



September 10, 2021

Luke Leafgren
Alston Burr Resident Dean
Mather House - Harvard University
10 Cowperthwaite Street
Cambridge, Massachusetts 02138

Sent via U.S and Electronic Mail (matherhousedean@fas.harvard.edu)

Dear Dean Leafgren:

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.

We write today to share our concern about an email sent by a Harvard University employee asking students to remove a flag depicting rapper Nicki Minaj from the window of their residence, citing the possibility that others might be offended by the display. Even if the flag was offensive to some, it does not fall into any category of unprotected speech, and an employee's request that it be removed is difficult to square with the university's commitment to its students' freedom of expression.

We call on Harvard to rescind its request that the students remove the flag and affirm its commitment to students' expressive rights.

I. Harvard Tells Students to Remove a Flag from the Window of Their Residence

The following is our understanding of the pertinent facts, which is based on public information posted on Twitter. We appreciate that you may have additional information to offer and invite you to share it with us.

On Sept. 5, 2021, a pseudonymous Harvard undergraduate student posted a now-deleted tweet concerning a Harvard employee's email complaining about a flag displayed in the window of the student's residence. The student's tweet also shared a photo of the flag, which depicted rapper Nicki Minaj saluting in front of an American flag:¹

¹ While the original tweet is no longer available, a screenshot of the tweet was shared on another account. barbz struggle tweets (@barbzstruggle), TWITTER (Sept. 6, 2021, 10:23 A.M.). <https://twitter.com/barbzstruggle/status/1434885013993046017>.



In the caption of the tweet, the student stated:

Harvard really said no Barbz allowed in this school 😞😞

THIS is where harvard draws the line?! #JusticeforNicki²

The tweet also included a screenshot of an email from a Harvard employee to the student and his suitemates, requesting they remove the flag from its current display. In the email, the Harvard employee, whose name was redacted, stated:

I wanted to check in about the poster (of a woman saluting in front of a flag) that is being displayed from the window of the 426 common room. I don't want to censor anyone's political or aesthetic expressions, but I'm concerned that members of the community will find the poster offensive, so I'm wondering if you'd be willing to take it down. If anyone would like to talk further about the poster or other possible places to make the statement, I'd be happy to talk early this week.³

The student's residence, Mather House, makes regulations publicly available on its website, but those restrictions do not reference either the location or content of expressive displays in students' living quarters.⁴

² *Id.* The term "Barbz" refers to the fans of musician Nicki Minaj.

³ *Id.*

⁴ *Building & Maintenance Info*, HARVARD UNIV., <https://mather.harvard.edu/facilities-maintenance-info> (last visited Sept. 7, 2021).

The reposting of the student's original tweet has received more than 250 retweets and over 4,000 likes as of the time of this letter.⁵ Other Harvard students tweeted that they have purchased and intend to display or are currently displaying the same flag in their windows in solidarity with the students in this suite.⁶

II. The Display is Protected by Harvard's Commitment to Freedom of Expression

Harvard University promises its students freedom of expression. That promise requires it to abstain from policing expression on the basis that its content or viewpoints are offensive or disagreeable to others. Because a student might reasonably interpret an email from a staff member requesting the removal of a display to be a requirement, we call on Harvard to clarify that its students are not required to remove public displays of Minaj's salute.

A. Harvard Makes Institutional Commitments to Free Speech

Although private institutions like Harvard are not bound by the First Amendment, Harvard has adopted clear promises protecting students' freedom of expression.⁷ These firm commitments to uphold students' expressive rights represent not only a moral obligation but a contractually binding legal duty on the part of the university.⁸

Harvard's *Free Speech Guidelines* states:

Free speech is uniquely important to the University because we are a community committed to reason and rational discourse. Free interchange of ideas is vital for our primary function of discovering and disseminating ideas through research, teaching, and learning. Curtailment of free speech undercuts the intellectual freedom that defines our purpose. It also deprives some individuals of the right to express unpopular views and others of the right to listen to unpopular views.⁹

These commitments are affirmed in the *Student Handbook*, which further states that “[b]y accepting membership in the University, an individual joins a community ideally

⁵ barbz struggle tweets (@barbzstruggle), Twitter (Sept. 6, 2021, 10:23 A.M.). <https://twitter.com/barbzstruggle/status/1434885013993046017>.

⁶ See, e.g., Sami Turner (@samiturner_), TWITTER (Sept. 6, 2021, 2:05 A.M.) https://twitter.com/samiturner_/status/1434759602999119876; smellie (@0rganicmeme), TWITTER (Sept. 5, 2021, 6:17 P.M.) <https://twitter.com/0rganicmeme/status/1434641768960561152>.

⁷ HARVARD UNIV., FACULTY OF ARTS AND SCIENCES, FREE SPEECH GUIDELINES (May 15, 1990) available at <https://president.richmond.edu/common/pdf/statement-on-free-expression.pdf>.

⁸ *Doe v. W. New England Univ.*, 228 F. Supp. 3d 154, 169 (D. Mass. 2017) (under Massachusetts law, the relationship between a student and a university is based on contract, the terms of which are contained in the student handbook and other college materials).

⁹ HARVARD UNIV., FACULTY OF ARTS AND SCIENCES, FREE SPEECH GUIDELINES (May 15, 1990) available at <https://president.richmond.edu/common/pdf/statement-on-free-expression.pdf>.

characterized by free expression, free inquiry, intellectual honesty, respect for the dignity of others, and openness to constructive change.”¹⁰

Given Harvard’s strong commitment to protect students’ expressive rights and its clear endorsement of a climate of open discourse, including expression of unpopular opinions, students would reasonably expect to be able to express any viewpoint—even those possibly considered offensive to others—without encountering institutional backlash.

B. Freedom of Expression Protects Subjectively Offensive Expression

The staff member’s email does not identify the basis for the contention that the suitemates’ flag might be offensive to others. But whether others are being reasonable in taking offense at the display is immaterial, as the putatively offensive nature of a communication is irrelevant to whether it is protected speech. Whether speech—offensive or otherwise—is protected is “a legal, not moral, analysis.”¹¹

The Supreme Court has repeatedly, consistently, and clearly held that expression may not be restricted on the basis that others find it to be offensive.¹² This core First Amendment principle is why the authorities cannot outlaw burning the American flag,¹³ punish the wearing of a jacket emblazoned with the words “Fuck the Draft,”¹⁴ penalize cartoons depicting a pastor losing his virginity to his mother in an outhouse,¹⁵ or disperse civil rights marchers out of fear that “muttering” and “grumbling” white onlookers might lead to violence.¹⁶ In ruling that the First Amendment protects protesters holding insulting signs outside of soldiers’ funerals, the Court reiterated this fundamental principle, remarking 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.”¹⁷

This principle applies with particular strength to universities which are, by their nature, dedicated to open debate and discussion. Take, for example, a student newspaper’s front-page uses of a vulgar headline (“Motherfucker Acquitted”) and a “political cartoon . . . depicting policemen raping the Statue of Liberty and the Goddess of Justice.”¹⁸ These words and images—published at the height of the Vietnam War—were no doubt deeply offensive to many at a time of deep polarization and unrest. So, too, were “offensive and sophomoric” skits

¹⁰ HARVARD UNIV., STUDENT HANDBOOK ACADEMIC YEAR 2021-2022 (2021), available at https://handbook.college.harvard.edu/files/collegehandbook/files/harvardcollege_studenthandbook_2021_2022.pdf.

¹¹ *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 821 (S.D. Iowa 2019).

¹² Again, while Harvard is a private institution not bound by the First Amendment, interpretations of the constitutional guarantee to freedom of speech serve to inform what a student would reasonably expect from an institution, like Harvard, that holds itself out as committed to freedom of expression.

¹³ *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag was protected by the First Amendment, the “bedrock principle underlying” the holding being that government actors “may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”).

¹⁴ *Cohen v. California*, 403 U.S. 15, 25 (1971).

¹⁵ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

¹⁶ *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

¹⁷ *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).

¹⁸ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

depicting women and minorities in derogatory stereotypes,¹⁹ “racially-charged emails” to a college listserv,²⁰ and student organizations that the public viewed at the time as “shocking and offensive.”²¹ Yet, “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.’”²²

C. The Minaj Display Does Not Appear to Violate Mather House Policy

Even protected speech may be subject to “reasonable restrictions on the time, place, or manner of protected speech” where they are content-neutral, narrowly tailored to advance a significant interest, and “leave open ample alternative channels” for the expression.²³ Accordingly, a university could impose a policy regulating *how* and *where* students may engage in expression—for example, by limiting the type of adhesive used in a window display.

However, we are not aware of any such policy that would serve to limit the Minaj display at issue here. While Mather House publishes a thorough set of rules, policies, and standards on its website, none purport to regulate what students may display in their rooms.²⁴ Further, if such a policy or its enforcement turned on the basis that others might find a display offensive, it would be a content-discriminatory restriction.

Even if Harvard could limit window displays, it *shouldn’t* do so. Students residing on campus have limited opportunities to engage in expressive displays. Outward displays, whether on the windows or doors of their rooms, are a traditional and commonplace form of expression on college campuses. It is one of the few avenues by which students can express themselves on matters of political, social, or personal concern. As our Supreme Court has recognized, signs “[o]ften placed . . . in windows . . . play an important part” in political expression and are a “venerable means of communication that is both unique and important.”²⁵ This will inevitably result in the display of some expression that others find unwelcome, disagreeable, or offensive. However, curtailing displays entirely would squelch student expression and frustrate students’ ability to contribute to a vibrant intellectual community.

III. Conclusion

We appreciate that the Harvard staff member’s email may have been intended as a request, not a directive. However, a student who receives such an email might reasonably interpret it as a directive. Indeed, the student here read it as an assertion that the display was not “allowed” at Harvard.

¹⁹ *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 388–392 (4th Cir. 1993)

²⁰ *Rodriguez v. Maricopa Cnty. Comm. Coll. Dist.*, 605 F.3d 703, 705 (9th Cir. 2009) (the First Amendment “embraces such a heated exchange of views,” especially when they “concern sensitive topics like race, where the risk of conflict and insult is high.”)

²¹ *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 661 (1st Cir. 1974).

²² *Papish*, supra note 18.

²³ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

²⁴ HARVARD UNIV., HOUSE RULES | MATHER HOUSE, <https://mather.harvard.edu/house-rules> (last visited Sept. 9, 2021).

²⁵ *City of Ladue v. Gilleo*, 512 U.S. 43, 54–55 (1994).

The flag displayed is allowed at Harvard because it is protected expression. Accordingly, FIRE calls on Harvard to clarify that students may display the flag, and other similarly expressive displays, in the windows of their residences.

We request receipt of a response to this letter no later than the close of business on Friday, September 24, 2021, confirming that Harvard will allow the students to continue displaying the flag without issue.

Sincerely,



Anne Marie Tamburro
Program Officer, Individual Rights Defense Program

Cc: L. Mahadevan, Faculty Dean
Amala Mahadevan, Faculty Dean
Chris Kuczynski, House Administrator