



September 22, 2020

Kent Syverud
Office of the Chancellor
Syracuse University
Crouse-Hinds Hall, Suite 600
900 South Crouse Avenue
Syracuse, New York 13244-2130

Sent via Electronic Mail (chancellor@syr.edu)

Dear Chancellor Syverud:

FIRE's¹ concern for the state of expressive rights at Syracuse University remains unabated, and we again have cause for concern in light of the university's punishment of Professor Jon Zubieta over a comment in his course syllabus. This action cannot be reconciled with the public commitments Syracuse has made purporting to protect the expressive rights of its faculty members.

I. Syracuse Places Professor Zubieta on Administrative Leave for Reference to 'Wuhan Flu or Chinese Communist Party Virus' on His Course Syllabus

Our understanding of the pertinent facts follows. We appreciate that you may have additional information to offer and invite you to share it with us. Please find enclosed an executed waiver authorizing you to share information with FIRE.

For thirty years, Jon Zubieta has served as a Professor of Chemistry at Syracuse University.

On August 25, 2020, Zubieta's fall 2020 CHE 411/611 Inorganic Chemistry course syllabus, which lists "Wuhan Flu or Chinese Communist Party Virus" under a section titled "Special

¹ As you will recall from past correspondence, 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.

Notice Related to the COVID-19 Pandemic,” began circulating online.² The section detailed university rules on student conduct in light of the COVID-19 pandemic.³

That same day, Dean of the College of Arts and Sciences Karin Ruhlandt and Interim Vice Chancellor and Provost John Liu issued a joint statement condemning the “derogatory language” as “damaging to the learning environment for our students and offensive to Chinese, international and Asian-Americans everywhere who have experienced hate speech, rhetoric and actions since the pandemic began.”⁴ The statement shared that Zubieta had been “placed on administrative leave from teaching and removed from the classroom” pending an investigation “according to procedures set forth in the Faculty Manual.”

Also on this date, Zubieta received a letter from Associate Provost for Faculty Affairs and Professor of Law LaVonda Reed alleging that Zubieta “engaged in behavior that violates the expectations set forth in the Faculty Manual, Section 4.1-Inappropriate Conduct by a Faculty Member,” and “that may otherwise counter expectations set forth in the University’s Non-Discrimination and Equal Opportunity Policy Statement and the University Code of Ethical Conduct by creating a hostile environment based on national origin.”⁵

II. Syracuse May Not Punish Zubieta for Syllabus Content

As a university that has made numerous, clear, and public commitments to uphold the expressive rights of its faculty, Syracuse may not punish Zubieta for his characterization of COVID-19 in his syllabus.

A. *Syracuse promises faculty members academic freedom and other expressive rights.*

While Syracuse is a private institution and thus not legally bound by the First Amendment, it nevertheless promises its faculty members broad academic freedom and free speech rights. Examples of these commitments have been exhaustively documented in our past correspondence. For the sake of brevity, we recount only some of these commitments here.

² Adrianna San Marco, *Syracuse University Places Professor On Leave After Writing ‘Wuhan Flu’ On Syllabus*, THE FEDERALIST (Aug. 25, 2020), <https://thefederalist.com/2020/08/25/syracuse-university-places-professor-on-leave-after-writing-wuhan-flu-on-syllabus>.

³ The offending phrase consisted of seven words within the eight-page, 2,546-word syllabus, the entirety of which consisted of class information. Zubieta, *SYLLABUS, CHE 411/611 Inorganic Chemistry* (Fall 2020), (on file with author).

⁴ Karin Ruhlandt and John Liu, *Joint Statement from Karin Ruhlandt, Dean of the College of Arts and Sciences, and John Liu, Interim Vice Chancellor and Provost*, SYRACUSE UNIV. NEWS (Aug. 25, 2020), https://news.syr.edu/blog/2020/08/25/joint-statement-from-karin-ruhlandt-dean-of-the-college-of-arts-and-sciences-and-john-liu-interim-vice-chancellor-and-provost/#utm_source=twitter&utm_medium=social-flagship.

⁵ Letter from LaVonda Reed, Associate Provost for Faculty Affairs and Professor of Law LaVonda Reed, to Zubieta (Aug. 25, 2020) (on file with author).

For example, under Faculty Manual Section 4.1 titled “Inappropriate Conduct by Faculty Members”—the same provision Reed accused Zubieta of violating—Syracuse states:

Syracuse University strongly supports and protects the principle of academic freedom. All members of the University community have a right to use the academic forum provided by the University to discuss controversial subjects and to express ideas with which some or most of the members of the community strongly disagree.⁶

Likewise, Syracuse incorporates the American Association of University Professors’ (AAUP) 1940 Statement of Principles on Academic Freedom and Tenure into its Faculty Manual, and explains that a commitment to academic freedom means refraining from the impulse to “discourage what is ‘controversial[,]’” because “[c]ontroversy is at the heart of the free academic inquiry” fostered by the university’s commitment to academic freedom.

These foundational commitments are not only a moral obligation to the professors of Syracuse but are also important to the university’s accreditation. As a former commissioner of the Middle States Commission on Higher Education,⁷ you are no doubt aware that Syracuse’s continued accreditation by this commission requires the university to “possess[]s and demonstrate[] . . . a commitment to academic freedom, intellectual freedom, [and] freedom of expression.”⁸ According to Middle States, Syracuse’s commitment to upholding these values is a matter of institutional “Ethics and Integrity” that is a “central, indispensable, and defining hallmark[] of effective higher education institutions,” adding that “in all activities, whether internal or external, an institution must be faithful to its mission, honor its contracts and commitments, adhere to its policies, and represent itself truthfully.”⁹

In addition to serving a central role in its accreditation, Syracuse’s promises to uphold faculty expressive rights form a contractual obligation on the part of the university, as private colleges like Syracuse are legally bound to uphold promises concerning freedom of expression and inquiry. For example, a New York court recently ruled against a private university that refused to recognize a chapter of Students for Justice in Palestine, which the administration feared would be “polarizing.”¹⁰ The court held that the possibility that advocacy “might be controversial or unpopular with a segment of the university community” is not a valid basis to restrict expressive rights, as such a restriction is inconsistent with the university’s mission

⁶ *Faculty Manual*, *supra* note 4.

⁷ *Commissioners Complete Service for Middle States Commission on Higher Education*, MIDDLE STATES COMMISSION ON HIGHER EDUCATION (Jan. 14, 2020), <https://www.msche.org/2020/01/14/commissioners-complete-service-for-middle-states-commission-on-higher-education-2>.

⁸ MIDDLE STATES COMM’N ON HIGHER EDUC., STANDARDS FOR ACCREDITATION AND REQUIREMENTS OF AFFILIATION 5 (13th ed. 2015), *available at* <http://msche.org/publications/RevisedStandardsFINAL.pdf>.

⁹ *Id.*

¹⁰ *Awad v. Fordham Univ.*, 2019 NY Slip Op 32353(U), ¶ 16 (Sup. Ct.).

statement guaranteeing freedom of inquiry.¹¹ Similarly, in *McAdams v. Marquette University*,¹² the Wisconsin Supreme Court held that Marquette, a private Catholic university, violated its contractual relationship—governed by the very same AAUP standards that Syracuse has adopted—with a faculty member when it disciplined him for a blog post others found demeaning to a graduate student at the university.¹³

B. Zubieta’s expression is protected under First Amendment standards.

In applying Syracuse’s promises, the Supreme Court’s longstanding interpretations of freedom of speech provides a useful baseline for understanding the expressive rights faculty members would reasonably expect from an institution that purports to grant them expressive rights. Under these principles, Zubieta’s characterization of COVID-19 is protected expression and may not form the basis of university discipline.

i. Zubieta’s syllabus is an academic forum where he is free to discuss controversial subjects

Under the policies mutually agreed upon by Syracuse and its faculty, professors have “the right to use the academic forum provided by the University to discuss controversial subjects and to express ideas with which some or most of the members of the community strongly disagree.”¹⁴ In recognition of faculty syllabi as a quintessential academic forum, Syracuse affords its professors wide latitude as to the content of their syllabi.¹⁵

Here, Zubieta’s syllabus is an academic forum where he is explicitly granted the right to—at the very minimum—*raise* controversial issues. The entirety of Zubieta’s misconduct consists of no more than seven words in the otherwise unobjectionable eight-page, 2,546-word document—a phrase that neither interfered with nor disrupted class time. Under Syracuse policy, Zubieta has the right to use this academic forum to at least *comment* on the exceedingly-significant public issue of COVID-19. That this comment elicited a negative reaction from some in the Syracuse community provides no basis for abrogating this right.

ii. Expressive rights may not be curtailed on the basis that others find words, images, or other material subjectively offensive

Although others may have found Zubieta’s characterization of COVID-19 offensive, the Supreme Court has repeatedly, consistently, and clearly held that expression may not be

¹¹ *Id*

¹² *McAdams v. Marquette Univ.*, 914 N.W.2d 708, 730-31 (Wis. 2018).

¹³ *Id.* at 730.

¹⁴ *Faculty Manual*, *supra* note 4.

¹⁵ Although Syracuse requires faculty to include a few notices their syllabi, there are no specific university rules regarding syllabi content. *See* SYRACUSE UNIV., OFFICE OF THE PROVOST, *Important Syllabus Reminders* (last accessed Sept. 17, 2020), <https://provost.syr.edu/important-syllabus-reminders> (describing mandatory notices and recommendations to include in course syllabi).

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 a satirical advertisement 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 freedom of expression protected offensive signs outside of fallen soldiers’ funerals (“Thank God for Dead Soldiers,” “Thank God for IEDs,” and “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 does not waver in the context of public universities, whether the speech is a “sophomoric and offensive” skit depicting women and minorities in derogatory stereotypes or, as in this case, a “heated exchange of views” on race²¹—including such debates in an academic journal.²² 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.’”²³

iii. Zubieta’s expression does not constitute discriminatory harassment

Syracuse may not justify disciplining of Zubieta on the basis that his expression constitutes discriminatory harassment because his expression does not rise to the exacting legal standard for this narrow category of unprotected conduct.

In *Davis v. Monroe County Board of Education*, the Supreme Court set forth a strict definition of harassment in the educational context.²⁴ In order for conduct (including expression) to constitute actionable harassment, it must be (1) unwelcome, (2) discriminatory on the basis of gender or another protected status, and (3) “so severe, pervasive, and objectively offensive

¹⁶ *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (holding that burning the American flag is 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”).

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, e.g., *Rodriguez v. Maricopa County Community College District*, 605 F.3d 703, 705 (9th Cir. 2009) (finding 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”).

²² *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 388–392 (4th Cir. 1993).

²³ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

²⁴ 526 U.S. 629 (1999),

that it can be said to deprive the victim[] of access to the educational opportunities or benefits provided by the school.”²⁵

In a July 28, 2003, “Dear Colleague” letter sent to college and university presidents nationwide, Assistant Secretary Gerald A. Reynolds of the Office for Civil Rights (OCR) of the U.S. Department of Education made clear that harassment “must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.”²⁶ On April 29, 2014, Assistant Secretary Catherine E. Lhamon issued guidance again clarifying that “the laws and regulations [OCR] enforces protect students from prohibited discrimination and do not restrict the exercise of any expressive activities or speech protected under the U.S. Constitution,” and stating that “when a school works to prevent and redress discrimination, it must respect the free-speech rights of students, faculty, and other speakers.”²⁷

This standard is partially recognized by Syracuse’s harassment policy, which excludes expression protected by free speech and academic freedom standards and requires that the expression “effectively prevent[] equal access to University programs.”²⁸

Here, the only evidence Syracuse puts forth to justify its disciplinary actions is that Zubieta’s syllabus contained allegedly “derogatory language” that is “offensive to Chinese, international and Asian-Americans everywhere.”²⁹ The offending phrase was not directed at any particular student, nor did it purport to establish any policy or procedures regarding classroom rules or etiquette. Under *Davis*, subjectively offensive expression, without more, does not rise to the level of discriminatory harassment and thus remains protected by the First Amendment standards. Indeed, the alleged misconduct here is precisely the mere “expression of views, words, symbols or thoughts that some person finds offensive” that OCR has expressly stated is not sufficient to constitute discriminatory harassment.³⁰

²⁵ *Id.* at 650.

²⁶ 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>.

²⁷ U.S. Dep’t of Educ., Questions and Answers on Title IX and Sexual Violence 43–44 (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

²⁸ *Anti-Harassment Policy*, SYRACUSE UNIV. (Dec. 13, 2016), <https://policies.syr.edu/policies/free-speech/anti-harassment-policy>.

²⁹ Karin Ruhlandt and John Liu, *supra* note 4.

³⁰ Dear Colleague Letter, *supra* note 26.

III. Syracuse Must Reinstate Zubieta and End Its Disciplinary Investigation

In 2017, your office received calls demanding that Syracuse punish Professor of Communications Dana Cloud over her tweet encouraging violence against fascists.³¹ In response, you steadfastly refused to punish Cloud for her controversial expression, stating:

They insist that the University—and that I—denounce, censor, or dismiss the professor for her speech. . . . Free speech is and will remain one of our key values. I can’t imagine academic freedom or the genuine search for truth thriving here without free speech. Our faculty must be able to say and write things—including things that provoke some or make other uncomfortable—up to the very limits of the law.³²

This was, and is, a laudable defense of the rights of faculty at Syracuse University. Doing so in the face of great public pressure to punish the professor served as a prominent example of how university leadership can support faculty when confronted with demands for institutional discipline as a result of protected expression.³³

FIRE calls upon Syracuse to once again exhibit that principled leadership. We urge Syracuse to protect its faculty members’ expression “up to the very limits of the law” by reinstating Zubieta and ending its disciplinary investigation.

We request receipt of a response to this letter no later than the close of business on September 30, 2020.

Sincerely,



³¹ Julie McMahon, *Syracuse University chancellor defends prof after tweet sets off right-wing backlash*, THE POST-STANDARD (updated Jan. 4, 2019), https://www.syracuse.com/su-news/2017/06/syracuse_university_chancellor_defends_prof_after_tweet_sets_off_right-wing_back.html; Colleen Flaherty, *Old Criticisms, New Threats*, INSIDE HIGHER ED (June 26, 2017), <https://www.insidehighered.com/news/2017/06/26/professors-are-often-political-lightning-rods-now-are-facing-new-threats-over-their>; Cloud’s Tweeted: “We almost have the fascists in on the run. Syracuse people come down to the federal building to finish them off.” Dana Cloud (@danaleecloud), TWITTER (June 10, 2017, 12:30 PM), <https://twitter.com/danaleecloud/status/873578029636866048>.

³² McMahon, *supra* note 31; Flaherty, *supra* note 31; Jonathan Zimmerman, *Stand Up to the Campus Bullies*, INSIDE HIGHER ED (Feb. 19, 2018), <https://www.insidehighered.com/views/2018/02/19/we-must-defend-free-speech-professors-who-are-verbally-attacked-class-opinion>.

³³ *E.g.*, Joan Wallach Scott, *Targeted Harassment of Faculty: What Higher Education Administrators Can Do*, AAUP (Spring 2018), <https://www.aacu.org/liberaleducation/2018/spring/scott>.

Zachary Greenberg
Program Officer, Individual Rights Defense Program
Syracuse University College of Law, Class of 2016

Cc: LaVonda Reed, Associate Provost for Faculty Affairs and Professor of Law
Matthew Cleary, Chair, University Senate Committee on Academic Freedom, Tenure,
and Professional Ethics

Encl.

Authorization and Waiver for Release of Personal Information

I, Jon Zubieta, do hereby authorize Syracuse University (the "Institution") to release to the Foundation for Individual Rights in Education ("FIRE") any and all information concerning my employment, status, or relationship with the Institution. This authorization and waiver extends to the release of any personnel files, investigative records, disciplinary history, or other records that would otherwise be protected by privacy rights of any source, including those arising from contract, statute, or regulation. I also authorize the Institution to engage FIRE and its staff members in a full discussion of all information pertaining to my employment and performance, and, in so doing, to disclose to FIRE all relevant information and documentation.

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights in Education, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

If the Institution is located in the State of California, I request access to and a copy of all documents defined as my "personnel records" under Cal. Ed. Code § 87031 or Cal. Lab. Code § 1198.5, including without limitation: (1) a complete copy of any files kept in my name in any and all Institution or District offices; (2) any emails, notes, memoranda, video, audio, or other material maintained by any school employee in which I am personally identifiable; and (3) any and all phone, medical or other records in which I am personally identifiable.

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights in Education, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

I also hereby consent that FIRE may disclose information obtained as a result of this authorization and waiver, but only the information that I authorize.

DocuSigned by:

Jon Zubieta

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Signature

9/21/2020

Date