



June 28, 2021

Members of the Board of Trustees  
c/o Chair Henry L. Kitchin, Jr.  
University of North Carolina Wilmington  
601 S. College Road  
Wilmington, North Carolina 28403

*Sent via Express Mail and Electronic Mail (hkitchin@mcquirewoods.com)*

Dear Members of the Board of Trustees:

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 appreciates that the University of North Carolina Wilmington (UNCW) is one of the few institutions in the country whose policies earn a "green light" rating from FIRE. However, we write today out of concern over the request by at least one UNCW trustee that the university's administration conduct an "investigation" into Dan Johnson, an associate professor at UNCW's School of Health and Applied Human Sciences.<sup>1</sup> This investigation has been urged, as trustee Woody White publicly commented, in order to alleviate "reasonable concern for public safety" arising from a post on Johnson's personal Facebook page, which read: "Blow up Republicans." Trustee White has also, in public comments, rightly called for "one standard" for expressive rights, irrespective of ideological persuasion.

The First Amendment *is* that standard, and it firmly protects Johnson's extramural speech—as the university's administration correctly concluded.<sup>2</sup> Faculty members at public universities retain the First Amendment right to speak as private citizens on matters of public concern,<sup>3</sup> even if that speech is inflammatory, hyperbolic, or provocative.<sup>4</sup> The Facebook post

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<sup>1</sup> See, e.g., Adam Sabes, *EXCLUSIVE: Update: UNCW trustee emails chancellor calling for investigation into 'Blow up Republicans' FB post after reading 'Campus Reform' story*, CAMPUS REFORM, June 25, 2021, <https://campusreform.org/article?id=17713>. The facts asserted here are drawn from this article.

<sup>2</sup> Phil Shiver, *University professor posted 'Blow up Republicans' on Facebook, will keep his job*, THE BLAZE, June 25, 2021, <https://www.theblaze.com/news/university-professor-posts-blow-up-republicans>.

<sup>3</sup> *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 564 (4th Cir. 2011).

<sup>4</sup> *Rankin v. McPherson*, 483 U.S. 378, 381 (1987) (police department employee's remark after hearing that President Reagan had been shot—"if they go for him again, I hope they get him"—was protected speech, as the "inappropriate or controversial character" of a remark is "irrelevant" to whether it addresses matters of public concern).

here is undoubtedly speech as a private citizen<sup>5</sup> conveying a negative view about a political party.

Charged political expression often contains or is comprised of rhetoric that uses verbiage synonymous with violence—without intending to advocate for literal violence. Some speech *does* promote violence, yet remains protected because the “language of the political arena . . . is often vituperative, abusive, and inexact.”<sup>6</sup> Consider, for example, the exhortation by Thomas Jefferson—a principal author of what ultimately became the First Amendment<sup>7</sup>—that revolution and violence were necessary implements of freedom, as the “tree of liberty must be refreshed from time to time with the blood of patriots and tyrants.”<sup>8</sup> Accordingly, “extreme care” must be taken to ensure that “highly charged political rhetoric lying at the core” of freedom of expression is not interpreted as unprotected “true threats” or “incitement.”<sup>9</sup>

Instead of being a threat or incitement to violence, Johnson’s post is likely a hyperbolic assertion that the Republican Party as an institution should be defeated or destroyed. Yet even assuming the post was construed to advocate for literal violence, it falls far short of the standards for unprotected “true threats” or “incitement.” The post is not a “true threat” because it is not a “serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals,”<sup>10</sup> as it instead encourages *others* to take unspecified action. Nor is it incitement, as it is not “directed to inciting or producing *imminent* lawless action and . . . likely to incite or produce such action.”<sup>11</sup> Nobody is going to read a three-word Facebook post and immediately detonate an explosive.

Because the post is speech protected by the First Amendment, UNCW would abandon its constitutional obligations—and cast an impermissible chilling effect—if it took any action that would likely deter a “person of ordinary firmness” from continuing to exercise their First Amendment rights.<sup>12</sup> Initiating an investigation, requiring sensitivity training, or taking other retaliatory steps—including those short of termination—risks violating the First Amendment.

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<sup>5</sup> See, e.g., *Higbee v. E. Mich. Univ.*, No. 18-13761, 2019 U.S. Dist. LEXIS 109394, at \*14 (E.D. Mich. July 1, 2019) (commenting on Facebook about the university’s response to racial incidents “would not appear to be within a history professor’s official duties”).

<sup>6</sup> *Watts v. United States*, 394 U.S. 705, 708 (1969) (Vietnam War draftee’s statement that “[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” was hyperbole, not a true threat.)

<sup>7</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 11 (1947).

<sup>8</sup> Letter from Thomas Jefferson to William Stephens Smith, Nov. 13, 1787, available at <https://founders.archives.gov/documents/Jefferson/01-12-02-0348>. See also, e.g., the license plate and state motto of New Hampshire, pledging that residents will “live free or die” in defense of liberty. *Wooley v. Maynard*, 430 U.S. 705, 722 (1977).

<sup>9</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926–27 (1982).

<sup>10</sup> *Virginia v. Black*, 538 U.S. 343, 359 (2003).

<sup>11</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (emphasis added).

<sup>12</sup> *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005).

The First Amendment applies across the ideological spectrum, and FIRE is often called upon to defend faculty members on the right and the left against retaliation by their institutions.<sup>13</sup> Urging universities to weaken those standards—or to continue to embrace responses that foster a chilling effect on protected expression—will serve only to undermine the expressive rights of all members of the UNCW community.

Trustee White also rightly urges that, when it comes to freedom of expression, “[w]hen we have the chance to move the needle toward one standard, we should do so.” Thus, if his call for an investigation is but a performative gesture intended to highlight censorship faced by conservatives in academia, and not a sincere complaint about community safety, it is regrettably unserious and unhelpful: it is not likely to be understood as such, but instead as a sincere effort to initiate an investigation.<sup>14</sup> Indeed, his statement has since been interpreted as a demand for retaliatory action—a call that has now been joined by a member of Congress who claims (falsely) the Facebook post is “criminal”<sup>15</sup> and questions whether the university should be “employing a man who wants to murder 74 million Americans because he disagrees with them.”<sup>16</sup> In this regard, regardless of whether White’s demand is merely performative, it has no meaningful difference from a sincere effort at censorship. As author Kurt Vonnegut once eloquently put it, “[w]e are what we pretend to be, so we must be careful about what we pretend to be.”<sup>17</sup>

Accordingly, we urge UNCW’s trustees to move the “needle toward one standard” by rejecting calls for investigations and calling on the institution you govern to adhere to its obligations under the First Amendment.

Sincerely,



Adam Steinbaugh  
Director, Individual Rights Defense Program

Cc: John Scherer, General Counsel

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<sup>13</sup> See, e.g., Samantha Harris, *On Free Speech, Double Standards, and Professor Mike Adams*, FIRE, Dec. 2, 2016, <https://www.thefire.org/on-free-speech-double-standards-and-professor-mike-adams> (highlighting the “critical importance of consistency” in defending freedom of expression); Adam Steinbaugh, *Collin College cracks down on COVID critics and union organizers, dismissing two professors and warning a third*, FIRE, Feb. 4, 2021, <https://www.thefire.org/collin-college-cracks-down-on-covid-critics-and-union-organizers-dismissing-two-professors-and-warning-a-third> (defending faculty members over union organizing, criticism of Vice President Pence).

<sup>14</sup> Notably, the *Campus Reform* report on your email interpreted—and conveyed—it as sincere.

<sup>15</sup> Rep. Madison Cawthorn (@CawthornforNC), TWITTER (June 26, 2021, 5:35 PM), <https://twitter.com/CawthornforNC/status/1408901872363130881>.

<sup>16</sup> Rep. Madison Cawthorn (@RepCawthorn), TWITTER (June 26, 2021, 5:47 PM), <https://twitter.com/RepCawthorn/status/1408904734254186496>.

<sup>17</sup> KURT VONNEGUT, *MOTHER NIGHT* (1966).