



August 3, 2020

Dr. Jay Gogue  
Office of the President  
Auburn University  
107 Samford Hall  
182 S. College Street  
Auburn, Alabama 36849

**URGENT**

*Sent via Electronic Mail (gjjg0002@auburn.edu)*

Dear President Gogue:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

FIRE appreciates that Auburn University is one of the few institutions in the country whose policies earn a "green light" rating from FIRE. We are, however, concerned by Auburn's statement that it is exploring "options" in response to lecturer Jesse Goldberg's extramural comments, which have drawn calls for his termination from at least one state legislator.

We write to seek Auburn's reassurance that it will not violate the First Amendment by heeding the calls of some of Goldberg's critics, and will instead defend the well-established First Amendment rights of its faculty and students.

**I. Calls for Goldberg's Termination Over Social Media Comments About Police**

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

Jesse Goldberg holds the position of Lecturer of African American & American Literature and Composition in the English department of Auburn University, where he is scheduled to teach four online classes—two sections of Composition and two of an American Literature survey course—during the fall term.

Goldberg is a prison abolitionist, a subject in which he takes personal and scholarly interest,<sup>1</sup> and shares his views on his personal social media accounts. On July 30, 2020, *Yellowhammer News*, a conservative news outlet covering Alabama, reported on Goldberg's abolitionist views, highlighting several of Goldberg's social media posts. One of these posts had received some attention on Twitter shortly before *Yellowhammer* shared it with a larger audience.<sup>2</sup>

That tweet was in response to a tweet by the ACLU, which had shared a widely-viewed video depicting plainclothes officers of the New York City Police Department seizing a demonstrator and pushing her into an unmarked vehicle, which the ACLU characterized as an abduction.<sup>3</sup> Goldberg shared the ACLU's tweet and video, adding: "This is kidnapping. Fuck every single cop. Every single one. The only ethical choice for any cop to make at this point is to refuse to do their job and quit. The police do not protect people. They protect capital. They are instruments of violence on behalf of capital."<sup>4</sup>

The *Yellowhammer* report also highlighted a Facebook post by Goldberg that same day in which he elaborated:

And then on the ground we continue to see police forces literally grab people off the streets and throw them into unmarked vans. If you haven't seen the video of plainclothes NYPD officers throwing Nikki Stone into a van yet, it's a brutal display of fascism (as all videos of police violence - a redundant phrase - are). It's kidnapping. ACAB.<sup>[5]</sup> Yes, all. Police do not protect people. They protect capital. Cops are instruments of violence on behalf of capital. Literally the only ethical decision for a cop in this moment is to refuse to do their job, to quit. The only good cop is a cop who quits.

The *Yellowhammer* report was widely shared on social media, including by Donald Trump, Jr., who opined: "This is what's happening on college campuses around our country. The liberal, anti-American-values egg heads already took over the Ivy League. Now they're gunning for middle America."<sup>6</sup>

Goldberg's comments also drew a response from Rep. Brett Easterbrook, a member of the Education Policy Committee of the Alabama House of Representatives. Easterbrook posted to

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<sup>1</sup> Jesse A. Goldberg, *About*, HUMANITIES COMMONS, [https://hcommons.org/members/jesse\\_a\\_goldberg](https://hcommons.org/members/jesse_a_goldberg) (last visited July 31, 2020).

<sup>2</sup> Sean Ross, *Auburn professor: 'F\*\*\* every single cop'*, YELLOWHAMMER NEWS, July 30, 2020, <https://yellowhammernews.com/auburn-professor-f-every-single-cop>.

<sup>3</sup> ACLU (@ACLU), TWITTER (July 28, 2020, 9:48 PM), <https://twitter.com/ACLU/status/1288290384771256321>.

<sup>4</sup> Jesse A. Goldberg, PhD (@KempoJesse), TWITTER (July 29, 2020, 7:46 AM) (screenshot available at <https://bit.ly/3ghhdB7>).

<sup>5</sup> "ACAB" is an acronym for "All Cops Are Bastards," a phrase often utilized by anti-police protesters.

<sup>6</sup> Donald Trump, Jr. (@DonaldJTrumpJr), TWITTER (July 30, 2020, 4:57 PM), <https://twitter.com/DonaldJTrumpJr/status/1288941754822139910>.

his campaign’s Facebook page that Goldberg “should be fired before the sun sets today!,” adding in the comments that “emails were sent” to Auburn the morning of July 30.<sup>7</sup> In a comment, Easterbrook said that if Goldberg did not resign, “he will be dealt with at the next ALGOP [Alabama Republican Party] meeting” and that the “stage is already set.” Easterbrook, who said Goldberg’s comments were “so shocking” because “Auburn is the most conservative school in the state,” explained his rationale:

You wonder how our society raised a bunch of communist [*sic*] that hate our country? Here is one of the main sources of the problems in our society. Universities! Not all college professors are complete liberals that are educated beyond their understanding, but here is a prime example. He also thinks we should abolish a society that could have prisons. Simply release all prisoners? Obviously he has no idea what type of people are in those prisons and yet he is educating our youth.

Professor Goldberg needs to resign today. If not, Auburn University, should fire him immediately. Our tax dollars are paying for this foolishness. As an Auburn graduate, I am ashamed that someone like this is “educating” our children.

Auburn issued a statement to media outlets calling “Goldberg’s comments inexcusable and completely counter to Auburn values,” adding:

Hate speech of any kind is simply wrong. Auburn is fully committed to the fundamental right of free speech, but we do not support hateful words or actions that degrade, disrespect or exclude. Especially during these difficult times in our nation, it’s vital that we reject crude stereotypes and work together to foster mutual understanding and respect within our communities.<sup>8</sup>

Auburn went on to say its “officials” were “considering options available,”<sup>9</sup> later adding that “Mr. Goldberg” (who holds a doctorate) “was hired on a temporary, non-tenure-track assignment.”<sup>10</sup>

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<sup>7</sup> Rep. Brett Easterbrook, FACEBOOK (July 30, 2020, 2:54 PM),

<https://www.facebook.com/RepBrettEasterbrook/posts/3507066645970324>.

<sup>8</sup> Alana Mastrangelo, *Auburn African American Literature Professor: ‘F\*ck Every Single Cop’*, BREITBART, July 31, 2020, <https://www.breitbart.com/tech/2020/07/31/auburn-african-american-literature-professor-fck-every-single-cop>.

<sup>9</sup> *Id.*

<sup>10</sup> Howard Koplowitz, *Auburn lecturer’s anti-cop tweets ‘inexcusable’ as university ‘continues to assess’ his future*, AL.COM, July 31, 2020, <https://www.al.com/news/montgomery/2020/07/auburn-lecturers-anti-cop-tweets-inexcusable-as-university-continues-to-assess-his-future.html>. Many, including Goldberg, interpreted this as an

## II. The First Amendment and Alabama Law Sharply Limit Auburn’s “Options” in Responding to Goldberg’s Extramural Political Speech

Goldberg’s extramural comments are protected by the First Amendment, state law, and Auburn policy, each recognizing the rights of faculty members at public institutions to comment on matters of public concern, including expression others may find deeply offensive.

### A. *The First Amendment, Alabama Law, and Auburn Policy Apply to Auburn University.*

Any attempt to sanction or terminate Goldberg would require Auburn to jettison its responsibilities under the Constitution, state law, and its own policies.

It has long been settled law that the First Amendment is binding on public colleges like Auburn.<sup>11</sup> Accordingly, faculty members at public universities do not “relinquish First Amendment rights to comment on matters of public interest by virtue of government employment.”<sup>12</sup> Instead, faculty members retain a First Amendment right to speak “(1) as a citizen . . . (2) on a matter of public concern.”<sup>13</sup>

State law is in accord, providing that students and faculty at Alabama’s public universities “are free to take positions on public controversies,” and that it is “not the proper role of the institution to shield individuals from speech protected by the First Amendment,” including “ideas and opinions they find unwelcome, disagreeable, or offensive.”<sup>14</sup>

Auburn’s policies—which, again, earn FIRE’s highest rating for campus free speech—likewise protect faculty expression. In setting forth the personnel policies in its Faculty Handbook, Auburn adopted the AAUP’s 1940 Statement of Principles on Academic Freedom and Tenure, providing that when faculty “speak or write on matters of public interest,” they “should be free from institutional censorship or discipline.”<sup>15</sup> As Wisconsin’s Supreme Court recently explained, academic freedom encompasses not only a right to speak inside a classroom, but to engage in “extramural” expression.<sup>16</sup> There, a private university could not punish a professor for online criticism of a graduate student, which was a “contractually-disqualified basis for

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indication that Auburn was exploring disciplinary consequences. *Id.*; *See, e.g.*, JorDan (@Jordohi), TWITTER (Aug. 1, 2020, 12:04 PM), <https://twitter.com/Jordohi/status/1289592903531028481>.

<sup>11</sup> *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).

<sup>12</sup> *Connick v. Myers*, 461 U.S. 138, 140 (1983).

<sup>13</sup> *Alves v. Bd. of Regents of the Univ. Sys. of Ga.*, 804 F.3d 1149, 1160 (11th Cir. 2015).

<sup>14</sup> CODE OF ALA. § 16-68-3(a). This law effectuates the legislature’s recognition that “all public institutions of higher education should strive to ensure the fullest degree of intellectual and academic freedom and free expression.” CODE OF ALA. § 16-68-1(5).

<sup>15</sup> AUBURN UNIV., FACULTY HANDBOOK §3.1.1 (rev. Mar. 5, 2020), *available at* [http://www.auburn.edu/academic/provost/facultyHandbook/chapter%203-personnel\\_policies.php](http://www.auburn.edu/academic/provost/facultyHandbook/chapter%203-personnel_policies.php).

<sup>16</sup> *McAdams v. Marquette Univ.*, 914 N.W. 2d 708, 730–37 (Wis. 2018).

discipline” by virtue of the university’s adoption of the AAUP’s 1940 Statement—the same policy adopted by Auburn.<sup>17</sup>

### ***B. Goldberg Spoke as a Private Citizen.***

Goldberg’s comments on his personal Facebook and Twitter accounts are unquestionably speech in his capacity as a private citizen, not as an employee of Auburn. The “critical question” in determining whether the speech was that of an employee or private citizen is “whether the speech at issue is itself ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.”<sup>18</sup> Universities ordinarily do not employ their faculty to post on their personal social media accounts.<sup>19</sup> Even if others knew that Goldberg is employed by Auburn, the mere knowledge of a speaker’s employment does not render their speech pursuant to their official duties.<sup>20</sup>

### ***C. Goldberg Spoke on Matters of Public Concern.***

There is no question that Goldberg’s comments addressed matters of significant public concern. “Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community[.]”<sup>21</sup>

The homicide of George Floyd became a watershed moment in American political discourse, placing issues of public policy on policing and race at the front and center of local,<sup>22</sup> national,<sup>23</sup> and international debate.<sup>24</sup> That public debate has emboldened calls to “defund” or abolish police departments.<sup>25</sup> Violent responses by police officers to protesters—many of them critical of the police—have drawn significant public scrutiny. That includes, in particular, police officers, whether wearing plain clothes or camouflage, detaining protesters.<sup>26</sup>

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<sup>17</sup> *Id.* at 737.

<sup>18</sup> *Lane v. Franks*, 573 U.S. 228, 240 (2014).

<sup>19</sup> *See, e.g., Higbee v. E. Mich. Univ.*, No. 18-13761, 2019 U.S. Dist. LEXIS 109394, at \*14 (E.D. Mich. July 1, 2019) (commenting on Facebook about the university’s response to racial incidents “would not appear to be within a history professor’s official duties”).

<sup>20</sup> *See, e.g., Pickering v. Bd. of Educ.*, 391 U.S. 563, 576–78 (1968) (appendix reproducing teacher’s letter to a local newspaper criticizing his employer, explaining that he teaches at the high school).

<sup>21</sup> *Snyder v. Phelps*, 562 U.S. 453 (2011).

<sup>22</sup> Tim Nail, *Gogue seeks task force on ‘meaningful change’ for Auburn black community*, AUBURN PLAINSMAN, June 5, 2020, <https://www.theplainsman.com/article/2020/06/gogue-seeks-task-force-on-meaningful-change-for-auburn-black-community>.

<sup>23</sup> Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES, July 10, 2020, <https://www.nytimes.com/article/george-floyd-protests-timeline.html>.

<sup>24</sup> *How George Floyd’s death sparked protests around the world*, WASH. POST, June 10, 2020, <https://www.washingtonpost.com/graphics/world/2020/06/10/how-george-floyds-death-sparked-protests-around-world>.

<sup>25</sup> Dionne Searcey, *What Would Efforts to Defund or Disband Police Departments Really Mean?*, N.Y. TIMES, June 8, 2020, <https://www.nytimes.com/2020/06/08/us/what-does-defund-police-mean.html>.

<sup>26</sup> Mihir Zaveri & Michael Gold, *Video of N.Y.P.D. Pulling Protester Into Unmarked Van Draws Criticism*, N.Y. TIMES, July 28, 2020, <https://www.nytimes.com/2020/07/28/nyregion/nypd-protester-van.html>.

These issues have drawn vociferous and sharply divergent views. Whether one identifies with the “Defund the Police” advocates, the “Back the Blue” supporters, or neither of these movements, none can deny that these are matters of public concern. That some find Goldberg’s speech offensive does not change this analysis, as the “inappropriate or controversial character” of the speech “is irrelevant to the question of whether it deals with a matter of public concern.”<sup>27</sup>

***D. The Subjectively Offensive Nature of Goldberg’s Speech Does Not Void its Status as Protected Speech.***

However offensive others find Goldberg’s statements, their subjectively offensive nature does not diminish their protected nature under the First Amendment, which involves “a legal, not moral, analysis.”<sup>28</sup>

***i. The First Amendment protects offensive expression.***

The Supreme Court has repeatedly, consistently, and clearly held that expression may not be restricted merely because some or even many find it to be offensive or disrespectful. This core First Amendment principle is why the authorities cannot ban the burning of the American flag,<sup>29</sup> penalize parody advertisements referencing a pastor losing his virginity to his mother in an outhouse,<sup>30</sup> or disperse civil rights marchers out of fear that “muttering” and “grumbling” white onlookers might resort to violence.<sup>31</sup> In ruling that the First Amendment protects protesters holding signs outside of soldiers’ funerals (including signs that read “Thank God for Dead Soldiers,” “Thank God for IEDs,” and “Fags Doom Nations”), the Court reiterated this fundamental principle, remarking that “[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”<sup>32</sup> Again, much to Auburn’s credit, its policies recognize these principles, which is why the university has earned FIRE’s green light rating since January 2018.

A Supreme Court decision addressing an unflattering portrayal of police officers at a public university is illustrative. In 1969, a student newspaper published, on its front page, a vulgar headline (“Motherfucker Acquitted”) and a “political cartoon . . . depicting policemen raping the Statue of Liberty and the Goddess of Justice.”<sup>33</sup> The Court held that the disciplinary sanctions against the editor, for distribution of “indecent” written material, were inconsistent

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<sup>27</sup> *Rankin v. McPherson*, 483 U.S. 378, 387 (1987) (expression of hope that President Ronald Reagan might be assassinated was protected against retaliation).

<sup>28</sup> *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 821 (S.D. Iowa 2019).

<sup>29</sup> *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”).

<sup>30</sup> *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

<sup>31</sup> *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

<sup>32</sup> *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).

<sup>33</sup> *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973); *Papish v. Bd. of Curators of Univ. of Mo.*, 464 F.2d 136, 140 (8th Cir. 1972).

with the First Amendment, as “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.’”<sup>34</sup> If the First Amendment protects the on-campus distribution of a graphic, denigrating depiction of police officers, it certainly protects insulting language off-campus.

Nor does Goldberg’s use of profane language change the course of this analysis. In its landmark 1971 decision *Cohen v. California*, the Supreme Court held that wearing a jacket emblazoned with the words “Fuck the Draft” in a courthouse hallway was protected by the First Amendment.<sup>35</sup> While some ideas may be expressed through “relatively precise, detached explication,” some words “are often chosen as much for their emotive as their cognitive force.”<sup>36</sup> Because “officials cannot make principled distinctions” between offensive or inoffensive speech, the First Amendment deprives government actors of that authority.<sup>37</sup>

## ii. There is no First Amendment exception for “hate speech.”

Auburn’s characterization of Goldberg’s remarks as “[h]ate speech” has no bearing on the legal protection afforded to Goldberg’s expression. The Supreme Court has repeatedly held that there is no First Amendment exception for expression others view as hateful.<sup>38</sup> The Court recently and expressly reaffirmed this principle, refusing to establish a limitation on speech viewed as “hateful” or demeaning “on the basis of” of membership in a protected class.<sup>39</sup> Even if such an exception existed, it would apply here only if that exception reached speech on the basis of employment as a police officer.

## III. Conclusion

Auburn’s suggestion that it might discipline or fail to renew Goldberg’s position due to his speech will have a chilling effect on campus discourse concerning matters of profound public importance. If the university carries through with either of these possibilities, including nonrenewal of Goldberg’s “temporary, non-tenure track assignment,”<sup>40</sup> it will certainly find itself in violation of the First Amendment.

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<sup>34</sup> *Id.*

<sup>35</sup> *Cohen v. California*, 403 U.S. 15, 25 (1971).

<sup>36</sup> *Id.* at 26.

<sup>37</sup> *Id.* at 25.

<sup>38</sup> *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

<sup>39</sup> *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017).

<sup>40</sup> *Perry v. Sindermann*, 408 U.S. 593, 598 (1972) (“[T]his Court has specifically held that the nonrenewal of a nontenured public school teacher’s one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights . . . . We reaffirm those holdings here.”) (internal citations omitted).

Accordingly, we call on Auburn to publicly disclaim the possibility of disciplinary sanctions and reaffirm its commitment to the First Amendment. Given the urgent nature of this matter, we request receipt of a response by the close of business on Thursday, August 6, 2020.

Sincerely,

A handwritten signature in blue ink, appearing to read 'AS', is positioned above the printed name.

Adam Steinbaugh  
Director, Individual Rights Defense Program