FIRE
Foundation for Individual Rights and Expression

October 11, 2024

Douglas A. Girod
Office of the Chancellor
University of Kansas
230 Strong Hall
1450 Jayhawk Boulevard
Lawrence, Kansas 66045

URGENT

Sent via U.S. Mail and Electronic Mail (kuchancellor@ku.edu)

Dear Chancellor Girod:

FIRE[1] is concerned by the University of Kansas's announcement that instructor Phil Lowcock is no longer employed at the university after a video showed him making a joke that men who cannot vote for a woman for president should be shot.[2] The First Amendment protects instructors who make off-hand, non-disruptive jokes in class. We urge KU to rescind any discipline of Lowcock and clarify that it will not punish faculty for protected classroom speech in the future.

Our concerns arise from KU's investigation and potential dismissal of Lowcock for his comment, made during a class earlier this semester, that he gets frustrated by men who say that they cannot vote for a woman for president.[3] "So what frustrates me, there are going to be some males in our society that will refuse to vote for a potential female president because they don't think females are smart enough to be president," he said during the class. "We could line all those guys up and shoot them. They clearly don't understand the way the world

[1] For more than 20 years, the Foundation for Individual Rights and Expression has defended freedom of expression, conscience, and religion, and other individual rights on America's college campuses. You can learn more about our expanded mission and activities at thefire.org.

[2] The recitation of facts here reflects our understanding of the pertinent information. We appreciate that you may have additional information to offer and invite you to share it with us.

[3] Ned Ryun (@nedryun), X (Oct. 9, 2024, 8:28 AM), https://x.com/nedryun/status/1843991931530993667 [https://perma.cc/5ABU-NBVB].

works."[4] He then added, "Did I say that? Scratch that from the recording, I don't want the dean hearing that I said that."[5]

A video of these comments went viral earlier this week, prompting outcry on social media.[6] In response, KU issued a statement saying the university "is aware of a classroom video in which an instructor made an inappropriate reference to violence," and that the instructor "is being placed on administrative leave, pending further investigation."[7] Two days later, on October 11, KU Provost Barbara A. Bichelmeyer announced that Lowcock "has left the university."[8] She added:[9]

> The free expression of ideas is essential to the functioning of our university, and we fully support the academic freedom of our teachers as they engage in classroom instruction. Academic freedom, however, is not a license for suggestions of violence like we saw in the video. While we embrace our university's role as a place for all kinds of dialogue, violent rhetoric is never acceptable.

But even "violent rhetoric" is protected by the First Amendment,[10] which courts have long held binds public universities like KU.[11] KU's actions and decisions, including the pursuit of disciplinary sanctions,[12] must comply with the First Amendment. While some may have taken offense to Lowcock's joke, whether speech is protected by the First Amendment is "a legal, not moral, analysis."[13]

Lowcock's comment—an example of First Amendment-protected "rhetorical hyperbole"—does not rise to the level of a "true threat." True threats occur only when "the speaker means

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[4] *Id.*

[5] *Id.*

[6] *See, e.g.*, Libs of TikTok (@libsoftiktok), X (Oct. 9, 2024, 1:55 PM) https://x.com/libsoftiktok/status/1844074122634199213 [https://perma.cc/E7JT-D4RN].

[7] University of Kansas (@UnivOfKansas), X, (Oct. 9 2024, 1:25 PM) https://x.com/UnivOfKansas/status/1844066744018796645 [https://perma.cc/26M4-AX7M].

[8] Email from Barbara A. Bichelmeyer, Provost & Executive Vice Chancellor, to KU community (Oct. 11, 2024, 11:40 AM) (on file with author).

[9] *Id.*

[10] Even if Lowcock *could* be said to be encouraging others to act violently, 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, 926-27 (1982) (emphasis in original).

[11] *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).

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

[13] *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 821 (S.D. Iowa 2019).

to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[14]

On the other hand, unserious and exaggerated suggestions of violence, especially within the context of political expression, maintain First Amendment protection. The Supreme Court's landmark decision concerning true threats makes this clear. In that case, the Court considered a man's statement — made after being drafted to serve in the Vietnam War — that "If they ever make me carry a rifle the first man I want to get in my sights is L. B. J." The Court concluded this statement was rhetorical hyperbole protected by the First Amendment, not a true threat to kill the president.[15] The true threat exception accordingly does not include speech which amounts to rhetorical hyperbole, the endorsement of violence, or the assertion of the "moral propriety or even moral necessity for a resort to force or violence."[16]

Here, Lowcock's speech does not, on its face or in context, indicate that he *intends* to engage in any form of violence. Rather, Lowcock made a hyperbolic statement expressing his frustration with men who do not support female candidates. He did not identify a specific individual or a reasonably identifiable group of men, nor did he suggest that such men line up to be shot on the spot. The comment therefore cannot be reasonably construed as a serious intent to commit unlawful violence.[17]

More broadly, the First Amendment protects generally offensive expression. The Supreme Court has repeatedly, consistently, and clearly held that expression may not be restricted on the basis that others find it to be offensive. This core First Amendment principle is why the authorities cannot outlaw burning the American flag,[18] punish the wearing of a jacket emblazoned with the words "Fuck the Draft,"[19] penalize a parody ad depicting a pastor losing his virginity to his mother in an outhouse,[20] or disperse civil rights marchers out of fear that "muttering" and "grumbling" white onlookers might resort to violence.[21] In ruling that the First Amendment protects protesters holding insulting signs outside of soldiers' funerals, the

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[14] *Virginia v. Black*, 538 U.S. 343, 359 (2003).

[15] *Watts v. United States*, 394 U.S. 705, 708 (1969) (man's statement, after being drafted to serve in the Vietnam War—"If they ever make me carry a rifle the first man I want to get in my sights is L. B. J."—was rhetorical hyperbole protected by the First Amendment, not a true threat to kill the president).

[16] *Noto v. United States*, 367 U.S. 290, 297–98 (1961).

[17] Furthermore, "First Amendment freedoms need breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 422 (1963). As the First Amendment must give faculty the breathing room to make off-handed, fleeting comments during instruction, KU may not punish Lowcock for his joke.

[18] *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").

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

[20] *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

[21] *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

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."[22]

Claiming that academic freedom "is not a license for suggestions of violence" represents an overbroad and inaccurate understanding of the First Amendment. While the First Amendment properly carves out instances of genuine threats for punishment, it also provides robust protections for hyperbolic advocacy for violence. KU's suggestion otherwise will certainly cast a broad chill on faculty speech — a chill that must be remediated.

Given the urgent nature of this matter, we request a substantive response to this letter no later than the close of business on October 18, 2024, confirming that KU will rescind any punishment of Lowcock resulting from his protected expression, and clarify that it will refrain from punishing faculty for hyperbolic expression.

Sincerely,

Graham Piro
Faculty Legal Defense Fund Fellow

Cc: Barbara A. Bichelmeyer, Provost and Executive Vice Chancellor

[22] *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).