



April 1, 2022

John Garvey  
Office of the President  
Catholic University of America  
620 Michigan Avenue NE  
Washington, District of Columbia 20064

**URGENT**

*Sent via U.S. Mail and Electronic Mail (office-of-the-president@cua.edu)*

Dear President Garvey:

The Foundation for Individual Rights in Education<sup>1</sup> is concerned by Catholic University of America's (CUA's) investigation of student Rory O'Connor for a post on his personal Instagram account depicting a popular meme and tagging the Instagram account of the university's Young Americans for Freedom (YAF) chapter. While the post may have irked members of YAF, it is protected by CUA's strong promises of free expression. As such, CUA must immediately terminate its investigation against O'Connor without issuing any discipline.

**I. CUA Launches Investigation Over O'Connor's Post**

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us. To these ends, please find enclosed an executed privacy waiver authorizing you to share information about this matter.

Rory O'Connor is an undergraduate enrolled at CUA. On March 23, 2022, CUA's YAF chapter posted on its Instagram account a picture of transgender collegiate swimmer Lia Thomas, who has faced criticism for competing in the women's league, with the text "Change my mind" and "Save women's sports."<sup>2</sup> O'Connor objected to YAF's post, adding it to his Instagram story with the text "Fuck outta here[.]"<sup>3</sup> O'Connor also made numerous posts that day using popular internet memes to criticize YAF for its post about Thomas.

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<sup>1</sup> FIRE is a nonpartisan nonprofit dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

<sup>2</sup> Young Americans for Freedom (@catholicuyaf), INSTAGRAM (Mar. 23, 2022), <https://www.instagram.com/p/CbcRr-ssEHA>.

<sup>3</sup> Rory O'Connor (@rwocon), INSTAGRAM (Mar. 23, 2022) (on file with author).

One of O'Connor's posts, which appears to be the subject of a complaint and CUA's reaction thereto that prompted this letter, depicted a popular meme from the children's cartoon "Arthur," in which Dora Winifred Read (better known as D.W., a cartoon aardvark who is Arthur's younger sister) stands next to Timmy Tibble (a cartoon bear in D.W.'s class) as Tibble holds a green bat.<sup>4</sup> The original meme includes a satirical caption meant to be Tibble's words: "Do you wanna keep the meme, or do you wanna keep your kneecaps?"<sup>5</sup> Playing off the original, O'Connor added the text, "My terms to stop cyber billing [*sic*] the shit out of @catholicuyaf are simple[.]" and he edited the meme's caption to read: "Do you wanna keep your post, or do you wanna keep your kneecaps?" in reference to YAF's post about Thomas.

On March 29, O'Connor received notice from CUA Associate Dean of Students Heidi Zeich charging him with "allegedly violating" the student code of conduct for engaging in disorderly conduct.<sup>6</sup> The letter defined disorderly conduct as "[a]cting in a manner which annoys, disturbs, interferes with, obstructs, or is offensive to another/others."<sup>7</sup> O'Connor now has a student conduct conference scheduled for April 4.

## II. CUA Cannot Punish or Investigate O'Connor for His Posts

Although CUA is a private institution not bound by the First Amendment, CUA policies provide students robust expressive rights, which the university is legally and morally bound to respect. To wit, CUA's demonstrations policy, which despite its title applies (among other things) to any "activity to express views," provides that:

The Catholic University of America values and defends the right of free speech and the freedom of members of the University community to express themselves on University property, provided that such expression does not violate the law or applicable University policies.<sup>8</sup>

Additionally, the university's mission statement provides:

The Catholic University of America is a community of scholars, both faculty and students, set apart to discover, preserve and impart the truth in all its forms, with particular reference to the needs and opportunities of the nation. As a university, it is essentially a **free and autonomous** center of study and an agency serving the needs of human society. It welcomes the collaboration of all scholars of good will who, through the process of study and

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<sup>4</sup> See Ai2ar, REDDIT, (Apr. 19, 2020, 7:27 AM), [https://www.reddit.com/r/MemeTemplatesOfficial/comments/g465vg/do\\_you\\_wanna\\_keep\\_the\\_or\\_do\\_you\\_wanna\\_keep\\_your](https://www.reddit.com/r/MemeTemplatesOfficial/comments/g465vg/do_you_wanna_keep_the_or_do_you_wanna_keep_your).

<sup>5</sup> *Id.*

<sup>6</sup> Letter from Heidi E. Zeich, Assoc. Dean of Students, Catholic Univ. of Am., to Rory O'Connor (March 29, 2022) (on file with author).

<sup>7</sup> *Id.*

<sup>8</sup> CATHOLIC UNIV. OF AM., DEMONSTRATIONS POLICY (rev. July 24, 2019), *available at* <https://policies.catholic.edu/safety/demonstrations.html> [<https://perma.cc/3FHD-JN3E>].

reflection, contribute to these aims in an atmosphere of academic competence where **freedom is fostered and where the only constraint upon truth is truth itself.**<sup>9</sup>

These promises bind CUA in its treatment of O'Connor and the rest of its student body,<sup>10</sup> and are fairly read as carrying a corresponding responsibility for CUA to protect students' expressive rights.<sup>11</sup>

*A. O'Connor's Posts are Protected by CUA's Promises of Free Expression.*

O'Connor's Instagram posts criticizing a student group's political views, regardless of whom they may annoy, remain clearly protected by CUA's promises of free expression. Nothing about the posts can deny them the protection that CUA's students rightfully expect.

*i. O'Connor's posts constitute protected satire.*

As important—indeed, vital—components of political speech, parody and satire lie at the core of our country's honored traditions. Expression that relies on satire—such as O'Connor's posts—exists to challenge, to amuse, to provoke, to educate, and, indeed, sometimes to offend. The landmark United States Supreme Court cases *Cohen v. California*<sup>12</sup> and *Hustler Magazine, Inc. v. Jerry Falwell*,<sup>13</sup> collectively illustrate reasons for protecting even highly offensive material, farce, profanity, and exaggeration. Here, O'Connor used one of his generation's preferred methods of satire—memes—to criticize YAF's opinions on transgender athletes. To punish O'Connor for this political criticism would run counter to one of the fundamental purposes of freedom of speech.<sup>14</sup>

*ii. O'Connor's posts do not amount to actionable harassment.*

CUA may not justify disciplining O'Connor on the basis that his posts amount to harassment, which, given CUA's promises of free expression, “must include something beyond mere

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<sup>9</sup> CATHOLIC UNIV. OF AM., FACULTY HANDBOOK PART I (“FACULTY HANDBOOK”), Art. B, §1 (“Mission Statement”) at p. 11, available at [https://policies.catholic.edu/\\_media/docs/facultyhandbooki\\_2018.pdf](https://policies.catholic.edu/_media/docs/facultyhandbooki_2018.pdf) (emphasis added) [<https://perma.cc/U3LS-E8PK>].

<sup>10</sup> *Basch v. George Washington Univ.*, 370 A.2d 1364, 1366 (D.C. 1977) (“[W]e recognize the general rule ‘that the relationship between a university and its students is contractual in nature . . . .’”).

<sup>11</sup> Given that CUA promises students that their speech is protected so long as “such expression does not violate the law or applicable University policies,” students will reasonably assume that they will not be punished for speech which would be protected by the First Amendment, which is the foremost legal standard concerning freedom of expression.

<sup>12</sup> 403 U.S. 15 (1971) (First Amendment protected Vietnam War protester's donning of jacket displaying “Fuck the Draft”).

<sup>13</sup> 485 U.S. 46 (1988) (First Amendment protected cartoon parody depicting Jerry Falwell in a drunken, incestuous encounter with his mother in an outhouse).

<sup>14</sup> *Id.* at 50 (“At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.”).

expression of views, words, symbols or thoughts that some person finds offensive” or irksome.<sup>15</sup>

In *Davis v. Monroe County Board of Education*, the Supreme Court set forth a strict definition of student-on-student (or peer) harassment.<sup>16</sup> In order for student conduct (including expression) to constitute actionable harassment, it must be (1) unwelcome, (2) discriminatory on the basis of gender or another protected status, and (3) “so severe, pervasive, and objectively offensive that it can be said to deprive the victim[] of access to the educational opportunities or benefits provided by the school.”<sup>17</sup>

Here, O’Connor’s posts are not objectively offensive. There is also no credible argument they have deprived any students of access to educational opportunities or benefits. The posts are critical of a group which has opened itself up to engagement and criticism by publicly commenting on a controversial political issue, including asking students to “Change my mind.”<sup>18</sup> Additionally, as mentioned above, the posts constitute *satire*, a protected category of expression.

### iii. O’Connor’s post is not a true threat.

Taken in context, O’Connor’s post—which uses a popular meme template and says “Do you wanna keep your post, or do you wanna keep your kneecaps?”—is not a “true threat,” which is limited to statements through which “the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>19</sup> O’Connor’s post was *satire*, the opposite of *serious*—it asked YAF if it wanted to “keep [its] kneecaps” in the context of a well-known internet meme featuring a cartoon bear speaking with an animated aardvark. Importantly, the post at issue followed other posts criticizing YAF’s views on transgender athletes, and it was clear O’Connor was simply stating his intention to continue that criticism. Nobody in YAF could reasonably interpret the post as a serious expression of an intent to commit violence against them. The post amounts to no more than a satirical joke protected by CUA’s free expression promises.

### iv. CUA cannot punish O’Connor for subjectively objectionable expression.

Although CUA has a responsibility to protect the safety of students on campus, the university’s commitment to free expression precludes it from punishing speech solely because it “annoys, disturbs, interferes with, obstructs, or is offensive to another/others.” The principle of freedom of speech does not exist to protect only or even primarily non-

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<sup>15</sup> U.S. Dep’t of Educ., Dear Colleague Letter from Gerald A. Reynolds, Assistant Sec’y for Civil Rights (July 28, 2003), <https://www2.ed.gov/about/offices/list/ocr/firstamend.html>.

<sup>16</sup> *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

<sup>17</sup> *Id.* at 650.

<sup>18</sup> Young Americans for Freedom, *supra* note 2.

<sup>19</sup> *Virginia v. Black*, 538 U.S. 343, 359 (2003).

controversial or unobjectionable expression. Rather, it exists precisely to protect speech that some or even most members of a community may find objectionable.

The Supreme Court has repeatedly, consistently, and clearly held that expression may not be restricted on the basis that others take offense at it. This core principle of expressive freedom is why the authorities cannot outlaw burning the American flag,<sup>20</sup> punish wearing a jacket emblazoned with “Fuck the Draft,”<sup>21</sup> penalize cartoons depicting a pastor losing his virginity to his mother in an outhouse,<sup>22</sup> or disperse civil rights marchers out of fear that “muttering” and “grumbling” white onlookers might resort to violence.<sup>23</sup> In ruling that the First Amendment protects protesters holding insulting signs outside of soldiers’ funerals, 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>24</sup> So too has CUA chosen to protect even objectionable speech by promising to respect students’ freedom of expression.

O’Connor’s posts may have annoyed or offended student members of YAF, but his speech is not harassing nor threatening, and therefore remains protected by the university’s laudable promises of student expressive freedoms. Speech cannot be prohibited solely because it is annoying<sup>25</sup> or offensive.<sup>26</sup>

### *B. CUA’s Investigation Alone Violates Its Expressive Rights Promises.*

Even if CUA finds in favor of O’Connor, the university’s investigation itself violates its expressive rights promises. The question is not whether formal punishment is meted out, but whether the institution’s actions in response “would chill or silence a person of ordinary firmness[.]”<sup>27</sup>

Investigations into protected expression may meet this standard.<sup>28</sup> For example, a public university launched an investigation into a tenured faculty member’s offensive writings on race and intelligence, announcing an *ad hoc* committee to review whether the professor’s expression—which the university’s leadership said “ha[d] no place at” the college—constituted “conduct unbecoming of a member of the faculty.”<sup>29</sup> In this case, the United

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<sup>20</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>21</sup> *Cohen*, 403 U.S. at 25.

<sup>22</sup> *Falwell*, 485 U.S. at 50.

<sup>23</sup> *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

<sup>24</sup> *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).

<sup>25</sup> See *People v. Dietze*, 75 N.Y.2d 47, 52 (N.Y. 1989) (striking down, on First Amendment grounds, a penal law proscribing the “use of ‘abusive’ language with the intent to ‘harass’ or ‘annoy’ another person”) (internal citations omitted).

<sup>26</sup> *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973); *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 661 (1st Cir. 1974).

<sup>27</sup> *Mendocino Envtl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

<sup>28</sup> See, e.g., *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000).

<sup>29</sup> *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992).

States Court of Appeals for the Second Circuit determined that an investigation itself constituted an implicit threat of discipline, and the resulting chilling effect constituted a cognizable First Amendment harm.<sup>30</sup>

Here, the student code of conduct<sup>31</sup> includes significant sanctions—ranging from educational reflection assignments to suspension or expulsion, each of which is sufficient to meet the ordinary firmness test<sup>32</sup>—and an investigation sends the message that speech similar to O’Connor’s may be punished in the future. A quick, preliminary review of O’Connor’s speech is all that is necessary to confirm it is protected, obviating the need for any investigation (or reason to even notify the student that the inquiry and summary disposition of the complaint occurred).

### **III. Conclusion**

O’Connor’s posts are clearly protected by CUA’s promises of free expression. This principle does not shield O’Connor from every consequence of his expression—including criticism by YAF, students, the broader community, or the university itself. Criticism is a form of “more speech,” the preferred alternative to censorship.<sup>33</sup> However, given that CUA has made strong promises to respect students’ expressive rights, it is limited in the *types* of consequences that may be imposed and who may impose them.

Given the urgent nature of this matter, we request receipt of a response to this letter no later than the close of business on Monday, April 4, 2022, confirming that CUA has ended its investigation of O’Connor and will not pursue disciplinary sanctions in this matter.

Sincerely,



Sabrina Conza  
Program Officer, Individual Rights Defense Program

Cc: Heidi E. Zeich, Associate Dean of Students

Encl.

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<sup>30</sup> *Id.* at 89–90.

<sup>31</sup> CATHOLIC UNIV. OF AM., CODE OF STUDENT CONDUCT (last rev. Nov. 18, 2021), <https://policies.catholic.edu/students/studentlife/studentconduct/conduct-full.html> [<https://perma.cc/4D99-VHMS>].

<sup>32</sup> *Speech First, Inc. v. Fenves*, No. 19-50529, 2020 U.S. App. LEXIS 34087, at \*28–30 (5th Cir. Oct. 28, 2020).

<sup>33</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927).

## Authorization and Waiver for Release of Personal Information

I, Rory William O'Connor, born on                     , do hereby authorize The Catholic University of America (the "Institution") to release to the Foundation for Individual Rights in Education ("FIRE") any and all information concerning my current status, disciplinary records, or other student records maintained by the Institution, including records which are otherwise protected from disclosure under the Family Educational Rights and Privacy Act of 1974. I further authorize the Institution to engage FIRE's staff members in a full discussion of all matters pertaining to my status as a student, disciplinary records, records maintained by the Institution, or my relationship with the Institution, and, in so doing, to fully disclose all relevant information. The purpose of this waiver is to provide information concerning a dispute in which I am involved.

I have reached or passed 18 years of age or I am attending an institution of postsecondary education.

In waiving such protections, I am complying with the instructions to specify the records that may be disclosed, state the purpose of the disclosure, and identify the party or class of parties to whom disclosure may be made, as provided by 34 CFR 99.30(b)(3) under the authority of 20 U.S.C. § 1232g(b)(2)(A).

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights in Education, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

I also hereby consent that FIRE may disclose information obtained as a result of this authorization and waiver, but only the information that I authorize.

DocuSigned by:  
  
7A36AF91F017419...

Student's Signature

3/31/2022

Date