



February 15, 2022

M. Katherine Banks
1246 TAMU
Texas A&M University
College Station, Texas 77843-1246

Sent via Electronic Mail (president@tamu.edu)

Dear President Banks:

FIRE¹ is deeply concerned by the course of conduct undertaken by Texas A&M University with respect to its student newspaper, *The Battalion*, including its demands that the publication cease print editions by the end of the spring semester and submit to university oversight, or lose previously-provided resources. While we understand that the university has withdrawn the most immediate demands, it appears to remain intent on ultimately imposing administrative control over the independent student publication.

FIRE recognizes that Texas A&M is one of the few institutions in the country whose policies earn an overall “green light” rating from FIRE. However, its present demands of *The Battalion* squarely contradict Texas A&M’s obligations under the First Amendment, which bars the institution from regulating the form or content of an editorially-independent student publication.

I. Texas A&M Administration Gives *The Battalion* 24 Hours to Respond to Unconstitutional Demands

Our understanding of the pertinent facts, based on public information, follows. If you have additional information to offer, we invite you to share it with us.

¹ The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, freedom of the press, due process, academic freedom, legal equality, and freedom of conscience on America’s college campuses.

A. The Battalion is an editorially independent student publication.

The Battalion has been a student-led publication since 1893,² and is currently organized as a registered student organization.³ Until three years ago, the newspaper was housed within the Communication Studies department, but, regardless of organization, the paper has maintained editorial independence for the past 129 years.⁴ As a student organization, *The Battalion* is supported by advertising revenue and incidental university resources, including office space and a faculty adviser, similar to what registered student organizations are typically afforded at public universities.⁵ The newspaper's weekly print edition⁶ brings in tens of thousands of dollars in advertising revenue every semester.⁷

B. The Texas A&M administration's initial demands.

On February 10, Texas A&M Dean of Students Anne Reber and Interim Director of Student Life Stefanie Baker unilaterally informed *The Battalion* staff that the newspaper would no longer be permitted to publish a print edition.⁸ This decision, the administrators said, was effective immediately.

Further, Reber and Banks told *The Battalion* that you, President Banks, had issued the publication an ultimatum: Within 24 hours, the paper's leadership must choose whether they would submit to operating as a university-overseen publication within the new journalism department, or continue to operate as an independent student organization with editorial independence.⁹ If *Battalion* leaders chose the latter, the university would pull all university-provided resources from the newspaper, including its office space and faculty adviser—resources which even non-media student organizations often receive from public universities.¹⁰

C. After initial public outcry, Texas A&M walks back some demands, but continues to misunderstand the relationship between the university and an independent student publication.

On February 11, after an initial outpouring of support for *The Battalion*, you walked back your demand that *The Battalion* cease print editions, instead “allowing” the newspaper to continue

² *About Us*, THE BATTALION, <https://www.thebatt.com/site/about.html> (last visited Feb. 13, 2022), <https://www.thebatt.com/site/about.html>.

³ Ishika Samant, *Breaking: President Banks demands The Battalion Stop Printing*, THE BATTALION (Feb. 11, 2022), https://www.thebatt.com/news/breaking-president-banks-demands-the-battalion-stop-printing/article_e399ccd2-8b69-11ec-966a-2f696477ceb7.html.

⁴ *Id.*

⁵ *Id.*

⁶ *About Us*, *supra* note 2.

⁷ Samant, *supra* note 3.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

to publish in print through the remainder of the spring semester.¹¹ After that point, however, you insist that *The Battalion* will be required to transition to an all-digital publication.¹²

Further, on February 14, you announced that you were adding two representatives from *The Battalion* staff, as well as its faculty adviser, to Texas A&M’s Journalism Working Group.¹³ This Working Group will “assess how *The Battalion* can best achieve its mission to be a strong, independent student voice in the future,” and may help to decide whether it will remain an independent student organization or come under Texas A&M’s new Journalism Department, as well as how the newspaper will be distributed.¹⁴ This change appears to permit *The Battalion* to maintain the status quo—operating as an independent student organization printing once a week—until the Working Group draws its conclusions.

II. The First Amendment Bars Texas A&M from Determining the Content, Organizational Structure, and Mode of Production of *The Battalion*

While including *Battalion* representatives on the Journalism Working Group is a step in the right direction, it also demonstrates that Texas A&M’s administration has missed the point: The university lacks the authority to make decisions about the future of *The Battalion* without consent of its editorial board.

While both the demand that *The Battalion* stop producing print editions and that it come under the journalism department are problematic, the most significant aspect of the demands to the newspaper—which has published in print for 129 years, with only a brief break during World War I¹⁵—is the intrusion on the newspaper’s independence. While you have stated your intention is not to control the content of *The Battalion*, these demands represent a significant overreach and unconstitutionally restrain the independence of the newspaper.

The First Amendment sharply circumscribes the authority available to the university’s administration in how it may regulate an independent student publication. Treating a student media outlet differently from other student organizations—that is, imposing “differential treatment” that “singles out the press”—violates the First Amendment.¹⁶ As discussed in greater detail below, conditioning access to resources made available to other organizations incidental to their recognition, such as office space or a faculty advisor, on the condition of cessation of print publication, subjects core expressive activity to an unconstitutional restraint. While Texas A&M can certainly study and make recommendations to *The Battalion*’s editors, it cannot make ultimatums to force editors to submit to its will. The

¹¹ *Id.*

¹² *Id.*

¹³ *Journalism Working Group to Include Representatives from the Battalion*, Texas A&M (Feb. 14, 2022), <https://president.tamu.edu/messages/feb-14-journalism-working-group-to-include-additional-representatives.html>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Minneapolis Star & Trib. Co. v. Minn. Comm’r of Rev.*, 460 U.S. 575, 586–591 (1983); *see also, Grosjean v. Am. Press Co., Inc.*, 297 U.S. 233, 244–250 (1936) (surveying history of efforts to tax circulation, and noting that if the tax “were increased to a high degree . . . it well might result in destroying both advertising and circulation.”); *Koala v. Khosla*, 931 F.3d 887, 904 (9th Cir. 2019).

university must make clear that its officials will no longer make unconstitutional demands of *The Battalion*.

Including two editors in the Working Group does not ameliorate the threat to the First Amendment posed by Texas A&M's conduct. The Working Group itself remains an organ of the Texas A&M administration; the very ability to appoint editors to the Group underscores that your administration retains direct control over it. Texas A&M cannot empower a group to engage in acts that would be unconstitutional if done directly, *no matter how it constitutes that group*. The university cannot delegate authority it does not have.

A. *The First Amendment Binds Texas A&M's Relationship with The Battalion.*

It is well established that the First Amendment is binding on public universities like Texas A&M University.¹⁷ Accordingly, the decisions and actions of a public university—including interactions with student journalists,¹⁸ the pursuit of disciplinary sanctions,¹⁹ recognition and funding of student organizations,²⁰ conduct of police officers,²¹ and maintenance of policies implicating student and faculty expression²²—must be consistent with the First Amendment.

These First Amendment obligations protect the independence of student publications like *The Battalion*. As helpfully explained by the United States Court of Appeals for the Fifth Circuit, the decisions of which are binding upon Texas A&M, “once a University recognizes a student activity which has elements of free expression, it can censor that expression only if it acts consistent with First Amendment constitutional guarantees.”²³ That is, a university may regulate student publications only if its content would lead to significant “violent disruption” of the educational environment.²⁴

Demanding that *The Battalion* cease its print edition and submit to university oversight or lose its office space and faculty adviser is an impermissible encroachment upon the student

¹⁷ *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).

¹⁸ *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).

¹⁹ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

²⁰ *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000).

²¹ *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011).

²² *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

²³ *Bazaar v. Fortune*, 476 F.2d 570, 574 (5th Cir. 1973).

²⁴ *Id.* at 580.

editors' right to determine the content, mode of production, and organizational structure of the publication.

B. Texas A&M Cannot Constitutionally Make Editorial Decisions About The Battalion, Including its Organizational Structure.

The Battalion is an entity independent from Texas A&M, specifically operating as a registered student organization. Thus, under both the First Amendment and basic notions of ownership, *The Battalion*, not the university, is ultimately responsible for its own operations, including legal liabilities,²⁵ operational structure, and business decisions, such as which content and advertisements to publish²⁶ and how often it should publish online and in print. These decisions are not subject to university oversight.

We remind you that “the state is not necessarily the unrestrained master of what it . . . fosters.”²⁷ In other words, the university’s support for forums for student expression—such as an independent student newspaper—does not allow Texas A&M to make decisions on behalf of student leaders within such forums. The university’s role vis-à-vis independent student publications is limited to one of *support* rather than one of *authority*.

This doctrine constrains Texas A&M both from making demands related to the mode by which *The Battalion* will publish, and also from requiring it to submit to a structural change that would make it no longer a student organization, but instead an educational program housed within the journalism department. Simply stated, Texas A&M lacks authority to make any decision on behalf of *The Battalion*.

C. To the Extent that Texas A&M’s Initial Demands Allowed Student Editors a “Choice,” this Choice Would Not Have Allowed for True Consent.

To the extent that Texas A&M may believe that the unconstitutionality of its now-withdrawn decision to require *The Battalion* to reorganize under the new journalism department was saved by the university posing this as a choice to the student editors, FIRE notes that a “choice” backed by a threat of loss of university resources is not a choice at all. This “choice”—to which student editors were initially given 24 hours to respond—put editors in the position of deciding between their institutional independence and their office space and faculty adviser. This “choice” was not only impossible, but unconstitutional under both the First and the Fifth Amendments.

²⁵ *Lewis v. St. Cloud State Univ.*, 693 N.W.2d 466, 472–73 (Minn. Ct. App. 2005) (holding that where a state university did not exercise control over the content of a student newspaper, the university could not be held vicariously liable for defamation); *Milliner v. Turner*, 436 So.2d 1300 (La. App. 1983); *McEvaddy v. City Univ. of N. Y.*, 220 A.D.2d 319, 633 N.Y.S.2d 4 (App. Div. 1st Dept. 1995); see also *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073, 1074-75 (5th Cir. 1976) (holding that the actions of student newspapers over which state institutions do not exercise regulation do not act on behalf of the university).

²⁶ See, e.g., *Pitt News v. Pappert*, 379 F.3d 96, 111 (3d Cir. 2004) (finding ban on alcohol advertisements “presumptively unconstitutional” because it targeted college publications).

²⁷ *Bazaar v. Fortune*, supra note 22, at 575 (quoting *Antonelli v. Hammond*, 308 F. Supp. 1329, 1337 (Mass. 1970)); see also *Barnstone v. Univ. of Hous.*, KUHT-TV, 514 F. Supp. 670, 689 (S.D. Tex. 1980).

Two legal principles restrain government actions of this type: the unconstitutional conditions doctrine and the waiver doctrine.

The unconstitutional conditions doctrine prohibits a government entity from demanding a surrender of rights to receive a benefit to which an individual or group is already otherwise entitled.²⁸ Here, *The Battalion* already is entitled to the same support as other student groups, and does in fact receive that support; you have asked them to surrender editorial independence as a condition for the continued receipt of that support. It should not shock you that asking a group to surrender *freedom of the press*, a specifically enumerated constitutional right, is an unconstitutional condition.

Even if, for the sake of argument, we assumed some of the imposed ultimatum did not directly touch on a constitutional right, those demands would violate the waiver doctrine. Under the waiver doctrine, the government cannot require the surrender of a right in exchange for the receipt of a benefit to which the individual is not otherwise entitled, such as a settlement.²⁹ For a waiver to be valid, two things must be true: First, it must be “made knowingly and voluntarily,” and second, in the specific facts of the case, “the interest in enforcing the waiver is not outweighed by a relevant public policy that would be harmed by enforcement.”³⁰

Even if the *Battalion*’s editors agreed to this ultimatum, the public has a strong policy interest in prohibiting negotiated government control of the media. Texas A&M *may* make recommendations and offers to *The Battalion* leadership. For example, it may offer that *The Battalion* become a part of the university’s new journalism program, and it may even offer additional benefits if the student leaders choose to accept this offer. But it *may not* threaten sanctions—such as loss of office space, funding, or faculty support—if the newspaper editors choose to decline this offer.

III. Texas A&M Must Reassure *The Battalion* That No Policy Changes Will Follow Rejection of the Working Group’s Proposals

While FIRE understands that Texas A&M has chosen to pause its demands and include representatives of *The Battalion* on its Journalism Working Group, those concessions do not alleviate our concerns that the university’s leadership is ignorant of—if not willfully blind to—the importance of maintaining an independent student press, and do not sufficiently recognize that decisions about the future operations of *The Battalion* are up to the student editors, not university officials.

We request receipt of a response to this letter no later than the close of business on February 22, 2022, confirming that, regarding *The Battalion* and other independent student media at

²⁸ See, e.g., *Planned Parenthood of Cent. & N. Ariz. v. Arizona*, 789 F.2d 1348, 1350–51 (9th Cir. 1986) (finding a state participant in a federal scheme to reimburse family planning services could not prohibit reimbursements to groups that offer counseling for abortion procedures), *aff’d*, 479 U.S. 925 (1986).

²⁹ See, e.g., *Overbey v. Mayor of Balt.*, 930 F.3d 215, 223-24 (4th Cir. 2019) (finding non-disparagement clause in police misconduct settlement unenforceable).

³⁰ *Id.* at 223; *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1397 (9th Cir. 1991) (noting that the government bears the burden of showing its interest is not outweighed by public policy).

Texas A&M, the university's Journalism Working Group will do no more than study and make recommendations to student editors about the publication's future.

We ask Texas A&M to affirmatively state that it will make no further demands regarding the content, organizational structure, or mode of production of *The Battalion* or any other independent student publication. Finally, we call upon Texas A&M to immediately clarify that *The Battalion* will face no required changes in policy or practice if its student editors decline the Journalism Working Group's proposals.

Sincerely,

A handwritten signature in black ink, appearing to read "Lindsay Rank". The signature is fluid and cursive, with the first name "Lindsay" written in a larger, more prominent script than the last name "Rank".

Lindsay Rank
Student Press Counsel, Student Press Freedom Initiative