



February 1, 2019

Chancellor Carol Folt  
103 South Building  
Campus Box 9100  
Chapel Hill, North Carolina 27599-9100

*Sent via U.S. Mail and Electronic Mail (chancellor@unc.edu)*

Dear Chancellor Folt:

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 University of North Carolina at Chapel Hill (UNC Chapel Hill) has established laudable policies committing itself to defending the rights of its faculty members and students to freedom of expression and academic freedom. We are pleased to recognize the university as one of the few institutions whose policies currently earn FIRE's "green light" rating. However, FIRE is concerned that UNC Chapel Hill has departed from these commendable public commitments by removing a student-created website that criticized UNC Chapel Hill's historical treatment of race-related issues because the site was not "university-related." Admirable promises and written policies mean little if they are abandoned in practice.

## **I. Statement of Facts**

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

In December 2018, UNC Chapel Hill visual arts student Annie Simpson created a website using [web.unc.edu](http://web.unc.edu), a university-provided publishing service that allows UNC students and faculty to publish their own websites. According to UNC's Information Technology Services, more than 12,000 websites are hosted by [web.unc.edu](http://web.unc.edu).<sup>1</sup>

Simpson's website, [jeopardy.web.unc.edu](http://jeopardy.web.unc.edu), invited visitors to play "UNC ANTI-RACIST JEOPARDY!" Simpson's site created a functional quiz game and included categories related to

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<sup>1</sup> *WEBdotUNC*, UNIV. OF N. CAROLINA INFO. TECH. SERVS., <http://web.unc.edu> (last visited Jan. 28, 2019).

race and UNC Chapel Hill's history.<sup>2</sup> Simpson created the site as an online visual arts piece and part of her portfolio as a visual arts student. She had also begun work on another site, [drainthebog.web.unc.edu](http://drainthebog.web.unc.edu), which provided biographical information on UNC's Board of Governors.

On December 18, Simpson was contacted by Art Department Chair Carol Magee, who asked Simpson to voluntarily take down the "UNC ANTI-RACIST JEOPARDY!" site. Magee told Simpson that Dean of the College of Arts and Sciences Kevin Guskiewicz and then-General Counsel and Vice Chancellor Mark Merritt requested the site's removal. Simpson chose not to take down the site.

On December 20, Vice Chancellor for Information Technology and Chief Information Officer Chris Kielt sent Simpson an email asserting that her websites violated the [web.unc.edu](http://web.unc.edu/terms-and-conditions/) Terms and Conditions and needed to be removed within 24 hours by Simpson, or the university would initiate their removal. Simpson replied the next day, writing "My site(s) are both part of University related research work and they do not violate the Terms and Conditions. I feel that the targeting of them was not content neutral. I would like to know the appeals process for unfair site termination." Kielt informed Simpson that she would need to provide "details regarding the academic program and faculty sponsors" to justify the sites' continued maintenance. Simpson did not reply to Kielt's email, and her sites were deleted.

On January 7, attorney Pam Starsia contacted Associate Vice Chancellor and Senior University Counsel Steve Keadey on Simpson's behalf, requesting more information about the removal of Simpson's websites and expressing concern that the takedowns were motivated by the sites' criticism of the university. Associate Vice Chancellor and Senior University Counsel Kara E. Simmons replied the next day, writing in part:

The Terms and Conditions (<http://web.unc.edu/terms-and-conditions/>) for users of the [web.unc.edu](http://web.unc.edu) service state that "Web.unc.edu is set up to allow people to create their own sites on any sub-domain they need for university-related projects. This service is not for personal projects."

It would be helpful if Ms. Simpson could share with Chris Kielt, the University's Vice Chancellor for Information Technology and Chief Information Officer, some background regarding how the websites she established are for university-related, rather than personal, projects. Vice Chancellor Kielt has previously communicated this request to Ms. Simpson, so she may already have his contact

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<sup>2</sup> For example, the site covered topics like UNC "Building Names." One corresponding answer read: "This building is named for [ ] the man who gave the dedication speech for Silent Sam, in which he describes whipping a Black woman and congratulates the confederacy for saving the purity of white blood in the South."

information, but if not, Vice Chancellor Kielt can be reached at [chris\\_kielt@unc.edu](mailto:chris_kielt@unc.edu).

As of today, Simpson’s sites have not been restored.

## II. Analysis

### A. *UNC Chapel Hill may not censor speech protected by the First Amendment.*

It has long been settled law that the First Amendment is binding on public colleges like UNC. *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”). The principles set forth here are also enshrined by UNC Chapel Hill, which has made affirmative, robust commitments to provide its students and faculty members with the rights to freedom of expression and academic freedom.<sup>3</sup>

Simpson’s sites may not be taken down by UNC Chapel Hill simply because they may have provoked discomfort or displeasure by criticizing the institution and engaging a controversial topic. 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. The Supreme Court has explicitly held, in 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.”

Simpson’s sites do not fall under any of the narrow, carefully-defined exceptions to the First Amendment. Rather, they present a classic example of “core political speech,” where First Amendment protection is “at its zenith.” *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 186–87 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414, 425 (1988)). In removing sites critical of UNC Chapel Hill and its leadership on matters of contentious public concern, UNC risks infringing on rights of core political expression, justified only if the policies invoked

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<sup>3</sup> *Message from Carolina on the First Amendment and free speech laws and policies*, UNIV. OF N. CAROLINA AT CHAPEL HILL (Aug. 20, 2018), <https://www.unc.edu/posts/2018/08/20/message-from-carolina-on-the-first-amendment-and-free-speech-laws-and-policies/>.

would survive strict scrutiny under the First Amendment. For the reasons discussed below, they do not.

***B. Web.unc.edu is a designated public forum and any restriction must be viewpoint-neutral.***

By establishing and maintaining web.unc.edu and allowing campus community members broad access to its publishing capabilities, UNC Chapel Hill has created a designated public forum. UNC Chapel Hill is accordingly prohibited from removing sites on the basis of their viewpoint, as it has here.

“Under long-established First Amendment law, governmental entities are ‘strictly limited’ in their ability to regulate private speech in public fora.” *Davison v. Randall*, Nos. 17-2002, 17-2003, 2019 U.S. App. LEXIS 406, at \*25 (4th Cir. Jan. 7, 2019) (quoting *Pleasant Grove City, Utah v. Sumnum*, 555 U.S. 460, 469 (2009)). In a traditional public forum, such as a public park, the state’s power to regulate speech is at its most limited. A government actor may impose reasonable, viewpoint- and content-neutral restrictions on the time, place, or manner of speech in a traditional public forum, but only if such restrictions are narrowly tailored in service of a significant governmental interest and leave open ample alternative channels for communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Conversely, in a nonpublic forum, such as an airport terminal, the state has a freer hand to regulate expression: “The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker’s activity due to disagreement with the speaker’s view.” *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 679 (1992).

A “limited or designated public forum”—a third, intermediate classification—is created when a public institution like UNC Chapel Hill “purposefully open[s]” a forum “to the public, or some segment of the public, for expressive activity.” *ACLU v. Mote*, 423 F.3d 438, 443 (4th Cir. 2005). While a designated public forum may be “opened only to a limited class of speakers or for limited topics,” once the government has created such a forum, “as regards the class for which the forum has been designated, a limited public forum is treated as a traditional public forum.” *Warren v. Fairfax Cty.*, 196 F.3d 186, 193 (4th Cir. 1999). “If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny.” *Ark. Educ. Tv Comm’n v. Forbes*, 523 U.S. 666, 677 (1998). After creating a public forum for the use of a designated class, in other words, “government may not prohibit others from assembling or speaking on the basis of what they intend to say.” *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 96 (1972).

Because web.unc.edu is a designated forum, content-based restrictions “are presumptively unconstitutional” and must satisfy strict scrutiny—that is, the government (here, CSU Bakersfield) must show that the regulation is “narrowly tailored to serve compelling state interests.” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Stated differently, the

government bears the burden of demonstrating that the “regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.” *Perry Educ. Ass’n. v. Perry Local Educators Ass’n.*, 460 U.S. 37, 45 (1983).

Forum analysis is not limited to physical spaces; the doctrine restricts government actors’ ability to regulate public fora online, as well. Guided by forum analysis, several recent federal court decisions have held that viewpoint-based restrictions on social media accounts operated by government actors violate the First Amendment—for example, President Trump’s blocking of Twitter critics violated the First Amendment. *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 549 (S.D.N.Y. 2018) (holding that portions of President’s twitter account are “properly analyzed under the ‘public forum’ doctrines set forth by the Supreme Court, that such space is a designated public forum, and that the blocking of the plaintiffs based on their political speech constitutes viewpoint discrimination that violates the First Amendment.”). Similarly, just last month, the United States Court of Appeals for the Fourth Circuit—the decisions of which are binding on UNC Chapel Hill—held that portions of a public official’s Facebook page were a public forum. *Davison v. Randall*, No. 17-2002 (4th Cir. Jan. 7, 2019).<sup>4</sup>

This jurisprudence is directly applicable to UNC Chapel Hill’s treatment of Simpson’s sites. By “allow[ing] anyone with an Onyen to create their own website at no charge” via web.unc.edu, UNC created a designated public forum.<sup>5</sup> Simpson is a member of the class for whom the forum was created and her sites conformed with the forum’s purpose and stated limitations. As discussed more fully below, Simpson’s sites were not personal projects. They were expressly related to both the university and her academic work, offering direct commentary on the university’s historical and current role in racial issues and serving as a portfolio for her visual arts studies. Further, but for the viewpoint they express, Simpson’s sites are of no different character than a vast array of other sites published on web.unc.edu.

Accordingly, we remind UNC Chapel Hill that it is “forbidd[en] . . . from exercising viewpoint discrimination, even when the limited public forum is one of its own creation.” *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). By selectively censoring Simpson’s expression on web.unc.edu while allowing other similarly situated speakers to post

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<sup>4</sup> See also, e.g., *Lloyd v. City of Streetsboro*, No. 18-3485, 2018 U.S. App. LEXIS 36090, \*9–13 (6th Cir. Dec. 20, 2018) (reversing dismissal where plaintiff alleged being blocked on an official Facebook page); *Leuthy v. LePage*, No. 17-cv-00296, 2018 U.S. Dist. LEXIS 146894, \*36–43 (D. Maine Aug. 29, 2018) (governor’s Facebook page); *Price v. City of New York*, No. 15-cv-5871, 2018 U.S. Dist. LEXIS 105815, \*25–46 (June 25, 2018) (NYPD precinct blocked Twitter user); *Dingwell v. Cossette*, No. 3:17-cv-01531, 2018 U.S. Dist. LEXIS 95832 (D. Conn. June 7, 2018) (critic blocked from police Facebook page); *One Wisconsin Now v. Kremer*, No. 17-cv-0820, 2019 U.S. Dist. LEXIS 8828 (W.D. Wis. Jan. 18, 2019) (legislators blocking critic on Twitter).

<sup>5</sup> *WEBdotUNC*, UNIV. OF N. CAROLINA INFO. TECH. SERVS., <http://web.unc.edu> (last visited Jan. 28, 2019). An “Onyen” is a “unique log-in identifier to gain authorized access to University electronic resources” issued to faculty, students, and staff. *UNC-Chapel Hill Onyen Policy*, UNIV. OF N. CAROLINA AT CHAPEL HILL, <https://unc.policystat.com/policy/5150152/latest/> (last visited Jan. 28, 2019).

similar material on their sites without issue, UNC has encroached upon her First Amendment rights.

***C. Web.unc.edu's Terms and Conditions are vague and open to administrative interpretation.***

Web.unc.edu's published rules, and the communications with Simpson and Starsia by Kielt and Simmons, offer vague explanations about what content can be hosted. Web.unc.edu's Terms and Conditions, which state that students and faculty can share "university-related projects" but not "personal projects,"<sup>6</sup> are vague and should be revised to offer students and faculty greater clarity. A policy or regulation is said to be unconstitutionally vague when it does not "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). Students encountering this policy are likely to be confused and uncertain as to whether their speech may or may not be considered "personal," and—given that the term is left undefined and thus at the discretion of UNC officials to enforce as they see fit—many students will self-censor rather than risk administrative interference.

The term "personal projects" is not defined in the Terms of Conditions, and is so broad that it could include any content the administrator applying the policy finds distasteful or inappropriate. Such unfettered discretion not only "sweeps within its ambit a substantial amount of protected speech," *Doe v. University of Michigan*, 721 F. Supp. 852, 864 (E.D. Mich. 1989), but it also fails to give adequate notice to UNC Chapel Hill students regarding what expression is permissible on web.unc.edu websites.

Kielt's suggestion that Simpson's sites must be associated with an "academic program and faculty sponsors" is not reflected in web.unc.edu's Terms and Conditions. Left unclear by both the Terms and Conditions and Kielt is whether "personal" encompasses material not intended for classroom use or material about students' or faculty members' personal lives. Indeed, Simpson was puzzled by the removal of "UNC ANTI-RACIST JEOPARDY!," given that it focused on a topic of importance to the university community about the university and was intended to be part of her artistic portfolio, the creation of which Simpson believed to be central to her academic career.

***D. UNC Chapel Hill's policy enforcement is uneven.***

A cursory review of web.unc.edu's hosted sites reveals uneven enforcement of "personal" sites exists—exactly the result likely to occur from vaguely worded policies. FIRE found multiple student-created sites not marked as class projects, but as pages for students to share their

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<sup>6</sup> Terms and Conditions, UNIV. OF N. CAROLINA INFO. TECH. SERVS., <https://web.unc.edu/terms-and-conditions/> (last updated Oct. 17, 2016).

personal interests and/or their professional accomplishments.<sup>7</sup> “Kathleen’s Site,” for example, features a student explaining that she studies at UNC Chapel Hill, loves the Tar Heels, and quotes Oprah Winfrey.<sup>8</sup> The other pages on her site are “personal,” “professional,” and “photos,” which provide information about her personal life and interests, her professional achievements, and photos from her life. It is unclear how “Kathleen’s Site” is permissibly “university-related,” while Simpson’s visual arts site about a matter of importance to UNC Chapel Hill and part of her professional portfolio is impermissibly “personal.”

“Kathleen’s Site” is not an anomaly. Among the sites that UNC has shown no interest in policing are pages expressing love for tacos,<sup>9</sup> the band Coldplay,<sup>10</sup> coffee,<sup>11</sup> travel,<sup>12</sup> hiking,<sup>13</sup> soccer,<sup>14</sup> and a dog named Snickers.<sup>15</sup> A Google search of pages on web.unc.edu returns 1,990 results for the phrase “about me” and 11,300 for “personal.” If UNC Chapel Hill has made any attempt to enforce its policy except to silence Simpson’s criticism, it is not readily apparent, nor is it clear how the university came to learn of Simpson’s sites.

### III. CONCLUSION

UNC Chapel Hill must honor its obligation to uphold the First Amendment. We ask that the university restore Simpson’s “UNC ANTI-RACIST JEOPARDY!” site and implement content- and viewpoint-neutral policies governing web.unc.edu’s use.

Given your laudable policies regarding student expression, we hope you will resolve this incident appropriately and expeditiously. We request receipt of a response to this letter by the close of business on February 15, 2019.

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<sup>7</sup> See, e.g., Candace Chambers, <http://candacechambers.web.unc.edu/> (last visited Jan. 28, 2019); Haley Westervelt, <http://hwesterv.web.unc.edu/home-2/> (last visited Jan. 28, 2019).

<sup>8</sup> Kathleen’s Site, <http://katreit.web.unc.edu/> (last visited Jan. 28, 2019).

<sup>9</sup> Greg Klaiber, *FRIDAY NIGHT TACOS!!!!*, TACO WORLD (Nov. 19, 2013), <http://tacoworld.web.unc.edu/2013/11/19/friday-night-tacos/>.

<sup>10</sup> Corben Summerlin, *Music, Film, and Philosophy*, CORBEN SUMMERLIN (Aug. 30, 2012), <http://uncds.web.unc.edu/music-and-film/>.

<sup>11</sup> Leah Johnson, *Coffee*, LEAH’S FIRST WEBSITE, <http://leahjohnson.web.unc.edu/coffee/> (last visited Jan. 29, 2019).

<sup>12</sup> Justo Marquez, *Chicken Rice and Calamansi with Ice*, MAKING MY WAY DOWNTOWN (Jan. 13, 2015), <http://miko.web.unc.edu/2015/01/13/chicken-rice-and-calamansi-with-ice/>.

<sup>13</sup> Carly High, *Home*, CARLY HIGH <http://carlyhigh.web.unc.edu/> (last visited Jan. 29, 2019).

<sup>14</sup> Candace Chambers, *Personal*, CANDACE CHAMBERS, <http://candacechambers.web.unc.edu/personal/> (last visited Jan. 29, 2019).

<sup>15</sup> Marlee Murphy, *A Momentous Occasion*, MY CAROLINA BLUE BUBBLE (Oct. 3, 2013), <http://mycarolinabluebubble.web.unc.edu/2013/10/08/a-momentous-occasion/>.

Sincerely,

A handwritten signature in black ink that reads "Sarah McLaughlin". The signature is written in a cursive, flowing style.

Sarah McLaughlin  
Senior Program Officer, Legal and Public Advocacy

cc:  
Vice Chancellor for Information Technology & Chief Information Officer Chris Kielt  
Associate Vice Chancellor and Senior University Counsel Kara E. Simmons