



April 19, 2018

Joseph I. Castro  
Office of the President  
California State University, Fresno  
5200 North Barton Avenue  
M/S ML48  
Fresno, California 93740

**URGENT**

*Sent via Overnight Delivery and Electronic Mail (josephcastro@csufresno.edu)*

Dear President Castro:

We the undersigned<sup>1</sup> are deeply concerned about the threat to freedom of expression at California State University, Fresno (Fresno State) following a press conference yesterday afternoon, during which the university announced the initiation of an investigation into Professor Randa Jarrar following her social media comments on the death of former First Lady Barbara Bush. Professor Jarrar's tweets voiced her opinion as a private citizen on matters of significant public concern. Accordingly, her speech is protected by the First Amendment and the liberty of speech clause of the California Constitution, by which Fresno State is legally bound. Fresno State must end its investigation of Jarrar, which impermissibly chills the expressive rights of faculty.

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<sup>1</sup> The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses. The ACLU Foundation of Northern California (ACLUF-NC) is an enduring guardian of justice, fairness, equality, and freedom, working to protect and advance civil liberties for all Californians. Defending Rights & Dissent strengthens our participatory democracy by protecting the right to political expression and working to ensure that the promise of the Bill of Rights is fulfilled for everyone. The National Coalition Against Censorship (NCAC), founded in 1974, is an alliance of over 50 national nonprofit organizations, including literary, artistic, religious, educational, professional, labor, and civil liberties groups dedicated to promoting the right to free speech. PEN America is a nonprofit organization standing at the intersection of literature and human rights to protect open expression in the United States and worldwide. The Thomas Jefferson Center for the Protection of Free Expression is a nonpartisan, nonprofit organization devoted solely to the defense of free expression in all its forms. Project Censored educates students and the public about the importance of a truly free press for democratic self-government. The Electronic Frontier Foundation is the leading nonprofit organization defending civil liberties in the digital world.

## I. FACTS

The following is our understanding of the facts; please inform us if you believe we are in error.

Randa Jarrar is a tenured professor of English at Fresno State. She is currently on a planned personal leave of absence for the spring 2018 semester. Following the news of the death of former First Lady of the United States Barbara Bush, Jarrar posted critical commentary on her personal Twitter page:

Barbara Bush was a generous and smart and amazing racist who, along with her husband, raised a war criminal. Fuck outta here with your nice words.

PSA: either you are against these pieces of shit and their genocidal ways or you're part of the problem. that's actually how simple this is. I'm happy the witch is dead. can't wait for the rest of her family to fall to their demise the way 1.5 million iraqis have. Byyyeeeeeeee. <sup>2</sup>

Jarrar's tweets sparked controversy, and many responded to her tweets with harsh criticism.<sup>3</sup> In response, Jarrar tweeted:

All the hate I'm getting ALMOST made me forget how happy I am that George W Bush is probably really sad right now 😊

Many of the responses to Jarrar's tweets demanded that Fresno State fire her, and expressed a desire to pressure the university into doing so.<sup>4</sup> Jarrar replied to some of those tweets:

you can try all you want. i will not be fired. and i know how much that hurts you :)

LOL! Let me help you. You should tag my president @JosephICastro. What I love about being an American professor is my right to free speech, and what I love about Fresno State is that I always feel protected and at home here. GO BULLDOGS! <3

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<sup>2</sup> Images of Jarrar's tweets are available upon request. All formatting and spelling as in original.

<sup>3</sup> See Ashley Collman, *I'm happy the witch is dead: Tenured Fresno State professor sparks outrage as she celebrates the death of Barbara Bush – calling her an 'amazing racist' who 'raised a war criminal'*, DAILY MAIL, Apr. 18, 2018, <http://www.dailymail.co.uk/news/article-5629641/Fresno-State-professor-sparks-outrage-tweet-saying-shes-happy-Barbara-Bush-dead.html>.

<sup>4</sup> See *id.*

In response to one Twitter user’s posting of her office contact information,<sup>5</sup> Jarrar responded:

Lol omg guys, i haven’t even activated that line. If you really wanna reach me, here’s my number ok? (480) 921-1006

The telephone number posted by Jarrar was in fact the contact number for Arizona State University’s 24-hour crisis hotline.<sup>6</sup>

At 10:30 p.m. on April 17, as the controversy unfolded, you issued a statement disagreeing with Jarrar’s expression but acknowledging that her statements were made in her capacity as a private citizen:

On behalf of Fresno State, I extend my deepest condolences to the Bush family on the loss of our former First Lady, Barbara Bush.

We share the deep concerns expressed by others over the personal comments made today by Professor Randa Jarrar, a professor in the English Department at Fresno State. Her statements were made as a private citizen, not as a representative of Fresno State.

Professor Jarrar’s expressed personal views and commentary are obviously contrary to the core values of our University, which include respect and empathy for individuals with divergent points of view, and a sincere commitment to mutual understanding and progress.<sup>7</sup>

At about the same time, Dr. Saúl Jiménez-Sandoval, dean of Fresno State’s College of Arts and Humanities, sent Jarrar an email saying he had “received several tweets from community members, most of whom are invested members in the arts & humanities and work earnestly to build bridges of understanding and collaboration.”<sup>8</sup> Jiménez-Sandoval shared his belief that Jarrar was “sending the tweets as a private citizen, but even so, you represent Creative Writing and its power to overcome differences and convene us together.” He shared his “support [for] your freedom to express yourself” but asked her to “consider how your tweets are affecting the community” and encouraged her to find “more constructive ways to convey your ideas.”

<sup>5</sup> @PDO707, TWITTER (Apr. 17, 2018, 10:24 PM), <https://twitter.com/PDO707/status/986426267959308288>.

<sup>6</sup> The *Fresno Bee* reported that an official at Arizona State University said that while there was a higher volume of calls to the hotline, they did not believe that any legitimate calls did not get through. Aleksandra Appleton, *Professor’s tweet about Barbara Bush was ‘beyond free speech,’ Fresno State president says*, FRESNO BEE, (Apr. 18, 2018), <http://www.fresnobee.com/news/local/education/article209227364.html>.

<sup>7</sup> Press Release, California State University, Fresno, President Joseph I. Castro statement regarding faculty member’s tweet (Apr. 17, 2018), available at <http://www.fresnostatenews.com/2018/04/17/president-castro-statement-regarding-faculty-members-tweet>.

<sup>8</sup> E-mail from Dr. Saúl Jiménez-Sandoval, Dean of the College of Arts and Humanities, to Randa Jarrar (April 18, 2018) (on file with author).

In an interview with *The Fresno Bee*, you stated that “[t]his was beyond free speech. This was disrespectful.”<sup>9</sup>

On April 18, Fresno State Provost Lynnette Zelezny conducted a press conference regarding the controversy. During the press conference, Zelezny announced that Fresno State has launched an investigation into Jarrar’s tweets, noting that tenure does not insulate a faculty member from termination.<sup>10</sup> When asked about faculty members’ freedom of speech, Zelezny stated:

We talk about the responsibility—this is not just the faculty, but to our staff and to our students as well . . . we do encourage the fact that all voices do matter, but again we are, again, a community where we respect diverse opinions, diverse thoughts. So, again, we very much do want to hear the voices of others, but we again want it to be in a climate of respect.

## II. ANALYSIS

The First Amendment and the California Constitution’s liberty of speech clause protects Randa Jarrar’s expression, and Fresno State may neither investigate nor punish her for it.

### A. The First Amendment binds Fresno State and protects subjectively offensive expression

It has long been settled law that the First Amendment is binding on public colleges like Fresno State. *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); *see also DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) (on public campuses, “free speech is of critical importance because it is the lifeblood of academic freedom”). *See also Grisot v. Fair Political Practices Com.*, 8 Cal.4th 851, 866 fn. 5 (1994) (“As a general matter, the liberty of speech clause in the California Constitution is more protective of speech than its federal counterpart.”).

The principle of freedom of speech does not exist to protect only non-controversial expression; it exists precisely to protect speech that some or even most members of a community may find controversial or offensive. The Supreme Court has explicitly held, in

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<sup>9</sup> Aleksandra Appleton, Fresno State: Tenure doesn’t necessarily protect professor who tweeted about Barbara Bush, *THE FRESNO BEE*, Apr. 18, 2018, <http://www.fresnobee.com/news/local/education/article209227364.html>.

<sup>10</sup> *Press conference with Provost Lynnette Zelezny regarding recent tweets by a Fresno State faculty member*, CALIFORNIA STATE UNIVERSITY, FRESNO (Apr. 18, 2018), <https://www.pscp.tv/w/1DXxyXXXkrWJM>.

rulings spanning decades, that speech cannot be restricted simply because it offends others, on or off campus. *See, e.g., Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973) (“[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”) The freedom to offend some listeners is the same freedom to move or excite others. As the Supreme Court observed in *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), speech “may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.” The Court reiterated this fundamental principle in *Snyder v. Phelps*, 562 U.S. 443, 461 (2011), proclaiming 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.”

In *Cohen v. California*, the Court aptly observed that although many would see as “the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance,” that people will encounter offensive expression is “in truth [a] necessary side effect[] of the broader enduring values which the process of open debate permits us to achieve.” 403 U.S. 15, 24–25 (1971). “That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength,” because “governmental officials cannot make principled distinctions” between what speech is sufficiently inoffensive, and the “state has no right to cleanse public debate to the point where it is . . . palatable to the most squeamish among us.” *Id.* at 25.

### **B. The First Amendment protects the private speech of government employees like Jarrar**

Employees of government institutions like Fresno State retain a First Amendment right to speak as private citizens on matters of public concern and may not be disciplined or retaliated against for their constitutionally protected expression unless the government employer demonstrates that the expression hindered “the effective and efficient fulfillment of its responsibilities to the public.” *Connick v. Myers*, 461 U.S. 138, 150 (1983); *Pickering v. Board of Education*, 391 U.S. 563 (1968).

As both you and Zelezny have publicly acknowledged, and as Jiménez-Sandoval acknowledged in private, Jarrar’s tweets were posted in her capacity as a private citizen, rather than as a representative of Fresno State.

It is indisputable that Jarrar’s Twitter commentary was squarely related to matters of public concern. *See Johnson v. Multnomah County, Oregon*, 48 F.3d 420, 422 (9th Cir. 1995) (“Speech involves a matter of public concern when it can fairly be considered to relate to any matter of political, social, or other concern to the community.”) (internal quotation marks and citation omitted). Jarrar’s expression is precisely the type of speech that the First Amendment was intended to protect. In commenting on the policies of former President Bush and the Iraq War, Jarrar engaged in “core political speech” where First Amendment protection is ‘at its zenith.’” *Buckley v. American Constitutional Law*

*Foundation*, 525 U.S. 182, 186–87 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414, 425 (1988)). That the statements are of an “inappropriate or controversial character . . . is irrelevant to the question of whether it deals with a matter of public concern.” *Rankin v. McPherson*, 483 U.S. 378, 387 (1987) (holding that the expression of hope that President Reagan might be assassinated was protected against retaliation.)

The United States Court of Appeals for the Ninth Circuit—the decisions of which are binding on Fresno State—has made clear that offense taken to a faculty member’s expression does not constitute adequate injury to government interests sufficient to override a professor’s First Amendment rights:

The desire to maintain a sedate academic environment, to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint, is not an interest sufficiently compelling, however, to justify limitations on a teacher’s freedom to express himself on political issues in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms. Only where expressive behavior involves substantial disorder or invasion of the rights of others may it be regulated by the state. Self-restraint and respect for all shades of opinions, however desirable and necessary in strictly scholarly writing and discussion, cannot be demanded on pain of dismissal once the professor crosses the concededly fine line from academic instruction as a teacher to political agitation as a citizen—even on the campus itself.

*Adamian v. Jacobsen*, 523 F.2d 929, 934 (9th Cir. 1975) (internal citations and quotation marks omitted); *see also Peacock v. Duval*, 694 U.S. 644, 647 (9th Cir. 1982) (“Although we recognize the necessity for the efficient functioning of a public university, such efficiency cannot be purchased at the expense of stifling free and unhindered debate on fundamental educational issues. Merely because Peacock’s speech may have had the effect of irritating or even harassing the University’s administration does not mean that such speech is stripped of its first amendment protection.”) (internal citations and quotation marks omitted). Despite your assertion to the contrary, the law in the Ninth Circuit is clear: Jarrar’s expression is not “beyond free speech” simply because it was disrespectful.

Similarly, courts in other jurisdictions have rejected the argument that a public institution can discipline a faculty member because her expression caused anger, alarm, or concern. In a case involving the use of gendered and racial slurs as part of a classroom discussion on how language is used to marginalize minorities and other oppressed groups in society, the U.S. Court of Appeals for the Sixth Circuit adhered to the principles set forth in *Terminiello* and rejected a college’s argument that intervention by a local civil rights activist posed an actionable risk of disruption to the school’s operations. The Court wrote:

Only after Reverend Coleman voiced his opposition to the classroom discussion did Green and Besser become interested in the subject matter of Hardy’s lecture. Just like the school officials in *Tinker*, Green and Besser

were concerned with “avoiding the discomfort and unpleasantness that always accompany” a controversial subject. On balance, Hardy’s rights to free speech and academic freedom outweigh the College’s interest in limiting that speech.

*Hardy v. Jefferson Community College*, 260 F.3d 671, 682 (6th Cir. 2001) (internal citation omitted).

Indeed, even in cases related to expression about campus administrators themselves, the Ninth Circuit has steadfastly protected faculty expression. In *Bauer v. Sampson*, a faculty member published in a campus newspaper several writings and illustrations sharply critical of Irvine Valley College’s president and board of trustees, some of which contained “violent overtones.” 261 F.3d 775 (9th Cir. 2001). Holding that the professor’s First Amendment rights outweighed the interests of the college, the Ninth Circuit noted that there was no evidence that the expression interfered with the performance of his duties, that any disharmony caused by his expression was incidental, and:

[G]iven the nature of academic life, especially at the college level, it was not necessary that Bauer and the administration enjoy a close working relationship requiring trust and respect — indeed anyone who has spent time on college campuses knows that the vigorous exchange of ideas and resulting tension between an administration and its faculty is as much a part of college life as homecoming and final exams.

*Id.* at 784.

This case presents an even clearer case of protected expression. Jarrar is on leave, and therefore her expression did not interfere with the performance of her job duties. If the First Amendment protects a faculty member’s caustic public comments about administrators on campus, it certainly protects a faculty member’s commentary about a contemporary political figure, no matter how offensive to some it may have been.

Nor can Fresno State base its investigation on Jarrar’s tweet providing the telephone number for Arizona State University’s student crisis hotline. The First Amendment permits government institutions to regulate employee speech only when the *employer’s* interest in its own operations outweigh the employee’s interest in freedom of expression. That Jarrar may have unintentionally caused substantial disruption at some other place does not impact Fresno State’s own interests. Even assuming Jarrar’s tweets caused a substantial disruption somewhere else, that disruption does not impact Fresno State’s interests as an employer.

### **C. Fresno State’s investigation of Jarrar unacceptably chills faculty expression**

We remind you that an investigation of constitutionally protected speech can itself violate the First Amendment. When “an official’s act would chill or silence a person of ordinary

firmness from future First Amendment activities,” that act violates the First Amendment. *Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999).

In *Sweezy v. New Hampshire*, 354 U.S. 234, 245–48 (1957), the Supreme Court noted that government investigations “are capable of encroaching upon the constitutional liberties of individuals” and have an “inhibiting effect in the flow of democratic expression.” Similarly, the Court later observed that when issued by a public institution like Fresno State, “the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation” might violate the First Amendment. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). Accordingly, several appellate courts, including the Ninth Circuit Court of Appeals, have held that government investigations into protected expression violate the First Amendment. See *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) (holding that a government investigation into clearly protected expression chilled speech and therefore violated the First Amendment); *Rakovich v. Wade*, 850 F.2d 1180, 1189 (7th Cir. 1988) (“[A]n investigation conducted in retaliation for comments protected by the first amendment could be actionable . . .”).

In *Levin v. Harleston*, for example, The City College of The City University of New York launched an investigation into a tenured faculty member’s offensive writings on race and intelligence, announcing an *ad hoc* committee to review whether the professor’s expression—which he stated “ha[d] no place at [the college]”—constituted “conduct unbecoming of a member of the faculty.” 966 F.2d 85, 89 (2d Cir. 1992). The United States Court of Appeals for the Second Circuit upheld the district court’s finding that the investigation constituted an implicit threat of discipline and that the resulting chilling effect constituted a cognizable First Amendment harm.

Fresno State presently finds itself in a similar position. Fresno State has very publicly announced an investigation into protected First Amendment activity. The threat of eventual discipline as a result is no less present than it was in *Harleston*, as is the unconstitutional chilling effect on Jarrar’s speech. Indeed, similar to the professor in *Harleston*, Jarrar has already self-censored, making her Twitter page private and withdrawing from public discussion. See *Harleston*, 966 F.2d at 89 (noting that the professor declined speaking and writing invitations for fear that he would be fired).

### III. CONCLUSION

In launching its investigation into Jarrar’s plainly protected speech, Fresno State places itself at odds with the First Amendment and the very principles of higher education. Fresno State’s initiation of an investigation into Randa Jarrar’s expression—after previously acknowledging her right to freedom of expression—is plainly aimed at quelling anger over Jarrar’s expression generated by social media. But the university’s response is antithetical to a core value of our democracy: the right to express views on issues central to our national conversation in ways that might be provocative or disagreeable. Fresno State’s response will prove counterproductive, serving only to reward complaints to public university administrators about the speech of any faculty member or student and signaling to

complainants that administrators will subject their target to punishment by process. Behavior that is rewarded will be repeated, to the detriment of all.

Be advised that a public college administrator who violates clearly established law will not retain qualified immunity and can be held personally responsible for monetary damages for violating First Amendment rights under 42 U.S.C. § 1983. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Fresno State must immediately halt its investigation and clarify to the university community that your administration will not investigate faculty members for lawfully expressing their views.

We request a response to this letter no later than April 25, 2017.

Sincerely,



Ari Z. Cohn  
Director, Individual Rights Defense  
Program  
Foundation for Individual Rights in  
Education



Christine P. Sun  
Legal and Policy Director  
ACLU Foundation of Northern California



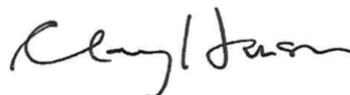
Sue Udry  
Executive Director  
Defending Rights & Dissent



Christopher Finan  
Executive Director, National Coalition  
Against Censorship



Katy Glenn Bass  
Director of Free Expression Research and  
Policy  
PEN America



Clay Hansen  
Executive Director  
Thomas Jefferson Center for the  
Protection of Free Expression

/s/ David Greene  
Civil Liberties Director  
Senior Staff Attorney  
Electronic Frontier Foundation

/s/ Mickey Huff  
Director  
Project Censored