FIRE
Foundation for Individual Rights and Expression

October 31, 2024

Ann Cudd
Office of the President
Portland State University
PO Box 751--POF
Portland, Oregon 97207-0751

URGENT

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

Dear President Cudd:

FIRE, a nonpartisan nonprofit dedicated to defending freedom of speech,[1] is concerned by Portland State University's public referral of a student to the PSU Office of Equity and Compliance's Bias Team for dressing as a Nazi for an on-campus Halloween costume contest.[2] While many may consider such a costume offensive, PSU, as a public university bound by the First Amendment,[3] may not initiate disciplinary procedures that violate students' expressive rights or launch investigations into instances of clearly protected expression.[4] Therefore, we urge PSU to promptly cease any investigation into the costume and publicly announce that it is no longer looking into the matter.

It is well-established that freedom of expression "does not end at the spoken or written word," but includes conduct "intend[ed] to convey a particularized message" likely to "be understood

[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 mission and activities at thefire.org.

[2] Tatum Todd, *Portland State student's Halloween costume deemed 'harmful,' leads to university response,* The Oregonian (updated Oct. 29, 2024, 8:10 PM), https://www.oregonlive.com/news/2024/10/portland-state-students-halloween-costume-deemed-harmful-leads-to-university-response.html. The recitation of facts here reflects our understanding of the situation. We appreciate that you may have additional information and invite you to share it with us.

[3] *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).

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

by those who viewed it" as expressive.[5] While authorities may enforce content-neutral regulations that may *incidentally* affect expressive conduct, they cannot restrict expressive conduct "because it has expressive elements."[6] This is what protects the act of saluting or refusing to salute a flag,[7] wearing black armbands to protest war,[8] or raising a "seditious" red flag.[9] The student here has the expressive right to dress in the costume, whether as a joke, to express an sincere opinion, to mock Nazis or their supporters, or for any other expressive purpose—regardless of others' reaction.

PSU's investigation of this costume cannot legitimately be justified on suspicion that the wearing of the costume itself, without more, constituted unprotected harassment. In *Davis v. Monroe County Board of Education*, the Supreme Court set forth a strict definition of discriminatory harassment in the educational context.[10] For conduct (including expression) to constitute actionable harassment, it must be (1) unwelcome, (2) discriminatory on the basis of gender or another protected status, and (3) "so severe, pervasive, and objectively offense that it can be said to deprive the victim[] of access to the educational opportunities or benefits provided by the school."[11]

Wearing a costume—even a Nazi costume—does not meet this stringent standard. Even if it could be said to be "objectively offensive," there is no suggestion that the costume was worn on more than one occasion, which means wearing it fails to meet the required "pervasive[ness]" component. PSU also cannot construe the wearing of the costume in a single instance as sufficiently serious enough to deprive a reasonable person of the university's educational opportunities or benefits.

Nor is an announced investigation into the costume justified by others taking offense. The Supreme Court has repeatedly, consistently, and clearly held that expression may not be punished on the basis that others find it to be offensive or hateful.[12] In ruling that the First Amendment protects even protesters holding purposefully insulting signs outside of soldiers' funerals, the Court reiterated this fundamental principle, remarking 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."[13] Courts have found protected expression in "offensive and sophomoric" skits depicting women and minorities in derogatory stereotypes,[14] "racially-charged emails" to a

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[5] *Texas v. Johnson*, 491 U.S. 397, 404, 406 (1989)

[6] *Id.*

[7] *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34 (1943).

[8] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969).

[9] *Stromberg v. California*, 283 U.S. 359, 369 (1931).

[10] 526 U.S. 629 (1999).

[11] *Id.* at 650.

[12] *E.g.*, *Matal v. Tam*, 582 U.S. 218, 245 (2017) (refusing to uphold a limitation on speech viewed as "hateful" or demeaning "on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground" even under a relaxed standard of scrutiny); *Johnson*, 491 U.S. at 414 (government actors "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

[13] *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).

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

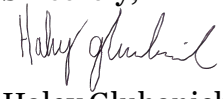
college listserv,[15] and student organizations that the public viewed as "shocking and offensive."[16] The First Amendment's protection of subjectively offensive expression applies regardless of informative or entertainment value,[17] such as performances with actors in "black face."[18]

PSU must therefore immediately cease any investigation into the costume. Such investigations alone into protected expression create an impermissible chilling effect, even where an investigation concludes in the student's favor.[19] Because of the implicit threat of discipline and implication that the expression at issue is not protected, these investigations have a censorial effect.[20] If PSU felt compelled to reassure students it was aware of the costume, it could have noted just that and done a private preliminary review of the situation to confirm the expression is protected and does not reach the *Davis* standard—and with that confirmation, proceed no further. That approach avoids the suggestion that the university will launch full-scale disciplinary investigations arising from protected expression.

Of course, this does not shield the individuals from every consequence of their expression—including criticism by students, faculty, or the broader community. Criticism is a form of "more speech," the remedy to offensive expression preferred to censorship.[21] Nor would PSU be barred from offering resources to students who may have been offended or upset by the costume. However, the First Amendment strictly limits government actors from censoring speakers for offending others.

Given the urgent nature of this matter, we request a substantive response to this letter no later than close of business on November 14, 2024, confirming PSU will end the investigation into the wearing of the costume, not pursue any punishment in this matter, and, moving forward, will refrain from announcing investigations into protected expression.

Sincerely,



Haley Gluhanich
Senior Program Officer, Campus Rights Advocacy

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[15] *Rodriguez v. Maricopa Cnty. Comm. Coll. Dist.*, 605 F.3d 703, 705 (9th Cir. 2009) (the First Amendment "embraces such a heated exchange of views" at a public college, especially when they "concern sensitive topics like race, where the risk of conflict and insult is high").

[16] *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 661 (1st Cir. 1974).

[17] *Winters v. New York*, 333 U.S. 507, 510 (1948) (holding that offensive magazine enjoyed First Amendment protection because "[t]he line between the informing and the entertaining is too elusive for the protection of that basic right. ... What is one man's amusement, teaches another's doctrine."); *see also Matal*, 582 U.S. at 243 ("Giving offense is a viewpoint.").

[18] *Berger v. Battaglia*, 779 F.2d 992, 999 (4th Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986).

[19] *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

[20] *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992).

[21] *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).