



January 25, 2019

Jere W. Morehead
Office of the President
University of Georgia
Administration Building
220 South Jackson Street
Athens, Georgia 30602-1661

URGENT

Sent via Express Mail and Electronic Mail (president@uga.edu)

Dear President Morehead:

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 for the state of freedom of expression and academic freedom at the University of Georgia (UGA) in light of the institution's initiation of an investigation, in conjunction with Georgia's Office of the Attorney General, into whether UGA may punish a teaching assistant and graduate student for extramural comments protected by the First Amendment. UGA's investigation is a reversal of its prior, correct conclusion that the remarks are protected speech, and is in express response to a campaign to discourage donations to the university if the teaching assistant is not terminated or expelled.

The First Amendment does not permit UGA to subject the expressive rights of faculty members or students to the whims of donors, students, or members of the public who find those views uncomfortable, objectionable, or deeply offensive. UGA has condemned the teaching assistant's expression; the First Amendment prevents the institution from taking any further steps. Instead, UGA must immediately abandon its investigation into protected expression.

I. Statement of Facts

The following is our understanding of the pertinent facts, which is based upon publicly-available information. We appreciate that you may have additional information to offer, and we invite you share any information with us that might change the analysis below.

Irami Osei-Frimpong is a Graduate Teaching Assistant and PhD student at UGA. He taught one of eight sections of Introduction to Philosophy during the Fall 2018 semester. Separate from his role as an instructor, Osei-Frimpong maintains an online social media presence where he discusses political, social, and philosophical issues as a private citizen.

On invitation, Osei-Frimpong spoke at the September 12, 2018, meeting of the Young Democrats of UGA “about the Democratic [P]arty’s identity” and “how our civil rights are our manifested form of freedom.”¹ Osei-Frimpong was identified as a “local activist.”²

Andrew Lawrence, then a student at UGA, attended the meeting. Lawrence never took a class with Osei-Frimpong, but had scoured his social media posts, and confronted Osei-Frimpong over views he found offensive, recording at least part of the exchange with his cell phone.³

That recording depicts Lawrence criticizing Osei-Frimpong’s criticisms of “white people,” and asking Osei-Frimpong how he could “talk about freedom and equality and all of these things, but you talk about a certain group of people as if, you put them in these stereotypes?”⁴ Osei-Frimpong explained his position that “generalities that admit exceptions” were necessary in arguments about justice, and that “if you get individualized in the discourse, you’ll never actually fight for any sort of group rights.”⁵ Lawrence yelled at Osei-Frimpong: “You teach a course and you subject students to this kind of hateful-ass rhetoric. . . . You subject people to negative rhetoric against white people when you don’t know every white person” at UGA.⁶

Lawrence did not make this video public until January 16, 2019, explaining that he waited to publish the video “in fear of backlash from the University of Georgia and other students.”⁷ Despite this concern, Lawrence provided UGA’s Equal Opportunity Office and Office of Legal

¹ Young Democrats of UGA, *Fall 2018 Meetings*, FACEBOOK (Sept. 12, 2018, 7:24 PM), <https://www.facebook.com/YoungDemsUGA/photos/ms.c.eJwzNDA0NbUwMTM3MTcyN7MwMNQzRBIxM0QTMTVfV2Nqgq7GzAAkAgAqzhH-;.bps.a.10155786641856801/10155846747601801/?type=3&theater>.

² Young Democrats of UGA, *Why We Need To Talk About Rights with YDUGA*, FACEBOOK, https://www.facebook.com/events/2182965568694098/?active_tab=about.

³ Andrew Logan Lawrence, FACEBOOK (Jan. 16, 2019, 9:48 AM), <https://www.facebook.com/100008961917254/videos/1937322949909750> (“Lawrence Video”).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Lawrence Video. Lawrence said in publishing the video that he felt “a duty to share my experience with the public” now that he had graduated, and that “[s]tudents, like myself, who have not bought into the radical Left’s agenda, face constant criticism and sometimes feel isolated at our own colleges and universities.” *Id.*

Affairs with a copy of the video and “copies of [Osei-Frimpong’s] tweets and screenshots” within a week of the September 12 exchange.⁸ Lawrence has met with UGA administrators on at least three occasions to discuss his concerns with Osei-Frimpong’s views.⁹

In the four months between the Young Democrats meeting and his publication of the video, Lawrence wrote three articles criticizing Osei-Frimpong’s tweets for *Campus Reform*, where Lawrence was the “Georgia Campus Correspondent” reporting on “liberal bias and abuse.”¹⁰ Lawrence’s articles highlighted posts he viewed as objectionable, including that Osei-Frimpong had “posted on his personal Facebook page” a comment “on the heels of a contentious gubernatorial race in Georgia” in which Osei-Frimpong argued that Democrats needed to “go to war on the White electorate” and “dismantle the institutions that make crappy white people: their churches, their schools, their families.”¹¹ Lawrence noted that had contacted UGA, which responded that “[v]iews expressed by students, faculty, and staff in their personal capacities do not reflect the views of the university.”

In a Facebook thread of comments on the video, Osei-Frimpong debated others about his views. *Campus Reform* published a screenshot of part of the now-deleted thread in which Osei-Frimpong responded that “Some White people may have to die for Black communities to be made whole in this struggle to advance to freedom. To pretend that’s not the case is ahistorical and dangerously naive.”¹² Another Facebook commentator understood Osei-Frimpong to be using the terms like “[f]ighting white people”¹³ as an expression of “fighting white supremacy.”¹⁴

On or about January 17, the day after Lawrence published the video, UGA’s Equal Opportunity Office responded to an email from Lawrence titled “Osei-Frimpong Posts from This Week.”¹⁵ The Equal Opportunity Office concluded that the “views expressed are personal opinion expressed by this person in their personal capacity on a private platform” and invited Lawrence to submit evidence of “discriminatory or harassing comments in their capacity as a

⁸ *Classic City Today* (WGAU radio interview between Tim Bryant and Andrew Lawrence, Jan. 22, 2019) at 7:30, available at <https://www.facebook.com/tim.bryant.94/videos/2051877721567189> (“WGAU Lawrence interview”).

⁹ *Id.*

¹⁰ Andrew Lawrence, *College Dems host TA who compared whites to ‘autistic kids’*, CAMPUS REFORM, Sept. 13, 2018, <https://www.campusreform.org/?ID=11303>; Andrew Lawrence, *Ga. TA: Dems should ‘wage war’ on ‘crappy’ white electorate*, CAMPUS REFORM, Nov. 8, 2018, <https://www.campusreform.org/?ID=11503>; Andrew Lawrence, *Facebook flags Georgia TA who bashed ‘crappy white people’*, CAMPUS REFORM, Nov. 21, 2018, <https://www.campusreform.org/?ID=11553>.

¹¹ *Id.* (Nov. 8, 2018 *Campus Reform* post).

¹² Eduardo Neret, *Georgia TA: ‘Some white people may have to die...’*, CAMPUS REFORM, Jan. 17, 2019, <https://www.campusreform.org/?ID=11763>.

¹³ “Fighting white people” was a reference to a tweet by Osei-Frimpong on January 12: “Fighting White people is a skill. Really, it’s one reason I’m in support of integrated schools. You have to get used to fighting White people. It takes practice. ‘Blacks kill Blacks because they have never been trained to kill Whites’ -Dr. Bobby Wright.”

¹⁴ Neret, *supra* note 12.

¹⁵ Andrew Lawrence (@YoungGaGOP), TWITTER (Jan. 17, 2019, 10:34 AM), <https://twitter.com/YoungGaGOP/status/1085923400764268549>.

member of the UGA Community.”¹⁶ There is no indication that any such evidence has ever been provided.

On January 17, following widespread media coverage,¹⁷ UGA used its official Twitter account to respond to Lawrence’s video.¹⁸ UGA shared its understanding that the video “was of a Young Democrats meeting last fall, not a class” and that all those “present chose to attend the meeting,” in which the speaker was “questioned about his personal views.” UGA again explained that views “expressed by students, faculty, and staff in their personal capacities do not reflect the views of the university.”

On January 18, UGA issued a lengthier statement via Twitter.¹⁹ The university explained that it was “aware of statements made on social media” and the video of the September meeting, about which UGA had been “contacted by many people[.]”²⁰ UGA condemned “the advocacy or suggestion of violence” and views “espousing racism and hatred[.]” However, UGA cautioned that, to its knowledge, all of the statements had been “made in his personal capacity as a private citizen,” and that UGA was “**unaware of any allegation of racially hostile or discriminatory conduct in the course of his professional duties or any statements falling outside of First Amendment protections.**”²¹

On January 20, Lawrence posted an open letter complaining that UGA had “failed to properly address remarks made both in the classroom and via social networking platforms,” invoking the “safety and well-being” of students. Lawrence proceeded to make inconsistent claims that donors were withholding significant recurring donations.²²

UGA used its official Twitter account to respond to Lawrence’s tweeted letter. This statement condemned “the advocacy or suggestion of violence in any form” and shared that UGA was “vigorously exploring all available legal options” and “seeking legal guidance from the Office of

¹⁶ *Id.*

¹⁷ Lawrence’s edited video was widely viewed and covered in conservative media outlets, sparking angry reactions. On the extreme side of these reactions, one internet forum labeled Osei-Frimpong a “COON PROFESSOR” and provided a script for readers to call the university to pretend to be prospective students or parents having second thoughts because of Osei-Frimpong’s “behavior.” 4Chan, Politically Incorrect, *COLLEGE COON PROFESSOR WANTS TO KILL WHYPIPO*, Jan. 17, 2019, archived at <https://archive.is/aEp0M>.

¹⁸ UGA (@universityofga), TWITTER (Jan. 17, 2019, 3:39 PM), <https://twitter.com/universityofga/status/1086000124290052099>.

¹⁹ UGA (@universityofga), TWITTER (Jan. 18, 2019, 8:25 PM), <https://twitter.com/universityofga/status/1086434508822507520>.

²⁰ *Id.*

²¹ *Id.* (emphasis added).

²² For example, on January 19, Lawrence said an “unnamed UGA donor said today that they would withhold their \$2.5million [*sic*] annual donation until the racist instructor is fired.” Andrew Lawrence, FACEBOOK (Jan. 19, 2019, 11:38 AM), https://www.facebook.com/permalink.php?story_fbid=1938955039746541&id=100008961917254. On January 22, Lawrence told a radio host that he had “received a call from a very involved alumni just two days ago who indicated that he’s going to withhold his annual \$10,000 donation until the matter’s resolved.” WGAU Lawrence interview at 10:07.

the Attorney General as to what actions we can legally consider in accordance with the First Amendment.”²³

Via Twitter, Lawrence encouraged his followers to “[k]eep it up,” and demanded that UGA “remove him from his position immediately!”²⁴ When Osei-Frimpong appeared on a radio program, Lawrence falsely claimed the host had asked Osei-Frimpong if he was “not ruling out violence... Violence against students?” and that Osei-Frimpong had “said he would use violence AGAINST STUDENTS.”²⁵

II. The First Amendment Binds UGA from Penalizing Academics for Speaking as Private Citizens on Matters of Public Concern

A. The First Amendment limits the consequences a public university may impose on protected speech

It has long been settled law that the First Amendment is binding on public colleges like the University of Georgia. *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”).

Employees of government institutions like UGA retain a First Amendment right to speak as private citizens on matters of public concern and may not be disciplined or retaliated against for their constitutionally protected expression unless the government employer demonstrates that the expression hindered “the effective and efficient fulfillment of its responsibilities to the public.” *Connick v. Myers*, 461 U.S. 138, 150 (1983); *Pickering v. Board of Education*, 391 U.S. 563 (1968). These protections extend to untenured faculty members. *Perry*

²³ UGA (@universityofga), TWITTER (Jan. 20, 2019, 9:31 PM), <https://twitter.com/universityofga/status/1087175905993244672>.

²⁴ Andrew Lawrence (@YoungGaGOP), TWITTER (Jan. 21, 2019, 12:32 PM), <https://twitter.com/YoungGaGOP/status/1087402446681460738>.

²⁵ Andrew Logan Lawrence, FACEBOOK (Jan. 22, 2019, 1:24 PM), <https://www.facebook.com/100008961917254/videos/1940559222919456>. In the cited exchange, Osei-Frimpong says “I didn’t advocate for violence, I was just honest about the history of racial progress in the United States.” The host asks whether he is “advocating for non-violence,” to which Osei-Frimpong responds, “Yeah, insofar as . . . it’s a transformative process” and public pressure is effective, at which point the host interrupts and asks, “So you’re not ruling out violence?” When Osei-Frimpong says “no,” the host asks: “Against *whom*? Against *whom*?” Osei-Frimpong responds that it’s “whoever the oppressors may be,” and that “the aim is non-violence.” Osei-Frimpong never endorses, let alone advocates, the use of violence against students. *Classic City Today* (WGAU radio interview between Tim Bryant and Irami Osei-Frimpong, Jan. 22, 2019) at 8:00, *available at* <https://www.facebook.com/wgauradio/videos/389250541647132>.

v. *Sindermann*, 408 U.S. 593, 598 (1972) (reaffirming that “the nonrenewal of a nontenured public school teacher’s one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights”) (internal citations omitted).

B. *Osei-Frimpong spoke as a private citizen, not as an employee of UGA*

As UGA has repeatedly and publicly acknowledged, the disputed statements were made by Osei-Frimpong in his capacity as a private citizen, not as an employee. This conclusion was manifestly correct. Whether speech was pursuant to official duties turns on a variety of factors, looking to whether the employee was “(1) speaking with the objective of advancing official duties; (2) harnessing workplace resources; (3) projecting official authority; [and] (4) heeding official directives[.]” *Fernandez v. Sch. Bd.*, 898 F.3d 1324, 1332 (11th Cir. 2018).

Each of these factors favors Osei-Frimpong’s First Amendment rights. As UGA has recognized, his statements were made either “as a private citizen on his personal social media accounts” or during a student organization’s meeting. He was identified not as a lecturer or employee of the university, but as an activist sharing his views on civil rights.²⁶

C. *Osei-Frimpong’s speech touched upon matters of public concern*

It is indisputable that Osei-Frimpong’s commentary was squarely related to matters of public concern. Speech “may be fairly characterized as constituting speech on a matter of public concern” when it relates “to any matter of political, social, or other concern to the community.” *Kurtz v. Vickrey*, 855 F.2d 723, 726 (11th Cir. 1988) (quoting, in part, *Connick v. Myers*, 461 U.S. 138, 103 (1983) (internal quotation marks omitted). In evaluating whether a matter is of public concern, courts look to the “content, form, and context of” the expression; whether the speech concerned matters of political or social import, as opposed to being “matters only of personal interest”; and whether the employee sought to have their expression aired in a public forum. *Connick v. Myers*, 461 U.S. 138, 147–48 (1983).

This inquiry does not turn on viewpoint or whether the statements are offensive. That the statement is of an “inappropriate or controversial character . . . is irrelevant” to “whether it deals with a matter of public concern.” *Rankin v. McPherson*, 483 U.S. 378, 387 (1987) (employee’s expression of hope that President Reagan might be shot was protected speech.)

Duke v. Hamil, 997 F.Supp.2d 1291, 1299–1300 (N.D. Ga. Feb. 4, 2014), is illuminative for both the private-citizen and public-concern prongs of the analysis. There, a Deputy Chief of Police of the Clayton State University Police Department used his private Facebook account the night Barack Obama won re-election to post the Confederate flag with the phrase, “It’s time

²⁶ Even if others were or became aware that he was employed by UGA, and even if Osei-Frimpong had identified himself as an employee, the disclosure of a speaker’s employment does not necessarily render their speech pursuant to their official duties. *See, e.g., Pickering v. Bd. of Educ.*, 391 U.S. 563, 576–78 (1968) (high school teaching speaking as a private citizen in letter to a local newspaper criticizing his employer, explaining that he teaches at the high school.)

for the second revolution.” *Id.* at 1293. This was speech “as a citizen, not as an employee.” *Id.* at 1300. The court rejected the argument that the speech was not on a matter of “legitimate” concern, finding that it related “to matters of political concern to the community because a Confederate flag can communicate an array of messages, among them various political or historical points of view,” and that “calling for a revolution” amounted to expression of “dissatisfaction with Washington politicians.”²⁷ *Id.*

Osei-Frimpong’s speech unquestionably touches upon matters of public concern. He was invited by the Young Democrats to give a presentation on civil rights and their relationship to the Democratic Party. Other posts address the state of race relations in the United States, both present and past, and discuss issues pertaining to critical race theory, a widely-discussed framework of debating racial issues across academic disciplines. These are indisputably issues of political or social concern.

D. Osei-Frimpong’s comments were protected political expression, not incitement or a true threat under the First Amendment

Osei-Frimpong’s statements fall far short of the long-recognized, narrow exceptions for “true” threats or incitement unprotected by the First Amendment. To the contrary, Osei-Frimpong’s statements are “core political speech,” where First Amendment protection is “at its zenith.” *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 186–87 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414, 425 (1988)). This is particularly so with respect to statements at the Young Democrats meeting convened to discuss a political party’s approach to civil rights. So, too, are criticisms of the president, governor, or the 2018 gubernatorial election.

i. Abstract discussion of the possibility of violence is not unprotected incitement under the First Amendment

Political discourse has long been steeped in themes of violence. Perhaps most famously, Thomas Jefferson—a principal author of what ultimately became the First Amendment²⁸—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.”²⁹ Our Constitution likewise grants considerable deference to language

²⁷ The plaintiff was ultimately unsuccessful because of the “acute” and “unique” government interest in regulating police departments, “paramilitary” or “quasi-military” in nature, and because of his high rank in the department. *Duke*, 997 F. Supp. 2d at 1301–02; *see also, e.g., Buker v. Howard Cnty.*, 2015 U.S. Dist. LEXIS 68763 (distinguishing *Duke* where a volunteer firefighter, part of the formal chain of command, posted about the gun control debate on Facebook: “lets (sic) all kill someone with a liberal . . . then maybe we can get them outlawed too! Think of the satisfaction of beating a liberal to death with another liberal . . .”). Osei-Frimpong, by contrast, is a teaching assistant who teaches one section of an introductory-level philosophy course, and the university’s primary interest is in freedom of inquiry, not advancing law and order or paramilitary discipline.

²⁸ *Everson v. Bd. of Educ.*, 330 U.S. 1, 11 (1947).

²⁹ 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

which invokes themes of violence in a political context. *See Watts v. United States*, 394 U.S. 705, 708 (1969) (“The language of the political arena . . . is often vituperative, abusive, and inexact. . .”). Courts approach “with extreme care” claims that “highly charged political rhetoric lying at the core of the First Amendment” amounts to unlawful threats or incitement. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926–27 (1982). 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 unprotected “incitement” or a “true threat.”

The most controversial statements by Osei-Frimpong do not approximate “incitement” under the First Amendment. To punish speech as “incitement,” the speech must have been “directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Additionally, where speech is “not directed to any person or group of persons” in particular, it cannot be said to be directed at commanding or urging any person to take action. *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973).

In particular, Osei-Frimpong’s assertion that it is “ahistorical” to disbelieve that “[s]ome White people may have to die for Black communities to be made whole in this struggle to advance to freedom” does not amount to unlawful incitement for several reasons.

First, the statement, like Thomas Jefferson’s views about refreshing the “tree of liberty,” is little more than a prediction which on its face does not endorse or advocate for violence. A prediction that protests or civil unrest may ultimately lead to the deaths of white people is not a call for violence against white people; indeed, recent history demonstrates that white people *have* died during demonstrations over civil rights.³⁰ Because it is not “directed to” producing violence, Osei-Frimpong’s statement fails the first prong of the *Brandenburg* analysis.

Similarly, even if it could reasonably be construed as an endorsement or advocacy of the use of violence, “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 be understood as encouraging violence). A statement that “white people may have to die” is concerned with a distant hypothetical event, not *imminent* violence. *See, e.g., Hess*,

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).

³⁰ Jonathan M. Katz & Farah Stockman, *James Fields Guilty of First-Degree Murder in Death of Heather Heyer*, N.Y. TIMES, Dec. 7, 2018, <https://www.nytimes.com/2018/12/07/us/james-fields-trial-charlottesville-verdict.html>.

414 U.S. at 107–08 (statement during an antiwar demonstration that “[w]e’ll take the fucking street later” was “nothing more than advocacy of illegal action at some indefinite future time.”).

Similarly, even if Osei-Frimpong’s tweet that “[f]ighting White people is a skill” could reasonably be read as advocacy of physical violence, as opposed to rhetorical hyperbole directed at resisting white supremacy, it cannot be said that the tweet is likely to spur its reader to imminent violence. This statement, too, fails a rudimentary *Brandenburg* analysis.

ii. Osei-Frimpong’s views are not an expression of a serious intent to commit violence, falling short of a “true threat” under the First Amendment

Nor do any of Osei-Frimpong’s statements amount to a “true threat,” which is unprotected where “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). None of Osei-Frimpong’s statements communicate an intent to undertake violence himself, and the suggestion that he was asked, and refused, to rule out violence against students is disproven by video.

iii. Speech cannot be penalized on the basis that others find it offensive or view it as “hate speech”

The principle of freedom of speech does not exist to protect only non-controversial expression; it exists precisely to protect speech that some or even most members of a community may find controversial or offensive. The Supreme Court has explicitly held, in rulings spanning decades, that speech cannot be restricted simply because it offends others, on or off campus. *See, e.g., Papish v. Board of Curators of the Univ. 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.’”). The freedom to offend some listeners is the same freedom to move or excite others. As the Supreme Court observed in *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), speech “may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.”

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,” that people will encounter 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 or is not 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.

In the same vein, decades of precedent make clear that the First Amendment protects expression others view as hateful. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down an ordinance that prohibited placing on any property symbols that “arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender”); *see also Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (finding perception that expression is “hateful” or that it “demeans on the basis of race” is insufficient to deprive it of First Amendment protection.).

E. Public anger is insufficient to override First Amendment rights

Courts have consistently ruled that offense taken to an expression does not constitute adequate injury to government interests sufficient to override First Amendment rights. For example, the United States Court of Appeals for the Ninth Circuit has observed:

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. Only where expressive behavior involves substantial disorder or invasion of the rights of others may it be regulated by the state. 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) (cleaned up).

Similarly, in *Bauer v. Sampson*, a faculty member published in a campus newspaper several writings and illustrations sharply critical of his college’s president and board of trustees, some of which contained “violent overtones.” 261 F.3d 775 (9th Cir. 2001). Holding that the professor’s First Amendment rights outweighed the interests of the college, the U.S. Court of Appeals for the Ninth Circuit noted that there was no evidence that the expression interfered with the performance of his duties, that any disharmony caused by his expression was incidental, and:

given the nature of academic life, especially at the college level, it was not necessary that Bauer and the administration enjoy a close working relationship requiring trust and respect—indeed anyone who has spent time on college campuses knows that the vigorous exchange of ideas and resulting tension between an

administration and its faculty is as much a part of college life as homecoming and final exams.

Id. at 784.

The Ninth Circuit is not alone. The Third Circuit, for example, has made clear that in order to overcome a faculty member's First Amendment right to speak as a private citizen on a matter of public concern, a public university must show more than mere speculation that the expression might substantially disrupt the operations of the institution:

It is particularly important that in cases dealing with academia, the standard applied in evaluating the employer's justification should be the one applicable to the rights of teachers and students in light of the special characteristics of the school environment, and not that applicable to military personnel who must meet the overriding demands of discipline and duty. In an academic environment, suppression of speech or opinion cannot be justified by an undifferentiated fear or apprehension of disturbance, nor by a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Instead, restraint on such protected activity can be sustained only upon a showing that such activity would materially and substantially interfere with the requirement of appropriate discipline in the operation of the school.

Trotman v. Bd. of Tr., 635 F.2d 216, 230 (3d Cir. 1980) (cleaned up).

So, too, has the Eleventh Circuit expressed caution against infringing upon academic freedom and professors' First Amendment rights, even when the university has a *constitutional obligation* to regulate faculty members' expression. *Bishop v. Aronov*, 926 F.2d 1066, 1078 (11th Cir. 1991) (upholding professor's rights to discuss religious beliefs with his students outside of formal classes, notwithstanding the Establishment Clause of the First Amendment, and limiting the university's power to the confines of the classroom).

In sum, academics' freedom of expression is robust under the First Amendment, and they may be neither disciplined or terminated for expression which simply offends others. Our theory of freedom of expression is loath to subordinate expressive rights to listeners' reaction to unpopular expression. *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation," as it burdens those "wishing to express views unpopular with bottle throwers.") This is particularly the case when organizations external to the academic community seek to identify academics with disfavored views and encourage supporters to demand action from the institution.³¹ If an

³¹ *See, e.g.*, AM. ASS'N OF UNIV. PROFESSORS, TARGETED ONLINE HARASSMENT OF FACULTY (Jan. 31, 2017), <https://www.aaup.org/news/targeted-online-harassment-faculty>; Laura Pappano, *Professors as Targets of Internet Outrage*, N.Y. TIMES, Aug. 4, 2017, <https://www.nytimes.com/2017/08/04/education/edlife/internet trolls-social-media-professors.html> ("Many professors who have expressed their views about race and politics this year have found themselves targets of both

academic’s right to expression is dependent upon whether a hypothetical student might be uncomfortable with his views, a veto would be granted over any faculty member’s expression on virtually any subject. This would hollow out both the First Amendment and academic freedom in higher education, where the ability to express, confront, and debate controversial views lies at the core of the university’s mission.

III. Investigations into Protected Expression Chill First Amendment Rights

Initiating an investigation into clearly protected expression is itself an affront to, and may violate, the First Amendment, even if no formal penalty is ultimately meted out. When “an official’s act would chill or silence a person of ordinary firmness from future First Amendment activities,” that act violates the First Amendment. *Mendocino Env’tl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

In *Sweezy v. New Hampshire*, 354 U.S. 234, 245–48 (1957), the Supreme Court noted that government investigations “are capable of encroaching upon the constitutional liberties of individuals” and have an “inhibiting effect in the flow of democratic expression.” Similarly, the Court later observed that when issued by a public institution like UGA, “the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation” may violate the First Amendment. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). Accordingly, several appellate courts have held that government investigations into protected expression violate the First Amendment. *See White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) (holding that a government investigation into clearly protected expression chilled speech and therefore violated the First Amendment); *Rakovich v. Wade*, 850 F.2d 1180, 1189 (7th Cir. 1988) (“[A]n investigation conducted in retaliation for comments protected by the first amendment could be actionable . . .”).

Federal courts have consistently protected public university faculty expression targeted for censorship or punishment due to subjective offense. In *Levin v. Harleston*, for example, The City College of the City University of New York launched an investigation into a tenured faculty member’s writings on race and intelligence that were perceived as offensive, announcing an *ad hoc* committee to review whether the professor’s expression—which the president of the university announced “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.

the left and right.”); Beth McMurtrie, *What Colleges Can Do When the Internet Outrage Machine Comes to Campus*, CHRON. OF HIGHER ED., June 26, 2017, <https://www.chronicle.com/article/What-Colleges-Can-Do-When-the/240445> (“Faculty members nationwide have been harassed and threatened with death for statements that were sometimes twisted or taken out of context.”).

The threat of a chilling effect is particularly acute where, as here, the parameters of the investigation are unclear. Lawrence and other critics have set out to scour Osei-Frimpong's personal political expression in order to assemble a laundry list of statements they find objectionable. In publicly announcing an "investigation" with no indication as to which expression the university believes may be unprotected, UGA and the Office of the Attorney General have endorsed a fishing expedition into *all* of Osei-Frimpong's speech.

IV. Conclusion

UGA has long possessed the video of Lawrence's encounter with Osei-Frimpong, as well as the tweets and posts over which Lawrence and others have complained. The university has repeatedly, publicly, and correctly acknowledged that Osei-Frimpong's statements were "in his capacity as a private citizen on his personal social media accounts," and stated that it has no evidence of any discriminatory *conduct* by Osei-Frimpong. To our knowledge, that remains the case. The only thing that has changed is that a wider audience is offended. Audiences, however, do not dictate rights.

The university is free to exercise, and has exercised, its own freedom of expression in condemning the personal views of a teaching assistant, but the First Amendment forbids the university from taking further action.

Given the urgent nature of this matter, we request receipt of a response to this letter no later than the close of business on Wednesday, January 30, 2019, confirming that UGA and the Office of the Attorney General will immediately abandon any investigation into Osei-Frimpong's protected expression.

Sincerely,



Adam Steinbaugh
Director, Individual Rights Defense Program

Cc:

Michael Raeber, General Counsel, University of Georgia
Annette M. Cowart, Deputy Attorney General and Director of the Government Services and Employment Division, Office of the Attorney General

Encl.