



June 10, 2020

Charles F. Robinson
General Counsel and Vice President, Legal Affairs
Office of the General Counsel
University of California
Office of the President
1111 Franklin Street, 8th Floor
Oakland, California 94607

URGENT

Sent via Electronic Mail (charles.robinson@ucop.edu)

Dear Mr. Robinson:

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 the University of California Los Angeles (UCLA) remains one of the few institutions in the country whose policies earn a "green light" rating from FIRE. We are, however, concerned that Continuing Lecturer Gordon Klein has been placed on a mandatory leave due to the controversy over his refusal—as directed by UCLA and pursuant to its policies—to alter his final exam schedule or grading policies for black students.

While some may disagree with Klein's approach, his right to academic freedom encompasses the right to manage the content and direction of his course. Further, his email exchange with the student who proposed an altered schedule and grading policies, with whom Klein had a prior cordial relationship, did not amount to unlawful harassment or discriminatory conduct. On the contrary, that exchange represented a discussion about university policies and how the institution should respond to the civil unrest following the homicide of George Floyd. Accordingly, UCLA's decision to place Klein on leave is incompatible with the university's First Amendment obligations and the basic tenets of academic freedom. FIRE calls on UCLA to immediately reinstate Klein.

I. After Klein Declines to Alter Exam Procedure or Grading for Accounting Course, a Petition Calls for UCLA to Fire Him

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. Please find enclosed an executed waiver authorizing you to share information with FIRE. However, if the facts here are substantially accurate, UCLA must rescind Klein’s involuntary leave of absence immediately.

Gordon Klein has been teaching at UCLA in the Anderson School of Management since 1981.¹ He teaches various subjects, including accounting and business law. In 39 years of teaching at UCLA, Klein has never been the subject of a complaint of harassing or discriminatory conduct. During the Spring 2020 quarter, Klein taught a section of Mgt. 127A, Principles of Taxation. The course was conducted entirely online due to the COVID-19 outbreak.²

On June 2, Klein received an email from a student in his Principles of Taxation course, asking him to consider making adjustments to the format and grading of his final exam for black students enrolled in the course due to the fear, anxiety, and trauma surrounding the civil unrest in the wake of the homicide of George Floyd.³ The student’s suggestions included a “no-harm exam” (which could only help, not hurt, a students’ final grade), a shortened exam, and extended deadlines for exams and other final projects.⁴ The email also thanked Klein for the “email [students] received from you about anti-racist resources.”⁵ According to reports, professors in many departments at UCLA received emails substantially similar to that sent by the student, in which non-black students requested these accommodations in solidarity with their black classmates.⁶

Klein responded thanking the student for his suggestions and calling the events that transpired in Minnesota a “tragedy.” However, Klein declined to change the final exam procedures, citing the logistical concerns with identifying which students would be granted such accommodations in a course conducted entirely online due to COVID-19, and with assigning grades without a final exam.⁷ In keeping with his past correspondence with the student, who had previously taken one of Klein’s courses involving legal principles,⁸ Klein

¹ *Gordon Klein, Lecturer in Accounting*, UCLA Anderson School of Management, <https://www.anderson.ucla.edu/faculty-and-research/accounting/faculty/klein> (last visited June 8, 2020).

² UCLA’s Spring 2020 Quarter started on March 25, 2020. *Annual Academic Calendar*, UCLA Registrar’s Office, <https://www.registrar.ucla.edu/Calendars/Annual-Academic-Calendar> (last visited June 8, 2020).

³ Email from ██████████ to Gordon Klein (June 2, 2020 10:50 A.M.) (on file with author).

⁴ *Id.*

⁵ *Id.*

⁶ Email from Mario Bonk, Professor and Chair, Department of Mathematics to Mathematics Instructors Listserv, *available at* <https://i.redd.it/px1607993x251.jpg>.

⁷ As set forth in the course syllabus, the only performance metric used to determine grades in this course was a curved final exam.

⁸ This was not Klein’s first communication with the student, who had also been a student in Klein’s Business Law course during the previous quarter. At the beginning of March, the two exchanged emails concerning whether

argued, rhetorically, that if he were to adjust the protocol for black students, then he should do so for students from Minneapolis as well.⁹ The student responded, apologizing to Klein “if any of this seemed offensive” to Klein, or “if it seemed like I was asking you to give preferential treatment to people because they are Black.”¹⁰ The student went on to say that Klein’s efforts “really do help us students during these trying times.”¹¹

Subsequently, a Change.org petition calling for UCLA to fire Klein—including the text of his email response to the student—appeared online.¹² Later that same day, Klein received an email from the Dean of the Anderson School of Management, Antonio Bernardo, asking Klein for a phone call to discuss emails he was receiving about Klein.¹³ In response, Klein shared with Bernardo the full text of his email exchange with the student.¹⁴ Klein also pointed out that previously he had received a directive from his supervisor in the undergraduate Accounting program that instructors should only adjust final exam policies and protocols based on standard university practices regarding grading.¹⁵

On June 3, Klein was placed on involuntary administrative leave until June 24.¹⁶ The notice states that the leave is necessary to give UCLA the opportunity to consider “allegations regarding behavior made in the course and scope of your position . . . inconsistent with [UCLA’s Faculty Code of Conduct].”¹⁷ The notice does not identify the specific provision of the Faculty Code of Conduct Klein is alleged to have breached. In an email addressed to the UCLA Anderson Community on June 4, Bernardo characterized Klein as having “a disregard for our

the student would be sitting for the final under UCLA’s adjusted rules concerning finals, which had been instituted in response to the COVID-19 outbreak. Email from ██████ to Klein (Mar. 11, 2020 6:50 P.M.) (on file with author); email from Klein to ██████ (Mar. 11, 2020 6:52 P.M.) (on file with author); email from ██████ to Klein (Mar. 11, 2020 9:11 P.M.) (on file with author); email from Klein to ██████ (Mar. 11, 2020 9:19 P.M.) (on file with author). At the end of the exchange, the student wrote “I am writing to let you know I will not be taking the final, thank you for a great quarter!” Email from ██████ to Klein (Mar. 15, 2020) (on file with author). The student chose to enroll in Klein’s Principles of Taxation Course the following term.

⁹ Email from Klein to ██████ (June 2, 2020 11:10 A.M.) (on file with author).

¹⁰ Email from ██████ to Klein (June 2, 2020 1:13 P.M.) (on file with author).

¹¹ *Id.*

¹² *Fire UCLA Professor Gordon Klein*, Change.org, https://www.change.org/p/ucla-fire-ucla-professor-gordon-klein?recruiter=859225359&recruited_by_id=13452650-18bb-11e8-bfa9-4f349aa08b70&utm_source=share_petition&utm_medium=copypink&utm_campaign=psf_combo_share_abi&utm_term=psf_combo_share_initial (last visited June 8, 2020).

¹³ Email from Antonio Bernardo, Dean and John E. Anderson Chair in Management, to Klein (June 2, 2020 6:13 P.M.) (on file with author).

¹⁴ Email from Klein to Bernardo (June 2, 2020 6:53 P.M.) (on file with author).

¹⁵ *Id.*; Email from Judson Caskey, Associate Professor of Accounting, Anderson School of Management, to Klein (June 1, 2020 3:45 P.M.) (on file with author) (stating that “If students ask for accommodations such as assignment delays or exam cancellations, I strongly encourage you to follow the normal procedures (accommodations from the CAE office, death/illness in the family, religious observance, etc.).”).

¹⁶ Notice of Administrative Leave, from Antonio Bernardo, Dean and John E. Anderson Chair in Management, to Gordon Klein (June 3, 2020) (on file with author).

¹⁷ *Id.*

core principles, including an abuse of power.”¹⁸ Bernardo’s email did not identify which “core principles” he was referring to, nor articulate how Klein committed an “abuse of power.”¹⁹

II. Klein’s Email Exchange Is Protected by the First Amendment and Academic Freedom

A. *UCLA is bound by the First Amendment.*

It has long been settled law that the First Amendment is binding on public colleges like UCLA. *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 DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) (on public campuses, “free speech is of critical importance because it is the lifeblood of academic freedom”).

UCLA also promises its faculty freedom of expression within its Faculty Code of Conduct, the same policy Klein is alleged to have violated. The Code states that “a major responsibility of the administration is to protect and encourage the faculty in its teaching, learning, research, and public service.”²⁰ This includes support for “free inquiry, and [the] exchange of ideas,” and the “enjoyment of constitutionally protected freedom of expression.”²¹

B. *The First Amendment and UCLA policy protect academic freedom, including the right to manage courses and comment on matters of public concern.*

i. **The First Amendment protects the right to speak on matters related to scholarship or teaching.**

Courts have long recognized that the First Amendment’s protection of freedom of speech is closely intertwined with academic freedom. Universities “occupy a special niche in our constitutional tradition,” *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003), and “academic freedom” is an area “in which government should be extremely reticent to tread.” *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). As the Supreme Court has explained:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special

¹⁸ Email from Bernardo to UCLA Anderson Listserv (June 4, 2020 6:04 P.M.) (on file with author).

¹⁹ *Id.*

²⁰ UNIV. OF CAL., LOS ANGELES, FACULTY CODE OF CONDUCT at 3 (last revised July 1, 2017), https://www.ucop.edu/academic-personnel-programs/_files/apm/apm-015.pdf.

²¹ *Id.*

concern to the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

“[T]he argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction” is “totally unpersuasive.” *Hardy v. Jefferson Cmty. College*, 260 F.3d 671, 680 (6th Cir. 2001).

To be sure, in *Garcetti v. Ceballos*, the Supreme Court upheld the power of non-academic government employers to regulate their employees’ speech that is pursuant to their employment duties. 547 U.S. 410, 421 (2006). The *Garcetti* court, however, reserved the question of “whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.” *Id.* at 425. As Justice Souter’s opinion stressed, that ruling should not be read to “imperil First Amendment protection of academic freedom in public colleges and universities,” which freedom encompasses “the teaching of a public university professor.” *Id.* at 438 (Souter, J., dissenting). Accordingly, the United States Court of Appeals for the Ninth Circuit—the decisions of which are binding on the University of California—has expressly recognized that expression “related to scholarship or teaching” falls outside of *Garcetti*. *Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014) (emphasis added).²²

UCLA also has a contractual obligation to protect academic freedom. *See, e.g., McAdams v. Marquette Univ.*, 2018 WI 88 (2018) (a private university breached its contract with a professor over a personal blog post because, by virtue of its adoption of the AAUP’s standards on academic freedom, the post was “a contractually-disqualified basis for discipline”).

UCLA explicitly promises freedom of teaching in its academic freedom policy, which states:

The University of California is committed to upholding and preserving principles of academic freedom. These principles reflect the University’s fundamental mission, which is to discover knowledge and to disseminate it to its students and to society at large. The principles of academic freedom protect freedom of

²² Other courts have reached similar conclusions. *See, e.g., Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011) (*Garcetti* does not apply in the “academic context of a public university”); *Van Heerden v. Bd. of Supervisors of La. State Univ.*, No. 3:10-cv-155, 2011 U.S. Dist. LEXIS 121414, at *19–20 (M.D. La. Oct. 20, 2011) (sharing “concern that wholesale application of the *Garcetti* analysis . . . could lead to a whittling-away of academics’ ability to delve into issues or express opinions that are unpopular, uncomfortable or unorthodox”); *Sheldon v. Dhillon*, No. C-08-03438, 2009 U.S. Dist. LEXIS 110275, at *14 (N.D. Cal. Nov. 25, 2009) (terminated community college instructor’s lecture on heredity and homosexuality was protected by the First Amendment if it was “within the parameters of the approved curriculum and within academic norms” and the punishment “not reasonably related to legitimate pedagogical concerns.”).

inquiry and research, freedom of teaching, and freedom of expression and publication.²³

The American Association of University Professors (AAUP), in 2013, issued a statement concerning faculty members' right to determine how to teach their courses:

The freedom to teach includes the right of the faculty to select the materials, determine the approach to the subject, make the assignments, and assess student academic performance in teaching activities for which faculty members are individually responsible, without having their decisions subject to the veto of a department chair, dean, or other administrative officer.²⁴

Likewise, UCLA's own Faculty Code of Conduct—under which Klein is being investigated—expressly guarantees to faculty members the “freedom to address any matter of institutional policy or action as a member of the faculty[.]”²⁵

ii. Klein spoke on matters of institutional policy and matters of public concern.

Klein's email exchange with the student falls squarely within the rights afforded to him as a faculty member and member of the university community. His remarks undoubtedly address matters related to scholarship or teaching. While others within the university community might well reach a different conclusion or believe Klein's justification to be in error, the act of sharing his rationale does not amount to harassment,²⁶ nor does it fall into any other exception for unprotected speech. As a result, it remains well within the scope of speech “related to scholarship or teaching” protected by the First Amendment. *Demers*, 746 F.3d at 406.

Some—like those who signed the Change.org petition calling for UCLA to fire Klein—may feel that his statements concerning the important social and political issues being discussed across the country were in poor taste or phrased indelicately. However, speech does not lose

²³ *Academic Freedom*, UCLA, at 1 (last revised Sept. 29, 2003), https://www.ucop.edu/academic-personnel-programs/_files/apm/apm-010.pdf.

²⁴ *Statement on the Freedom to Teach*, AAUP (Nov. 7, 2013), https://www.aaup.org/file/2013-Freedom_to_Teach.pdf.

²⁵ FACULTY CODE OF CONDUCT, *supra* note 20, at p. 3.

²⁶ The student chose to reach out to Klein to send the form email—apparently sent by students across several departments on campus—perhaps because they two had a pre-existing relationship based on the student's enrollment in a prior course taught by Klein. As a result, it is doubtful that the solicited response could be said to be so “severe, pervasive, and objectively offensive” to deny the student equal access to an educational opportunity or benefit. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999). This is also evident in the second email sent by the student, in which the student thanked Klein for the other efforts he made to address student concerns about the current events surrounding police brutality and racism, including sending students anti-racist resources. A student who has been “effectively” barred from “access to an educational opportunity or benefit” does not continue the cordial conversation. *Id.*

its protection on the basis that it offends others. *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973) (“[T]he 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.’”). Klein’s email was responsive to a student with whom he had carried on a candid, cordial relationship. His response, relating to matters of both institutional policy and broader issues of profound public importance, does not lose its protection for being blunt or indelicate, as “the desire to maintain a sedate academic environment does not justify limitations on a teacher’s freedom to express himself on political issues in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms.” *Rodriguez v. Maricopa County Community College District*, 605 F.3d 703, 708–09 (9th Cir. 2009) (professor’s “racially-charged emails” sent to every employee in the college district remained protected speech, as the First Amendment “embraces such a heated exchange of views, even . . . when they concern sensitive topics like race, where the risk of conflict and insult is high.”).

Even if Klein had said nothing, his refusal to depart from the course schedule and grading mechanism cannot be said to violate university policy. The course schedule was established by the university and the grading criteria set forth by the course syllabus. Just as academic freedom protects his right to include pedagogically-relevant content and discussion, it also protects his right to administer final exams and evaluate those exams consistent with university policy.

Moreover, acceding to the student’s request would have placed Klein at odds with university policy, including those which prohibit discrimination. UCLA’s policies prohibit “evaluation of student work by criteria not directly reflective of course performance,” (Part II(A)(1)(d), “failure to . . . hold examinations as scheduled” (Part II(A)(1)(c)), and “[d]iscrimination . . . against a student . . . for reasons of race, color,” or membership in another protected class (Part II(A)(2).)

Surely, UCLA does not intend to send the message that its faculty members must grant or deny privileges or obligations based on race. Likewise, on June 2, when the student proposed this altered final exam format, Klein had already received instruction from his superior in the undergraduate accounting department, Judson Claskey, not to deviate from standard examination procedures other than for reasons that UCLA instructors would typically do so, such as if a student suffered a loss in the family or had a medical emergency. It cannot be that UCLA expects its faculty to engage in insubordination, and punishes them when they follow UCLA’s directives and policy.


III. UCLA Must Uphold Its Obligations and Express Commitments and Reinstate Klein

In times of great social and political upheaval, our governmental and educational institutions face substantial pressure to foreclose on expression protected by the First Amendment. This, however, is when institutions must be most vigilant in refusing to do so. Penalizing protected expression is not a cure for addressing the underlying challenges faced by society, and abandoning a robust defense of freedom of expression will inure to the detriment of the rights

possessed by students and faculty across the political, social, and ideological spectrum. The mere initiation of an investigation, even if discipline is not ultimately meted out, sends the message that the university may punish protected expression. The chilling effect engendered by that conduct itself violates the First Amendment,²⁷ and undermines UCLA's laudable commitment to the expressive rights of its faculty members and students.

Given the urgent nature of this matter, we request receipt of a response to this letter no later than the close of business on June 12, 2020.

Sincerely,



Katlyn Patton

Program Officer, Individual Rights Defense Program and Public Records

Cc: Allison Woodall, Deputy General Counsel of the Labor, Employment and Benefits Group, Office of the General Counsel, Office of the President, University of California.

Encl.

²⁷ *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992) (First Amendment violated by the chilling effect created by an investigation into a faculty member's offensive writings on race and intelligence, coupled with condemnation of his speech as "conduct unbecoming of a member of the faculty,")