FIRE
Foundation for Individual Rights in Education

August 6, 2020

Neal J. Smatresk
Office of the President
University of North Texas
1155 Union Circle, #311425
Denton, Texas 76203-5017

URGENT

Sent via Electronic Mail (president@unt.edu)

Dear President Smatresk:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

FIRE is concerned by the University of North Texas' ("UNT's") investigation into the *Journal of Schenkerian Studies* ("*Journal*" or "*JSS*"). This investigation follows demands that the university dissolve the *Journal* and dismiss Professor Timothy Jackson, a member of *JSS*'s advisory and editorial boards and founder of UNT's Center for Schenkerian Studies, in response to the *Journal*'s discussion of race issues within music theory scholarship. While some may find the viewpoints espoused by the *Journal* or Jackson, or the namesake of the *Journal* itself, to be deeply offensive, UNT has violated core principles of academic freedom—and the First Amendment—by initiating an investigation into the editorial practices and decisions of a journal produced by graduate students and faculty members.

I. UNT Announces Investigation into Academic Journal after Petition for Its Dissolution

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.

In November 2019, music theory scholar Philip Ewell delivered "Music Theory's White Racial Frame," the plenary address at the annual meeting of the Society for Music

Theory ("SMT").[1] The address used data to discuss that, despite efforts to diversify, the SMT specifically and the field of music theory generally continue to have a predominantly white membership and continue to focus predominantly on white musical examples.[2] The presentation also discussed racially-disparaging statements made by early music theorist Heinrich Schenker.[3]

As a response to Ewell's plenary address and its discussion of Schenker, *JSS* published a series of responses by various music theory scholars in its 2019 edition.[4] These responses represented varied levels of agreement with and dissent from Ewell's critiques of the field and of Schenker.[5] On July 27, an internal dispute between editorial staff of *JSS* became public after a graduate student editor of *JSS* alleged that the editorial staff was not in agreement about the publication of this series.[6]

On July 29, "a cross-section of graduate students" from UNT's Division of Music History, Theory, and Ethnomusicology (MHTE) wrote to John W. Richmond, Dean of UNT's College of Music, to express concerns both about the treatment of race issues in this series of responses to Ewell's address, and about Dr. Jackson individually.[7] This letter demands, among other things, that *JSS* be dissolved, that the issue be publicly condemned, and that Jackson be removed from UNT's faculty.[8]

A group of MHTE faculty members soon thereafter released a statement in support of the graduate students' letter to Richmond, declaring the 2019 edition of *JSS* to be "replete with racial stereotyping and tropes."[9] The faculty statement urges that "[r]esponsible parties must be held accountable."[10]

Following the graduate student letter and the faculty statement, Richmond publicly announced "a formal investigation" into *JSS* on July 31.[11] This announcement also

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[1] Philip Ewell, *Ewell-SMT-Plenary*, VIMEO (NOV. 12, 2019), https://vimeo.com/372726003.
[2] Philip Ewell, *Music Theory's White Racial Frame*, http://philipewell.com/wp-content/uploads/2019/11/SMT-Plenary-Slides.pdf (last visited Aug. 3, 2020).
[3] *Id.*
[4] *Symposium on Philip Ewell's SMT 2019 Plenary Paper, "Music Theory's White Racial Frame"*, 12 J. OF SCHENKERIAN STUDIES 125 (2019), *available at* https://drive.google.com/file/d/1dTOWwlIsuiwsgAa4f1N99AlvG3-ngnmG/view.
[5] *Id.*
[6] Levi Walls, FACEBOOK (July 27, 2020, 11:09 PM), https://www.facebook.com/levi.walls.77/posts/3395982897100075.
[7] Letter from MHTE graduate students to Dean Richmond (July 29, 2020) (on file with author).
[8] *Id.*
[9] Statement of MHTE faculty in support of MHTE graduate students' letter (on file with author).
[10] *Id.*
[11] E-mail from Dean Richmond to Music Faculty (July 31, 2020, 9:35 AM) (on file with author); UNIV. OF N. TEX. COLL. OF MUSIC, *Schenkerian Journal Statement*, https://music.unt.edu/schenkerian-journal-statement (last visited Aug. 4, 2020).

"reaffirm[ed] [MHTE's] dedication to combatting racism on campus" and asserted a commitment to the "highest standards" of "academic freedom, and academic responsibility."[12]

II. The First Amendment Bars UNT from Penalizing Scholarly Writing Others Find Offensive

While the content of *JSS*'s series of responses to Ewell's SMT address may be deeply offensive to some readers, it does not fall into any exception to the expressive rights shielded by the First Amendment and academic freedom. It is well-established that the First Amendment does not make a categorical exception for expression that some may find hateful, and equally well-established that it constrains public universities in penalizing students for exercising their right to free expression and faculty members for exercising their right to academic freedom.

A. UNT is Bound by the First Amendment's Protection of Academic Freedom

It has long been settled law that the First Amendment is binding on public colleges like UNT. *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 Supreme Court of the United States has made clear that academic freedom is a "special concern of the First Amendment," explaining that "[o]ur nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). As the Court remarked in *Sweezey v. New Hampshire*, 354 U.S. 234, 250 (1957):

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

[12] *Id.*

The exercise of academic freedom by *JSS* and its graduate student and faculty editors, which is guaranteed by the First Amendment, is a type of protected expressive activity and cannot lawfully be investigated or punished.

B. The First Amendment Protects Faculty Scholarship, Teaching, and Publishing

Numerous courts have recognized that the First Amendment's protection of freedom of speech is closely intertwined with academic freedom. Academic freedom restricts public university administrators from infringing the right to speak in the classroom and in scholarship because universities "occupy a special niche in our constitutional tradition," *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003), and "academic freedom" is an area "in which government should be extremely reticent to tread." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

While, generally, a public employer may discipline employees for statements made "pursuant to their official duties," this concept applies with less force with respect to faculty members. *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2008). In *Garcetti*, the Supreme Court expressly reserved the question of whether faculty expression "related to academic scholarship or classroom instruction" could be restricted, even if the speech were pursuant the faculty member's job duties. *Id.* at 425. Such expression, the *Garcetti* Court observed, may not be subject to the same employer oversight as job-related speech by other public employees because faculty expression may "implicate[] additional constitutional interests . . . not fully accounted for by this Court's customary employee-speech jurisprudence." *Id.* Lower courts have subsequently recognized the Court's reservation in *Garcetti* and held that "*Garcetti* does not apply to 'speech related to scholarship or teaching.'" *Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014); *see also Adams v. Trs. of the Univ. of N. Carolina-Wilmington*, 640 F.3d 550, 564 (4th Cir. 2011).

Similarly, in the harassment context, the United States Court of Appeals for the Ninth Circuit explained that faculty members' expression of offensive viewpoints remains protected expression. *Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 710 (9th Cir. 2009). In this discussion, the Ninth Circuit was particularly concerned that limitations on faculty members' expression would cast a chilling effect on higher education, which has "historically fostered" the exchange of views. *Id.* at 708.

The First Amendment also includes the right to publish, which, in the academic context, is inextricably tied to the right to academic freedom. The freedom of academic publications and their editors to publish and to maintain editorial independence remains, regardless of whose pocketbook subsidizes the publication. This is particularly true at a public institution like UNT, where public expenditures cannot be separated from constitutional obligations. As the Supreme Court stated in *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974):

> The choice of material to go into a [publication], and the decisions made as to limitations on the size and content of the paper, and

> treatment of public issues and public official — whether fair or unfair — constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

In *Mississippi Gay Alliance v. Goudelock*, the United States Court of Appeals for the Fifth Circuit—the decisions of which are fully binding on UNT—applied this principle to reiterate that university officials may not impede the editorial independence of a campus publication, regardless of its financial relationship with the university. 536 F.2d 1073, 1075 (5th Cir. 1976). While *Mississippi Gay Alliance* took place within the context of student media publications, the same tenets are easily applied to scholarly publications edited by both graduate students and faculty.

As succinctly stated by a federal district court in *Antonelli v. Hammond*, 308 F. Supp. 1329, 1337 (D. Mass. 1970), and later cited in full by the Fifth Circuit,[13]

> We are well beyond the belief that any manner of state regulation is permissible simply because it involves an activity which is a part of the university structure and is financed with funds controlled by the administration. The state is not necessarily the unrestrained master of what it creates and fosters.

In fact, the freedom to publish is not only protected by the First Amendment, but also by UNT's own policy, which defines academic freedom as "the right of members of the academy to study, discuss, investigate, teach, conduct research and/or creative activity, and **publish**, perform, and/or display their scholarship freely[.]"[14] UNT's policy follows the American Association of University Professors' 1940 statement on academic freedom, which provides that faculty "are entitled to full freedom in research **and in the publication** of the results."[15]

UNT has no jurisdiction to determine whether the content of the latest issue of *JSS* was fit for publication, as that decision is the sole province of the faculty and graduate student editors who produce the *Journal*. To the extent that any editors, including Jackson, acted inappropriately according to *JSS*'s editorial structure and internal policies, this represents an

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[13] *Bazaar v. Fortune*, 476 F.2d 570, 574-75 (1973) (citing *Antonelli*, rejecting university attempt to limit distribution of student magazine with offending content, despite the magazine being subsidized by the English department); *see also Schiff v. Williams*, 519 F.2d 257, 261 (1975) (citing *Antonelli* favorably and finding that, absent special circumstances, school could not exercise control over a sponsored publication it believed to be of poor quality).

[14] *Academic Freedom and Academic Responsibility*, UNIVERSITY OF NORTH TEXAS, https://policy.unt.edu/sites/default/files/06.035_AcademicFreedomAndAcademicResponsibility_2014.pdf (last visited Aug. 4, 2020) (emphasis added).

[15] *1940 Statement of Principles on Academic Freedom and Tenure,* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure (last visited Aug. 4, 2020) (emphasis added).

internal dispute, the resolution of which must be left to the editorial board of the *Journal* within its rights of editorial independence. UNT may not, within the bounds of its First Amendment obligations, penalize faculty or the *Journal* itself because of disagreement with the editorial and peer review process followed by the *Journal*. Nor may it penalize faculty or graduate student editors or the *Journal* because some or many found *JSS*'s content offensive. Both the First Amendment and institutional policy restrain UNT's actions.

C. The First Amendment Protects Offensive Expression, Making No Exception for Expression Others View as Hateful

The content of the latest issue of *JSS* proved offensive to many who read it. However, even beyond concerns about academic freedom, the First Amendment generally protects offensive expression, as whether speech is protected by the First Amendment is "a legal, not moral, analysis." *Animal Legal Def. Fund v. Reynolds,* 353 F. Supp. 3d 812, 821 (S.D. Iowa 2019).

The Supreme Court has repeatedly, consistently, and clearly held that expression may not be restricted merely because some or even many find it to be offensive, hateful, or disrespectful. This core First Amendment principle is why the authorities cannot prohibit the burning of the American flag,[16] prohibit the wearing of a jacket emblazoned with the words "Fuck the Draft,"[17] penalize cartoons depicting a pastor losing his virginity to his mother in an outhouse,[18] or disperse civil rights marchers out of fear that "muttering" and "grumbling" white onlookers might resort to violence.[19]

In ruling that the First Amendment did not allow the government to punish signs outside of fallen soldiers' funerals (including signs that read "Thank God for Dead Soldiers," "Thank God for IEDs," "Fags Doom Nations"), 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."[20]

This principle was reiterated by the Court most recently in *Matal v. Tam*, in which the Court refused to establish a limitation on speech viewed as "hateful" or demeaning "on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground." 137 S. Ct. 1744, 1764 (2017).[21] This principle does not wane in the context of public universities, whether the speech is a "sophomoric and offensive" skit depicting women and minorities in derogatory

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[16] *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag was protected by the First Amendment, the "bedrock principle underlying" it being that government actors "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").
[17] *Cohen v. California*, 403 U.S. 15, 25 (1971).
[18] *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).
[19] *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).
[20] *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).
[21] See also *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down an ordinance that prohibited placing on any property symbols that "arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender").

stereotypes or, as here, a "heated exchange of views" on race[22] in an academic journal.[23] To the contrary, "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

D. Investigations into Clearly-Protected Expression Violate the First Amendment

An investigation of constitutionally-protected speech can itself violate the First Amendment, even if no formal punishment is ultimately imposed. When "an official's act would chill or silence a person of ordinary firmness from future First Amendment activities," that act violates the First Amendment. *Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999). The Supreme Court has noted that government investigations "are capable of encroaching upon the constitutional liberties of individuals" and have an "inhibiting effect in the flow of democratic expression." *Sweezy*, 354 U.S. at 245–48. Similarly, the Court later observed that when issued by a public institution like UNT, "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" risks violating the First Amendment. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).

Accordingly, government investigations into protected expression violate the First Amendment.[24] For example, a public university launched an investigation into a tenured faculty member's offensive writings on race and intelligence. The university announced an *ad hoc* committee would review whether the professor's expression—which the university leadership said "ha[d] no place at" the college—constituted "conduct unbecoming of a member of the faculty." *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992). The United States Court of Appeals for the Second Circuit upheld the district court's finding that the investigation itself constituted an implicit threat of discipline and that the resulting chilling effect constituted a cognizable First Amendment harm. *Id.* at 89–90.

The content of *JSS* at issue here is protected by the First Amendment. That fact does not shield the individual authors or editors from every consequence of the expression—including criticism by students, faculty, the broader community, or the university itself. Criticism is a form of "more speech"—the remedy to offensive expression that First Amendment prefers to censorship.[25] This principle also does not shield editors from internal sanctions brought forward by the publication's editorial board itself. However, the First Amendment limits the *types* of consequences that may be imposed and *by whom*. Here, the university may not permissibly investigate the content of *JSS*, an academic journal that should be extended full editorial independence. It also may not act to penalize the *Journal* or its student or faculty

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[22] *See, e.g., Rodriguez*, 605 F.3d at 705 (faculty member's use of system-wide listserv to send "racially-charged emails" was not unlawful, as 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.").
[23] *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 388–392 (4th Cir. 1993).
[24] *See, e.g., White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000).
[25] *Whitney v. California*, 274 U.S. 357, 377 (1927).

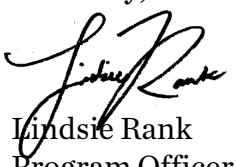
editors, whether by answering graduate students' demand for UNT to investigate or dissolve *JSS* or their demand for UNT to investigate or dismiss Jackson.

III. Conclusion

In times of great social and political upheaval, governmental and educational institutions face substantial pressure to foreclose on expression protected by the First Amendment. This, however, is when institutions must be most vigilant in refusing to do so. Penalizing protected expression is not a cure for addressing the underlying challenges faced by society, and abandoning a robust defense of freedom of expression will erode rights across political, social, and ideological spectrums.

Given the urgent nature of this matter, we request receipt of a response to this letter no later than the close of business on Thursday, August 13, 2020, confirming that UNT will not pursue an investigation, disciplinary sanctions, or dissolution of *JSS* in this matter.

Sincerely,



Lindsie Rank
Program Officer, Individual Rights Defense Program

Cc: John W. Richmond, Dean, UNT College of Music