

<sup>12</sup> *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).

<sup>13</sup> *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011).

<sup>14</sup> *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

<sup>15</sup> *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 821 (S.D. Iowa 2019).

<sup>16</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (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”).

<sup>17</sup> *Cohen v. California*, 403 U.S. 15, 25 (1971).

<sup>18</sup> *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

<sup>19</sup> *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

In ruling that the First Amendment protects protesters holding insulting signs outside of soldiers' funerals, the Court reiterated this fundamental principle, remarking that “[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”<sup>20</sup>

This principle applies with particular strength to universities, dedicated to open debate and discussion. Take, for example, a student newspaper’s front-page uses of a vulgar headline (“Motherfucker Acquitted”) and a “political cartoon . . . depicting policemen raping the Statue of Liberty and the Goddess of Justice.”<sup>21</sup> These words and images—published at the height of the Vietnam War—were no doubt deeply offensive to many at a time of deep polarization and unrest. So, too, were “offensive and sophomoric” skits depicting women and minorities in derogatory stereotypes,<sup>22</sup> “racially-charged emails” to a college listserv,<sup>23</sup> and student organizations that the public viewed as “shocking and offensive.”<sup>24</sup> Yet, “the 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.’”<sup>25</sup>

### ***C. Investigations into Clearly-Protected Expression Violate the First Amendment***

In announcing that the Dean of Students will conduct “further review” of clearly-protected expression, Fresno State sends the chilling message that provocative or offensive expression on matters of political or public concern may warrant review by administrators responsible for student disciplinary proceedings. Such an investigation into constitutionally-protected speech can itself violate the First Amendment, even if that investigation concludes in favor of the speaker. The question is not whether formal punishment is meted out, but whether the institution’s actions in response “would chill or silence a person of ordinary firmness from future First Amendment activities[.]”<sup>26</sup>

Investigations into protected expression may meet this standard.<sup>27</sup> For example, a public university launched an investigation into a tenured faculty member’s offensive writings on race and intelligence, announcing an *ad hoc* committee 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.”<sup>28</sup> This investigation itself constituted an implicit threat of discipline, and the resulting chilling effect constituted cognizable First Amendment harm.<sup>29</sup>

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<sup>20</sup> *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).

<sup>21</sup> *Papish*, *supra* note 10.

<sup>22</sup> *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 388–392 (4th Cir. 1993).

<sup>23</sup> *Rodriguez v. Maricopa Cnty. Comm. Coll. Dist.*, 605 F.3d 703, 705 (9th Cir. 2009) (the First Amendment “embraces such a heated exchange of views,” especially when they “concern sensitive topics like race, where the risk of conflict and insult is high.”)

<sup>24</sup> *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 661 (1st Cir. 1974).

<sup>25</sup> *Papish*, *supra* note 10.

<sup>26</sup> *Mendocino Env'tl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

<sup>27</sup> See, e.g., *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000).

<sup>28</sup> *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992).

<sup>29</sup> *Id.* at 89–90.

Here, Fresno State’s announcement of a “review” into the College Republicans’ protected tweets to a non-student suggests their commentary may have nonetheless violated the student code of conduct. Sanctions for such violations are significant—up to and including suspension or expulsion—and independently sufficient to meet the ordinary firmness test.<sup>30</sup> This sends the message that such speech (even speech directed at non-students over which Fresno State arguably has minimal institutional interest) may be punished in the future. This threat will chill students from exercising their protected First Amendment rights for fear that their constitutionally protected speech could nonetheless be investigated and punished.

### **III. Conclusion**

The appropriate response to offensive expression is “more speech,” the remedy to offensive expression that the First Amendment prefers to censorship.<sup>31</sup> The Fresno State College Republicans will doubtlessly receive the former in spades as they navigate backlash from members of the public who believe the tweets to be insensitive to disabled veterans. Fresno State may criticize protected speech, but they cannot enlist the authority granted to them by the state—to investigate or to punish students enrolled at a public university—in tandem with that criticism.

Given the urgent nature of this matter, we request receipt of a response to this letter no later than the close of business on Friday, August 13, 2021, confirming that Fresno State will not pursue an investigation or disciplinary sanctions in this matter.

Sincerely,



Alex Morey  
Program Officer, Individual Rights Defense Program

Cc: Carolyn V. Coon, Interim Vice President for Student Affairs and Dean of Students

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<sup>30</sup> *Speech First, Inc. v. Fenves*, No. 19-50529, 2020 U.S. App. LEXIS 34087, at \*28–30 (5th Cir. Oct. 28, 2020).

<sup>31</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927).