



September 10, 2019

President Michael D. Johnson
Office of the President
John Carroll University
1 John Carroll Boulevard
University Heights, Ohio 44118

URGENT

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

Dear President Johnson:

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 for the state of freedom of expression at John Carroll University in the wake of the university's cancellation of an annual drag show, which is sponsored by the JCU Student Union Programming Board (SUPB) and LGBTQA+ Allies Club. The administration's unilateral cancellation of the student-organized event is contrary to the promises JCU makes to protect its students' freedom of expression.

I. JCU's Administration Unilaterally Cancels a Long-Running, Student-Organized Drag Show

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. However, if the facts here are substantially accurate, the cancellation of the drag show is inconsistent with the university's commitments to its students' freedom of expression.

LGBTQA+ Allies (or "Allies") is a recognized student organization at JCU.¹ For at least a decade, Allies has organized an annual drag show at JCU, open to any JCU students who wish

¹ JOHN CARROLL UNIV., STUDENT ORGANIZATIONS, <https://jcu.edu/student-life/getting-involved/student-organizations> (last visited Sept. 6, 2019).

to attend, in order to “learn a little about drag performing and the LGBT community[.]”² According to the programming board’s president, the drag show is “one of our more popular events,” drawing about 250 people per year.³

The annual event has also drawn controversy. In 2009, JCU’s administration postponed the show due to its “controversial nature,” despite the event having been “well received” in preceding years.⁴ And last year, the drag show was criticized by a student columnist writing in *The Carroll News*, the student newspaper, as “the deviant entertainment of misguided young people,”⁵ leading to an administrative investigation into the author of the column.⁶

In a meeting on August 28, 2019, you announced to student leaders the unilateral cancellation of the event.⁷ During the meeting, you reportedly cited “conversations with seminarians, Jesuits, and the Catholic Bishop of Cleveland.”⁸

In response to media inquiries, a JCU spokesperson reportedly attributed the cancellation to concerns about “divisiveness” on campus.⁹ The university issued a statement averring that its administration was “working with our students on new and more extensive programming that will promote the expression, appreciation and understanding of the many identities represented at” JCU.¹⁰

II. JCU’s Cancellation of the Drag Show Is Inconsistent with its Commitments to its Students’ Freedom of Expression

John Carroll is a private institution, and the First Amendment does not compel it to grant students’ freedom of expression. Nevertheless, it has made public commitments promising John Carroll students free expression. In cancelling a student-organized expressive event because of its content or “divisive” nature, JCU departed from those commitments.

² John Carroll Univ., *Drag Show Tonight*, Oct. 3, 2013, <https://inside.jcu.edu/2013/10/03/drag-show-tonight>.

³ Suzanne Stratford, *Mixed reactions across campus after John Carroll University cancels drag show*, WJW, Sept. 4, 2019, <https://fox8.com/2019/09/04/mixed-reactions-across-campus-after-john-carroll-university-cancels-drag-show>.

⁴ Jenny Friedman, *Dragged Away*, CARROLL NEWS, March 19, 2009, <http://www.jcunews.com/2009/03/19/dragged-away>.

⁵ Declan Leary, *Drag queens and Jesuits*, CARROLL NEWS, Oct. 1, 2018, <https://medium.com/the-carroll-news/drag-queens-and-jesuits-aa961ad9652a>.

⁶ Maria Lencki, *Student at Catholic college called into Title IX meeting after he criticized drag show*, COLLEGE FIX, Oct. 25, 2018, <https://www.thecollegefix.com/student-at-catholic-college-called-into-title-ix-meeting-after-he-criticized-lgbtq-drag-show>.

⁷ Lauren Phillip, *Bring Back the JCU Drag Show*, <https://www.thepetitionsite.com/157/909/184/bring-back-the-jcu-drag-show> (last visited Sept. 9, 2019).

⁸ *Id.*

⁹ Emily Bamforth, *John Carroll University cancels annual drag show after controversy*, CLEVELAND.COM, Sept. 5, 2019, <https://www.cleveland.com/news/2019/09/john-carroll-university-cancels-annual-drag-show-after-controversy.html>.

¹⁰ Stratford, *supra* note 3.

A. *JCU makes institutional commitments to students' freedom of expression.*

John Carroll University has made repeated and clear commitments that its students and faculty members enjoy expressive freedoms as members of the JCU community. For example, John Carroll's Code of Conduct states plainly that "[a]mong the central values of the University are the inherent dignities of every individual as well as the right of each person to hold and to express one's viewpoint."¹¹ Although JCU is a Jesuit institution, its mission and statement of core values expressly commit the university to respect the freedom of students and faculty to engage in the expression of views contrary to the Catholic Church, welcoming "the perspectives and participation in our mission of . . . students . . . of all faiths and no faiths."¹² In other words, while it is a Catholic institution, JCU "as a university community . . . welcomes other approaches and expects and honors the right to question" core Catholic values, and commits itself to allowing "every member of the community [to feel] that she or he can pursue her or his dream, ask her or his deepest questions, and fulfill her or his professional and spiritual ambitions."¹³

JCU's commitment to freedom of expression is also critical to its accreditation by the Higher Learning Commission of the North Central Association of Colleges and Schools, the standards of which require that accredited institutions be "committed to freedom of expression and the pursuit of truth in teaching and learning."¹⁴

B. *JCU is legally and morally bound to uphold its commitments to freedom of expression.*

It is eminently reasonable for students to rely on a private institution's promises when they choose to enroll, and we think you will agree that it is important for institutions to keep the commitments they make.

These commitments represent not only a moral obligation, but a legal duty: Private colleges, including those with a religious background, are legally bound to uphold their promises of freedom of expression. *See, e.g., McAdams v. Marquette Univ.*, 2018 WI 88, ¶84 (2018) (private Catholic university breached its contract with a professor over a personal blog post because, by virtue of its adoption of the 1940 AAUP Statement of Principles on Academic Freedom, the blog post was "a contractually-disqualified basis for discipline"). This is true even where the

¹¹ JOHN CARROLL UNIV., *Community Standards Manual* (2019–2020), https://jcu.edu/sites/default/files/2019-08/Community_Standards_Manual_2019-2020.pdf.

¹² JOHN CARROLL UNIV., MISSION, VISION, AND CORE VALUES, <https://jcu.edu/about-us/values-and-jesuit-tradition/mission-vision-and-core-values> (last visited Sept. 9, 2019).

¹³ JOHN CARROLL UNIV., JOHN CARROLL UNIVERSITY CATHOLICITY STATEMENT, <http://webmedia.jcu.edu/mission/files/2011/05/JCUCatholicandJesuitStatement.pdf> (last visited Sept. 9, 2019).

¹⁴ HIGHER LEARNING COMM'N, CRITERIA FOR ACCREDITATION (rev. June 2014), *available at* <https://www.hlcommission.org/Policies/criteria-and-core-components.html>.

Jesuit principles of the university, or its administrators' concerns about disruption, are proffered to justify restrictions on student organizations.

For example, a New York court recently ruled unlawful Fordham University's refusal to recognize a chapter of Students for Justice in Palestine, which the Jesuit university's administration feared would be "polarizing." *Awad v. Fordham Univ.*, 2019 NY Slip Op 32353(U), ¶ 16 (Sup. Ct.). That "political positions that might be controversial or unpopular with a segment of the university community" is not a valid basis to restrict student expression, as such a restriction is inconsistent with the Jesuit university's mission statement guaranteeing freedom of inquiry. *Id.* Importantly, the court explained that "consideration of whether a group's message may be polarizing is contrary to the notion that universities should be centers of discussion of contested issues." *Id.*

C. *In unilaterally cancelling the student-organized drag show, JCU violated the expressive rights it guarantees to its students.*

We understand that drag shows have generated public controversy, including at JCU,¹⁵ and that some members of John Carroll's community may find such shows to be offensive. However, the likelihood that others may find expression offensive is not a defensible basis to limit student expression. In limiting a student-organized expressive event on the basis that others find its content or viewpoints offensive, JCU impermissibly violated the expressive rights it guarantees to its students.

i. *Holding and performing in a drag show is expressive conduct.*

Both the act of wearing drag and performing in a drag show qualify as expressive conduct encompassed and protected by freedom of expression.

Freedom of expression "does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989).¹⁶ To the contrary, conduct "intend[ed] to convey a particularized message" likely to "be understood by those who viewed it" is expressive conduct, and while authorities may enforce content-neutral regulations that may incidentally impact expressive conduct, they cannot restrict the expressive conduct "*because* it has expressive elements." *Id.* at 404, 406. So, too, is conduct which falls within a traditionally-protected genre—such as music, paintings, and parades—expressive conduct, even if it does not convey a "narrow, succinctly articulable message." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group* 515 U.S. 557, 569 (1995). This is what protects the act of saluting a flag (or refusing to do so) (*West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 633–34 (1943)), wearing black armbands to protest war (*Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 505–06 (1969)),

¹⁵ Olivia Shackleton, *Drag queens and Jesuits*, THE CARROLL NEWS (Oct. 1, 2018), <https://medium.com/the-carroll-news/drag-queens-and-jesuits-aa961ad9652a>.

¹⁶ Again, while JCU is not bound by the First Amendment, the Supreme Court's interpretation of the First Amendment's guarantee of "freedom of speech" provides a useful baseline for understanding what students would reasonably expect from an institution that promises those freedoms.

raising a “seditious” red flag (*Stromberg v. California*, 283 U.S. 359, 369 (1931)), burning an American flag (*Johnson*, 491 U.S. at 414), picketing or leafletting (*U.S. v. Grace*, 461 U.S. 171, 176 (1983)), and participating in a sit-in (*Brown v. Louisiana*, 383 U.S. 131, 383 (1966)).

Freedom of expression also protects students’ sartorial choices when those choices are intended to convey a message, particularly when the message is of political or social import. In fact, the Supreme Court’s seminal case addressing student expressive rights, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969), turned entirely on student expression through clothing. In *Tinker*, the Supreme Court held that high school students wearing black armbands protesting the Vietnam War was protected expression. *Id.* Similarly, a federal appellate court overturned on First Amendment grounds a university’s sanctions on a fraternity for conducting an “ugly woman contest” with “racist and sexist” overtones, holding that fraternity members who dressed in drag as “ugly” women and performed a skit intended to convey a message—both through their mode of dress *and* by performing in a theatrical skit. *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 389-90, 392 (4th Cir. 1993). That court noted that “some forms of entertainment are so inherently expressive as to fall within” the scope of freedom of expression “regardless of their quality,” as “[e]ven crude street skits come within the First Amendment’s reach.” *Id.* at 390. If freedom of expression protects a right to engage in expressive conduct intended to demean others, it undoubtedly embraces a right to engage in expression intended to *express their own views* on sexuality and gender.

ii. Expression does not lose protection because it is subjectively offensive.

The principle of freedom of speech does not exist to protect only non-controversial expression. Rather, it exists precisely to protect speech that some or even most members of a community may find controversial or offensive.

The Supreme Court has repeatedly and consistently held that speech cannot be restricted simply because it offends others, on or off campus. *See, e.g., Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973) (“[T]he 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.’”). The freedom to offend some listeners is the same freedom to move or excite others. As the Court observed in holding that burning the American flag was protected expression, the “bedrock principle underlying the First Amendment” is the notion that authorities “may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989). And in *Cohen v. California* (holding that wearing a jacket reading “Fuck the Draft” was protected expression), the Court aptly observed that although “the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive” expression, that people will encounter offensive expression is “in truth [a] necessary side effect[] of the broader enduring values which the process of open debate permits us to achieve.” 403 U.S. 15, 24–25 (1971).

In short, student expression, including student-organized events, cannot be restricted by a university administration on the basis that its message is contrary to the values of the institution or other members of its community. The values to which the institution commits itself include freedom of expression, which cannot be subordinated to the administration's views on whether expression is appropriate.

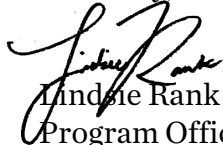
III. JCU Must Rescind Its Prohibition on the Student-Organized Drag Show

John Carroll University presents itself publicly as being committed to free expression, but it regulates student events based on their expressive content. If students' freedom of expression rises or falls based on whether that expression is acceptable to other members of the community, they have no such freedom at all, and the institution's commitments have no meaning.

John Carroll must rectify this inconsistency by publicly recommitting to freedom of expression and rescinding any prohibition on the student-organized drag show. We understand this event was scheduled to take place imminently, so John Carroll must work to reverse course as soon as possible.

We respectfully request receipt of a response to these questions by the close of business on September 16, 2019.

Sincerely,



Lindsey Rank

Program Officer, Individual Rights Defense Program

Cc:

Steven Herbert, Provost & Academic Vice President

Mark D. McCarthy, Vice President for Student Affairs