



FIRE

Foundation for Individual
Rights and Expression

September 6, 2023

Jay Gogue
Hadley Hall
2850 Weddell Drive
New Mexico State University
Las Cruces, New Mexico 88003-8001

Sent via U.S. Mail and Electronic Mail (president.gogue@nmsu.edu)

Dear Interim President Gogue:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is reaching out regarding a letter the university reportedly received from several state legislators last month inaccurately suggesting the university has “a responsibility to shield” students from certain views by preventing speakers from appearing on campus.² The legislators specifically suggest NMSU erred, and perhaps even violated New Mexico’s Human Rights Act, by allowing conservative commentator Matt Walsh to speak on campus in April.³ They further argue the mere expression of views by someone like Walsh could cause NMSU’s transgender and queer students “emotional and psychological damage.”⁴

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

² Zach Jewell, *State Senators Call On University To ‘Prevent’ More Emotional ‘Damage’ After Being Triggered By Matt Walsh Speech On Campus*, DAILY WIRE, Sept. 1, 2023, <https://www.dailywire.com/news/state-senators-call-on-university-to-prevent-more-emotional-damage-after-being-triggered-by-matt-walsh-speech-on-campus>.

³ Riley Robertson and Adeline Triplett, *Opposition in action: Dueling communities gather to invoke free speech at NMSU*, ROUND UP, April 10, 2023, <https://nmsuroundup.com/22108/showcase/opposition-in-action-dueling-communities-gather-to-invoke-free-speech-at-nmsu/>.

⁴ Jewell, *supra* note 2.

But were the university to censor speakers as the legislators suggest, it would violate the First Amendment,⁵ which bars government actors like NMSU from interfering with students' right to discuss, listen to, or invite to campus speakers with a wide range of viewpoints—even when those views offend some, many, or even most members of the university community. The Supreme Court has repeatedly, consistently, and clearly held that the First Amendment protects expression others find offensive, or even hateful, precisely because, “[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”⁶ While the First Amendment, of course, does not protect *all* speech, carveouts for unprotected speech are strictly limited. The legislators here are mistaken to suggest that an invited speaker like Walsh who expresses broadly anti-queer or anti-trans views—even while those views may be deeply offensive to many on campus—would, without more, meet the legal bar for unprotected harassment.

In the higher-education context, speech will not constitute harassment unless it is unwelcome, sufficiently targeted, and so severe, pervasive, and objectively offensive that it effectively deprives the victim-students of their ability to receive an education.⁷ The U.S. Department of Education has likewise made clear that harassment “must include something beyond the mere expression of views, symbols, or thoughts that some person finds offensive.”⁸ These speech-protective principles apply with particular force at public institutions of higher education like NMSU, where censorship “risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation’s intellectual life, its college and university campuses.”⁹

Importantly, the legislators here should know the very same expressive rights they seek to limit have been employed time and again to protect *pro*-LGBTQIA+ speech, which at one time was considered fringe expression, viewed as “shocking and offensive”¹⁰ to some, and routinely faced censorship attempts.¹¹ Even today, regulations that would limit a variety of rights for queer and transgender citizens have been challenged on First Amendment grounds. For example, a group of transgender military members successfully challenged former President

⁵ *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).

⁶ See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011); *R.A. V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down 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”). The Court has refused to uphold limitations on speech viewed as “hateful” or demeaning “on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground.”

⁷ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999).

⁸ U.S. Dep’t of Educ., *Dear Colleague Letter from Gerald A. Reynolds, Assistant Sec’y for Civil Rights* (July 28, 2003), <https://www2.ed.gov/about/offices/list/ocr/firstamend.html>.

⁹ *Rosenberger v. Rectors of the Univ. of Va.*, 515 U.S. 819, 836 (1995).

¹⁰ *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 661 (1st Cir. 1974).

¹¹ See e.g., *Weaver v. Nebo School Dist.*, 29 F. Supp. 2d 1279 (1998) (holding a public school that prohibited prohibit a teacher from discussing her same-sex relationship, while not imposing a similar limit on heterosexual instructors, violated the teacher’s First Amendment rights).

Donald Trump’s ban on trans military members on a variety of grounds, including that it prohibited them from exercising their core rights to free expression and association.¹²

Finally, given the supremacy of the federal Constitution, New Mexico’s Human Rights Act cannot take precedence, especially not if its effect would be to authorize NMSU to violate the First Amendment. Because, as the Supreme Court recently reaffirmed, “[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought that we hate.”¹³

We urge NMSU to stand firmly by these important principles and by its constitutional obligations, even in the face of legislative pressure. We respectfully request confirmation by Tuesday, September 13, 2023, that NMSU remains committed to honoring its students’ expressive rights and will not bar speakers from campus based on their views.

Sincerely,



Alex Morey
Director, Campus Rights Advocacy

¹² See e.g., *Karnoski v. Trump*, 926 F.3d 1180.

¹³ *Matal v. Tam*, 528 U.S. 218, 246 (2017) (internal quotation marks omitted).