



# FIRE

Foundation for Individual  
Rights and Expression

February 21, 2023

Sylvia M. Burwell  
Office of the President  
American University  
4400 Massachusetts Avenue NW  
Washington, District of Columbia 20016

**URGENT**

*Sent via U.S. Mail and Electronic Mail (president@american.edu)*

Dear President Burwell:

FIRE<sup>1</sup> is concerned by reports that American University is investigating a student for writing “Black people suck” on a university library whiteboard.<sup>2</sup> We write—for the third time in less than a year—to again bring your attention to American’s binding commitment to free expression, which bars administrators from publicly announcing investigations into expression protected by its free speech promises.

American commits to “protecting free expression for all members of its community” and affirms that its “[p]rotections for free expression play an essential role in creating space for individuals to practice the ethos of inquiry, which is fundamental to the mission of a university.”<sup>3</sup> However, despite making this firm commitment, American publicly announced it would investigate the student’s message on the library whiteboard to determine “whether violations of the code of conduct occurred.”<sup>4</sup>

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<sup>1</sup> As you may remember from recent correspondence, the Foundation for Individual Rights and Expression is a nonpartisan nonprofit dedicated to defending freedom of speech, expression, and conscience, and other individual rights on campus and beyond. You can read more about our mission and activities at [thefire.org](https://thefire.org).

<sup>2</sup> The recitation of facts here reflects our understanding of the pertinent facts, which is based on public reporting. We appreciate that you may have additional information to offer and invite you to share it with us. Abigail Turner and Katie Mass, *Investigation found person potentially responsible for racist language written on Bender Library whiteboard*, EAGLE (Feb. 20, 2023), <https://www.theeagleonline.com/article/2023/02/investigation-found-person-potentially-responsible-for-racist-language-written-on-bender-library-whiteboard>.

<sup>3</sup> *Freedom of Expression and Expressive Conduct*, AM. UNIV. (rev. Aug. 29, 2022), <https://www.american.edu/policies/au-community/upload/university-policy-freedom-of-expression-and-expressive-conduct-final.pdf> [<https://perma.cc/9RUT-49H4>].

<sup>4</sup> Turner & Mass, *supra* note 2.

As we explained last year when American investigated a group of law students for expressing pro-choice views in a GroupMe chat, FIRE agrees that American may take appropriate action on any credible allegation of discriminatory harassment.<sup>5</sup> However, merely offensive expression, without more, fails to even approach the legal definition of discriminatory harassment.<sup>6</sup>

The Supreme Court has made clear that student expression may constitute actionable discriminatory harassment only where it is (1) unwelcome, (2) discriminatory on the basis of a protected status, and (3) “so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.”<sup>7</sup> By definition, this includes only extreme and typically repetitive behavior targeted at an individual based on a protected class—conduct so serious it would prevent a reasonable person from receiving his or her education. The U.S. Department of Education’s Office for Civil Rights has also explicitly said that campus harassment “must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.”<sup>8</sup>

A single message on a whiteboard that doesn’t appear targeted at anyone in particular falls far short of the required standard. Accordingly, publicly announcing an investigation of students when the allegations pertain to protected speech alone is not appropriate.

Nor can American justify its investigation by citing “conventions of decency.”<sup>9</sup> While the whiteboard message may be objectionable to most people, 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.<sup>10</sup> This is especially so at institutions of higher education, which by their very nature depend heavily on free exchange under the First Amendment,<sup>11</sup> which “embraces such a heated exchange of views” even if they “concern sensitive topics like race, where the risk of conflict and insult is high.”<sup>12</sup>

To be clear, even if formal punishment is never meted out, an investigation alone into protected speech can, itself, violate American’s strong commitment to free expression. The question is

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<sup>5</sup> FIRE Letter to American University, July 8, 2022, *available at* <https://www.thefire.org/research-learn/fire-letter-american-university-july-8-2022>.

<sup>6</sup> While American is a private institution not bound by the First Amendment, students will reasonably interpret the university’s commitment to freedom of expression to be in line with the First Amendment’s protections

<sup>7</sup> *Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629, 651 (1999).

<sup>8</sup> U.S. Dep’t of Educ., Dear Colleague Letter from Gerald A. Reynolds, Assistant Sec’y for Civil Rights (July 28, 2003), <https://www2.ed.gov/about/offices/list/ocr/firstamend.html>. [<https://perma.cc/84RK-NFXR>]

<sup>9</sup> *See Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

<sup>10</sup> *See 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”); *see also Cohen v. California*, 403 U.S. 15, 25 (1971).

<sup>11</sup> *See Papish*, 410 U.S. at 667–68 (1973).

<sup>12</sup> *Rodriguez v. Maricopa Cnty. Comm. Coll. Dist.*, 605 F.3d 703, 705 (9th Cir. 2009).

whether the institution's actions in response to protected expression "would chill or silence a person of ordinary firmness" from engaging in future protected expression.<sup>13</sup>

Here, American's student code of conduct includes significant sanctions—ranging from mandatory participation in educational programming or reflection papers to suspension or dismissal—each of which is sufficient to meet the ordinary firmness test because publicly announced investigations send the message that controversial speech is subject to severe punishment.<sup>14</sup> To avoid chilling student speech, American should instead have performed a preliminary review of the message and determined it did not rise to the exacting standard of discriminatory harassment, which by its definition must be not only targeted but also extreme and/or repetitive. It could then have chosen to employ its own expressive rights to criticize the message or to take no further action—without signaling to speakers in the campus community that speaking controversially may imperil them.

Unfortunately, the chilling effect of American's investigations into protected speech is not theoretical. Daniel Brezina, one of eight students investigated by American last year for criticizing the overturn of *Roe v. Wade* in a class group chat and upsetting a pro-life student, told FIRE the chilling effect worked almost instantly to silence him and many of his classmates, who no longer feel comfortable using that forum for discussions of any kind. In theory, American's commitment to free expression was "designed to avoid these ends by avoiding these beginnings," that is, it must avoid chilling speech by announcing investigations of expression that its commitments to free speech preclude punishing.<sup>15</sup>

At the time, Brezina said: "If American doesn't commit to changing the way it handles these investigations, other students will still have to fear being investigated for pure speech."<sup>16</sup> Unfortunately, his fears have been realized.

Whether a student expresses controversial opinions on a whiteboard or an online message board, American promises their speech will be protected. Accordingly, it cannot publicly investigate or punish students when they exercise their rights.

We request a substantive response by Tuesday, February 28, 2023, confirming American will cease its investigation of the student's message and recommit to protecting students' expressive rights.

Sincerely,



Sabrina Conza  
Program Officer, Campus Rights Advocacy

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<sup>13</sup> *Mendocino Env'tl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

<sup>14</sup> *Speech First, Inc. v. Fenves*, 979 F.3d 319, 332-334 (5th Cir. Oct. 28, 2020).

<sup>15</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641.

<sup>16</sup> Press Release, *VICTORY: 43 days later, American University finally ends investigation into pro-choice law student*, FIRE (July 8, 2022), <https://www.thefire.org/news/victory-43-days-later-american-university-finally-ends-investigation-pro-choice-law-student>.