FIRE
Foundation for Individual Rights and Expression

May 31, 2023

Félix V. Matos Rodríguez
Office of the Chancellor
City University of New York
205 East 42nd Street
New York, New York 10017

URGENT

Sent via U.S. Mail and Electronic Mail (chancellor@cuny.edu)

Dear Chancellor Matos Rodríguez:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,[1] is concerned by your statement regarding student-selected speaker Fatima Mousa Mohammed's remarks at City University of New York's Law School graduation. We are particularly concerned by your admonition that "hate speech . . . should not be confused with free speech and has no place on our campuses or in our city, our state or our nation."[2] While we understand that Mohammed's remarks—criticizing both Israel and CUNY—may be considered hateful or offensive to many on and off CUNY's campus, they are protected by the First Amendment, which binds CUNY.

Simply put, your statement that Mohammed's remarks constitute hate speech that "should not be confused with free speech" is inaccurate.[3] Although FIRE is unaware of any punishment of Mohammed for her expression, which would be unconstitutional as explained below, we write to make clear that no CUNY student should be punished for or chilled from similar expression in the future.

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[1] For more than 20 years, FIRE has defended freedom of expression, conscience, and religion, and other individual rights on America's college campuses. You can learn more about our recently expanded mission and activities at thefire.org.

[2] The factual recitation here reflects our understanding of the pertinent facts based on public information. *See, e.g. Statement from the Board of Trustees and Chancellor of the City University of New York*, CITY UNIV. OF N.Y. (May 30, 2023), *available at* https://www1.cuny.edu/mu/forum/2023/05/30/statement-from-the-board-of-trustees-and-chancellor-of-the-city-university-of-new-york [https://perma.cc/H7AJ-TH9X] [hereinafter CITY UNIV. OF N.Y.]. However, we appreciate that you may have additional information and if so invite you to share it with us.

[3] *Id.*

As a public institution, CUNY cannot penalize student expression protected by the First Amendment.[4] While some examples of hateful expression may fall into narrow exceptions to the First Amendment, the Supreme Court has repeatedly held that there is no categorical exception for expression others view as hateful.[5] Whether speech is protected by the First Amendment is "a legal, not moral, analysis."[6] The Court recently and expressly reaffirmed this principle, refusing to establish a limitation on speech viewed as "hateful" or demeaning "on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground."[7]

This principle does not waver in the context of public universities, regardless of whether the speech is, for example, a "heated exchange of views" on race[8] or a "sophomoric and offensive" skit depicting women and minorities in derogatory stereotypes.[9] If authorities could punish expression deemed hateful, it would imperil a broad range of political speech and academic inquiry, and such an exception would undoubtedly become a tool against those it intends to protect. For example, when the University of Michigan briefly enacted an unconstitutional prohibition against hate speech, it was almost universally used to punish students of color who offended white students.[10]

At CUNY, if the university punished speech that is anti-Israel, it would open the door to punish speech that is anti-Palestinian, anti-conservative, anti-liberal, and more. Criticism of government institutions and foreign nations constitute core political speech, for which First Amendment protection is "at its zenith."[11] As the Supreme Court has made clear, "mere

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[4] *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); *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973) (establishing that pursuit of disciplinary sanctions at a public university must comply with the First Amendment).

[5] *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down an ordinance that prohibited placing on any property symbols that "arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender").

[6] *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 821 (S.D. Iowa 2019).

[7] *Matal v. Tam*, 582 U.S. 218, 246 (2017).

[8] *See, e.g.*, *Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 705 (9th Cir. 2009) (faculty member's use of system-wide listserv to send "racially-charged emails" was not unlawful harassment, as 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").

[9] *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 388–92 (4th Cir. 1993).

[10] "[M]ore than twenty cases were brought by whites accusing blacks of racist speech; the only two instances in which the rule was invoked to sanction racist speech involved punishment of speech by a black student and by a white student sympathetic to the rights of black students, respectively; and the only student who was subjected to a full-fledged disciplinary hearing was a black student charged with homophobic and sexist expression." Thomas. A. Schweitzer, *Hate Speech on Campus and the First Amendment: Can They Be Reconciled?*, 27 CONN. L. REV. 493, 514 (1995) (citing Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 DUKE L.J. 484, 557–58 (1990)); *see also Doe v. Univ. of Mich.*, 721 F. Supp. 852, 869 (E.D. Mich. 1989) (striking down the university's speech code as unconstitutional).

[11] *Meyer v. Grant*, 486 U.S. 414, 425 (1988); *see also Snyder v. Phelps*, 562 U.S. 443, 444 (2011).

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.'"[12]

Regardless of the offense and backlash it causes, speech remains protected even if hateful "toward people and communities based on their religion, race or political affiliation."[13] CUNY is free to condemn such speech, but it cannot claim the speech is unprotected solely because it considers the speech hateful. CUNY's implication that such speech is unprotected will certainly chill students' future protected expression, which is unacceptable—and unconstitutional—at a public institution.[14]

We therefore write to ensure CUNY appreciates its constitutional obligation to not punish students for what it considers hateful expression. We request a substantive response to this letter no later than the close of business on Wednesday, June 7, 2023, confirming that CUNY will not punish students solely because it subjectively deems their speech hateful. Additionally, CUNY should mitigate the chilling effect of its statement on students' expressive rights by publicly reaffirming that even hateful speech remains fully protected by the First Amendment.

Sincerely,

Sabrina Conza
Program Officer, Campus Rights Advocacy

Cc: Gayle Horwitz, Senior Advisor to the Chancellor & Secretary to the Board of Trustees
Sudha Setty, Dean, CUNY School of Law

[12] *Papish*, 410 U.S. at 667–68.

[13] CITY UNIV. OF N.Y., *supra* note 2.

[14] A university's actions can violate students' First Amendment rights if its response to protected speech "would chill or silence a person of ordinary firmness from future First Amendment activities." *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).