



FIRE

Foundation for Individual
Rights and Expression

November 20, 2023

Carol Folt
Office of the President
University of Southern California
Bovard Administration Building
Los Angeles, California 90089-0012

URGENT

Sent via U.S. Mail and Electronic Mail (president@usc.edu)

Dear President Folt:

FIRE¹ is concerned by USC's decision to require that Professor John Strauss teach remotely for the rest of the semester in response to his comments to pro-Palestinian protesters last week. While his remarks may have been deeply offensive to some or even many listeners, they are protected by USC policy and thus cannot serve as the basis of discipline. The university must allow Strauss to return to his normal, on-campus teaching responsibilities and cease any further investigation or sanction.

Our concerns regarding Strauss arise out of a student-led November 9 pro-Palestinian protest on USC's campus as part of a nationwide "shutdown for Palestine" movement.² As captured in a film ultimately posted to social media,³ Strauss passed a group of protesters gathered at the Tommy Trojan statue and said: "You people are ignorant. Really ignorant. Hamas are murderers. That's all they are. Every one should be killed, and I hope they all are."⁴ Students reported that Strauss also stepped on a printed list of names of Palestinians killed by Israeli strikes.⁵ More than a dozen students and faculty filed complaints about Strauss's remarks, and

¹ As you may recall from previous correspondence, the Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending freedom of speech. You can learn more about our recently expanded mission and activities at thefire.org.

² Jen Byers, *USC professor's comments to students disrupt pro-Palestinian protest*, USC ANNENBERG MEDIA (Nov. 11, 2023, 12:10 pm), <https://www.uscannenbergmedia.com/2023/11/11/usc-professors-comments-to-students-disrupt-pro-palestinian-protest/>.

³ AnnenbergMedia, *Video 1*, YOUTUBE, <https://www.youtube.com/shorts/978k1yK7zt0>.

⁴ *Id.*

⁵ *Id.* Strauss maintains that he stepped on the list unintentionally when he moved closer to the protesters to speak with them.

a clip showing only the final part of his comment (“Every one should be killed, and I hope they all are”) received millions of views.⁶

USC issued an initial statement on November 10, saying it was “looking into” the incident.⁷ The same day, an associate dean called and told Strauss the provost had placed him on administrative leave for the rest of the semester.⁸ But on November 14, the university told the student newspaper that Strauss was *not* on administrative leave, but would teach his classes remotely the rest of the semester.⁹

As a private university, USC is not directly bound by the First Amendment, but it is legally and morally bound to its own laudable commitment to faculty’s freedom of expression. The Faculty Handbook protects the right of faculty like Strauss to comment on matters of public concern: “When [faculty members] speak or write as citizens, they should be free from institutional censorship or discipline.”¹⁰ Based on this commitment, faculty would reasonably believe they have expressive rights commensurate with those guaranteed by the First Amendment. This is all the more true here because USC’s policy mirrors the language used to describe the First Amendment rights of public employees “as [] citizen[s], in commenting upon matters of public concern.”¹¹

Just as the First Amendment protects the right to comment on matters of public concern,¹² and restricts public universities from penalizing faculty’s protected speech—including that which “concern[s] sensitive topics” like ethnicity or religion, “where the risk of conflict and insult is high”¹³—so, too, does USC’s academic freedom policy prevent it from penalizing its faculty’s protected speech.

⁶ Nathan Elias, *Professor whose comments at Gaza memorial went viral not on administrative leave, USC says*, DAILY TROJAN, Nov. 15, 2023, <https://dailytrojan.com/2023/11/15/professor-strauss/>; see also, e.g., Tara Alami (@taraxrh), X (Nov. 10, 2023, 2:38 PM) <https://twitter.com/taraxrh/status/1723062614295445678>.

⁷ byers, *supra* note 2.

⁸ Hali Mecklin and Kaitlyn Huamani, *Professor put on leave of absence defends his language at pro-Palestinian protest*, USC ANNENBERG MEDIA (Nov. 13, 2023, 7:23 PM), <https://www.uscannenbergmmedia.com/2023/11/13/professor-put-on-leave-of-absence-defends-his-language-at-pro-palestinian-protest/>. Strauss originally understood he could finish only one of his two current courses by Zoom, but on November 13, USC said Strauss could teach both classes remotely for the remainder of the semester. *Id.*

⁹ Elias, *supra* note 6.

¹⁰ *University of Southern California Faculty Handbook 2022*, Faculty Rights and Responsibilities, Academic and Professional Freedom, Academic Freedom, UNIV. OF S. CAL. 19, <https://policy.usc.edu/wp-content/uploads/2022/10/Faculty-Handbook-2022.pdf>. The policy also states that faculty have “special obligations” when speaking as citizens due to “their special position in the community.” Specifically, faculty “should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the University.”

¹¹ See *Connick v. Myers*, 461 U.S. 138, 143 (1983).

¹² *Id.* at 140 (“[P]ublic employee[s] do[] not relinquish [their] First Amendment rights to comment on matters of public interest by virtue of government employment.”).

¹³ *Rodriguez v. Maricopa Cnty. Comm. Coll. Dist.*, 605 F.3d 703, 705 (9th Cir. 2009).

And the “bedrock principle underlying” freedom of speech is that it may not be restricted on the basis that others find it offensive.¹⁴ “As a Nation we have chosen ... to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”¹⁵ Even hateful and racially or ethnically offensive speech is protected,¹⁶ absent a demonstrated intent to intimidate or threaten physical violence against another person.¹⁷ This is particularly true in the context of a university, where “conflict is not unknown”¹⁸ and “dissent is expected and, accordingly, so is at least some disharmony.”¹⁹ The “desire to maintain a sedate academic environment does not justify limitations on a teacher’s freedom to express himself on political issues in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms.”²⁰

Strauss’s comments to protesters are protected speech on a matter of public concern,²¹ as issues related to ethnic and political conflict generally are,²² and the ongoing Israeli-Palestinian conflict in particular currently captivates conversation on the news and social media while triggering large public protests nationwide. “The public interest in having free and unhindered debate on matters of public importance” is “the core value” underlying First Amendment protection of free expression.²³

The fact that some protesters characterized Strauss’s comments as hateful, or even threatening to students,²⁴ does not deprive Strauss’s speech of protection. None of his remarks rise to the level of actionable harassment as speech is protected and cannot constitute harassment unless it is unwelcome, discriminatory on the basis of protected status, and “so severe, pervasive, and

¹⁴ *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag was protected by the First Amendment based on the “bedrock principle” that government actors “may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”).

¹⁵ *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011) (holding signs outside of soldiers’ funerals reading “Thank God for Dead Soldiers,” “Thank God for IEDs,” and “Fags Doom Nations” was expression protected by the First Amendment).

¹⁶ *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (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”); *R.A. V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down an ordinance that prohibited placing on any property symbols that “arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender”).

¹⁷ *Virginia v. Black*, 538 U.S. 343, 347–48 (2003).

¹⁸ *Hulen v. Yates*, 322 F.3d 1229, 1239 (10th Cir. 2003).

¹⁹ *Highbee v. E. Mich. Univ.*, 399 F.Supp.3d 694, 704 (E.D. Mich. 2019).

²⁰ *Rodriguez*, 605 F.3d at 708.

²¹ Speech on a matter of public concern is that which may “be fairly considered as relating to any matter of political, social, or other concern to the community.” *Connick v. Myers*, 461 U.S. 138, 146 (1983).

²² *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 679 (6th Cir. 2001) (questions about “race, gender, and power conflicts in our society” are “matters of overwhelmingly public concern”).

²³ *Pickering v. Bd. of Ed.*, 391 U.S. 563, 573 (1968); see also, e.g., *Snyder*, 562 U.S. at 451–52 (“Speech on matters of public concern is at the heart of the First Amendment’s protection.”) (cleaned up); *Connick*, 461 U.S. at 145 (“[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”).

²⁴ byers, *supra* note 2 (“[An organizer of the protest] characterized Strauss as using hate speech. He ‘has threatened us as students,’ she said, ‘making us feel unsafe in our academic environment.’”).

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.”²⁵ Speech like Strauss’s directed to a wider audience, rather than a single person, is less likely to constitute unprotected harassment—even if it “may be emotionally distressing,” like “messages that condemn or express dislike for” the subject.”²⁶ USC’s punishment of such speech violates its express commitment to faculty’s freedom of expression.

Neither the First Amendment nor USC’s policies shield Strauss from every consequence of his expression—including criticism by students, faculty, or the broader community. Criticism is “more speech,” the remedy to offensive expression the First Amendment prefers to censorship.²⁷ But university policies that invoke the First Amendment limit the *types* of consequences that may be imposed on protected expression, and who may impose them.

Restricting Strauss to teaching remotely the rest of the semester is precisely the type of consequence for constitutionally protected expression that USC’s First Amendment-mirroring Faculty Handbook plainly prohibits, because such a restriction is likely to chill future faculty speech. The question is not whether formal punishment is meted out,²⁸ but whether the institution’s actions “would chill or silence a person of ordinary firmness from future [expressive] activities[.]”²⁹ Courts have explicitly recognized consequences similar to those imposed on Strauss, such as changes to working conditions or restricting access to the institution’s facilities as sufficiently chilling speech.³⁰ Whether the university labels the restriction “administrative leave” is irrelevant to the analysis: USC violated Strauss’s free speech rights by imposing the remote-teaching restriction in response to his protected expression.

²⁵ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999) (cleaned up).

²⁶ Aaron H. Caplan, *Free Speech and Civil Harassment Orders*, 64 HASTINGS L.J. 781, 821–22 (2013). Strauss’s comment also does not meet the standard for a true threat, which is defined as a serious expression of intent to commit a violent and unlawful act against an individual or group. Merely advocating violence, without more, is protected speech. *Black*, 538 U.S. at 347–48.

²⁷ *Whitney v. California*, 274 U.S. 357, 377 (1927).

²⁸ See, e.g., *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000); *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992).

²⁹ *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

³⁰ *Boquist v. Courtney*, 32 F.4th 764, 783–84 (9th Cir. 2022) (imposing requirement that state senator “give at least twelve hours advance notice ... before he intended to visit the State Capitol” was sufficient allegation of adverse action because it prevented him from doing his job of meeting with constituents, elected officials, and others at the capitol building, sometimes on short notice); *Dahlia v. Rodriguez*, 735 F.3d 1060, 1079 (9th Cir. 2013) (placing employee on administrative leave is adverse employment action); *Coszalter v. City of Salem*, 320 F.3d 968, 976–77 (9th Cir. 2003) (transfer to new duties, unwarranted disciplinary investigation, unpleasant work assignment, and threat of disciplinary action were adverse employment actions that would chill a person of ordinary firmness); *Thomas v. Carpenter*, 881 F.2d 828, 829 (9th Cir. 1989) (plaintiff’s claim that he had been banned from attending certain meetings and participating as an evaluator in training exercises in retaliation for his political activity sufficient to be adverse action).

Given the urgent nature of this matter, we request a substantive response to this letter no later than close of business November 29, 2023, confirming USC will immediately allow Strauss to return to his original teaching assignments, including teaching in-person and on campus, and will not pursue further investigation or disciplinary sanctions in this matter.

Sincerely,



Jessie Appleby
Program Officer, Campus Rights Advocacy

Cc: Andrew Guzman, Provost
John Strauss, Professor of Economics