



FIRE

Foundation for Individual
Rights and Expression

April 15, 2024

Sabah Randhawa
Office of the President
Western Washington University
Old Main 450
Bellingham, Washington 98225-9000

Sent via U.S. Mail and Electronic Mail (sabah.randhawa@wwu.edu)

Dear President Randhawa:

FIRE¹ is disappointed at Western Washington University's refusal to address its unconstitutional punishment of the WWU Racing team for sending a private social media message containing a drawing of a penis. As explained in our enclosed November 20 letter, because the First Amendment clearly protects the totality of the students' expression here, that expression may not form the basis of any university punishment.

While some WWU administrators and faculty may believe the team's "posting of penis images is completely inappropriate and is not funny in the least,"² students' established legal rights under the First Amendment do not change because of university officials' sensibilities.³ These rights encompass the "inside jokes, good-ole-boy humor" and negative talk "about individuals or organizations" that WWU cited to justify its punishment.⁴

¹ As you'll recall from prior correspondence, FIRE is a nonpartisan nonprofit dedicated to defending freedom of expression, conscience, and religion, and other individual rights on America's college campuses.

² Letter from David Gill, Engineering and Design Department Chair, to WWU Racing Leadership (Nov. 3, 2023, 10:44 AM) (enclosed).

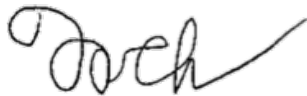
³ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973) (holding that "mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"); see also *Healy v. James*, 408 U.S. 169, 180 (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, [t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.") (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

⁴ Letter, *supra* note 2.

Meanwhile, there is nothing funny about violating students' rights under the First Amendment, which provides robust protection for speech that public college administrators may subjectively deem offensive, distasteful, or uncivil.⁵ Accordingly, not only is the punishment unconstitutional, WWU's additional directive to the team to "never post anything that would embarrass" the university gets the First Amendment exactly backward.⁶ Free speech protects individuals' right to embarrass the government, it does not protect the government from embarrassment by its citizens.⁷

FIRE would welcome an opportunity to provide training to WWU administrations about their First Amendment responsibilities free of charge.⁸ We request a substantive response to this letter no later than the close of business April 29, 2024, confirming that WWU will bring its policies and practices in line with the First Amendment and commit to honoring its basic constitutional obligations moving forward.

Sincerely,



Zachary Greenberg
Senior Program Officer, Campus Rights Advocacy

Cc: Brad Johnson, Provost
Michael Sledge, Executive Director for Student Life
Janelle Leger, Dean of the College of Science and Engineering
Jackie Caplan-Auerbach, Associate Dean of the College of Science and Engineering
David Gill, Department Chair, Engineering and Design

Encl.

⁵ *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 388–392 (4th Cir. 1993) (overturning university punishment for students' "offensive and sophomoric" "ugly woman contest" with "racist and sexist" overtones); *cf.*, *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (holding the First Amendment protects burning the American flag, with the "bedrock principle underlying" that holding being that government actors "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

⁶ Gill Letter, *supra* note 2.

⁷ *Baumgartner v. United States*, 322 U.S. 665, 673–74 (1944) (discussing First Amendment "right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.").

⁸ We remind you that a public college administrator who violates clearly established law will not retain qualified immunity and can be held personally responsible for monetary damages for violating First Amendment rights. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Gerlich v. Leath*, 861 F.3d 697, 709 (8th Cir. 2017) (upholding denial of qualified immunity to defendants—public university administrators—because student plaintiffs' First Amendment right was clearly established).



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November 20, 2023

Sabah Randhawa
Office of the President
Western Washington University
Old Main 450
Bellingham, Washington 98225-9000

Sent via U.S. Mail and Electronic Mail (sabah.randhawa@wwu.edu)

Dear President Randhawa:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is concerned by Western Washington University's punishment of student members of its WWU Racing team (Racing) for a sending private social media message containing a drawing of a penis. While that expression may have offended some at WWU, it is protected by the First Amendment, which bars WWU from punishing students or student clubs for vulgar, rude, or offensive speech. FIRE calls on WWU to confirm it will honor its constitutional obligations and refrain from punishing the team, or any WWU students, for protected speech moving forward.

Our concerns arise from punishment imposed by the club's faculty advisor, Engineering and Design Department Chair David Gill, on Racing group members for First Amendment-protected expression. Racing is a university recognized student group that seeks to "[p]rovide students an environment to challenge themselves, expand their knowledge, and grow as a team, through real world experiences."² To this end, WWU has granted Racing access to the ET155 space, a campus lab and workshop that functions as club headquarters where team members design and manufacture racecars.³ Gill, as department chair, oversees this space.

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 *About Us*, WWU RACING, <https://wwuracing.com/about> [<https://perma.cc/BP3X-PN5G>]; *Department Related Activities Committee*, W. WASH. UNIV., <https://wp.wwu.edu/drac/> [<https://perma.cc/V292-J4QM>]. The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us.

³ *About Us*, *supra* note 2.

On November 3, Gill informed the group they were banned from accessing their ET155 lab from November 3-10, stating that he was instituting the ban to intentionally “be inconvenient and disruptive for the team.”⁴ He justified the ban on the team’s “written and verbal communication of unacceptable messages, especially regarding individuals and organizations,” “culture of inside jokes, good-ole-boy humor, or talking negatively about individuals or organizations,” and “posting of inappropriate images on whiteboards and otherwise in the ET155 spaces.”⁵ Gill failed to describe what, exactly, prompted the ban, but according to the team, it was in response to a picture posted by a team member in a private Snapchat group of a penis drawn on a pizza box in ET155.

Gill warned the team that “continued posting of penis images is completely inappropriate and is not funny in the least,” adding “[t]his is a symbol of white, male power and domination. Even if you did not intend it in that way, it is commonly used in that manner and will ... be seen by many as symbolizing that unacceptable message.”⁶ He also instructed the team to “never post anything that would embarrass the department, the University, SAE International, or the WWU Racing team if a potential employer were to walk into the space to interview someone,” and he cautioned the students to be wary of “donor[s] being distressed or offended by images or discussions occurring in the room.”⁷ Finally, he demanded the team “promote a professional and inclusive culture in the space so that we can keep the space open and accessible.”⁸

WWU’s punishment of Racing, through Gill, violates the group’s constitutional rights. It has long been settled that the First Amendment binds public universities like WWU,⁹ such that its actions and decisions—including punishment of students¹⁰—must comply with the First Amendment. It is equally well-established the First Amendment does not make a categorical exception for inappropriate, offensive, vulgar, or uncivil student expression.

This core First Amendment principle is why authorities cannot punish the wearing of a jacket emblazoned with the words “Fuck the Draft,”¹¹ penalize a parody ad depicting a pastor losing

⁴ Letter from David Gill, Engineering and Design Department Chair, to WWU Racing Leadership (Nov. 3, 2023, 10:44 AM) (enclosed). It’s unclear whether Gill, as a department chair and the club’s advisor, has the power to suspend students’ access to university spaces.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* While Gill mentions multiple Racing messages, he failed to disclose what exactly these communications referred to, and the team is unaware of any other potentially inappropriate messages.

⁹ *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).

¹⁰ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

¹¹ *Cohen v. California*, 403 U.S. 15, 25 (1971).

his virginity to his mother in an outhouse,¹² or outlaw burning an American flag.¹³ This principle applies with particular force to universities, dedicated to open debate and discussion. Take, for example, a student newspaper’s front-page publication of a “political cartoon ... depicting policemen raping the Statue of Liberty and the Goddess of Justice” and a vulgar headline (“Motherfucker Acquitted”).¹⁴ These words and images—published at the height of the Vietnam War—no doubt deeply offended many at a time of polarization and unrest. Yet, “mere 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.’”¹⁵

Applying these principles, a federal appellate court overturned a public university’s sanctions on a fraternity for conducting an “offensive and sophomoric” “ugly woman contest” with “racist and sexist” overtones.¹⁶ The court held fraternity members who dressed as the “ugly” women intended to convey a message—both in their mode of dress and in performing the theatrical skit—and thus enjoyed First Amendment protection.¹⁷ Explaining how “some forms of entertainment are so inherently expressive” as to qualify for freedom of expression “regardless of their quality,” the court held that “[e]ven crude street skits come within the First Amendment’s reach.”¹⁸

While some may likewise characterize Racing’s Snapchat photo as “offensive and sophomoric,” it receives full First Amendment protection.¹⁹ WWU’s revocation of Racing’s access to ET155—a denial of privileges intended to be “inconvenient and disruptive for the team”²⁰—is thus impermissible punishment of protected expression. WWU may not condition access to campus space on students adhering to vague and undefined notions of civility or respect, such as refraining from speech that may embarrass the university.²¹ Gill’s chilling directive to “never post anything that would embarrass” WWU will cause team members to self-censor rather than risk further punishment from WWU, to the detriment of student free speech rights on campus.

¹² *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

¹³ *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning 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.”).

¹⁴ *Papish*, 410 U.S. at 667–68.

¹⁵ *Id.*

¹⁶ *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 388–392 (4th Cir. 1993).

¹⁷ *Id.*

¹⁸ *Id.* at 389–90.

¹⁹ It’s unclear how the student’s expression on Snapchat represents “white, male power and domination,” but even if it did, the expression of such views, without more, remains protected by the First Amendment and may not form the basis of punishment by public universities.

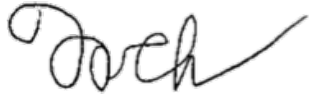
²⁰ Letter from David Gill, *supra* note 4.

²¹ *Coll. Republicans at S. F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1018–20 (N.D. Cal. 2007) (striking down college requirement that students “be civil to one another” on First Amendment grounds); *see also Baumgartner v. United States*, 322 U.S. 665, 673–74 (1944) (discussing the First Amendment “right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.”). Even to the extent that the university has an obligation to address harassment, its legal obligations do not impose or justify a “general civility code.” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

While WWU may *encourage* students to respect the sensibilities of university officials and donors, it may not punish students for failing to do so.

We request a substantive response to this letter no later than close of business December 4, 2023, confirming WWU will rescind its chilling warning to Racing and refrain from punishing protected speech going forward.

Sincerely,

A handwritten signature in black ink, appearing to read "Zach", with a stylized flourish extending to the right.

Zachary Greenberg
Senior Program Officer, Campus Rights Advocacy

Cc: David Gill, Department Chair, Engineering and Design
Michael Sledge, Executive Director, Student Life
Melynda Huskey, Vice President for Enrollment and Student Services

Encl.

Losing ET155 & After Hours Access

David Gill [REDACTED]

Fri 11/3/2023 10:44 AM

To [REDACTED]
Cc [REDACTED]

FSAE leadership – please forward this message to all students participating in WWU Racing

FSAE Team Members,

I am very disappointed with some members of the FSAE team and their **continued antipathy toward an inclusive and welcoming culture**. This has been evident in a number of different forms including written and verbal communication of unacceptable messages, especially regarding individuals and organizations. *Therefore, the team will not be allowed in ET155 during the day or after-hours for the week of Fri. Nov. 3-Fri. Nov 10. There will also be no after-hours project lab access during that time.* This will be inconvenient and disruptive for the team. I hope that you will take this opportunity to **consider whether your personal actions** have been welcoming to others or whether they have promoted a culture of inside jokes, good-ole-boy humor, or talking negatively about individuals or organizations. After this week, we will reopen the spaces, expecting that you will have identified ways that you can promote a professional and inclusive culture in the space so that we can keep the space open and accessible.

Among other unacceptable actions, **I am very disappointed** with continued posting of inappropriate images on whiteboards and otherwise in the ET155 spaces. It is important to remember that images that may seem to you to be a joke, may have a very different effect on someone else. The continued posting of penis images is completely inappropriate and is not funny in the least. This is a symbol of white, male power and domination. Even if you did not intend it in that way, it is commonly used in that manner and will, therefore, be seen by many as symbolizing that unacceptable message.

Similarly, **ET155 is an academic space**. Communication within the space, activities pursued in the space, and messages on whiteboards should all be of a professional nature. You should never post anything that would embarrass the department, the University, SAE International, or the WWU Racing team if a potential employer were to walk into the space to interview someone. The space should be one where a potential donor could be brought in to see the excellent work that the team and other student organizations are doing in their extracurricular clubs without fear of that donor being distressed or offended by images or discussions occurring in the room.

Team members are reminded that **nothing on social media is private** in any way. Anything posted can be reposted by anyone with access. Private channels may have alumni, potential employers, school officials and others as part of the distribution. Consider that ANYTHING that you post becomes part of your digital footprint and will likely be available to any future employer who is considering whether to hire you or not. Therefore, the images and messages that are inappropriate on the board are inappropriate on the pizza box and inappropriate on social media.

Finally, it is **completely unacceptable for retribution of any kind** to be made against any individual, student group, faculty group, or organization. The complaints behind this closure are from many sources as well as my own observations of the space. If you are unhappy about this shutdown, take that frustration and use it to consider *how you will help to positively change the culture* of the team. Please encourage each other to take appropriate actions and to make good decisions.

The faculty advisors want WWU Racing to thrive and to succeed. We want you to have a great race car. But most of all, we want the club to be a place that students learn and that learning requires a space where students feel safe. So let's all take a week, think about how we're going to go forward in the effort of improving culture, and come back with a renewed commitment to making a professional team and a professional academic space.

Sincerely,

David Gill, Chair Engineering & Design, FSAE Co-Advisor