



August 30, 2021

Dr. James Hurley  
Office of the President  
Tarleton State University  
1333 West Washington Street  
Stephenville, Texas 76401

**URGENT**

*Sent via Express Mail and Electronic Mail (president@tarleton.edu)*

Dear President Hurley:

FIRE<sup>1</sup> and the SPLC<sup>2</sup> are concerned by Tarleton State University's directive that one of its student media outlets, *The Texan News Service (TNS)*, remove news articles and video in response to a frivolous demand letter threatening a defamation action.<sup>3</sup> This directive contradicts Tarleton's obligations under the First Amendment, which bars the institution from threatening to retaliate against a student publication for protected content. To rectify the ongoing damage Tarleton has caused to its student journalists' rights, Tarleton must revoke the directive and commit to indemnifying *TNS* against potential litigation caused by Tarleton's actions.

**I. Tarleton Directs *TNS* to Remove Articles and Video**

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.

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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.

<sup>2</sup> Founded in 1974, the Student Press Law Center (SPLC) is the nation's only legal assistance agency devoted exclusively to supporting, defending, and educating high school and college journalists about the rights and responsibilities embodied in the First Amendment and supporting the student news media in covering important issues free from censorship. The SPLC is a nonpartisan, nonprofit organization.

<sup>3</sup> Nell Gluckman, *Student Journalists Wrote About Allegations Against a Professor. Then the Articles Disappeared*, CHRON. OF HIGHER EDU. (Aug. 17, 2021), <https://www.chronicle.com/article/student-journalists-wrote-about-allegations-against-a-professor-then-the-articles-disappeared>.

**A. *The Texan News Service is an editorially independent student publication.***

*TNS* is a student-led publication housed within the Department of Communication Studies at Tarleton.<sup>4</sup> *TNS* was created in 2004 as a center for independent student reporting to support Tarleton’s commitment to journalism education.

It is written and edited by students, and its student editor ultimately determines the content of the publication. *TNS*’ policies make clear that the student journalists who operate the publication enjoy expressive freedoms. As indicated in *TNS*’s policy handbook, “[s]tudent journalists exercise the same first amendment rights and responsibilities as professional journalists, foremost among them the right to practice their craft *without fear of retaliation or censorship*.”<sup>5</sup>

**B. *TNS’ 2018 content about allegations concerning Tarleton professor Michael Landis***

In 2018, *TNS* published a series of news articles reporting allegations of inappropriate behavior towards female students by then-Tarleton professor Michael Landis. The first, published on February 28, 2018, accurately reported that at least four students had filed Title IX complaints against Landis, including one student who alleged that Landis had invited her to his home for “dinner, drinks & movies” while his wife was away.<sup>6</sup>

In March of 2018, when Tarleton completed its investigation into Landis, *TNS* reported—again accurately—that while the investigation could not substantiate the allegations of sex-based discrimination against Landis, Tarleton’s Associate Vice President of Academic Affairs Dwayne Snider recommended Landis be terminated because of “unprofessional” conduct.<sup>7</sup> Around the same time, *TNS* also posted a video report about the allegations against Landis.<sup>8</sup>

A third article, published April 6, 2018, recounted the stories of five female students who shared experiences with Landis’s allegedly inappropriate behavior. These allegations

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<sup>4</sup> See, e.g., Tarleton State Univ., *Texan News Service names new editor in chief*, TARLETON NEWS AND INFORMATION (Sept. 18, 2013), <https://www.tarleton.edu/scripts/press/display.asp?id=4144> (describing *TNS* as “a student-run news outlet”); Tarleton State Univ., *Campus news outlet names editor*, TARLETON NEWS AND INFORMATION (Sept. 22, 2011), <https://www.tarleton.edu/scripts/press/display.asp?id=3602> (identifying *TNS* as a “student-produced news portal”).

<sup>5</sup> Texan News Service Policies 2021-22, Texan News Service (emphasis added) (on file with author).

<sup>6</sup> Quanecia Fraser, *Former Tarleton student accuses professor of inappropriate behavior*, TEXAN NEWS SERVICE (Feb. 28, 2018), <https://web.archive.org/web/20210607195740/http://texannews.net/former-tarleton-student-accuses-professor-of-inappropriate-behavior> (web archive).

<sup>7</sup> Quanecia Fraser, *Breaking: University administrator recommends termination for professor accused of inappropriate behavior*, TEXAN NEWS SERVICE (Mar. 29, 2018), <https://web.archive.org/web/20210607192840/http://texannews.net/breaking-news-university-administrator-recommends-termination-for-professor-accused-of-inappropriate-behavior> (web archive).

<sup>8</sup> Quanecia Fraser, *Tarleton student accuses professor of inappropriate behavior*, VIMEO (Mar. 4, 2018), <https://vimeo.com/258531732>.

included Landis inviting students to his home and offering to buy alcohol for underage students.<sup>9</sup>

When a public records request filed by *TNS* revealed—months after it was recommended that Landis be terminated—that Tarleton was continuing to pay Landis, *TNS* again accurately reported on this development.<sup>10</sup> In this article, *TNS* included a comment by Landis’s attorney, who indicated he was “confident that the facts will show that termination is not warranted.”<sup>11</sup>

In September of 2018, *TNS* reported on a new institutional policy that prohibited romantic relationships between professors and students.<sup>12</sup> In this reporting, *TNS* reported that this policy change was not in response to the allegations against Landis.<sup>13</sup>

According to a report by *The Chronicle of Higher Education*, Landis, evidently displeased by *TNS*’s reporting, emailed “at least two historians asserting that the paper had printed lies about him and that university administrators wanted to fire him because of his politics, not his conduct.”<sup>14</sup> Landis ultimately left Tarleton and is now an adjunct professor in New York.<sup>15</sup>

### ***C. TNS receives demand letter from Landis’s attorney three years after publication.***

*TNS* is currently led by editor-in-chief Sierra Dyson, a Tarleton student. On July 27, 2021—more than three years after *TNS* published the majority of its articles that mention Landis—Dyson received a demand letter from Diana R. Warshow, an attorney employed with the New York-based firm Nesenhoff & Miltenberg LLP, which represents Landis (the “Demand Letter,” enclosed).<sup>16</sup>

The Demand Letter alleged that *TNS*’ reporting “has contributed to, amplified, and further spread □ extremely damaging and defamatory statements” and demanded that *TNS* “remove

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<sup>9</sup> Quanecia Fraser, ‘*We’re finally being heard*’: Professor faces more accusations, *TEXAN NEWS SERVICE* (Apr. 10, 2018), <https://web.archive.org/web/20210607190557/http://texannews.net/were-finally-being-heard-professor-faces-more-accusations> (web archive).

<sup>10</sup> Quanecia Fraser, *Professor accused of inappropriate behavior still getting paid*, *TEXAN NEWS SERVICE* (May 3, 2018), <https://web.archive.org/web/20190905010538/http://texannews.net/professor-accused-of-inappropriate-behavior-still-getting-paid> (web archive).

<sup>11</sup> *Id.*

<sup>12</sup> Quanecia Fraser, *Student-faculty relationships now prohibited at Tarleton*, *TEXAN NEWS SERVICE* (Sept. 4, 2018), <http://texannews.net/student-faculty-relationships-now-prohibited-at-tarleton>.

<sup>13</sup> *Id.*

<sup>14</sup> Nell Gluckman, *A Professor Tries to Clear His Name with Colleagues. They Are Not Buying It.*, *CHRON. OF HIGHER EDU.* (June 28, 2018), <https://www.chronicle.com/article/a-professor-tries-to-clear-his-name-with-colleagues-they-are-not-buying-it>.

<sup>15</sup> About, DR. MICHAEL LANDIS, <https://drmichaellandis.com> (last visited Aug. 24, 2021).

<sup>16</sup> Letter from Diana R. Warshow, Esq., Nesenhoff & Miltenberg LLP, to *TNS*, Jul. 27, 2021 (enclosed).

the Statements *in their entirety* on or before August 6, 2021” on pain of “any and all legal action necessary[.]”<sup>17</sup> The Demand Letter cited the articles discussed above.<sup>18</sup>

Dyson, concerned, shared the Demand Letter with Communication Studies Department Head Christopher Gearhart, who then shared it with Tarleton’s administration.

***D. Tarleton directs TNS to remove articles about Landis.***

Not long after receiving the Demand Letter, Dyson called to meet with Eric V. Morrow, dean of the College of Liberal and Fine Arts, to discuss the Demand Letter.<sup>19</sup> Dyson brought *TNS* executive producer Madison Reed, as well as fellow *TNS* member and Tarleton student Cody Vannoy to the meeting. During that meeting, Morrow asked that Dyson remove the articles mentioned in the Demand Letter. The university, Morrow explained, had concerns that it would be held liable for any claims Landis might bring against *TNS* and raised the cost of defending such an action.<sup>20</sup>

Dyson cited Texas’ one-year statute of limitations for defamation, asking if Tarleton was “ignoring the fact that this could be them just trying to scare a whole bunch of college students,” but Morrow was unconvinced.<sup>21</sup> Morrow told Dyson and Vannoy that if *TNS* chose not to remove the articles, *TNS* would risk losing its university funding.

Even though the meeting between Morrow, Dyson, and Vannoy ended by Morrow telling the students they need not remove the articles, Morrow emailed Dyson the following day demanding that she remove the articles.<sup>22</sup> Morrow relayed that he had “received the following directive from the university administration. Please have *TNS* remove all of the articles/videos referenced” in the Demand Letter.<sup>23</sup>

Dyson, fearing that her funding was in jeopardy and in conformity with Tarleton’s code of conduct,<sup>24</sup> complied with the directive, removing all but one article referenced in the Demand Letter.<sup>25</sup> Dyson chose to leave the article about Texas A&M’s faculty-student relationship policy.<sup>26</sup> Morrow then asked that Dyson also remove that article, which briefly mentions Landis.<sup>27</sup> Dyson has not yet removed this article.

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<sup>17</sup> *Id.* (emphasis in original).

<sup>18</sup> *Id.* See Quanecia Fraser, *Student-faculty relationships now prohibited at Tarleton*, TEXAN NEWS SERVICE (Sept. 4, 2018), <http://texannews.net/student-faculty-relationships-now-prohibited-at-tarleton>.

<sup>19</sup> Gluckman, *supra* note 3.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Email from Morrow to Dyson, Aug. 5, 2021, 11:16 AM (on file with author).

<sup>23</sup> *Id.*

<sup>24</sup> Failing to “comply with directions of a university official . . . acting in the performance of their duties” violates Tarleton’s Student Conduct Code. TARLETON STATE UNIV., STUDENT CONDUCT CODE § 5.25, *available at* <https://www.tarleton.edu/studentrules/code-of-student-conduct.html>.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* See Fraser, *supra* note 12.

<sup>27</sup> *Id.*

## **II. Tarleton State University Violated the First Amendment Rights of its Students in Response to a Frivolous Threat**

The range of options available to Tarleton State University in responding to Michael Landis’s unfounded demand is informed and circumscribed by the First Amendment. Instead of defending its students’ rights, Tarleton State opted to sacrifice their rights to avoid a lawsuit that it knew Landis would not bring. In making this unconstitutional election, Tarleton State not only violated its students’ First Amendment rights, but also damaged their ability to mount the statute of limitations for defamation as an affirmative defense to any frivolous action brought by Landis. As a result, Tarleton must bear any liability incurred in reposting the content in order to restore the students’ First Amendment rights.

### ***A. The First Amendment Bars Tarleton State from Censoring TNS***

It is well established that the First Amendment is binding on public universities like Tarleton.<sup>28</sup> Accordingly, the decisions and actions of a public university—including interactions with student journalists,<sup>29</sup> the pursuit of disciplinary sanctions,<sup>30</sup> recognition and funding of student organizations,<sup>31</sup> conduct of police officers,<sup>32</sup> and maintenance of policies implicating student and faculty expression<sup>33</sup>—must be consistent with the First Amendment.

It is well established that public institutions of higher education “may not constitutionally take adverse action against a student newspaper, such as withdrawing or reducing the paper’s funding, because it disapproves of the content of the paper.”<sup>34</sup> As helpfully explained by the United States Court of Appeals for the Fifth Circuit, the decisions of which are binding upon Tarleton, “once a University recognizes a student activity which has elements of free expression, it can censor that expression only if it acts consistent with First Amendment

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<sup>28</sup> *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).

<sup>29</sup> *Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995).

<sup>30</sup> *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

<sup>31</sup> *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000).

<sup>32</sup> *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011).

<sup>33</sup> *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

<sup>34</sup> *Husain v. Springer*, 494 F.3d 108, 124 (2d Cir. 2007); *Stanley*, 719 F.2d at 282; *see also Rosenberger*, 515 U.S. at 829–30.

constitutional guarantees.”<sup>35</sup> That is, a university may regulate student publications only if its content would lead to significant “violent disruption” of the educational environment.<sup>36</sup>

Refraining from exercising purported control over the content of student media likewise helps to minimize the university’s legal exposure to claims arising from student expression.<sup>37</sup> Yet in purporting to dictate to *TNS* what it may or may not publish, Tarleton State invites future would-be suitors to bring claims against the university for its students’ expression.

The compulsory removal of articles and video from a student newspaper’s website, at the direction of university administrators, is an impermissible interference with the student editor’s right to determine the content of the publication. As discussed in greater detail below, that restriction cannot be justified by reference to the *Hazelwood* doctrine or Michael Landis’s baseless legal threat.

***B. The Hazelwood Doctrine is Not Applicable in the Fifth Circuit, and Would Not Apply to TNS***

FIRE and SPLC understand that the Tarleton administration asserted it had authority to direct *TNS* to remove content because the publication is organized under an academic department rather than as a student organization.

This assertion is incorrect. The First Amendment rights of *TNS* are not diminished by its support from the Department of Communication Studies, as the university confirmed in recognizing that *TNS* journalists have “the same first amendment rights and responsibilities as professional journalists, foremost [...] the right to practice their craft *without fear of retaliation or censorship*.” First, *Hazelwood* does not apply in the higher education context. Second, even if *Hazelwood* reached collegiate publications in the Fifth Circuit, Tarleton has established *TNS* as a forum for student expression. Third, even if *TNS* were subject to regulation by Tarleton, Landis’s litigation threat does not present a legitimate pedagogical purpose for censoring *TNS*.

***i. Hazelwood is inapplicable in the university context and has not been adopted by the Fifth Circuit***

Because of the importance of the marketplace of ideas on college campuses, while some curricular student publications at K-12 schools may be subject to increased administrative regulation under *Hazelwood v. Kuhlmeier*<sup>38</sup> (and even then within limits, as discussed below), the same cannot be said for a student newspaper on a university campus like Tarleton. The

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<sup>35</sup> *Bazaar v. Fortune*, 476 F.2d 570, 574 (5th Cir. 1973).

<sup>36</sup> *Id.* at 580.

<sup>37</sup> *Lewis v. St. Cloud State Univ.*, 693 N.W.2d 466, 472–73 (Minn. Ct. App. 2005) (holding that where a state university did not exercise control over the content of a student newspaper, the university could not be held vicariously liable for defamation); *Milliner v. Turner*, 436 So.2d 1300 (La. App. 1983); *McEvaddy v. City Univ. of N. Y.*, 220 A.D.2d 319, 633 N.Y.S.2d 4 (App. Div. 1st Dept. 1995); see also *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073, 1074-75 (5th Cir. 1976) (holding that the actions of student newspapers over which state institutions do not exercise regulation do not act on behalf of the university).

<sup>38</sup> 484 U.S. 260 (1988).

*Hazelwood* Court itself questioned whether its framework would be appropriate in the college context, and subsequent courts have determined that *Hazelwood* does not apply to college students.<sup>39</sup>

This reluctance to extend censorial authority to administrators recognizes that “state colleges and universities are not enclaves immune from the sweep of the First Amendment[,]” and college students generally have expressive rights commensurate with adults in other settings.<sup>40</sup> While courts have opined upon the rights of students in middle and high schools, allowing some school regulation of expression *in loco parentis*, courts have been more restrictive upon the ability of institutions of higher education to regulate student speech. This is because the college campus “is peculiarly the ‘marketplace of ideas[,]’” and “[t]he Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth.”<sup>41</sup> The expressive rights of college students are co-equal to those of adults outside the educational setting.

Thus, even if *TNS* is supported by Tarleton’s Department of Communication Studies, it is a student-run publication entitled to the same panoply of First Amendment rights as other university student publications.

***ii.* Tarleton has established *TNS* by policy, intent, and practice as an open forum for student expression.**

Even if *Hazelwood*’s framework extended to university student publications, it would not authorize Tarleton’s censorship of *TNS* because it has been established as a forum for student expression. *Hazelwood* explicitly has no application to student publications which “by policy or practice” have been opened as a forum for use by students.<sup>42</sup>

Here, *TNS* has clearly been established as such a forum. The publication’s own policy manual guarantees that its journalists are not subject to “retaliation or censorship,” such as by Tarleton exercising dominion over what *TNS* publishes (or maintains as publicly viewable once published), and that they “exercise the same first amendment rights and responsibilities as professional journalists.”<sup>43</sup> Further, it is our understanding that *TNS* was originally conceived as a laboratory for the express purpose of supporting *editorially independent*

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<sup>39</sup> See *Student Gov’t Ass’n v. Bd. Of Trustees of the Univ. of Mass.*, 868 F.2d 473, 480 n. 6 (1st Cir. 1989) (noting that *Hazelwood* “is not applicable to college newspapers”); see also *Kincaid v. Gibson*, 236 F.3d 342, 346 n. 5 (6th Cir. 2001) (en banc) (in a case involving a college yearbook, noting that, unlike with the K-12 student publications considered in *Hazelwood*, “there can be no justification for suppressing the yearbook on the grounds that it might be ‘unsuitable for immature audiences’”). The Fifth Circuit has not applied *Hazelwood* to student publications in the higher education context, and has made only passing reference to *Hazelwood* as applied to college students generally. See *Esfeller v. O’Keefe*, 391 Fed. App’x 337, 341 (5th Cir. 2010) (in analyzing Louisiana State University’s harassment policy, noting the university need not allow harassing expression, which “is inconsistent with its ‘basic educational mission’”).

<sup>40</sup> *Healy*, 408 U.S. at 180.

<sup>41</sup> *Keyishian v. Bd. Of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967).

<sup>42</sup> *Id.* at 267.

<sup>43</sup> *Supra* note 5.

student journalism, and that founding documents will support this proposition. These are the hallmarks of opening a forum to the speakers for whom it is intended, here, *TNS* staff.

Thus, *TNS* is an open forum for student expression by policy, intent, *and* practice, and *Hazelwood*'s framework would be inapplicable to *TNS* even if it were in a K-12 context. Instead, the applicable framework is that of general First Amendment doctrine: that is, that Tarleton "may not censor, retaliate, or otherwise chill that outlet's speech[.]"<sup>44</sup>

***iii. Even if TNS were subject to Hazelwood, Tarleton would have no legitimate pedagogical purpose for its censorship.***

Even leaving aside these considerable hurdles, Tarleton's mandates would not satisfy *Hazelwood*. Even where *Hazelwood* is the appropriate standard for administrative regulation of student publications, it allows such censorship only for "legitimate pedagogical reasons."<sup>45</sup>

The *Hazelwood* Court outlined what constitutes a pedagogical purpose for regulation in the K-12 context, including correcting grammar, insisting upon well-researched content, and banning content that promotes underage drinking, drug use, or "irresponsible sex."<sup>46</sup>

Michael Landis's threats do not present legitimate pedagogical reasons to censor *TNS*. First, acceding to legally-baseless complaints about the content of the newspaper may satisfy the university's interest in avoiding the reputational and monetary costs of potential litigation against one of its student publications, but that interest does not advance any pedagogical purpose. Second, the decision was made not by journalism faculty teaching students how to operate a newspaper, but by administrators. These are administrative, not pedagogical, considerations.

***C. Landis Could Not Successfully State a Claim for Defamation***

While Landis and his attorney claim that the *TNS*'s content is defamatory, it does not meet the legal definition of defamation, which is constrained by First Amendment principles designed to provide 'breathing space' for free speech.<sup>47</sup> Yet Landis's claims are objectively frivolous: they were time-barred, arising years after the expiration of any relevant statute of limitations. Even if Landis's claims were timely, they concern articles accurately reporting allegations made by a third party regarding a matter of public concern, and there is no dispute that the articles are substantially true. Yet Tarleton State's censorship retreats from each of these considerable and absolute defenses.

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<sup>44</sup> *Husain*, 494 F.3d at 124.

<sup>45</sup> *Hazelwood*, 484 U.S. at 272.

<sup>46</sup> *Id.* at 271-72.

<sup>47</sup> *New York Times v. Sullivan*, 376 U.S. 254, 272 (1964).

***i. Even if the articles were defamatory, the statute of limitations had passed at the time of the Demand Letter.***

First, Landis’s claims are not only baseless, they are time-barred. Texas imposes a one-year statute of limitations for libel and defamation.<sup>48</sup> That period began to run when the articles were published.<sup>49</sup>

Thus, Landis’s claim that he would sue *TNS* for defamation some three years after the articles had been published was completely meritless. Disappointingly, Tarleton was aware of this manifest defect in Landis’s claims at the time it issued its directive requiring *TNS* to remove the articles, as Dyson had informed Morrow of the statute of limitations during their meeting. We are aware of no facts which would suggest that Landis—whose demand letter made no effort to explain the delay—has any meritorious argument that the statute had been tolled.

Landis’s rekindled interest in silencing students—censorship effectuated by Tarleton State’s pusillanimous acquiescence—arises not because he has suddenly discovered that *TNS* published articles about him. Instead, Landis’s letter closely follows new allegations raised against him on social media, which linked back to *TNS*’ reporting.<sup>50</sup> Landis’s demand letter indicates as much, citing an “ongoing campaign of defamation and cyber harassment [...] perpetuated by the online presence of” the *TNS* articles, allegedly placing Landis at “risk of physical harm.”

***ii. The articles were not defamatory because they accurately reported the allegations against Landis.***

Recognizing the special role of newspapers and other publications in keeping the public informed about allegations of public concern, in 2015 the Texas legislature amended state law to enact special rules for defamation actions brought against periodicals. “In an action brought against a newspaper or other periodical or broadcaster, the [truth defense] applies to an accurate reporting of allegations made by a third party regarding a matter of public concern.”<sup>51</sup> This means that, so long as *TNS* accurately reported the substance of the allegations against Landis, the publication and its staff are not liable—even if those allegations turned out to be false. Landis could avoid this defense only by showing that *TNS*’s reporting mischaracterized the allegations against him.

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<sup>48</sup> Tex. Civ. Prac. & Rem. Code § 16.002(a). Similarly, New York, where Landis now resides and where he retained an attorney, also imposes a one-year statute of limitations on defamation actions. N.Y. C.P.L.R. § 215(3).

<sup>49</sup> Consequently, Landis—then represented by an attorney—concurrently complained about the articles in question, demonstrating his subjective awareness of them. Gluckman, *supra* note 14.

<sup>50</sup> See, e.g., Dr. Rebecca Shapiro (@RebeccaJShapiro), TWITTER (June 8, 2021, 11:27 AM), <https://twitter.com/RebeccaJShapiro/status/1402286161658327041>; Ariela Gross (@arielagross), TWITTER (June 7, 2021, 5:34 PM), <https://twitter.com/arielagross/status/1402016241632509953>; David M. Perry (@Lollardfish), TWITTER (June 7, 2021), <https://twitter.com/Lollardfish/status/1401992394715713536>. FIRE and SPLC have no insight into the veracity of these allegations and cite them only to note the temporal relationship between them and Landis’s belated legal claims.

<sup>51</sup> *Id.* at § 73.005(b).

In all of *TNS*'s reporting on the allegations against Landis, then-*TNS* reporter Quanecia Fraser provides information in three ways: (1) through direct quotes by one of Landis's accusers; (2) through paraphrases of statements by the same individual; and (3) through direct quotes to documents acquired by *TNS*, including text messages from Landis himself and an email chain between an alleged victim and a university administrator. At no point in this reporting does *TNS* make unsubstantiated claims about the allegations against Landis.

Make no mistake: Allegations of sexual misconduct by a university professor are matters of significant public concern, particularly to *TNS*' audience. Indeed, Tarleton State employs administrators and staff members to address allegations of sexual harassment, as required by state and federal law, and deployed those considerable resources in response to the students' complaints about Landis. Even in the absence of these particular legal obligations, concerns that a faculty member—employed by an institution funded by public tax dollars—had made a habit of buying alcohol for underage students and inviting female students to spend time alone with him in his house are certainly issues in which the citizens of Texas would have an interest.

Because *TNS* reported on allegations against Landis—allegations in which the general public certainly had an interest—and did so accurately, Landis could not state a claim for defamation, as he could not show the articles were false within the meaning of Texas law.

***iii.* The articles were not defamatory because they are substantially true.**

Even if Landis's claims were timely and the accurate-reporting statutory bar were absent, Landis would be unable to mount a claim for defamation, as the articles are substantially true.

Truth is an absolute defense to a claim for defamation.<sup>52</sup> Texas courts apply a “substantial truth” test to defamation actions, meaning that a statement must contain more than a minor mischaracterization, but must have been *substantially false*—that is, the “alleged defamatory statement was more damaging to [the plaintiff's] reputation, in the mind of the average listener, than a truthful statement would have been.”<sup>53</sup>

Landis's demand letter primarily focuses on a March 29, 2018 article concerning the university's investigation and recommendation that he be terminated. Landis concedes that *TNS* accurately reported that Tarleton State had found him not responsible, but complains that this information was included in the “last several paragraphs” of a particular article. First, defamation actions consider the full context of the publication, not whether its headline or particular paragraphs would leave readers with a different impression if divorced from the rest of the article.<sup>54</sup> Second, the headline does not contradict the university's finding—it *repeats* it: While Landis was not found responsible for violating the university's

<sup>52</sup> Tex. Civ. Prac. & Rem. Code § 73.005(a).

<sup>53</sup> *McIlvain*, 794 S.W.2d at 16.

<sup>54</sup> *City of Keller v. Wilson*, 168 S.W.3d 802, 811 (Tex. 2005) (“[P]ublications alleged to be defamatory must be viewed as a whole -- including accompanying statements, headlines, pictures, and the general tenor and reputation of the source itself.”); *see also, e.g., Ross v. Columbia Newspapers, Inc.*, 266 S.C. 75, 81 (“As a general rule, both the headline and the article following it must be considered as one document in determining whether it is defamatory.”).

policies on sexual harassment, the university's report—which was embedded in the article—expressly concluded that Landis had, in fact, sent an “inappropriate” text message inviting a student “for dinner, drinks, and a movie,” and that Landis “admitted sharing a hotel room with a student,” which the university determined was “highly inappropriate and unprofessional behavior.”<sup>55</sup>

Moreover, reasonable readers can differ on whether conduct Landis has *not* denied<sup>56</sup> was “inappropriate,” even if the university found his conduct fell short of violating its sexual harassment policies. Landis himself apparently agreed: when the student responded to his overture for drinks by saying she didn't “think that would be appropriate,” Landis responded, “I guess that makes sense.”<sup>57</sup>

### **III. Tarleton Must Act to Rectify its Violation of the First Amendment Rights of *TNS* and Its Members, Which Prejudiced their Legal Rights**

In issuing a directive demanding that *TNS* comply with the Demand Letter from Landis's attorney, Tarleton turned a frustrating situation into one that is potentially more fraught for Dyson and her staff. In effect, Tarleton itself became an agent for Landis's threats—threats that Tarleton had *actual knowledge* Landis could not successfully pursue. While Dyson and her staff, having learned about the statute of limitations, no longer feared legal action by Landis, Tarleton's directive—coupled with threats of pulling *TNS*'s funding—compelled the removal of articles protected by the First Amendment.

Tarleton's choice to effectuate Landis's censorial threats has meaningful and ongoing consequences for *TNS*. While the publication had an unassailable defense in the statutes of limitations, the legal exposure to the students—who were the recipients of Landis's demand—has now changed. If *TNS* were to restore these articles in conformity with its First Amendment rights, there is a chance a court would consider their restoration a *new* publication, resetting the statute of limitations. As a result, in the event of a lawsuit, the *TNS* students might not be able to rely only on that complete defense, but could be required to take significant efforts to bolster their substantive defenses, requiring substantial time and financial resources. This legal exposure is damage flowing directly from *TNS*' unconstitutional choice to join Landis in his campaign of censorship in lieu of defending its students' fundamental rights.

To make *TNS* whole following Tarleton's constitutional violation, then, Tarleton must not only retract its directive that *TNS* remove the articles in question, but must also agree to indemnify it for any costs associated with defending itself against litigation brought by Landis.

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<sup>55</sup> Memo. from Dr. Dwayne Snider, Designated Admin., Tarleton State Univ., to Complainant 2, Mar. 28, 2018, enclosed and *available at* <http://texannews.net/wp-content/uploads/2018/03/032818-Decision-to-Complainant2-re-062717-Complaint.pdf>.

<sup>56</sup> Landis denied making remarks of a sexual nature to two students who complained to the university, which concluded that the lack of witnesses precluded a finding that Landis violated university policy.

<sup>57</sup> Fraser, *supra* note 6.

The conduct here is a particularly stark illustration of a “reckless or callous indifference to the federally protected rights of others,”<sup>58</sup> Accordingly, we remind you 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.<sup>59</sup>

Given the urgent nature of this matter, we request receipt of a response to this letter no later than the close of business on Friday, September 10, 2021, confirming that Tarleton will revoke its directives to *TNS* and agree to indemnify *TNS* and its current, future, and former student journalists and editors for any costs associated with defending litigation brought by Landis.

Be advised that FIRE is committed to using all of the resources at its disposal to see this matter to a just conclusion.

Sincerely,



Lindsay Rank  
Program Officer, Individual Rights Defense Program  
Foundation for Individual Rights in Education



Mike Hiestand  
Senior Legal Counsel  
Student Press Law Center

Cc: Dr. Eric Morrow, Dean, College of Liberal & Fine Arts  
Dr. Christopher Gearhart, Department Head, Communication Studies

Encl.

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<sup>58</sup> *Smith v. Wade*, 461 U.S. 30, 56 (1983).

<sup>59</sup> See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Gerlich v. Leath*, 861 F.3d 697, 709 (8th Cir. 2017) (upholding denial of qualified immunity to defendants—public university administrators—because plaintiffs’ First Amendment right was clearly established).



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July 27, 2021

**VIA OVERNIGHT & ELECTRONIC MAIL**

Texan News Service  
Box T-0230  
Stephenville, Texas 76402  
[editor@texannews.net](mailto:editor@texannews.net)

**Re: Michael Landis; Defamatory Publication**

To Whom It May Concern:

The undersigned has been retained as litigation counsel by Michael Landis in connection with the above-referenced matter.

As you are aware, on February 28, 2018, you published an article (the “February Article”) on your website, [texannews.net](http://texannews.net) (“TSN” or the “Website”), which contained highly defamatory statements about Dr. Landis. A month later, on March 29, 2018, you published a second article (the “March Article”), which again contained highly defamatory statements about Dr. Landis. Less than two weeks later, on April 10, 2018, you published a third article (the “April Article”), and yet another article several weeks later, on May 3, 2018, (the “May Article”) collectively the “Articles”), both of which contained highly defamatory statements about Dr. Landis.

The Articles contained unfounded and false content about our client, repeating baseless claims that Dr. Landis engaged in sexual harassment and created a hostile educational environment (the “Statements”). The Statements were authored by Quanecia Fraser and are located at the following URLs:

<http://texannews.net/former-tarleton-student-accuses-professor-of-inappropriate-behavior/>

<http://texannews.net/breaking-news-university-administrator-recommends-termination-for-professor-accused-of-inappropriate-behavior/>

NEW YORK | 363 Seventh Avenue | 5th Floor | New York, NY 10001 | T: 212.736.4500  
BOSTON | 101 Federal Street | 19th Floor | Boston, MA 02110 | T: 617.209.2188

<http://texannews.net/were-finally-being-heard-professor-faces-more-accusations/>

<http://texannews.net/professor-accused-of-inappropriate-behavior-still-getting-paid/>

Furthermore, you published a video report regarding false accusation against our client on March 7, 2018 (the “Video”), located at the following URL:

<http://texannews.net/texan-tv-video-tarleton-student-accuses-professor-of-inappropriate-behavior/>

The Statements disseminate false accusations of sexual harassment against our client. Despite the fact that Tarleton State University (the “University”) determined Dr. Landis had *not* sexually harassed his accusers and did *not* create a hostile educational environment, you intentionally buried that information in the last several paragraphs of the March Article, wherein you write:

However, the investigation also concluded that reported behavior did not “create a hostile education environment.”

“Based on the preponderance of the evidence (i.e., more likely than not), I conclude that [Respondent] did not sexually harass [Complainant] or the other two anonymous complainants,” Snider wrote. “There were no witnesses to the comments of a sexual nature attributed to him, and he denied making them.”

In the memo, Snider also said: “the comments of a sexual nature attributed to [Respondent] were not sufficiently severe, persistent, or pervasive so as to unreasonably interfere with a student’s educational environment or performance.”

Despite the fact that our client was cleared of sexual harassment by the University, your March Article is titled Breaking News: University administrator recommends termination for professor accused of inappropriate behavior.

Such a headline led readers to believe that the University found Dr. Landis responsible for sexual harassment, as your previous Articles and Video had informed the public that Dr. Landis was being investigated for sexual harassment. And yet that information was instead buried deep into the article. Although the recommended termination was based on the fact that three women filed allegations, and not because those allegations were substantiated, this information is not stated until halfway through the March Article. A review of your website indicates that there was not a single article published that made clear to the public that Dr. Landis was exonerated of sexual harassment and the claims were concluded as unsubstantiated.

Further, despite our client being cleared of sexual harassment and hostile environment claims, you dedicated two additional articles to our client in the following five weeks, one of which focused on the status of his salary. Thereafter, in a September 4, 2018, article titled “Student-faculty relationships now prohibited at Tarleton,” published almost six months after it was determined that our client did *not* commit acts of sexual harassment and that his accusers’ claims were unsubstantiated, you refer to him once again. It is perplexing and disappointing that your publication has perpetuated false allegations against our client even after the university determined that those allegations were unsubstantiated. Upon information and belief, you acted maliciously in an effort to sensationalize the situation and maintain a presumption in the community that our client committed the acts alleged by his accusers.

You published these Statements and the entire Articles without any due diligence as to the truthfulness of the claims. Had you conducted even the bare minimum of due diligence, you would have discovered and reported the fact that there existed no evidence or support for the claims alleged against Dr. Landis.

Furthermore, nowhere in the Articles did the author remind readers that allegations are not findings; that there is an official process for determining potential violations; or that University policy requires that the accused are afforded a presumption of innocence. As a result, the author has contributed to, amplified, and further spread these extremely damaging and defamatory statements. Due to the recklessness of the Articles, it is clear that the author lacked reasonable grounds to believe that the Statements were true. As such, TNS has defamed our client, causing him to suffer irreparable damage.

The Statements will continue to adversely affect our client the longer Twitter refrains from removing them from the Internet. There has been ongoing campaign of defamation and cyber harassment against our client, perpetuated by the online presence of the defamatory Articles, which are causing our client to suffer reputational, emotional, and financial damages, as well as risk of physical harm.

**BASED ON THE FOREGOING, DEMAND IS HEREBY MADE** that you remove the Statements *in their entirety* on or before August 6, 2021, in order to prevent further damage, harassment, and threats against our client. While we hope to be able to resolve this matter swiftly, our client is prepared to take any and all legal action necessary to lessen and reverse the damage caused by the publishing and dissemination of the Statements on your website and recoup any losses suffered.

In any event, please be mindful of the following preservation notice. *See, e.g., Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003). As part of the requirements therein, we insist that you and your client preserve every document and communication that is currently in your possession concerning this matter. You must preserve all future communications and documents created that concern this matter. In particular, you must preserve all browser and network data, including browser cache, emails and instant message

transcripts concerning this matter. You must also create and preserve a Preservation Compliance Log as hereinafter detailed. We intend to request the foregoing documents in discovery and will expect that they be made available.

Please be advised that this communication is without prejudice to any facts, whether stated herein, or absent herefrom. Please further be advised that this communication is without prejudice to and shall not affect, in any manner, the rights, claims, remedies, actions or causes of action which our client has, or may have, at law, in equity or otherwise.

**NESENOFF & MILTENBERG, LLP**

By: *Diana R. Warshow*  
**Diana R. Warshow, Esq**



**MEMORANDUM**

**DATE** March 28, 2018

**TO:** Complainant 2  
Student

**FROM:** Dr. Dwayne Snider (Designated Administrator)  
Associate Vice President, Academic Affairs

*Dwayne Snider*

**RE:** Decision - Complaint Dated June 27, 2017

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On February 26, 2018, I received the investigation report regarding the above-referenced complaint. On March 9, 2018, I requested some clarification from the investigative authority. On March 20, 2018, I received the revised final investigation report regarding the above-referenced complaint addressing the following allegations:

- Did [Respondent] sexually harass [Complainant], Complainant 2, and/or Complainant 3?

The investigative authority concluded: “Based on the preponderance of the evidence (i.e., more likely than not), I conclude that [Respondent] did not sexually harass [Complainant] or the other two anonymous complainants. There were no witnesses to the comments of a sexual nature attributed to him, and he denied making them. Therefore, the allegations that [Respondent] sexually harassed [Complainant] or the other two anonymous complainants are unsubstantiated.”

- Did [Respondent] create a hostile educational environment?

The investigative authority further concluded: “... that the comments of a sexual nature attributed to [Respondent] were not sufficiently severe, persistent, or pervasive so as to unreasonably interfere with a student’s educational environment or performance. Therefore, the allegation that [Respondent] created a hostile educational environment is unsubstantiated.

The investigative authority further concluded: “That being said, the fact that three separate female students were sufficiently concerned about [Respondent’s] interactions with them to report them is troubling. Further, [Respondent’s] invitation to a student for dinner, drinks, and a movie was inappropriate, and his admitted sharing a hotel room with a student was highly inappropriate and unprofessional behavior.”

I have carefully reviewed and considered the complaint and the investigation report with exhibits and I concur with the conclusions.

Based on this finding, I recommend that Respondent’s employment with the University be terminated.



You have a right to appeal in accordance with the provisions of TSU Rule 08.01.01.T1, *Civil Rights Compliance*, within Five (5) business days of receipt of this letter. In accordance with the provisions of A&M System Regulation 08.01.01, *Civil Rights Compliance*, subsection 4.5.1, an appeal should be submitted only on the following bases, as applicable:

- (a) A procedural error or omission that significantly impacted the outcome;
- (b) New evidence, unknown or unavailable during the investigation, that could have significantly impacted the outcome; or
- (c) The appropriateness or severity of the sanctions.

If you wish to inspect a redacted copy of the investigation report and exhibits please contact Ms. Angie Brown, Assistant Vice President for Employee Services at (254) 968-9128.

Pursuant to A&M System Regulation 08.01.01, subsection, 4.5.1, the decision with regard to the appeal will be final.

cc: Ms. Angie Brown, Assistant Vice President, Employee Services