



October 15, 2020

H. Neil Matkin, Ed.D.
District President
Collin College
3452 Spur 399
Collin Higher Education Center
Room 406
McKinney, Texas 75069

Sent via Electronic Mail (nmatkin@collin.edu)

URGENT

Dear President Matkin:

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 is concerned by Collin College's recent response to the extramural political expression of Prof. Lora D. Burnett. Invoking the "execution of [the college's] personnel policies"—intimating that punishment might follow—and following that statement with a written warning against use of "Collin College systems or resources to engage in private or personal communications" is retaliatory. Because the First Amendment prohibits Collin College from disciplining Burnett for her extramural political speech and the warning misinterprets the college's written policy, we ask that you rescind any warning and reassure Burnett that no formal consequences will result from her protected expression.

I. **After Burnett's Tweets About the Vice-Presidential Debate Draw Criticism, Collin College Responds**

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.

Lora D. Burnett is a professor of history at Collin College. She maintains a personal Twitter account, which at all times relevant here has consistently noted that her “[t]weets do not rep[resent] my employer.”¹

On October 8, 2020, *Campus Reform*, a conservative media outlet dedicated to “expos[ing] liberal bias and abuse on the nation’s college campuses,”² published a roundup of tweets from faculty members criticizing Vice President Michael Pence during the previous evening’s vice presidential debate.³ The article was repackaged by *Fox News* the following day.⁴

Burnett was among the professors whose tweets were highlighted in the articles, including a tweet commenting that the moderator “needs to talk over Mike Pence until he shuts his little demon mouth up”⁵ and sharing another’s tweet referring to Pence as a “scumbag lying sonofabitch.”⁶

On Monday, October 12, the college posted a public statement condemning Burnett’s tweets as “hateful, vile and ill-considered[.]”⁷ The statement acknowledged that the tweets “may be protected” but added that “[f]aculty members . . . have a special obligation to remember that their public statements reflect on their unique roles both in educating students and modeling behavior, as well as on the college,” and that “in our free exercise of expression, professionalism should dictate decorum rather than resorting to profanity.”

That same day, you sent an email to a college-wide distribution list, noting that Burnett’s tweets had been “picked up by national media and has been in broad circulation among some of our college constituents.”⁸ You shared that complaints—including “calls and contacts from legislators”—had “poured in over the weekend.” Most of these contacts “ask[ed] us to terminate” Burnett, but a “handful” were “encouraging us to uphold ‘academic freedom’ and ‘free speech’ . . .” You averred that you did not see “an issue with academic freedom nor is the

¹ See, e.g., L.D. Burnett (@ldburnett), TWITTER, <http://web.archive.org/web/20190422100801/https://twitter.com/ldburnett> (archived Apr. 22, 2019).

² CAMPUS REFORM, *About*, <https://www.campusreform.org/about> (last visited Oct. 13, 2020).

³ Haley Worth, ‘Racist,’ ‘demon,’ ‘scumbag,’ ‘white boy’: Profs take aim at Pence during VP debate, CAMPUS REFORM, Oct. 8 2020, <https://www.campusreform.org/?ID=15900>.

⁴ Paul Best, *College professors let loose profane criticism of Pence during VP debate*, FOX NEWS, Oct. 9, 2020, <https://www.foxnews.com/us/college-professors-expetive-criticism-vp-debate>.

⁵ L.D. Burnett (@ldburnett), TWITTER (OCT. 7, 2020 9:02 PM), <https://twitter.com/LDBurnett/status/1314023216034320391>.

⁶ L.D. Burnett (@ldburnett), TWITTER (OCT. 7, 2020 8:21 PM), <https://twitter.com/LDBurnett/status/1314013018716622848>.

⁷ COLLIN COLL., *Collin College Statement* (Oct. 12, 2020), <http://www.collincollegenews.com/2020/10/12/collin-college-statement-october-12-2020>.

⁸ E-mail from Neil Matkin, Dist. Pres., Collin Coll., to All College Distribution (Oct. 12, 2020, 11:45 AM) (on file with author).

scholarship of [Burnett] in question,” but that the “college’s execution of its personnel policies will not be played out in a public manner. . . .”

On Tuesday, October 13, Burnett was presented with an “Employee Coaching Form” with “Performance Feedback” styled as “Constructive Feedback” and providing, in full:

This is to serve as acknowledgement that you are entitled to your views and may freely post these views on your personal social media.

This is also to clearly communicate that you are not to use Collin College systems or resources to engage in private or personal conversations. If you are contacted through your Collin.edu account, you are not to respond from the college email system. You should use your personal email account on any and all personal communications.

In addition, please refrain from copying what appears to be private or personal communications to others via their Collin.edu email accounts. The Collin.edu system is for professional communications and those related to the educational mission of the college.

Burnett has declined to sign the “Employee Coaching Form,” which the college’s website indicates is used to respond to “behavior or performance that has previously been discussed informally but is still not meeting expectations.”⁹ Burnett has not previously had a discussion with Collin College concerning use of email.

II. Collin College’s Reprimand of Burnett Ignores its Written Policy and Threatens to Chill its Faculty Members’ First Amendment Rights

Burnett’s tweets are extramural political expression protected by the First Amendment, which limits public universities and colleges in their responses to faculty members’ expression. While the college is free to criticize Burnett’s tweets, it cannot take—or imply that it will take—adverse action, including through misapplication of the college’s technology resources policy.

A. The First Amendment Applies to Collin College as a Public Institution

It has long been settled law that the First Amendment is binding on public colleges like Collin College.¹⁰ Accordingly, the decisions and actions of a public university—including the pursuit

⁹ COLLIN COLL., *Coaching and Discipline Instructions*, http://www.collin.edu/perf_mgmt/coach_discipline_forms.html (last visited Oct. 13, 2020).

¹⁰ *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).

of disciplinary sanctions,¹¹ recognition and funding of student organizations,¹² interactions with student journalists,¹³ conduct of police officers,¹⁴ and maintenance of policies implicating student and faculty expression¹⁵—must be consistent with the First Amendment.

B. Burnett’s Tweets Are Protected by the First Amendment and Academic Freedom

Employees of government institutions like Collin College do not “relinquish First Amendment rights to comment on matters of public interest by virtue of government employment.”¹⁶ A government employer cannot penalize an employee for speaking as a private citizen on a matter of public concern unless it demonstrates that its interests “as an employer, in promoting the efficiency of the public services it performs through its employees” outweighs the interest of the employee, “as a citizen, in commenting upon matters of public concern[.]”¹⁷ No such interest is applicable here.

i. Burnett’s tweets, addressing matters of public concern, are in her capacity as a private citizen.

Burnett’s tweets are made in 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.”¹⁸ Colleges ordinarily do not employ their faculty to post on their personal social media pages.¹⁹ Even if others became aware that Burnett was employed by Collin College—whether through *Campus Reform* or *Fox News*, or through their own research—the mere knowledge of a speaker’s employment does not render their speech pursuant to their official duties.²⁰

Burnett’s tweets also address 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[.]”²¹ One would be hard pressed to identify

¹¹ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

¹² *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000).

¹³ *Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995).

¹⁴ *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011).

¹⁵ *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

¹⁶ *Connick v. Myers*, 461 U.S. 138, 140 (1983).

¹⁷ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

¹⁸ *Lane v. Franks*, 573 U.S. 228, 240 (2014).

¹⁹ *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”).

²⁰ *See, e.g., Pickering*, 391 U.S. at 576–78 (appendix reproducing teacher’s letter to a local newspaper criticizing his employer, explaining that he teaches at the high school).

²¹ *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).

a matter of greater public interest than a vice presidential debate watched by 58 million people.²²

ii. Burnett’s tweets cannot be punished on the basis that others find them subjectively offensive, “hateful,” “vile,” or “ill-considered.”

Although some—including you—may find the remarks offensive, the “inappropriate or controversial character” of the speech “is irrelevant to the question of whether it deals with a matter of public concern.”²³ This is because the First Amendment, distilled to its most fundamental concepts, is intended to protect expression when it is controversial or upsetting to others. The Supreme Court has repeatedly, consistently, and clearly held that expression may not be restricted merely because some, many, or even most find it to be offensive or disrespectful. This core First Amendment principle is why the authorities cannot ban the burning of the American flag,²⁴ prohibit the wearing of a jacket emblazoned with the words “Fuck the Draft,”²⁵ penalize satirical advertisements depicting a pastor losing his virginity to his mother in an outhouse,²⁶ or disperse civil rights marchers out of fear that “muttering” and “grumbling” white onlookers might lead to violence.²⁷ 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.”²⁸

This principle does not lose its salience in the context of the public college. To the contrary, a commitment to expressive rights must be robust and uncompromising if students and faculty are to be free to engage in debate and discussion about the issues of the day in pursuit of advanced knowledge and understanding. This dialogue may encompass speech that offends. For example, the Supreme Court unanimously upheld as protected speech a student newspaper’s use of a vulgar headline (“Motherfucker Acquitted”) and a front-page “political cartoon . . . depicting policemen raping the Statue of Liberty and the Goddess of Justice.”²⁹ These images were no doubt deeply offensive to many at a time of political polarization and

²² John Koblin, *Pence-Harris Debate Is No. 2 in Vice-Presidential Ratings, With 58 Million TV Viewers*, N.Y. TIMES, Oct. 8, 2020, <https://www.nytimes.com/2020/10/08/business/media/pence-harris-debate-is-no-2-in-vice-presidential-ratings-with-58-million-tv-viewers.html>.

²³ *Rankin v. McPherson*, 483 U.S. 378, 387 (1987) (expression of hope that President Ronald Reagan might be assassinated was protected against retaliation).

²⁴ *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”).

²⁵ *Cohen v. California*, 403 U.S. 15, 25 (1971).

²⁶ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

²⁷ *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

²⁸ *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).

²⁹ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

civil unrest, 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.’”³⁰

iii. Collin College’s policies recognize that academic freedom protects extramural expression.

Collin College’s policies are in accord with these fundamental principles of expressive rights. The College’s “Employee Expression and Use of College Facilities” policy—updated by the college just two months ago—provides that the college’s “position on academic freedom” extends broad protection to extramural speech:

Faculty members are citizens, and, therefore, possess the rights of citizens to speak freely outside the classroom on matters of public concern and to participate in lawful political activities.

Prior restraint or sanctions will not be imposed upon faculty members in the exercise of their rights as citizens or duties as teachers. Nor will faculty members fear reprisals for exercising their civic rights and academic freedom.

Faculty members have a right to expect the Board and the College District’s administrators to uphold vigorously the principles of academic freedom and to protect the faculty from harassment, censorship, or interference from outside groups and individuals.³¹

This approach is consistent with the widely accepted principles of academic freedom embraced by academic institutions across the country. A recent decision from the Wisconsin Supreme Court is illustrative.³² After a private university punished a professor for his internet commentary criticizing a graduate student at the university, the court held that the imposition of discipline was improper, as the university’s commitment to academic freedom rendered the blog post “a contractually-disqualified basis for discipline.”³³ The court explained that “the doctrine of academic freedom comprises three elements: teaching; research; and extramural comments.”³⁴ The blog post, an “expression made in [the professor’s] personal, not professorial, capacity,” fell into the “extramural” category.³⁵ Such remarks are protected under a commitment to academic freedom unless the remark “clearly demonstrates the faculty member’s unfitness for his or her position” in light of their “entire

³⁰ *Id.*

³¹ COLLIN COLL., EMPLOYEE RIGHTS AND PRIVILEGES: EMPLOYEE EXPRESSION AND USE OF COLLEGE FACILITIES (Aug. 12, 2020), [https://pol.tasb.org/Policy/Download/304?filename=DGC\(LOCAL\).pdf](https://pol.tasb.org/Policy/Download/304?filename=DGC(LOCAL).pdf).

³² *McAdams v. Marquette University*, 914 N.W.2d 708, 731 (Wis. 2018).

³³ *Id.* at 737.

³⁴ *Id.* at 730.

³⁵ *Id.*

record as a teacher and scholar.”³⁶ This “stringent standard” is “[s]o strict, in fact, that extramural utterances rarely bear upon the faculty member’s fitness for the position.”³⁷

Accordingly, academic freedom protects not only a faculty member’s research or teaching but limits the ability of an institution to restrict faculty members’ speech outside of the classroom. This provides an important safeguard against external pressures on an institution that would chill research or teaching: if speech outside of a classroom were the proper subject of regulation, then institutions—under the pressure of the public, legislators, or donors—could impose ideological litmus tests on who can conduct research or teaching based on their extramural speech. Indeed, we are not far removed from public university faculty being required to submit to state interrogation regarding their possible involvement with “subversive” organizations or being forced to sign loyalty oaths disavowing socialism or communism as a condition of employment.³⁸

Because Collin College recognizes in policy that protecting faculty members’ extramural speech against censorship is important to its core functions, the college’s interests are insufficient to justify limits on a citizen’s expressive rights involving political speech—where the First Amendment’s protection is “at its zenith.”³⁹ While the college’s administration may fear that allowing its faculty to exercise their civic rights may reflect poorly on the institution’s reputation, “[p]ublic 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. . . .⁴⁰

C. Collin College’s Condemnation and Written Warning Go Beyond Mere Criticism

The First Amendment provides no privilege to be free from criticism, however caustic, including from the leadership of universities and colleges. Indeed, criticism is a form of “more

³⁶ *Id.* at 731–32, citing AAUP, POLICY DOCUMENTS AND REPORTS, COMMITTEE A STATEMENT ON EXTRAMURAL UTTERANCES 31 (11th ed. 2014)).

³⁷ *Id.* at 732 (cleaned up).

³⁸ See, e.g., *Keyishian v. Bd. of Regents, State Univ. of N.Y.*, 385 U.S. 589, 594 (1967).

³⁹ *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 186–87 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414, 425 (1988)).

⁴⁰ *Goza v. Memphis Light, Gas & Water Div.*, No. 2:17-cv-2873, 2019 U.S. Dist. LEXIS 100057, at *2, 29–31 (W.D. Tenn. June 14, 2019).

speech,” the remedy to offensive expression that the First Amendment prefers to censorship.⁴¹ However, courts across the country have held that “retaliatory speech” violates the First Amendment where it “intimat[es] that some form of punishment or adverse regulatory action”⁴² may follow, and the “mere *threat* of harm can be an adverse action, regardless of whether it is carried out because the threat itself can have a chilling effect.”⁴³

Here, Collin College’s public-facing statement recognized that Burnett’s tweets “may” be protected by the First Amendment. However, the email sent to those at the college intimated that adverse action might follow, sharing that the “execution of [the college’s] personnel policies will not be played out in a public manner[.]” If Burnett’s speech were more than *theoretically* protected speech, then there are no “personnel policies” to “execut[e].”

We do not need a crystal ball to determine whether or not it is reasonable to read this statement as intimating that adverse action would follow: Adverse action *did* follow, when Burnett was presented with a written warning concerning her “personal” use of college resources. That warning—utilized by the college in progressive employee discipline⁴⁴—expressly invokes Burnett’s posting of her “views” on her “personal social media,” establishing a causal link between her speech and the issuance of the “feedback.” The form does not identify what conduct, in particular, by Burnett violated any policy concerning personal use of institutional resources.

This lack of specificity is concerning. District policy governing use of college technological resources expressly *permits* “incidental personal use that does not otherwise violate” college policy “or have an adverse effect on [college] resources[.]”⁴⁵ It is difficult to imagine that responding to unsolicited emails—sent to that address because critical media outlets, through no effort of the faculty member, identified the professor’s employer—is not an “incidental” use. If there is some other “use” that the college believes violates that policy, it should identify that impermissible use in order to give Burnett an opportunity to avoid violating policy.⁴⁶

⁴¹ *Whitney v. California*, 274 U.S. 357, 377 (1927).

⁴² *Greisan v. Hanken*, 925 F.3d 1097, 1114 (9th Cir. 2019); *see also, Robles v. Aransas Cnty.*, No. 2:15-CV-495, 2016 U.S. Dist. LEXIS 103119, at *19 (S.D. Tex. Aug 5, 2016) (the “question is whether . . . the defendant made statements that could be interpreted as intimating that some form of punishment or adverse regulatory action would follow. . .”).

⁴³ *Brodheim v. Cry*, 584 F.3d 1262, 1970 (9th Cir. 2009) (emphasis in original). Notably, the United States Court of Appeals for the Fifth Circuit recently held that even a “formal reprimand” may be violate the First Amendment. *Wilson v. Houston Cmty. Coll. Sys.*, 955 F.3d 490, 498 (5th Cir. 2020).

⁴⁴ *Coaching and Discipline Instructions*, *supra* note 9.

⁴⁵ COLLIN CNTY. CMTY. COLL. DIST., TECHNOLOGY RESOURCES (Nov. 7, 2017), <https://www.collin.edu/hr/boardpolicies/Nov2017/CRlocalApproved.pdf>.

⁴⁶ The college’s form also warns Burnett against “copying what appears to be private or personal communications to others via their Collin.edu email accounts.” This is ambiguous. Is Burnett being warned against using the carbon copy function to send “private or personal” emails to others at the college? If so, the college should identify those emails. Alternatively, is she being directed not to *reproduce* emails sent to her

Moreover, invoking an inapplicable policy in a response flowing from Burnett's protected expression is designed to have a chilling effect. The college may be in search of some action it can take in order to sate Burnett's critics, but the law forbids it from doing so.

III. Conclusion

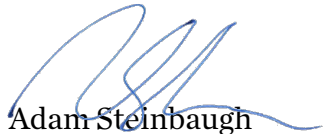
Collin College cannot punish a faculty member for commenting as a citizen on national political affairs, even if others—whether colleagues, the public, or their representatives in the halls of the legislature—find her comments offensive. District policy provides—rightly—that faculty members have “a right to expect the Board and the [college's] administrators to uphold vigorously the principles of academic freedom and to protect the faculty from harassment, censorship, or interference from outside groups and individuals.”

Accordingly, we call on Collin College to:

- (1) Confirm to Burnett, by 12:00 p.m. on Monday, October 19, that Collin College will cancel the Monday meeting concerning the written warning;
- (2) Affirm, without reservation, that Burnett's comments are protected by the First Amendment; and
- (3) Withdraw the written warning concerning “personal” use of college resources.

We respectfully request receipt of a response to this letter no later than the close of business on October 23, 2020.

Sincerely,



Adam Steinbaugh
Director, Individual Rights Defense Program

Encl.