



February 27, 2024

Alan Garber
Office of the President
Harvard University
Massachusetts Hall
Cambridge, Massachusetts 02138

URGENT

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

Dear Interim President Garber:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is concerned by Harvard University's investigation into what it described as a "deeply offensive antisemitic" image posted on social media by student and faculty groups.² While many may have taken offense to the image, controversial speech is protected under Harvard's commitment to free expression, which is tested in precisely these moments of heightened tension on campus. We therefore urge Harvard to end the investigation and recommit to ensuring it refrains from punishing protected speech moving forward.

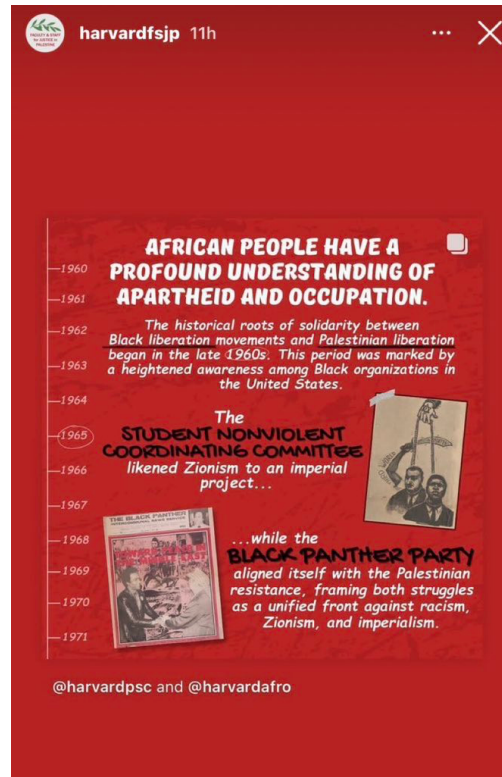
Our concerns arise from the university's response to an Instagram story posted February 18 by the Harvard Undergraduate Palestine Solidarity Committee and the African and African American Resistance Organization, which contained text explaining the history of black liberation movements and their connections to Palestinian liberation movements.³ The post

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 *Harvard University Statement Feb. 19*, HARVARD UNIV. (Feb. 19, 2024), <https://www.harvard.edu/media-relations/2024/02/19/harvard-university-statement-feb-19/> [<https://perma.cc/6KBN-XG8R>]. Specifically, the posts were made by two student groups and one faculty group. Note that the recitation here reflects our understanding of the pertinent facts, which is based on public information, though we appreciate you may have additional information, and if so, invite you to share it with us.

³ Michelle N. Amponsah & Joyce E. Kim, *As Harvard Warns of Disciplinary Action, Pro-Palestine Groups apologize for Antisemitic Image*, THE HARVARD CRIMSON (updated Feb. 20, 2024, 2:10 AM) <https://www.thecrimson.com/article/2024/2/20/harvard-antisemitic-image-apology/>.

contained a small image of a hand, embellished with a dollar sign inside the Star of David, depicted as holding a rope connected to the necks of two black men. The Harvard Faculty and Staff for Justice in Palestine reposted the post, which appears below:⁴



Backlash to the image was immediate.⁵ Harvard Faculty and Staff for Justice in Palestine subsequently deleted the post and apologized, saying it used “offensive antisemitic tropes,” while the Harvard Undergraduate Palestine Solidarity Committee and the African and African American Resistance Organization both deleted it and reposted it without the offending image.⁶

Soon after, Harvard released a statement condemning the post “in the strongest possible terms,” and said it was referring the matter for review by the Harvard College Administrative Board “responsible for the application and enforcement of undergraduate academic regulations and social conduct.”⁷ In a separate statement, you described the post as “grossly irresponsible and profoundly offensive” and said the university would “review the situation to

⁴ *Id.*

⁵ See, e.g., House Committee on Education & the Workforce, @EdWorkforceCmte, X (Feb. 19, 2024, 4:46 PM) <https://twitter.com/EdWorkforceCmte/status/1759695994722177032> [<https://perma.cc/GM2A-BN5C>] (describing the image as “repugnant”); Harvard Chabad, @HarvardChabad, X (Feb. 19, 2024, 12:51 PM) <https://twitter.com/HarvardChabad/status/1759636766909173883> [<https://perma.cc/MSF8-4QBJ>] (describing the image as reprehensible, bigoted, and hateful).

⁶ Amponsah & Kim, *supra* note 2.

⁷ Harvard University Statement, *supra* note 2.

better understand who was responsible for the posting and to determine what further steps are warranted.”⁸

The widespread criticism of the post and the groups’ decisions to remove the offending image represents precisely the kind of productive ideological exchange envisioned by Harvard’s “special emphasis” on “freedom of speech,”⁹ which “entails tolerating some speech that members of the community may receive as offensive or harmful.”¹⁰ The university, conversely, goes too far in suggesting controversial speech may warrant punishment, especially insofar as its free expression promises, vital to Harvard’s accreditation,¹¹ align with First Amendment principles that protect offensive expression.¹²

Courts have consistently held that expression may not be restricted on the basis that others find it offensive, and that universities committed to free speech may not restrict expression on the basis that others find it to be offensive.¹³ While free speech principles may not protect some expression because it falls into exceptions to the First Amendment, such as those for “true threats” or incitement, the Supreme Court has repeatedly held there is no categorical exception for expression others view as subjectively hateful.¹⁴ The Court recently and expressly reaffirmed this principle in refusing to establish a limitation on speech viewed as

⁸ Statement by Alan M. Garber, HARVARD OFFICE OF THE PRESIDENT, <https://links.repoint.harvard.edu/servlet/MailView?ms=MzUzNjQ2MzES1&r=MjE4MzYzNTU4NjMS1&j=MjYwMzgwMzE1NgS2&mt=1&rt=0> [<https://perma.cc/4FQA-A6S2>].

⁹ *University-Wide Statement on Rights and Responsibilities*, HARVARD UNIV. <https://provost.harvard.edu/university-wide-statement-rights-and-responsibilities> [<https://perma.cc/XVA7-BDN5>].

¹⁰ *Guidelines for Free Expression, Open Debate, Protest, and Dissent*, The Challenge of Open Debate, Student Handbook, HARVARD SCH. OF PUB. HEALTH, <https://www.hsph.harvard.edu/student-handbook/guidelines-for-open-debate-protest-and-dissent/> [<https://perma.cc/WWU7-SR2B>].

¹¹ The New England Commission of Higher Education requires that accredited institutions like Harvard “commit[] to the free pursuit and dissemination of knowledge,” and to assure “faculty and students the freedom to teach and study, to examine all pertinent data, to question assumptions, and to be guided by the evidence of scholarly research.” *Standards for Accreditation*, Standard Nine: Integrity, Transparency, and Public Disclosure, NEW ENGLAND COMM’N OF HIGHER EDUC., https://www.neche.org/standards-for-accreditation/#standard_nine [<https://perma.cc/46WN-HCDV>].

¹² While Harvard is a private institution, its invocation of the First Amendment’s protection of “freedom of speech” means that students and faculty will reasonably look to First Amendment jurisprudence to determine their expressive rights on campus.

¹³ See, e.g., *Cohen v. California*, 403 U.S. 15, 25 (1971) (punishment of a man wearing a jacket emblazoned with the words “Fuck the Draft” was unlawful); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag was protected under the “bedrock principle” that the authorities “may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”); *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011) (reaffirming that “[a]s a Nation we have chosen ... to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”).

¹⁴ See, e.g., *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”).

“hateful” or demeaning “on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground.”¹⁵

To be sure, the groups here are not shielded from the consequences of their expression—including criticism by students, faculty, or the broader community, like that noted above. Such criticism constitutes “more speech,” the remedy free speech principles anticipate in eschewing censorship.¹⁶ Indeed, that appears to be what happened here, resulting in the groups removing the image that drew criticism. Conversely, Harvard’s attempt to step in to investigate them risks chilling the groups’ future expression, and that of other speakers in the campus community, for fear of incurring administrative sanction for protected speech. That’s because an investigation of protected speech can itself intrude on the rights of the speaker, even where the investigation concludes in their favor.¹⁷

You have an opportunity to give credence to your predecessor’s recent statements to Congress that Harvard “must model what it means to preserve free expression[.]”¹⁸ We urge Harvard to take this opportunity to do just that, by publicly announcing an end to this investigation.

We request a substantive response to this letter no later than close of business on Tuesday, March 12.

Sincerely,



Graham Piro
Program Officer, Campus Rights Advocacy

Cc: Harvard College Palestine Solidarity Committee
Harvard Faculty and Staff for Justice in Palestine

¹⁵ *Matal v. Tam*, 528 U.S. 218 (2017).

¹⁶ *Whitney v. California*, 274 U.S. 357, 377 (1927).

¹⁷ *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999) (The question is not whether formal punishment is meted out, but whether an institution’s actions in response to protected expression “would chill or silence a person of ordinary firmness from future First Amendment activities[.]”).

¹⁸ Miles J. Herzenhorn, et al., *As It Happened: Harvard President Claudine Gay Testifies Before Congress on Antisemitism*, HARVARD CRIMSON (Dec. 5, 2023), <https://www.thecrimson.com/article/2023/12/5/gay-testimony-congress-live-updates/>.