



March 28, 2019

Dr. Nathan O. Hatch
Reynolda Hall
Wake Forest University
1834 Wake Forest Road
Winston-Salem, NC 27109

URGENT

Sent via Priority Mail and Electronic Mail (nhatch@wfu.edu)

Dear President Hatch:

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.

FIRE is concerned about the threat to the expressive rights of Wake Forest University (WFU) students posed by the institution's investigation into an alleged Instagram post that jokingly referenced, among other political issues, "building a wall" between WFU and its cross-town rival, Winston-Salem State University (WSSU). While WFU is free to condemn jokes it finds in poor taste, it cannot mount investigations into student expression that the university purports to protect, by virtue of its institutional commitment to freedom of expression. That Wake Forest continues to investigate even after recognizing that the image is a joke is a violation of the rights Wake Forest purports to guarantee to its students.

I. FACTS

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us.

On Friday, March 22, an Instagram post on a now-deleted account was screenshotted and circulated on Twitter,¹ among other places. The tweet showed the image of a WFU student and

¹ See, e.g., @Bri_Reddick, TWITTER (Mar. 22, 2019, 4:10 PM), https://twitter.com/Bri_Reddick/status/1109200666180882438.

encouraged other students to vote for him as a write-in candidate for student government president. It included the following statements:

- “He promised to hold the Swiss and cut prices on pitchers at shortys”²
- “He has faught [*sic*] fraud twice and won!”
- “He wants to build a wall between wake and winston salem state [*sic*]. And he’ll make them pay for it.”

The screenshot of the post circulated on Twitter linked to a series of pre-existing hashtags used to criticize Wake Forest for perceived racial issues, including #WhiteForest1834 and #wfuzerotolerance.³ The tweets seem to suggest that, because WSSU is a historically black institution, the reference to “building a wall” is racist.

The next day, you posted a statement about the screenshot to your Twitter account that read, in pertinent part:⁴

While the intent of the authors may have been a parody of a national issue, it was deeply offensive and unacceptable.

The impact on the community is widespread and harmful, regardless of the original intent. We are gathering details about this incident. What I can share with you at this time is that the student in the image was away for the weekend and did not participate in the image A team led by the Dean of Students is investigating the matter further and will report their findings to me.

The message disparaged an institution whose values and mission we embrace and with whom we are building an increased collaboration that brings our communities together.

The story has since received national media attention, generally repeating the description of the post as “racist.”⁵

² Shorty’s is a restaurant in Wake Forest’s student center.

³ *Id.* See also, e.g., @tiffanycrystal, TWITTER (Mar. 22, 2019 4:56 PM), <https://twitter.com/tiffanycrystal/status/1109212326056607744> (using hashtags); @wfuydsa, TWITTER (Mar. 3, 2019 3:50 PM), <https://twitter.com/wfuydsa/status/1102325349227159552> (using the same hashtags weeks earlier).

⁴ @PresidentHatch, TWITTER (Mar. 23, 2019 4:33 PM), <https://twitter.com/PresidentHatch/status/1109568768324354049>.

⁵ See, e.g., Associated Press, *Racist Instagram post about HBCU sparks Wake Forest probe*, THE WASHINGTON POST (March 25, 2019), https://www.washingtonpost.com/national/higher-education/racist-instagram-post-about-hbcu-sparks-wake-forest-probe/2019/03/25/10022da4-4f05-11e9-bdb7-44f948cc0605_story.html?utm_term=.b9977c9877c6.

II. ANALYSIS

A. Wake Forest promises its students freedom of expression.

As a private institution, WFU is not required to protect freedom of expression by virtue of the First Amendment. However, it can be contractually held to the rules it creates. *Taylor v. Wake Forest Univ.*, 16 N.C. App. 117 (Ct. App. N.C. Sept. 20, 1972) (ruling that WFU had fulfilled its obligation under “the contractual agreement between plaintiffs and Wake Forest”); *see also Ross v. Creighton Univ.*, 957 F.2d 410, 416 (7th Cir. 1992) (“[T]he basic legal relation between a student and a private university or college is contractual in nature.”) (internal citation omitted), *cited by Ryan v. Univ. of N.C. Hosps.*, 128 N.C. App. 300, 301-02 (Ct. App. N.C. Jan. 6, 1998) (finding student could pursue breach of contract claim). WFU makes such promises and is morally and legally obligated to adhere to the commitments it makes.

For example, guarantees of freedom of expression are among the terms WFU has chosen to incorporate into its tuition contracts. WFU’s strategic plan touts “a climate of academic freedom and an unfettered search for truth.”⁶

WFU’s “Statement on Expression” provides, in pertinent part:⁷

Free speech and peaceable assembly are basic requirements of a university as a center for free inquiry and the search for knowledge and insight.

The University is committed to providing all students the right to openly dissent and to speak, write, listen, challenge, protest, and learn. Though the vibrant exchange of ideas may become contentious, such interactions, as part of the University’s educational mission, can lead to changed perspectives, advanced knowledge, and informed action.

In the “Community Standards” shared by its Bias Response Team, WFU states:⁸

The community shares a tradition that embraces freedom and integrity and acknowledges the worth of the individual. The heritage, established by the school’s founders and nurtured by succeeding generations, promotes a democratic spirit arising from open-mindedness and discourse.

As you wrote in a 2016 letter to *The Charlotte Observer*, “[a] university is a place where academic freedom and freedom of expression are fundamental. It’s [a] place where community members can voice their beliefs — whether progressive or conservative, radical or traditional.”⁹

⁶ The Strategic Plan, Wake Forest: The Collegiate University, <http://strategicplan.wfu.edu/strategic.plan.summary.html> (last visited Mar. 26, 2019).

⁷ Statement on Expression, Wake Forest Undergraduate Student Handbook, <https://studentconduct.wfu.edu/undergraduate-student-handbook/honor-code-and-conduct-system/#StatementonExpression>.

⁸ Community Standards, <https://reportbias.wfu.edu/community-standards/> (last visited Mar. 26, 2019).

B. Speech is not unprotected by virtue of being offensive to others.

As you noted, the post appears to be parody. Parody, satire, and jest are often intended to draw attention to or make light of contemporary or historic political concerns. They, of course, may be offensive, but the principle of freedom of speech does not exist to protect only non-controversial speech; indeed, it exists precisely to protect speech that some members of a community may find controversial or offensive.

The right to free speech includes the right to say things that are deeply offensive to many people. *See, e.g., Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (noting that “[Free 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.”). These principles extend not only to sober, scholarly debate, or to “informed and responsible criticism,” but also provide a right to “speak foolishly and without moderation.” *Cohen v. California*, 403 U.S. 15, 26 (upholding First Amendment right to wear jacket bearing the words “Fuck the Draft” in a courthouse hallway, and quoting *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944)).¹⁰ For example, in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the Supreme Court of the United States ruled that freedom of expression protects even the most caustic, outlandishly offensive parody. In that instance, the First Amendment protected a mock advertisement purporting to interview Reverend Jerry Falwell, who described losing his virginity to his mother in an outhouse.

Nor does the anonymous origin of the image serve as a basis to restrict or investigate it. “The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible Accordingly, an author’s decision to remain anonymous . . . is an aspect of freedom of speech” *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 341-42 (1995).

C. The post does not violate any published Wake Forest policies.

As WFU’s speech guarantees are conditional to the other terms of its handbook, it is important to note that the Instagram post in question does not violate any other applicable policy.

The university’s harassment policy, for example, prohibits speech that has the purpose or effect of being sufficiently serious to “create an intimidating, hostile, or demeaning educational, living, or work environment” or “deny or limit a person’s work performance or a student’s ability to

⁹ Nathan O. Hatch, Letter to *The Charlotte Observer*, April 27, 2016, <https://www.charlotteobserver.com/opinion/op-ed/article74171157.html>.

¹⁰ In *Cohen*, the Supreme Court aptly observed that although “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).

participate in or benefit from an educational program.”¹¹ It must additionally “include something beyond the mere expression of views, words, symbols, or thoughts that some person may find offensive.”¹²

The language in question fails to reach this high bar, and instead, is an example of pure speech, with no purpose or effect beyond “the mere expression of views.” You acknowledged in your condemnation of the statement that it was “a parody of a national issue.” Presumably, WFU is not devoting its resources to determine whether a student has a genuine plan to construct a physical wall between WFU and WSSU; that would suggest that even WFU recognizes the content of the image is pure speech. Nor could someone reasonably argue that they were unable to attend class because someone, somewhere, in a parody, suggested building a wall somewhere else.

WFU’s policy on bullying and cyberbullying prohibits “[r]epeated and/or severe actions that intimidate or intentionally harm or control another person physically or emotionally.”¹³ This is a single Instagram post that parodies a political campaign and contains no call to action. That you may find it unfunny does not make it “severe.”

D. WFU’s actions are creating a chilling effect on speech.

Although the university has not yet identified and formally punished anyone responsible for the image, the chilling effect precedes the imposition of final, formal discipline, and instead arises from the initiation, announcement, and maintenance of an investigation into speech WFU already knows to be protected. Official “inquiry alone trenches upon” freedom of expression. *Paton v. La Prade*, 469 F. Supp. 773, 778 (D.N.J. 1978) (student’s speech impermissibly chilled when anonymous request for information from a political organization resulted in being labeled a “subversive” and formally investigated).

The effect investigations have on free expression is reflected in substantial First Amendment jurisprudence. 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.” Accordingly, several appellate courts, including the Ninth Circuit, have held that government investigations into protected expression violate the First Amendment. *See White v. Lee*, 227 F.3d 1214 (9th Cir. 2000); *Rakovich v. Wade*, 850 F.2d 1180, 1189 (7th Cir. 1988).

Levin v. Harleston, for example, is illuminating. There, The City College of The City University of New York launched an investigation into a tenured faculty member’s offensive writings on race

¹¹ Harassment, Wake Forest Undergraduate Student Handbook, https://studentconduct.wfu.edu/undergraduate-student-handbook/minimum_expectations/#Harassment (last visited Mar. 26, 2019).

¹² *Id.*

¹³ Bullying/Cyberbullying, Wake Forest Undergraduate Student Handbook, https://studentconduct.wfu.edu/undergraduate-student-handbook/minimum_expectations/#Bullying/Cyberbullying (last visited Mar. 26, 2019).

and intelligence, announcing an ad hoc committee to review whether the professor's expression—which the university president 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: the speech was protected, but the public maintenance of an investigation suggested that it could be disciplined, and the resulting chilling effect constituted a cognizable First Amendment harm.

The chilling effects emanating from WFU's response may already be observable; the Instagram account referenced in the screenshots of the post has already been deleted. While WFU is not bound by the First Amendment, it has bound itself to freedom of speech, freedom of inquiry, and freedom of expression. WFU should recognize that maintaining an investigation into a post it recognizes as parody will undermine its purported goals.

III. CONCLUSION

By initiating and carrying on with this investigation, WFU has contravened the speech and expression promises it makes to its students. If WFU's commitments to freedom of expression are sincere, it must immediately abandon any investigation into speech it knows to be encompassed by those commitments.

We request a response by April 15, 2019.

Sincerely,



Adam Goldstein
Program Officer, Individual Rights Defense Program

cc:

Adam Goldstein, Dean of Students¹⁴

¹⁴ No relation.