



# FIRE

Foundation for Individual  
Rights and Expression

April 25, 2023

Kevin O'Connell  
Office of Student Integrity and Community Standards  
College of the Holy Cross  
One College Street, Box 13A  
109 Hogan Campus Center  
Worcester, Massachusetts 01610-2395

**URGENT**

*Sent via Electronic Mail (koconnel@holycross.edu)*

Dear Mr. O'Connell:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,<sup>1</sup> is concerned by your requirement that student Teresa Esquivel attend an “investigative meeting” today for joking in *The Fenwick Review's* internal group chat that “I’m gonna accuse [the college’s president] of sexual assault and see what happens[.]”<sup>2</sup> As plainly evidenced by the chat, Esquivel made the comment in the context of critiquing what she believes is a double standard in how sexual assault claims are adjudicated based on the perceived political views of the accuser and alleged perpetrator.<sup>3</sup> Others in the group chat acknowledged the sarcastic nature of Esquivel’s comment,<sup>4</sup> and, of course, Esquivel never *actually* made the accusation.

The College of the Holy Cross makes clear commitments to students’ expressive freedoms.<sup>5</sup> Such commitments represent a moral and ethical obligation on the part of the college to abide

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<sup>1</sup> 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](http://thefire.org).

<sup>2</sup> Letter from Kevin O’Connell, Director of Student Integrity and Community Standards, to Teresa Esquivel (Apr. 23, 2023) (on file with author); the facts here reflect our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us. To these ends, please find enclosed an executed privacy waiver authorizing you to share information about this matter.

<sup>3</sup> Esquivel’s comment responded to a message that said, “Anita Hill is STILL being mentioned. And yet again nothing about Wanita Brodrick or any of the other women bill clinton raped.” (message on file with author).

<sup>4</sup> See *Fenwick Review group chat on Feb. 15, 2023*, “Teresa 🤔🤔🤔 absolutely out of pocket[.]” (messages on file with author).

<sup>5</sup> *Community Standards Process and Procedures 2022-2023*, COLL. OF THE HOLY CROSS, 5, 36, <https://www.holycross.edu/office-student-integrity-community-standards/community-standards-process->

by its own policies, which promise free speech rights commensurate with the First Amendment’s guarantees.

Holy Cross cannot investigate or punish Esquivel merely because her comment may be viewed as offensive to administrators.<sup>6</sup> Nor may the college base an investigation on the comment constituting a true threat or harassment — because it does not approach the legal standards for these types of actionable misconduct. For example, a true threat requires *a serious* expression of intent to commit an unlawful act *of violence*,<sup>7</sup> and neither seriousness nor violence are present here. And harassment requires unwanted *contact* that is severe, pervasive, and objectively offensive,<sup>8</sup> but Esquivel never contacted the president, or filed a complaint against him.

While Holy Cross asserts that an investigative meeting “does not constitute formal notice of administrative charges and is not an indication that the interviewee is alleged to have violated the College’s Community Standards[.]”<sup>9</sup> such “fact-finding” still impermissibly chills speech regardless of whether a formal investigation materializes.<sup>10</sup> The question is not whether formal punishment is meted out, but whether the institution’s actions “would chill or silence a person of ordinary firmness from future First Amendment activities.”<sup>11</sup> Here, a meeting investigating protected speech that involves the speaker constitutes censorship because of the threat of discipline.<sup>12</sup> This is the case especially since possible sanctions for violating college policy are severe.<sup>13</sup> It sends a message that protected speech may be punished in the future, and students may accordingly self-censor. Here, free press concerns also arise as *Fenwick Review* staff will be chilled from freely brainstorming content for the publication where protected commentary may nonetheless prompt the college to implement formal disciplinary review. Because Holy Cross clearly promises students expressive freedom, this cannot stand.

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and-procedures [<https://perma.cc/LQ6S-7W5X>] (students have “. . . the right to express ideas and discuss ideas with others[]” and the right to “[e]xpression of opinion, which includes the right to state agreement or disagreement with the opinions of others . . . .”) (“all members of the College community have a responsibility to help build and preserve a climate favorable to maintaining a free exchange of ideas and expression.”).

<sup>6</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (holding that government actors “may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (holding that a parody ad depicting a pastor losing his virginity to his mother in an outhouse is protected). *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667-68 (1973) (“the mere dissemination of ideas—no matter how offensive to good taste— . . . may not be shut off in the name alone of ‘conventions of decency.’”).

<sup>7</sup> *Virginia v. Black*, 538 U.S. 343, 359 (2003) (emphasis added).

<sup>8</sup> See *Davis v. Monroe Cnty. Bd. Of Educ.*, 526 U.S. 629, 651 (1999).

<sup>9</sup> *Community Standards Process and Procedures 2022-2023*, *supra* note 5 at 11.

<sup>10</sup> *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

<sup>11</sup> *Id.*

<sup>12</sup> *Levin v. Harleston*, 966 F.2d 85, 89-90 (2d Cir. 1992).

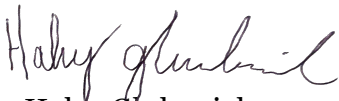
<sup>13</sup> Possible sanctions include: College warning, residence hall probation, college probation, college suspension, and college dismissal. *Community Standards Process and Procedures 2022-2023*, *supra* note 5 at 13.

FIRE understands that Holy Cross may have a duty to conduct preliminary reviews of complaints to determine if allegations could constitute actionable misconduct. When a report is filed, Holy Cross should review the matter internally, without notifying the speaker. When a complaint, as here, involves only protected speech, the college must proceed no further. Holy Cross possesses the message at issue here, as well as the context in which it was communicated, and can therefore readily confirm Esquivel's speech is a protected joke.

Of course, none of this shields speakers from every consequence of their speech—including criticism by students, faculty, the broader community, or the university itself. Criticism is a form of “more speech,” a remedy preferred to censorship.<sup>14</sup> But, the university must abide by its commitments to free expression.

Given the urgent nature of this matter, we request a substantive response to this letter prior to the close of business on April 26, 2023, confirming that Holy Cross will cancel the investigative meeting and will not hand down any punishment in this matter.

Sincerely,



Haley Gluhanich  
Program Officer, Campus Rights Advocacy

Encl.

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<sup>14</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927).

### Authorization and Waiver for Release of Personal Information

I, Teresa Esquivel, born on March 14, 2001, do hereby authorize College of the Holy Cross (the "Institution") to release to the Foundation for Individual Rights and Expression ("FIRE") any and all information concerning my current status, disciplinary records, or other student records maintained by the Institution, including records which are otherwise protected from disclosure under the Family Educational Rights and Privacy Act of 1974. I further authorize the Institution to engage FIRE's staff members in a full discussion of all matters pertaining to my status as a student, disciplinary records, records maintained by the Institution, or my relationship with the Institution, and, in so doing, to fully disclose all relevant information. The purpose of this waiver is to provide information concerning a dispute in which I am involved.

I have reached or passed 18 years of age or I am attending an institution of postsecondary education.

In waiving such protections, I am complying with the instructions to specify the records that may be disclosed, state the purpose of the disclosure, and identify the party or class of parties to whom disclosure may be made, as provided by 34 CFR 99.30(b)(3) under the authority of 20 U.S.C. § 1232g(b)(2)(A).

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights and Expression, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

I also hereby consent that FIRE may disclose information obtained as a result of this authorization and waiver, but only the information that I authorize.

DocuSigned by:  
*Teresa Esquivel*  
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4/25/2023

Student's Signature

Date