FIRE
Foundation for Individual Rights and Expression

April 13, 2023

Romeo Agbalog
President, Board of Trustees
Kern Community College District
2100 Chester Avenue
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URGENT

Sent via U.S. Mail and Electronic Mail (romeo.agbalog@kccd.edu)

Dear President Agbalog:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,[1] is deeply concerned by the recommended termination of Professor Matthew Garrett from Bakersfield College for comments he made at a diversity committee meeting last fall. As Garrett's criticism of a proposed racial justice task force does not fall within a category of speech unprotected by the First Amendment, the Kern Community College District cannot legitimately—or constitutionally—investigate or punish him for his expression.

I. Garrett Charged with Unprofessional Conduct for Remarks at Diversity Committee Meeting

At an October 2022 meeting of the BC Equal Opportunity & Diversity Advisory Committee, Professor Garrett criticized a racial climate task force proposal that he feared could usurp the jurisdiction of the diversity committee.[2] Several faculty members also challenged the veracity of a survey of students, the results of which were cited as justification for the proposed task force's creation. Garrett called for a new survey because the original was conducted amidst COVID shutdowns when no students were on campus.[3] He also questioned the objectivity of

[1] For more than 20 years, FIRE has defended freedom of expression, conscience, and religion, and other individual rights on America's college campuses. You can learn more about our recently expanded mission and activities at thefire.org.

[2] The recitation here reflects our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us.

[3] Greg Piper, *'Unprofessional conduct': Prof faces firing for questioning data for racial climate task force*, JUST THE NEWS (Feb. 26, 2023, 11:21 PM), https://justthenews.com/nation/free-speech/unprofessional-conduct-professor-faces-firing-questioning-data-racial-climate [https://perma.cc/NQP2-4VEX].

the University of Southern California Race and Equity Center, which had created the original survey, as well as the use of appeals to popularity and authority by the survey's backers as evidence for truth.[4] Finally, he told the committee he had not seen evidence of a connection between the data presented and proposed solutions.[5] Nonetheless, the committee approved creation of the racial climate task force.

On November 15, BC Professor Paula Parks—the faculty member who had proposed the racial climate task force—published an op-ed in *Kern Sol News* in which she accused Garrett and other faculty associated with BC's Renegade Institute for Liberty of a "disturbing pattern of actions" that assertedly "encouraged this hostile, toxic environment" and "created negativity and division in the name of free speech."[6] According to Parks, these "actions" included filing complaints against her and other individuals at the school, suing BC officials for First Amendment retaliation, bringing speakers to campus who "deny established facts about slavery and continued discrimination," and commenting critically on Facebook and local radio about the Umoja Community program Parks coordinates.[7]

Parks said the students she had brought with her to the October diversity committee meeting were "traumatized by the hostile reception they received at the [diversity committee] meeting from faculty members of the Renegade Institute" and "recognize[d] the sadly familiar feeling of racism."[8] She called on the community to demand that BC President Zav Dadabhoy, KCCD Chancellor Sonya Christian, and the KCCD Board of Trustees put an end to the "hateful rhetoric and actions" by removing the Renegade Institute from campus.[9]

On November 21, Garrett received a notice of "unprofessional conduct" based on his remarks at the October diversity committee meeting.[10] The underlying charges included expressing dishonest opinions regarding a diversity program, filing complaints of harassment and retaliation, and engaging in unspecified immoral conduct.[11] The notice quoted comments by three students who had accompanied Parks to the meeting as evidence of the "very real harm you are causing" students.[12] One student said attendees of the October meeting did not care about the safety and education of black students, another said they did not feel like they belonged in the meeting, while a third said "she 'did not feel safe in that room' even though 'nothing was said towards me directly.'"[13]

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[4] *Id.*

[5] *Id.*

[6] Paula L. Parks, *Op-Ed: A Call to KCCD Leaders 'Do Not Allow Such Hateful Rhetoric and Actions to Continue'*, KERN SOL NEWS (Nov. 15, 2022), https://southkernsol.org/2022/11/15/op-ed-a-call-to-kccd-leaders-to-not-let-this-hate-go-on/ [https://perma.cc/RAV7-XJK7].

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Email, Matthew Garrett to Romeo Agbalog, April 6, 2023, 4:04 PM.

[11] *Id.*

[12] Piper, *supra* note 3.

[13] *Id.* One of the three students also accused Garrett of insulting Parks and attributed direct quotes to him, but the article reports that the recording does not substantiate the student's accusations. *Id.*

Parks and others later repeated their accusations of racism against Garrett and the Renegade Institute at a December 13 KCCD Board of Trustees meeting.[14] A trustee then publicly commented on the need to "cull" the "bad actors" as he does in his livestock business—"that's why we put a rope on some of 'em and take 'em to the slaughterhouse."[15]

The events of last fall were not the first time Garrett was targeted by BC and KCCD for his speech. In 2019, the school launched an investigation after Garrett criticized the politicized allocation of college funds—naming several individual faculty members—in a public lecture about censorship.[16] An investigation ultimately concluded that he and BC Professor Erin Miller had engaged in unprofessional conduct by accusing other faculty of financial impropriety. Garrett and Miller filed a First Amendment lawsuit against BC officials for retaliating against them for their protected speech. Their lawsuit remains pending in federal district court.

II. Terminating Garrett for His Protected Expression on Matters of Institutional Governance Violates the First Amendment

The First Amendment protects the right of faculty members like Garrett to comment on matters of public concern and binds Bakersfield College and Kern Community College District as public institutions,[17] such that their actions and decisions—including pursuit of disciplinary sanctions[18] and maintenance of policies implicating student and faculty expression[19]—must comply with the First Amendment. And it is well-established that the First Amendment restricts public colleges from penalizing a faculty member's protected speech—including speech that "concern[s] sensitive topics like race, where the risk of conflict and insult is high."[20]

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.[21] Even hateful and racially offensive

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[14] Kern Community College District Board of Trustees, *December 2022 Board of Trustees Meeting (12/13/2022)*, YouTube (Dec. 13, 2022), https://www.youtube.com/watch?v=ftRes8eeQWs.

[15] *Id.*

[16] Graham Piro, *Faced with firings, Bakersfield professors sue school over criticism of grant allocations for 'partisan' causes*, FIRE (June 28, 2021), https://www.thefire.org/news/faced-firings-bakersfield-professors-sue-school-over-criticism-grant-allocations-partisan.

[17] *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).

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

[19] *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

[20] *Rodriguez v. Maricopa Cnty. Comm. Coll. Dist.*, 605 F.3d 703, 705 (9th Cir. 2009) (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."); *see also Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992) (holding that a public university violated the First Amendment when it investigated a professor's offensive writings on race and intelligence as "conduct unbecoming of a member of the faculty").

[21] *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011) ("As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate."); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag is protected expression based on the "bedrock principle" that

expression is protected, absent a demonstrated intent to intimidate or threaten physical violence against another person.[22] This is particularly true in the context of a public college, where "conflict is not unknown . . . given the inherent autonomy of tenured professors and the academic freedom they enjoy,"[23] and where "dissent is expected and, accordingly, so is at least some disharmony."[24] "[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.'"[25]

Enforcing subjective norms regarding offensiveness or civility on faculty speech also creates the inherent risk that administrators will use these standards to selectively punish faculty who express disfavored viewpoints—a risk heightened when that viewpoint is critical of administrators and faculty within the school, as was Garrett's speech both in 2019 and at the October diversity committee meeting.

These principles protect not only expression about political or academic matters, but also faculty members' ability to share their views on institutional concerns—speech of fundamental importance to the shared governance of colleges and universities. In *Demers v. Austin*, the United States Court of Appeals for the Ninth Circuit held a public university professor's proposed reorganization plan for the school—prepared "pursuant to [his] official duties" while serving as a member of a committee actively considering the issues addressed in his proposal—was speech on a matter of public concern protected by the First Amendment.[26]

Garrett's comments at the October diversity committee meeting regarding creation of a racial climate task force are protected speech on matters of public concern—as are each of his previous public statements on politicized appropriation of college funds and the Umoja Community program, his federal lawsuit against school officials for First Amendment retaliation, and his administrative complaints against faculty and administrators. Issues related to race, diversity, and equity on college campuses are undeniably matters of public concern, frequently debated in the news and on social media.[27] Likewise, courts have explicitly

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government actors "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (parody ad depicting a pastor losing his virginity to his mother in an outhouse is protected expression); *Papish* 410 U.S. at 667–68; *Cohen v. California*, 403 U.S. 15, 25 (1971) (wearing a jacket emblazoned with the words "Fuck the Draft" is protected expression).

[22] *Virginia v. Black*, 538 U.S. 343, 347–48 (2003). The Court recently and expressly reaffirmed this principle, refusing to establish a limitation on speech viewed as "hateful" or demeaning "on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground." *Matal v. Tam*, 582 U.S 218, 247 (2017).

[23] *Hulen v. Yates*, 322 F.3d 1229, 1239 (10th Cir. 2003).

[24] *Highbee v. E. Mich. Univ.*, 399 F.Supp.3d 694, 704 (E.D. Mich. 2019). This remains true even where the remarks are intemperate, forceful, or provocative. *See Smith v. Coll. of the Mainland*, 63 F.Supp.3d 712, 718 (S.D. Tex. 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.'").

[25] *Papish*, 410 U.S. at 667–68.

[26] 746 F.3d 402 (9th Cir. 2014); *see also Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011).

[27] *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 679 (6th Cir. 2001) (holding that questions about "race, gender, and power conflicts in our society" are "matters of overwhelmingly public concern").

recognized issues of public college governance and administration to be matters of public concern.[28]

The fact that some faculty and students have characterized Garrett's statements as racist, or even hateful, does not deprive Garrett's speech of First Amendment protection. None of Garrett's criticisms, whether considered individually or collectively, rise to the level of actionable harassment. Speech is protected and cannot constitute harassment unless it is unwelcome, discriminatory expression on the basis of protected status, and "so severe, pervasive, and objectively offensive, and so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."[29] "Speech directed to a wider audience is even more likely to enjoy constitutional protection than speech to a private audience of one."[30] That includes speech that "may be emotionally distressing," such as "messages that condemn or express dislike for" the subject.[31] Efforts by BC and KCCD to punish such speech are unconstitutional.

The nature of some of the charges against Garrett also raise significant First Amendment and due process concern. Specifically, the "unprofessional conduct" charge raises concerns of overbreadth and vagueness when applied to Garrett's speech. Even if some expression that would be penalized under an "unprofessional conduct" standard is unprotected—for instance, that which communicates a true threat of violence which might also be penalized as unprofessional in the workplace—the natural meaning of "unprofessional" sweeps in a wide variety of protected expression.[32] With only very limited legitimate application to speech, the professionalism standard's potential for unconstitutional applications far outweigh BC's legitimate objectives to maintain proper functioning of the college. The subjective and undefined boundaries of "unprofessional conduct" also renders the standard unconstitutionally vague because it fails to provide fair notice of precisely what is prohibited, thereby encouraging arbitrary and discriminatory enforcement—such as that seen here in BC's and KCCD's treatment of Garrett.[33]

Similar issues arise with the charge of unspecified "immoral" conduct. California law limits dismissal for "immoral" conduct to "egregious misconduct" narrowly defined by specific reference to provisions of the penal code dealing with drug crimes, sexual abuse, or child abuse.[34] KCCD has not provided Garrett the factual basis for this charge. But if the clear limits of the education code are ignored and the category of "immoral" conduct is expanded to Garrett's protected speech, it would violate the First Amendment as well as the due process clause. A proscription on "immoral" speech would be extraordinarily overbroad as well as

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[28] *Demers*, 746 F.3d 402; *see also Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (holding public school teacher's public comments about school budgetary issues was speech on a matter of public concern).

[29] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999) (cleaned up).

[30] Aaron H. Caplan, *Free Speech and Civil Harassment Orders*, 64 HASTINGS L.J. 781, 821–22 (2013).

[31] *Id.*

[32] *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 944 (9th Cir. 2011).

[33] *Hill v. Colorado*, 530 U.S. 703, 732 (2000); *United States v. Williams*, 553 U.S. 285, 304 (2008).

[34] EDC § 44932.

vague and highly subjective.[35] There would be no objective legal standards for determining whether speech is "immoral" and therefore KCCD officials would hold unbridled discretion to punish speech they dislike by labelling it as "immoral."[36] Faculty would also surely self-censor to avoid crossing a line they cannot see, resulting in a broad chill on campus speech.

Finally, KCCD cannot charge Garrett with harassment and retaliation for simply attempting to vindicate his constitutional rights through internal complaints and a federal lawsuit. Disciplining Garrett for exercising his right to seek redress is itself a violation of the First Amendment and civil rights law.[37]

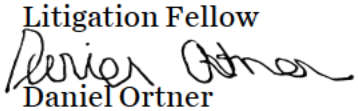
III. Conclusion

The record provides persuasive evidence that Garrett is being targeted for discipline and termination solely on the basis of his protected speech because he has expressed views critical of and disfavored by many others within BC and KCCD. But terminating Garrett for his protected speech is a flagrant violation of the First Amendment and the Board must vote to reject the recommendation of termination.

Given the urgent nature of this matter, we request a substantive response to this letter no later than the close of business on Wednesday, April 19, confirming KCCD and BC have ceased efforts to terminate Garrett and will not pursue any further investigation or discipline.

Sincerely,

Jessie Appleby
Litigation Fellow



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[35] *Comite de Jornaleros*, 657 F.3d at 944.

[36] *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998).

[37] *Johnson v. Multnomah Cnty., Or.*, 48 F.3d 420, 427 (9th Cir. 1995) (holding government entity "does not have a legitimate interest in covering up mismanagement or corruption and cannot justify retaliation against whistleblowers as a legitimate means of avoiding the disruption that necessarily accompanies such exposure"); *Adler v. Pataki*, 185 F.3d 35, 45 (2d Cir. 1999) (finding vindictive action taken on account of a First Amendment lawsuit is itself a First Amendment violation under §1983); *see also NAACP v. Button*, 371 U.S. 415 (1963) (holding that civils rights litigation can be a form of political speech protected by the First Amendment).