



February 24, 2019

Chief Kelly A. Roudebush
Michigan State University Police Department
1120 Red Cedar Road
East Lansing, Michigan 48824

URGENT

Sent via Express Mail and Electronic Mail (RoudebushK@police.msu.edu)

Dear Chief Roudebush:

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 by a report that the Michigan State University (MSU) Police Department is seeking to obtain the IP addresses of anonymous users whose comments during an online forum with MSU's president were perceived as "racist and hateful." We're writing to ask that you clarify that the MSU Police Department will not seek identifying information of those whose online speech, however offensive to others, is protected by the First Amendment.

I. The "Ask President Stanley" Forum

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 February 17, 2020, the Associated Students of Michigan State University ("ASMSU"), MSU's student government, hosted an online question-and-answer forum with MSU President Samuel L. Stanley.¹ The forum, held through the "Slido" website, allowed students

¹ Press Release, Associated Students of Michigan State University, ASMSU Statement on Ask President Stanley (Feb. 17, 2020), *available at* <https://www.facebook.com/ASMSU1/posts/10156933251687703>. Except where otherwise noted, all facts herein are derived from the ASMSU statement.

to “anonymously submit their questions” to Stanley. The Slido platform also allows participants to add comments to others’ submitted questions.²

During the “Ask Stanley” forum, “numerous racist and hateful comments were anonymously submitted to Slido,” but the moderator of the event was “unable to physically see the racist comments [in] real-time,” addressing them only at the conclusion of the forum.

The offending comments, shared with a local newspaper³ and on Twitter,⁴ were:

Pres stanley can’t do nothing ! Racist will always be racist. Negros is freedom of speech. Nobody uses nooses no more that’s why we have our officers 🚔 ELPD^[5] [user: “The police is your noose”]

Go study. Yall got those mid terms coming up. Go work on that black retention rate so pres. Stan can focus on those results [user: “Hld each other accountable”]

Most questions being asked by black students to president Stanley are dumb as hell and unproductive. Go study and let that man focus on his job. [user: “Hld each other accountable”]

They really thought the Pres was going [sic] to listen ;) black people only a small portion of the population. You all can leave and no one will notice. [user: “Complaints”].

After the event concluded, the ASMSU “contacted MSU Police for an investigation and Slido for IP address recognition of the racist comments submitted.” ASMSU President Mario Kakos told *The State News* that MSU Police were trying obtain the users’ IP addresses.⁶

II. The Comments, and Their Authors’ Identities, are Protected by the First Amendment

Anonymous speech, including offensive speech, is protected by the First Amendment. There is no indication that any of the comments amount to unprotected threats, nor did the comments prevent the “Ask Stanley” event from proceeding.

² Slido, *Questions*, <https://www.sli.do/features-questions> (last visited Feb. 22, 2020).

³ Wendy Guzman, *Racist comments in ‘Ask President Stanley’ online question platform*, STATE NEWS, Feb. 17, 2020, <https://statenews.com/article/2020/02/racist-comments-in-ask-stanley-online-question-platform>.

⁴ @Rwin_, TWITTER (Feb. 17, 2020, 9:56 PM), https://twitter.com/Rwin_/status/1229600597252419585.

⁵ “ELPD” presumably refers to the East Lansing Police Department.

⁶ Guzman, *supra* note 3.

A. *The First Amendment binds Michigan State University.*

It has long been settled law that the First Amendment is binding on public colleges like MSU. *See, e.g., Doe v. Univ. of Mich.*, 721 F.Supp. 852, 862–63 (E.D. Mich. 1989) (University of Michigan could not regulate “pure speech” through an “anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed”). As the Supreme Court explained, “the 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.” *Healy v. James*, 408 U.S. 169, 180 (1972). “Quite to the contrary, the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” *Id.* (cleaned up).

B. *The First Amendment protects the right to anonymous speech against compelled disclosure.*

The First Amendment protects not only the right to speak, but to do so anonymously. *Watchtower Bible & Tract Soc. of New York v. Village of Stratton*, 536 U.S. 150, 166–67 (2002) (striking down ordinance that, among other things, required canvassers to identify themselves to mayor’s office); *Justice for All v. Faulkner*, 410 F.3d 760, 764–65 (5th Cir. 2005) (striking down college policy requiring leaflets distributed on campus to identify their authors).

The Supreme Court explained that anonymous speakers may have a variety of motivations for maintaining their anonymity:

[A]n author generally is free to decide whether or not to disclose his or her true identity. 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.

McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 341–42 (1995). Anonymous communication, the Court explained, “is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.” *Id.* at 357. The roots of that tradition can be traced through the competing pamphlets distributed by Federalists like James Madison, Alexander Hamilton, and John Jay—who jointly published *The Federalist Papers* under the pseudonym “Publius”—and the Anti-Federalists, who also published under pseudonyms such as “Brutus,” “Centinel,” and “The Federal Farmer.” *Id.* at 344 n.6. Thomas Paine, fearing prosecution for seditious libel against King George III, published “Common Sense” anonymously in 1776. *State v. North Dakota Educ. Ass’n*, 262 N.W.2d 731, 735 (N.D. 1978). This history of speech was incorporated into the freedom enshrined 15 years later in the First Amendment.

Today, internet users follow in that path, continuing to use pseudonyms in the forms of handles and usernames. Although the internet is, in context, a recent development, the legal analysis remains as it has for decades, as the right to remain anonymous extends “beyond the

literary realm.” *Id.* at 342. It extends to unsigned handbills,⁷ association with political organizations,⁸ purchasing books,⁹ and receiving political mailings viewed as subversive.¹⁰ It has also, for decades, extended to online speech. *See, e.g., Doe v. Harris*, 772 F.3d 563, 574 (9th Cir. 2014) (First Amendment scrutiny “warranted” where statute burdened “sex offenders’ ability to engage in *anonymous* online speech”); *Doe v. 2themart.com Inc.* 140 F.Supp. 2d 1088, 1092 (W.D.Wash. 2001) (the “right to speak anonymously extends to speech via the Internet”).

Where investigators’ action “collides with First Amendment rights,” the government must meet “strict scrutiny” or “exacting scrutiny,” a “heightened standard” requiring the government to first demonstrate (1) a “compelling interest in . . . the information sought;” and (2) a “sufficient connection between the information sought and the criminal investigation.” *Tattered Cover*, 44 P.3d at 1056–57 (citing *In re Grand Jury Subpoena to Kramerbooks & Afterwords, Inc.*, 26 Med. L. Rptr. 1599 (D.D.C. 1998)).

As discussed below, there is no compelling legal basis to justify efforts to unmask the anonymous speakers. The comments do not approach the exacting legal standard of “true threats,” nor is their subjectively offensive nature a cognizable rationale for invading protected First Amendment rights. Further, reports that the MSU Police Department is seeking to identify anonymous speakers is particularly troubling given that media reports preceding the event *highlighted* the anonymous nature of the forum.¹¹

C. *Speech does not lose its protection on the basis that it is subjectively offensive.*

The speech at issue here is, concededly, not of the sober, civic-oriented character of *The Federalist Papers*. However, the First Amendment protects “not only informed and responsible criticism, but the freedom to speak foolishly and without moderation.” *Baumgartner v. United States*, 322 U.S. 665, 673–74 (1944). As the Supreme Court aptly observed in *Cohen v. California*, 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). “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.

⁷ *Talley v. California*, 362 U.S. 60, 64 (1960).

⁸ *NAACP v. Alabama*, 357 US. 449, 462 (1958).

⁹ *Tattered Cover v. City of Thornton*, 44 P.3d 1044, 1051 (Colo. 2002).

¹⁰ *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965).

¹¹ *See, e.g.,* Wendy Guzman, *ASMSU to host Q&A with President Stanley*, STATE NEWS, Jan. 28, 2020, <https://statenews.com/article/2020/01/asmsu-to-host-q-a-with-president-stanley>.

The principle of freedom of speech does not exist to protect only non-controversial expression. Rather, it exists precisely to protect speech that some or even most members of a community may find controversial or offensive. Speech cannot be restricted simply because it offends others, on or off campus. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If 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”). For example, in holding that a student newspaper’s political cartoon depicting the Statue of Liberty being raped by police officers was protected speech, the Supreme Court explained that “the 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.’” *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973). 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.”

That principle does not waver with respect to offensive speech concerning race. While true threats, incitement, and fighting words directed at another in a face-to-face encounter are not protected by the First Amendment, that expression is “hateful” or “demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground” is not a sufficient basis to remove it from the protection of the First Amendment. *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017).

D. The comments do not amount to unprotected “true threats.”

Certain well-defined categories of speech are excluded from First Amendment protection, including “true threats,” which are unprotected where “the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 359 (2003). Considerable deference is afforded to speech that touches on matters of public concern, as the language in public debate “is often vituperative, abusive, and inexact. . . .” *Watts v. United States*, 394 U.S. 705, 708 (1969).

The comments here do not amount to threats of violence. While one comment invokes our nation’s grotesque history of lynching, it doesn’t reflect a serious expression of an intent to commit violence, or take any action at all. To the contrary, the comment is ambiguous in its precise meaning, and may plausibly be read as a criticism of law enforcement as a racist institution, and of the East Lansing Police Department in particular:

Pres stanley can’t do nothing ! Racist will always be racist. Negros is freedom of speech. Nobody uses nooses no more that’s why we have our officers 🚔 ELPD [user: “The police is your noose”]

If so, then the MSU Police Department's efforts to uncover the identities of the anonymous commentators will not only implicate racially-offensive speech, but may also ensnare a critic of law enforcement.

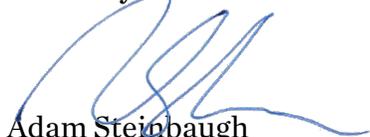
III. The MSU Police Department Must Disclaim or End Any Investigation.

The First Amendment is not violated only when discipline is ultimately meted out, or when a prosecution commences. Government actions preceding formal processes or discipline may themselves violate the First Amendment, including investigations. *Sweezy v. New Hampshire*, 354 U.S. 234, 245–48 (1957), *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).

Accordingly, FIRE asks that the MSU Police Department publicly clarify its involvement in this matter. If the Department has taken any steps to investigate this matter, we call upon it to cease any further steps and to commit that it will not share any information it has received.

Given the urgent nature of this matter, we request receipt of a response to this letter no later than the close of business on Wednesday, February 26, confirming whether or not the MSU Police Department has conducted any investigation into the comments at issue here.

Sincerely,



Adam Steinbaugh
Director, Individual Rights Defense Program

Cc:

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