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November 25, 2008

VIA ELECTRONIC AND U.S. MAIL

President Erskine B. Bowles
The University of North Carolina
910 Raleigh Road
P.O. Box 2688
Chapel Hill, North Carolina 27515-2688

Re: Post-Election Racist Statements Written in Free Expression Tunnel at NC State

Dear President Bowles,

I write today at the request of some North Carolina State University students, who have sought the assistance of ACLU of North Carolina Legal Foundation (ACLU-NCLF) regarding the consideration of the implementation of University speech codes. These codes have been proposed by some NC State students, as well as by one of our coalition partners, the North Carolina Conference of the NAACP (NAACP NC), in response to racist graffiti found in NC State's "free expression tunnel" on the morning after the 2008 Presidential election. I have spoken at length with Reverend Dr. William J. Barber, II and Mr. Al McSurely of NAACP NC. I have conveyed to Reverend Barber and Mr. McSurely that while we at the ACLU-NCLF share their strong concerns about current race relations on the campus of NC State, we disagree with the need for – or the constitutionality of – a proposed speech code in response to the incident at issue. Further, we disagree with their conclusion that the speech at issue is not protected by the First Amendment.

It is our understanding that the statements found in the free expression tunnel on the morning of November 5, 2008 included "Hang Obama by a Noose" and "Let's shoot that ni-er in the head." Further, it is our understanding that Ku Klux Klan symbols were also found. Finally, it is our understanding that many African-American students were very frightened by the writings and were afraid to wear buttons supporting President-elect Obama to school on the day after Election Day, for fear that the statements were meant as a rallying cry for violence against African-American students.

The statements found on the wall are offensive, reprehensible and evidence a complete lack of respect for the history of racial violence against African-Americans in North Carolina and around the country. Further, we do not doubt the authenticity of the fears expressed by African-American students in response to the statements. However, the First Amendment to the United States Constitution protects speech no matter how offensive its content, so long as it does not fall into very narrow exceptions. As a court long ago explained in the infamous Skokie case, "it is better to allow those who preach racial hate to expend their venom in rhetoric rather than to be panicked into embarking on the dangerous course of permitting the government to decide what its citizens may say and hear." *Collin v. Smith*, 447 F. Supp. 676, 702 (1978).

One exception to the general rule protecting speech pertains to “true threats.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388, 112 S.Ct. 2538, 120 L.Ed.2d 305 (“[T]hreats of violence are outside the First Amendment”); *Watts v. United States*, 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (*per curiam*); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 774, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994); *Schenck v. Pro-Choice Network of Western N. Y.*, 519 U.S. 357, 373, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997). In *Virginia v. Black*, the United States Supreme Court considered the “true threats” exception in the context of a Virginia statute outlawing cross burning with the intent to intimidate any person or group of persons. *Virginia v. Black*, 538 U.S. 343, 348, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003). The Court held that a State can regulate activities such as cross burning if “the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Id.* at 359. Thus, the Court held that Virginia could outlaw cross burnings done with the intent to intimidate without running afoul of the First Amendment or previous court decisions. *Id.* at 362-63 (distinguishing *R.A.V. v. City of St. Paul*).

We have considered whether the statements made in the free expression tunnel fall within the “true threats” exception. After careful review of the case law and consideration of the facts as we know them, we conclude that these statements do not fall under this exception. The Court in *Virginia v. Black* explained that “[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. *Virginia v. Black*, 538 U.S. at 360. The Supreme Court made clear that the intent of the speaker is key. *Id.* at 364-65.

While we do not doubt that some students felt fearful of bodily harm in response to hearing about the statements, it does not appear from the facts as we understand them that the students who made the statements did so with the intent of placing other students in fear of bodily harm or death. Under *Virginia v. Black*, it appears that the statements themselves can be the only evidence of intent. *Virginia v. Black*, 538 U.S. at 364-65 (declaring unconstitutional the provision of the Virginia ordinance which provided that the burning of a cross itself was sufficient evidence of requisite intent).

Further, the statements all appeared to be directed at President-elect Obama, and not at other students. And although a statement about wanting to kill the President-elect will almost certainly earn a person a visit from the Secret Service, even such statements are protected speech unless they constitute “true threats.” See *Watts v. United States*, 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (*per curiam*) (reversing conviction and holding that statement of individual that he would refuse induction into armed forces and “if they ever make me carry a rifle the first man I want in my sights is L.B.J.” did not amount to a threat against the life of the President of the United States). Finally, the statements appeared in an area of campus traditionally reserved for unfettered speech, typically on political issues. Accordingly, even though the statements were racist and deeply offensive, we do not believe that they rise to the level of unprotected speech.


With regard to any proposed “hate speech code,” the ACLU-NCLF believes that speech codes adopted by state colleges and universities amount to government censorship in violation of the Constitution. Further, where racist speech is concerned, more speech – not less – is the best cure. We believe that this is particularly true at universities, whose mission is to facilitate learning through open debate and study, and to enlighten.

As has already been evidenced by student response to the statements, when hate is out in the open, people can see the problem. They can then organize effectively to counter bad attitudes, possibly change them, and forge solidarity against the forces of intolerance. Further, while college administrators may find speech codes attractive as a quick fix, as one critic so aptly noted: "Verbal purity is not social change." We believe that codes that punish bigoted speech treat only the symptom. The problem itself is bigotry.

The ACLU-NCLF believes that instead of opting for gestures that only *appear* to cure the disease, NC State and other North Carolina state colleges and universities need to do the hard work in combatting racism on campus, especially in light of the racially-charged events that have occurred at NC State in the recent past. As such, the ACLU-NCLF would join the NAACP NC in any request for the following: (1) recruitment to increase faculty and student diversity; (2) counseling to raise awareness about bigotry and its history; (3) changing curricula to institutionalize more inclusive approaches to all subject matters; and (4) diversity classes and other opportunities for students to meet and engage in full and frank discussion about diversity issues.

Thank you in advance for your consideration of this matter. Please contact me at (919) 834-3466 with any questions or concerns.

Sincerely,



Katherine Lewis Parker
Legal Director

cc: Chancellor Jame L. Oblinger, North Carolina State University
Mary Elizabeth Kurz, Vice Chancellor and General Counsel, North Carolina State University
David T. Drooz, Senior Associate General Counsel, North Carolina State University
Laura Bernstein Luger, Vice President and General Counsel, The University of North Carolina
Reverend Dr. William J. Barber, II, President, NAACP NC
Alan McSurely, General Counsel, NAACP NC