August 5, 2024

Governor Josh Shapiro
Office of the Governor
508 Main Capitol Building
Harrisburg, Pennsylvania 17120

Sent via U.S. Mail and Electronic Mail (governor@pa.gov)

Dear Governor Shapiro:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech, is concerned by Pennsylvania's ban on "scandalous or disgraceful" statements by public employees when they are speaking as private citizens. That prohibition, which you enacted in May by executive order, threatens the well-established constitutional rights of thousands of employees—from tenured professors to tollbooth operators—to speak on matters of public concern when they are off the clock. We urge you to eliminate or revise this policy to bring it into compliance with the First Amendment.

Our concerns arise from recent amendments to Executive Order 1980-18, which state in relevant part: "No employee, appointee, or official of the Executive Branch of the Commonwealth shall engage in scandalous or disgraceful conduct, or any other behavior, on or off duty, which may bring the service of the Commonwealth into disrepute."[1] This language mirrors a separate management directive.[2]

The amendment to the executive order was intended to apply to and deter employees' off-the-clock speech. Its introduction makes clear that it reaches speech, noting that while your "Administration supports free speech, and consistent with the First Amendment, such speech may never incite violence, encourage people to violate the law or harass others."[3] And in the email to members of your cabinet announcing the executive order, Secretary of the Office of Administration Neil Weaver wrote that "all of us have a responsibility to speak and act with

[1] Commonwealth of Pa. Governor's Off., Exec. Order No. 1980-18 Rev. No. 5 (May 6, 2024). Those who violate the policy "shall be subjected to disciplinary action including, but not limited to, reprimands, suspensions, and termination." *Id.*

[2] Commonwealth of Pa. Governor's Off., Management Directive No. 505.7 § 13.1(a) (Nov. 9, 2010) ("No employee of the commonwealth is to engage in scandalous or disgraceful conduct, or any other behavior, on or off duty which may bring the service of the commonwealth into disrepute.").

[3] Exec. Order 1980-18, *supra* note 1.

moral clarity."[4] He emphasized speech as the type of "conduct" implicated by the order:

> The need for moral clarity is especially pronounced today, as antisemitism, Islamophobia, and other forms of hate speech are increasing across not only in Pennsylvania, but nationally and globally. This behavior takes many forms, from social media posts, to boycotts, to graffiti, to public confrontations, to other actions motivated by hate.[5]

The executive order and management directive violate the First Amendment because they unduly limit employees' right to speak as citizens on matters of public concern, discriminate against speech based on viewpoint, and fail to give employees adequate notice of what speech is prohibited.[6]

I. Public Employees Retain Robust Rights to Comment as Citizens on Matters of Public Concern

Although the Commonwealth has the authority to regulate its employees' speech when they speak pursuant to job duties,[7] government employees retain a robust First Amendment right to speak as private citizens on matters of public concern.[8] A government employer may only discipline employees for speech in their personal capacity on matters of public concern when it can prove its interest "in promoting the efficiency of the public services it performs through its employees" outweighs "the interests of the [employee], as a citizen, in commenting upon matters of public concern."[9]

In *United States v. National Treasury Employees Union* ("*NTEU*"), the Supreme Court held that the government's evidentiary burden is even greater when it establishes a policy prospectively restricting the speech of a large number of employees.[10] Such a "ban chills potential speech before it happens" and "imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said."[11] Under this heavy burden, the

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[4] Email from Neil Weaver, Sec'y, Governor's Off. of Admin., to Cabinet Members, Off. of the Governor (May 8, 2024, 10:46 AM) (on file with author).

[5] *Id.*

[6] FIRE recognizes that an elected official "must be able to appoint some high-level, personally and politically loyal officials who will help him implement the policies that the public voted for." *Bardzik v. Cnty. of Orange*, 635 F.3d 1138, 1144 (9th Cir. 2011) (citing *Branti v. Finkel*, 445 U.S. 507, 517–20 (1980); *Elrod v. Burns*, 427 U.S. 347, 367 (1976)). Our concerns are limited to the policy's application to officials and employees who are not members of your cabinet.

[7] *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

[8] *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

[9] *Id.* To prove as much, the employer must demonstrate that the speech "impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

[10] 513 U.S. 454, 467–68 (1995).

[11] *Id.* at 468.

government "must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government."[12] To satisfy this requirement, the Commonwealth "must make two showings: first, that it has identified 'real, not merely conjectural' harms; and second, that the ban as applied . . . addresses these harms in a 'direct and material way.'"[13] The Commonwealth must not only identify the harms, "but also provide evidence that those concerns exist" and show the ban is "narrowly tailored" to addressing them.[14]

II. The Policy's Viewpoint-Based Restrictions Are Constitutionally Fatal

The executive order and management directive violate the First Amendment because they restrict speech solely based on the viewpoint expressed—an "egregious" form of censorship.[15] Expression of disfavored viewpoints is not a "harm" the Commonwealth has a legitimate interest in addressing, as the government must "abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[16]

The Supreme Court has specifically held that a prohibition on "scandalous" speech is viewpoint-discriminatory because it "distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation."[17] The restriction on "disgraceful" speech is viewpoint-based for the same reason. Standing alone, judgments about what is "scandalous" or "disgraceful" represent nothing more than a subjective stamp of disapproval of the speech's content or message. But as the Court has warned, "[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech."[18]

III. The Policy Is Not Narrowly Tailored to Addressing Concrete Harms

Even setting aside the policy's constitutionally fatal viewpoint discrimination, it fails to meet the high bar set by *NTEU*, which applies because the policy prospectively bans thousands of employees from engaging in certain kinds of expressive activity, even when off duty. Under this standard, the Commonwealth cannot demonstrate a policy of this breadth is necessary to address real harms and is narrowly tailored to alleviating them in a direct and material way.

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[12] *Id.* (quoting *Pickering*, 391 U.S. at 571).

[13] *Amalgamated Transit Union Loc. 85 v. Port Auth. of Allegheny Cnty.*, 39 F.4th 95, 105 (3d Cir. 2022) (quoting *NTEU*, 513 U.S. at 475) (internal brackets removed).

[14] *Id.* at 105–06 (citations omitted).

[15] *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

[16] *Id.*

[17] *Iancu v. Brunetti*, 588 U.S. 388, 394 (2019).

[18] *Rankin*, 483 U.S. at 384.

The U.S. Court of Appeals for the Third Circuit—whose decisions bind the Commonwealth—blocked the Port Authority of Allegheny County's enforcement of a broad ban on employees wearing political masks, concluding that "fear that 'Black Lives Matter' and other controversial masks might cause disruption to its service" was "merely conjectural" and "a wide range of political and social-issue speech is not disruptive."[19] The policy's "breadth" was "especially suspect because the ban affect[ed] 'core' political speech, an area where fit must be particularly close."[20]

The broad, subjective terms "scandalous" and "disgraceful" likewise reach a potentially vast array of speech, including speech on matters of public significance. A wide range of speech on social and political issues might later be judged to be "scandalous" or "disgraceful"—or to have the potential to bring the Commonwealth into "disrepute"—despite having little to no impact on the executive branch's public services. The breadth of the policy restricts employee speech beyond what is necessary to ensure the executive branch's efficient functioning or to address any concrete harms the Commonwealth has a legitimate interest in alleviating. And unlike the ban in the Third Circuit case—which was limited to working hours but still struck down—the executive order explicitly applies to on-duty *and* off-duty conduct.

Notably, Secretary Weaver's May 8 email calls out "boycotts" and "hate speech,"[21] and the policy changes appear to be a response to recent controversial speech and protests related to the Israel-Hamas war. Consequently, it is easy to imagine the Commonwealth punishing an employee for "scandalous" or "disgraceful" conduct for supporting a boycott of Israel or attending a pro-Palestinian rally, as either action could offend those with different views on this deeply polarizing issue. At the same time, those who believe Israel is committing genocide in Gaza may consider an off-the-clock employee's expression of support for the Israeli military "scandalous" or "disgraceful." In today's political environment, it is unremarkable for even a seemingly benign comment to engender disagreement or controversy. None of this speech, however, is lawful grounds for discipline absent evidence of actual or reasonably likely workplace disruption that outweighs the employee's interest in speaking on issues of public importance.[22]

The executive order also incorrectly states that the First Amendment does not protect speech that "encourage[s] people to violate the law." While incitement is unprotected, that narrow exception applies only to speech intended to and likely to cause imminent unlawful action.[23] Abstract advocacy of civil disobedience, for example, is fully protected by the First Amendment and cannot, absent more, justify employee discipline.

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[19] *Amalgamated Transit Union*, 39 F.4th at 105–06.

[20] *Id.* at 106 (citing *Connick v. Myers*, 461 U.S. 138, 145 ("[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values[] and is entitled to special protection.") (alterations in original)).

[21] "Hate speech" is not a recognized exception to the First Amendment. To the contrary, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

[22] *Watters v. City of Phila.*, 55 F.3d 886, 896 (3d Cir. 1995).

[23] *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

Moreover, the executive order and management directive appear to apply to even state university faculty.[24] If so, their breadth exacerbates the First Amendment violation. Although the Supreme Court held that the First Amendment generally does not protect public employees' speech when it is spoken as part of their official duties, it explicitly reserved deciding how this rule would apply to public university faculty, and every federal court of appeals to address the issue has recognized an exception for academic speech.[25] "[O]n public university campuses throughout this country, . . . free speech is of critical importance because it is the lifeblood of academic freedom."[26] Academic freedom is of "special concern to the First Amendment."[27] As the Third Circuit explained:

> The university atmosphere of speculation, experiment, and creation is essential to the quality of higher education. Our public universities require great latitude in expression and inquiry to flourish[.][28]

Much of that expression, inquiry, and thought experimentation might strike others as scandalous or disgraceful—indeed, it often does and results in improper punishment[29]—but

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[24] *See Agency Directory*, COMMONWEALTH OF PA., https://www.pa.gov/en/agencies.html (listing State System of Higher Education as Pennsylvania agency).

[25] *Garcetti*, 547 U.S. at 425 (declining to decide whether the "official duties" framework "would apply in the same manner to a case involving speech related to scholarship or teaching"); *Heim v. Daniel*, 81 F.4th 212, 227 (2d Cir. 2023) (rejecting application of *Garcetti*'s "official duties" framework to academic speech, which "have the effect of exiling all public-university faculty scholarship and instruction from the shelter of the First Amendment"); *Meriwether v. Hartop*, 992 F.3d 492, 506 (6th Cir. 2021) (declining to apply *Garcetti* to professor's in-class speech); *Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014) ("We conclude that *Garcetti* does not — indeed, consistent with the First Amendment, cannot — apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor."); *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 564 (4th Cir. 2011) ("[W]e will not apply *Garcetti* to the circumstances of this case."); *see Buchanan v. Alexander*, 919 F.3d 847 (5th Cir. 2019) (applying *Pickering* rather than *Garcetti* where tenured professor was fired for classroom comments).

[26] *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008).

[27] *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

[28] *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 243 (3d Cir. 2010); *see also Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.").

[29] *See, e.g.*, Sabrina Conza, *Déjà vu: San Francisco State University threatens academic freedom, investigates professor for showing Prophet Muhammad image in history class*, FIRE (Apr. 6, 2023), https://www.thefire.org/news/deja-vu-san-francisco-state-university-threatens-academic-freedom-investigates-professor; Sabrina Conza, *San Diego Mesa College violates academic freedom, investigates professor for essay example associating GOP with fascism*, FIRE (Sept. 29, 2022), https://www.thefire.org/news/san-diego-mesa-college-violates-academic-freedom-investigates-professor-essay-example; Amanda Nordstrom, *Three Claremont McKenna professors sound alarm over school's treatment of historical texts with racial slurs*, FIRE (Aug. 23, 2022), https://www.thefire.org/news/three-claremont-mckenna-professors-sound-alarm-over-schools-treatment-historical-texts-racial; Press Release: *California writing professor investigated after admin calls works by black, brown, queer authors 'triggering,' 'deviant pornography'*, FIRE (May 11, 2022), https://www.thefire.org/news/california-writing-professor-investigated-after-admin-calls-works-black-brown-queer-authors.

that does not strip it of the constitutional protection that allows universities to fulfill their knowledge-seeking missions.

The executive order and management directive sweep far too broadly. Their "large-scale disincentive to Government employees' expression" cannot stand.[30]

IV. The Policy Is Unconstitutionally Vague

The executive order and management directive are also unconstitutional for the independent reason that their vague language leaves employees in the dark about what speech is permissible. Laws and policies must give fair warning about what conduct is prohibited and "provide explicit standards for those who apply them" to prevent "arbitrary and discriminatory enforcement."[31] The "need for specificity is especially important where . . . the regulation at issue is a content-based regulation of speech . . . because of its obvious chilling effect on free speech." [32] For example, a federal court invalidated as unconstitutionally vague a policy targeting "stigmatizing" and "victimizing" language—terms no less precise than "scandalous" or "disgraceful"—because they "elude precise definition" and the policy articulated no "principled way to distinguish sanctionable from protected speech."[33]

Deciding whether speech is "scandalous" or "disgraceful" similarly requires an inescapably subjective judgment, and the policy offers no definitions of these nebulous terms or other guidance for discerning the line between permissible and impermissible expression. An employee has no way to know whether their off-the-clock speech will be retroactively deemed to meet this invisible bar.

As discussed, it is unclear whether the policy might cover speech supporting Israel's invasion of Gaza or speech accusing Israel of perpetrating a genocide. The same goes for other hot-button political issues. For example, some argue transgender athletes competing in women's sports is a civil rights issue and threatens women and girls,[34] while others argue excluding transgender athletes is transphobic.[35] Would speech in favor of either position be deemed "scandalous" or "disgraceful," or bring the Commonwealth into "disrepute"? It is anybody's guess. As a result, the policy's unpredictable enforcement is likely to cause employees to "steer

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[30] *NTEU*, 513 U.S. at 470.

[31] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

[32] *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 266 (3d Cir. 2002).

[33] *Doe v. Univ. of Mich.*, 721 F.Supp. 852, 867 (E.D. Mich. 1989).

[34] *See, e.g.,* Riley Gaines, *Riley Gaines: Trans athletes make women's sports a civil rights issue*, N.Y. POST (June 2, 2024), https://nypost.com/2024/06/02/opinion/trans-athletes-make-womens-sports-a-civil-rights-issue.

[35] *See, e.g.,* Derrick Clifton, *Anti-Trans Sports Bills Aren't Just Transphobic — They're Racist, Too,* THEM (Mar. 31, 2021), https://www.them.us/story/anti-trans-sports-bills-transphobic-racist; Alex Cooper, *Caitlyn Jenner Says Florida Gov.'s Transphobia Is Just 'Common Sense'*, ADVOCATE (Mar. 25, 2022), https://www.advocate.com/news/2022/3/25/caitlyn-jenner-says-florida-govs-transphobia-just-common-sense.

far wider" of the forbidden zone "than if the boundaries of the forbidden areas were clearly marked."[36]

V. Conclusion

Even if the Commonwealth has every intention of enforcing the policy only in those rare instances when an employee's speech is unprotected, that does not render it constitutional. The First Amendment "does not leave us at the mercy of *noblesse oblige*"—courts will "not uphold an unconstitutional statute merely because the Government promised to use it responsibly."[37]

FIRE thus urges you to uphold the First Amendment rights of executive branch officials and employees by amending Executive Order 1980-18 and Section 13.1 of the Management Directive to eliminate their unconstitutional flaws. FIRE would be pleased to assist with that endeavor.

Thank you for your attention to this matter. We respectfully request a response by August 19, 2024, addressing our legal arguments and clarifying whether Executive Order 1980-18 and the Management Directive apply to state university faculty.

Sincerely,

Aaron Terr
Director of Public Advocacy

Cc: Neil Weaver, Secretary of the Office of Administration

[36] *Grayned*, 408 U.S. at 109.

[37] *United States v. Stevens*, 559 U.S. 460, 480 (2010).