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May 24, 2010

President James F. Barker
Office of the President
201 Sikes Hall
Clemson University
Clemson, South Carolina 29634

Sent via U.S. Mail and Facsimile (864-656-4676)

Dear President Barker:

As you know from our letter of January 15, 2010, the Foundation for Individual Rights in Education (FIRE; thefire.org) unites civil rights and civil liberties leaders, scholars, journalists, and public intellectuals from across the political and ideological spectrum on behalf of liberty, free speech, legal equality, due process, the right of conscience, and academic freedom on America's college campuses. Thank you for your response of January 26 to our letter of concern regarding the freedom of faculty and staff to contact government officials.

FIRE writes you today out of grave concern about the threat to freedom of expression and due process presented by Clemson University's charges of "Disorderly Conduct," "Harassment," and "Computer Misuse" against a student because of an unspecified e-mail he sent to an administrator. His e-mail is entirely protected by the First Amendment right to freedom of speech which Clemson, a public university, is bound to uphold. FIRE also is deeply concerned by Clemson's decision to charge the student with "Failure to Comply with Official Request" because he declined to attend an optional meeting.

This is our understanding of the facts. Please inform us if you believe we are in error. Clemson student William Kirwan is President of Central Spirit, an undergraduate student organization. On May 13, 2010, he exchanged e-mails with the group's advisor, Laura McMaster, Assistant Director of Leadership Education, and with Marty Kern, General Manager of Littlejohn Coliseum and Director of Major Events. McMaster tried to persuade Kirwan to have Central Spirit participate in Clemson's Fall Organizations Fair, but Kirwan argued against participating. Kirwan wrote, in relevant part:

> I'm not going to let you bully the organization into doing the things you want us to do or perceive as important when they take away our resources from being able to concentrate on our mission. If there are events that dovetail into the mission of the

> organization, that's great, but as six (6) previous Central Spirit presidents […] have all intimated to me, recruiting members into central spirit through events like organization fairs doesn't bring us strong members […]. I would trust the advice of six different people that have been in my shoes and given me the same advice over yours any day of the week and twice on Sunday.

He copied Kern on the message. Kern responded about six minutes later, telling Kirwan that his e-mail's "language and tone [are] unacceptable in any setting" and that she wanted to meet with him:

> Wil – your language and tone is unacceptable in any setting, much less in this one where advisors who have NO agenda except to help you further the mission of your organization are offering insight. If you are on campus, I would like to meet with you asap. If you are not, we need to talk via phone. Where can I reach you?

Kirwan declined the invitation to the optional meeting three minutes after that, writing only, "Yeah, I'd prefer not to, so, I'm gonna have to say no." Nine minutes after that, Kern replied, writing only, "Unacceptable. Since you have declined a meeting, I will proceed in calling one without you."

Ten minutes later, Kirwan and Kern exchanged two more e-mails that made clear that Kirwan had broken no rule and that the meeting invitation had been optional. Kirwan replied, "Do what you want! There's no university policy in place that says I have to be respectful to anybody or grant them my time," and Kern responded about one minute later, "it's not a policy Wil – you miss the point – as usual" (quoted without alteration).

On May 19, Kirwan received a disciplinary letter from Justin Carter, Associate Director of Clemson's Office of Community and Ethical Standards, telling him that he was facing several charges because he allegedly "sent an email that had the effect of creating a hostile work environment and failed to comply with the request of a staff member acting in accordance of their duties." Carter's letter stated that Kirwan would be facing charges of "Disorderly Conduct," "Harassment," "Failure to Comply with Official Request," and "Computer Misuse."

According to Kirwan, he met with Associate Vice President and Dean of Students Joy Smith on May 24 and has a disciplinary conference scheduled for June 4 at 10:00 a.m. The disciplinary conference is effectively a hearing; Carter's letter states that the disciplinary conference "will consider all the information available and will render a decision on this case" unless the official decides that the allegations could lead to "eviction from University facilities or suspension or expulsion from Clemson University," in which case "an administrative hearing" would be held.

To be clear: Clemson may not punish Kirwan for engaging in speech protected by the First Amendment. That the First Amendment's protections fully extend to public universities such as Clemson has long been settled law. See, e.g., *Healy v. James*, 408 U.S. 169, 180 (1972) (citation omitted) ("[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'"); *Widmar v. Vincent*, 454 U.S. 263, 268-69 (1981) ("With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities").

The charges against Kirwan violate his First Amendment right to free expression and his right to due process in several ways.

Kirwan's Speech Is Not Harassment.

Kirwan's e-mails may not be punished as "harassment" for creating a "hostile work environment," nor may they be punished for constituting "hostile environment" harassment more generally.

Pursuant to Title VII of the Civil Rights Act of 1964 and federal regulations enforced by the United States Equal Employment Opportunity Commission, Clemson is legally bound to prohibit workplace harassment, including conduct that creates a hostile work environment. However, Kirwan is a student, not an employee; as such, Clemson may not apply regulations governing employee conduct to his speech.

Nor does Kirwan's speech in this instance constitute actionable "hostile environment" harassment. Even if Kirwan were one of McMaster's or Kern's co-workers, which he is not, to be legally punishable for hostile environment harassment, Kirwan would have had to have been *far* more than simply rude or offensive. Rather, he would have to be actively engaged in a course of behavior that effectively changed the working conditions of a fellow employee. Kirwan's e-mails to McMaster or Kern do not even come close to meeting that standard.

In response to widespread misinterpretation of federal harassment law by colleges, on July 28, 2003, Assistant Secretary Gerald A. Reynolds of the U.S. Department of Education's Office for Civil Rights (OCR) issued an open letter to all college and university presidents in the United States that clarified the relationship between harassment law, federal regulations, and the First Amendment. Secretary Reynolds wrote:

> [I]n addressing harassment allegations, OCR has recognized that **the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment** under the statutes enforced by OCR … Some colleges and universities have interpreted OCR's prohibition of "harassment" as encompassing all offensive speech regarding sex, disability, race or other classifications. **Harassment, however, to be prohibited by the statutes within OCR's jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.** [Emphases added.]

Reynolds' instruction makes clear that Kirwan's e-mails do not meet the high threshold needed for speech to lose First Amendment protection and become harassment subject to discipline.

Kirwan's Speech Is Not Disorderly Conduct or Computer Misuse.

The "Student Conduct" section of the *Clemson University Student Handbook* refers to disorderly conduct as an "action" such as "causing objects to fall from windows." Under the First Amendment, speech in e-mails is strongly protected except for very few, carefully defined exceptions such as true threats, obscenity (not profane language but actual, legally recognized obscenity), or incitement to immediate violence. Merely writing with an angry or rude "tone" and colorful language in an e-mail comes nowhere close to the exceptions that would raise an e-mail to the level of unprotected speech or punishable conduct. Kirwan's e-mails are without question protected under the First Amendment's guarantee of freedom of speech, which Clemson, a public university, is obligated to uphold.

The principle of freedom of speech does not exist to protect only non-controversial speech; indeed, it exists precisely to protect speech that some members of a community may find controversial or offensive. The right to free speech includes the right to say things that are deeply offensive to many people, and the Supreme Court has explicitly held, in rulings spanning decades, that speech cannot be restricted simply because it offends people. In *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973), the Court held that "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.'" In *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), the Court held that "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." In *Texas v. Johnson*, 491 U.S. 397, 414 (1989), the Court explained the rationale behind these decisions well, saying that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Under these standards, there can be no question that Kirwan's e-mails are protected.

It may be instructive to consider United States Magistrate Judge Wayne Brazil's order, on First Amendment grounds, preventing administrators in the entire California State University System from enforcing a "civility" policy against student speech:

> There also is an emotional dimension to the effectiveness of communication. Speakers, especially speakers on significant or controversial issues, often want their audience to understand how passionately they feel about their subject or message. […] Civility connotes calmness, control, and deference or responsiveness to the circumstances, ideas, and feelings of others. […] Given these common understandings, a regulation that mandates civility easily could be understood as permitting only those forms of interaction that produce as little friction as possible, forms that are thoroughly lubricated by restraint, moderation, respect, social convention, and reason. The First Amendment difficulty with this kind of mandate should be obvious: the requirement "to be civil to one another" and the directive to eschew behaviors that are not consistent with "good citizenship" reasonably can be understood as prohibiting the kind of communication that it is necessary to use to convey the full emotional power with

> which a speaker embraces her ideas or the intensity and richness of the feelings that attach her to her cause. […] In sum, there is a substantial risk that the civility requirement will inhibit or deter use of the forms and means of communication that, to many speakers in circumstances of the greatest First Amendment sensitivity, will be the most valued and the most effective.

College Republicans at San Francisco State University v. Reed, 523 F. Supp. 2d 1005, 1018–20 (N.D. Cal. 2007).

Kirwan Did Not Fail to Comply with a University Official.

Kern did not summon Kirwan to a mandatory meeting. She admitted that "it's not a policy" that a student must meet with an administrator who merely asks for a meeting. (Nor would it be permissible to discipline Kirwan for declining McMaster's invitation to Central Spirit to participate in the Fall Organizations Fair.) Furthermore, Kern acknowledged Kirwan's free choice to decline the meeting. To her, the "point" was not that Kirwan had failed to comply under school policy; rather, the point appears to have something to do with Kern's view of good manners. Although Kern called his choice "[u]nacceptable," she responded that she would simply call a meeting without his presence. (It is unclear what the point of holding such a "meeting" would be.)

Moreover, the purpose of Kern's meeting apparently was to discuss her complaint that Kirwan's "language and tone [are] unacceptable in any setting." Again, it would be blatantly unconstitutional to investigate or discipline a student under Kern's standard. Both his language and its "tone" are protected by the First Amendment, and it is unclear whether Kern had any intention but to tell him otherwise.

Due Process Concerns.

In addition to the clear violations of Kirwan's First Amendment rights, Clemson's conduct raises several due process concerns. At the least, Kirwan deserves the rudimentary fairness required to adequately defend himself. This fairness includes specific knowledge of the evidence against him and the identities of his accusers. In fact, the *Student Handbook* promises that administrative hearings shall include "[a] description of the incident" and "names of possible witnesses." This basic information is not yet known to Kirwan.

In particular, the May 19 disciplinary letter fails to identify specifically which e-mail or e-mails are at issue in his case. The specific language leading to the charges is not provided. Furthermore, it is not stated whether Kirwan's e-mail(s) to Kern or to McMaster are the sources of the charges; he was not even told in writing which person is his accuser. These omissions are unacceptable and compound the illegitimacy of Clemson's actions.

Conclusion

Given that Kirwan's speech is protected by the First Amendment, it cannot be grounds for punishment. Clemson must immediately drop all charges against Kirwan.

FIRE urges Clemson University to show the courage to take the necessary steps to correct its errors in prosecuting Kirwan for his protected speech. While we hope this situation can be resolved amicably and swiftly, we are committed to using all of our resources to see this situation through to a just and moral conclusion. Please spare Clemson the embarrassment of fighting against the Bill of Rights, by which it is legally and morally bound.

With this letter we enclose a signed FERPA waiver from William Kirwan, permitting you to fully discuss his case with FIRE.

We ask for a response by 5:00 PM, June 3, 2010, the day before Kirwan's disciplinary conference.

Sincerely,

Adam Kissel
Director, Individual Rights Defense Program

Encl.

cc:
Laura McMaster, Assistant Director of Leadership Education, Clemson University
Marty Kern, General Manager, Littlejohn Coliseum, and Director of Major Events, Clemson University
Joy Smith, Associate Vice President and Dean of Students, Clemson University