FIRE
Foundation for Individual Rights and Expression

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Kellie Peterson
Office of Legal Counsel
Montana State University
216 Montana Hall
P.O. Box 174220
Bozeman, Montana 59717-4220

Sent via U.S. Mail and Electronic Mail (kellie.peterson@montana.edu)

Dear Ms. Peterson:

We appreciate your response to our August 16 letter, though we remain concerned regarding the chilling of free expression at Montana State University given the mandatory meeting that it required Greenberg to attend with Associate Dean McKenney. This rests in significant part on MSU's explanation that Greenberg's asserted "pattern of aggressive and vulgar communication with MSU personnel" justified a meeting, as "an educational conversation with [him] regarding his behavior," raising constitutional concerns in at least two respects, as explained below.

Before reaching those, however, we note as an overarching matter that it is our understanding the "pattern … of communication" referenced involves the events of June 5 and June 6. We understand the disciplinary reprimand Greenberg received arose from events of August 7, but this letter relates only to those of June 5 and 6, as to which, if you have additional information, we invite you to share it.[1]

Moving to the two troubling foundational points, we note, first, that MSU appears to deem the mandatory meeting appropriate based in part on Greenberg being uncivil. This is problematic because freedom of expression includes the right to be uncivil,[2] to use rude hand gestures,[3] and

[1] Please note our previous letter included a privacy waiver for Greenberg.

[2] *See Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1020 (N.D. Cal. 2007) (ordering university to stop enforcing policy requiring students to "be civil to one another" because it was overbroad and infringed on their expressive rights). Even to the extent MSU has an obligation to address unprotected speech, like harassment, for example, that legal obligation does not support imposing a "general civility code." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

[3] *Duran v. Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990) ("Thus, while police, no less than anyone else, may resent having obscene words and gestures directed at them, they may not exercise the awesome power at

"to speak foolishly and without moderation."[4] As one federal court put it, a "desire to maintain a sedate academic environment . . . [does not] justify limitations" on the right to express views "in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms."[5] Notably, this Ninth Circuit precedent—which binds MSU—calls into question the efficacy of any claim that the First Amendment "does not stand in the way of modest efforts to encourage civility on college campuses" under the Fourth Circuit's recent decision in *Speech First v. Sands*.

In addition to public universities being barred from punishing students for so-called uncivil behavior, decades of Supreme Court precedent further establish that students cannot be punished merely because their speech is rude, offensive, or even hateful.[6] While MSU may not agree with Greenberg's expression, and/or may find it unbecoming of an MSU student, that does not trump his First Amendment rights.

Secondly, McKenney's calling Greenberg into a mandatory meeting raises First Amendment concern because it can constitute adverse governmental action that would "chill a person of ordinary firmness from continuing to engage in protected activity."[7] 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[.]"[8] Investigations into protected expression may meet this standard.[9] The investigation here carried an implicit threat of discipline, and the resulting chilling effect itself constituted a cognizable First Amendment harm. Investigations by public universities, "are capable of encroaching upon the constitutional liberties of individuals" and have an "inhibiting effect in the flow of democratic expression."[10]

Your letter claims the meeting was appropriate because it provided "the opportunity for the conduct officer to determine whether the alleged conduct constitutes pure protected speech, or whether there is something more that would constitute a violation of the conduct code." When MSU wants to determine whether alleged "conduct constitutes pure protected speech," it should instead undertake an initial inquiry into the conduct to make this decision, preferably without questioning or notifying the speaker. If the university can resolve the matter in their favor solely on the face of their speech, as ought to have been possible here, that can be done without involving the speaker and thus avoiding a chilling effect.

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their disposal to punish individuals for conduct that is not merely lawful, but protected by the First Amendment.").

[4] *Baumgartner v. United States*, 322 U.S. 665, 674 (1944).

[5] *Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 708–09 (9th Cir. 2009) (quoting *Adamian v. Jacobson*, 523 F.2d 929, 934 (9th Cir. 1975)).

[6] *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011). ("As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate.")

[7] *Koala v. Khosla*, 931 F.3d 887, 905 (9th Cir. 2019); *Mendocino Env't Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

[8] *Mendocino Envtl. Ctr.*, 192 F.3d at 1300.

[9] *See, e.g.*, *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000).

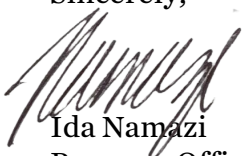
[10] *Sweezy v. New Hampshire*, 354 U.S. 234, 245–48 (1957).

While administrators may, to be sure, conduct "educational" meetings with students, when such a meeting arises from protected speech, it must be obvious to the student that attendance is optional and that there is no threat of discipline. Otherwise, the power differential alone suggests participation is not voluntary and that it could lead to discipline, thereby chilling speech. Here, not only did MSU not indicate to Greenberg the meeting was voluntary and carried no threat of discipline, as described in your letter, it *could* have resulted in further investigation and disciplinary action, given the above-noted "opportunity" the meeting sought to provide the conduct officer.

Going forward, MSU should avoid punishing or chilling protected student speech simply because the university deems it uncivil, or vulgar, or aggressive, and if it nonetheless believes inquiry into such speech necessary, it should undertake it to whatever extent possible without involving the speaker, especially where MSU can determine from the speech itself that the First Amendment protects it.

We request a substantive response to this letter no later than close of business on September 8, confirming MSU will maintain that course in the future.

Sincerely,



Ida Namazi
Program Officer, Campus Rights Advocacy

Cc: Waded Cruzado, President
Bill McKenney, Associate Dean of Students
Matthew R. Caires, Dean of Students