



FIRE

Foundation for Individual
Rights and Expression

May 10, 2023

Philip DiStefano
Office of the Chancellor
University of Colorado Boulder
914 Broadway
Boulder, Colorado 80309

Sent via U.S. Mail and Electronic Mail (Chancellor@colorado.edu)

Dear Chancellor DiStefano:

FIRE appreciates that University of Colorado Boulder is one of the few institutions in the country whose policies earn a “green light” rating from FIRE.¹ Yet, we are concerned by CU Boulder’s publicly announced reporting to its Office of Institutional Equity and Compliance² of an anonymous Twitter exchange that apparently involved a CU Boulder student.³ While the university must ensure an environment free of harassment for students, the individual who reported the exchange does not appear to be a CU Boulder student, and as a public institution bound by the First Amendment,⁴ CU Boulder must first determine the speech at issue is unprotected before publicly announcing an inquiry. By acting prematurely in this case, the university sends a speech-chilling message to students and faculty that any controversial speech—even speech protected by the First Amendment—could nonetheless fall subject to formal disciplinary review.

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 CU Boulder (@CUBoulder), TWITTER (May 9, 2023, 1:10 PM), <https://twitter.com/CUBoulder/status/1655621197961494529>.

³ A2.0 (@Burner24690), TWITTER (May 6, 2023, 10:41 AM); 🧡❤️ (@Footydolo), TWITTER (May 6, 2023, 10:43 AM); A2.0 (@Burner24690), TWITTER (May 6, 2023, 10:45 AM), <https://twitter.com/Burner24690/status/1654860048277946368>. The recitation of facts here reflects our understanding based on public information. We appreciate that you may have additional information to offer and invite you to share it with us.

⁴ *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).

The known facts surrounding this matter indicate that after an apparent CU Boulder student anonymously tweeted at an individual seemingly unaffiliated with the university, calling them “a jareer who claims to be somali royalty,” the unaffiliated individual tagged CU Boulder’s official Twitter account, asserting the speech is racially abusive. CU Boulder responded to that tweet, stating it “reported this to the Office of Institutional Equity and Compliance.”⁵ This statement, promising to investigate protected speech, appears to violate the university’s First Amendment obligations.⁶

As a public institution, CU Boulder’s actions and decisions—including the pursuit of disciplinary sanctions⁷—must comport with its constitutional obligations to honor students’ expressive rights. Here, a single report of speech that, on its face, is constitutionally protected,⁸ cannot justify a public announcement of an investigation. While CU Boulder may conduct a preliminary inquiry into conduct administrators reasonably believe may violate the code of conduct, it cannot publicly announce such an inquiry, and in doing so communicate to the speaker and the rest of the campus community that the speech may face punishment, without first determining it is unprotected by the First Amendment.

If the anonymous Twitter user’s expression in this case meets the strict legal standard to constitute unprotected harassment—unwanted, targeted conduct that is so severe, pervasive, and objectively offensive that denies the victim access to educational opportunities⁹—the university may further investigate, and at that juncture arguably may involve the speaker. However, at this point—with the only available information being a one-time subjectively offensive tweet—there is no evidence of actionable misconduct.

Importantly, institutions can violate an individual’s First Amendment rights by announcing an investigation into clearly protected expression, even if no formal punishment follows. When the institution’s actions directed to protected expression “would chill or silence a person of ordinary firmness from future First Amendment activities,” those actions impose constitutionally cognizable harm.¹⁰ Publicly announcing referral of speech to a body empowered to significantly sanction campus individuals—ranging from educational sanctions or probation to suspension or dismissal, each of which suffices under the ordinary firmness

⁵ CU Boulder tweet, *supra* note 2.

⁶ Alex Morey, *CU Boulder’s stock Twitter response to complaints about student and faculty speech may violate First Amendment*, FIRE (Oct. 29, 2021), <https://www.thefire.org/news/cu-boulders-stock-twitter-response-complaints-about-student-and-faculty-speech-may-violate>.

⁷ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

⁸ 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. *See 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”); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (a parody advertisement depicting a pastor losing his virginity to his mother in an outhouse was protected by the First Amendment); *Cohen v. California*, 403 U.S. 15, 25 (1971) (an individual wearing a jacket emblazoned with the words “Fuck the Draft” engaged in Constitutionally protected expression).

⁹ *See Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999).

¹⁰ *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

test¹¹—sends a message that such speech may be punished in the future. CU Boulder accordingly should have conducted a preliminary review of the available information without notifying any involved individuals or publicly announcing an inquiry, and should follow that model in the future.

FIRE therefore calls on CU Boulder to delete its tweet announcing it reported the exchange to a disciplinary body, and to confirm it will end its practice of publicly announcing such inquiries to avoid chilling protected speech in the future. We request a substantive response to this letter no later than the close of business on Wednesday, May 24, 2023.

Sincerely,



Sabrina Conza
Program Officer, Campus Rights Advocacy

¹¹ *Speech First, Inc. v. Fenves*, 979 F.3d 319, 333 (5th Cir. 2020).