



FIRE

Foundation for Individual
Rights and Expression

August 16, 2023

Waded Cruzado
Office of the President
Montana State University
P.O. Box 174220
Bozeman, Montana 59717-4220

URGENT

Sent via Electronic Mail (president_cruzado@montana.edu)

Dear President Cruzado:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is concerned that Montana State University is taking disciplinary action against students Caleb Greenberg and Dora Craven arising from a constitutionally-protected interaction with a campus parking enforcement officer, and for referring those citations to the Bozeman City Attorney's Office.² Without more, Greenberg and Craven's alleged use of profanity during a parking dispute and Greenberg later showing his middle finger to a parking enforcement officer, are wholly protected by the First Amendment, which bars public entities like MSU and the Bozeman City Attorney's Office from investigating or punishing pure speech.

On June 5, a MSU parking enforcement officer told Greenberg and Craven the parking garage her vehicle was in was closed and that her vehicle would be towed.³ Greenberg responded by asking if the vehicle would be towed without being given a "fucking ticket first." Greenberg and Craven were allowed to depart the garage with Craven's vehicle and no ticket was issued. The next day, Greenberg was driving around campus with Craven, when he raised his middle finger to a different parking enforcement officer. MSU Police subsequently issued Greenberg two

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 Letter from Rebecca Fisk, Accreditation/Police Information Manager, to Caleb Greenberg, Aug. 14, 2023 (on file with author).

³ The recitation of facts here reflects our understanding of the pertinent information. 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 waivers authorizing you to share information about this matter.

citations for violating Montana Code section 45-8-101(1),⁴ which states: “A person commits the offense of disorderly conduct if he knowingly disturbs the peace by: . . . (c) using threatening, profane, or abusive language . . .”⁵. Craven was not issued any citations.

But MSU is separately investigating the incident, and Greenberg and Craven have been called to a meeting with Associate Dean of Students, Bill McKenney, today regarding potential violations of MSU’s Student Code of Conduct.

MSU’s actions are unconstitutional. It has long been settled law that the First Amendment binds public universities like MSU,⁶ such that its actions and decisions—including the pursuit of disciplinary sanctions,⁷—must comply with the First Amendment. Whether speech is protected by the First Amendment is “a legal, not moral, analysis.”⁸ Legally, Greenberg has done nothing more than exercise his First Amendment rights to express his displeasure at the actions of government officials—notwithstanding that those officials or MSU administrators found that expression offensive, which the Supreme Court has repeatedly, consistently, and clearly held may not be a basis for punishing or restricting speech.⁹

In this case, misconduct charges cannot legitimately rest on a claim the students expressed “threatening language.” As a constitutional matter, “true threats” are only those statements through which “the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals”,¹⁰ and requires that the speaker consciously disregard a substantial risk that their speech would place another in fear of serious physical harm.¹¹ “True threats” require far more than speech amounting to rhetorical hyperbole, the endorsement of violence generally,¹² or the assertion of the “moral

⁴ Letter from Rebecca Fisk, Accreditation/Police Information Manager, to Caleb Greenberg, Aug. 14, 2023 (on file with author).

⁵ Mont. Code Ann. §45-8-101(1)(c) (1995).

⁶ *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).

⁷ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

⁸ *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 821 (S.D. Iowa 2019).

⁹ *See e.g., 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”); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (penalizing a parody ad depicting a pastor losing his virginity to his mother in an outhouse in prohibited by the First Amendment); *Cohen v. California*, 403 U.S. 15, 25 (1971) (wearing a jacket emblazoned with the words “Fuck the Draft” is protected by the First Amendment); *Cox v. Louisiana*, 379 U.S. 536, 557 (1965) (holding a government actor cannot disperse civil rights marchers out of fear that “muttering” and “grumbling” white onlookers might resort to violence).

¹⁰ *Virginia v. Black*, 538 U.S. 343, 359 (2003).

¹¹ *See Counterman v. Colorado*, 143 S. Ct. 2106, 2117–18 (2023).

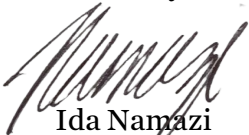
¹² *Watts v. United States*, 394 U.S. 705, 708 (1969) (*per curiam*) (holding a man’s statement, after being drafted to serve in the Vietnam War—“If they ever make me carry a rifle the first man I want to get in my sights is L. B. J.”—was rhetorical hyperbole protected by the First Amendment, not a true threat to kill the president).

propriety or even moral necessity for a resort to force or violence.”¹³ Here, the speech does not on its face or in context indicate either student communicated any intent to engage in any form of violence. Rather, they were expressing displeasure with the MSU police. While that expression—the use of profanity and, on Greenberg’s part, the middle finger gesture—appears to have offended the parking officers, such expressive conduct, *without more*, remains wholly protected.¹⁴

Beyond MSU’s binding Constitutional obligations, its own Student Bill of Rights clearly states that “students have the right to...express opinions on campus.”¹⁵ Of course, this principle does not shield students from every consequence arising from their expression—including criticism by students, faculty, or the broader community. Criticism is a form of “more speech,” the remedy to offensive expression that the First Amendment prefers to censorship.¹⁶ However, the First Amendment limits the *types* of consequences that may be imposed and who may impose them.

Given the urgent nature of this matter, we request a substantive response to this letter no later than the close of business on Friday, August 18, confirming that MSU will not further pursue an investigation or disciplinary sanctions in this matter.

Sincerely,



Ida Namazi
Program Officer, Campus Rights Advocacy

Cc: Bill McKenney, Associate Dean of Students
Matthew R. Caires, Dean of Students
Kellie A. Peterson, Legal Counsel

Encl.

¹³ *Noto v. United States*, 367 U.S. 290, 297–98 (1961).

¹⁴ *Black*, 538 U.S. at 347–48.

¹⁵ *Conduct Guidelines and Grievance Procedures for Students*, Student Bill of Rights, https://www.montana.edu/policy/student_conduct/#Studentmisconduct300 [<https://perma.cc/3J2A-ACKF>].

¹⁶ *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

Authorization and Waiver for Release of Personal Information

I, Dora Craven, born on 12/13/1999, do hereby authorize Montana State University (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:
Dora Craven
06E354307B30473

8/16/2023

Student's Signature

Date

Authorization and Waiver for Release of Personal Information

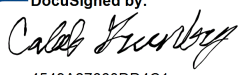
I, Caleb Greenberg, born on 04/07/2003, do hereby authorize Montana State University (the "Institution") to release to the Foundation for Individual Rights and Expression ("FIRE") any and all information concerning my current status, disciplinary records, or other student records maintained by the Institution, 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.

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DocuSigned by:

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8/16/2023

Student's Signature

Date