



September 29, 2021

Carlos C. Johnson  
Senior Vice President/University Counsel  
Singleton Building 110  
103 Tom Trout Drive  
Conway, South Carolina 29528-0654

**URGENT**

*Sent via Electronic Mail (carlosj@coastal.edu)*

Dear Senior Vice 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.

We write today to share our concerns with the suspension of Professor Dr. Steven Robert Earnest by Coastal Carolina University as a result of his criticism of student protesters. CCU's suspension of Earnest is contrary to its obligations under the First Amendment, which protects the rights of faculty members at public universities to comment on matters of public concern, even if their views are offensive to others. We call on CCU to immediately rescind Earnest's suspension and discontinue any investigation that may be ongoing into the matter.

**I. Coastal Carolina University Suspends Earnest Over an Email Criticizing a Student Protest**

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. Please find enclosed a waiver authorizing Coastal Carolina University (CCU) to share information with us.

On Thursday, September 16, 2021, a group of students at Coastal Carolina found names of several non-white students written on a board in a theatre classroom.<sup>1</sup> The names had been written on the board while Artist-in-Resident Susan Finque was "working with two Black students" after an earlier class had ended, discussing "their frustration and isolation." During

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<sup>1</sup> Donovan Harris, *CCU students refuse to go to class after professor's 'racially insensitive comment,'* WCIV (Sept. 20, 2021), <https://abcnews4.com/news/local/curtain-call-for-professor-ccu-students-refuse-to-go-to-class-after-racially-insensitive>.

this discussion, “[o]ne of the students jumped up and started writing names” of other students of color on the board. Students who thereafter entered the room for the next class interpreted the list of names on the board as singling out non-white students.<sup>2</sup> This prompted several students to hold a protest in a campus courtyard on Monday, September 21, in lieu of attending class.<sup>3</sup>

The incident prompted the Department of Theatre’s Diversity, Equity and Inclusion (DEI) Committee to discuss the matter with the faculty and students involved.<sup>4</sup> The DEI Committee determined the names on the board were “theatre students that identify with the BIPOC community,” presented “as a resource for newer students who are looking to be in community with other BIPOC students.”<sup>5</sup> The DEI Committee nonetheless said its determination “in no way undermines the feelings that any of you feel about this incident,” and that the “faculty and students involved as well as the Theatre Department as a whole are deeply sorry to anyone who was affected by this incident.”<sup>6</sup>

Dr. Earnest, a CCU Theatre professor, did not agree. He responded to the DEI Committee’s email, stating: “Sorry but I dont think its a big deal. Im just sad people get their feelings hurt so easily. And they are going into Theatre?”<sup>7</sup>

Earnest received responses criticizing his remark. One student wrote:

Grow up. Full offense. There are people actively trying to make this department better, I don’t get why your’e resisting that. If you didn’t like/understand the email then you could have spoken to someone privately. But isntead of doing that and trying to learn you decided to chalk it all up to sensitivity. Read a book. Talk to people. Gain some perspective. You’re far too old to be behaving this way. Also please do not respond to this email because I do not care. I repeat, **I do not care.**<sup>8</sup>

In a follow-up email, Earnest wrote: “Thanks for all of your hate mails! Deleting this chain. I still know nothing about it but just defending our guest artist. I appreciate all of your attacks. Learned alot tonight.”<sup>9</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Email from The Department of Theatre DEI Committee to Theatre Faculty and Theatre student major listservs (Sept. 17, 2021 5:05 p.m.) (on file with author).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Email from Robert Earnest to Theatre Faculty and Theatre student major listserv (Sept. 18, 2021, 9:46 p.m.) (on file with author) (errors in original).

<sup>8</sup> E-mail from student to Earnest, et al., Sept. 18, 2021, 10:10 PM (on file with author) (emphasis and errors in original).

<sup>9</sup> Email from Robert Earnest to Theatre Faculty and Theatre student major listserv (Sept. 18, 2021, 10:34 p.m.) (on file with author) (error in original).

Students critical of Earnest's emails accused him of being racially insensitive and dismissive of students of color.<sup>10</sup> Several students have also called for Earnest to be fired and are protesting by boycotting theatre classes.<sup>11</sup>

Claudia Bornholdt, the Dean of the College of Humanities and Fine Arts, told Earnest in an email on September 20 not to come to his classes and to send her his syllabus.<sup>12</sup>

## **II. The First Amendment Protects Earnest's Remark**

While the First Amendment does not shield Earnest from criticism, it does limit the actions a public university may take in response to faculty members' speech on matters of public concern. CCU's suspension of Earnest due to two emails criticizing students' protests transgresses those constitutional limits.

### **A. *The First Amendment Applies to CCU as a Public University***

It has long been settled law that the First Amendment is binding on public universities like CCU.<sup>13</sup> Accordingly, the decisions and actions of a public university—including pursuit of disciplinary sanctions,<sup>14</sup> recognition and funding of student organizations,<sup>15</sup> interactions with student journalists,<sup>16</sup> conduct of police officers,<sup>17</sup> and maintenance of policies implicating student and faculty expression<sup>18</sup>—must be consistent with the First Amendment.

### **B. *The First Amendment protects the rights of faculty members to comment on matters of public and campus concern***

Faculty members at public universities do not “relinquish First Amendment rights to comment on matters of public interest by virtue of government employment.”<sup>19</sup> Instead, the

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<sup>10</sup> Manny Martinez, *Students boycott classes; want 'racially insensitive' professor removed*, WSAV (Sept. 22, 2021), <https://www.wsav.com/news/local-news/south-carolina-news/students-boycott-classes-want-racially-insensitive-professor-removed>.

<sup>11</sup> Emma Colton, *South Carolina teacher criticizes 'hurt feelings' of non-white students, they demand his removal*, FOX NEWS, Sept. 22, 2021 <https://www.foxnews.com/us/coastal-carolina-university-professor-racially-insensitive-removed-protest>

<sup>12</sup> Email from Claudia Bornholdt to Dr. Robert Earnest (Sept. 20, 3:30 p.m.) (on file with author)

<sup>13</sup> *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).

<sup>14</sup> *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

<sup>15</sup> *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000).

<sup>16</sup> *Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995).

<sup>17</sup> *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011).

<sup>18</sup> *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

<sup>19</sup> *Connick v. Myers*, 461 U.S. 138, 140 (1983).

First Amendment and CCU's adoption of the AAUP's 1940 Statement of Principles on Academic Freedom<sup>20</sup> protect faculty members' expression on matters of public concern.

*i. Speech about the protest addresses a matter of public concern.*

The students' protest is a matter of public concern, which encompasses those which "can be fairly considered as relating to any matter of political, social, or other concern to the community[.]"<sup>21</sup> This protest yielded attention in the media<sup>22</sup> and on social media.<sup>23</sup> The act of protest itself is indicia that the underlying matter is one of student concern: protests are designed to draw public attention to a perceived wrong. Here, that protest centers on questions about diversity and inclusion at CCU, and questions about "race, gender, and power conflicts in our society" are "matters of overwhelmingly public concern."<sup>24</sup> The university, too, treated the matter as one of public concern, devoting the resources of a committee to investigate the concerns and share its results with the community.

That other members of the community find the viewpoint offered "inappropriate or controversial" does not alter this analysis, as its "controversial character . . . is irrelevant to the question of whether it deals with a matter of public concern."<sup>25</sup>

*ii. Earnest's emails are extramural expression.*

Earnest's emails matters of community concern represent his own views as a citizen and member of the academic community, not as an employee. The "critical question" in determining whether the speech was that of an employee or private citizen is "whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."<sup>26</sup> As one court explained in holding that a professor's online remarks critical of his institution were protected by the First Amendment, "[u]sing a public forum to comment on the University's response to recent racial incidents would not appear to be within a history professor's official duties."<sup>27</sup>

Earnest's speech is also protected by the university's adoption of the 1940 Statement of Principles on Academic Freedom, which protects extramural expression—that is, as distinguished from speech within the classroom, speech addressed to "the larger community with regard to any matter of social, political, economic, or other interest[.]" Earnest's speech,

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<sup>20</sup> COASTAL CAROLINA UNIV., FACULTY MANUAL 2021 – 2022 § 5.2.1 (effective Aug. 16, 2021), *available at* [https://www.coastal.edu/media/2015ccuwebsite/contentassets/images/documents/facultysenate/facultymanuals/2021-2022\\_Faculty\\_Manual.pdf](https://www.coastal.edu/media/2015ccuwebsite/contentassets/images/documents/facultysenate/facultymanuals/2021-2022_Faculty_Manual.pdf).

<sup>21</sup> *Snyder v. Phelps*, 562 U.S. 443, 453 (2011).

<sup>22</sup> *See, e.g.*, Josh Marcus, *Students go on strike after names of Black students found written on board*, THE INDEPENDENT (Sept. 21, 2021), <https://www.independent.co.uk/news/world/americas/students-strike-carolina-names-whiteboard-b1924296.html>.

<sup>23</sup> *See, e.g.*, Black Musicals, Theater & Arts, FACEBOOK (Sept. 22, 2021, 1:15 AM), <https://www.facebook.com/groups/2347621675497389/posts/2972135799712637>.

<sup>24</sup> *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 679 (6th Cir. 2001).

<sup>25</sup> *Rankin v. McPherson*, 483 U.S. 378, 384 (1987).

<sup>26</sup> *Lane v. Franks*, 573 U.S. 228, 240 (2014).

<sup>27</sup> *Higbee v. E. Michigan Univ.*, 399 F. Supp. 3d 694, 702 (E.D. Mich. 2019), *case dismissed*, No. 19-1751, 2019 WL 5079254 (6th Cir. Aug. 7, 2019).

directed at the campus community, is extramural expression as a citizen.<sup>28</sup> Accordingly, it is protected under both the First Amendment and the obligations undertaken by the university by virtue of its adoption of the 1940 Statement.<sup>29</sup>

iii. *That others found Earnest's emails uncivil does not diminish the emails' protection under the First Amendment.*

That the speech is offensive to others does not alone provide CCU with a defensible basis to restrict or penalize that speech: The Supreme Court has repeatedly, consistently, and clearly held that expression may not be restricted on the basis that others find it to be offensive. This core First Amendment principle is why authorities cannot outlaw burning the American flag,<sup>30</sup> punish the wearing of a jacket emblazoned with the words “Fuck the Draft,”<sup>31</sup> penalize cartoons depicting a pastor losing his virginity to his mother in an outhouse,<sup>32</sup> or disperse civil rights marchers out of fear that “muttering” and “grumbling” white onlookers might lead to violence.<sup>33</sup> In ruling that the First Amendment protects protesters holding insulting signs outside of soldiers’ funerals, 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.”<sup>34</sup>

These principles’ potency is not diluted in the higher education context, where 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[.]”<sup>35</sup> Take, for example, a student newspaper’s front-page uses of a vulgar headline (“Motherfucker Acquitted”) and a “political cartoon . . . depicting policemen raping the Statue of Liberty and the Goddess of Justice.”<sup>36</sup> These words and images—published at the height of the Vietnam War—were no

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<sup>28</sup> Extramural expression is not a “literal distinction” between “speech outside or inside the university’s walls,” but instead is “shorthand for speech in the public sphere and not in one’s area of academic expertise[.]” AAUP, ACADEMIC FREEDOM AND ELECTRONIC COMMUNICATIONS 52 (adopted Nov. 2013), *available at* <https://bit.ly/3zDNLOp>. Faculty speech directed at the campus community has long been seen as extramural expression protected under both academic freedom as conceptualized by the 1940 Statement and by the First Amendment. *See, e.g., Adamian v. Jacobson*, 523 F.2d 929, 934 (9th Cir. 1975) (professor’s on-campus protests were extramural expression under the 1940 Statement, which was “intended to assure a professor his full measure of [F]irst [A]mendment rights”). Even if extramural expression were so narrowly limited, academic freedom also protects the rights of faculty to express themselves on matters of institutional concern. *See, e.g., AAUP Committee A Report, Protecting an Independent Faculty Voice: Academic Freedom after Garcetti v. Ceballos* (2009), *available at* <https://bit.ly/3i6sas4>. The right of faculty to criticize protesters’ criticisms of the university is the same right that allows faculty to join their cause.

<sup>29</sup> *See, e.g., McAdams v. Marquette Univ.*, 2018 WI 88, ¶84 (2018) (university breached its contract with a professor over a personal blog post criticizing a graduate student because, by virtue of its adoption of the 1940 Statement, the blog post was “a contractually disqualified basis for discipline”).

<sup>30</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag was 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”).

<sup>31</sup> *Cohen v. California*, 403 U.S. 15, 25 (1971).

<sup>32</sup> *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

<sup>33</sup> *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

<sup>34</sup> *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).

<sup>35</sup> *Rodriguez v. Maricopa Cnty. Comm. Coll. Dist.*, 605 F.3d 703, 705 (9th Cir. 2009).

<sup>36</sup> *Papish*, 410 U.S. at 667–68.

doubt deeply offensive to many at a time of deep polarization and unrest. So, too, were “offensive and sophomoric” skits depicting women and minorities in derogatory stereotypes,<sup>37</sup> “racially-charged emails” to a college listserv,<sup>38</sup> and student organizations that the public viewed as “shocking and offensive.”<sup>39</sup> Yet, “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.’”<sup>40</sup>

While public institutions of higher education might understandably prefer civility, “the desire to maintain a sedate academic environment does not justify limitations on [faculty members’] freedom to express [themselves] on political issues in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms.”<sup>41</sup> This is because higher education is committed to unfettered debate, where “conflict is not unknown” in light of the “inherent autonomy of tenured professors and the academic freedom they enjoy,”<sup>42</sup> and where “dissent is expected and, accordingly, so is at least some disharmony.”<sup>43</sup> Controversy and the sharp exchange of views is a function, not a disruption, of universities and colleges. The mere fact that expression “caused discussion *outside* of the classrooms,” but not “interference with work” or “disorder,” is insufficient to override First Amendment rights.<sup>44</sup> The “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint” is equally insufficient.<sup>45</sup>

### C. *Earnest’s Removal from Classes Violates the First Amendment*

The First Amendment prohibits state actors, including CCU, from actions which “would chill or silence a person of ordinary firmness from future First Amendment activities[.]”<sup>46</sup> As a result, adverse actions in response to protected expression may violate the First Amendment even when those actions fall short of formal discipline.

Of course, a suspension from teaching amounts to an adverse action against a faculty member. So, too, would investigation into protected expression likely deter a faculty member from continuing to engage in protected speech, even if no discipline is ultimately meted out.<sup>47</sup> Indeed, the AAUP has traditionally regarded suspensions as a “severe sanction second only to

<sup>37</sup> *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 388–392 (4th Cir. 1993).

<sup>38</sup> *Rodriguez*, 605 F.3d at 705.

<sup>39</sup> *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 661 (1st Cir. 1974).

<sup>40</sup> *Papish*, 410 U.S. at 670.

<sup>41</sup> *Rodriguez v. Maricopa Cnty. Comm. Coll. Dist.*, 605 F.3d 703, 709 (9th Cir. 2009) (cleaned up).

<sup>42</sup> *Hulen v. Yates*, 322 F.3d 1229, 1239 (10th Cir. 2003).

<sup>43</sup> *Higbee v. E. Michigan Univ.*, 399 F. Supp. 3d 694, 704 (E.D. Mich., 2019). This remains true even where the remarks are intemperate, forceful, or provocative. *Smith v. Coll. of the Mainland*, 63 F.Supp.3d 712, 718 (S.D. Tex., Oct. 30, 2014) (“Indeed, divisiveness among faculty members is so ubiquitous that it spawned the saying that ‘academic politics is the most vicious and bitter form of politics, because the stakes are so low.’”).

<sup>44</sup> *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 514 (1969) (emphasis added).

<sup>45</sup> *Pred v. Bd. of Pub. Instruction*, 415 F.2d 851, 858 (5th Cir. 1969).

<sup>46</sup> *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

<sup>47</sup> See, e.g., *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992); *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000).

dismissal,” as it “inflicts ignominy upon the teacher and is destructive to the morale of the academic community.”<sup>48</sup>

### III. Conclusion

Earnest’s emails were construed as offensive by some who read them. But speech protected by the First Amendment “is often provocative and challenging,”<sup>49</sup> and includes the right to engage in “not only informed and responsible criticism,” but also speech that others may perceive as spoken “foolishly and without moderation.”<sup>50</sup> So, too, does it protect others who responded to Earnest in kind: Criticism is a form of “more speech,” the remedy to offensive expression that the First Amendment prefers to censorship.<sup>51</sup> However, the First Amendment limits the *types* of consequences that may be imposed and who may impose them.

CCU has chosen a course denied to it by the First Amendment. We call upon CCU to abandon its current path. Given the urgent nature of this matter, we request receipt of a response to this letter no later than the close of business on Friday, October 1, 2021.

Sincerely,



Adam Steinbaugh  
Director, Individual Rights Defense Program

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<sup>48</sup> AAUP COMMITTEE A ON ACADEMIC FREEDOM AND TENURE, *The Use and Abuse of Faculty Suspensions* (Aug. 2008), <https://www.aaup.org/report/use-and-abuse-faculty-suspensions>.

<sup>49</sup> *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

<sup>50</sup> *Baumgartner v. United States*, 322 U.S. 665, 674 (1944).

<sup>51</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927).