



# FIRE

Foundation for Individual  
Rights and Expression

December 12, 2023

Robert C. Robbins  
Executive Office of the President  
University of Arizona  
Old Main, Room 200  
1200 East University Boulevard  
P.O. Box 210021  
Tucson, Arizona 85721-0021

**URGENT**

*Sent via U.S. Mail and Electronic Mail (president@email.arizona.edu)*

Dear President Robbins:

FIRE<sup>1</sup> writes today with concern about a recent faculty-wide email from the University of Arizona's Faculty Senate Chair improperly suggesting faculty may face investigation or punishment for certain First Amendment-protected expression, and that such speech by faculty or students may be subject to formal monitoring and "intervention."

We know UA understands its obligations to protect campus expression under both the U.S. Constitution and the institution's own exceptionally speech-protective policies.<sup>2</sup> We also know tensions around the Israeli-Palestinian conflict are at an all-time high, prompting fraught, emotional discourse on many campuses across the nation. But it is in precisely these moments of social and political conflict that your institution's steadfast commitment to—and accurate application of—its free speech principles is most critical. Accordingly, we urge UA to ensure protected speech will not face undue monitoring or targeting by administrators or faculty oversight bodies for reform and, likewise, that it reassures faculty their longstanding expressive and academic freedom rights remain unchanged.

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<sup>1</sup> As you may recall from previous correspondence, the Foundation for Individual Rights and Expression is a nonpartisan nonprofit dedicated to defending freedom of speech, expression, and conscience, and other individual rights on campus.

<sup>2</sup> We recognize UA is one of the few institutions in the country whose student speech policies earn a "green light" rating from our organization. UA has also adopted the Chicago Statement, the University of Chicago's gold-standard free speech policy statement committing to maximize the campus climate for free expression and academic freedom.

Our concerns arise from an all-faculty email by Faculty Senate Chair Leila Hudson last week entitled “First State of the Faculty Message” that, while containing important articulations of UA’s free expression obligations, also includes two inaccurate statements about the scope of those obligations and how the rules will apply.<sup>3</sup> Specifically, in the message’s subsection on “Protected Speech and Hate Speech,” Hudson cites the rise of “[c]asual anti-Palestinian, anti-Arab, and anti-Muslim hateful rhetoric and a spate of violent Islamophobic hate crimes around the country,” as well as “the omnipresent and rising spectre and reality of rhetorical and violent antisemitism [that] threaten all of us.”<sup>4</sup> Hudson correctly acknowledges that on campus, safety and expressive rights are of utmost importance, but she also proposes two initiatives that would violate the First Amendment. The first reads as follows:<sup>5</sup>

I am working with Associate VP for Campus Life Jenna Hatcher and an emergent advisory committee of staff and students to establish a Campus Climate response team to document and intervene in incidents that do not meet the threshold of credible threats of violence for TAMT [Threat Assessment and Management Team] or Title IX grievances but nevertheless proliferate as we disagree vocally and passionately with one another in difficult times like these.

This type of formalized government monitoring of protected speech is deeply chilling and unlawful. The subtext here suggests these interventions may encourage students or faculty to somehow adapt or change their views or expressive choices to make them less “disagree[able]” or to better conform with UA’s views on the matter.

At its core, the First Amendment protects the right to express one’s deeply held views, even where such expression prompts “disagreement” or happens to “proliferate,” as Hudson’s email put it. The law also protects freedom of conscience and freedom from compelled speech.<sup>6</sup>

Yet UA’s proposed interventions would violate these freedoms and amount to thought-reform by calling for institutional punishment of protected expression that differs from the majority on campus.

Courts have held these kinds of interventions, even where they do not ultimately prompt a traditional punishment like suspension, can be unconstitutional. The legal question is not whether formal punishment is meted out, as even the spectre of punishment can violate the First Amendment.<sup>7</sup> Instead, the objective test courts use is whether a university’s response to speech “would likely deter a person of ordinary firmness from continuing to engage in

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<sup>3</sup> Email from Leila Hudson, Faculty Senate Chair, to Faculty (Dec. 2, 2023, 3:55 PM) (on file with author).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.”).

<sup>7</sup> *Surita v. Hyde*, 665 F.3d 860, 878 (7th Cir. 2011) (“The First Amendment prohibits threats of punishment designed to discourage future speech.”).

protected activity.”<sup>8</sup> And there is no doubt that reasonable students and faculty, believing administrators or faculty bodies with disciplinary authority will formally monitor and document their controversial speech, will self-censor accordingly, to the detriment of campus dialogue.

Hudson’s second problematic statement also runs afoul of the “ordinary firmness” test. She writes, in relevant part:<sup>9</sup>

It is important to note that pro-Palestinian sentiments and expressions, calls for a ceasefire in Gaza or an end to US unconditional support for Israel, allegations of genocide, terrorism, war crimes, or critiques of any ideology, government, non-state actor, or state policy or practice are protected speech. **Accusations that the above are, in and of themselves, essentially pro-Hamas, antisemitic, genocidal, or terroristic are problematic and potentially defamatory and have a chilling effect on free expression.** Conversation about where the boundary lies between hate speech and free speech is itself protected speech, and it is some of the most important speech that we do. Civility, even in the face of passionate emotions, respect and dialogue with those with whom we disagree (on campus and off) are one of the only paths towards a more peaceful and just future. As we enter into what promises to be a contentious election cycle, more campus-wide conversations about free speech, academic freedom, and prohibited political activity are needed.

Again, we deeply appreciate Hudson’s expressed commitment to the First Amendment and the attendant free speech norms that create a healthy climate for campus expression. Yet criticism, and *response* to that criticism, is highly unlikely to be defamatory or chill campus expression.<sup>10</sup> The responses Hudson flags are, rather, almost certainly protected speech, and it is her incorrect assertion—that broad swaths of protected political speech might constitute misconduct—that is itself chilling.

Speech is defamatory so as to lose the protection of the First Amendment only where it can be shown a speaker’s statements are “provably false” and concern “objectively verifiable facts.”<sup>11</sup> With respect to public figures, like public campus administrators or faculty, even false speech remains protected unless it is shown the speaker acted “subjectively” with actual malice—that is, the speaker had “actual knowledge” of the falsity of their statement or “in fact entertained

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<sup>8</sup> *Id.*

<sup>9</sup> Email from Hudson, *supra* note 3 (emphasis added).

<sup>10</sup> Tim Steller, *Tim Steller’s column: Israel conflict shouldn’t change U of A campus speech policies*, ARIZ. DAILY STAR (Dec. 10, 2023), [https://tucson.com/news/local/subscriber/tim-stellers-column-israel-conflict-shouldnt-change-u-of-a-campus-speech-policies/article\\_df34f9c2-948c-11ee-ac27-af59af35a8f4.html](https://tucson.com/news/local/subscriber/tim-stellers-column-israel-conflict-shouldnt-change-u-of-a-campus-speech-policies/article_df34f9c2-948c-11ee-ac27-af59af35a8f4.html).

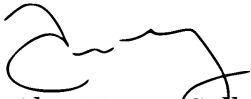
<sup>11</sup> *Point Ruston, LLC v. Pac. Nw. Reg’l Council of the United Bhd. of Carpenters & Joiners of Am.*, 2010 U.S. Dist. LEXIS 95239, at \*22 (W.D. Wash. Sept. 13, 2010).

serious doubts” about its veracity.<sup>12</sup> Here, criticizing pro-Palestinian expression as “essentially pro-Hamas, antisemitic, genocidal, or terroristic” would constitute statements of opinion, which are not provably false, and thus cannot be defamatory.

The First Amendment provides no privilege to be free from criticism, however caustic. Indeed, criticism is a form of “more speech,” the remedy to offensive expression the First Amendment prefers to censorship.<sup>13</sup> But the monitoring, correcting, or sanctioning of speech by government actors runs afoul of the First Amendment.

In light of the recent Faculty Senate message, UA must ensure the prompt communication of updated, accurate information to faculty who may now be fearful of offering authentic criticisms on campus. Likewise, UA must resist forming speech-monitoring bodies that would target protected expression and must communicate that decision to faculty as well. Given the urgent nature of this situation, including the ongoing chill on faculty speech, FIRE respectfully requests a substantive response to this letter no later than close of business December 18, 2023.

Sincerely,



Alex Morey, College of Social & Behavioral Sciences '07  
Director, Campus Rights Advocacy

Cc: Art M. Lee, Vice President & Deputy General Counsel  
Ron Marx, Interim Provost  
Mona Hymel, Vice Chair of the Faculty  
Leila Hudson, Faculty Senate Chair  
Tessa Dysart, Secretary of the Faculty  
John Arnold, Executive Director, Arizona Board of Regents

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<sup>12</sup> *Dodds v. Am. Broad. Co.*, 145 F.3d 1053, 1060–61 (quoting, in part, *Harte-Hanks Comms. v. Connaughton*, 491 U.S. 657, 688 (1989)).

<sup>13</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).