FIRE
Foundation for Individual Rights in Education

August 27, 2019

Dr. Lori Sundberg
President
Kirkwood Community College
6301 Kirkwood Boulevard SW
Cedar Rapids, Iowa 52404

Sent via U.S. Mail and Electronic Mail (lori.sundberg@kirkwood.edu)

Dear President Sundberg:

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.

We are concerned for the state of freedom of expression at Kirkwood Community College in light of the college's constructive termination of adjunct professor Jeff Klinzman due to public anger at his remarks on his personal Facebook page and his affirmation that he is an "antifascist." Klinzman spoke as a private citizen on matters of public concern, and his speech, not amounting to unlawful "true" threats or incitement, is protected by the First Amendment. By constructively terminating Klinzman, Kirkwood impermissibly subordinated his First Amendment rights to the approval of a hostile audience.

FIRE calls on Kirkwood to reinstate Klinzman and clarify that its faculty members' First Amendment rights will not be infringed.

I. Statement of Facts

The following is our understanding of the pertinent facts, which is based on media reports and Kirkwood's public statements. We appreciate that you may have additional information to offer and invite you to share it with us. However, if the facts here are substantially accurate, Kirkwood Community College's constructive termination of Klinzman violated its obligations under the First Amendment.

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Jeff Klinzman was an adjunct professor at Kirkwood, where he taught English courses since January 2010.[1]

On August 22, 2019, a local television news station published a report concerning Klinzman's posts on his personal Facebook page and on the Facebook page of an "Iowa Antifa" group.[2] Neither this report, nor the reports that followed, allege that Klinzman has engaged in any act of violence or discrimination. Klinzman, a native Iowan who graduated from the University of Iowa, has no apparent criminal record in Iowa, save for minor traffic infractions.

Klinzman's comment in the "Iowa Antifa" group responded to a screenshot of a tweet by President Donald Trump following violence between the "Proud Boys" and "antifa" in Portland, Oregon.[3] In his tweet, Trump said:

> Consideration is being given to declaring ANTIFA, the gutless Radical Left Wack [*sic*] Jobs who go around hitting (only non-fighters) people over the heads with baseball bats, a major Organization of Terror (along with MS-13 & others). Would make it easier for police to do their job![4]

Klinzman commented: "Yeah, I know who I'd clock with a bat..."[5]

A second post, from 2012, shared a *Rolling Stone* article entitled "One Town's War on Gay Teens," which focused on the "extreme anti-gay climate" in then-Rep. Michele Bachmann's district.[6] Klinzman commented:

> This is what the country will come to if we don't stop evangelical christians [*sic*]. I am struggling with my feelings after reading the [Rolling Stone] story below. Hatred is corrosive, and almost nothing good comes out of hating. But I cannot stand how some evangelicals insist that their homophobic bigotry must be, not the defining, but the ONLY value allowed in public discourse. Reading this story, and the descriptions of the evangelical activists who seem to WANT gay teens to commit suicide, reminded me of Ilya

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[1] Josh Scheinblum, *Kirkwood professor: 'I affirm that I am antifa'*, KCRG, Aug. 22, 2019, https://www.kcrg.com/content/news/Kirkwood-professor-I-affirm-that-I-am-antifa-557897151.html.
[2] *Id.*
[3] Gary LaFree, *As Portland deals with Proud Boys protests, here's what Trump doesn't get about antifa*, NBC NEWS: THINK, Aug. 18, 2019, https://www.nbcnews.com/think/opinion/portland-braces-proud-boys-protests-here-s-what-trump-doesn-ncna1041441.
[4] Donald J. Trump (@realDonaldTrump), TWITTER (July 27, 2019, 3:55 PM), https://twitter.com/realDonaldTrump/status/1155205025121132545.
[5] Scheinblum, *supra* note 1.
[6] Sabrina Rubin Erdely, *One Town's War on Gay Teens*, ROLLING STONE, Feb. 2, 2012, https://www.rollingstone.com/culture/culture-news/one-towns-war-on-gay-teens-232572.

> Ehrenburg's war poem, and how he motivated Soviet soldiers to deal with the German invaders:
>
> Kill them all, and bury them deep in the ground,
> Before millions more are tortured to death.
>
> It's not pretty, and I'm not proud, but seeing what evangelical christians [*sic*] are doing to this country and its people fills me with rage, and a desire to exact revenge.[7]

In response to an inquiry from KCRG, Klinzman said: "I affirm that I am 'antifa'."[8]

Klinzman's comment drew widespread media coverage, most prominently from national conservative outlets.[9] The coverage of Klinzman's remarks generated substantial criticism online, with many online commentators calling on Kirkwood to terminate Klinzman. Others made veiled threats against Klinzman.[10]

At 3:14 p.m. on August 23, Kirkwood posted a message from you to its Facebook page explaining that Klinzman's "opinions" had "drawn considerable attention from many inside and outside of the Kirkwood community," and that Kirkwood's "leadership has been assessing this matter in recent days." You explained that Kirkwood had "made the decision this morning" to remove Klinzman from the "one course that Mr. Klinzman was to have taught this semester," and that Kirkwood spoke to Klinzman "this afternoon about this matter and have accepted his resignation." The statement twice referred to "our decision to remove" Klinzman "from the classroom." Klinzman told KCRG that he had been placed on administrative leave and asked to resign.[11]

Your statement preemptively defended criticism from those who would "use this decision to support broader arguments about free speech on college campuses," urging that Klinzman could continue to "articulate his views in whatever forum he chooses." Kirkwood, you explained, would "always do what is necessary" when "any member of our community is

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[7] Jeff Klinzman, FACEBOOK (Feb. 18, 2012) (screenshot on file with author).
[8] Scheinblum, *supra* note 1.
[9] *See, e.g.*, Lukas Mikelionis, *Iowa prof says 'I am Antifa'; once posted desire to bash Trump with baseball bat*, FOX NEWS, Aug. 23, 2019, https://www.foxnews.com/us/iowa-prof-says-hes-part-of-antifa-amid-social-media-posts-expressing-wish-to-hit-trump-with-baseball-bat; Jessica Chasmar, *Iowa professor: 'I affirm that I am antifa'*, WASH. TIMES, Aug. 22, 2019, https://www.washingtontimes.com/news/2019/aug/22/jeff-klinzman-kirkwood-professor-i-affirm-that-i-a; Adam Sabes, *Iowa prof admits: 'I am Antifa'*, CAMPUS REFORM, Aug. 23, 2019, https://wwwt2.campusreform.org/?ID=13614.
[10] *See, e.g.*, John Armesto (@John_Armesto), TWITTER (Aug. 23, 2019, 11:52 AM), https://twitter.com/John_Armesto/status/1164943451668058112 (advising Kirkwood to tell "Jeff to get life insurance this week"), Simple Kind of Man (@infiltraitors), TWITTER (Aug. 23, 2019, 9:07 AM), https://twitter.com/Infiltraitors/status/1164901977651892226 (posting a photo of Klinzman's house and street name in response to a user who said he "look[s] forward to meeting" Klinzman).
[11] Josh Scheinblum, *Kirkwood professor with ties to Antifa resigns*, KCRG, Aug. 23, 2019, https://www.kcrg.com/content/news/Kirkwood-professor-with-ties-to-Antifa-resigns--558045171.html.

perceived as placing public safety in jeopardy[.]" Your statement twice cited the "potential" impact on Kirkwood's "environment."

II. Klinzman's Speech Is Protected by the First Amendment, Which Bars Retaliation by Kirkwood Community College, a Public Institution

However offensive Klinzman's comments may be to others, there is no reasonable argument that they are unprotected true threats or incitement. In taking steps to penalize Klinzman, Kirkwood exceeded the authority available to it under the First Amendment.

A. As a public institution, Kirkwood Community College's authority to penalize faculty or student speech is limited by the First Amendment.

The First Amendment is binding on public colleges, like Kirkwood. *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); *see also Gerlich v. Leath*, 861 F.3d 697, 715 (8th Cir. 2017) (denying qualified immunity in a First Amendment lawsuit against administrators of an Iowa public university and noting it has long been "clearly established" that colleges act "as the instrumentality of the State" and cannot restrict speech on the basis that it finds a group's views abhorrent.)

A public college administrator who violates clearly established law will not retain qualified immunity and can be held personally responsible for monetary damages for violating First Amendment rights under 42 U.S.C. § 1983. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

i. It is clearly established that faculty at public colleges have a First Amendment right to comment on matters of public concern.

Employees of government institutions like Kirkwood do not "relinquish First Amendment rights to comment on matters of public interest by virtue of government employment." *Connick v. Myer*s, 461 U.S. 138, 140 (1983). A government employer cannot penalize an employee for speaking as a private citizen on a matter of public concern unless it demonstrates that the expression hindered "the effective and efficient fulfillment of its responsibilities to the public." *Id.* at 150. These protections extend to untenured faculty members, and bar public educational institutions from refusing, based "on [the] exercise of First and Fourteenth Amendment rights," to renew an educator's contract. *Perry v. Sindermann*, 408 U.S. 593, 598 (1972).

ii. Klinzman's remarks were made as a private citizen.

There is no reasonable dispute that Klinzman's remarks were made in his capacity as a private citizen, not as an employee. 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." *Lane v. Franks*, 573 U.S. 228, 240 (2014). Colleges ordinarily do not employ their faculty to post on their personal Facebook pages. *See, e.g.*, *Higbee v. Eastern Michigan University*, 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.")

iii. Klinzman's remarks related to matters of public concern.

There is no reasonable dispute that Klinzman's remarks concerned matters of 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[.]" *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (picketers' signs outside of a fallen soldier's funeral, including "Thank God for dead soldiers," related to matters of public concern). That others find the statements to be of an "inappropriate or controversial character . . . is irrelevant to the question of whether it deals with a matter of public concern." *Rankin v. McPherson*, 483 U.S. 378, 387 (1987) (expression of hope that President Ronald Reagan might be assassinated was protected against retaliation).

Klinzman's 2012 and 2019 Facebook posts were, respectively, in response to a *Rolling Stone* article relating to a member of Congress and to the President of the United States calling for "antifa" to be designated as a terrorist organization. These posts are clearly relevant to matters of public concern, even if others find them offensive or controversial.

iv. Safety concerns presented by public anger cannot justify suppression of a faculty member's First Amendment rights without effectuating a heckler's veto.

Kirkwood's statement avers that its action was undertaken in an effort to protect the "safety of our students, faculty and staff" with anticipation of a "potential impact on our learning environment." In asserting a public safety rationale for removing a professor from the classroom, it is critical that authorities be precise and transparent about the threat posed, and narrow in mitigating the threat without restricting the First Amendment rights of a speaker or his critics. "[A] heckler's veto," the United States Court of Appeals for the Sixth Circuit has explained, "will nearly always be susceptible to being reimagined and repackaged as a means for protecting the public, or the speaker himself, from actual or impending harm." *Bible Believers v. Wayne County*, 805 F.3d 228, 255 (6th Cir. 2015).

Kirkwood's statement is not clear as to the origin of a public safety risk. If it means to suggest that Klinzman's comments themselves present a safety risk, those statements fall short of the First Amendment's exacting standards for unprotected true threats or incitement, as discussed below.

If, instead, Kirkwood refers to the possibility of violence or disruption from Klinzman's critics, that possibility would undoubtedly justify steps to avert the possibility of violence or disruption, but Kirkwood cannot cite the anger of others (or the "potential" of disruption) as a justification to penalize Klinzman for his protected speech. To do so would permit a heckler's veto: If authorities can silence the speaker in deference to the reaction of his critics, "the law in effect acknowledges a veto power in hecklers who can, by being hostile enough, get [authorities] to silence any speaker of whom they do not approve." *Bible Believers*, 805 F.3d at 234 n.1 (quoting HARRY KLAVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 140 (Ohio St. Univ. Press 1965)). The heckler's veto cannot be effectuated by institutions bound by the First Amendment. *See, e.g.*, *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) (speech cannot be burdened or punished "simply because it might offend a hostile mob," as "[l]isteners' reaction to speech is not a content-neutral basis for regulation").[12]

A recent decision from a federal court in Memphis is instructive. A utility worker employed by a public electric company told a local newspaper that he was opposed to the removal of a statue of Jefferson Davis and "tired of . . . being portrayed as KKK or a white supremacist simply because I'm a white guy who wants to preserve my heritage," then posted about his white separatist views on his personal Facebook page, which suggested that his racist views related to his contact with the company's customers.[13] *Goza v. Memphis Light, Gas & Water Div.*, No. 2:17-cv-2873, 2019 U.S. Dist. LEXIS 100057, at *5–6 (W.D. Tenn. June 14, 2019). After members of the public discovered that he was employed by the utility company, they began posting about his views and employment on Facebook, and the company received numerous complaints. *Id.* at *6. The utility company suspended, demoted, and ultimately terminated the employee. *Id.* at *8–9.

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[12] The origin of any potential disruption is also important. Klinzman's posts themselves did not cause any disruption. Rather, the *coverage* of the posts and *critics* of Klinzman's posts are the proximate cause of the possibility of disruption. Taken to its logical conclusion, a theory that permits Kirkwood to penalize Klinzman because of public attention would *also* permit Kirkwood to penalize the student or faculty member who brought the posts to the attention of the media, leading to public outcry. *See, e.g.*, *Schoenecker v. Koopman*, 349 F. Supp. 3d 745, 753 (E.D. Wis. 2018) (disruption of public high school by media interviews was not attributable to the underlying speech, but to the school's decision to censor it).

[13] The utility worker's Facebook posts:

> "You want to be with your kind. I want to be with mine, There's no wrong it that. You celebrate your history, but you want to destroy mine. You have black history month, but being proud of white history is racist. That's the hypocrisy I will never be at peace with. I work the streets of Memphis daily. The real racists are blacks. 90% of the blacks who are murdered are done so at the hands of other blacks. So if black lives matter, why don't you clean up your own damn house before complaining about my history and blaming your problems on whitey. . . . We at the League of the South are doing much more. We are getting in the streets. New Orleans was only a beginning. Charlottesville is this weekend and over a thousand [are] planning on going. We're planning these all over South. The attacks have awakened more and more."

Goza at *5–6.

The federal court explained that the utility company's response violated the First Amendment. While "government does not have to turn a blind eye to the speech of its employees," it cannot make decisions "based on unconstitutional factors." *Id.* at *1–2. The plaintiff's statements, while "insensitive, offensive, and even bigoted," were protected, and the employer made no effort to assess whether there was a likelihood that the employee would engage in discrimination against the company's customers. *Id.* at *2, 25. "Public perception alone cannot justify a restriction on free speech. . ." and "concern" about "brand or reputation is not sufficient to outweigh" First Amendment rights:

> Voters cannot use the ballot box to make the government silence their opponents; the public cannot use social media to do so either. The idea that the government should be permitted to censor speech in order to avoid public outcry was raised and dismissed in the Civil Rights era. . . . The fear of "going viral," by itself, does not appear to be a reasonable justification for a restriction on an employee's speech. To hold otherwise would permit the government to censor certain viewpoints based on the whims of the public. . . .

Id. at *2, 29–31.

The protection of the First Amendment is particularly vital with respect to faculty members. "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Institutions of higher education cannot penalize protected expression on the basis that it might cause discomfort, disharmony, or deep offense among colleagues or prospective students. For example, the United States Court of Appeals for the Ninth Circuit has made clear that offense taken to a faculty member's expression does not constitute injury to government interests sufficient to override a professor's First Amendment rights:

> The desire to maintain a sedate academic environment, to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint, is not an interest sufficiently compelling, however, to justify limitations on a teacher's freedom to express himself on political issues in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms. . . . Self-restraint and respect for all shades of opinions, however desirable and necessary in strictly scholarly writing and discussion, cannot be demanded on pain of dismissal once the professor crosses the concededly fine line from academic instruction as a teacher to political agitation as a citizen—even on the campus itself.

Adamian v. Jacobsen, 523 F.2d 929, 934 (9th Cir. 1975) (internal citations and quotation marks omitted).

Other federal courts have similarly rejected the argument that a public institution can discipline a faculty member because her expression caused anger, alarm, or concern. In a case involving the use of gendered and racial slurs as part of a classroom discussion on how language is used to marginalize minorities and other oppressed groups in society, the United States Court of Appeals for the Sixth Circuit rejected a college's argument that intervention by a local civil rights activist posed an actionable risk of disruption to the school's operations. *Hardy v. Jefferson Community College*, 260 F.3d 671 (6th Cir. 2001). The Sixth Circuit wrote:

> Only after Reverend Coleman voiced his opposition to the classroom discussion did Green and Besser become interested in the subject matter of Hardy's lecture. Just like the school officials in Tinker, Green and Besser were concerned with "avoiding the discomfort and unpleasantness that always accompany" a controversial subject. On balance, Hardy's rights to free speech and academic freedom outweigh the College's interest in limiting that speech.

Id. at 682 (internal citation omitted).

In other words, that a faculty member's expression offends students, colleagues, or the general public is not a sufficient basis on which to limit his or her First Amendment rights. This well-established principle is directly applicable to the situation at issue here.

B. Klinzman's remarks may be offensive, but remain protected because they are not "true threats" or incitement under the First Amendment.

Klinzman's response to a statement by President Trump, his response to a *Rolling Stone* article about Christianity and homosexuality, and his association with the political views of "antifa" are protected by the First Amendment, as they do not amount to unprotected "true" threats, incitement, or unlawful assembly. While his views may be deeply offensive to some, "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation." *Baumgartner v. United States*, 322 U.S. 665, 673–74 (1944).

i. The First Amendment protects subjectively offensive expression.

A cursory review of the public responses to Klinzman's speech reveals that some members of the public, including elected officials,[14] find his remarks deeply offensive. However, whether

[14] *See, e.g.*, Ashley Hinson (@hinsonashley), TWITTER (Aug. 23, 2019, 2:17 PM) https://twitter.com/hinsonashley/status/1164979940854509568 ("Free speech on college campuses is essential

speech is protected by the First Amendment is "a legal, not moral, analysis." *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 821 (S.D. Iowa 2019).

The principle of freedom of speech does not exist to protect only non-controversial 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. For example, in holding that burning the American flag was expression protected by the First Amendment, the Supreme Court urged 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." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

This principle applies with particular strength with respect to public institutions of higher education. For example, the Supreme Court unanimously upheld as protected speech a student newspaper's front-page use of a vulgar headline ("Motherfucker Acquitted") and a "political cartoon . . . depicting policemen raping the Statue of Liberty and the Goddess of Justice." *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 667–68 (1973). The university's response was not predicated on the time, place, or manner of speech, but instead driven by the "disapproved *content* of the newspaper. . . ." *Id.* at 670 (emphasis in original.) These images were no doubt deeply offensive at a time of profound political polarization, yet "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.'" *Id.* Expressive rights, in short, may not be curtailed on the basis that others find them offensive or outrageous.

Federal courts have consistently protected public university faculty expression targeted for censorship or punishment due to subjective offense. In *Levin v. Harleston*, 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 administrators stated "ha[d] no place at [the college]"—constituted "conduct unbecoming of a member of the faculty." 966 F.2d 85, 89 (2d Cir. 1992). The United States Court of Appeals for the Second Circuit upheld the district court's finding that the investigation constituted an implicit threat of discipline and that the resulting chilling effect constituted a cognizable First Amendment harm, even though the faculty member was not terminated or formally disciplined.

In the absence of these principles, authorities—granted the power to distinguish the civil from the outrageous—would have unfettered discretion to penalize speech. As James Madison wrote about the First Amendment, "[s]ome degree of abuse is inseparable from the proper use

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to the free exchange of ideas and our democracy. However, the comments and behavior from this Iowa professor in Cedar Rapids are inexcusable. Advocating for Antifa? Really?").

of everything."[15] More recently, in *Cohen v. California*, the Court aptly observed that although "the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance," encountering offensive expression is "in truth [a] necessary side effect[] of the broader enduring values which the process of open debate permits us to achieve." 403 U.S. 15, 24–25 (1971). "That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength," because "governmental officials cannot make principled distinctions" between what speech is sufficiently inoffensive, and the "state has no right to cleanse public debate to the point where it is . . . palatable to the most squeamish among us." *Id.* at 25.

ii. Klinzman's remarks fall short of the First Amendment exceptions for "true threats" or incitement.

Political discourse has long been steeped in themes of violence. Perhaps most famously, Thomas Jefferson—a principal author of what ultimately became the First Amendment[16]—predicted that revolution and violence would be necessary to preserve liberty, writing: "The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is [its] natural manure."[17] Because rhetoric tinged with violent themes often intersects with charged political expression, the First Amendment requires an exacting standard to be met before a statement constitutes an unprotected "true threat" or "incitement."

A "true threat" is a statement 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." *Virginia v. Black*, 538 U.S. 343, 359 (2003). The United States Court of Appeals for the Eighth Circuit has analyzed alleged true threats under an "objectively reasonable listener" test. *United States v. Nicklas*, 713 F.3d 435, 440 (8th Cir. 2013). Under that test, a statement is a true threat only if "a reasonable recipient would have interpreted the defendant's communication as a serious threat to injure." *Id.*

Klinzman's response to President Trump's tweet, "Yeah, I know who I'd clock with a bat...," is remarkably similar to a remark made by a draftee facing the prospect of involuntary service in the Vietnam War. *Watts v. United States*, 394 U.S. 705, 706 (1969). The draftee, addressing a crowd that included, to his misfortune, an investigator for the Army Counter Intelligence Corps, said "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* The Supreme Court overturned his conviction for threatening the president, finding that the "political hyperbole indulged in" by the defendant was protected by the First

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[15] James Madison, "Report on the Virginia Resolutions, Jan. 1800," *reprinted in* 5 THE FOUNDERS' CONSTITUTION 141, 43 (Philip Kurland & Ralph Lerner eds., 2000), *available at* http://press-pubs.uchicago.edu/founders/documents/amendI_speechs24.html.

[16] *Everson v. Bd. of Educ.*, 330 U.S. 1, 11 (1947).

[17] Letter from Thomas Jefferson to William Stephens Smith, Nov. 13, 1787, *available at* https://founders.archives.gov/documents/Jefferson/01-12-02-0348. *See also, e.g.,* the license plate and state motto of New Hampshire, suggesting that residents "live free or die" in defense of liberty. *Wooley v. Maynard*, 430 U.S. 705, 722, 97 S. Ct. 1428, 1439 (1977).

Amendment. *Id.* at 708. "The language of the political arena . . . is often vituperative, abusive, and inexact[,]" but the country maintains a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* (quoting, in part, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). The statement's "context" and "expressly conditional nature" amounted to no more than "a kind of very crude offensive method of stating a political opposition to the President." *Id.* Like the draftee in *Watts*, Klinzman's statement is political hyperbole, not a manifestation of a serious intent to undertake violence against the President.

Nor does Klinzman's 2012 comment in response to a *Rolling Stone* article constitute either a true threat or incitement. Even if Klinzman's quotation of a Soviet poet could reasonably be understood as advocating the use of violence, as opposed to a hyperbolic affirmation that a particular political and religious viewpoint should be firmly opposed, the "mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982) (emphasis in original). The perceived endorsement of violence does not amount to incitement, which requires both that the language "specifically advocate for listeners to take unlawful action" *and* that it be "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." *Nwanguma v. Trump*, 903 F.3d 604, 609–10 (6th Cir. 2018) (then-candidate Trump's repeated "get 'em out of here" statements to a crowd at a rally, concerning protesters, did not constitute specific advocacy of violence, even if the statements could be understood as encouraging violence). There is no indication that Klinzman's post was directed to inciting immediate unlawful activity, and no evidence that it actually incited any unlawful acts in the seven years after it was posted.

Because Klinzman's 2012 post and 2019 comment do not amount to true threats or incitement, they remain political speech squarely within the ambit of the First Amendment.

iii. Affiliation with "antifa" is protected by the First Amendment.

Much of the public anger—and nearly every media headline—turns on Klinzman's statement that he "affirms" that he is "'antifa.'" Klinzman's statement is ambiguous, as "antifa" may refer to autonomous, left-wing groups without a formal structure, or it may refer to his self-identification as an antifascist.

In any case, even if "antifa" referenced a discrete and identifiable organization, the First Amendment bars the denial of "rights and privileges solely because of a citizen's association with an unpopular organization." *Healy v. James*, 408 U.S. at 185–86. If government actors could designate particular groups "having both legal and illegal aims" as unlawful, there would be a "real danger that legitimate political expression or association would be impaired." *Scales v. United States*, 367 U.S. 203, 229 (1961).

In order to penalize association with an organization with both lawful and unlawful aims, the government must show both that "the group itself possessed unlawful goals and that the individual had a specific intent to further those illegal aims." *NAACP v. Claiborne Hardware*, 458 U.S. at 920. While some who affiliate with antifa have undoubtedly engaged in unlawful violence, the political objectives of "antifa" supporters often include wholly lawful activities, including political organizing and public demonstrations, and "violence represents a small though vital sliver of anti-fascist activity."[18] Moreover, even assuming Klinzman was referring to a particular group, there is no indication that he intended to further specific unlawful conduct. At worst, the evidence demonstrates that he made an uncouth remark on Facebook about the president.

C. Kirkwood's response to Klinzman amounts to retaliation, and there is reason to doubt that his "resignation" was voluntary.

Where a government actor responds to protected speech with an "adverse action" that would "chill a person of ordinary firmness from continuing in the activity," it has engaged in impermissible retaliation. *Revels v. Vincenz*, 382 F.3d 870, 876 (8th Cir. 2004). This "well established" test does not require a "great" deal of harassment in order to be "actionable," and the "objective" test asks "not whether the plaintiff herself was deterred" from speaking. *Garcia v. City of Trenton*, 348 F.3d 726, 728–29 (8th Cir. 2003). The college's conduct here satisfies that test: it unilaterally rescinded Klinzman's solitary teaching assignment, placed him on involuntary leave, and prepared a public statement condemning his speech.

Klinzman's purported resignation itself does not end the inquiry. "[O]ffering an employee a choice between resignation and termination" does not violate constitutional rights only when an ensuing resignation is truly "voluntary." *Lenz v. Dewey*, 64 F.3d 547, 552 (10th Cir. 1995). A resignation is involuntary where the "employer's conduct in requesting or obtaining the resignation effectively deprived the employee of free choice in the matter." *Angarita v. St. Louis County*, 981 F.2d 1157, 1544 (8th Cir. 1992) (quoting *Stone v. University of Maryland Medical System Corporation*, 855 F.2d 167, 173 (4th Cir. 1988). Courts look to, among other factors, whether the employee was "given an alternative to resignation," had a "reasonable time in which to choose," and "was permitted to select the effective date of the resignation." *Id.* An employee must have "real alternatives" in order for a resignation to be upheld as voluntary. *Rodriguez v. City of Doral*, 863 F.3d 1343, 1353 (11th Cir. 2017).

Kirkwood's own statement on the matter lays bare that termination was a foregone conclusion. In the morning, the administration had already decided to remove Klinzman from his sole class and sought his resignation in the afternoon. Additionally, per Klinzman's report

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[18] Mark Bray, ANTIFA: THE ANTIFASCIST HANDBOOK 168 (2017). One U.S. Attorney's Office has explained that "antifa" is "short for 'anti-fascists,' a movement of people who generally oppose the white supremacist and 'Alt-Right' movements, sometimes by *protesting events* or engaging in property damage or violence." Press Release, U.S. Attorney's Office, District of Mass. (June 8, 2018) (emphasis added), *available at* https://www.justice.gov/usao-ma/pr/indianapolis-man-arrested-threatening-boston-free-speech-rally-attendees-2017.

to a local news station, it is apparent that Kirkwood's administration informed him that he had been placed on administrative leave. There do not appear to have been "real alternatives" available to Klinzman: He could refuse to resign, but Kirkwood had already decided to remove his teaching position and place him on leave.

III. Conclusion

Your statement announcing Klinzman's termination voiced "support" for "those who wish to engage in discussion and debate about this matter." You wrote: "In a free society and especially in higher education, a lively, robust and free exchange of ideas is essential, after all."

We strongly agree. But the participants in this exchange of ideas cannot be chosen or removed at the whim of those critics that boo the loudest. As Klinzman's speech was protected, we call on you to reinstate his status as an adjunct faculty member *post haste*.

We respectfully request receipt of a response to this letter by the close of business on September 10, 2019.

Sincerely,

Adam Steinbaugh
Director, Individual Rights Defense Program