FIRE
Foundation for Individual Rights and Expression

May 21, 2024

President XXX
Office of the President
School Name
Street Address
City, State Zip

Sent via U.S. Mail and Electronic Mail (email@address.edu)

Dear President XXX:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,[1] is deeply concerned by Governor Greg Abbott's March 27 Executive Order (GA44) directing all Texas higher education institutions to revise their free speech policies to "address the sharp rise in antisemitic speech and acts on university campuses."[2] We understand the present moment is one of heightened political tension, with conflicts between students, faculty, and administrators on campuses across the country. It is at such times that compromising fundamental principles of American liberty, such as our nation's commitment to protecting even highly unpopular speech, may seem attractive. Our Constitution and laws therefore make those principles unwavering in the political winds of the day. As a result, to the extent Executive Order GA44 demands that Texas' public institutions of higher education violate Texans' constitutional rights, those bodies are not free to follow it.

The executive order directs each institution to review and update its free speech policies and establish appropriate punishments, to ensure the policies are being enforced and violators are disciplined, and to include the definition of antisemitism adopted by the State of Texas in Section 448.001 of the Texas Government Code, which tracks the International Holocaust Remembrance Alliance's (IHRA) definition of antisemitism.[3] The order also requires the chair

[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 expanded mission and activities at thefire.org.

[2] Tex. Exec. Order No. GA-44 (Mar. 27, 2024), https://gov.texas.gov/uploads/files/press/EO-GA-44_antisemitism_in_institutions_of_higher_ed_IMAGE_03-27-2024.pdf.

[3] *Id.*

of the Board of Regents for each Texas public university system to submit a report confirming and documenting the revisions and evidence the policies are being enforced.[4]

It is well-settled the First Amendment protects freedom of expression—including speech some may consider offensive[5]—and that it applies in full on public university campuses.[6] Universities can and must respond to and protect community members from violence. They may also sanction expression falling within one of the narrow categories of speech unprotected by the First Amendment, such as true threats[7] or incitement to violence.[8] Yet the need for some regulation of behavior cannot and will not ever justify categorical withdrawal of the First Amendment right to engage in speech deemed "antisemitic" or "hate speech" more broadly. Our laws distinguish speech from action, thus the First Amendment protects rhetorical hyperbole or the conceptual endorsement of violence,[9] and assertions of the "moral propriety or even moral necessity for a resort to force or violence."[10]

As the Supreme Court noted, the "bedrock principle underlying" free speech is that it is not subject to limitation "simply because society finds the idea itself offensive or disagreeable,"[11] and government actors may not restrict expression on the basis that it implicates ethnicity or religion in ways others may deem hateful.[12] That is why, though the exchange of views on campus may sometimes be caustic, provocative, or inflammatory, the Supreme Court has held

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[4] *Id.*

[5] *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667 (1973).

[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] *Virginia v. Black*, 538 U.S. 343, 359 (2003) (true threats as "those statements where 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").

[8] *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (the First Amendment does not protect speech which is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

[9] *Watts v. United States*, 394 U.S. 705, 708 (1969).

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

[11] *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

[12] *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (refusing to establish a limitation on speech viewed as "hateful" or demeaning "on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground"); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down an 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 mere dissemination of ideas, no matter how offensive to others" at public universities and colleges "may not be shut off in the name alone of 'conventions of decency.'"[13]

Beyond regulating traditional unprotected speech categories like true threats and incitement, institutions can also address instances of antisemitic or otherwise hateful expression that constitutes actionable harassment. As narrowly defined by the Supreme Court in *Davis v. Monroe County Board of Education*, actionable harassment in the educational setting is that which is (1) unwelcome, (2) discriminatory on the basis of gender or another protected status, *and* (3) is "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."[14] Following this constitutional standard will allow Texas's universities to properly address discriminatory harassment on campus while also protecting free expression. The Department of Education's Office for Civil Rights has been clear that antisemitic expression on campus, "even when personally offensive and hurtful," does not always constitute actionable harassment.[15]

It is true that when antisemitic speech constitutes true threats or incitement, or crosses the line set by *Davis* into unprotected harassment, Texas institutions have a legal obligation to take action. But Governor Abbott's executive order directs universities and colleges to punish expression that falls within the International Holocaust Remembrance Alliance's definition of antisemitism.[16] And that definition is unsuitable for determining whether public institutions may restrict or punish speech consistent with the First Amendment.[17]

That is the case particularly because the IHRA did not create the definition for that purpose. As its primary author, Kenneth Stern, explains, he opposes legislation requiring the definition's

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[13] U.S. Dep't of Educ, Dear Colleague Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights (May 7, 2024) https://www.whitehouse.gov/wp-content/uploads/2024/05/colleague-202405-shared-ancestry.pdf. *See also Papish*, 410 U.S. at 667–68.

[14] 526 U.S. 629 (1999). As the Court's only decision to date regarding the substantive standard for peer harassment in education, *Davis* is controlling on this issue.

[15] Larry Gordon, *Feds dismiss Jewish students' complaint against UC Berkeley*, LA TIMES (Aug. 27, 2013, 12:00 AM), https://www.latimes.com/local/lanow/la-xpm-2013-aug-27-la-me-ln-jewish-uc-20130827-story.html.

[16] Under this standard, antisemitism is "a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities." *What is antisemitism?*, INT'L HOLOCAUST REMEMBRANCE ALL. (adopted May 26, 2016), https://www.holocaustremembrance.com/resources/working-definitions-charters/working-definition-antisemitism. Examples of antisemitism under this standard include "[m]aking mendacious, dehumanizing, demonizing, or stereotypical allegations about Jews;" "[d]enying the fact, scope, mechanisms ... or intentionality of ... the Holocaust;" "[c]laiming that the existence of a State of Israel is a racist endeavor;" "[a]pplying double standards by requiring of [Israel] behavior not expected or demanded of any other democratic nation;" "[d]rawing comparisons of contemporary Israeli policy to that of the Nazis." *Id.*

[17] For example, criticizing Israel by comparing it to Nazi Germany or referring to it as a racist settler colonial state may or may not be antisemitic, but it is protected speech that government actors—including public universities—may not restrict.

use for disciplinary purposes because, among other things, he believes it will chill campus speech, and in any event, the definition: "was intended for data collectors writing reports about anti-Semitism in Europe. It was never supposed to curtail speech on campus."[18] It is, in short, simply the wrong tool for the job to which the EO puts it, as its definition of antisemitism is so vague and overbroad that it sweeps in a substantial amount of speech the First Amendment protects.[19] That includes core political speech about the Israeli-Palestinian conflict, which is of the sort that courts have long recognized as receiving the greatest First Amendment protection.[20] Forcing Texas's public colleges to adopt the IHRA's definition of antisemitism will chill speech related to the Israeli-Palestinian conflict as students and faculty will self-censor for fear of running afoul of the definition's vague and overbroad ban on constitutionally protected political speech.[21]

FIRE understands the difficult position the Executive Order foists upon Texas' public universities. But following the Constitution is not optional. In their effort to comply with Governor Abbot's directive, Texas's public colleges and universities should revise their policies to reflect constitutional standards. Broad bans on expression that is "antisemitic" independent of the context in which it arises violate the First Amendment on their face, even before enforcement. Institutions will almost certainly face litigation, and their presidents, chancellors, provosts, and other administrators risk personal liability for damages (including punitive damages) for constitutional violations, because the rights at issue are clearly established under longstanding Supreme Court precedent, including that cited here.

Forgoing unlawful categorical bans on speech does not leave universities without the tools to address antisemitic harassment. Nor should it serve as a license to allow Jewish students and faculty members, or anyone else, to face situations where they may reasonably believe their safety is at risk if they speak out or participate in peaceful protests or counterprotests. Recent instances of assaults and physical altercations, vandalism, and blocking ingress and egress cross far beyond what the First Amendment protects. Ensuring that such unlawful activity

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[18] Kenneth S. Stern, *Will Campus Criticism of Israel Violate Federal Law?*, N.Y. TIMES (Dec. 12, 2016), https://www.nytimes.com/2016/12/12/opinion/will-campus-criticism-of-israel-violate-federal-law.html.

[19] Will Creeley, *State Department's Anti-Semitism Definition Would Likely Violate First Amendment on Public Campuses*, FIRE (May 22, 2015), https://www.thefire.org/news/state-departments-anti-semitism-definition-would-likely-violate-first-amendment-public.

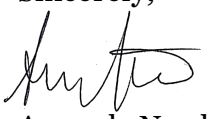
[20] *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of government affairs"). *See also Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 186–187 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414 (1988)) (speech about current issues in geopolitics, like the Israeli-Palestinian conflict and military funding, is undoubtedly "core political speech" at the very heart of any conception of free expression, and is where First Amendment protection is "at its zenith").

[21] The chilling effect is exacerbated by how the definition explicitly incorporates "contemporary examples of antisemitism in public life," most of which the First Amendment protects. Two egregious examples include "double standards ... requiring of [Israel] behavior not expected or demanded of any other democratic nation" and "[d]rawing comparisons of contemporary Israeli policy to that of the Nazis." *Working definition of antisemitism*, INT'L HOLOCAUST REMEMBRANCE ALL. (adopted Oct. 8, 2020), https://holocaustremembrance.com/resources/working-definition-antisemitism.

does not chill others from expressing themselves is a primary function of our democratic government. It is important for universities to keep their campus communities safe.

At times of great political and social unrest, illiberal calls to silence unpopular views inevitably rise. In this difficult moment, we urge you to honor your unique commitment as the leader of a public institution whose mission depends on the vast expressive freedoms afforded to all on our nation's public campuses. We urge you in the strongest possible terms to rise to this moment, stand by the institution's constitutional duty to honor students' core expressive freedoms, and reject Governor Abbott's order to violate their rights.

Sincerely,



Amanda Nordstrom
Program Officer, Campus Rights Advocacy