



FIRE

Foundation for Individual
Rights and Expression

June 28, 2023

Adena W. Loston
Office of the President
St. Philip's College
1801 Martin Luther King Drive
San Antonio, Texas 78203

Sent via U.S. Mail and Electronic Mail (aloston@alamo.edu)

Dear President Loston:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is concerned by St. Philip's College's reported dismissal of Professor Johnson Varkey after complaints about his in-class statements regarding biological sex.² While some may have taken offense at Varkey's comments, they are doubtlessly protected by the First Amendment, which bars St. Philip's—a public institution—from investigating or punishing protected, pedagogically relevant speech.

Varkey has been a professor of Human Anatomy and Physiology at St. Philip's for twenty years, teaching Human Anatomy and Physiology.³ On November 28, 2022, Varkey gave a lecture to his human biology class during which he stated sex is determined by X and Y chromosomes.⁴ A

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 This is our understanding of the pertinent facts based on public information. We appreciate that you may have additional information to offer and invite you to share it with us.

³ Letter from Keisha T. Russell and Kayla Toney, First Liberty Inst., to Randall Dawson, Vice President for Academic Success, St. Philip's Coll., et. al, *available at* https://firstliberty.org/wp-content/uploads/2023/06/Letter-from-First-Liberty-6-20-2360_Redacted.pdf. [<https://perma.cc/E76H-H4WM>]

⁴ Billy Hallowell, *'I was shocked': Professor Fights Back, Contends He Was Fired For Teaching Basic 'Human Biology'*, CBN (June 23, 2023), <https://www2.cbn.com/news/us/i-was-shocked-professor-fights-back-contentends-he-was-fired-teaching-basic-human-biology>.

number of Varkey’s students reportedly walked out of class because “he spoke about how human sex was determined by chromosomes[.]”⁵

Shortly thereafter, Varkey received an email from Vice President for Academic Success Randall Dawson, informing him that he was under investigation for an ethics violation.⁶ The email did not include the alleged complaint, and, despite Varkey promptly requesting additional information on the nature of the purported violation, St. Philip’s did not provide Varkey any additional details about which policy he allegedly violated.⁷ Nonetheless, Varkey received a Notice of Discipline and Termination of Employment and Contract on January 27, 2023, citing “several reports of ‘religious preaching, discriminatory comments about homosexuals and transgender individuals, anti-abortion rhetoric, and misogynistic banter.’”⁸

St. Philip’s must reverse course, however, because terminating Varkey for pedagogically relevant in-class speech violates the First Amendment. It is settled law that the First Amendment binds public institutions like St. Philip’s,⁹ such that its actions and decisions, including its disciplinary sanctions,¹⁰ must comply with the First Amendment. Academic freedom—a corollary of free expression that the Supreme Court identifies as a “special concern of the First Amendment”¹¹—necessitates that faculty members receive substantial breathing room to determine how to approach subjects and materials relevant to their coursework. As the Court has made clear: “Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.”¹²

It is clear that the First Amendment protects expression that, “however repugnant[.]” is “germane to classroom subject matter.”¹³ Here, Varkey’s discussion about sex determination in Human Anatomy and Physiology is doubtlessly germane to the class material. Even if a complainant believes—reasonably or not—that Varkey’s presentation, interpretation, or discussion of that material was offensive, it remains protected if it is broadly “related to” scholarship or teaching.

⁵ *Id.*; Michel Gryboski, *College accused of firing professor for saying chromosomes determine sex*, THE CHRISTIAN POST (June 22, 2023), <https://www.christianpost.com/news/college-accused-of-firing-prof-for-saying-chromosomes-determine-sex.html>.

⁶ Gryboksi, *supra* note 5.

⁷ Russell and Toney Letter, *supra* note 3.

⁸ Letter from Randall Dawson to Dr. Johnson Varkey (Jan. 27, 2023), Ex D. Notice of Discipline – Termination of Employment and Contract, *available at* https://firstliberty.org/wp-content/uploads/2023/06/Letter-from-First-Liberty-6-20-2360_Redacted.pdf.

⁹ *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).

¹⁰ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

¹¹ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

¹² *Id.*

¹³ *Hardy v. Jefferson Community College*, 260 F.3d 671, 683.

The Sixth Circuit has clarified how broad this latitude is. In *Hardy v. Jefferson Community College*, an instructor teaching “Introduction to Interpersonal Communication” lectured students about “language and social constructivism,” including how “language is used to marginalize minorities and other oppressed groups in society.”¹⁴ Students, asked by the instructor to provide examples, suggested the words “lady,” “girl,” “faggot,” “nigger,” and “bitch.”¹⁵ The Sixth Circuit found that the instructor’s use of those words was “clearly” relevant to his lecture exploring the “social and political impact of certain words,” and was not “gratuitously used . . . in an abusive manner.”¹⁶ Accordingly, it remained protected expression.¹⁷ Varkey, on the other hand, taught college-approved material from a college-approved textbook. By this standard, Varkey’s discussion of the physiology of gender in a Human Anatomy and Physiology class is similarly clearly protected—so clearly, in fact, that St. Philip’s should not have launched an investigation into Varkey’s teaching in the first place.

That’s because, to comply with the First Amendment, public colleges must make a facial review of any complaints and first determine whether the alleged conduct constitutes protected expression. And in cases that solely allege protected speech, St. Philip’s should resolve the complaint or provide support to the complainant without ever notifying or involving the speaker to avoid chilling their speech.

But worse still, St. Philip’s decision to investigate then terminate Varkey without so much as notifying him of the charges against him raises serious due process concerns. Principles of due process and basic fairness necessitate certain core procedural safeguards for faculty including, but not limited to, timely and adequate notice of the charges against them, adequate time to prepare a defense, a meaningful hearing process, and a meaningful right to appeal.¹⁸

Varkey received none of these critical protections, making his termination suspect not only under the First Amendment, but also under any conception of due process. This is critical, not just from the perspective of avoiding constitutional violations, but because basically fair proceedings afford all parties confidence that the outcome reached was just. Here, St. Philip’s unwillingness to allow Varkey to defend himself makes the college’s actions all the more suspect.

Of course, these principles do not shield faculty from every consequence of their expression—including criticism by students, other faculty, the broader community, or the university itself. Criticism is a form of “more speech,” the First Amendment’s preferred remedy to state-imposed censorship of controversial expression.¹⁹ But as a state actor, St. Philip’s may not wield its institutional authority to force compliance with any particular view.

¹⁴ *Id.* at 674.

¹⁵ *Id.* at 675.

¹⁶ *Id.* at 679.

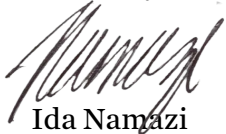
¹⁷ *Id.*

¹⁸ *Sigma Chi Fraternity v. Regents of Univ. of Colorado*, 258 F. Supp. 515, 528 (D. Colo. 1966)

¹⁹ *Whitney v. California*, 274 U.S. 357, 377 (1927).

Accordingly, we request Varkey be reinstated, with all disciplinary charges against him in this matter dropped and expunged from his file. We also request that the college recommit to upholding faculty's expressive and academic freedom rights moving forward. Given the urgent nature of this matter, we request a substantive response to this letter no later than the close of business on Friday, July 7.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ida Namazi', written over a horizontal line.

Ida Namazi
Program Officer, Campus Rights Advocacy

Cc: Randall Dawson, Vice President for Academic Success
Nina Sosa, Director of Employee Relations, Advocacy, and Civil Rights
Roxella T. Cavazos, Associate General Counsel